ORAL ARGUMENT NOT YET SCHEDULED

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

No. 11-1189 (and consolidated cases)

SOLVAY USA INC.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of Final Administrative Actions of the
United States Environmental Protection Agency

FINAL REPLY BRIEF FOR ENVIRONMENTAL PETITIONERS

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

AMC	American Mining Congress
API	American Petroleum Institute
CAA	Clean Air Act
EPA	Respondents U.S. Environmental Protection Agency and Gina McCarthy, Administrator
NRDC	Natural Resources Defense Council
RCRA	Resource Conservation and Recovery Act

SUMMARY OF ARGUMENT

EPA's brief confirms that by denying scrap tires, used oil, demolition wood waste, and unrecyclable remnants of cardboard that are thrown away by their original owner are discarded, EPA contravenes the Resource Conservation and Recovery Act ("RCRA"). Further, it dismantles the comprehensive framework Congress established by linking RCRA and the Clean Air Act ("CAA") to ensure that industrial burning of any solid waste material for any purpose will proceed under protective emission standards. EPA's attempts to find support for allowing admittedly discarded materials to be processed and then burned without meeting protective standards also fall flat in light of RCRA and the CAA. The brief also often does not defend the inconsistencies and non sequiturs that riddled the rules at issue, and when it does, it fails to resolve them. It thus confirms the rules are arbitrary. Finally, EPA's lawyers' *post-hoc* rationalizations are not cognizable and lack merit.

ARGUMENT

EPA's brief confirms that the flaws in the rules at issue stem from a persistent misinterpretation of RCRA and the CAA. Whereas EPA argued inconsistently that it was issuing a comprehensive definition of solid waste but also issuing a definition limited to determining CAA §129's applicability, Br. 43-44

(citing, *e.g.*, 76 Fed. Reg. 15,456, 15,515/2, 15,529/3, 15,536/2 (Mar. 21, 2011), JA0131, 0145, 0152),[1] EPA's lawyers now say that the rules only address the status of materials "when combusted for energy recovery or used as ingredients." EPA Br. 5; *accord id.* 7, 10-12, 14-15, 17, 32, 34-35 & nn.5-6, 54, 59-60, 64. Indeed, they go even further and say (at 10 (emphasis added)) that, in the rules, "EPA promulgated criteria for distinguishing secondary materials for which combustion constitutes discard, even if there is energy recovery." EPA's lawyers cannot wish away the inconsistency of EPA's rule rationale. *See, e.g.*, *NRDC v. EPA*, 755 F.3d 1010, 1020-21 (D.C. Cir. 2014) (*post-hoc* rationales are impermissible).

In any event, Congress linked RCRA and the CAA and thus hinged CAA §129's application on whether a material has been discarded in any way, not just by burning. *See* Br. 3-4, 26, 39-42. The narrow view espoused by EPA's lawyers (and sometimes acknowledged by EPA) led EPA to ignore various materials' initial discard, which is the relevant consideration under RCRA and the CAA.

[1] We refer herein to our opening brief as "Br."; EPA's brief as "EPA Br."; and Industry Intervenors' as "Int.Br."

I. EPA'S RULE IS INCONSISTENT WITH RCRA AND THE CLEAN AIR ACT.

A. EPA's Rule Is Inconsistent with RCRA.

1. EPA Unlawfully Deems Discarded Materials Not Discarded.

EPA's brief confirms that, to claim scrap tires, used oil, construction and demolition wood waste ("demolition wood waste"), and unrecyclable paper and cardboard are not "discarded," EPA interpreted the term "discarded" to exclude the original owner's discard. Because it is already established that "discarded" unambiguously has its ordinary meaning of "disposed of, abandoned, or thrown away," that interpretation must be rejected, *Am. Mining Congress* ("*AMC*") *v. EPA*, 824 F.2d 1177, 1184, 1193 (D.C. Cir. 1987) ("*AMC I*"). *See* Br. 27-28, 30-31.

EPA's main defense for its rule is to mischaracterize the issue presented. The agency claims the issue is whether "all non-hazardous secondary materials that are combusted are solid waste." EPA Br. 29 (emphasis added); Int.Br. 9-10 (similar). Even a cursory review of Environmental Petitioners' brief shows that claim is untrue. At issue is whether EPA can: (1) deem specific materials—scrap tires, used oil, "clean" demolition wood waste, and old corrugated cardboard rejects—not discarded, even though they have been thrown away; and (2) deem undisputedly discarded materials to be non-wastes if they are processed before being burned. Br. 2, 6, 27-36.

