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March 6, 2009

VIA MAIL & VIA ELECTRONIC MAIL

Lisa Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building, Room 3000
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: ***Response to Sierra Club's Petition for Reconsideration of "Revisions to the Definition of Solid Waste" 73 Fed. Reg. 64,668 (October 30, 2008) and Request for Stay***

Dear Ms. Jackson:

On behalf of the Metals Industries Recycling Coalition ("MIRC"),[1] the American Chemistry Council ("ACC"), the Alliance of Automobile Manufacturers ("Auto Alliance"), the American Coke & Coal Chemicals Institute ("ACCCI"), the National Paint and Coatings Association ("NPCA"), the Treated Wood Council ("TWC"), the American Forest and Paper Association ("AF&PA"), and the Synthetic Organic Chemical Manufacturers Association ("SOCMA") (hereinafter, collectively referred to as "Industry Respondents"), we are pleased to submit the attached Response to Sierra Club's petition for reconsideration and repeal of the Environmental Protection Agency's ("EPA" or "the Agency") final rule entitled "Revisions to the Definition of Solid Waste" ("DSW Rule" or "the Rule") filed on January 29, 2009, under section 7004(a) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6974(a). Industry-Respondents respectfully request that EPA deny the Sierra Club's petition for reconsideration and repeal of the DSW Rule, and also deny Petitioner's request to stay implementation of the Rule. In addition, Industry-Respondents respectfully request that EPA, at its earliest convenience, schedule a meeting to confer regarding this Response.

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[1] MIRC is comprised of several metals companies and trade associations representing the interests of iron, steel, nickel, chromium, copper, and brass industries. MIRC members include: the American Iron & Steel Institute ("AISI"), the Copper and Brass Fabricator's Council, the Copper Development Association Inc. ("CDA"), the International Metals Reclamation Company, Inc. ("Inmetco"), the Specialty Steel Industry of North America ("SSINA"), and the Steel Manufacturers Association ("SMA").

The DSW Rule establishes conditions for exclusion from the definition of solid waste under RCRA Subtitle C of certain hazardous secondary materials that are being recycled by being reclaimed.[2] The Rule also sets forth "legitimacy criteria" for determining when a hazardous secondary material is being legitimately recycled for purposes of these exclusions. Most importantly, the DSW Rule implements the statutory concept of "discard" by removing from RCRA jurisdiction those secondary materials that are appropriately managed and legitimately recycled (*i.e.*, not discarded) and thus, not part of the nation's waste disposal problem. The four major pieces of the Final Rule are:

(1) An exclusion for hazardous secondary materials generated and reclaimed under the control of the generator ("generator-control exclusion");

(2) An exclusion for hazardous secondary materials transferred by the generator to another person or company for reclamation ("transfer-based exclusion");

(3) A petition process for case-specific non-waste determinations; and

(4) Criteria for determining legitimate recycling for purposes of these exclusions or non-waste determinations.

Exclusion under the Rule remains unavailable for materials that are: (1) inherently waste-like; (2) used in a manner constituting disposal or used to produce products that are applied to or placed on the land; (3) burned for energy recovery or used to produce a fuel; (4) subject to material-specific management conditions under § 261.4(a); (5) spent lead-acid batteries; or (6) listed K171 or K172 hazardous wastes.

Petitioner seeks to have EPA reconsider and repeal the DSW Rule and stay its implementation, claiming that the Rule is unlawful. Specifically, Petitioner argues that the Rule: increases threats to public health and the environment and the likelihood of greater harm; does not account for the instability of recycling markets or current financial conditions; will not substantially increase hazardous waste recycling; does not provide adequate economic benefits to justify the risks; is arbitrary, capricious, an abuse of discretion, and not in accordance with law due to the alleged vagueness of certain terms; and violates Executive Order 12,898.

Contrary to each of Petitioner's allegations, the DSW Rule is a thoughtful and lawful rulemaking action supported by years of effort by Agency staff that falls well within the authority granted to EPA pursuant to RCRA to promulgate regulations that encourage resource conservation and recovery. Moreover, the Rule comports with a number of court rulings over the past two decades that have struck down EPA rulemakings for exceeding its authority " . . . in seeking to bring materials that are not discarded or otherwise disposed of within the compass of 'waste'."[3] The DSW Rule properly recognizes the limits on EPA's jurisdiction over secondary materials that are recycled by being reclaimed under management conditions that prevent them from becoming

[2] The exclusions under the DSW Rule are codified at 40 C.F.R. § 261.4(a).

[3] *See* 73 Fed. Reg. at 64,671 (*citing American Mining Congress* 824 F.2d 1177 (D.C. Cir. 1987)).

part of the waste disposal problem. In particular, the protections and controls imposed on hazardous secondary materials recycling operations (including conditions placed on generators, reclamation facilities, transporters, and intermediate facilities) are reasonably calculated based on the extensive administrative record to minimize any potential risks to human health and the environment associated with future reclamation activities conducted pursuant to the Rule.

The following is a brief summary of Industry-Respondent's major arguments in support of the DSW Rule:

- The Rule comports with the line long of court cases construing the scope of EPA's jurisdiction to regulate solid waste under RCRA Subtitle C. Indeed, Sierra Club effectively requests that the Agency ignore judicial precedent on this issue and promulgate a Rule that would violate the scope of the Agency's authority to regulate solid waste under RCRA, as codified by Congress.

- By encouraging the recovery, recycling, and reuse of valuable resources, and discouraging disposal while protecting public health and the environment, the Rule advances the objectives of RCRA.

