

**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
“Conditional Exclusions From Hazardous Waste and Solid Waste for
Solvent-Contaminated Industrial Wipes”
Proposed Rule
68 Fed. Reg. 65586 (November 20, 2003)**

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Proposed Rule 68 Fed. Reg. 65586 (November 20, 2003)**

The following comments in response to EPA’s proposed conditional exclusions for solvent-contaminated rags and wipes from the definitions of “hazardous waste” and “solid waste” (68 Fed. Reg. 65586 (Nov. 20, 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 National Rural Electric Cooperative Association (“NRECA”) and the American Gas Association (“AGA”) (collectively referred to herein as “USWAG”).¹

INTRODUCTION

Since its formation in 1978, USWAG has participated in virtually every major RCRA rulemaking to present our members’ views on the need to develop a cost-effective, practical, and environmentally protective hazardous waste regulatory program. Of special relevance to this rulemaking, many USWAG members generate solvent-contaminated rags and wipes (collectively referred to as “wipes”) in the course of generating and distributing electricity and natural gas. In many cases, the wipes are

¹ 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 the EEI, the APPA, NRECA and the AGA. EEI is the principal national association of investor-owned electric power and light companies. APPA is the national association of publicly owned electric utilities. NRECA is the national association of rural electric cooperatives. 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.

subject to hazardous waste regulation due to de minimis contamination by spent solvents. Therefore, USWAG has long been supportive of EPA's efforts to establish a more streamlined, practical, and cost-effective regulatory program for handling these materials.

While certain groups have spoken out in opposition to this proposal (some of which oppose the initiative purely out of their economic interests in keeping wipes subject to full hazardous waste regulation), USWAG believes the proposal is an important step in the Agency's overall effort to tailor its hazardous waste rules to better conform to the *real*/world risks posed by contaminated wipes. We fully agree with EPA's findings that, from a risk-management perspective, the proposed conditional exclusions are fully warranted. The proposal makes clear that management of the wipes in accordance with good management practices will ensure that they do not pose a hazard to human health and the environment and, accordingly, do not warrant hazardous waste regulation.

USWAG supports EPA's attempt to develop management standards that, for the most part, are intended to provide the regulated community with some degree of flexibility. This type of performance-based approach is absolutely critical in a rulemaking of this nature, where there will be thousands of different generators involved in many different businesses interested in managing wipes under the conditional exclusions.

While USWAG supports the broad aspects of this important regulatory initiative, there is always room for improvement. Some of USWAG's major comments on the proposal are summarized below.

- EPA should clarify the regulatory text to make clear that the exclusions apply to *all* wipes exhibiting a hazardous characteristic due to use with solvents, not just those contaminated with F-listed solvents or discarded U- and P-listed commercial chemical products.
- EPA should clarify that the scope of the rule includes solvent-contaminated industrial wipes that exhibit the hazardous characteristic of ignitability due to co-contaminants.
- The conditional exclusion should apply to materials contaminated with solvents that have properties and uses similar to wipes, such as gloves and other personal protective equipment.
- The conditional exclusions should *not* be narrower in scope than equally protective existing state programs.
- USWAG opposes excluding specific solvents from the conditional exclusion for disposal wipes. The rule's risk assessment, when properly evaluated, supports inclusion of wipes contaminated by *all* listed solvents within this option.
- EPA should abandon the use of the "dry" test because it is impractical and unnecessary to ensure that the final rule will be protective of human health and the environment; EPA should substitute the "no free liquids" test for the "dry" test.
- USWAG is especially interested in preserving cost-effective and practical options for electric utilities – many of which have geographically dispersed transmission and distribution systems – to consolidate wipes for centralized management. Therefore, USWAG supports EPA's proposal to allow for the *intra*-company transfer of contaminated wipes, *even* when they contain free liquids.
- USWAG fully supports the management option of burning industrial wipes – including for use as a fuel – in qualified non-hazardous waste combustion units. EPA's risk analysis demonstrates that such combustion practices would be protective of human health and the environment when conducted in accordance with applicable permit conditions.
- USWAG supports EPA's proposal *not* to establish any specific record keeping requirements under either one of the proposed exclusions, especially with regard to generators of contaminated wipes. EPA correctly reasons that such additional regulation is unnecessary because persons claiming an exemption from hazardous waste regulation already are required, when requested by EPA, to provide appropriate documentation demonstrating compliance with the exemption.

