**ORAL ARGUMENT NOT YET SCHEDULED**

**Case No. 11-1189 (and consolidated cases)**

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**SOLVAY USA INC., et al.**
**Petitioners**

v.

**ENVIRONMENTAL PROTECTION AGENCY, et al.**
**Respondent**

Petition for Review of 78 Fed. Reg. 9112 (Feb. 7, 2013)
and 76 Fed. Reg. 15456 (March 21, 2011)

# FINAL JOINT REPLY BRIEF OF INDUSTRY PETITIONERS

**AMERICAN CHEMISTRY COUNCIL, AMERICAN FOREST & PAPER ASSOCIATION, AMERICAN GAS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN WOOD COUNCIL, ASSOCIATION OF AMERICAN RAILROADS, BIOMASS POWER ASSOCIATION,**
**CEMENT KILN RECYCLING COALITION, CEMEX, INC., CEMEX CONSTRUCTION MATERIALS FLORIDA, LLC, COUNCIL OF INDUSTRIAL BOILER OWNERS, EDISON ELECTRIC INSTITUTE, HATFIELD TOWNSHIP MUNICIPAL AUTHORITY, HOLCIM (US) INC., LAFARGE NORTH AMERICA INC., LAFARGE MIDWEST, INC., LAFARGE BUILDING MATERIALS INC.,**
**NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, PORTLAND CEMENT ASSOCIATION, RAILWAY TIE ASSOCIATION, SOLVAY USA INC., TREATED WOOD COUNCIL, UTILITY SOLID WASTE ACTIVITIES GROUP**

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* Authorities upon which we chiefly rely are marked with asterisks.

**Regulations**

## GLOSSARY

"EPA" refers to the United States Environmental Protection Agency.

"RCRA" refers to Resource Conservation and Recovery Act, 42 U.S.C. §§6901, *et seq.*

## SUMMARY OF ARGUMENT

EPA concedes that its jurisdiction under the Resource Conservation and Recovery Act, 42 U.S.C. §§6901, *et seq*. ("RCRA") is limited to "discarded" materials that are "solid wastes," yet insists, contrary to law and arbitrarily and capriciously, on attempting to extend that jurisdiction to non-hazardous secondary materials that have not been discarded and thus are not solid wastes. Specifically, EPA wrongfully asserts RCRA jurisdiction over non-hazardous secondary materials transferred to third parties for combustion as alternative fuels based solely on the fact of the transfer itself. EPA claims it will relinquish its RCRA jurisdiction over such materials only when it affirmatively finds that a discard has not occurred, even though it made no determination of a discard in the first instance. EPA also wrongly classified sewage sludge as solid waste when combusted even though RCRA prohibits such a classification.

## ARGUMENT

### I. EPA's Claim That Firm-To-Firm Transfers Of Alternative Fuels Are "Discards" Of "Solid Waste" Is Contrary To Law And Arbitrary And Capricious.

EPA's effort to impose RCRA jurisdiction over all non-hazardous materials transferred to third parties for combustion as fuels rests on two mutually exclusive propositions. First, EPA acknowledges that its RCRA jurisdiction is limited to "discarded" materials that are "solid wastes" (EPABr.1), such that a "discard" is a

"prerequisite" to a material's being regulated under RCRA (EPABr.7), and materials "are not subject to regulation under RCRA" unless they are discarded (EPABr.30). Second, EPA contends that all "materials transferred to another entity should *presumptively* be characterized as solid wastes *unless* the Agency makes an *affirmative determination* that the material should be characterized as a product fuel," (EPABr.27 (emphasis supplied)), and that "as-generated non-hazardous secondary materials that are used as a fuel in facilities not under control of the generator are solid wastes *unless EPA has determined* that the material should instead be regulated as a product fuel." EPABr.55 (emphasis supplied).[1] The first proposition is indisputably correct: RCRA is a statute of limited jurisdiction, and EPA can regulate non-hazardous secondary materials under RCRA only when the jurisdictional line is crossed via a "discard." That makes untenable EPA's second proposition, which is an effort to impose RCRA jurisdiction over an entire class of useful secondary materials that are not discarded *before* they cross the RCRA jurisdictional line, based solely on firm-to-firm transfers.[2]

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[1] Indeed, EPA makes the sweeping claim that all secondary materials destined for combustion of any kind are subject to its RCRA jurisdiction. EPABr.35.