- The conditions imposed under the Rule on the generators, reclaimers, intermediate facilities, and transporters seeking to avail themselves of the Rule's exclusions are significant. These conditions, entirely ignored by Sierra Club, are based on the evidence in the record, and are designed to ensure that hazardous secondary materials reclaimed under the Rule's exclusions, are done so legitimately while protecting public health and the environment from potential hazards associated with such hazardous secondary material recycling. Along will the other conditions, the "reasonable efforts" and "financial assurance" requirements in particular, will prevent, if not entirely eliminate, the types of mismanagement and abandonment EPA identified during the rulemaking as having contributed to environmental harm at some recycling facilities.

- EPA has taken over fifteen years to promulgate the DSW Rule in its final form, receiving substantial input each step of the way from various stakeholders, including industry and environmental groups. This was not a midnight rule as Sierra Club asserts. The administrative record is voluminous, and the Rule is a rational outgrowth of the evidence in the record.

- The Rule will provide significant economic benefits for struggling industries in this country.

- The DSW Rule is a lawful regulation, promulgated in accordance with EPA's obligations under the Administrative Procedure Act, as that act has been construed by the courts, and other administrative rulemaking authority, and should be upheld.

Each one of Industry-Respondent's arguments, as summarized above, is more fully explained below.

A. The DSW Rule Conforms to the Scope of EPA's Jurisdiction Over Solid Waste Under RCRA

By basing the Rule on the concept of "discard," EPA appropriately respects the scope of its RCRA jurisdiction over solid waste, as delimited by the statute and the litany of cases addressing this issue. EPA's final Rule, and its decision to focus on "discard" follows a long line of cases, which discuss EPA's RCRA jurisdiction over solid waste, including *Association of Battery Recyclers v. EPA* ("*ABR*"),[4] and the D.C. Circuit's earlier decisions in *American Mining Congress v. EPA* ("*AMC I*"),[5] *American Petroleum Institute v. EPA* ("*API*"),[6] *American Mining Congress v. EPA* ("*AMC II*"),[7] and *Safe Food and Fertilizer v. EPA* ("*Safe Food and Fertilizer*").[8] Although these cases, particularly *AMC I* and *ABR*, dealt with whether EPA has RCRA jurisdiction over materials recycled in a "continuous industrial process" within the "generating industry," the holdings of those cases were not so limited. Rather, the common thread of the cases is that Congress limited EPA's RCRA authority to materials that are "discarded" by being disposed of, abandoned, or thrown away, and, as the *ABR* court specifically stated, materials destined for recycling are "plainly not in that category."[9]

The *AMC I* case was the first time the D.C. Circuit considered EPA's RCRA jurisdiction over recyclable materials. At issue was whether EPA has RCRA authority to regulate materials reused or recycled onsite within an industry's ongoing production process. Answering this question in the negative, the court held that RCRA "reveals clear Congressional intent to extend EPA's authority only to materials that are truly discarded, disposed of, thrown away, or abandoned," and precluded the Agency from asserting RCRA jurisdiction over materials that had "not yet become part of the waste disposal problem."[10]

AMC II, the next in the line of D.C. Circuit cases on this issue, remained loyal to *AMC I*'s core message—that EPA's RCRA jurisdiction extends only to "discarded" materials. At issue in *AMC II* was whether EPA unlawfully asserted RCRA jurisdiction over three mining waste streams that were typically managed in surface impoundments and had only some potential to be recycled in the future. The court found that the materials at issue in the case had indeed been discarded and that potential future recycling was not enough to escape RCRA. Importantly, *AMC II* did not contract the holding of *AMC I*, and had the facts been different, and the materials routinely recycled, the court's holding likely would have mirrored *AMC I*.

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[4] 208 F.3d 1047 (D.C. Cir. 2000).

[5] 824 F.2d 1177 (D.C. Cir. 1987).

[6] 906 F.2d 729 (D.C. Cir. 1990).

[7] 907 F.2d 1179 (D.C. Cir. 1990).

[8] 350 F.3d 1263 (D.C. Cir. 2003).

[9] *ABR*, 208 F.3d at 1053.

[10] *AMC I*, 824, F.2d at 1186.

Re-affirming its focus on "discard," in 2000 the D.C. Circuit in *ABR* vacated provisions of the definition of solid waste that expanded EPA's jurisdiction over characteristic by-products and sludges destined for reclamation. There, the court rejected EPA's argument that it could treat secondary materials as discarded unless the reclamation was continuous, pointing to *AMC I*'s conclusion that "Congress 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."[11] Lack of continuity in the recycling process is not necessarily indicative of discard.

In the most recent case on this topic, *Safe Food & Fertilizer*, the court upheld EPA's determination that RCRA Subtitle C does not apply to recycled materials used to make zinc fertilizers, or to the fertilizers themselves, provided they meet certain management and reporting conditions and concentrations of specified substances are below certain limits. The zinc fertilizer rule was challenged on the grounds that EPA lacked jurisdiction to conditionally exclude these materials. Specifically, the petitioner in *Safe Food & Fertilizer* relied on *ABR* to claim that material transferred to another firm or industry for recycling must be considered "discarded."[12] The court disagreed, stating that while its previous opinions suggest that materials destined for future recycling by another industry may be considered "discarded" if deemed to be part of the waste disposal problem, it "had never said that RCRA compels the conclusion that material destined for recycling in another industry is necessarily 'discarded.'"[13] Another central tenet of the court's holding was its acceptance of EPA's reasoning that "valuable" recycled products, such as zinc fertilizer, could be excluded from RCRA solid waste regulation because they would be managed in a way that is inconsistent with discard.