- USWAG opposes EPA's proposed enforcement scheme whereby generators would automatically lose the exemption if a down-stream handler does not comply with applicable management conditions. This approach unfairly imposes liability on entities that have no culpability whatsoever in the alleged violation. EPA should abandon this proposed enforcement scheme.

DISCUSSION

I. Proposed Scope of the Conditional Exclusions

A. EPA Should Clarify That All Solvent-Contaminated Wipes Exhibiting A Hazardous Characteristic Are Included Within The Scope Of The Rule.

The proposed regulatory text setting forth the scope of the conditional exclusions inadvertently excludes an important category of solvent-contaminated wipes from the rule: wipes contaminated by spent solvents that are *not* listed hazardous wastes, but which nonetheless cause the wipe to exhibit a hazardous characteristic. In describing the scope of solvents covered by the proposed rule, EPA states that it will cover “*industrial wipes that exhibit a hazardous characteristic (see 40 C.F.R. 261.21-261.14 [sic] due to use with solvents and to industrial wipes containing any listed hazardous waste solvents: F001-F005 listed spent solvents (see 40 CFR 261.31) and corresponding P- or U-listed commercial chemical products when spilled (see 40 CFR 261.33)*” (68 Fed. Reg. at 65593 (emphasis added)); see *also* discussion at 68 Fed. Reg. at 65589, explaining that the rule will encompass “(1) industrial wipes exhibiting a hazardous characteristic (*i.e.*, ignitability, corrosivity, reactivity, or toxicity) due to use with solvents or (2) industrial wipes contaminated with F001-F005 spent F-listed solvents or comparable P- and U-listed commercial chemical products that are spilled and cleaned up with industrial wipes.”

In other words, it is clear that EPA intends for the conditional exclusions to apply not only to industrial wipes contaminated with F-listed solvents or comparable P- and U-

listed commercial chemical products, but also to *any other* industrial wipe contaminated by a spent solvent – even if not listed – if such solvent causes the wipe to exhibit a hazardous characteristic. This makes perfect sense, as there are wipes contaminated with solvents that, while not listed, nonetheless cause the wipes to exhibit a hazardous characteristic, such as ignitability. This category of solvent-contaminated wipes clearly warrants inclusion in the final rule. The problem, however, is that the proposed regulatory text identifies only wipes contaminated with F-listed solvents or comparable P- or U-listed commercial chemical products as falling within the scope of the rule. See 68 Fed. Reg. at 65618-19 (proposed 40 C.F.R. §§ 261.4(a)(22) & 261.4(b)(19)).

Another flaw in the proposed regulatory text is the inadvertent exclusion of contaminated wipes exhibiting the characteristic of ignitability due to being “co-contaminated with ignitable waste.” 68 Fed. Reg. at 65602. As EPA explains: “because [such] industrial wipes are already likely to be ignitable because of the nature of the solvents on them and because this risk is managed by the conditions of the exclusion from hazardous waste, wipes co-contaminated with ignitable waste would remain eligible for the exclusion if they meet its other conditions.” *Id.* Here too, however, the proposed regulatory text fails to include this category of wipes that EPA plainly intends to include the proposal.

To correct these drafting errors, the regulatory text should be amended, in pertinent part, to provide:

. . . when they [the wipes] contain an F-listed spent solvent, a corresponding spilled P- or U-listed commercial chemical product, or exhibit the hazardous characteristic of ignitability, corrosivity, reactivity, or toxicity due to contamination by any spent solvent, or exhibit the hazardous waste characteristic of ignitability due to contamination by an ignitable waste

This text will ensure that the final rule does not inadvertently exclude from coverage wipes exhibiting a hazardous waste characteristic due to contamination by a spent solvent or wipes otherwise exhibiting the characteristic of ignitability.

B. Solvent-Contaminated Protective Clothing Should Be Included Within The Scope Of The Rule.

USWAG suggests that EPA include within the rule's scope worker protective clothing – such as gloves, coveralls, and shirts – that, like wipes, become contaminated with spent solvents and must be managed as a hazardous waste. Workers in a wide variety of industries use industrial wipes in conjunction with personal protective clothing, such as coveralls and gloves, and this clothing often becomes contaminated with the same solvents that contaminate wipes. The same rationale underlying the proposed exclusion for contaminated wipes applies to protective clothing contaminated with the same solvents – indeed, they are generally cloth-like materials just like wipes and are managed in the same way. When this protective clothing becomes contaminated, regulated entities are confronted with the same regulatory quagmire that led EPA to pursue this rulemaking for contaminated wipes.