EPA next argues that the term "discarded" is ambiguous, giving it virtually unfettered discretion to deem any material to be waste or non-waste. *See* EPA Br. 31-32. This Court has already rejected the argument that "in light of [*Am. Petroleum Inst.* ("*API*") *v. EPA*, 906 F.2d 729 (D.C. Cir. 1990) ("*API I*")] and *AMC [v. EPA*, 907 F.2d 1179 (D.C. Cir. 1990) ("*AMC II*")], 'discarded' is now ambiguous and thus we should defer to its interpretation." *Ass'n of Battery Recyclers v. EPA*, 208 F.3d 1047, 1056 (D.C. Cir. 2000) ("*ABR*"). "To accept EPA's contention would be to conclude that two later panels of this court overruled the decision in *AMC I* that 'discarded' was not ambiguous." *Id.* Underscoring this point, the *ABR* Court further found that "the *AMC I* court stressed, again and again, that it was interpreting 'discarded' to mean what it ordinarily means," and that "[l]ater cases in this court do not limit *AMC I*, as EPA supposes." *Id.* 1053-54.

Although *ABR* found the term "discarded" could be ambiguous "as applied to some situations," *id.* 1056, the situation here is not like those where the Court has found discarded to be ambiguous. At issue here are scrap tires, used oil, "clean" demolition wood waste, and cardboard rejects. They are not like the metal slag generated in one industry and shipped directly to another that was at issue in *API I*. 906 F.2d at 740; *see also Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1265-66 (D.C. Cir. 2003), *modified on reh'g in unrelated part* 365 F.3d 46 (D.C. Cir. 2004) (similar material). Nor are they like the metal-bearing wastewaters

stored for future reuse at smelting operations that were at issue in *AMC II*. 907 F.2d at 1185-86. Rather, they are (or are derived from) post-consumer wastes that have been used and then discarded by their original owners. Accordingly, they fall within the unambiguous ordinary meaning of discarded, and EPA's attempt to exclude them from this meaning must be rejected under *Chevron* step one or, if there is any ambiguity, step two. Br. 27-32, 36-49.

Finally, EPA wrongly claims (at 33-34) that *Safe Food*, 350 F.3d at 1269, authorizes it to find that these discarded materials are not discarded. That case could not overrule *AMC I* any more than *API I* or *AMC II* could. *ABR*, 208 F.3d at 1052, 1056.[2] In any event, *Safe Food* is not on-point. First, it does not address post-consumer materials like those here. Second, nothing in the record shows that these materials' original owners treat them like commodities. The original owners do not get paid for them. Indeed, in some cases, the facilities that burn them are paid to do so. Br. 7 (whole tires); EPA-HQ-RCRA-2008-0329-1393 at 3 (demolition wood waste), JA0496. Third, *Safe Food* addresses the recovery of material (fertilizer) rather than burning a material for energy, 350 F.3d at 1265, and RCRA consistently distinguishes between the recovery of "material" and "energy,"

[2] To the extent there is any conflict, the "earlier decision"—*AMC I*—binds. *United States v. Old Dominion Boat Club*, 630 F.3d 1039, 1045 (D.C. Cir. 2011).

making clear that burning a waste to recover energy does not make it any less a waste. Br. 34-36.[3]

2. EPA's Arguments Regarding Specific Wastes Are Without Merit, and Its Lawyers' *Post-Hoc* Arguments Are Impermissible and Without Merit.

a. Scrap Tires.

In the rulemaking, EPA relied on collection and other post-discard handling of tires to argue they aren't waste. 76 Fed. Reg. 15,491/3-92/2, JA0107-08; *see also* EPA Br. 50. Those arguments are without merit because a discarded material remains discarded regardless of post-discard handling. Br. 27-28, 30-32.

Apparently recognizing EPA's position is untenable, EPA's lawyers now claim (at 51) scrap tires aren't discarded because, when the original owners leave them at the tire store or at tire collection events, the original owners want to buy new tires, not dispose of their old ones. This *post-hoc* argument is not cognizable. *NRDC*, 755 F.3d at 1020-21. It is meritless anyhow. Car owners typically pay to dispose of their tires at tire stores. *E.g.*, EPA-HQ-RCRA-2008-0329-1140 (EPA, Scrap Tires: Frequent Questions) 5-6 ("fee is usually charged" to "[l]eave used tires with a reputable tire dealer" and dealers "may include the cost [of tire disposal fees] in the price of the tires purchased"), JA0389-90. When they throw them out

[3] Thus, EPA itself recognizes (at 31 n.3) *Safe Air For Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004), is inapposite because it does not address energy recovery.

at "collection events," they receive nothing in return. *See* 78 Fed. Reg. 9112, 9144/1 (Feb. 7, 2013), JA0227. Thus, whatever a tire-owner's (unknowable) state of mind, she discards her old tires within the ordinary sense by throwing them away or abandoning them at a tire store or collection event.

b. Used Oil and "Clean" Demolition Wood Waste.