With regard to the materials eligible for exclusion under the DSW Rule, the Rule properly addresses the discard issue in a manner consistent with this long line of cases. For the specifically excluded materials, EPA has correctly defined its authority to regulate solid waste by focusing on the concept of "discard," recognizing that valuable, legitimately recycled, secondary materials that are not discarded, are not part of the waste disposal problem, and therefore, fall outside the purview of EPA's jurisdiction over solid waste under RCRA Subtitle C. And, of course, "[m]aterials that are not solid wastes are not subject to regulation as hazardous wastes under RCRA Subtitle C." 73 Fed. Reg. at 64,671. Accordingly, the Rule excludes from regulation under Subtitle C those hazardous secondary materials being legitimately reclaimed and not discarded and imposes a set of "regulatory factors" on those seeking the exclusion to ensure that these materials are, in fact, being legitimately reclaimed.[14]

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[11] *ABR*, 208 F.3d at 1052.

[12] *See* 67 Fed. Reg. 48393 (July 24, 2002).

[13] *Safe Food & Fertilizer*, 350 F.3d at 1268.

[14] EPA routinely places qualifying conditions similar to the "regulatory factors" in the DSW Rule on materials excluded under RCRA § 261.4. For example, under 40 C.F.R. § 261.4(a)(9), EPA excludes spent wood preserving solutions that have been reclaimed and are reused for their original intended purposes from regulation as solid waste provided certain conditions are met, including management to prevent release to either land or groundwater or both, a one-time notification to the appropriate agency (EPA or state) stating that the facility intends to use the exclusion, and a requirement that any unit used to manage the solutions can

As the statute and judicial decisions discussed above make clear, EPA does not have RCRA jurisdiction over hazardous secondary materials that are being legitimately reclaimed, are not being discarded, and thus are not part of the waste disposal problem RCRA seeks to ameliorate. Seen in this light, the DSW Rule may actually be mandated by the language of RCRA. By seeking to have EPA retain RCRA jurisdiction over material that is never "discarded," Petitioner is requesting EPA to promulgate a Rule that would extend the Agency's RCRA authority beyond the bounds set by Congress.

B. The DSW Rule is Precisely the Type of Regulation Congress Intended EPA to Enact Under RCRA

Petitioner narrowly, and incorrectly, focuses on only one of RCRA's objectives in arguing that RCRA requires EPA to adopt only "preventative" [sic] measures. *See* Sierra Club's Petition for Reconsideration of Revisions to the Definition of Solid Waste, 1-9 at 2 (Jan. 29, 2009) ("Sierra Club's Petition"). Contrary to Petitioner's myopic argument, the DSW Rule advances several of RCRA's statutory objectives. Congress created RCRA as a "cradle-to-grave" statute, designed to ensure that waste generated in this country does not harm the environment. *See Resource Conservation and Recovery Act of 1976*, P.L. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992). To this end, Congress intended RCRA to serve several objectives, including the protection of public health and the environment and the encouragement of resource conservation and recovery through materials recovery, recycling, and reuse. *See* 42 U.S.C. § 6902(a). For its part, EPA properly recognized these objectives in laying out the statutory authority for the DSW Rule. *See* 73 Fed. Reg. at 64,688 (looking no further than the name of the statute in recognition that Congress sought to encourage resource conservation). Indeed, as EPA notes, the DSW rule is consistent with the Agency's longstanding policy of encouraging recovery, recycling, and reuse of valuable resources as an alternative to disposal. *Id.* This policy has stood the test of time because it meets the multiple purposes Congress codified in RCRA—*i.e.*, protecting public health and the environment and encouraging resource conservation and recovery.

The DSW Rule meets all of RCRA's objectives, including encouraging the recovery, recycling, and reuse of valuable resources, and discouraging disposal, while protecting public health and the environment. The Rule imposes numerous conditions ("regulatory factors") on manufacturers, transporters, intermediate facilities, and reclamation facilities involved in the reclamation of certain hazardous secondary materials.[15] These conditions, which go beyond those EPA has imposed as conditions for most earlier adopted exclusions in 40 C.F.R. § 261.4, ensure that recycling conducted under the new DSW Rule will not result in the kinds of damage incidents analyzed in EPA's *2007 Environmental Assessment*. Petitioner ignores these conditions in arguing that the Rule lays the groundwork for the kinds of environmental damage described in the *2007*

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be visually determined to prevent releases. *See also* 40 C.F.R. § 261.4(a)(17) (allowing for certain spent materials to be excluded provided various conditions are met including, no speculative accumulation, storage in tanks and containers meeting minimum integrity requirements, and a notification requirement).

[15] Under the Final Rule, "hazardous secondary materials" are defined as those that which would be classified as hazardous waste if discarded. *See* 73 Fed. Reg. at 64,669.

Environmental Assessment. The picture of widespread environmental damage that Petitioner attempts to paint based on the *2007 Environmental Assessment*, therefore, has nothing to do with the Rule EPA actually adopted.[16] Indeed, the DSW Rule was specifically designed to avoid the perceived shortcomings associated with the environmental damage incidents described in the *2007 Environmental Assessment*. As a result, hazardous secondary materials being reclaimed under the DSW Rule will be managed in a manner that is fully protective of the environment. *See Regulatory Impact Analysis*, Sept. 25, 2008, at 10 (hereinafter referred to as the "*RIA*").

The Rule also encourages the recovery and conservation of secondary materials, thereby reducing disposal volume. *See* 42 U.S.C. § 6903(a)(6) (one of the many objectives of RCRA is to "minimize[e] the generation of hazardous waste and the land disposal of hazardous waste . . . ."). In fulfillment of RCRA's objective to "encourage" the recovery, recycling, and reuse of hazardous materials, EPA projects that an additional 23,000 tons per year of potentially recoverable materials contained in metals, solvents and other chemicals may now be recycled rather than being disposed. *See RIA*, at 10. In addition, EPA estimates the Rule will conserve over 900 tons per year of virgin materials, at a market value of $ 4.7 million dollars. *See RIA*, at 10. By imposing environmentally-protective conditions, encouraging additional recovery, conserving virgin material, and reducing disposal volumes, the Rule makes significant strides in advancing the purposes of RCRA.

