

**Comments Of
The Utility Solid Waste Activities Group,
The Edison Electric Institute, The American Public Power Association,
The American Gas Association, and the National Rural Electric
Cooperative Association
On The
“REVISIONS TO THE DEFINITION OF SOLID WASTE”
Proposed Rule
68 Fed. Reg. 61558 (October 28, 2003)**

Docket No. RCRA-2002-0031

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**Of Counsel:
Piper Rudnick LLP
1200 Nineteenth Street, N.W.
Washington, D.C. 20036**

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INTRODUCTION

The following comments in response to EPA’s proposed revisions to the definition of “solid waste” (68 Fed. Reg. 61558 (Oct. 28, 2003)) are submitted on behalf of the Utility Solid Waste Activities Group (“USWAG”), the Edison Electric Institute (“EEI”), the American Public Power Association (“APPA”), the American Gas Association (“AGA”), and the National Rural Electric Cooperative Association (“NRECA”) (collectively referred to herein as “USWAG”). USWAG was formed in 1978, and is an association primarily dedicated to assisting members in the management of wastes and the beneficial use of materials associated with the generation, transmission, or sale of electricity and natural gas. USWAG is comprised of approximately 80 energy industry operating companies and associations, including EEI, the NRECA, the AGA, and the APPA. EEI is the principal national association of investor-owned electric power and light companies. NRECA is the national association of rural electric cooperatives. APPA is the national association of publicly owned electric utilities. AGA is the national association of natural gas utilities. Together, USWAG members represent more than 85% of the total electric generating capacity of the U.S., and service more than 95% of the nation's consumers of electricity and over 93% of the nation’s consumers of natural gas.

Since its formation in 1978, USWAG has participated in virtually every major RCRA rulemaking to present its views on the need to develop a cost-effective, practical and environmentally protective hazardous waste regulatory program. USWAG member companies generate solid and hazardous wastes in the course of generating and distributing electricity and natural gas. Any revisions to the regulatory definition of “solid waste” under 40 C.F.R. § 261.2 that results in increased recycling opportunities will have a significant effect on the day-to-day operations of electric utilities. Similarly, so will EPA’s proposal to clarify the fundamental criteria for distinguishing “legitimate” recycling.

USWAG supports EPA’s proposal to amend the regulatory definition of “solid waste” to properly exclude from its scope legitimate recycling operations that do not involve the “discard” of solid waste. The proposed rule is positive because it will encourage environmentally sound recycling: “By removing hazardous waste regulatory controls over certain recycling practices, and by providing more explicit criteria for determining the legitimacy of recycling practices in general, EPA expects that this proposed rule will encourage safe, beneficial recycling of hazardous secondary materials by industry.” *Id.* at 61560.

While the proposal is a step in the right direction, to respond fully to the recent decisions from the United States Court of Appeals for the D.C. Circuit regarding this subject, the Agency must promulgate a conditional exclusion that embraces *all* legitimate reclamation operations that do not involve discard, as opposed to limiting the final rule to recycling operations within the same industry. Recycling operations

meeting EPA's proposed legitimacy criteria occur *between* different industries, as well as within industries. Therefore, any final rule must encompass both scenarios; failure to do so will inappropriately leave legitimate recycling activities that do not involve discard within the scope of RCRA program. The D.C. Circuit has admonished EPA repeatedly that this is not acceptable.

USWAG's major points are summarized below.

- The fundamental holding of the recent D.C. Circuit decisions addressing the scope of the term "solid waste" under RCRA is that *any* legitimately reclaimed material – whether recycled within the same industry or between industries – is not "discarded" and thus *cannot* be regulated as a solid waste.
- Applying the controlling logic of the recent D.C. Circuit decisions to the instant rulemaking, USWAG believes that EPA *must* abandon its proposal to limit the rulemaking only to intra-industry recycling practices, as it plain that legitimate recycling also occurs between industries.
- In light of the above, EPA should finalize its proposed criteria for legitimate recycling and, based on those criteria, establish a conditional exclusion from the definition of solid waste under 40 C.F.R. § 261.4(a) "for essentially all materials that are legitimately recycled by reclamation, whether the recycling is done within the generating industry, or between industries."
- The legitimacy factors for recycling should remain "general criteria," as opposed to hard and fast regulations. If the legitimacy criteria are promulgated as explicit regulatory requirements, the flexibility necessary to properly assess the legitimacy of varying recycling methods will be lost and otherwise environmentally beneficial and legitimate recycling operations will be arbitrarily thwarted.
- Given the highly variable forms of legitimate recycling operations that are available across the country, EPA is correct in not proposing to require that every legitimacy criterion be met to determine that a particular recycling activity is legitimate. As EPA recognizes, there will be circumstances "where a particular legitimacy criterion may not be

met, but where the overall recycling practice would nevertheless be considered legitimate.”

- In proposing to implement criterion number four of the legitimacy factors, EPA is correct in not pursuing a “bright-line” or “risk-based” approach for determining whether the level of hazardous constituents in the recycled product are “significant.” The determination of whether a recycled product contains “significantly elevated levels” or a “significant amount” of hazardous constituents in comparison to an analogous product cannot occur in a vacuum; rather, the comparison must be undertaken in the context of whether any difference is meaningful from a perspective based on health and environmental risks.
- EPA’s proposed enforcement scheme is fundamentally unfair because it would impose liability on entities that have no culpability whatsoever in the alleged violation. A generator or other entity who complies in good faith with all applicable requirements under the exclusion should not be held liable under RCRA for any downstream violations of the exclusion over which such entity has no control or responsibility.
- EPA’s proposed enforcement scheme inappropriately attempts to shift the Agency’s burden in enforcement actions. It is a fundamental tenet of administrative law that EPA has the ultimate burden of persuasion in any enforcement case to prove that a violation has in fact occurred. EPA’s position that it does not carry this burden should be corrected in the final rule.
- It is premature for EPA to conclude that the proposed exclusion will supersede any of the pre-existing regulatory exclusions from the definition of solid waste. EPA should wait until after the new exclusion has been implemented and any ambiguities regarding its scope resolved. In this way, EPA will not prematurely and inadvertently eliminate a pre-existing exclusion that is not completely subsumed by the new exclusion.
- While both options limiting the recycling exclusion to intra-industry activities are too narrow, Option One is plainly preferable to Option Two because it is the least narrow of the two and would provide more opportunities for legitimate recycling.
- EPA’s suggestion that the list of NAICS industries that may be eligible for the recycling is too broad is without merit. There is no reason to think that any of the industries represented on the list of available

NAICS classifications are incapable of engaging in legitimate recycling. USWAG, therefore, is opposed to any narrowing of the available NAICS classifications to include only businesses in the mining and manufacturing sector.