Based on the risk assessment underlying the proposal for contaminated wipes, management of similar solvent-contaminated protective clothing equipment in accordance with the proposed management conditions will ensure that such materials do not pose a substantial risk to human health or the environment when disposed or laundered.

C. EPA Should Abandon The “Dry Condition” For Disposal Wipes.

USWAG opposes the “dry” condition for disposal wipes and recommends that EPA drop this condition in exchange for the “no free liquids” standard proposed for reusable wipes. 68 Fed. Reg. at 65598. USWAG members operating in different states

across the country all agree that requiring generators to remove excess solvents to achieve a maximum solvent residue of 5 grams of solvent per wipe, or requiring every wipe to go through some type of solvent extraction process, is completely impractical and would effectively undermine the disposal portion of the rule. Even EPA concedes that certain contaminated wipes can be *safely* disposed in a municipal or other non-hazardous waste landfill by meeting the “no-free liquids” standard as opposed to the more onerous “dry” standard. Remarkably, EPA nonetheless proposes to impose the “dry” standard on *all* disposal wipes purportedly to “simplify the rule.” *Id.* at 65598. It will do nothing of the sort and it is wholly inappropriate to subject solvent-contaminated wipes to a condition that EPA knows full well is not necessary to protect human health and the environment. Instead, the “dry” standard will result in subjecting disposal wipes to management conditions that EPA concedes are unnecessary, as well as making the rule far more burdensome and complicated than necessary, which is precisely the opposite of EPA’s stated intent in this rulemaking initiative.

EPA must remember that literally thousands of generators of different sizes and industries generate solvent-contaminated wipes. When attempting to develop a “one size fits all” approach for such a large and diverse universe of generators, the imposition of an inflexible volumetric limit on *each individual wipe* will simply be too burdensome and impractical for the regulated community, especially for purposes of demonstrating compliance. The costs of attempting to meet and/or to demonstrate compliance with this condition would simply overwhelm a large percentage of otherwise qualifying generators. Any final wipes management regulatory program containing such compliance uncertainties will cause generators to shy away from this option and will cause wipes that clearly do not warrant full hazardous waste regulation to nonetheless

be managed under RCRA Subtitle C. This does not make for sound environmental policy.

EPA's "dry" standard also is at odds with and *more* stringent than certain of EPA's *existing* rules for the disposal of contaminated wipes. For example, wipes are sometimes used to absorb and remove the residual spent solvents contained in the bottom of "empty" containers, as that term is defined under EPA's hazardous waste rules – *e.g.*, no more than one inch of residue remains on the bottom of the container. See 40 C.F.R. § 261.7(b)(1)(ii). EPA has made clear, however, that such residuals are *not* subject to hazardous waste regulation because such de minimis amounts of residuals "do not pose a substantial risk to human health and the environment." See 45 Fed. Reg. 78524, 78525 (Nov. 25, 1980). Thus, if an "empty container" has a listed spent solvent remaining at the bottom, under today's hazardous waste rules, such residuals can be absorbed with an industrial wipe and disposed of as non-hazardous, *even* if the wipe contains more than 5 grams of solvent residue. See, *e.g.*, EPA interpretive letter to Richard Stoll, dated April 10, 1990 (explaining that the residuals removed from an "empty container" through steam-spraying are not subject to hazardous waste regulation). The proposed "dry" standard is inconsistent with this existing practice and at odds with EPA's earlier finding that the management of wipes contaminated with such residuals does not warrant hazardous waste regulation. Indeed, as noted above, EPA readily concedes that, even under its own risk assessment, the "dry" condition is overly restrictive with respect to at least certain solvent-contaminated wipes.

In short, USWAG recommends that EPA abandon the "dry" condition altogether and replace it with the "no free liquids" condition. Using the "no free liquids" condition

as the “universal” condition for both disposal and reusable wipes will offer generators a far simpler, less confusing, and more practical “universal” wipes management program. As EPA itself recognizes, this type of “universal” approach for both disposal and reusable wipes would ensure a rule that is “simpler and easier to implement and would simplify the regulations for generators of solvent-contaminated disposable industrial wipes.” *Id.* at 65608.