C. EPA's Final Rule Revising the Definition of Solid Waste is Over Fifteen Years in the Making and is Anything but "Rushed"

It simply belies the record to state, as Petitioner does, that EPA rushed to finalize this Rule. As the Agency is well aware, efforts to revise the definition of solid waste to remove from RCRA Subtitle C jurisdiction hazardous secondary materials that are being legitimately reclaimed began in earnest in 1993. For over fifteen years, industry stakeholders, environmental groups, including Petitioner, and the Agency have been engaged in developing this Rule. During this time, as noted above, numerous court rulings have addressed the scope of EPA's RCRA jurisdiction over solid

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[16] Petitioner states in its petition for reconsideration that "a large majority of the damage cases occurred at facilities that were already exempted . . . under . . . 40 C.F.R. § 261.4." *See* Sierra Club's Petition at 3. Petitioner does not indicate the methodology for arriving at this conclusion. In its comments, Sierra Club similarly states that 130 of the 208 damage sites involved recycling activities currently exempted in 40 C.F.R. Part 261. *See* Sierra Club's 2007 Comments at 8. Also in its 2007 comments, Sierra Club provides an appendix (Appendix A) purporting to show which of the facilities of the 208 damage cases were operating under a Part 261 exemption. It is unclear how Petitioner arrived at these numbers. Neither in its petition for reconsideration, nor its comments does Petitioner provide an explanation. For its part, EPA indicates that the scope of its damage case assessment included facilities operating under existing exclusions, but the Agency does not indicate which of the sites fell into this category, or in any way attribute any percentage of the damage sites to excluded facilities. *See 2007 Environmental Assessment* at 4. To attempt to understand Petitioner's conclusions, Industry-Respondents ran several damage case sites which Petitioner claims to have been operating under an existing exclusion through EPA's CERCLIS, ECHO, and EnviroFacts databases. None of the results, under any of these databases, indicates whether these sites ever operated under a RCRA Part 261 exclusion. Further, it is unclear to Industry-Respondents how it may be possible to make such a determination. As such, we believe that Petitioner's conclusion regarding damage sites operating under existing RCRA exclusions is not substantiated in the record.

waste. In response, the Agency has wrestled with the scope of its RCRA jurisdiction, and in conjunction with this rulemaking, issued two proposed rules, each accompanied by full public notice and comment procedures, and after due deliberation promulgated the DSW Rule at issue in this petition.

Throughout this lengthy rulemaking process, EPA has made significant modifications to the Rule as originally proposed. Due in large part to widespread dissatisfaction with the 2003 proposed rule and its narrow focus on excluding only those hazardous secondary materials generated and reclaimed within the same industry, EPA undertook a massive effort to reformulate the Rule, ultimately resulting in the 2007 proposal, which appropriately focused on the concept of "discard." Specifically, after the 2003 proposal, EPA decided that additional information regarding the hazardous secondary material recycling industry was needed. The Agency developed a "Recycling Studies" approach (*i.e.*, the damage case assessments), which sought to examine best industry practices as well as determine the types of sites where hazardous secondary materials recycling had resulted in environmental damage. From start to finish, this effort took the Agency over three years to complete. In the end, EPA developed a comprehensive study that included a detailed review of how recycling activities at 208 damage sites caused environmental harm. In EPA's words, the sites were chosen to fulfill the goal of "identify[ing] and characterize[ing] environmental problems that have been attributed to some type of hazardous secondary material recycling activity that are relevant for the purpose of this rulemaking effort." 73 Fed. Reg. at 64,673. Following publication of the 2007 proposal, the Agency added ten additional damages sites (and updated information in three) to address concerns raised about intermediate facilities.

The results from the 218 damage cases suggest clear patterns regarding how the recycling of hazardous secondary materials has, in the past, resulted in environmental harm. EPA concluded that the damages were overwhelmingly reducible to three causes: mismanagement, improper disposal, and abandonment. The principles learned from these case studies provided EPA with substantial and sufficient information about how best to ensure that hazardous secondary material recycling does not harm the environment. A more exhaustive study would have been largely duplicative (if not impossible) and was not necessary to inform the rulemaking.

While perhaps not "exhaustive" in the sense that EPA did not review every site in the country where hazardous wastes or hazardous secondary materials may have contributed to environmental damage, the study was careful, comprehensive, and most importantly tailored to the needs of the Rule—thus, "provid[ing] information to the Agency that has helped [it] determine what types of controls would be appropriate for hazardous secondary materials sent for reclamation to determine that they are handled as commodities rather than wastes." 73 Fed. Reg. at 64,673. Petitioner has accused the Agency of essentially burying its head in the sand by conducting a last-minute, quick and easy, non-exhaustive damage assessment in a rush to pass a midnight rule. Over fifteen years in the making, the extensive history and rulemaking docket for this Rule overwhelmingly demonstrate that nothing could be further from the truth. The record underlying this rulemaking, with which the Agency is intimately familiar, belies Petitioner's claim that EPA acted with undue haste.

D. The DSW Rule Imposes Significant Controls on the Hazardous Secondary Material Recycling Industry That Are Fully Protective of the Environment

To read the Sierra Club Petition, one would never guess that the DSW Rule imposes a series of stringent conditions designed to ensure that material excluded from the definition of solid waste is managed in an environmentally protective manner. This fundamental point, which Petitioner entirely ignores, makes Petitioner's arguments based on the *2007 Environmental Assessment* largely irrelevant—because to avail themselves of any of the DSW Rule's exclusions from regulation under Subtitle C of RCRA, generators and reclaimers (as well as transporters and intermediate facilities where applicable) will have to comply with requirements and conditions that are at least as protective of the environment as existing RCRA exclusions (and more protective than many of them). As Petitioner admits, of the 218 total damage cases (the original 208 sites, plus 10 additional sites), 209 (over 95 percent) occurred at sites which had almost none of the controls this Rule imposes. *See* Sierra Club Petition, at 3. Virtually none of these 209 facilities likely had been audited by generators, procured financial assurance, or were subject to the notice, recordkeeping, tracking, and reporting requirements contained in the Rule. Under the DSW Rule, in order to qualify for the transfer-based exclusion, each generator and reclaimer (and each intermediate facility where applicable) must comply with the Rule's requirements. As noted earlier, these controls will help ensure that the approximately 1.5 million tons/year (approximately 3.5 percent of all RCRA hazardous waste)[17] potentially affected by the Rule will be managed in a manner protective of the environment. *See RIA*, at 10.

