How to Take Recycling One Step Forward, Two Steps Back: The EPA's Proposal to Revise the Definition of Solid Waste Under RCRA

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> We'll continue to worry for many years about the long-term stewardship and institutional controls related to disposal facilities. In short, EPA is not walking away from its regulatory obligations under RCRA. But here's the point: EPA's days of proposing and writing and finalizing command-and-control waste disposal regulations are just about over. That job's mostly done. So where do we go from here? In a word, we go back to the future. We rediscover the wisdom of the authors of RCRA a generation ago. We move on to RCRA's second major emphasis: "recovery of energy and other resources from discarded materials."[1]

I. INTRODUCTION

In late 2004, Tom Dunne, the Acting Administrator for the Environmental Protection Agency's (EPA) Office of Solid Waste and Emergency Response (OSWER), made the above statement during his remarks to a mixed crowd of industry representatives and state and federal regulators at the 2004 Byproducts Beneficial Reuse Summit in Kansas City, Missouri. The event was designed to provide a forum for discussion about the handling, treatment, and regulation of industrial

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1. Thomas P. Dunne, Acting Assistant Administrator, EPA Office of Solid Waste and Emergency Response, Remarks at the 2004 Byproducts Beneficial Reuse Summit (Nov. 8, 2004) (transcript available at http://www.epa.gov/oswer/speeches.htm).

byproducts.[2] Using the EPA's approach to enforcement of the Resource Conservation and Recovery Act (RCRA or Act)[3] as his primary example, Dunne spoke of a new focus for the EPA, one that would involve a shift away from an emphasis on regulatory waste management and enforcement toward collaborative relationships with both industry and governmental organizations in an effort to facilitate recycling and materials management.[4] His rationale for this shift was twofold. First, Dunne endorsed recycling practices because it simply does not make economic sense to use raw materials only once before throwing them away, especially when finding new landfill space may become more difficult in the future.[5] Second, Dunne argued that the rising global price of raw materials could change the way companies do business as they make every effort to find ways to "reduce their reliance on input materials."[6] A logical inference to be made from these comments is that recycling serves the dual purposes of preserving the environment and encouraging a thriving industrial sector (and thus a thriving economy).

RCRA "is a comprehensive environmental statute that empowers [the] EPA to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C, 42 U.S.C. §§ 6921-6934."[7] The primary stated objectives of the statute are to "promote the protection of health and the environment and to conserve valuable material and energy resources."[8] As Dunne noted in his remarks, RCRA professes to accomplish those objectives both by establishing controls on the disposal of solid waste, and by preemptively taking measures to minimize the amount of waste to be disposed of through proper recycling practices.[9] Dunne stated at the summit that the EPA currently has about four times as many employees working on the former method (traditional RCRA regulatory programs)

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2. *See* 2004 Byproducts Beneficial Use Summit Homepage, *available at* http://www.byproductsummit.com/index.html (last visited Feb. 21, 2005).

3. 42 U.S.C. §§ 6901-6992k (2000).

4. *See* Dunne, *supra* note 1, at 2-6.

5. *Id.* at 3.

6. *Id.* at 4. Dunne noted that the cost of raw materials for virtually all products had increased dramatically in the past year, particularly crude oil, which saw a seventy percent increase. *Id.* at 5. Dunne stated that the international prices of cement, steel, paper, and most metals had increased in like fashion. *Id.*

7. City of Chi. v. Envtl. Def. Fund, 511 U.S. 328, 331 (1994).

8. RCRA § 1003(a), 42 U.S.C. § 6902(a).

9. *See id. Compare* RCRA § 1003(a)(8), 42 U.S.C. § 6902(a)(8) ("[P]roviding for the promulgation of guidelines for solid waste collection, transport, separation, recovery, and disposal practices and systems."), *with* RCRA § 1003(a)(6), 42 U.S.C. § 6902(a)(6) ("[M]inimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment.").

as there are working on the latter (reuse projects) and that a change in direction was needed to create a more strategic, systematic, and comprehensive approach to reuse.[10] Perhaps the greatest catalyst driving this paradigm shift within the EPA is the Resource Conservation Challenge (RCC), a voluntary agency initiative launched in late 2002 to prevent pollution, promote recycling and reuse, reduce priority chemicals, and conserve energy and materials.[11] As part of the RCC, departments within the EPA have begun to collaborate more closely; for example, the Office of Solid Waste (OSW) and the Office of Pollution Prevention and Toxics (OPPT) recently signed an agreement to work together towards establishing activities and accomplishing their RCC commitments.[12] The program has also provided avenues for the EPA to collaborate with manufacturers, businesses, trade groups, and state and local governments to encourage waste reduction efforts and other green initiatives.[13] Thus far, the RCC has been so successful that the EPA has completed a draft plan of priority areas for its expansion. The draft plan will discuss strategies to deal with municipal solid waste, the beneficial use of selected secondary waste streams, and electronic waste.[14]

Perhaps the most controversial regulatory action to be associated with the RCC has been the EPA's attempt to revise the RCRA definition of "solid waste."[15] Proposed on October 28, 2003, the Revisions to the Definition of Solid Waste Proposed Rule (Solid Waste Proposal) seeks to redefine the regulatory definition of solid waste in a manner that would exclude certain types of hazardous secondary materials from RCRA Subtitle C jurisdiction, if they are generated and reclaimed in a continuous process within the same industry.[16] An effort more than ten years in the making,[17] the Solid Waste Proposal is expected to affect more

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10. Dunne, *supra* note 1, at 5.

11. Linda Roeder, *Top Waste Control Issues in 2005*, 36 Env't Reporter (BNA) (Jan. 14, 2005).

12. *Id.*

13. *See id.*

14. *Id.* For a full description of the RCC, refer to the initiative's home on the EPA's Web site, *available at* http://www.epa.gov/epaoswer/osw/conserve/index.htm.

15. Revisions to the Definition of Solid Waste, 68 Fed. Reg. 61,558 (proposed Oct. 28, 2003) (to be codified at 40 C.F.R. pts. 260 and 261). The EPA states at the outset of the proposed rule's preamble that "this regulatory proposal is an important component of EPA's recently announced 'Resource Conservation Challenge,' which is designed to encourage and provide new incentives for increased reuse and recycling of materials, including hazardous wastes and hazardous secondary materials." *Id.* at 61,560.

16. *Id.* at 61,558.