D. All Spent Solvents Should Be Included Within The Scope Of The Conditional Exclusion For Disposal Wipes Destined For Land Disposal

USWAG opposes EPA’s proposal to exclude 11 specified solvents from the proposed disposal option. A review of the risk assessment underlying the proposal does not support this limitation on its scope. Nonetheless, EPA has tentatively concluded that disposal wipes contaminated with any of the 11 solvents listed below *cannot* be disposed of in a municipal landfill or non-hazardous waste landfill, but rather must continue to be managed in full compliance with RCRA’s hazardous waste management standards when land disposed (though, as discussed below, wipes contaminated with these solvents could be combusted under this exclusion in a municipal waste or other combustion facility):

benzene, carbon tetrachloride, chlorobenzene, cresols (o,m,p), methyl ethyl ketone (“MEK”), trichloroethylene, 2-nitropropane, nitrobenzene, pyridine, tetrachloroethylene, and methylene chloride

Id. at 65597. EPA has preliminarily determined that disposal of the above solvents in a non-hazardous landfill would pose a substantial hazard to human health and the environment. *Id.* USWAG believes this finding is inconsistent with the record. In this regard, USWAG refers EPA to the relevant portions of the joint comments submitted in this rulemaking by The Association of the Nonwoven Fabrics Industry (“INDA”) and The Secondary Materials and Recycled Textiles (“SMART”) (“INDA/SMART Comments”).

These comments make clear that EPA's risk screening analysis for disposal wipes destined for land disposal is unduly conservative and cannot justifiably be used to either prohibit any solvent-contaminated wipes from the land disposal option under the proposed conditional exclusion or to impose the "dry standard" on disposal wipes.

For example, the INDA/SMART comments reveal that at least six of the "ineligible" eleven solvents in fact do *not* fail EPA's risk screening analysis, but were simply lumped in the "ineligible" category because they meet the toxicity characteristic ("TC"). 68 Fed. Reg. at 65597-98. However, as the INDA/SMART comments correctly point out, there is no reasonable basis to employ TC results to prohibit these six solvents from the land disposal option when a more waste-specific and waste management scenario-specific risk analysis reveals that wipes contaminated with these solvents do not warrant this prohibition. See *e.g., Dithiocarbamate Task Force v. EPA*, 98 F.3d 1394, 1404 (D.C. Cir. 1996) (EPA cannot base risk assessment for purposes of determining whether waste is hazardous under RCRA on assumption that waste would be disposed of in unlined landfills when waste under review was being disposed in lined landfills).

With respect to the remaining "ineligible" solvents, the INGA/SMART comments correctly argue that the risk assessment employed by EPA improperly used a large number of conservative assumptions, several of which were not necessary or warranted. As a result, the final analysis was overly conservative, not properly balanced by the use of "best estimates," and failed to account for real world management conditions. Incorporation of more realistic determinations and/or assumptions based on available data and real world properties is necessary to avoid an arbitrary and unfounded overestimation of risk. See *e.g., Chemical Manufacturers*

Association v. EPA, 28 F.3d 1259, 1264-66 (D.C. Cir. 1994) (holding that EPA may not use assumptions in a model that do not bear a rational relationship to the properties of the substances or conditions being analyzed).

For the above reasons, USWAG urges EPA to abandon its proposal to exclude wipes contaminated with the eleven “ineligible” solvents from the “disposal” option. Instead, the conditional exclusion for disposal wipes should encompass wipes contaminated with any solvents provided the wipes meet the no free liquids test.

E. Removal Of Solvents From Wipes For Purposes Of Meeting The Conditional Exclusion Is Not RCRA “Treatment.”

USWAG concurs with EPA’s explanation that the removal of solvents from wipes for purposes of meeting a condition of the exclusion (*e.g.*, to ensure that no free liquids are contained in the wipes prior to disposal) does not constitute RCRA “treatment” because such materials would not be hazardous waste during the removal process. 68 Fed. Reg. at 65600. EPA correctly reasons that generators will be more likely to recover solvents from their contaminated wipes if such removal operations do not implicate RCRA’s treatment standards. *Id.* Indeed, if the removal of solvents from wipes were considered “RCRA treatment,” there would be little, if any, incentive for regulated entities to even attempt to qualify for the conditional exclusion as the burden of becoming subject to RCRA’s treatment standards (including RCRA’s permit requirement) would far outweigh any benefit of the conditional exclusion.

F. The Conditional Exclusions Should Not Be Narrower In Scope Than Existing State Programs

EPA acknowledges that in the early 1990s, it developed a policy to defer determinations and interpretations regarding the regulation of solvent-contaminated wipes to authorized states or to the EPA regional directors. *Id.* at 65591-65592. In

developing this rule, EPA should be cognizant of the fact that many states have had over a decade of experience in establishing cost-effective, practical, and protective regulatory programs for contaminated wipes. EPA, therefore, should be cautious to avoid interfering with pre-existing and equally-protective state programs that already are in place for the management of contaminated wipes. To the extent that an existing state program is already in place and equally protective as, though different from, EPA's proposed exclusions, the Agency should retain the discretion to authorize such programs to continue in place.