[2] Environmental Intervenors mischaracterize Industry Petitioners' argument as stating that EPA cannot determine that "any" secondary material transferred to a third party is a "waste" and that Industry Petitioners seek a "per se bar" that transferred materials can ever be regulated under RCRA. Env.IntervenorBr.5, 7-8. To the contrary, Industry Petitioners believe that transferred materials may be

EPA claims that it has been misunderstood, that it has not determined that transfers to third parties are *per se* "discards," and that the transfer of a material is only one factor taken into account by EPA in making solid waste determinations. EPABr.59. This assertion is belied by EPA's own statement that third party transfers, without more, are presumptively discards, and thus subject to RCRA jurisdiction unless and until a determination to the contrary is made. EPABr.27, 55, 59. EPA concedes that the only thing that differentiates secondary materials combusted by the generator (not presumptively discarded) and secondary materials that are combusted by a third party (presumptively discarded) is the fact of the firm-to-firm transfer. EPABr.26-27, 35 n.6, 54-55. EPA admits that this approach may result in the RCRA regulation of materials that are not wastes, but attempts to cure this jurisdictional defect by promising that it may someday in the future make case-by-case determinations that certain materials were, in fact, never wastes at all. JA86, JA149. However, such speculation about possible future action cannot cure EPA's arbitrary and capricious attempt to throw a presumptive RCRA jurisdictional blanket over all third-party transfers of secondary materials destined for combustion as fuel regardless of whether a discard has occurred.

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wastes, but only if they have first been "discarded." The occurrence of a transfer, by itself, is not a "discard." Hence, Environmental Intervenors' argument that the RCRA status of discarded material does not change by virtue of its being transferred (Env.IntervenorBr.6-7) is irrelevant here, since what is at issue is EPA's claim that it is the transfer itself that constitutes a discard.

*American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987) ("*AMC I*") and its progeny do not support EPA's expansive view of its RCRA jurisdiction. *AMC I* expressly held that EPA's RCRA jurisdiction is "*limited* to those materials that constitute 'solid waste.'" 824 F.2d at 1179 (emphasis supplied). *AMC I* did not authorize EPA to create a "RCRA holding pen" in which all secondary materials transferred to third parties would be kept, only to be let out at EPA's discretion upon a "non-waste" determination. Further, EPA wrongly implies that outside of specific cases where this Court has concluded as a matter of law that EPA does not have RCRA jurisdiction, EPA has essentially unfettered discretion in making RCRA jurisdictional judgments. EPABr.58-59. EPA over-states its authority. This Court has explicitly concluded, consistent with the everyday meaning of "discard," that "firm-to-firm transfers are hardly good indicia of a 'discard' as the term is ordinarily understood." *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1268 (D.C. Cir. 2003). Disregarding this explicit direction, EPA nonetheless asserts that it can exercise RCRA jurisdiction over secondary materials on a generic basis solely because of firm-to-firm transfers.

Taking this even further, EPA imposes the "responsibility on the generator or burner to demonstrate that a particular material is not discarded when combusted." EPABr. 59.[3] EPA has thus transformed RCRA from a statute of

[3] *See* JA76 ("[a]ny petition that is submitted to EPA requesting a non-waste

limited jurisdiction into one of virtually unlimited jurisdiction where the regulated community must demonstrate that EPA does not have RCRA jurisdiction.[4] EPA's reliance on *American Chemistry Council v. EPA*, 337 F.3d 1060 (D.C. Cir. 2003) is misplaced. EPABr.58-59. In that case, this Court accepted EPA's position that entities already regulated by RCRA should have the burden to demonstrate that their already-regulated hazardous wastes were no longer subject to RCRA. *Id*. at 1063. Thus, *American Chemistry Council* was about how hazardous wastes *already* subject to RCRA could *exit* RCRA, where the issue in this case is the

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determination *must demonstrate* that the nonhazardous secondary material *has not been discarded in the first instance*" (emphasis supplied)).