The significance of this point should not be understated. For example, of the 208 damage cases that comprise the core of the Recycling Study, 74 percent of the environmental harm was primarily the result of mismanagement (both of recyclables and residuals) and 14 percent was caused primarily by abandonment (although, abandonment was a contributing factor in many). *See 2007 Environmental Assessment*, at 8. In recognition of these facts, the DSW Rule requires that hazardous secondary materials subject to this Rule be properly contained (or managed in a manner that is at least as protective as an analogous raw material), that materials not be speculatively accumulated, that generators perform comprehensive due diligence on reclamation facilities that do not have RCRA Part B permits, and that each reclamation facility (or intermediate facility where appropriate) obtain full RCRA financial assurance, among other requirements. Under the generator-control exclusion, the Rule requires generators to certify that they retain responsibility for materials recycled off-site by facilities that they also control, or by tolling counterparties with whom they have written contracts.

The financial assurance requirement is particularly noteworthy because it vastly reduces, if not eliminates, the risk that hazardous secondary materials will be abandoned or mismanaged at the reclamation sites to which they are sent. EPA added full RCRA financial assurance to the DSW Rule presumably to address the fact that, as Petitioner notes in its comments to the 2007 Supplemental Proposal, of the 101 CERCLA sites among the damage cases, 82 percent required at least some public funds for cleanup. *See* Comments from the Sierra Club to EPA's 2007 Supplemental Proposed Rule, 1-55 at 9 (June 25, 2007) ("Sierra Club's 2007 Comments"). The

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[17] *See RIA*, at 9.

robust financial assurance requirements under this Rule will significantly decrease, if not outright eliminate, the use of public funds to clean up any potential damage resulting from hazardous secondary material reclamation activities taking place under the auspices of the DSW Rule. The notice, recordkeeping, and reporting requirements of the Rule -- which allow EPA and the states to track the excluded material and know how it is being managed -- also will greatly reduce, if not entirely eliminate, the potential for mismanagement and abandonment.

In addition to the conditions discussed above, the DSW Rule provides another layer of environmental protection. Each facility seeking to benefit from the new exclusions must also certify that the recycling is legitimate according to the "legitimacy criteria" set forth in the Rule. The legitimacy criteria under the DSW Rule have two basic parts. There are two mandatory requirements that the secondary material being recycled: (1) provide a useful contribution to the recycling process or a product of the process; and (2) that the product of the recycling process be valuable (together the "core of legitimacy"). The legitimacy criteria also include two non-mandatory "factors" that must be considered in making a legitimacy determination. These non-mandatory factors require: (1) a consideration of whether the material is managed as a valuable commodity; and (2) a consideration of the presence of hazardous constituents in the product of the recycling activity to guard against there being "toxics along for the ride."

By requiring that each facility seeking to avail itself of one of the Rule's exclusions demonstrate that its recycling operations are legitimate, the Agency has ensured that no "sham" recycling will take place. The legitimacy criteria, in addition to the conditions discussed above, specifically tailored to ameliorate problems identified in the damage case assessments, impose multiple layers of environmental protection on those facilities seeking to benefit from the exclusions. Indeed, the conditions for exclusion under the DSW Rule are analogous to those conditions required for a RCRA Part B permit (see below, section F, n. 21). In sum, EPA has ensured, to the extent possible within the scope of its RCRA jurisdiction, that the DSW Rule is as protective of the environment as possible.

E. Contrary to Petitioner's Claims, the Rule Achieves Significant Economic and Conservation Benefits While Preventing Discard by Financially Unstable Entities

1. The Reasonable Efforts and Financial Assurance Requirements Ensure that Reclamation Facilities are Financially Responsible and Properly Managed

The every-three year "reasonable efforts" condition, which is essentially an environmental due diligence requirement placed on all generators sending hazardous secondary materials to reclamation facilities that do not manage the excluded material under a RCRA Part B permit or interim status, is a significant, environmentally-protective regulatory control. As the Rule states, this requirement reflects the best practices within the industry and ensures that "hazardous secondary materials are properly managed and reclaimed, and not discarded." 73 Fed. Reg. at 64,686. To comply with the "reasonable efforts" requirements, EPA requires at a minimum that each generator seeking to avail itself of the transfer-based exclusion answer the following five questions affirmatively:

(1) Does the available information indicate that the reclamation process is legitimate?

(2) Does publicly available information indicate that the reclamation facility (and any intermediate facility) notified the appropriate authorities of hazardous secondary material reclamation activities under the notification provisions of 40 C.F.R. § 260.42, and that the financial assurance condition is satisfied?

(3) Does publicly available information indicate that the reclamation facility (and any intermediate facility) has not had any formal enforcement actions taken against it in the previous three years for RCRA hazardous waste violations and has not been classified as a significant non-complier[18] under RCRA Subtitle C? If there has been a formal enforcement action taken, is there credible evidence that the facility will manage the hazardous secondary material properly?