17. EPA, 530-F-03-035, REGULATORY CHANGES PROPOSED FOR CERTAIN HAZARDOUS WASTE RECYCLING ACTIVITIES (FACT SHEET) at 2, (Oct. 2003) *available at* http://www.epa.gov/epaoswer/hazwaste/dsw/abr.htm [hereinafter SOLID WASTE PROPOSAL FACT SHEET].

than 1700 facilities nationwide that generate and/or recycle hazardous secondary materials, resulting in a net savings to industry of approximately $178 million per year.[18] The EPA claims that the changes in the Solid Waste Proposal make it easier for industry to recycle more than 1 million tons of hazardous waste and to recover valuable materials from these recycling efforts approaching a value of nearly $1 billion.[19] Overall, the EPA estimates that the Solid Waste Proposal would exclude 1.5 million tons of hazardous waste annually from RCRA regulation.[20]

Predictably, public reaction to the Solid Waste Proposal has been mixed. While industry groups such as the American Chemistry Council praise the rule as a "step in the right direction" and lobby for an even broader approach to the exclusion, environmentalists say that the proposal will do nothing more than erode established environmental protections and increase the likelihood that waste will be mismanaged.[21] This Comment examines the Solid Waste Proposal as originally submitted and offers insight as to whether it represents a positive move forward for the industrial recycling movement, or if it more closely resembles what Environmental Technology Council attorney Scott Schlesinger claims is "the single biggest rollback in land and groundwater protection in the history of RCRA."[22] Part II provides an overview of RCRA. Part III reviews the Solid Waste Proposal and examines whether it is consistent with the case law of which it purports to be a logical extension. The arguments of representative stakeholders will then be discussed in Part IV in order to frame the issues involved in this impassioned debate. Part V concludes with a discussion of whether the Solid Waste Proposal is consistent with the fundamental objectives of RCRA.

II. AN OVERVIEW OF RCRA SUBTITLE C

In order to understand the potential impact of the Solid Waste Proposal, it is first necessary to examine the general structure of RCRA, and more specifically the Subtitle C program that the proposal could effect.[23] Referred to by one commentator as "mind-numbing" and the

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18. Revisions to the Definition of Solid Waste, *supra* note 15, at 61,558.

19. SOLID WASTE PROPOSAL FACT SHEET, *supra* note 17, at 1.

20. Linda Roeder, *Hazardous Waste: EPA Considering Broader Exclusion, Additional Safeguards in Recycling Rule,* 35 Env't Reporter (BNA) 1943 (Sept. 17, 2004).

21. Linda Roeder, *Hazardous Waste: Proposed Expansion of Recycling Exclusion Needs Broad Revision, Various Groups Say*, 34 Env't Reporter (BNA) 2783 (Dec. 19, 2003).

22. *Id.*

23. *See* Revisions to the Definition of Solid Waste, *supra* note 15, at 61,560 (stating that "[t]oday's proposed rule is intended to revise and clarify the RCRA definition of solid waste as it

"most complicated environmental statute,"[24] RCRA is a testament to forty years of federal solid waste regulation created in response to the country's ever-growing waste management needs, and is a combination of the original statutes and their subsequent amendments.[25]

In 1965 Congress enacted the Solid Waste Disposal Act (SWDA)[26] as the first federal statute that specifically focused on improving solid waste disposal methods.[27] SWDA was amended in 1976 by RCRA,[28] which dramatically remodeled the federal solid waste management system and established the current hazardous waste management framework.[29] RCRA was most significantly modified by the Hazardous and Solid Waste Amendments of 1984 (HSWA),[30] which expanded the law's scope and requirements into the comprehensive regulatory format we recognize today.[31]

RCRA currently consists of ten subtitles, A-J.[32] Three of these subtitles represent the Act's major programs.[33] Subtitle C, the focus of the Solid Waste Proposal discussed in this Comment, establishes a federal program for the management of hazardous solid wastes.[34] Subtitle D is a largely nonregulatory program designed to encourage state and local governments to improve their management of nonhazardous solid waste.[35] It includes minimum federal technical standards and guidelines for state solid waste plans, including criteria for municipal solid waste landfills (MSWLFs) and other solid waste disposal

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pertains to certain types of hazardous secondary materials that are not considered to be discarded, and thus are not considered wastes subject to regulation under RCRA Subtitle C").

24. Randolph L. Hill, *An Overview of RCRA: The "Mind-Numbing" Provisions of the Most Complicated Environmental Statute*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,254 (May 1991).

25. *See* EPA, 530-R-02-016, RCRA ORIENTATION MANUAL I-2 to I-3 (Jan. 2003), *available at* http://www.epa.gov/epaoswer/general/orientat/ [hereinafter RCRA ORIENTATION MANUAL]. The amount of waste produced in the United States increased dramatically as a result of the industrial revolution, as well as in the post-World War II industrial and economic boom. *See id.* at I-1. The amount of hazardous waste continued to increase throughout the twentieth century: a 1995 survey showed that the amount of hazardous waste produced annually had increased 500-fold in 50 years. *Id.*

26. Pub. L. No. 89-272, 79 Stat. 997 (1965).

27. RCRA ORIENTATION MANUAL, *supra* note 25, at I-3.

28. Pub. L. No. 94-580, 90 Stat. 2795 (1976).

29. RCRA ORIENTATION MANUAL, *supra* note 25, at I-3.

30. Pub. L. No. 98-616, 98 Stat. 3221 (1984).

31. *See* RCRA ORIENTATION MANUAL, *supra* note 25, at I-3. Minor revisions were subsequently made to RCRA by the Federal Facility Compliance Act of 1992 and the Land Disposal Program Flexibility Act of 1996. *Id.*

32. *Id.*

33. *Id.*

34. *See id.* at I-5.

35. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 181 (4th ed. 2003).

facilities.[36] Finally, Subtitle I regulates underground storage tanks (USTs) containing petroleum or hazardous substances as defined under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[37] Under Subtitle I, the EPA is required to issue regulations governing detection, prevention, and correction of leaks from USTs, including setting performance standards for new tanks and establishing financial responsibility requirements for cleanups.[38]

The extensive "cradle to grave" management system of Subtitle C regulates hazardous waste generators and transporters, as well as treatment, storage, and disposal facilities (TSDFs).[39] The standards applicable to generators are found under RCRA section 3002.[40] The statute itself provides only general guidelines, requiring the EPA to promulgate more detailed regulations for enforcement.[41]

The basic requirements for generators, outlined in section 3002, include: accurate recordkeeping and labeling practices for hazardous waste, the use of appropriate containers, the furnishing of information about waste to transporters and TSDFs, the use of a manifest system to insure that waste designated for TSDFs has reached its destination, and the submission of biannual reports to the EPA detailing the quantities of waste the generator has produced and any efforts undertaken to reduce that volume.[42] The Code of Federal Regulations (CFR) defines a generator as "any person, by site, whose act or process produces hazardous waste identified or listed in Part 261 of this chapter or whose act first causes a hazardous waste to become subject to regulation."[43] The regulations further classify generators into three different categories depending on the level of waste generated: fully regulated generators, which produce more than 1000 kg of hazardous waste per calendar month; Small Quantity Generators (SQGs), which produce less than 1000 kg but more than 100 kg of such waste per month; and Conditionally Exempt Generators (CEGs), which produce less than 100 kg a month. SQGs are fully subject to regulation under Subtitle C, while

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36. RCRA ORIENTATION MANUAL, *supra* note 25, at I-8, I-5.
37. *Id.* at I-5. CERCLA is codified at 42 U.S.C. §§ 9601-9675 (2000).
38. PERCIVAL ET AL., *supra* note 35, at 181.
39. *See* RCRA ORIENTATION MANUAL, *supra* note 25, at III-2.
40. 42 U.S.C. § 6922.
41. *See id.* ("[T]he Administrator shall promulgate regulations establishing such standards, applicable to generators of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment.").
42. *Id.*
43. 40 C.F.R. § 260.10 (2004).