In the record, EPA said used oil and "clean" demolition wood waste are materials "that have not been discarded and may not have been traditionally used as fuels (*i.e.*, a product that is created for its use as a fuel)." 76 Fed. Reg. 15,478/3 (emphasis added), JA0094. Jettisoning that argument, EPA's lawyers assert (at 47-48 (emphasis added)) that "the concept of discard is irrelevant" to used oil and "clean" demolition wood waste because they "are produced for the purpose of being used as fuel." That argument is an impermissible *post-hoc* rationale. *NRDC*, 755 F.3d at 1020-21. In any event, under RCRA, whether a material is "discarded" is not only relevant but dispositive of whether it is a solid waste. 42 U.S.C. §6903(27); *AMC I*, 824 F.2d at 1193; *ABR*, 208 F.3d at 1056.

Further, the lawyers' claim lacks record support. Clean, on-spec, or otherwise, used oil and demolition wood waste are not produced as fuel: they are produced when drivers change their oil and when people construct and demolish buildings. Br. 27-30. The lawyers neither deny that demolition wood waste has been discarded nor explain how it is "produced for the purpose of being used as

fuel." EPA Br. 49-50 (denying that it matters that such material was discarded). For used oil, they claim (at 49 n.7) people who get their oil changed do not concern themselves with "discarding the used oil," just "with purchasing new oil." This is meritless for reasons given above regarding scrap tires. *See supra* pp.6-7.

Similarly, EPA's claim (at 48-50) that its exemption for these materials is lawful because they are like non-wastes in some respects is unlawful. When a material is actually discarded, like these materials are, it is a waste under RCRA regardless of whether it is like or even identical to a non-waste. 42 U.S.C. §6903(27); *AMC I*, 824 F.2d at 1193. Indeed, EPA itself agrees (correctly) that "identical materials" must have different waste statuses if one has been discarded and the other has not. 76 Fed. Reg. 15,476/2-3, JA0092; *accord* Br. 15 fig.2.

To the extent EPA's lawyers suggest (at 47-49) that the discard status of used oil and "clean" demolition wood waste is irrelevant because they are processed, that is not the rationale EPA gave. *See NRDC*, 755 F.3d at 1020-21. Moreover, a waste cannot be converted into a non-waste just by processing it before burning it. *See infra* pp.11-15.

Contrary to Intervenors' claim (at 21), this Court's finding that used oil is discarded is not dicta. The *AMC I* Court relied on used oil's being discarded to reject EPA's argument that RCRA provisions—including on used oil—indicate that, under RCRA, "discarded" goes beyond its ordinary meaning, and thus EPA

could regulate as hazardous waste certain materials that are not discarded in the ordinary sense of the word. 824 F.2d at 1187 & n.14; EPA Br. 21, *AMC I*, 824 F.2d 1177, JA0856. Thus, though Intervenors "would have decided on another basis," the Court's conclusion about used oil was not dicta but a "stated and, on its view, necessary basis for deciding."[4] *Kalka v. Hawk*, 215 F.3d 90, 96 (D.C. Cir. 2000). Further, this Court has repeatedly relied on *AMC I*'s discussion of used oil to refute arguments that *AMC I* has been overruled by later cases, *ABR*, 208 F.3d at 1054-55, or prevents EPA from regulating discarded materials that have value, *see API I*, 906 F.2d at 741 n.16. For this reason as well, it is not dicta. *See Barhoumi v. Obama*, 609 F.3d 416, 422 (D.C. Cir. 2010).

Intervenors also irrelevantly argue (at 21-23) that EPA has general RCRA authority over used oil regardless of the oil's discard. Whatever EPA's authority to regulate undiscarded used oil, the issue in *AMC I* and here is whether certain materials have been discarded, and in construing EPA's authority over materials that might be "discarded," the Court has repeatedly acknowledged that used oil collected from service stations is discarded.

[4] An intervenor here, API apparently then wanted the *AMC I* Court to decide on precisely the basis that EPA could only regulate as hazardous discarded used oil, like used oil collected from service stations. API Reply Br. 17-18 & n.16, *AMC I*, 824 F.2d 1177, JA0859-60.

c. Cardboard Rejects.