(4) Does the available information indicate that the reclamation facility has the equipment and trained personnel to safely recycle the material?; and

(5) If residuals are generated from the reclamation, does the facility have the necessary permits? If not, does the facility have a contract with an appropriately permitted facility to dispose of the residuals? If not, does the generator have credible evidence that the residuals will be managed in a manner that is protective of human health and the environment?

73 Fed. Reg. 64,686 through 64,690, and 64,761. As stated above, these questions together represent a minimum standard. Good business practices and the desire to avoid potential future liability or enforcement will often require more detailed reasonable efforts such as site-specific audits or detailed examinations of the company's financial and technical capabilities.

While the Rule requires generators to perform due diligence reviews initially, and every three years thereafter, the reality is that most reclamation facilities are large commercial operations with dozens, if not hundreds, of customers. These customers will conduct due diligence reviews independently, and at different times. *See RIA*, at 52 (contemplating that the Rule affects recycling either through off-site commercial recycling or investment in on-site recycling). Therefore, each off-site reclamation facility will, essentially, be subject to frequent, and ongoing due diligence reviews. Practically, this means that the comprehensive due diligence requirements will cover the overwhelming majority of recycling that takes place under this Rule (approximately 94 percent of the damage cases were off-site recyclers – *See* 73 Fed. Reg. at 64,677).

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[18] A significant non-complier is defined under EPA's *Hazardous Waste Civil Enforcement Response Policy* and applies to violators that have caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents; are recalcitrant violators; or deviate substantially from the terms of a permit, order, agreement, or from the RCRA statutory or regulatory requirements. Available at http://www.epa.gov/compliance/resources/policies/civil/rcra/finalerp1203.pdf.

In addition, the financial assurance requirements are so substantial that the environmental risk associated with abandonment at commercial reclamation facilities will be effectively neutralized. As the Agency stated:

> [B]y obtaining financial assurance, the reclamation or intermediate facility is making a direct demonstration that it will not abandon the hazardous secondary materials, it will properly decontaminate equipment, and it will clean up any unacceptable releases, even if events beyond its control make its operations uneconomical. Moreover, financial assurance also addresses the issue of the correlation of the financial health of a reclamation or intermediate facility with the absence of discard. In essence, financial assurance will help demonstrate that the reclamation or intermediate facility owner/operators who would operate under the terms of this exclusion are financially sound and will not discard the hazardous secondary materials.

73 Fed. Reg. at 64,692 (emphasis added).

As for off-site reclamation under the generator-control exclusion, the Rule requires the generator to acknowledge full responsibility for the safe management of the hazardous secondary material at the reclamation site. This retention of responsibility is a powerful incentive to ensure that the generator polices the reclamation process. Indeed, the concept of "fly-by-night" operators is irrelevant under the generator-control exclusion, as the reclaiming entity will be either (i) the generator itself, or (ii) a party that the generator has chosen to conduct a manufacturing process on its behalf; either way, the generator remains liable.

The reasonable efforts and financial assurance requirements ensure that any commercial reclamation facility operating under the transfer-based exclusion, is a viable, financially responsible, environmentally-protective entity. Petitioners claim that the Rule incentivizes discard by allowing "fly-by-night" operations simply ignores the safeguards put into place, and the practical reality of how the Rule works.

2. Consistent With RCRA, the DSW Rule Encourages Resource Conservation and Recovery

Consistent with its statutory charge, EPA has promulgated a rule that encourages the recovery, recycling, and reuse of hazardous secondary materials and will result in additional hazardous secondary material recycling. *See* 42 U.S.C. § 6902(a)(6) (RCRA objectives include "encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment."). The DSW Rule is not fatally flawed (as Petitioner asserts) for failure to "substantially increase" hazardous waste recycling under RCRA. Rather, EPA's objective as set forth under RCRA is to "encourage" hazardous waste recycling. *See id.* The DSW Rule fulfills this statutory objective.

In addition, as MIRC noted in its comments to the 2007 proposal, the Agency's estimation of additional hazardous waste recycling generated by this rule is likely low. In its 2007 proposal,

the Agency estimated that 60,000 tons per year of hazardous secondary materials would switch from disposal to recycling as a result of the Rule. *See* 72 Fed. Reg. 14,172, 14,210 (Mar. 26, 2007). MIRC, in its comments indicated that it believed this number was low as one of its members, SMA, alone estimated that an additional 25 to 75 thousand tons per year of steelmaking baghouse dust would immediately be diverted from disposal to recycle as a result of the Rule.[19] *See* MIRC Comments, at 17. In the final Rule, EPA reduced the volume of projected switchover by more than two-thirds, estimating that 23,000 tons per year of hazardous waste would switch from disposal to recycling. *See RIA*, at 10. While the RIA does not contain a reason for this downward adjustment, the preamble states that adjustments in regulatory impact are the results of enhancements made to the methodology of the RIA. *See* 73 Fed. Reg. at 64,754. In the RIA's sensitivity analysis #10, EPA indicates that depending on market fluctuations and corresponding affects on same-company facilities sharing off-site captive recycling facilities, up to 327,000 tons per year of hazardous waste may switch from disposal to recycling under the Rule. *See RIA*, at 152. Industry-Respondents believe the results of sensitivity analysis #10 are reflective of the potential for this rule to significantly impact additional recycling. Based on the experience of SMA members alone, and Industry-Respondent's members more generally, Industry-Respondents believe EPA has substantially underestimated the volume of hazardous materials that will switch from disposal to recycling under the Rule. Nonetheless, even if 23,000 tons per year are legitimately and beneficially recycled rather than discarded, the Rule will have achieved a significant victory in terms of protecting the environment from unnecessary disposal, and EPA will have advanced the RCRA objective that the Agency "encourage" resource conservation and recovery.