CEGs producing less than 100 kg a month are largely excluded from RCRA jurisdiction.[44]

A generator of hazardous waste must obtain an EPA identification number before it is allowed to treat, store, or deal in the transport of hazardous waste in any manner, and must not offer its hazardous waste to a transporter or TSDF that does not also have a number.[45] As noted above, the generator must also prepare a manifest, which serves as the core document for tracking the transport of the hazardous waste from the point of generation to the TSDF.[46] The generator must designate a facility on the manifest which is permitted to handle the listed waste.[47] The generator signs the manifest, obtains the signature of the transporter, and retains one copy of the manifest—leaving enough copies with the transporter so that there will be a final copy available to the generator. The final copy is to be sent as a receipt confirmation from the TSDF, thus confirming that the hazardous waste has reached its ultimate destination.[48]

Transporter activity is governed by RCRA section 3003, which contains standards similar to those required of generators: transporters are required to engage in the recordkeeping process, to comply with the manifest system, and may only transport properly labeled waste to the TSDF designated on the manifest.[49] The transporter must deliver the hazardous waste to the designated or alternate facility listed on the manifest; if this is not possible, the transporter must contact the generator and revise the manifest accordingly.[50] In the event of a spill en route to a TSDF, the transporter is obligated to notify the appropriate authorities.[51]

The requirements for TSDFs are even more extensive than those for generators or transporters.[52] RCRA section 3004 requires that the EPA develop and enforce standards for a variety of TSDF duties, including: properly treating, storing, and disposing of wastes as defined by EPA guidelines; maintaining records of all hazardous wastes at the facility; properly complying with the manifest system; following standards for location, design, and construction of TSDFs; demonstrating financial

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44. *See id* at §§ 260.10, 261.5(a). An estimated 200,000 firms fall into one of the top two categories. PERCIVAL ET AL., *supra* note 35, at 181.
45. 40 C.F.R. § 262.12.
46. *See id.* §§ 262.20-262.23.
47. *Id.* § 262.23(b).
48. *Id.* §§ 262.22-262.23.
49. *See* RCRA § 3003, 42 U.S.C. § 6923 (2000).
50. 40 C.F.R. § 263.21 (2004).
51. *Id.* § 263.30
52. RCRA ORIENTATION MANUAL, *supra* note 25, at III-53.

responsibility for the facility; and maintaining contingency plans for any possible emergencies.[53] RCRA also requires that all TSDFs obtain a permit from the EPA, as noted in section 3005.[54] Permits are issued to facilities that satisfy a series of specific regulatory performance standards.[55] The treatment, storage, and disposal of hazardous wastes are separately permitted functions, and any given facility may be permitted to undertake all or only a subset of these functions.[56]

In the event of a hazardous waste leak at a TSDF, RCRA mandates the investigation and cleanup (remediation) of the release.[57] The cleanup process is referred to as corrective action.[58] Currently there are approximately 3700 sites undergoing corrective action nationwide.[59] Facilities may be brought into the RCRA corrective action process in several ways. First, RCRA contains statutory provisions in sections 3004(u), 3004(v), and 3005(c) for incorporating corrective action into a facility's permit requirements.[60] The EPA may also issue corrective action orders outside the permit process upon the identified release of hazardous wastes.[61] Finally, a facility owner or operator may volunteer to take corrective action measures under the oversight of the EPA and state agencies.[62] Corrective action typically consists of five elements common to most cleanup activities: (1) initial site assessment, (2) site investigation and characterization, (3) interim abatement actions, (4) evaluation of remedial alternatives, and (5) implementation of the corrective action remedy.[63] Due to a lack of comprehensive cleanup

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53. RCRA § 3004, 42 U.S.C. § 6924.

54. RCRA § 3005, 42 U.S.C. § 6925.

55. *See generally* 40 C.F.R. § 270 (2004). The permit application consists of two parts. Part A is a standardized form that requires the owner/operator to furnish basic information such as the location of the facility, contact information, and the activities to be conducted at the facility. *Id.* § 270.13. Part B is extensive and requires the owner/operator of the TSDF to furnish information detailing how each applicable feature of the TSDF (surface impoundments, incinerators, landfills, tank systems, etc.) meets the EPA's strict regulatory guidelines. *See id.* §§ 270.14-270.29.

56. 40 AM. JUR. 3D *Proof of Facts* § 23 (2004).

57. RCRA ORIENTATION MANUAL, *supra* note 25, at III-121.

58. *Id.*

59. *Id.*

60. *See* RCRA §§ 3004-3005, 42 U.S.C. §§ 6924-6925 (2000).

61. RCRA ORIENTATION MANUAL, *supra* note 25, at III-122.

62. *Id.*

63. *See id.* at III-125. The initial site assessment is known as a RCRA Facility Assessment (RFA). *Id.* The site investigation and characterization step is often referred to as the RCRA Facility Investigation (RFI). *Id.* Alternative corrective action measures are evaluated in a Corrective Action Measures Study (CMS). *Id.* at III-126. The implementation phase is formally referred to as a Corrective Measures Implementation (CMI). *Id.*

regulations, the EPA implements the corrective action program largely through guidance measures.[64]

Although RCRA was conceived as a comprehensive federal measure, Congress intended the states to assume primary responsibility for its implementation, because each state is more familiar with the local community and thus better able to cater to local needs.[65] RCRA section 3006 mandates that the EPA "shall promulgate guidelines to assist the States in the Development of State hazardous waste programs."[66] If the EPA concludes that a state's hazardous waste program is "equivalent" to that laid out in RCRA and its accompanying regulations, the state is authorized to carry out its own program in lieu of the federal program.[67] Many states fashion equivalent programs by citing the federal regulations in their state regulations, a practice known as "incorporation by reference."[68] The EPA retains the right to withdraw its authorization of any state program that falls out of compliance with RCRA or that is not properly enforced.[69] The EPA offers grants to assist the states in implementing their hazardous waste plans and negotiates annually with each state to determine the amount of grant money to be distributed based on proposed work plans.[70]

III. THE EVOLVING DEFINITION OF SOLID WASTE

As noted above, the coverage of RCRA Subtitle C is restricted to hazardous wastes. Hazardous wastes are generally defined in the statute by a health-based standard; a waste is deemed hazardous if it may contribute to an increase in mortality or illness or pose a hazard to human health or the environment when improperly treated, stored, or disposed of.[71] The first section of Subtitle C mandates that the EPA "promulgate regulations identifying the characteristics of hazardous waste, and listing particular hazardous wastes . . . which shall be subject to the provisions of this subchapter."[72] These regulations make the identification of hazardous wastes a fairly straightforward process. A waste is considered

64. *Id.* at III-121.
65. *Id.* at III-137.
66. RCRA § 3006(a), 42 U.S.C. § 6926(a) (2000).
67. RCRA § 3006(b), 42 U.S.C. § 6926(b). For a state's program to be fully authorized, it must be consistent with and no less stringent than the federal program. RCRA ORIENTATION MANUAL, *supra* note 25, at III-138.
68. RCRA ORIENTATION MANUAL, *supra* note 25, at III-138.
69. *See* RCRA § 3006(e), 42 U.S.C. § 6926(e).
70. RCRA ORIENTATION MANUAL, *supra* note 25, at III-1.
71. RCRA § 1004(5), 42 U.S.C. § 6903(5).
72. RCRA § 3001(b)(1), 42 U.S.C. § 6921(b)(1).