- USWAG notes that the 4-digit code that would apply to the electric utility industry would be: “2211 – Electric Power Generation, Transmission and Distribution,” while the 4-digit code for the natural gas distribution industry would be “2212 – Natural Gas Distribution.” It is not uncommon, however, for a power company to have combined electric power generation and natural gas distribution operations within the same corporate family. Under EPA’s proposal to use only a 4-digit NAICS code, these inter-related components of the same company would be viewed as different industries and could not engage in excluded recycling. To avoid this result, USWAG believes that the NAICS code for the power industry should be no more than 3 digits, which would be NAICS code 221.
- USWAG disagrees with EPA’s proposal to exclude the use of middlemen or brokers as part of an excluded recycling process. The legitimacy of a recycling process involving a broker should be examined in the same manner as other recycling activities under the proposal – namely, whether the recycling is legitimate when viewed against the proposed legitimacy criteria.
- USWAG agrees with EPA that the timeframe under the “speculative accumulation” rule is the appropriate measure to use in determining how much time should be allowed to elapse between the generation and reclamation of a hazardous secondary material. The speculative accumulation rule has effectively served for many years as the regulatory cornerstone in ensuring the timely completion of legitimate recycling operations, and there is nothing in the record suggesting that any further conditions or limitations are necessary in the final rule.
- Any notification and/or record keeping requirements associated with the final exclusion should be kept as simple as possible so as not to discourage entities from engaging in legitimate recycling activities. If EPA persists in adopting a notification condition, it should be a one-time obligation.
- USWAG opposes any suggestion that generators and reclaimers should be required to keep on-site records relating to the types and volumes of secondary materials they handle. As with any recycling exclusion, generators would be prepared to provide “appropriate

documentation” to prove that their recycling process meets the requisite conditions of the exclusion. Nothing in the record supports the notion that anything more is needed in this rulemaking.

DISCUSSION

I. Judicial Decisions *Demand* That Any Secondary Materials That Are Legitimately Recycled – And Thus Not Discarded – Be Excluded From The Definition of Solid Waste.

While USWAG strongly supports EPA’s initiative to exclude secondary materials that are legitimately reclaimed from the regulatory definition of solid waste, the fundamental flaw in the proposal is the Agency’s failure to fully embrace and adopt the judicial directives from the D.C. Circuit on this topic, namely, that *any* legitimately reclaimed material – whether recycled within the same industry or between industries – is not “discarded” and thus *cannot* be regulated as a solid waste. See *Ass’n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1051-52 (D.C. Cir. 2000) (“*ABR*”). The court’s recent decision in *Safe Food and Fertilizer, et al. v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003) (“*Safe Food*”), makes clear that this fundamental holding applies in the context of recycling between industries just as much as it does to recycling within a single industry.

USWAG appreciates the fact that *Safe Food* was decided after issuance of the instant proposal, but that decision only reinforces and clarifies earlier D.C. Circuit decisions mandating the same result: *i.e.*, the statutory definition of “solid waste” is predicated on a material being “discarded” and “[s]econdary materials destined for [legitimate] recycling are obviously not of that sort.” *ABR* 208 F.3d at 1051, *citing American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987) (“*AMC I*”).

Collectively, these decisions direct EPA to forego its proposal to limit its revisions to

only legitimate recycling occurring “within the same industry” (68 Fed. Reg. at 61564), and instead adopt in the final rule its proposal to establish a conditional exclusion from the definition of solid waste “for essentially all materials that are legitimately recycled by reclamation, whether the recycling is done within the generating industry, or between industries.” *Id.* at 61588. This approach will “further encourage recycling and reuse while maintaining protection of human health and the environment,” *id.*, and would be fully consistent with the D.C. Circuit’s repeated admonitions that RCRA only applies to materials that are truly discarded.

A. Any Material That Is Legitimately Recycled Is Not A Solid Waste.

The fundamental holding in *AMC I* is simple and straightforward: Congress intended to extend EPA’s authority to regulate “solid waste” under RCRA “only to materials that are truly discarded, disposed of, thrown away, or abandoned” (824 F.2d at 1190), and materials destined for legitimate beneficial reuse or recycling are “not part of the waste disposal problem” and thus cannot be subsumed by the definition of solid waste. *Id.* at 1186. While the materials recycled in *AMC I* were reclaimed in “a continuous process by the generating industry itself,” the factual circumstances of the particular recycling practices at issue were not intended to cabin the court’s central holding that materials that are legitimately recycled are, by definition, not discarded and thus cannot be a “solid waste.”

This point was reiterated by the court in *ABR*, where it exclaimed that the plain meaning of the term “solid waste” extends only to materials that are “discarded” and that “[s]econdary materials destined for recycling are obviously not of that sort.” 208 F.3d at

1051. To emphasize this point, the *ABR* court referred back to its core holding in *AMC I*, where it “stressed, again, and again, that it was interpreting ‘discarded’ to mean what it ordinarily means. To say that when something is saved it is thrown away is an extraordinary distortion of the English language.” *Id.* at 1053. While the materials at issue in *ABR* also were being recycled within the same industry, that factor was not intended to limit the court’s central holding that materials destined for legitimate recycling “have not yet become part of the waste disposal problem,” and thus cannot be subject to regulation as a solid waste. *Id.* at 1053, *citing AMC I*, 824 F.2d at 1193.