[4] Environmental Intervenors suggest that what EPA is doing here is no different than what is in 40 C.F.R. § 261.2(f), which provides that, in an EPA enforcement action alleging violations of the hazardous waste regulations, a defendant claiming that its material is not a solid or hazardous waste must provide appropriate documentation to support that defense. Env.IntervenorBr.9, n.6. This provision is irrelevant for at least two reasons. First, it is from the hazardous waste regulations, which are not at issue in this case. Second, it is addressing the relative burdens of production and proof in the context of case-by-case enforcement actions. In administrative enforcement cases, EPA has the burden to make out a *prima facie* case that a violation occurred. 40 C.F.R § 22.24(a). In RCRA hazardous waste enforcement cases, EPA has the initial burden of demonstrating that a particular material is "solid waste," and it is only after EPA has met that burden that, pursuant to § 261.2(f), the defendant must present evidence that the material is exempt or excluded from regulation. *See*, *e.g.*, *In Re Augakem Caribe, Inc.*, Docket No. RCRA-02-2009-7110, 2011 EPA ALJ Lexis 24, at **41-44 (Dec. 22, 2011). Therefore, § 261.2(f) presumes that EPA has already met its *prima facie* case that the material at issue has been discarded and is a solid waste. Accordingly, § 261.2(f) provides no support to EPA's effort in this Rule to exercise RCRA jurisdiction over materials that have not been discarded.

threshold for when otherwise unregulated materials first become subject to RCRA.[5]

The statute and the decisions of this Court are clear that RCRA jurisdiction does not attach to a material *until* it is discarded. EPA may not exercise "anticipatory RCRA jurisdiction" based on the *potential* that an otherwise unregulated material *might* be discarded. *See*, *e.g.*, *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011) (EPA cannot require operators of concentrated animal feeding operations that propose to have water discharges to apply for a Clean Water Act discharge permit unless they will have actual discharges, since EPA's Clean Water Act jurisdiction does not extend to potential discharges); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005) (EPA cannot require concentrated animal feeding operations to apply for Clean Water Act permits in order to demonstrate that they do not have water discharges because Clean Water Act jurisdiction extends only to actual, not potential,

[5] Similarly, Environmental Petitioners' reliance on *American Petroleum Inst. v. EPA*, 216 F.3d 50 (D.C. Cir. 2000) is misplaced. Env.IntervenorBr.9-10. In that case, this Court affirmed a decision by EPA that a particular material in a specific situation could not be excluded from the definition of solid waste if it also contained discarded contaminants (i.e. wastes) that were added to the material. 216 F.3d at 58. In that specific situation, where unexpected chemicals were discovered to be present in the material, the facility had the opportunity to demonstrate that they were not discarded and not the result of adulteration. Therefore, that case does not support EPA's effort in this Rule, on a generic basis, to impose RCRA jurisdiction over all non-hazardous secondary materials transferred to other firms for use as alternative fuels, without any determination that a discard has occurred.

discharges). But that is exactly what EPA has done here. EPA's starting point is a sweeping categorical and generic judgment that non-hazardous secondary materials are subject to RCRA simply because they are transferred to a third party, without any specific findings of discard. Having claimed RCRA jurisdiction over all transferred alternative fuels, EPA then offers the companies the opportunity to escape RCRA jurisdiction, including petitioning EPA for case-by-case "non-waste" determinations. This structure turns RCRA on its head, changing it from a statute that regulates materials only *after* they have been discarded into one that EPA wants to use to regulate any material until someone demonstrates that it is *not* discarded.

Simply put, RCRA gives EPA jurisdiction over materials that are discarded. RCRA does not grant EPA the authority to regulate a fuel product until a "non-waste" determination has been made; it does not grant EPA authority to place conditions on the use of products to prevent discard; and it does not grant EPA authority over non-hazardous secondary materials solely on the grounds that they *might*, at some point of time in the future, become discarded.

EPA attempts to shield its arbitrary conclusions by claiming that determining the RCRA status of "particular" secondary materials is a "complex" process involving a "broad range" of factors and thus this Court should show particular deference to EPA's technical expertise in such matters. EPABr.23-

24,32-34, 53-54, 59. However, EPA has not made a complex technical multi-factor determination at all, nor has it made a specific determination about a particular secondary material. Rather, EPA has made a sweeping generic judgment about all non-hazardous secondary materials based on a single, easily understood and familiar commercial and non-technical factor: firm-to-firm transfers.