EPA does not deny that cardboard rejects, which it called "OCC rejects," are "something derived from" discarded material and cannot be reused, and thus are solid waste. Br. 31 n.9; *see also id.* 12, 30-31 (discussing this material). Instead, its lawyers deny (at 52-53 n.9) EPA made any waste determination for them and claim the argument is therefore "prudentially unripe." But the agency itself said, "In the 2011…rule, EPA determined that paper recycling residuals, referred to as OCC rejects, are not discarded when used under the control of the generator, such as at pulp and paper mills." 78 Fed. Reg. 9173/1-2, JA0256; *see also* Br. 48-49 (citing same); 79 Fed. Reg. 21,006, 21,017/2-3 (Apr. 14, 2014) (similar), JA0811. The lawyers' contention is inconsistent with the record and the agency's own extra-record statements. Nor does EPA's choice to consider expanding its exemption of cardboard rejects and related materials render unripe the claim that EPA's existing exemption is unlawful because cardboard rejects derive from discarded materials. *See Clark County v. FAA*, 522 F.3d 437, 441 (D.C. Cir. 2008).

EPA's lawyers also claim *ABR*'s statement that "once material qualifies as 'solid waste,' something derived from it retains that designation even if it might be reclaimed and reused at some future time" is dicta. EPA Br. 44-45 (quoting 208 F.3d at 1056 (footnote omitted)). But in *ABR*, EPA contended this Circuit's post-1987 cases limited *AMC I*, and the Court made the quoted statement as part of

explaining why EPA was wrong. *ABR*, 208 F.3d at 1054-56. It is thus necessary to the decision and not dicta. *See Kalka*, 215 F.3d at 96; *see also* 76 Fed. Reg. 15,473/3 (EPA's relying on same statement from *ABR*), JA0089.

Although Intervenors do not contest that paper that goes to a recycling plant has been discarded, they rely (at 24) on the fact that they don't buy the discarded material to dispose of it. This argument is irrelevant because EPA disagrees with it. *E.g.*, 76 Fed. Reg. 15,471/3 (agreeing that waste remains waste even if it has value to someone), JA0087.[5]

3. A Waste Does Not Become a Non-Waste by Being Processed and Then Burned.

EPA's brief confirms that the agency contravenes RCRA by allowing materials that are undisputedly solid waste to become non-waste if they are processed before being burned. Br. 32-36. EPA contends (at 43-44, 45-46) that this Court's case law only addresses recycling processes, not the status of the resulting material. But discarded materials that are shredded, sorted, or otherwise processed before being burned remain discarded within the "ordinary, plain-English

[5] Intervenors parade as horribles (at 24) the notion that a newspaper would be waste "as soon as the person who bought it finished reading it" and that EPA would be required to regulate campfires under CAA §129, 42 U.S.C. §7429. To the contrary, only if paper is discarded by being thrown out (read or unread), is it waste, Br. 30-31, and nothing in the CAA's definition of "solid waste incineration unit" even hints at "campfire," 42 U.S.C. §7429(g)(1).

meaning" of the term. *AMC I*, 824 F.2d at 1184. Further, from *AMC I* to *ABR*, the cases affirm that once-discarded materials remain "discarded" even after they are processed and then sold as fuel. Br. 33-34 (citing cases).[6]

EPA contends that *API I* supports it by referring to processed used oil as a "valuable product." EPA Br. 44 (citing 906 F.2d at 741 n.16). That case says nothing about whether the processed oil is still a waste, and EPA acknowledges that "a material may not lose its waste status merely because it has value," 76 Fed. Reg. 15,507/2, JA0123.

EPA also claims (at 45) that *United States v. ILCO, Inc.*, 996 F.2d 1126, 1132 (11th Cir. 1993), rejected "the contention that regulation of the recycling process necessitates regulation of the recycled product." To the contrary, the *ILCO* Court was only rejecting a battery recycler's claim that because "it has never 'discarded' the" materials at issue, they were not discarded under RCRA. 996 F.2d at 1131-32. It was not offering any opinion on whether the products of a recycling process cease to be waste, let alone suggesting—as EPA would have it—that

[6] EPA's lawyers attack a straw man when they claim "Environmental Petitioners…inappropriately rely on language from *ABR* for the contention that a material derived from a solid waste remains a solid waste" and thus EPA's processing exemption is unlawful, EPA Br. 44-45 (citing Br. 28, 31 n.9 (citing *ABR*, 208 F.3d at 1056)). Environmental Petitioners never even cited that language as a basis for arguing the processing exemption is unlawful. Br. 32-36.

merely processing a waste before it is burned for energy converts that waste into a non-waste.