II. Proposed Management Conditions For Contaminated Wipes

USWAG is generally supportive of the proposed management conditions (with the exception of the "dry condition" discussed above) with respect to both disposal and reusable wipes. The Agency has, for the most part, done a reasonable job in balancing the need for practicality and simplicity with its obligation of ensuring that the proposed conditions will ensure protection of human health and the environment. USWAG does, however, have comments on specific elements of the proposed management conditions.

A. The Performance-Based Management Conditions For The Initial Storage And Accumulation Of Wipes Are Reasonable.

The first condition for both disposal and reusable wipes is that they be placed in a "non-leaking covered container." *Id.* at 65619. EPA has deliberately *not* defined what constitutes a "non-leaking covered container," but instead has appropriately recognized that a range of devices can meet this performance standard (*e.g.*, ranging from "a spring-operated safety container to a drum with its opening covered by a piece of plywood."). *Id.* at 65595. Given the large numbers of entities likely to operate under the conditional exclusions, this is the only practical way to implement this condition.

On a related issue, USWAG opposes the imposition of an accumulation time limit on the storage of disposal wipes. *Id.* Generation of contaminated wipes is generally an episodic event, with uncertain frequency and intervals. There is an extremely low likelihood that wipes held in non-leaking covered containers would pose any significant risk if allowed to accumulate on-site for more than the 90 or 180 days generally applicable to generators for the on-site accumulation of hazardous waste under 40 C.F.R. § 262.34. EPA also should make clear that nothing in the conditional exclusion would preclude generators from accumulating the wipes pursuant to the “satellite accumulation” rule under 40 C.F.R. § 261.5, under which wipes can be accumulated in a 55-gallon container with no time limit on storage until the drum becomes full.

USWAG is *not* opposed to the imposition of the “speculative accumulation rule” for the storage of *reusable* wipes – *i.e.*, those destined for recycling through laundering. *Id.* at 65604. In other words, in any calendar year, 75% of the wipes accumulated for recycling must actually be recycled. *Id.* If this percentage is not fulfilled, the reusable wipes would not be eligible for the conditional exclusion. The speculative accumulation rule has served as the cornerstone for establishing a time limit on legitimate recycling operations and its use in this context seems reasonable.

USWAG also agrees with EPA’s proposal to defer to Occupational Safety and Health Act (“OSHA”) regulations on workplace safety for the proper storage of solvent-contaminated wipes on site at a generator’s facility. *Id.* at 65595. The OSHA regulations are specifically designed to address potential risks to workers, and establishing two sets of guidelines designed to protect worker safety concerning the proper storage of solvent-contaminated wipes is a recipe for unnecessary duplication and regulatory inconsistencies.

B. The No Free Liquids Test Is Reasonable And Should Not Be Altered In The Final Rule.

A key condition underlying several components of the conditional exclusions is that the wipes meet a “no free liquids” condition. See *id.* at 65619 (*e.g.*, proposed 40 C.F.R. § 261.4(a)(22)(iii)). EPA intends for this condition to be met by a practical test: does liquid drip from the wipe when it is handled for a short period of time, for example, when being transferred from one container to another? *Id.* at 65599-65600. EPA explains that an inspector could test for compliance with this condition by placing two containers adjacent to one another and transferring wipes from one container to another. If the wipes drip liquid during the transfer or if there are free liquids in the bottom of the container, the wipes would not meet the “no free liquids” condition. *Id.* at 65600. While EPA is careful not to identify any specific test method that must be used to demonstrate compliance with this condition, it discusses a number of methods (*e.g.*, the Paint Filter Test (SW-846, Method 9095) or hand wringing the wipe) which, if met by the generator, would it make it “unlikely” that the no free liquids test was violated. *Id.* at 65599. Generators also would have the option of using “process knowledge” to determine that their wipes contain “no free liquids.” *Id.* at 65600.

USWAG fully agrees with EPA that compliance with this condition must be kept simple and easy to administer and supports EPA’s decision not to prescribe any specific procedure for meeting the test, but rather to provide the regulated community with an objective test that can be achieved in any number of ways. The Agency also should retain the option of demonstrating compliance through “process knowledge.” The “process knowledge” rule has worked effectively for decades in assessing whether a solid waste exhibits a hazardous characteristic (see 40 C.F.R. § 262.11(c)(2)), and

there is no reason to believe that this option will not be equally effective in allowing the regulated community to determine whether a wipe meets the “no free liquids” standard.