hazardous under RCRA if under testing it exhibits one of four characteristics specifically defined by the EPA: ignitability, corrosivity, reactivity, or toxicity.[73] Such wastes are deemed "characteristic wastes." A waste is also considered hazardous if it is specifically listed by name in the regulations because of its dangerous properties (so-called "listed wastes").[74] Additional regulatory provisions clarify how material is classified when it is mixed with or derived from hazardous wastes. The mixture rule declares that mixtures of characteristic wastes and nonhazardous wastes are hazardous only if the mixture itself also exhibits a hazardous characteristic, while mixtures of listed wastes and nonhazardous wastes are always considered to be hazardous by default.[75] Under the derived-from rule, solid waste that is generated from the treatment, storage, or disposal of hazardous waste is itself considered a hazardous waste as well.[76]

The definitional controversy that arises under Subtitle C lies not in hazardous wastes, however, but in solid wastes. Under RCRA, hazardous wastes are first and foremost a subset of solid wastes.[77] And although hazardous wastes are fairly easy to identify based upon the test-based characteristic standards contained in the RCRA regulations, the broader language defining solid wastes in the statute and accompanying regulations has led to a developing body of case law which serves as the basis for the Solid Waste Proposal discussed herein.

RCRA defines solid waste as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities."[78] Thus, a waste does not have to be "solid" in the traditional sense to be considered a solid waste under RCRA. The regulations elaborate on this standard by further defining what constitutes a "discarded material."[79] Among discarded materials are those which are abandoned, recycled, or considered inherently waste-like.[80]

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73. 40 C.F.R. §§ 261.20-261.24 (2004).
74. *Id.* §§ 261.30-261.38.
75. *See id.* § 261.3(a)(2)(iv).
76. *Id.* § 261.3(c)(2).
77. *See* RCRA § 1004(5), 42 U.S.C. § 6903(5) ("The term 'hazardous waste' means a *solid waste, or combination of solid wastes*" (emphasis added)).
78. RCRA § 1004(27), 42 U.S.C. § 6903(27).
79. 40 C.F.R. § 261.2(a)(1) ("A *solid waste* is any discarded material.").
80. *Id.* § 262.2(a)(2).

Controversies over the scope of the EPA's solid waste definition have raged on in the federal court system for nearly twenty years. The first in this line of cases was *American Mining Congress v. EPA* (*AMC I*).[81] *AMC I* arose after EPA promulgated a new rule that for the first time incorporated certain types of recycling activities into the definition of solid waste.[82] The rule identified five broad categories of secondary materials (sludges, spent materials, by-products, commercial chemical products, and scrap metal), and situationally defined whether each material was a solid waste when it was recycled by means of each of four identified methods (use constituting disposal, burning energy for recovery, speculative accumulation, and reclamation).[83]

Petitioners American Mining Congress and American Petroleum Institute, mindful of the fact that the new regulations would place their respective petroleum refining and in-house smelting recycling processes within the scope of RCRA, challenged the scope of the rule on the grounds that EPA's statutory authority under RCRA was "limited to controlling materials that are discarded or intended for discard."[84] The United States Court of Appeals for the D.C. Circuit applied the first prong of the statutory interpretation test delineated in *Chevron, U.S.A. v. Natural Resources Defense Council*[85] and found that the language and structure of RCRA as well as its legislative history "clearly and unambiguously expressed its intent that 'solid waste' (and therefore EPA's regulatory authority) be limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away."[86] With respect to the recycling issue raised in the case, the court stated that the EPA need not regulate materials recycled and reused "in an ongoing manufacturing or industrial process" because such materials "have not yet become part of the waste disposal problem," but are instead "destined

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81. 824 F.2d 1177 (D.C. Cir 1987).

82. *See* Hazardous Waste Management System; Definition of Solid Waste, 50 Fed. Reg. 614, 615 (Jan. 4, 1985) (codified at 40 C.F.R. pts. 260, 261, 264, 265, and 266).

83. *See id.* at 618. Reclamation is the recycling process at issue in the cases described herein, as well as in the Solid Waste Proposal. Under the RCRA regulations, "a material is 'reclaimed' if it is processed to recover a usable product, or if it is regenerated." 40 C.F.R. § 261.1(c)(4).

84. *AMC I*, 824 F.2d at 1180-81.

85. 467 U.S. 837 (1984). The *Chevron* test is composed of two parts. First, the reviewing court is to consider "whether Congress has directly spoken to the precise question at issue," focusing first on the language and structure of the statute itself, and then to secondary indicia of intent. *Id.* at 842. If Congressional intent is unclear (i.e. the statute is silent or ambiguous with respect to the relevant issue), then the second analytical step, with deference to be given to the agency, is "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

86. *AMC I*, 824 F.2d at 1193.

for beneficial reuse or recycling in a continuous process by the generating industry itself."[87] The court thus held that the EPA acted in contravention of the statute by regulating in-process secondary materials.[88]

In response to the D.C. Circuit's holding in *AMC I*, the EPA chose to provide an exclusion to its new solid waste definition rather than scrap it altogether. The EPA, believing that the *AMC I* holding applied only to ongoing manufacturing activities involving the continuous extraction of material values, stated in the preamble to its amended rule that the bulk of the new regulations "clearly involve elements of discard as construed by the court."[89] As such, it kept the recycling activities provision in the rule intact and supplemented the regulations with a new "closed-loop reclamation" exclusion.[90] Under this provision, secondary materials reclaimed and returned to the original production process in which they were generated are excluded from the definition of solid waste, provided that only tank storage is involved and the entire process is closed through a system of pipes or similarly sealed means of conveyance.[91] In this way the EPA seemingly addressed the particular concerns of the *AMC I* petitioners while retaining recycling in the regulatory definition of discard (and, by extension, in the definition of solid waste).

Subsequent cases construed *AMC I* in such a narrow manner as to validate the EPA's retention of recycling in the definition of discarded material. In *American Petroleum Institute v. EPA* (*API*), the D.C. Circuit rejected the EPA's argument that it lacked the authority to establish treatment standards for metal slag residue that results from the metals reclamation process.[92] The EPA contended that K061 hazardous waste was no longer discarded when it arrived at a metal reclamation facility for processing.[93] Purporting to rely "almost entirely" on its *AMC I* holding, the court distinguished the two matters by pointing out that

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87. *Id.* at 1186.

88. *Id.* at 1193.

89. Identification and Listing of Hazardous Waste; Amendments to the Definition of Solid Waste, 53 Fed. Reg. 519, 520 (proposed Jan. 8, 1988) (codified at 40 C.F.R. pt. 261).

90. *See* 40 C.F.R § 261.4(8) (2004).