Nor would giving the term "discarded" its ordinary meaning preclude energy recovery from solid waste, *see* EPA Br. 42. Contrary to EPA's claim, Congress contemplated energy recovery from solid waste, but required it to occur under protective emission standards that apply to any waste-burning (with a few, specific exceptions), including for energy recovery. *See* Br. 4-6, 26-27, 36-42.[7]

Intervenors irrelevantly and wrongly say (at 3) that the rules at issue here only dictate "how [sources] will be regulated" and "health and the environment are protected" either way. But, as the table below shows for certain important pollutants, the waste-burners rule significantly reduces overall waste-burner

[7] Intervenors make (at 6, 17-18 & n.9) policy arguments that EPA's exemptions are beneficial and that EPA expects no new waste-burners to be built. But becoming a waste-burner does not require new construction—all it requires is that a unit start burning solid waste. Intervenors provide no evidence that facilities will be unable to comply with the waste-burner standards, and, indeed, even after this rule's promulgation, units have become waste-burners. *See* Renewable Operating Permit for St. Mary's Cement Plant, Charlevoix, Michigan 25, 49, 51 (Aug. 20, 2014), *available at* http://www.deq.state.mi.us/aps/downloads/rop/pub_ntce/B1559/B1559%20Final%208-20-14.pdf, JA0909, 0911, 0913; http://www.deq.state.mi.us/aps/downloads/permits/finpticon/Active%20PTIs%20by%20SRN.pdf at 5 (plant's request to burn waste was granted in August 2011), JA0921; *cf.* Brief for Environmental Respondent-Intervenors 15 & n.10 (explaining that Industry Petitioners' similar dire predictions lack a rational basis).

emissions, whereas the area source boilers rule leaves area source boiler emissions effectively unregulated.

Overall Percentage Reduction in Existing Source Emissions.

Pollutant	**Waste-Burners Rule**	**Area Source Rule**
Particulate matter	83%	2%
Carbon monoxide	43%	1%
Hydrogen chloride	79-80%	1%
Mercury	43%	0%

See EPA-HQ-OAR-2006-0790-2314 at 2-3 & app.B-1, JA0843-44, 0845-46; EPA-HQ-OAR-2003-0119-2660 tbls.1-2, JA0836-41.

Contrary to EPA's (at 40) and Intervenors' (at 11-12) arguments, 42 U.S.C. §6924(q) does not show that, for processed non-hazardous waste, EPA has discretion to undo the statutory scheme. *See NRDC,* 755 F.3d at 1019-21 (cited by EPA and Intervenors); *see also id.* 1021-22 (explaining how 42 U.S.C. §6924(q) addresses particular issue, separate from meaning of "discarded"). In that provision, Congress only addressed a specific problem: EPA had exempted hazardous waste from being solid waste in its regulations that apply solely to hazardous waste. *Id.* 1013-14; *see also infra* pp.19-20 (CAA §129 applies to processed wastes burned as fuel).

Further, though EPA tries (at 40, 46) to justify the processing exemption as just another form of material recovery, RCRA treats materials and energy as different recovered resources, with energy recovery subject to emission standards under CAA §129. Br. 34-36. EPA contends (at 41) that Congress's careful

separation of recovered materials from recovered energy is of no moment in part because "Materials" and "Energy" are "different." EPA's repeated agreement that materials and energy are "different" scarcely helps its position that Congress's careful distinction between the two should be ignored.

B. EPA's Rule Contravenes the Clean Air Act and Defeats Congress's Purpose in Linking RCRA with the Clean Air Act.

EPA cannot explain how its interpretation harmonizes RCRA and the CAA—rather than creates dissonance between them—and thus confirms that its interpretation violates fundamental principles of statutory interpretation and frustrates Congress's decision to link the two statutes in 42 U.S.C. §6905(b)(1) and §7429(g)(6). Br. 26-27, 39-42.

In particular, EPA confirms its tire (and, implicitly, used oil) exemption goes well beyond the exemption the CAA provides. EPA claims (at 52) "it would be bizarre" to read CAA §129 to require EPA to exempt a limited set of facilities burning tires from regulation under §129, but also to regulate all other facilities burning tires under §129. That is precisely what §129 does. Whether EPA thinks it bizarre or not, the agency lacks authority to expand the scope of the exemption Congress crafted. *NRDC v. EPA*, 489 F.3d 1250, 1259 (D.C. Cir. 2007) ("when the Congress wanted to exempt a particular kind of solid waste combustor from section 129's coverage—based on the desirability of resource recovery or any

other interest—it knew how to accomplish this through an express statutory exception and in fact did so for four specific classes of combustion units.").