In light of the above, USWAG opposes any prescribed method for meeting the “no free liquids” condition, including the “no free liquids when wrung” standard. This approach would require that each wipe cannot drip solvent when hand wrung. *Id.* at 65599. EPA correctly recognizes that this option would be more burdensome and could result in additional exposure of the wipes to the air. As a practical matter, this would require an unnecessary step of hand-wringing each individual wipe, which would not only result in potentially increased solvent exposures to workers, but also would be impractical from an operational perspective.

USWAG also recognizes the concerns raised by some stakeholders that industrial wipes can compress when transported in containers and solvents can percolate through them and collect at the bottom of the container. *Id.* at 65599. EPA acknowledges the possibility of this happening and therefore proposes that if free liquids are discovered at the downstream handling/combustion facility, the wipes would remain eligible for the exclusion as long as the handler removes the free solvents and manages the wipes appropriately, or returns the shipment to the generator as soon as reasonably practicable. *Id.* Any free solvent removed from the containers would have to be managed in accordance with applicable hazardous waste requirements. *Id.* USWAG believes that this is a reasonable approach for such circumstances.

Finally, EPA seeks comment on the applicability of the “no free-liquids” condition to so-called “exotic” solvents, such as terpenes and citric acids that, while labeled as non-hazardous, could actually be flammable. Stakeholders advised EPA that, under certain conditions, oxygen can mix with industrial wipes contaminated with these

solvents and spontaneously combust. *Id.* at 65600. For wipes contaminated with these particular solvents, stakeholders suggested that EPA allow for them to be transported offsite with free liquids, so that generators can wet down the wipes with water prior to offsite transport. *Id.* at 65600. USWAG agrees with this approach, which also serves to underscore the need for EPA to maintain as much flexibility as possible in developing a rule with such far-reaching applicability.

C. There Should Be No Limit On The Number of Reusable Wipes Sent To A Laundering Or Dry Cleaning Facility.

EPA seeks comment on whether there should be a limit on the maximum amount of solvent or the concentration of solvent on reusable wipes sent to a downstream handler and/or whether there should be a numerical limit on the number of reusable wipes that laundries or dry cleaners could accept on an annual basis for cleaning. *Id.* at 65605. While USWAG is not opposed to the proposed management conditions applicable to the transport of reusable wipes to a launderer – including the “no free liquids” condition – EPA has offered no rationale for establishing a specific limit on either the maximum amount of reusable wipes or the concentration of solvents on reusable wipes that can be sent off-site for laundering or dry cleaning. There is no justification for setting an arbitrary limit on this important option.

D. Intra-Company Transfers Of Contaminated Wipes Containing Free Liquids Should Be Allowed To Facilitate The Cost-Effective Consolidation Of Wipes For Disposal And/Or Laundering.

USWAG is especially interested in preserving cost-effective and practical options for electric utilities – many of which have geographically dispersed transmission and distribution systems – to consolidate wipes for centralized management. Therefore, USWAG is extremely supportive of EPA’s proposal to allow for the *intra*-company transfer of contaminated wipes, even when the wipes contain free liquids. *Id.* at 65600-

01. Under this proposal, generators would be able to transfer contaminated wipes containing free liquids between their own facilities *conditioned* on the receiving facility having a solvent extraction and/or recovery process that would remove sufficient solvent to ensure that the wipe meets either the dry condition (if going to a landfill and assuming this condition is retained in the final rule, which USWAG opposes) or the no free liquids condition (if going to a non-landfill destination). *Id.* at 65601.

While USWAG supports this option, we are opposed to the proposed requirement that the intra-company “receiving facility” have a solvent extraction and/or recovery process in order to receive contaminated wipes from other intra-company sources. *Id.* Such processes may be completely unnecessary and therefore there is no reason to retain this condition in the intra-company consolidation option. For example, any entity transporting the consolidated wipes to a downstream commercial handling facility will have to meet the no free liquids standard. Because there is no prescribed method by which this standard can be met, and indeed it may be met through “process knowledge,” there may be no need for the “receiving” facility to have a solvent extraction and/or recovery process in place. Thus, *requiring* an intra-company receiving facility to have such processes – when in fact they may not be necessary for the consolidation facility to lawfully manage the wipes under the proposed exclusion – is unduly restrictive and would unnecessarily frustrate the ability of entities to engage in the intra-company consolidation of contaminated wipes. This requirement should be dropped from the final rule.