The D.C. Circuit’s recent decision in *Safe Food* expressly confirms that its earlier holdings in *AMC I* and *ABR* are not restricted to recycling within the same industry, but rather extend broadly to include all legitimate recycling, including recycling between different industries. *Safe Food*, 350 F.3d at 1268. *Safe Food* involved the validity of EPA’s conditional exclusion from the definition of solid waste regulation for certain hazardous secondary materials used in the production of zinc fertilizers – plainly a case where the secondary material was being recycled between industries. Petitioners in *Safe Food* argued that *AMC I* and *ABR* required that materials transferred to another firm or industry for subsequent recycling must always be viewed as “discarded” and thus subject to RCRA regulation. The *Safe Food* court disagreed, explaining that Petitioners had “misread” its earlier decisions and that the legal rationale underlying those cases was not restricted to continuous recycling within the same industry. *Id.*

The *Safe Food* court acknowledged that, while it had previously held that “the term ‘discarded’ [and thus the definition of solid waste] cannot encompass materials that

‘are destined for beneficial reuse or recycling in a continuous process by the generating industry itself’” (citing *AMC I* and *ABR*), it had *never* said that “RCRA compels the conclusion that material destined for recycling in another industry is necessarily ‘discarded.’” *Id.* (emphasis added). Indeed, the court reasoned, [a]s firms have ample reasons to avoid complete vertical integration [internal citations omitted], firm-to-firm transfers are hardly good indicia of ‘discarded’ as the term is ordinarily used.” *Id.*

Having established that “legitimate recycling” is *not* limited to intra-industry recycling, the court went on to address the same questions presented in *AMC I* and *ABR* – *i.e.*, whether the recycling at issue in *Safe Food* was the type of “legitimate recycling” that did not constitute discard and thus was properly excluded from the definition of solid waste. The court agreed with EPA that the recycled fertilizers at issue in that case were being recycled in a manner that did not constitute discard, resting its decision on a combination of factors, including (1) that the market participants handled the materials more like valuable products than like negatively-valued wastes, (2) EPA’s required management practices for the secondary materials, and (3) EPA’s use of contaminant limits assuring substantial chemical identity between the reclaimed materials and analogous commercial products made from virgin materials. *Id.* at 1269. What is critical about the collective holdings of *AMC I*, *ABR* and *Safe Food* is the court’s reasoning that, as long as the secondary material is being recycled in a manner that does not involve “discard” – even if such recycling is between industries – the material is not, by definition, subsumed with the definition of solid waste.

B. EPA Should Proceed With the Broader Exclusion For All Legitimately Reclaimed Materials.

Applying the controlling logic of the above decisions to the instant rulemaking, USWAG believes that EPA *must* abandon its proposal to limit the rulemaking only to intra-industry recycling practices, as it is plain that legitimate recycling that does not involve “discard” also occurs between industries. In fact, a key element of the instant proposal is to codify the criteria to be used in determining whether a particular recycling activity involves “legitimate recycling” – the so-called legitimacy criteria. Materials meeting these criteria plainly are not “discarded” and, therefore, are not solid wastes (see 68 Fed. Reg. at 61581). And there is no dispute that these criteria can be applied just as readily to the recycling of materials between industries as to the recycling of materials within an industry. Thus, it would be flatly inconsistent with the above D.C. Circuit decisions for EPA to continue to assert RCRA jurisdiction over *any* category of legitimate recycling that meets the legitimacy criteria – which by definition does not involve “discard” – whether such recycling occurs intra- or inter-industry.

In fact, the rationale behind EPA’s proposal to adopt the narrower, intra-industry exclusion applies equally to the broader inter-industry option. EPA asserts that materials “generated and reclaimed in a continuous process within the same industry” are still “useful” and thus have not been discarded; in effect, “the industry has not ‘finished’ with the material.” 68 Fed. Reg. at 61565. However, the same rationale applies to the recycling of materials between industries provided the proposed legitimacy criteria are met. As discussed below, when recycled materials meet these

criteria – whether inter- or intra-industry – the materials are still “useful” and are not being discarded. Indeed, the very purpose of the proposed legitimacy criteria is to ensure that qualified recyclable materials are providing a useful function and are serving a true purpose in the marketplace without an element of discard. There is no legitimate basis for limiting the proposed exclusion solely to intra-industry recycling, when legitimate recycling that does not involve discard also occurs between industries.

USWAG believes, therefore, that the focus of this rulemaking should be for EPA to finalize its proposed criteria for legitimate recycling (the so-called “legitimacy criteria,” see 68 Fed. Reg. at 61581-61587) and, based on those criteria, establish a conditional exclusion from the definition of solid waste under 40 C.F.R. § 261.4(a) “for essentially all materials that are legitimately recycled by reclamation, whether the recycling is done within the generating industry, or between industries.” *Id.* at 61588. Materials that are recycled in accordance with these legitimacy criteria are not, by definition, “discarded” and thus should not be subject to RCRA regulation. This principle is at the core of the trilogy of above-referenced D.C. Circuit decisions, and EPA’s final rule should be faithful to and consistent with those decisions.

C. Implementation Issues Associated With A Recycling Exclusion For All Legitimately Reclaimed Materials

If EPA proceeds with the broader recycling exclusion – which USWAG believes it must – the Agency seeks comment on a number of issues associated with implementing the exemption, including whether the factors for legitimate recycling should remain as general criteria, or be promulgated as hard and fast regulatory criteria.

68 Fed. Reg. at 61588. USWAG believes that the recycling factors should remain “general criteria,” as opposed to “hard and fast regulations.” As EPA recognizes, there are innumerable, case-specific factors and considerations that arise in evaluating whether any given recycling operation involves “legitimate” recycling. As EPA correctly acknowledges, “there may be situations when a recycling activity that does not conform to one or more of the criteria could be considered legitimate.” *Id.* at 61583. USWAG is concerned that if the legitimacy criteria are promulgated as explicit regulatory requirements, the type of flexibility necessary to properly assess the legitimacy of varying recycling methods would be lost and otherwise environmentally beneficial and legitimate recycling operations would be arbitrarily thwarted simply because regulators would not be able to check off every box on the legitimacy checklist. USWAG urges EPA to retain the legitimacy factors as *criteria* so the Agency and the regulated community have the ability to assess a particular recycling activity based on real world factors, as opposed to a rigid set of criteria that may not be applicable in all circumstances.

EPA also seeks comment on the advantages and disadvantages of the broader proposal; specifically, whether the recycling legitimacy criteria would be sufficient to govern the exclusion, whether it would encourage recycling, whether it would harm human health or the environment, and whether a case-by-case variance mechanism would be more appropriate for providing regulatory relief for reclaimed materials than the broader regulatory exclusion discussed above. *Id.* For the reasons discussed above, USWAG believes that EPA must proceed with the broader exclusion for all

materials that are reclaimed in accordance with the legitimacy criteria. Proceeding with the case-by-case variance approach would be needlessly burdensome, especially given the already taxing demands on limited federal and state resources, and would undoubtedly result in eliminating new initiatives designed to foster increased recycling opportunities. This would be counter-productive by perpetuating the unnecessary disposal of materials that could otherwise be beneficially and safely reused.