Without citing *NRDC*, EPA claims (at 52) legislative history shows Congress was attempting to "encourag[e] the development of alternative energy sources" beyond the sources it included in the CAA's text. EPA's claim is unavailing in view of *NRDC*, which rejected similar efforts to use legislative history to override the CAA's plain text. 489 F.3d at 1259-60.

Intervenors claim (at 20, 23 n.15) that Congress's choice to provide an exemption in CAA §129 for only certain facilities burning tires or used oil "proves nothing" because only "some" tires or used oil "may be waste." That argument ignores that the CAA uses tires, used oil, and refuse-derived fuel as examples of "homogenous waste." 42 U.S.C. §7429(g)(1)(B) (emphasis added). Under EPA's definition, scarcely any tires and used oil are waste (well under 10% and under 4%, respectively, Br. 37-38), and Congress's carefully crafted exemption for just some units burning these wastes is rendered "virtually bereft of meaning." *City of Roseville v. Norton*, 348 F.3d 1020, 1028 (D.C. Cir. 2003). Rational statutory interpretation calls for looking at related statutory provisions to see if an interpretation makes parts of them redundant. *E.g.*, *W. Va. Univ. Hospitals v. Casey*, 499 U.S. 83, 88-92, 100-01 (1991) (superseded by statute) (rejecting

reading of statutory term where reading would render use of terms in other statutes "an inexplicable exercise in redundancy").

For its part, EPA's processing exemption contravenes Congress's express choice not to exempt any units burning refuse-derived fuel from satisfying waste-burner standards, 42 U.S.C. §7429(g)(1)(B). Br. 38. EPA itself just denied that the CAA is "relevant to this regulation." 76 Fed. Reg. 15,469/3-70/2, JA0085-86; Br. 45. Rather than defend that untenable position, EPA's lawyers no longer dispute that the CAA is relevant but argue (at 42-43) that to accept that it means what it says requires assuming Congress made "a sweeping change to the jurisdictional provisions of RCRA through parenthetical language in the Clean Air Act." *See NRDC*, 755 F.3d at 1020-21 (*post-hoc* rationales are impermissible).

Moreover, the lawyers assume what they seek to prove, that solid wastes cease to be waste when processed before being burned. RCRA and this Court's precedent refute that assumption. Br. 32-36. CAA §129(g)(1)(B) confirms this point by showing that Congress viewed tires, used oil, and refuse-derived fuel to be waste. 42 U.S.C. §7429(g)(1)(B). Accordingly, whereas reading §129(g)(1)(B) to mean (as it says) that refuse-derived fuel is waste that is ineligible for any exceptions is consistent with this Court's case law and gives meaning to all the text in both statutes, EPA's reading of the statutes unlawfully overrides text in the CAA. *E.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

The lawyers claim (at 42-43) that "refuse-derived fuel" refers only to "fuel derived from municipal solid waste," and Congress took no position on fuels derived from other wastes. They provide no textual support for their claim, instead relying entirely on a single piece of legislative history, S. Rep. No. 101-228, at 145-46 (1989). Undefined in the statute,[8] "refuse" thus has its ordinary meaning of, in essence, trash, rubbish, or waste.[9] *Hamilton v. Lanning*, 560 U.S. 505, 513 (2010). The legislative history does not undercut that ordinary meaning. It discusses an early draft of the CAA's waste-burners provision that "differed dramatically from the finally enacted" version, directing EPA to promulgate standards only for municipal waste combustors and lacking a cross-reference to RCRA's definition of solid waste. *Davis County Solid Waste Mgmt. v. EPA*, 101 F.3d 1395, 1406 (D.C. Cir. 1996); *see* S.1630, §306(a), sec.130(a), (d), (k) (1989),

[8] In three of the four places where Congress used the term "refuse-derived fuel," it was discussing solid waste generally, not just municipal solid waste. 42 U.S.C. §§6982(c), 7429(a)(2), 7429(g)(1)(B). In the fourth place, it does not say refuse-derived fuel comes exclusively from municipal solid waste. *Id.* §7429(g)(5). To the contrary, by exempting certain wastes when "segregated from such other wastes" that would be "municipal waste," Congress indicated that there is refuse that is not municipal solid waste. *See id.*

[9] *E.g.*, *Webster's New Universal Unabridged Dictionary* 1520 (deluxe 2d ed. 1983) ("that which is refused or thrown away as worthless or useless; rubbish; trash; waste matter; as the refuse of a factory").

reprinted in 5 *Clean Air Act Legislative History* 7906, 8154-60, 8163-65, 8174-76 (1993). It thus sheds little light on Congress's intent.