As noted above, the ability to consolidate contaminated wipes from intra-company locations is essential to a cost-effective and practical contaminated wipes management program. For this reason, USWAG is opposed to EPA’s suggestion that

there be geographic limits on the intra-company consolidation option (*id.* at 65601), especially in the context of electric utilities, where inter-related transmission and distribution systems can span hundreds of miles. Further, because of the inter-related nature of utility operations, USWAG supports EPA's suggestion that the intra-company transfer option include affiliates, subsidiaries, and parent companies. *Id.* Again, this is especially relevant and necessary in the utility industry, where it is common for inter-related divisions of a single company to operate collectively in the generation, transmission, and distribution of power to the public. In fact, recognizing the unique nature of electric utility operating practices, EPA has taken a similar approach in the context of the federal PCB regulatory program, where EPA had defined the term "related company" to include, among other things, "a parent company and its subsidiaries: sibling companies owned by the same parent company; companies owned by a common holding company; members of electric cooperatives; . . . and a company having a joint ownership interest in a facility from which PCB waste is generated (such as a jointly owned electric power generating station) where the PCB waste is stored by one of the co-owners of the facility." See 40 C.F.R. § 761.3. USWAG suggests that EPA consider adopting portions of the definition of "related company" from the federal PCB regulations for incorporation into the relevant provisions of the conditional exclusion for contaminated wipes.

USWAG also urges EPA to keep the qualifying conditions for intra-company consolidation activities to a minimum. Because intra-company consolidation practices would involve a high degree of controls and incentives to prevent spills, there is no need to establish requirements concerning notifications to regulatory authorities, or requiring the retention of business records designating where and how such transfers occurred.

Such conditions add little, if any, incentive for companies to appropriately handle solvent-contaminated wipes, but rather would only encumber a program that is intended to be simple, practical, and streamlined in nature.

E. Management Conditions For Handlers.

While USWAG generally believes that the proposed management options for “handlers” of contaminated wipes – e.g., facilities receiving the wipes for laundering or disposal – are reasonable (see *id.* at 65601-02), we oppose requiring a handler to submit a notification to the authorized state or EPA Region whenever it receives wipes that do not meet the “no free liquids” condition. *Id.* at 65602. EPA acknowledges that liquids may percolate from wipes during transport, and it has proposed to address these circumstances by requiring the handler to either return the container with the free solvents to the generator or recover any liquid solvent and properly manage it in accordance with applicable federal or state hazardous waste requirements. *Id.* at 65602. As EPA recognizes, solvents can percolate from the wipes during transportation without any fault of the generator. Thus, there is little to be gained by notifying regulators when these cases arise, other than inappropriately suggesting some degree of culpability on the part of the generator. Such a notice provision would result only in the unnecessary waste of resources in potentially investigating and responding to the natural phenomenon of percolation.

F. Combustion Options For Contaminated Wipes.

USWAG fully supports the management option of burning industrial wipes – including for use as a fuel – in qualified non-hazardous waste combustion units. *Id.* at 65602. EPA’s risk analysis demonstrates that such combustion practices would be protective of human health and the environment when conducted in accordance with

applicable permit conditions. *Id.* From a practical perspective, this management option will provide an environmentally beneficial recycling alternative to disposal and will allow generators – including electric utilities – to use contaminated wipes as supplemental fuels in lieu of virgin fuels.

USWAG also agrees with EPA’s position that the hazardous waste mixture and derived-from rules would *not* apply to the ash derived from such combustion operations, because wipes meeting the conditions of the proposed exclusion would not be hazardous wastes, including when combusted. *Id.* at 65603. Therefore, the combustion ash would be considered “newly generated” and would be regulated as hazardous only if it independently exhibited a hazardous waste characteristic (and if the combustion ash did not otherwise qualify for an exclusion from hazardous waste regulation under the so-call Bevill Amendment exclusion (see 40 C.F.R. § 261.4(b)(4)). *Id.*

G. EPA Should Not Impose Additional Record Keeping Requirements On Generators Of Contaminated Wipes.

USWAG supports EPA’s decision *not* to establish any specific record keeping requirements under either one of the proposed exclusions, especially with regard to generators of contaminated wipes. *Id.* at 65607. EPA correctly reasons that such additional regulation is unnecessary because persons claiming an exemption from hazardous waste regulation already are required, when requested by EPA, to provide appropriate documentation demonstrating compliance with the exemption. *Id.*, citing 40 C.F.R. § 261.2(f).