EPA also requests comment on whether a broader exemption should include additional safeguards on handling and storage than those proposed for the intra-industry option. USWAG's response to this suggestion is an emphatic no. First, materials handled in accordance with the legitimacy criteria are, by definition, being handled as product-like materials, which necessarily includes the requisite handling safeguards to preserve the integrity of the material and to prevent spills.

Second, the imposition of unnecessary controls on materials being legitimately reclaimed would create an uneven playing field between the reuse of these materials and comparable virgin materials. With already thin profit margins for many recycling initiatives, it would be counter-productive to impose unnecessary "handling" controls on materials that could be legitimately reclaimed. Such "controls" will be reflected in the ultimate price of the recycled products and will serve as an economic deterrent to entities that might otherwise be inclined to reuse such materials in lieu of purchasing virgin raw materials. USWAG urges EPA to establish as few "conditions" as possible on materials destined for legitimate recycling because such "conditions" may be determinative of whether the recycling is economically viable.

Finally, USWAG agrees with EPA that the Agency has provided the regulated community with adequate notice and an opportunity to comment on the broader, inter-industry option (*see, e.g.*, discussion at 68 Fed. Reg. at 61589, left column). As such, EPA is fully entitled to promulgate the broader exclusion in final form without having to undertake another round of notice and comment rulemaking.

II. EPA's Proposed Legitimacy Criteria Are Good Indicia For Determining That A Material Has Not Been Discarded.

The legitimacy criteria are obviously critical to this rulemaking and USWAG supports EPA's proposal to clarify and refine them. As stated above, USWAG urges EPA to continue to use the criteria as simply that – criteria – and not as hard and fast regulatory requirements. As EPA itself reasons, the array of potentially legitimate recycling activities is simply too broad to fit into a box of rigid criteria; instead, legitimacy determinations generally will require case-specific evaluations and “will require some subjective evaluation and balancing.” 68 Fed. Reg. at 61583. EPA also correctly observes that “there may be situations when a recycling activity that does not conform to one or more of the criteria could be considered legitimate.” *Id.* Similarly, there will be other circumstances “where a particular legitimacy criterion may not be met, but where the overall recycling practice would nevertheless be considered legitimate.” *Id.* Given the highly variable forms of legitimate recycling operations that are available across the country, EPA is absolutely correct in not proposing that every criterion be met to determine that a particular recycling activity is legitimate.

USWAG also agrees with EPA's proposal to condense the existing set of six criteria into a set of four criteria, *id.* at 61582. This refinement does not alter the substance of the criteria, but rather makes the criteria easier to use going forward and less prone to ambiguity.

With respect to the proposed criteria themselves, USWAG believes they generally set forth the appropriate considerations for evaluating the "legitimacy" of a recycling operation and determining whether or not the material at issue is being "discarded." We do, however, have comments on particular aspects of the proposed criteria.

A. Proposed Criterion One

Proposed criterion number one would provide that:

The secondary material to be recycled is managed as a valuable commodity. Where there is an analogous raw material, the secondary material should be managed in a manner consistent with the management of the raw material. Where there is no analogous raw material, the secondary material should be managed to minimize the potential for releases into the environment.

68 Fed. Reg. at 61583. EPA elaborates on Criterion One by explaining that, in determining whether real recycling is occurring, it is illustrative to ask whether secondary materials being recycled are handled in the same way that "analogous" raw materials are handled before manufacturing. *Id.* In other words, EPA expects "all parties involved in handling secondary materials destined for recycling to handle them as carefully as 'analogous' raw materials would be handled." *Id.* at 61584. Where there is no "analogous" raw material, this criterion would focus on the effectiveness of

equipment and systems in preventing releases of the hazardous secondary materials to the environment. *Id.* Overall, USWAG believes this proposed criterion is reasonable, as it contemplates that materials destined for recycling will be handled as more “product-like” than “waste-like” as reflected by the manner in which the material is stored prior to recycling.

B. Proposed Criterion Two

The second proposed criterion would provide that:

The secondary material provides a useful contribution to the recycling process or to a product of the recycling process and evaluating this criterion should include consideration of the economics of the recycling transaction. The recycling process itself may involve reclamation, or direct reuse without reclamation.

Id. at 61583. EPA explains that Criterion Two “expresses the fundamental principle that secondary materials should actually be useful (*i.e.*, contribute value) to a recycling process.” *Id.* at 61584. This is intended to prevent the practice of adding secondary materials to recycling operations simply to dispose of them (sham recycling). *Id.*

USWAG agrees with EPA’s recognition that not every last bit of the secondary material would have to contribute to the product or process for this criterion to be met. Recovery of materials with “sufficient value” to justify recycling would be enough (*e.g.*, recovery of precious metals might not recover all of the components of a hazardous secondary material, but would recover precious metals with sufficient value to justify the recycling). *Id.*

At its core, this criterion is about how useful or valuable a secondary material is to the recycling process and should not turn, as EPA acknowledges, solely on a specific

economic test. EPA correctly observes that a secondary material need not always be marketable to the public “for it to have sufficient value for the recycling process to be legitimate recycling.” *Id.* Thus, the “question of who pays whom” and the “amounts of money involved” should not be the only factors evaluated under this criterion. EPA appropriately recognizes this point by observing that many legitimate recycling transactions involve cases where the generator pays the recycler to accept the material to be recycled. *Id.* In fact, this not uncommon in circumstances where the recycling profit margins are exceedingly thin (*e.g.*, as is the case with the recycling of certain spent solvents), but the secondary material clearly has value in the recycling process.

USWAG also believes that EPA’s list of examples of what it means by “useful contribution” under this criterion (*id.* at 61585), while all reasonable, really serves to underscore the multitude of ways in which a secondary material can provide a real contribution to a recycling operation. This reinforces the above point that the recycling factors should be retained as “criteria” to give EPA and other regulatory bodies the necessary flexibility to evaluate the true dynamics of any recycling operation.