Far from conducting a case-by-case evaluation of complex technical factors, EPA speculates that third parties "may" not have the same "incentives" to properly manage non-hazardous secondary materials as the generators of such materials. EPABr.54-55. EPA attempts to find support for this speculation by relying on the record from a different (and as yet not completed) rulemaking involving the recycling of hazardous materials, and a handful of incidents in the record for that rule involving fires at wood recycling facilities and tire piles. *Id.*; S*ee* IndustryPet.Br.19-20.[6] However, EPA does not identify any evidence in the

[6] Environmental Intervenors try to make an argument out of a single statement in the record that there was a fire at a facility that burns wood. Env.IntervenorBr.13-14. The full context of that statement was that there was no evidence in the record regarding the cause of the fire, JA532, and thus nothing that suggests any relationship with the issue of firm-to-firm transfers. EPA can hardly construct the edifice of this nationwide Rule on this event. Indeed, if EPA's six-page review of accidental fires at three tire piles; a fire at a debris pile that was not burning for energy recovery; and quickly contained fires at three facilities that recycle wood pallets provided a legally sufficient record for determining that nonhazardous secondary materials are wastes, EPA could determine that all materials that have ever been burned in an accidental fire are wastes, including commercial products,

record about the subject matter of the dispute: firm-to-firm transfers of *non-hazardous* secondary materials for use as alternative fuels, much less a quantum of evidence upon which it is reasonable for EPA to rely. This record does not support EPA's assertion that a company that pays for non-hazardous secondary materials has any less incentive to manage them appropriately than the company that sold them (or that decides to combust the non-hazardous secondary materials onsite). Indeed, EPA's unsupported speculation about the incentives of buyers is effectively an attack on one of the foundations of the nation's economy: firm-to-firm transfers are what profitable businesses do.

EPA also incorrectly asserts that Industry Petitioners' have not identified any alternative fuels that may be transferred to third parties that EPA has mischaracterized as solid waste, EPABr.57, wrongfully claiming that the record did not provide any rationale for why alternative fuels combusted in sulfuric acid recovery units are not solid waste when combusted. EPABr.57 n.11. However, to the contrary, the record demonstrates that:

- Sulfuric acid regeneration units have traditionally combusted a variety of sulfur bearing materials and fuels as part of the sulfuric acid regeneration process;

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entire factories, and even houses. Of course, such a determination would not be legally valid, whether applied to commercial products or non-hazardous secondary materials such as wood pallets.

- Since the sulfur value and heat value of material combusted in sulfuric acid regeneration units may vary significantly even within the same stream, determining whether the primary purpose of the material is as a fuel or ingredient is sometimes impossible;
- All fuels combusted in sulfuric acid regeneration units are delivered in bulk and transferred directly to the units, not to storage;
- Some of the materials combusted in these units are not solid or hazardous wastes under the hazardous waste regulations at 40 C.F.R. Parts 260 and 261, but are "non-hazardous secondary material" under 40 C.F.R. § 241.2; and
- The materials combusted in sulfuric acid regeneration units were not described as "waste" by the EPA in the Federal Register preamble to the proposed Rule at 75 Fed. Reg. 31, 850.

JA404 – 408.4. These comments, submitted by Solvay USA Inc., also explain that the EPA had as recently as 2004 found that all materials combusted in Solvay's sulfuric acid regeneration units, including "alternative non-hazardous fuels," were necessary for the regeneration process. *Id*. The record, therefore, contains sufficient information to demonstrate that materials combusted in sulfuric acid

regeneration units, including alternative fuels, are managed as valuable products, and that treating all alternative fuels as "waste" is therefore inappropriate.[7]

Therefore, EPA is not only wrong on the law, it has also failed to provide support in the record for its effort to extend RCRA jurisdiction over firm-to-firm transfers of non-hazardous secondary materials.

## II. EPA Is Prohibited From Regulating Sewage Sludge As A Solid Waste.

EPA and Environmental Intervenors wrongly contend that sludge from the treatment of domestic sewage is solid waste when combusted. Their interpretation points to the definition of "sludge" in Section 1004(26A) of RCRA but does not give full effect to the domestic sewage exclusion contained within the definition of "solid waste" in Section 1004(27). As a result, both parties would have this Court incorrectly interpret the definition of sludge in a way that trumps the broader domestic sewage exclusion contained in the definition of solid waste.