Nonetheless, EPA seeks comment on whether it should impose new and additional record keeping requirements on generators of wipes, including information on the number or volume of wipes generated, where the wipes were sent and how many

shipments were sent off-site. *Id.* In addition, EPA requests comment on whether generators should be required to certify that their wipes meet the “no free liquids” or “dry” conditions (assuming the latter survives in the final rule) and whether their employees are adequately trained to manage contaminated wipes. *Id.* USWAG sees absolutely no need for these additional requirements for the very reason EPA itself has already articulated – entities availing themselves of the exclusion already are under a regulatory obligation to demonstrate, when requested by regulators, that they meet the applicable conditions of the exclusion. Therefore, any additional requirements would be redundant and only serve to impose needless paperwork obligations on the regulated community at a time when EPA is attempting to reduce unnecessary record keeping and reporting requirements generally. Absent an explicit and compelling need for such record keeping requirements – which EPA has not offered – the final rule should not include additional paperwork burdens on the regulated community.

H. Reusable Wipes Should Be Excluded From The Definition Of Solid Waste.

In contrast to disposal wipes – which would be excluded from the definition of “hazardous waste” – the proposal would exclude reusable solvent-contaminated wipes from the regulatory definition of *solid waste*. *Id.* at 65603. As EPA explains, this is both appropriate and sensible because reusable wipes are more commodity-like than waste-like and, therefore, should not be viewed as a waste material (provided, of course, that the wipes are managed in accordance with the proposed management conditions). *Id.*

USWAG agrees with this rationale because it is fully consistent with the controlling case law construing RCRA’s definition of “solid waste.” As EPA is well aware, that United States Court of Appeals for the District of Columbia Circuit has made abundantly clear – on several occasions – that 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,” and that 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. *American Mining Congress v. EPA*, 824 F.2d 1177, 1190 (D.C. Cir. 1987) (emphasis added). This fundamental holding was reiterated in *Ass’n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1051-52 (D.C. Cir. 2000), where the court once again admonished EPA that RCRA’s definition of “solid waste” is predicated on a material being “discarded,” and materials “destined for recycling are obviously not of that sort.” As EPA is aware, the court recently made clear that this fundamental limitation on RCRA’s jurisdiction applies in the context of recycling between industries just as much as it does to recycling within a single industry. See *Safe Food and Fertilizer, et al. v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003).

There is no element of discard in the case of sending reusable wipes to laundering or dry cleaning facilities. The wipes are collected, handled, and re-used as valuable commodities and thus are not being discarded, thrown away, or abandoned. Thus, per the clear directives of the above D.C. Circuit decisions, reusable wipes do not fall within the definition of solid waste. Moreover, as certain stakeholders have observed, under the narrower option – an exclusion from the definition of hazardous waste – reusable wipes would remain subject to state solid waste laws and could become subject to state solid waste fees. *Id.* at 65608. This would place an inappropriate burden on legitimate reuse options for reusable contaminated wipes.

III. EPA's Enforcement Mechanism Is Fundamentally Unfair

EPA makes clear that a party operating under either one of the proposed exclusions would be responsible for maintaining the exclusion by ensuring that all of the conditions are met. *Id.* at 65607. In the event that a particular condition is not met, “the party managing the wipes at that time will need to remedy the situation as soon as possible in order not to jeopardize the exclusion.” *Id.* if this is not done – *e.g.*, the wipes are transported with “free liquids” and the handling facility does not promptly send them back to the generator – the wipes would be considered hazardous waste from the point of generation (*i.e.*, from the point when the generator had finished using them).

USWAG believes that 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 solvent-contaminated industrial wipes complies in good faith with all the applicable conditions of the exclusion and uses all appropriate due diligence in selecting a qualified handler or laundry facility, but the wipes are subsequently mishandled by the downstream facility (*e.g.*, the facility adds additional solvents to the wipes), the handler or laundry 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 handler, 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).

USWAG also is concerned about EPA's assertion that a RCRA-authorized State or EPA could choose to bring an enforcement action "for all violations of the hazardous waste requirements occurring from the time the industrial wipes are generated through the time they are finally disposed of, reclaimed, or reused." *Id.* at 65607. 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.

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USWAG appreciates the opportunity to submit comments on this important rulemaking initiative and urges EPA to move forward as soon as possible with promulgation of the final rule.