C. Proposed Criterion Three

The third proposed criterion provides that:

The recycling process yields a valuable product or intermediate that is: (i) Sold to a third party; or (ii) Used by the recycler or the generator as an effective substitute for a commercial product or as a useful ingredient in an industrial process.

Id. at 61583. This criterion is intended to capture the concept that recycling must produce something of value; otherwise, it is simply a disposal process in disguise. *Id.*

This can be done by showing that the recycled product has economic value or a value that is more intrinsic (e.g., it is useful to the end user, though it may not be salable as a product or commodity in the marketplace). *Id.* Again, these are reasonable factors and appropriately focus on the real considerations involved in any recycling transaction. USWAG is especially supportive of EPA's recognition that recycled materials not sold to third parties can still have "value" by showing that "the recycled product replaces an alternative product or material that would otherwise have to be purchased." *Id.* at 61585. These types of internal recycling practices are commonplace, and EPA is wise to acknowledge the important value of recycled products in this context.

EPA also properly recognizes that there may be several steps in the recycling process occurring at separate facilities which, in the end, all serve a unique function in producing a valuable product. *Id.* at 61586. This is especially true in cases where a particular recycling step may not, in and of itself, yield a readily useable product, but the step nonetheless is part of the legitimate recycling chain because it is necessary to facilitate the next recycling step (e.g., where a metal-bearing secondary material undergoes particle size reduction to make the material amenable for the final step of incorporating it into a final product). *Id.* As EPA explains, "[a]lthough reducing the particle size in this case would not by itself produce a valuable product, it may add value to the recycling process and is consistent with the intent of this criterion." *Id.* USWAG agrees.

D. Proposed Criterion Four

The fourth and final criterion would provide that:

The product of the recycling process:

- (i) Does not contain significant amounts of hazardous constituents that are not found in analogous products; and
- (ii) Does not contain significantly elevated levels of any hazardous constituents that are not found in analogous products; and
- (iii) Does not exhibit a hazardous characteristic that analogous products do not exhibit.

Id. at 61583. Criterion Four is designed to determine whether or not unacceptable amounts of toxic constituents are passed through to recycled products, commonly referred to as the “toxics along for the ride” or “TAR.” *Id.* at 61586. Put another way, this criterion is designed to examine “whether hazardous constituents are ‘discarded’ by being incorporated into a product made from hazardous secondary materials, which would indicate sham recycling.” *Id.* USWAG generally agrees with EPA’s proposed formulation of this criterion, but believes that elements of the D.C. Circuit’s decision in *Safe Food* also are relevant in formulating this criterion and should be reflected in the final rule.

EPA appropriately acknowledges that the first two factors of the proposed criterion – both of which essentially compare the amount of toxic constituents in the recycled product to the presence of any such materials in analogous virgin products – are most likely to be involved in making TAR determinations. *Id.* In this regard, USWAG agrees with EPA’s decision not to propose a “specific formula” for determining what constitutes a “significant amount” or a “significantly elevated level” of a hazardous constituent. *Id.* at 61587. EPA is absolutely correct that “[g]iven the exceptional

diversity and variability of potentially recyclable materials . . . this issue is best addressed on a case-by-case basis, instead of imposing a generic limit that could apply to all recycling and all recyclable materials.” *Id.*

For the above reason, USWAG also agrees with EPA’s decision not to pursue a “bright-line” or “risk-based” approach under this criterion, as the former would be too inflexible and the latter would be needlessly complex and a “radical departure” from how EPA has implemented this criterion in the past. *Id.* at 61588. While a bright-line or risk-based approach might, on the surface, appear to provide a more predictable administrative solution, in reality such an approach would produce arbitrary results and could, as EPA correctly acknowledges, result in “either over-regulation or under-regulation, or both.” *Id.* at 61587.

In fact, EPA’s proposed approach of comparing the level of hazardous constituents in the recycled product relative to levels in an analogous product was expressly affirmed by the D.C. Circuit in *Safe Food*. In addition to confirming that legitimate recycling can readily occur *between* industries, the *Safe Food* court examined the particulars of the conditional exclusion for the recycled fertilizer at issue in that case. Of relevance to this rulemaking, the court noted that one of the valid reasons cited by EPA for determining that the recycled fertilizer was not “discarded” – and thus exempt from the definition of solid waste – was the Agency’s reliance on “contaminant limits assuring substantial chemical identity” between the recycled fertilizer and analogous products. 350 F.3d at 1269. The court dubbed this condition the “identity principle,” *id.*,

which is effectively what EPA is proposing to codify as proposed Criterion Four – namely, the principle that the recycled product not contain TARs.

In upholding the “identity principle” as a legitimate criterion to be used by EPA in determining that a recycled material is not being “discarded,” the court also affirmed the approach proposed by EPA in this rulemaking of not requiring absolute identity between the recycled product and an analogous virgin product. As the court explained: “[w]e do not believe that affirmance of EPA’s [identity] principle requires literal identity, so long as the differences [in the level of hazardous constituents in the recycled product to an analogous virgin product] are so slight as to be substantively meaningless.” 350 F.3d at 1270. The court agreed with EPA that any differences between hazardous constituents in the recycled product and an analogous product must be put in a proper perspective – “namely, a perspective based on health and environmental risks.” *Id.* For example, the court agreed with EPA that

[i]n the absence of any indication of health and environmental risks, it was hardly unreasonable for the EPA to treat 8 ppt [dioxin in the recycled fertilizer] and 1 ppt [the level in an analogous virgin product] as ‘identical’ enough to support a finding that recycled materials with 8 ppt dioxin are products rather than ‘discarded’ products.

Id. at 1271.

This rationale should serve as a guide to EPA in finalizing Criterion Four. *Specifically, the determination of whether a recycled product contains “significantly elevated levels” or a “significant amount” of hazardous constituents in comparison to an analogous virgin product cannot occur in a vacuum; rather, the comparison must be undertaken in the context of whether any difference is meaningful from a perspective*

based on health and environmental risks. EPA suggests taking such an approach in the proposal (see 68 Fed. Reg. at 61587 setting forth examples of how “significant” might be evaluated under this criterion), and USWAG respectfully suggests that the *Safe Food* decision directs EPA to proceed with this approach in the final rule.