91. *Id.* Note that the term "closed loop" is used to describe other processes by which materials are returned to the original process from which they are generated as well. Before the advent of this reclamation exclusion, the term was first used to describe the exception listed in 40 C.F.R. section 261.2(e)(1)(iii), which states that materials are not solid wastes when returned to the original production process and used as a substitute for feedstock materials without first being reclaimed. *Id.* § 261.2(e)(1)(iii); *see also* Identification and Listing of Hazardous Waste; Amendments to the Definition of Solid Waste, 53 Fed. Reg. at 524 (stating that the proposed rule does not affect the existing section 261.2(e)(1)(iii) closed-loop provision).

92. 906 F.2d 729 (D.C. Cir. 1990).

93. *Id.* at 740.

unlike the materials in *AMC I*, the hazardous material being reclaimed here was not processed as part of an ongoing manufacturing or industrial process within the same industry, but instead as part of a mandatory waste treatment plan.[94] This narrow interpretation of *AMC I* was again confirmed in *American Mining Congress v. EPA* (*AMC II*), where the petitioner claimed that sludges from wastewater that were stored in surface impoundments and that *may* be reclaimed at a later date were not discarded.[95] In rejecting this argument, the court stated that the *AMC I* holding concerned only materials that are "destined for *immediate* reuse in another phase of the industry's ongoing production process."[96]

A decade later, the D.C. Circuit took a semantic step back from this immediacy requirement in *Ass'n of Battery Recyclers, Inc. v. EPA*.[97] In this consolidated action, petitioners National Mining Association and American Iron and Steel Institute, along with intervenor Chemical Manufacturers Association, challenged a new rule that conditioned a RCRA solid waste exclusion for certain mining wastes on the manner in which the waste was stored.[98] According to the new Land Disposal Restrictions Phase IV Rule, certain secondary materials reclaimed by the mineral processing industry would be examined outside the purview of the existing regulatory framework and would be deemed solid wastes by default, absent a new exclusion requiring that the pre-recycled materials be stored in tanks, containers, or on properly maintained pads.[99] Petitioners challenged the singling out of these wastes and argued that a secondary material destined for recycling could not be considered solid waste regardless of its method of storage, because a material set aside for recycling has not been discarded.[100] The case therefore challenged the EPA's view that a material could be deemed solid waste unless "reclamation is continuous in the sense that there is no interdiction in time—i.e., the materials move from one step of a recovery process to another without a break in the process, as for storage."[101] In rejecting this claim, the court stated that the *AMC I* court did not intend the word

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94. *Id.* at 741. As such, the court stated that the reclaimed waste qualified as "sludge from a waste treatment plan," falling squarely under the RCRA statutory definition of solid waste. *Id.* (quoting 42 U.S.C. § 6903(27) (2000)).

95. 907 F.2d 1179, 1186 (D.C. Cir 1990).

96. *Id.* at 1186 (quoting Am. Mining Cong. v. EPA, 824 F.2d 1177, 1185 (D.C. Cir. 1987)).

97. 208 F.3d 1047 (D.C. Cir 2000).

98. *Id.* at 1050.

99. *See id.* at 1051.

100. *Id.*

101. *See id.* at 1052 (quoting Land Disposal Restrictions Phase IV, 63 Fed. Reg. 28,556, 28,581 (May 26, 1998)).

"immediate" in the phrase "immediate reuse" to mean "at once," as the EPA construed it to mean, but rather "direct."[102] The court noted that this interpretation was bolstered by the fact that the *AMC I* court also used the words "retained" and "destined" in its standard, both of which indicate a somewhat wider temporal scope.[103] The court also stated that the phrase "immediate reuse" was not mentioned in the portion of the *AMC I* opinion containing the holding, and this was another reason to reject the EPA's reading of the term.[104] In addressing *AMC II*, where the term "immediate" is used much more prominently, the court appeared to all but ignore the *AMC II* court's reliance on the phrase and instead focused on the facts, finding that the practices of the defendant were distinguishable because they amounted to speculative accumulation and thus constituted discard under the regulations.[105] The *Ass'n of Battery Recyclers* holding therefore represents continued deference to the "ordinary" meaning of the word "discard" under *AMC I* and a rejection of any notion that the temporary storage of materials intended for recycling causes them to fit under that classification.

IV. ANATOMY OF THE SOLID WASTE PROPOSAL

A. Overview

In response to the aforementioned series of D.C. Circuit decisions, in particular *Ass'n of Battery Recyclers*, the EPA submitted the Solid Waste Proposal for comment at the end of October 2003.[106] The EPA proposes to add a new exclusion under section 261.2 of the RCRA regulations stating that hazardous secondary materials generated and reclaimed in a continuous process within the same industry are not discarded, and are therefore not solid waste.[107] This reclamation of excluded materials within the industry must produce a product or ingredient that can be used without any further reclamation.[108] A second portion of the rule outside the purview of this Comment proposes to codify for the first time explicit criteria for determining the legitimacy of recycling practices in order to distinguish between practices that the EPA

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102. Ass'n of Battery Recyclers, Inc., 208 F.3d at 1053.
103. *See id.*
104. *Id.*
105. *See id.* at 1055.
106. *See* Revisions to the Definition of Solid Waste, *supra* note 15, at 61,563.
107. *Id.* at 61,595. Note that the new exclusion would not apply to materials used in a manner constituting disposal, materials burned for energy recovery, or inherently waste-like materials. *Id.*
108. *Id.* at 61,564.

considers to be legitimate and those that it considers to be mere "sham" recycling.[109] The EPA states that the proposed rule is designed to cover those cases "where discard most likely does not occur because materials are being truly reused or recycled in a continuous process within the same industry."[110] Given this assertion, the agency states in the preamble to the proposed the rule that it expects the measure "will encourage safe, beneficial recycling practices by industry," making it consistent with the primary congressional goals in enacting RCRA.[111]

The EPA offers two different options in its proposal for what constitutes a "continuous process" within the same industry.[112] The first option would allow reclamation to take place in multiple processing steps, and multiple physical locations, so long as each step takes place in the same industry that generated the material.[113] The second option is similar to the first, but would add the additional restriction that the reclamation may not take place at a facility within the same industry if that facility also recycles hazardous materials from other industries.[114] The EPA states that this second option would establish a "bright line" between intra-industry recycling that would fall under the exclusion and commercial recycling, which would not be covered.[115] Nevertheless, the EPA prefers the first option because it believes its broader scope will lead to more beneficial recycling.[116] The EPA opines that another reason for advocating this option is that the clear definition approach of option two may not be necessary, given the fact that the commercial facilities likely to be excluded would be RCRA-permitted facilities already well suited to handle a variety of different types of materials.[117]

The EPA is proposing to define the term "industry" in the new rule using the new North American Industry Classification System (NAICS) developed by the Office of Management and Budget (OMB).[118] Created in 1992, the NAICS has replaced the Standard Industrial Classification System (SIC) as a means to collect statistical data and for other

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109. *Id.* at 61,560-61,561.

110. *Id.* at 61,560; *cf. id.* at 61,563 ("In today's proposed rule, therefore, EPA is attempting to identify a certain class or category of materials that EPA has determined are *not* discarded for purposes of Subtitle C.").