In any event, even on the lawyers' terms, the processing exemption violates RCRA and the CAA. Neither they nor EPA deny (at 42-43) that the processing exemption allows fuel derived from municipal solid waste to lose its waste status. Indeed, EPA said the rule "does not preclude processing under RCRA of any non-hazardous waste, including municipal waste, into a product fuel." EPA-HQ-RCRA-2008-0329-2015 at 72, JA0773; *accord id.* 71, JA0772.[10] EPA has no Humpty-Dumpty power to make "refuse-derived fuel" mean whatever EPA wants at various times and thus nullify Congress's refusal to exempt any units burning such material from regulation. *See TVA v. Hill*, 437 U.S. 153, 173 n.18 (1978); Br. 38.

CAA §129 also disproves EPA's claim (at 40) that "the one statutory provision that addresses the use of wastes as fuels is 42 U.S.C. §6924(q)" and thus EPA has free rein over processed non-hazardous waste. Section 129 says that solid wastes burned as fuels are regulated, *NRDC*, 489 F.3d at 1260, and even specifically identifies three wastes—"tires," "used oil," and "refuse-derived fuel"—that are or may be processed. 42 U.S.C. §7429(g)(1)(B); *see* Br. 33 (used

[10] EPA's practice confirms that it allows materials processed from municipal solid waste to be used as non-waste refuse-derived fuel. *See* Br. 17 (citing examples).

oil may be "distill[ed]…for use in boilers"); 76 Fed. Reg. 15,537/3 (tire-derived fuel), JA0153. EPA exempts all these processed materials from being solid waste. That contravenes the CAA and thus severs the careful link Congress drew between RCRA and the CAA, contrary to EPA's obligation to construe the two harmoniously. Br. 26-27, 36-39, 42.

II. EPA'S RULE IS AN UNREASONABLE INTERPRETATION OF RCRA AND THE CLEAN AIR ACT AND IS ARBITRARY.

Irrationally and Arbitrarily Interpreting RCRA and the Clean Air Act.

EPA does not even try to defend (at 34-35 n.5) its inconsistent, selective reliance on CAA provisions in the rulemaking. Br. 45. For this reason alone, the rules are unlawful and arbitrary. *Id.*

Nor do EPA's lawyers deny that the agency was inconsistent about whether it was just determining the applicability of CAA §129 or (as Congress tasked it) defining solid waste under RCRA. *See* Br. 43-44. They come down firmly (at 34-35 n.5) on the side of just determining the applicability of CAA §129, which is a *post-hoc* explanation at odds with the record, *NRDC*, 755 F.3d at 1020-21, and which, if considered, only confirms the rule is illegal and arbitrary. Br. 44-45 (EPA's decision relies on irrelevant considerations and "leads to irrational results in practice"); *see also id.* 39-40.

Nonetheless, EPA claims (at 34-35 n.5) that it could limit itself to materials "that are combusted" because "the determination of whether a particular material is a solid waste depends both on the nature of the material and the way in which it is managed." Under RCRA, however, what matters is whether the materials have been discarded at some point, and EPA ignores initial discard. *See* Br. 27-32, 44-45; *supra* pp.3-11. EPA also contends (at 34-35 n.5) that it "had no reason to address" materials handled not to be burned. To the contrary, RCRA and the CAA make clear that Congress wanted a single definition of solid waste that would support a comprehensive and coordinated regulatory scheme. Br. 39-42, 44-45. EPA makes no response to this point.

Specific Materials.

EPA claims (at 47) that the "only specific challenge" to its definition of "traditional fuels" was to its decision on used oil and "clean" demolition wood waste. *See also* Int.Br. 29-30 (claiming waiver). Not so. Environmental Petitioners challenged EPA's explanation of the entire "traditional fuels" category as irrational. Br. 45-46. EPA's brief contains no response to this challenge.

EPA does not defend its irrational analysis of scrap tire discard, which lacked record support and irrationally assumed tires were only discarded by dumping. Br. 46-47.