Finally, USWAG supports EPA’s proposed shift from existing guidance by placing less emphasis in Criterion Four on the up-front presence of toxic constituents in recyclable secondary materials primarily because the Agency properly recognizes that most recycling involves removing or destroying such harmful materials. *Id.* Rather, this criterion would focus on whether or not (and how much of) these hazardous constituents end up in the final product. *Id.* USWAG supports this approach. This is the approach embodied in the “identity principle” upheld by the D.C. Circuit in *Safe Food – i.e.*, focusing on the level of hazardous constituents in the finished recycled product vis-à-vis an analogous virgin product, as opposed to analyzing the make-up of the secondary material prior to being recycled into an end product.

III. EPA’s Proposed Enforcement Scheme Is Fundamentally Unfair and Inappropriately Attempts to Shift the Burden for Persuasion.

USWAG has several fundamental objections to EPA’s proposed enforcement scheme for alleged violations of the recycling exclusion. First, EPA takes the position that if a generator or reclaimer claims that a particular secondary material qualifies for the recycling exclusion, but this later turns out *not* to be the case, the material would be viewed as a fully regulated hazardous waste from the point of generation and *all* parties involved in the transaction would be at risk for enforcement. *Id.* at 61581. EPA reasons

that this approach will provide “everyone involved with an incentive to handle materials to prevent the loss of the exclusion” and encourage persons “to use all appropriate steps to see that others handle the material so it is legitimately reclaimed.” *Id.*

This approach is fundamentally unfair and violates basic principles of due process because it would impose liability on entities that have no culpability whatsoever in the alleged violation. For example, if a generator of a secondary material complies in good faith with all the applicable conditions of the exclusion and uses all appropriate due diligence in selecting a qualified recycler, but the material is nonetheless subsequently mishandled by the downstream recycling facility (e.g., the facility disposes of the material as opposed to reclaiming it), the recycling facility, not the generator, should be the sole entity subject to enforcement measures. EPA, however, would hold the wholly innocent generator to the same degree of culpability as the recycler, which is fundamentally unfair and runs afoul of basic notions of due process. Indeed, courts have made clear that “[i]mplicit within the concept of due process is that liability may be imposed on an individual *only* as a result of that person’s own act or omissions.” See, *Tyson v. New York City Housing Authority*, 369 F. Supp. 513, 518 (S.D.N.Y. 1974) (emphasis added).

Further, EPA’s proposed enforcement scheme – which effectively converts RCRA into a strict liability statute -- would serve as a significant deterrent to many generators even contemplating engaging in otherwise environmentally beneficial recycling activities. The bottom line is that RCRA is not a “strict liability” program and any attempt by EPA to establish such a scheme is inconsistent with Congressional

intent and beyond EPA's authority. See, e.g., *Fort Worth and Denver Ry. Co. v. Lewis*, 693 F.2d 432, 435 and n. 8 (5th Cir. 1982) (prohibiting federal agency from straying from standard of liability established by Congress).

USWAG also is concerned with EPA's assertion that a RCRA authorized State or EPA could choose to bring an enforcement action against the "reclaimer, transporter, and/or generator for violations of applicable RCRA hazardous waste requirements." *Id.* This approach suggests that EPA believes it could bring an "over-filing" action if it is dissatisfied with an authorized state's enforcement action for a particular violation. If this is EPA's position, USWAG strongly disagrees. USWAG believes that EPA's enforcement ability under the final rule should be controlled by the holding in *Harmon Industries v. Browner*; 191 F.3d 894 (8th Cir. 1999); namely, that EPA is prohibited from bringing an "over-filing" action against a particular entity that has already been prosecuted by a RCRA authorized state for the same violation.

Finally, USWAG disagrees with EPA's assertion that if an enforcement action is commenced, the burden of proof and the *burden of persuasion* would be on the regulated entity to demonstrate that the material had been managed in a manner consistent with the exclusion from the point at which it was generated. *Id.* EPA is inappropriately attempting to shift the Agency's burden. It is a fundamental tenet of administrative law that EPA has the initial burden of proof and the ultimate burden of persuasion in any enforcement case. See e.g., *In the Matter of Nello Santrocce & Dominic Fanelli D/B/A/ Gilroy Associates*, 24 Env'tl. L Rep. 40146, 40148-49 (March 25, 1993) (making clear that EPA as the complainant "bears the burden of persuasion by a

preponderance of the evidence” that the violation in fact occurred). In addition, EPA has the initial burden in any enforcement case of making out a *prima facie* case that a violation has even occurred. EPA cannot shift these fundamental obligations in this rulemaking.

IV. EPA Should Wait Until After Implementation of the Final Rule Before Determining Which Pre-Existing Exclusions Should Be Eliminated.

EPA proposes to eliminate a number of existing regulatory exclusions from the definition of solid waste because it believes the proposed exclusion would “overlap” with pre-existing exclusions and render them unnecessary (e.g., the exclusion under 40 C.F.R. § 261.2(e)(1)(iii) for materials that are recycled by being “returned to the original process from which they were generated without first being reclaimed.”). See 68 Fed. Reg. at 61578. USWAG urges EPA to refrain from eliminating any pre-existing exclusions until (1) the final contours of the new exclusion are firmly established, and (2) the Agency and the regulated community have had some real world experience in implementing and interpreting the scope of the new exclusion. As EPA and the regulated community are well aware, the precise contours of a new regulation – especially a new regulatory exclusion – often only become clear after the regulation has been in place for a period of time and any ambiguities regarding its applicability have been ironed out either by EPA or the courts.

Therefore, USWAG believes it is premature for the Agency to conclude that the new exclusion will supersede any of the pre-existing regulatory exclusions currently in effect. Rather, USWAG believes that EPA should wait until after the new exclusion has

been implemented and any ambiguities regarding its scope resolved. In this way, EPA will not prematurely eliminate a pre-existing exclusion that is not completely subsumed by the new exclusion. If this were to occur, recycled materials that previously had been excluded from the definition of solid waste would be inappropriately and unintentionally swept into the RCRA system. Such a result would be directly contrary to EPA's position that the proposal is intended to be "de-regulatory in nature" and that "[t]his proposal is not intended to bring new wastes into the RCRA subtitle C regulatory system." *Id.* at 61560. Since there is no apparent harm from temporarily deferring any determination regarding whether pre-existing exclusions are no longer necessary, USWAG urges EPA to revisit this issue after the new exclusion is in place and its contours firmly established.