The only reading of both definitions that gives proper meaning to each term is one in which sludge generated from a waste treatment plant is solid waste unless that sludge includes "solid or dissolved material in domestic sewage." *Compare* 42 U.S.C. § 6903(26A) with § 6903(27). In other words, while certain

[7] EPA also incorrectly suggests that all off-specification used oil is solid waste, even when burned for energy recovery. EPABr.17. To the contrary, off-specification oil may, depending on the circumstances, be managed and regulated as an alternative fuel and not a solid waste. *See*, *e.g.*, JA233 (off-specification oil may be combusted in a unit designed to burn coal or oil if the contaminants in the oil are comparable to those in the coal).

sludges are a type of solid waste, not all sludge must be solid waste; and indeed, sewage sludge is prohibited from being considered solid waste under the domestic sewage exclusion of Section 1004(27). In this way, both Section 1004(27) and 1004(26A) can be read in "context and with a view to their place in the overall statutory scheme." *Roberts v. Sea-Land Servs. Inc.*, 132 S. Ct. 1350, 1357 (2012) (citation/quotations omitted). Accordingly, since sewage sludge generated by publicly-owned treatment works is composed of and derived from solid or dissolved material in domestic sewage, RCRA's definition of solid waste excludes that material from being solid waste for purposes of regulation under RCRA. Therefore, EPA is statutorily precluded from classifying sewage sludge generated from publicly-owned treatment works as a solid waste when combusted.

EPA's reliance on *National Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115 (D.C. Cir. 2013), is similarly misplaced. While EPA correctly points to this Court's prior decision in *NACWA* as having importance for this issue, EPABr.61-62, it does so without acknowledging or addressing the fact that this Court embraced EPA's view – for purposes of sewage sludge incinerators – that domestic sewage is the "but-for source of sewage sludge." 734 F.3d at 1127. In other words, this Court has already recognized that sewage sludge is just the treated form of domestic sewage, not a new and distinct product as EPA and Environmental Intervenors erroneously suggest. Without attempting to resolve

EPA's position in that case with its contradictory position in this case, EPA instead suggests that the *NACWA* decision is an implicit endorsement of sewage sludge being solid waste for purposes of RCRA. That suggestion is entirely incorrect. This Court's *NACWA* decision did not address whether sewage sludge was solid waste under RCRA. Rather, the *NACWA* decision addressed EPA's sewage sludge incinerator rule under the Clean Air Act, which – in turn – relies on the RCRA Rule at issue in this appeal. As such, it is the decision in this case which will confirm that RCRA prohibits EPA from regulating sewage sludge when combusted as a solid waste.

Finally, EPA attempts to justify its failure to comply with the agency's non-discretionary duty under RCRA Section 6905(b)(1) to "avoid duplication, to the maximum extent practicable," with other environmental statutes such as the Clean Water Act and the Clean Air Act by stating for the first time that integration with those acts is not possible. *See* EPABr.63-64. To the contrary, integration with those statutes is possible and has been the case for decades. It continues to be possible so long as EPA: (1) correctly interprets RCRA, as required by the plain language of the statute, to recognize that the domestic sewage exclusion prohibits the regulation of sewage sludge as solid waste; and (2) continues to primarily regulate the disposal of sewage sludge under Section 405 of the Clean Water Act. If not, municipalities will be faced with duplicative, and in some cases

contradictory, regulatory schemes under the Clean Water Act, Clean Air Act, and RCRA. This untenable state of affairs is all because EPA chose to regulate sewage sludge incinerators under Section 129 of the Clean Air Act, rather than under the more appropriate Section 112 of the Act. In order to do so, EPA was required to depart from long-standing EPA interpretation of Section 1004(27) of RCRA and claim for the first time in this Rule that sewage sludge was a solid waste when combusted. In doing so, EPA has actively sought to duplicate the existing Clean Water Act regulatory scheme for sewage sludge disposal in contravention of Section 6905(b)(1). Accordingly, the Rule as applied to sewage sludge should be vacated because it contravenes Congress' unambiguous intent of Section 1004(27) of RCRA and cannot be harmonized with Section 405 of the Clean Water Act.

## CONCLUSION

For the foregoing reasons, this Court should grant the Industry petitions for review and (i) remand the Rule to EPA with the direction that EPA may only exercise RCRA jurisdiction over transfers of *discarded* non-hazardous secondary materials that are combusted as alternative fuels, and (ii) vacate EPA's classification as solid waste sewage sludge when it is combusted.

November 12, 2014

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 3,505 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 pt. Times New Roman font.

/s/Christopher L. Bell
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I hereby certify that on November 12, 2014, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

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