For used oil, EPA confirms (at 48) that the regulations it relied on "do not specifically address whether on-specification used oil is a solid waste when combusted (or at all)." Nor does it deny that it did not rationally consider whether used oil is initially discarded. *See* Br. 48. Its sole defense for using regulations that do not address the waste status of a material to determine the waste status of that material, *id.* 47-48, is thus apparently that "the concept of discard is irrelevant," EPA Br. 48. That position is irrational under RCRA. *See supra* pp.7-8.

On cardboard rejects, EPA's lawyers first wrongly claim (at 52-53 n.9) that EPA made no decision and any decision is unripe for review. *See supra* p.10. On the merits, EPA's lawyers claim (at 53 n.9 (citing 76 Fed. Reg. 15,478/3, 15,487/1, JA0094, 0103)) that when it said "paper residues," it didn't include cardboard rejects. Yet EPA itself said cardboard rejects "consist[] of recycled paper and paper products." 76 Fed. Reg. 15,486/3, JA0102; *accord* 78 Fed. Reg. 9173/1-2 (cardboard rejects ("OCC rejects") are a type of or identical to "paper recycling residuals"), JA0256. Thus, EPA has no record-based response to the inconsistency of its statements.

Legitimacy Criteria and Processing.

EPA says (at 36) that it only looked at CAA contaminants because "the focus of the Rule is on regulation of air emissions under the Clean Air Act." Assuming contaminant levels are relevant, EPA's conclusion doesn't follow for

purposes of determining whether a material has been discarded. A person owning, for example, moldy or bug-infested wood, generated from building demolition or tree trimming, discards it regardless of its levels of CAA contaminants. That EPA does not set air emission standards for mold or bugs says nothing about whether a wood containing them is "discarded." Br. 49.

EPA contends the argument that its "adequate containment" provision is arbitrary misreads "EPA's preamble." EPA Br. 36-37 (emphasis added); *see* Br. 49-50. But EPA's explanation in the preamble of its legitimacy criteria regulations for fuels and ingredients is inconsistent with those regulations, and EPA does not defend the regulations. Br. 49-50 (preamble says solid wastes are held "in a way that protects the surrounding environment from the material," and regulations making material not solid waste only require material "be adequately contained to prevent releases to the environment"). The regulations, not the preamble, govern. *Mich. Pub. Power Agency v. FERC*, 405 F.3d 8, 14-15 (D.C. Cir. 2005). Moreover, because of "the inconsistency between the language of the regulations and the preamble's explanation," EPA's regulations are arbitrary. *E.g.*, *Kennecott Utah Copper v. Dep't of Interior*, 88 F.3d 1191, 1220 (D.C. Cir. 1996).

EPA's decision to make the legitimacy criteria and processing exemption self-implementing is also arbitrary. EPA's lawyers defend that decision (at 37-38) based on EPA's experience with another program and because CAA rules require

notifications and recordkeeping. Because they do not identify anywhere in the record where EPA relied on its experience with another program, that argument is another impermissible *post-hoc* rationale. Nor can the CAA requirements "provide assurance that facilities will apply the legitimacy criteria," 76 Fed. Reg. 15,533/3 (cited in EPA Br. 38), JA0149, given that facility operators can rely on their own "expert or process knowledge" without reassessing even if they change suppliers of materials. Br. 50. Moreover, for demolition wood waste, such "process knowledge" fails to provide any meaningful assurance because processing fails to exclude dirty wood. EPA-HQ-RCRA-2008-0329-1393 at 2, 5, 7-9, JA0495, 0498, 0500-02; EPA-HQ-RCRA-2008-0329-1974 at 10-14, JA0712-16. Finally, though EPA claims that its CAA regulations for boilers and waste-burners provide adequate reporting requirements, the area source boilers rule does not require sources to submit reports unless the permitting authority requests, 40 C.F.R. §63.11225(b), and EPA identifies no requirement that applies to non-waste-burning cement plants, which combust materials at issue in this case. *See, e.g.*, 76 Fed. Reg. 15,535/2-3, JA0151.

CONCLUSION

The Court should grant Environmental Petitioners' petitions.

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Respectfully Submitted,

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing Final Reply Brief for Environmental Petitioners contains 5,590 words, as counted by counsel's word processing system, and thus complies with the applicable word limit established by the Court.

DATED: November 12, 2014

/s/Seth L. Johnson
Seth L. Johnson

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2014, I have served the foregoing **Final Reply Brief for Environmental Petitioners** on all registered counsel through the Court's electronic filing system (ECF).

/s/ Seth L. Johnson
Seth L. Johnson