V. Assuming, For Purposes of Discussion, That EPA Adopts the Narrower Intra-Industry Option, EPA Should Adopt Option One.

As discussed above, USWAG believes that EPA must adopt an exclusion that encompasses *all* materials that are legitimately recycled, as opposed to limiting the exclusion to intra-industry recycling. Nonetheless, USWAG offers the following comments on the narrower intra-industry option if EPA persists in pursuing this overly narrow approach.¹

¹ By offering comments on this aspect of the proposal, USWAG is in no way (1) suggesting this approach is consistent with the D.C. Circuit decisions referenced above declaring that RCRA does not apply to *any* material that is legitimately recycled and not discarded, or (2) waiving its right to challenge any final exclusion that is under-inclusive by inappropriately continuing to subject to RCRA regulation materials that are legitimately recycled between industries.

A. Option One is Preferable to Option Two

EPA requests comment on the pros and cons of so-called Option One and Option Two. Option One would exclude from regulation hazardous secondary materials, including spent materials (e.g., spent solvents), listed sludges and listed by-products, when such secondary materials are “*generated and reclaimed in a continuous process within the same industry.*” *Id.* at 61565, 61593 (emphasis added). The reclamation could take place in multiple processing steps (at different facilities) as long as the entire recycling process remained within the same industry and the reclamation produces a product or ingredient that is used or reused without further reclamation. *Id.* at 61565.

Option two would include the same conditions as Option 1, but would limit the types of facilities that could qualify for the exclusion to those that exclusively recycle hazardous wastes from within their own industry. In other words, Option 2 would prohibit facilities that recycle wastes from different industries from availing themselves of the exclusion. *Id.* at 61566. In EPA’s view, this option would “establish a bright line” between facilities that are simply recycling wastes from within their own industry, and commercial recycling outfits that may be recycling wastes from a number of different industries. *Id.* EPA suggests that this option could provide “greater certainty to the regulated community as to when they would be ineligible for the exclusion.” *Id.*

With the caveat referenced in footnote one that both options are too restrictive in scope, USWAG believes that Option One is plainly preferable to Option Two because it is the least narrow of the two and would provide more opportunities for legitimate

recycling. Further, by precluding any facility from qualifying under the exclusion if it receives recyclable materials from different industries, Option Two unfairly and inappropriately excludes all commercial recycling facilities from qualifying for the exclusion. There is no legitimate basis for this categorical prohibition. Whether or not materials recycled by a commercial facility qualify for the exclusion should turn on the same set of factors applicable to all other recycling facilities – specifically, whether such activities meet the legitimacy criteria discussed above.

USWAG also does not give much weight to EPA's suggestion that Option Two may be preferable because it would establish a "bright line" as to what facilities qualify for the exclusion; any facilities interested in operating under this option would have ample incentive to properly ensure that they fall within the requisite "NAICS" code and to segregate eligible and ineligible materials destined for recycling. Similar types of regulatory responsibilities are implicit in scores of EPA hazardous waste regulations. To limit the scope of the recycling exclusion exclusively to facilities recycling wastes from within their own industry so as to establish a clearer line for eligibility is unnecessary and would needlessly stymie the development of otherwise environmentally sound and beneficial recycling opportunities.

USWAG also disagrees with EPA's alternative approach to defining "continuous" within the generating industry by limiting the scope of the exclusion only to recycled materials that either are (a) sold to the general public if such products were considered typical products of the generating industry, or (b) reused as a product or ingredient with

the generating industry, if the reclaimed material is not a typical product of the generating industry.” 68 Fed. Reg. at 61566.

Once again, EPA has floated an option that is needlessly restrictive and goes beyond *any* reasonable construction of the applicable D.C. Circuit decisions construing the term “solid waste.” There is absolutely nothing in those decisions remotely suggesting that the court intended to impose such limitations on its core holding that materials legitimately reclaimed do not warrant solid waste regulation. For example, there are obviously innumerable instances where secondary materials can be reclaimed and recycled legitimately by being sold to the public even if the reclaimed product is not “a typical product of the generating industry.” This option would both stymie environmentally beneficial recycling activities and inappropriately retain RCRA jurisdiction over reclaimed materials that clearly are not solid wastes. It should be rejected.

B. If EPA Uses The NAICS To Define The Appropriate “Industry,” It Should Employ No More Than A 3-Digit Code

To determine when two facilities are within the same industry, EPA proposes to rely upon an existing catalog known as the North American Industry Classification System (“NAICS”). *Id.* at 61567. NAICS employs a 6-digit coding system to classify industries and sub-industries within manufacturing and other sectors. *Id.* at 61568. EPA believes the NAICS system is well-suited to the purposes of the proposal because its classifications are designed to reflect situations in which production units that use similar processes are grouped together. Although the NAICS system includes

classifications that are highly specific, represented by a 6-digit number, EPA has proposed to require businesses to use the 4-digit code assigned to facilities for purposes of determining their eligibility under the proposal. Therefore, two establishments would be considered to be within the same industry (and eligible for the continuous process recycling exclusion) if they share the same 4-digit NAICS code. *See id.* at 61569.

EPA believes that requiring only a 4-digit classification will “strike the appropriate balance” between specificity and breadth; however, it seeks comment on whether it would be better to require a 3-digit or 5-digit classification. *Id.* In addition, EPA questions whether the list of possible NAICS numbers is too broad, and would allow too many facilities to take advantage of the proposed recycling exclusion. Therefore, it seeks comment on whether the list of available NAICS classifications should be narrowed to include only those businesses in the mining and manufacturing sector. *Id.* at 61572.

USWAG does not believe that the list of possible NAICS numbers is too broad; there is no reason to think that any of the industries represented by the list of available classifications are incapable of engaging in legitimate recycling. USWAG, therefore, is opposed to any narrowing of the available NAICS classifications to include only businesses in the mining and manufacturing sector. There is no rational basis for such an arbitrary limitation.

USWAG also notes that the 4-digit code that would apply to the electric utility industry would be: “2211 – Electric Power Generation, Transmission and Distribution.”