3. The Economic Benefits of the Rule are More Substantial Than Petitioner States

The Rule is expected to result in an economic benefit of approximately $95 million per year. Contrary to Petitioner's statement, these benefits are not insignificant. Ninety-five million dollars per year in benefits is a substantial amount. The true value may be even higher. EPA indicates that changing the assumptions about the possibility of same-company facilities sharing off-site captive recycling facilities may result in an economic impact of the Rule of up to $333 million per year. And these monetary benefits are in addition to the resource conservation benefits, and the diversion of materials otherwise disposed, realized under the Rule.

Petitioner also asserts that the DSW Rule would result in "dramatic cutbacks and job losses for hazardous waste recyclers." *See* Sierra Club's Petition at 5. Industry-Respondents point the Agency to the comments of the Environmental Technology Council ("ETC"), the national trade association representing firms that comprise the commercial hazardous waste recycling industry. In

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[19] For example, on January 17, 2009, Steel Dust Recycling, LLC ("SDR"), and Zinc Nacional SA, announced plans to build a Waelz Kiln facility in central Texas that will be capable of recycling more than 100,000 tons of electric arc furnace baghouse dust per year. SDR recently built a similar plant in Milport, Alabama, launching operations in June, 2008. Together, these two facilities bring a new capacity of 220,000 tons/year of baghouse dust recycling to the market. The cost savings under the Rule will allow these facilities to operate close to, or at, capacity, thereby diverting more baghouse dust from disposal to reclamation. Further, SDR's operations demonstrate that even under current economic conditions, hazardous secondary materials recycling, such as baghouse dust recycling, provides substantial positive economic benefits.

these comments, ETC suggested a variety of improvements to the proposed rule, but overwhelmingly supported the Agency's effort to promulgate the DSW Rule. *See* ETC Comments on the 2007 Supplemental Proposed Rule, 1-35 at 35 (June 25, 2007) ("ETC urges EPA to promulgate a final rule on the definition of solid waste with the revisions and improvements presented in these comments.").

F. The DSW Rule is a Lawful Regulation and Should be Upheld

Petitioner argues that the DSW Rule is arbitrary and capricious and amounts to an abuse of EPA's discretion because it does not define "contained" or "significant release," two terms used in the Rule. Since Petitioner will not conduct any operations subject to the Rule, its standing to even raise this issue is questionable. In any event, these terms are fully explained in the Rule's preamble, and EPA is not required to define every operative term in a regulation. EPA is merely required to conduct reasoned rulemaking in light of the evidence in the record. The controlling case provides that:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of an agency expertise.

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983); *see also Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983); *U.S. Telecom Association v. FCC*, 400 F.3d 29 (D.C. Cir. 2005) (an agency regulation need not address every conceivable question (*citing Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 96 (1995)).

The preamble to the DSW Rule does, in fact, define "contained." Consistent with RCRA's objective to protect public health and the environment, the Agency defines "contained" to mean a material "placed in a unit that controls the movement of the hazardous secondary material out of the unit and into the environment" (*i.e.*, a unit that prevents releases). 73 Fed. Reg. at 64,681. Recognizing that both mismanagement and abandonment were the two major causes of environmental harm at the 218 background damage sites, EPA's treatment of "contained" in this portion of the DSW Rule responds to an important aspect of the problem and is a direct result of the evidence before the Agency. *See State Farm, supra.* Thus, EPA's use of the term "contained" is wholly appropriate under the purposes of RCRA as set forth by Congress and under historic judicial precedent.

In addition, the concept of "contained" as set forth in the DSW Rule is entirely consistent with past Agency actions regarding RCRA § 261.4 exclusions. Indeed, Petitioner in its comments to the 2007 proposed supplemental rule admits that EPA often imposes containment requirements for RCRA § 261.4(a) exclusions while only defining generally what containment should mean. *See* Sierra Club's 2007 Comments at 31 (noting that EPA requires containment under 40 C.F.R.

§ 261.4(a)(9), (10), (11), (12)(i), (14), (18), (19), and (20) and provides no further definition beyond either a prohibition on "land disposal" or a requirement to "prevent release").

More importantly, however, EPA justifies its reasons for not formally defining the term "contained" in its response to comments on this issue:

> Such detailed measures are unnecessary for hazardous secondary materials that are handled as valuable products that are destined for recycling. Under [the DSW Rule] regulatory authorities can determine whether such materials in a unit are contained by considering all such site-specific circumstances. For example, local conditions can greatly affect whether hazardous secondary materials managed in a surface impoundment are likely to leak and cause damage, and therefore, whether the unit could be considered contained. Similarly, facilities may employ such measures as liners, leak detection measures, inventory control and tracking, control of releases, or monitoring and inspections. Any or all of these practices may be used to determine whether the hazardous secondary materials are contained in the unit.

73 Fed. Reg. at 64,729 (applying similar logic to non-land based units).

Essentially, it would be impractical, perhaps impossible, for EPA to try to define "contained" so as to encompass every conceivable type of containment required for each secondary material stream at every facility affected by the Rule. Moreover, EPA, in the Rule, references existing performance standards and other requirements for managing hazardous materials and for the reasons stated above, chose not to add additional requirements. *See* 40 C.F.R. § 261.4; 40 C.F.R. Part 265. Under both these existing performance standards and the approach outlined in the DSW Rule (*i.e.*, containment is evaluated based upon the local, facility-specific conditions preventing releases to the environment), EPA has delineated an objective, workable concept of "contained."

Similarly, in response to comments on "significant release," the Agency provided substantial clarification for this term in the DSW Rule. EPA stated:

> [A] 'significant' release is not necessarily large in volume, but would include an unaddressed small release from a unit that, if allowed to continue over time, could cause significant damage. Any one release may not be significant in terms of volume. However, if the cause of such a release remained unaddressed over time and hazardous secondary materials are managed in such a way that the release is likely to continue, the hazardous secondary materials in the unit would not be contained.