111. *Id.* at 61,560.

112. *Id.* at 61,565.

113. *Id.*

114. *Id.* at 61,566.

115. *Id.*

116. *Id.*

117. *See id.*

118. *Id.* at 61,567.

regulatory and administrative purposes.[119] The EPA endorses the use of the NAICS system principally because it is an existing, recognized industry classification system, and eliminates the need for the agency to spend unnecessary time and effort creating new industry categories from scratch.[120] It is also seen as favorable by the EPA because it was developed as a "production-oriented" system, under which facilities that use identical or similar production processes tend to be commonly grouped.[121] The NAICS coding system is based upon a possible total of six digits, with each additional digit denoting another level of generality. Three-digit codes denote subsectors, four-digit codes denote industry groups, and five- and six-digit codes denote industries.[122] With minor exceptions, the EPA proposes to classify industries for purposes of the rule at the four-digit NAICS level, as it thinks this level of specificity strikes the proper balance between being overly broad and excessively narrow.[123] The EPA acknowledges that this system may pose some disadvantages for on-site recycling, particularly in the case of large, integrated industrial facilities owned and operated by the same generator but consisting of two or more industries under the NAICS system.[124] In such a scenario, hazardous materials from one area of the facility may not qualify under the exclusion since the reclamation portion of the operation is integrated in a different area with a different NAICS code, or conceivably all hazardous materials on site would fail to qualify under the exclusion.[125] Alternatively, all hazardous materials on site would fail to qualify under the exclusion if the generator chooses to run its reclamation operation as a separate entity, making it a distinct economic unit unlikely to fall into the same NAICS categories as any of the other operations on site.[126] The agency believes that an exclusion for on-site recycling in such a scenario is a more practical approach to encouraging legitimate recycling and invited comments to that effect.[127]

Just as it does in its interpretation of "continuous process," the EPA emphasizes in its discussion of "industry classifications" that

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119. *Id.*
120. *See id.* at 61,567-61,568.
121. *Id.* at 61,568.
122. *See id.*
123. *Id.* at 61,569. The EPA proposes to use existing classification systems for the primary mineral processing and petroleum industries in lieu of the NAICS system because it believes these detailed methods (as delineated in previous rulemakings and other definitions) better capture the boundaries of each industry. *See id.* at 61,570-61,571.
124. *Id.* at 61,575.
125. *See id.*
126. *See Id.*
127. *Id.*

commercial recycling practices are not intended to fall under the exclusion. It specifically notes that the "Waste Management and Remediation Services" NAICS industry category has been intentionally left off the list of industrial classifications in Appendix X of the Solid Waste Proposal because the majority of materials reclaimed by waste management industries are not generated by those industries, but rather "first discarded by another entity that has no further use for them."[128] Therefore such facilities are not recycling their own secondary materials in a continuous process, and do not fall under the purview of the Solid Waste Proposal.[129]

In defining the "continuous process" element of the rule, the EPA proposes that the exclusion would only apply if the materials are handled by the entities or facilities exclusively within the same industry as the generator, with the exception of transporters.[130] Thus, sending materials to a broker or other middleman before they arrive at the reclamation facility would be prohibited.[131] Hazardous materials will not fall within the continuous process loop if they are speculatively accumulated as per 40 C.F.R. section 261.1(c)(8), meaning that the generator must show that the material is potentially recyclable and has a feasible means of being recycled.[132] Additionally, in order to prove that the material is not being speculatively accumulated, the generator must show that, given the commencement of the calendar year on January 1st, seventy-five percent by weight or volume of any material accumulated on site has either been recycled or transferred to a different site for recycling by the end of December of that year.[133]

In order to be eligible for the exclusion, the EPA has proposed that generators submit a one-time notification to the EPA or to the authorized state program, including such basic information as the contact details for the generating facility and the types of materials produced that would be subject to the exclusion.[134] The EPA is also considering alternative options to the notice requirement that would require the signature of a responsible corporate official, or the requirement of additional

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128. *Id.* at 61,571.

129. *See id.* ("Generally speaking, where such waste service facilities are stand-alone operations . . . and it is clear that virtually all materials reclaimed at such facilities are secondary materials received from off-site generators (in one or more industry categories), then reclamation services are quite obviously the principal activity undertaken at the site.").

130. *Id.* at 61,596.

131. *Id.* at 61,575.

132. *Id.* at 61,596; *see also* 40 C.F.R. § 261.1(c)(8) (2004).

133. 40 C.F.R. § 261.1(c)(8).

134. Revisions to the Definition of Solid Waste, *supra* note 15, at 61,577.

notification in the event that major changes occur such as a change in generator ownership or processed materials.[135] Although the EPA does not formally propose any other recordkeeping requirements apart from this initial notification, it does state that it is "considering the option of requiring generators and reclaimers to keep on-site records relating to types and volumes of materials they handle."[136] The EPA has chosen not to include more detailed recordkeeping requirements in the Solid Waste Proposal due to its ongoing commitment to minimize recordkeeping and reporting requirements, particularly in cases where such documentation would be unnecessary or duplicative.[137]

Finally, the EPA lists several existing provisions in the regulations that would be redundant or otherwise affected by the adoption of the Solid Waste Proposal. Of particular note, the agency declares that both of the closed-loop provisions described above would be encompassed by the new rule, and therefore would be deleted.[138] The new rule would therefore serve as the sole closed-loop exception for intra-industry recycling.

B. Level of Consistency with Prevailing Case Law

The EPA states in the preamble to the Solid Waste Proposal that it has been "guided by the *AMC I* and [*Ass'n of Battery Recyclers*] opinions" in creating the new exclusion.[139] A review of this case law reveals that the Solid Waste Proposal is in fact consistent with these D.C. Circuit holdings. As discussed above, the *AMC I* court laid the foundation for the line of cases by holding that materials have "not yet become part of the waste disposal problem" if they are "destined for beneficial reuse and recycling in a continuous process within the generating industry itself."[140] This description alone appears to coincide with the language of the Solid Waste Proposal, which attempts to exclude "hazardous materials generated and reclaimed in a continuous process within the same industry."[141] In order to adjust for the court's decision in *AMC I*, the EPA cleverly chose to fashion a closed-loop reclamation exclusion that would have been appropriate for the specific mining and petroleum refining reclamation processes in that case, rather than undo

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135. *Id.*

136. *Id.* at 61,578.

137. *Id.*

138. *Id.* The two closed-loop exceptions, one for reclaimed materials and one for those that have not been reclaimed, are codified at 40 C.F.R. §§ 261.2(e)(iii) and 261.4(8).

139. *Id.* at 61,563.

140. Am. Mining Cong. v. EPA, 824 F.2d 1177, 1186 (1987).

141. Revisions to the Definition of Solid Waste, *supra* note 15, at 61,595.

all the work it had recently done to include recycled materials under the definition of discarded materials (and therefore of solid waste) in the RCRA regulations. By the language of the *AMC I* holding, absent any of the particulars regarding its various definitional components (e.g., continuous process, industry, etc.), the Solid Waste Proposal would have been facially consistent with *AMC I* had the EPA offered it in response to the D.C. Circuit's holding in that matter.