See *id.* at 61597. The 4-digit code for the natural gas distribution industry would be “2212 – Natural Gas Distribution.” *Id.* It is not uncommon, however, for a power company to have combined electric power generation and natural gas distribution operations within the same corporate family. Under EPA’s proposal to use only a 4-digit NAICS code, these inter-related components of the same company would be viewed as different industries and could not engage in excluded recycling because such operations would not occur within the same industry. This result does not make sense, and would inhibit otherwise environmentally beneficial recycling opportunities between inter-related components of the same company. To avoid this result, USWAG believes that the NAICS code for the power industry should be no more than 3 digits, which would reflect 221.

C. The Definition of “Continuous Process” Should Not Prohibit the Use of Brokers to Facilitate Legitimate Recycling

USWAG disagrees with EPA’s proposal to exclude the use of middlemen or brokers as part of the legitimate recycling process by defining a recycling process as “continuous” only if the secondary materials “are handled exclusively by facilities or entities (except for transporters) that are within the generating industry, and the materials are not ‘speculatively accumulated’ as defined in 40 C.F.R. 261.1(c)(8).” *Id.* at 61575. Therefore, the exclusion would not apply if a facility ships secondary materials to a “broker or other middleman” before they are received at a reclamation facility. *Id.*

While EPA acknowledges the value of “brokers” or other “middlemen” (collectively “brokers”) in finding markets for recyclable materials, the Agency

nonetheless believes that the use of brokers is not consistent with the policy rationale behind the concept of recycling in a “continuous process.” EPA suggests that brokers may not have the same familiarity with, or interest in, the materials they are being asked to transport. *Id.* In addition, EPA believes that if a facility is willing to allow a third party to find the appropriate reclamation facility, the materials must not have the inherent value that recycled materials normally would. *Id.*

EPA’s blanket characterization of the role of brokers in the recycling process is too simplistic and does not allow room for taking into account circumstances where such entities are truly instrumental in facilitating and implementing legitimate recycling operations. Categorically excluding *any* recycling operation from the scope of the exclusion based simply on the presence of a broker in the process unfairly and inappropriately stigmatizes an entire service industry and certainly will result in excluding otherwise legitimate recycling operations from the scope of the exclusion. Instead of this categorical exclusion, USWAG suggests that the legitimacy of a recycling process involving a broker be examined in the same manner as other recycling operations – namely, whether the recycling is legitimate when viewed against the proposed legitimacy criteria. While it is possible that entities using brokers *may* have more of a burden in demonstrating that they meet the criteria (*e.g.*, whether under proposed Criterion One the material is managed as a valuable commodity through the entire transaction), parties should at least be provided with the opportunity to make this showing.

EPA should refrain from making sweeping and generalized assumptions that will unfairly and inappropriately stymie the development of legitimate recycling opportunities. As EPA recognized elsewhere in the proposal, “given the exceptional diversity and variability of potentially recyclable materials” (*id.* at 61587), it is not wise nor possible to impose generic limits that could apply to all recycling and all recyclable materials. This admonition applies just as well in the case of recycling operations involving brokers. EPA should evaluate the role of such entities in recycling operations on a case-by-case basis.

D. The Speculative Accumulation Time Period is the Appropriate Period to Use In Determining That a Process is Continuous

USWAG agrees with EPA that the timeframe under the so-called “speculative accumulation” rule is the appropriate measure to use in determining how much time should be allowed to elapse between the generation and reclamation of a hazardous secondary material. *Id.* at 61575 (see 40 C.F.R. § 261.1(c)(8)). Under the speculative accumulation rule, a facility accumulating a material must show that during a calendar year, the amount of material that is recycled or transferred to a different site for recycling equals at least 75 percent by weight or volume of the original amount of material. *Id.* at 61576. As EPA correctly recognizes, use of the speculative accumulation rule is more consistent with the existing RCRA regulatory framework and is familiar to the regulated community. *Id.* In addition, EPA is correct that shorter time limits will discourage otherwise legitimate recycling. *Id.*

USWAG does not favor the imposition of any additional conditions on this factor beyond those currently embodied in the speculative accumulation rule. In particular, USWAG does not believe that entities qualifying for the exclusion should be required to maintain records demonstrating that they have complied with the conditions of the rule (e.g., that 75 percent of the secondary materials have been reclaimed in a calendar year) or that further tests/conditions *beyond* the speculative accumulation rule (e.g., geographical limits between the point of generation and the reclamation facility) be established in defining a “continuous process.” *Id.* at 61576-77. The speculative accumulation rule has effectively served for many years as the regulatory cornerstone in ensuring the timely completion of legitimate recycling operations. There is nothing in the record suggesting that it will not continue to serve this function under the final exclusion. Therefore, USWAG urges EPA to use the speculative accumulation rule in the final rule, without any additional conditions or restraints.

E. Notification and Record Keeping Requirements Should Be Kept As Simple As Possible

USWAG believes strongly that any notification and/or record keeping requirements associated with the final rule be kept as simple as possible so as not to discourage entities from engaging in legitimate recycling activities. Under the proposal, generators would be required to submit a *one-time* notice to EPA or a RCRA authorized state setting forth the name, address, and EPA ID number of the generating facility, the name and telephone number of a contact person at that facility, the type of materials proposed for the exclusion, and the industry that generated the materials, denoted by its

NAICS classification number. *Id.* at 61577. Other regulatory exclusions in 40 C.F.R. § 261.4 have been implemented for years without the need for notification to EPA by generators that they are engaging in such operations (see e.g., 40 C.F.R. § 261.4(a)(8), excluding secondary materials that are reclaimed and returned to the original process from which they were generated). USWAG sees nothing in the record justifying the imposition of such a requirement for this particular exclusion. If EPA nonetheless persists in adopting this condition, it should be required *only* once and not evolve into a paperwork morass of requiring periodic updates based on changes in recycling operations.

For similar reasons, USWAG opposes any suggestion that generators and reclaimers should be required to keep on-site records relating to the types and volumes of secondary materials they handle. *Id.* at 61578. As with any recycling exclusion, generators would be prepared to provide “appropriate documentation” to prove that their recycling process meets the requisite conditions of the exclusion. *Id.* That responsibility has worked well under the RCRA program without the need for an affirmative duty to keep on-site records regarding the types and volumes of recycled materials. Nothing in the record supports the notion that anything more is needed in this rulemaking.

* * * * *

USWAG appreciates the opportunity to submit comments on this important rulemaking initiatives, and looks forward to continuing to work with the Agency in finalizing this important revision to the definition of solid waste.