73 Fed. Reg. at 64,729.

As with "contained," EPA's response to comments regarding "significant release" demonstrates that it is simply impossible for the Agency to define the term in a manner that could encompass every possible scenario at each of the 5,564 potentially affected facilities. To avoid this

sort of futility, courts construing RCRA or the Administrative Procedure Act ("APA") do not require agencies to define each operative term in a regulation. So long as the Agency offers a logical, reasonable explanation for its actions (as it did here), the courts will defer to the Agency's expertise. Under the prevailing judicial standards, EPA's treatment of both "contained" and "significant release" is lawful and should be upheld.[20]

Petitioner also asserts that EPA's screening assessment was unlawful. In response to comments on the 2003 proposal, the Agency undertook a screening assessment, using conservative assumptions to gather additional data on recycling damage cases and hazardous material recycling industry best practices. The goal of the assessment was to avoid inadvertently neglecting a known risk by identifying and characterizing cases of environmental damage that have been attributed to some type of hazardous material recycling activity relevant to the scope and purpose of the rulemaking. The screening assessment EPA conducted was the only means EPA had of assessing the impact of this Rule given the vast variety of industries, facilities, and operations affected. The type of screening-level assessment conducted by EPA in this case is a recognized and accepted method of assessing a rule's impact where elaborate statistical or engineering models would be impractical or impossible.[21] The screening assessment was conducted according to EPA's Information and Data Quality Guidelines, which, in turn, are in accordance with the Office of Management and Budget's ("OMB") government-wide policy regarding information dissemination to the public.[22] Such screening assessments are often used by the Agency to gather available data and develop conservative assumptions in order to determine whether a more elaborate quantitative risk assessment is needed.[23]

Here, EPA did far more than merely tally the potential risks in one column, and assess which elements of the DSW Rule addressed each risk in another column, as Petitioner claims. In fact, the conditions for each exclusion in the DSW rule are specifically designed and targeted toward preventing the potential risks identified in the damage assessment cases. The assessment involved a study of 218 damage cases, spanning 23 years. What emerged was a clear picture of the types of activities that historically have caused environmental damage at some recycling facilities. EPA was able to identify five primary causes of environmental damage at these recycling facilities that accounted for 96 percent of all causes in the damage case assessment. *See RIA*, at 123. Nearly 90 percent of all the damage cases were caused by either mismanagement (either of recyclables or residuals) or abandonment. *See id.* at 124, Exhibit 11C. Consequently, the conditions under the

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[20] Petitioner indicates that "several states" wanted to have EPA define "contained" (citing to comments from the Colorado Department of Public Health and Environment). Most states are free to impose more stringent standards than the federal standards under their state RCRA programs. One option before these states would be to include a more precise definition of "contained" if the state deems that desirable.

[21] *See e.g.*, National Research Council, *Science and Judgment in Risk Assessment* (Nat'l Academy Press, 1994).

[22] *See* Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Environmental Protection Agency at 25 (Oct. 2002); 67 Fed. Reg. 8,452 (Feb. 22, 2002) (OMB information quality guidelines).

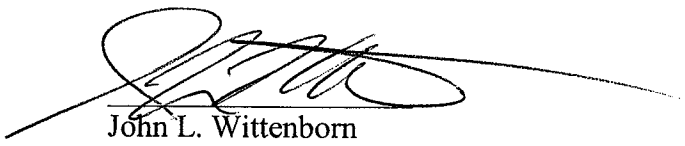
[23] For example, EPA used a screening-level risk assessment as part of its High Production Volume Chemical Risk Program.

DSW Rule are specifically designed to minimize these events. The containment, due diligence, tracking, legitimacy criteria, and financial assurance requirements in particular are designed to ensure that recycling facilities are managing hazardous secondary materials appropriately and to discourage abandonment. As the Agency noted, "the DSW final rule conditions address the damages causes for all three exclusions, which suggests a high level of protection from future recycling operation-related damages to the environment and human health. Furthermore, most all exclusions have three or more protective conditions which address each of the five known primary causes of historical recycling damages." *Id.* at 123. As a result of the qualitative screening analysis, and the lessons learned therefrom, the DSW Rule is more protective of the environment because it now imposes conditions to cover the vast majority of problems that, in the past, may have contributed to environmental harm at recycling facilities.[24] In sum, the screening-level risk assessment is lawful and appropriate for this rulemaking, and the Agency, therefore, properly concluded that the Rule poses no environmental threat.

Finally, because the DSW Rule poses no environmental threat, EPA is wholly justified in concluding that the Rule has no net impact for purposes of Executive Order 12,898. Moreover, Petitioner has no standing to argue that EPA did not comply with Executive Order 12,898. Executive Order 12,898 is intended to improve the internal management of the executive branch and expressly precludes a private right of action based on alleged noncompliance with the Order. *See* Executive Order 12,898 (February 11, 1994) ("This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order."); *see also Kuhl v. Hampton*, 451 F.2d 340, 342 (8th Cir. 1971) (federal courts with limited jurisdiction "certainly were not established to operate the administrative agencies of government.").

E. CONCLUSION

For the foregoing reasons, EPA should deny Sierra Club's Petition for Reconsideration and also deny Sierra Club's request to stay implementation of the Rule.



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[24] For those facilities currently conducting recycling pursuant to a RCRA Part B permit, the new transfer-based exclusion does not substantially reduce protection. Generators must provide notice (not currently required), must ensure that materials arrive at the intended destination, and must conduct periodic due diligence investigations aimed at ascertaining the legitimacy of the operations. Recycling facilities must also report their activities, must contain the materials (no meaningful change), and must maintain full RCRA financial assurance (no change at all). As EPA properly concluded, these conditions under the DSW Rule will ensure proper material handling and are fully protective of the environment.