The subsequent cases interpreting *AMC I* have done little to belie this assertion. The *API* court merely affirmed RCRA jurisdiction over hazardous materials reclaimed as part of a waste treatment plan, stating that its holding would have been different (i.e., the material would not be discarded under RCRA) if the waste in that matter was being treated as part of an ongoing manufacturing or industrial process within the generating industry—which is exactly the scenario that the Solid Waste Proposal is intended to apply to.[142] Finally, the *Ass'n of Battery Recyclers* court extracted what it considered to be the most crucial portion of the *AMC II* holding—the emphasis on the speculative nature of the recycling activity—while it simultaneously downplayed that court's reliance on an immediacy requirement for RCRA exclusion. In so doing, the *Ass'n of Battery Recyclers* court suggested that the existing speculative accumulation definition found in the RCRA regulations was the proper standard by which to judge whether or not material has been left untreated for so excessive a period of time as to be considered discarded. The Solid Waste Proposal incorporates this logic by suggesting the speculative accumulation standard as the measure by which the "continuous process" parameter of the new rule is to be measured.[143] Therefore, the broad strokes of the Solid Waste Proposal accurately reflect the state of the D.C. Circuit case law with regard to the definition of solid waste. The proposed regulation adheres to the fundamental holding of *AMC I* while acknowledging the modifications that the *Ass'n of Battery Recyclers* decision made to the language regarding the acceptable length of time that material may be accumulated before it is discarded.

As the EPA admits in the proposal's preamble, the only notable element of the Solid Waste Proposal that is not based upon existing case law is the possibility of an on-site recycling exclusion for integrated facilities.[144] For this element of the rule the EPA cites the general premise that materials that are reclaimed on-site, even if processed by multiple

142. *See* Am. Petroleum Inst. v. EPA, 906 F.2d 729, 741 (D.C. Cir. 1990).
143. *See* Revisions to the Definition of Solid Waste, *supra* note 15, at 61,596.
144. *Id.* at 61,575.

industries, are unlikely to be discarded because they would be closely managed by an entity with knowledge of both the production and reclamation procedures associated with the material.[145] The EPA also argues that such an exclusion would be free of most liability questions because the materials would not be subject to the risks of transport or would not otherwise change hands.[146] Although this exclusion would not follow from any D.C. Circuit holding, it is not contrary to any decision. The emphasis on the generating industry voiced in *AMC I* and its progeny could feasibly be construed rather broadly when the same generator operates multiple facilities on-site without violating the letter or spirit of that holding.

Thus, with the exception of a possible on-site recycling exclusion presented in a cursory manner apart from the bulk of the rule, the premise of the Solid Waste Proposal is comfortably in accordance with the existing case law. However, whether the proposed rule is practical or structurally sound for implementation and enforcement is a source of heated contention among various stakeholders.

C. Stakeholder Viewpoints

Reaction to the Solid Waste Proposal, as expected, has been extremely polarized. Industry is satisfied with the general rule, but not with its specifics. Environmental groups are voicing strong opposition to its purported deficiencies. The only common ground has been an expression of dissatisfaction with the proposal as it now stands.

By and large, comments from industry have been receptive to the new rule, but have urged for an even broader exclusion. This is of no surprise considering the EPA's summary of pre-proposal stakeholder comments. Prior to the rule, the EPA states in the preamble to the Solid Waste Proposal that most suggestions from industry focused on broadening the regulatory definition of "discarded material," with several prominent commentators such as the American Chemistry Council (ACC), the American Petroleum Institute (API), Chevron Texaco, and the International Precious Metals Institute (IPMI) calling for an outright removal of the term "recycled" from the definition of discarded materials.[147] This same sentiment can be seen in each trade groups' public comments to the rule and represents the long-held view of industry that the inclusion of recycling under the regulatory definition of

145. *Id.*
146. *Id.*
147. *Id.* at 61,563.

discard places unnecessary restrictions on industrial recycling efforts, and often discourages recycling altogether.[148]

Aside from objecting to the overall regulatory definition of discard, the most frequent reaction to the Solid Waste Proposal from industry has been a sentiment that the "within-industry" element to the exclusion is too narrow and is particularly unfair to integrated facilities that run several different product lines with different NAICS codes.[149] Even absent the integrated facilities argument, industry representatives claim that inter-industry practices offer the greatest opportunities for recycling and encourage market-driven economic partnerships between businesses.[150]

Environmental groups, illustrated by a public comment fronted by the Sierra Club, have called for the complete withdrawal of the Solid Waste Proposal.[151] The Sierra Club argues that the new exclusion will allow facilities that have no experience in hazardous waste recycling to accept unknown quantities of hazardous wastes and process them into potentially unsafe consumer products, while waste management facilities with recycling expertise will paradoxically be subject to greater regulation.[152] The Sierra Club also opposes the definition of "continuous process" as overly broad because of a loophole in the speculative accumulation definition—as long as seventy-five percent of the stored material is recycled *or* transferred within a calendar year, the accumulation period will begin anew.[153] The Sierra Club contends that generators will take advantage of this provision to transfer materials from locale to locale and thus store them indefinitely free of regulatory controls.[154] Finally, the Sierra Club is staunchly opposed to the Solid Waste Proposal's "one-time only" notification requirement for generators

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148. *See, e.g.*, AM. CHEMISTRY COUNCIL, RCRA-2002-0031-0093, COMMENT TO REVISIONS TO THE DEFINITION OF SOLID WASTE 11, *available at* http://docket.epa.gov/edkpub/do/EDKStaffCollectionDetailView?objectId=0b0007d4800f85a3.

149. *See, e.g.*, ALLIANCE OF AUTO. MFRS., RCRA-2002-0031-0169, COMMENT TO REVISIONS TO THE DEFINITION OF SOLID WASTE 7 *available at* http://docket.epa.gov/edkpub/do/EDKStaffCollectionDetailView?objectId=0b0007d4800f85a3.

150. *See, e.g.*, FORD MOTOR CO., RCRA-2002-0031-0157, COMMENT TO REVISIONS TO THE DEFINITION OF SOLID WASTE 2, *available at* http://docket.epa.gov/edkpub/do/EDKStaffCollectionDetailView?objectId=0b0007d4800f85a3.

151. *See* SIERRA CLUB, RCRA-2002-0031-0231, COMMENT TO REVISIONS TO THE DEFINITION OF SOLID WASTE 6, *available at* http://docket.epa.gov/edkpub/do/EDKStaffCollectionDetailView?objectId=0b0007d4800f85a3.

152. *See id.* at 7, 12.

153. *See id.* at 7; *see also* 40 C.F.R. § 261.1(8) (2004).

154. *See* SIERRA CLUB, RCRA-2002-0031-0231, COMMENT TO REVISIONS TO THE DEFINITION OF SOLID WASTE, *supra* note 151, at 7.

intending to use the exclusion.[155] The organization argues that this minor requirement, which entirely exempts generators, transporters, and treatment facilities from RCRA's manifest system, will allow wastes to be shipped without any mechanisms designed to protect against illegal dumping.[156]

In another forceful comment opposing the Solid Waste Proposal, the Environmental Technology Council (ETC), a national trade association representing the commercial hazardous waste recycling, treatment, and disposal industry, echoes many of the arguments raised by the Sierra Club.[157] The ETC (whose Subtitle C-compliant members stand to lose an estimated $270 million in revenue should the Solid Waste Proposal be codified) also sharply criticizes the EPA for not conducting an environmental impact study along with its proposed rule, in order to evaluate the potential risks of the measure.[158] It is the ETC's position that most of the hazardous wastes to be excluded under the proposed rule are already being reclaimed at RCRA-regulated commercial facilities, and that the Solid Waste Proposal encourages very little new recycling, and merely serves to place experienced waste management companies at a competitive disadvantage to a group of unqualified, unregulated treatment facilities.[159]

V. CONCLUSION

The Solid Waste Proposal as currently presented represents a fundamental conflict between two goals, both of which are intended to effectuate the fundamental RCRA objectives of protecting human health and the environment and conserving material and energy resources.[160] On one hand lies the aim of facilitating industrial recycling efforts. It is clear that fostering more widespread recycling within the industrial sector is one of the most effective methods of ensuring that recycling is practiced on the largest and most far-reaching scale possible. In an otherwise well-reasoned public comment, the Sierra Club offers a quizzical argument, by claiming that "there is nothing in the record—other than unsubstantiated statements from industries seeking relaxed

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155. *Id.* at 8.

156. *See id.* at 7-8.

157. *See* ENVTL. TECH. COUNCIL, RCRA-2002-0031-0119, COMMENT TO REVISIONS TO THE DEFINITION OF SOLID WASTE 1, *available at* http://docket.epa.gov/edkpub/do/EDKStaffCollectionDetailView?objectId=0b0007d4800f85a3.

158. Roeder, *supra* note 21, at 2783.

159. *See* Linda Roeder, *Hazardous Waste: Proposed EPA Recycling Exclusion Rule Draws Many Widely Divergent Comments*, 35 Env't Reporter (BNA) 595 (Mar. 19, 2004).

160. RCRA § 1003(a), 42 U.S.C. § 6902(a) (2000).

regulation—that demonstrates that existing regulation of hazardous wastes impedes legitimate recycling or that this rule is even necessary."[161] While the latter portion of that assertion may be correct, the former portion is patently false. Simply put, the EPA offers up in the Solid Waste Proposal an opportunity for industry to save money by largely avoiding the cost of regulatory compliance. To assert that the significant cost of manifesting, recordkeeping, and reporting does not impede some legitimate recycling efforts is unrealistic. However, in order for the Solid Waste Proposal to effectuate the recycling goals of RCRA, it is necessary to establish more than the fact that the proposal removes a disincentive to industrial recycling. For such a significant change to be prudent, the EPA must establish that the Solid Waste Proposal provides real positive incentives to recycle, and on this matter the agency has fallen far short of its burden.

In numerous portions of the preamble to the proposed rule, the EPA claims that the proposed rule "will encourage safe, beneficial recycling of hazardous secondary materials by industry."[162] Yet at no point does the agency ever explain exactly *how* the proposal will accomplish this lofty goal. The EPA instead appears to make an enormous leap in logic by assuming that industry might willingly increase its legitimate recycling efforts simply because the proposal would conceivably make it less expensive to do so, casting aside the assurance of current regulatory controls in the process.

This voluntary relinquishment of regulatory RCRA controls in the proposed exclusion conflicts with the stated goal of increased recycling. The objectives section of RCRA is explicit in its endorsement of well-structured controls for the handling of hazardous wastes, espousing the importance of "properly managed" hazardous waste, "properly conducted recycling and reuse," and the assurance that hazardous waste management practices are "conducted in a manner which protects human health and the environment."[163] By opting for an informal, one-time notification of participation in reclamation activities that qualify under the exclusion in lieu of the use of the extensive RCRA permitting and manifest system described above, the Solid Waste Proposal essentially eviscerates the force of the statute.

The EPA points out that the exclusion in the Solid Waste Proposal "would not affect the obligation of a generator to respond to and

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161. SIERRA CLUB, COMMENT TO REVISIONS TO THE DEFINITION OF SOLID WASTE, *supra* note 151, at 12.

162. Revisions to the Definition of Solid Waste, *supra* note 15, at 61,560.

163. RCRA § 1003(a)(4), 42 U.S.C. § 6902(a)(4).

remediate any releases of hazardous secondary material that may occur,"[164] but the absence of any "cradle to grave" tracking system for the materials clearly makes the assignment of ownership and responsibility a more daunting task should a quantity of harmful material be illegally discarded. Considering that materials destined for recycling were involved in one-third of the first sixty filings under RCRA's imminent and substantial endangerment authority and twenty of the first sites listed under CERCLA,[165] removing all permit and tracking requirements for secondary byproducts that may very well pose a risk to human health and the environment is far too grand a risk for a rule that at best offers the mere *possibility* of increased industrial recycling efforts.

In his Byproducts Beneficial Use Summit remarks discussed at the beginning of this Comment, Tom Dunne spoke of a need for a new EPA, an agency that would be "[m]ore of a collaborator, and less of a commander. More of a facilitator, and less of a regulator."[166] Dunne thinks this evolution in administrative approach is possible if it occurs simultaneously with a shift in business thought—not viewing waste disposal as a cost of business, but rather as an opportunity for reuse and efficiency, spurred on by the rising cost of raw materials.[167] Recognizing that the EPA cannot be a collaborator in every reuse project in the same way that it implemented command and control regulations for disposal, Dunne stressed that generators must be receptive to working with interested third parties such as universities and testing agencies.[168] He then offered the following as a key to making this type of relationship feasible:

> I realize that confidential business information and competitive advantage are always top priorities. But in the future those issues will need to be balanced with transparency and trust. In the eyes of the pubic, transparency is the key to legitimacy. In my long career, if I have learned anything, I have learned this: if you want regulation to go down, then transparency has to go up.[169]

In the proposed new collaborative age of the EPA, if companies are to display transparent business practices to the public with respect to their recycling practices, some older guidelines must persist. In particular, transparency is greatly facilitated by the RCRA permit and manifest

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164. Revisions to the Definition of Solid Waste, *supra* note 15, at 61,581.
165. Roeder, *supra* note 21, at 2783.
166. Dunne, *supra* note 1, at 6.
167. *See id.*
168. *Id.*
169. *Id.*

system that has been in place for the past two decades, which ensures that hazardous waste generators are formally held accountable for the handling of their secondary materials. In its current form,[170] the Solid Waste Proposal does not encourage transparency, but collusion. Though the proposed rule could have some positive effect of encouraging recycling by reducing the reclamation costs that generators would incur, the potential dangers of excluding a sizeable quantity of hazardous secondary materials from virtually all regulatory controls under RCRA is far too high a price to pay for such speculative gains.

170. Note that this rule is still very much a work in progress, with a final rule not anticipated until sometime in 2006. At the time of this writing, contractors hired by the EPA are conducting a study of recycling practices and their potential pitfalls in response to public comments submitted in reaction to the Solid Waste Proposal. Roeder, *supra* note 20, at 1943.