ORAL ARGUMENT NOT YET SCHEDULED

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

No. 09-1038

AMERICAN PETROLEUM INSTITUTE,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of Final Action of the
United States Environmental Protection Agency

CORRECTED BRIEF FOR RESPONDENT

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July 26, 2011
(Final Brief)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) PARTIES AND AMICI.

All parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioners.

(B) RULINGS UNDER REVIEW.

Rreferences to the rulings at issue appear in the Brief for Petitioners.

(C) RELATED CASES.

This case has not been before this Court or any other court previously. Counsel is not aware of "any other related cases" currently pending in this Court or in any other court, as the quoted phrase is defined in Circuit Rule 28(a)(1)(C). However, *Sierra Club v. EPA*, No. 09-1041, which the Court deconsolidated from

this case and held in abeyance by Order dated January 11, 2011, also seeks review of the rulings under review in the present case.

Respectfully submitted,

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GLOSSARY

APA	Administrative Procedure Act
API	American Petroleum Institute
RCRA	Resource Conservation and Recovery Act

STATEMENT OF JURISDICTION

On October 30, 2008, EPA published in the *Federal Register* an action entitled "*Revisions to the Definition of Solid Waste; Final Rule*." *See* 73 Fed. Reg. 64,668 (Oct. 30, 2008) (the "2008 Rule") (JA 0092). The American Petroleum Institute ("API") timely filed a petition for review on January 27, 2009, but as we explain in Argument I, the Court lacks jurisdiction over API's petition because API's challenge to EPA's action is not ripe. The Court also lacks jurisdiction over API's challenge to EPA's authority under the Resource Conservation and Recovery Act ("RCRA") to regulate spent catalysts from petroleum refining, because EPA asserted that authority in an earlier rule. As we show in Argument III, API's challenge is untimely.

STATEMENT OF THE ISSUES PRESENTED

1. Whether API's challenge to EPA's deferral of a decision whether to make spent petroleum refining catalysts eligible for the definition of solid waste's general exclusions for reclamation activities is ripe for judicial review.

2. Whether EPA reasonably deferred a decision on whether to make spent petroleum refining catalysts eligible for the definition of solid waste's general exclusions for reclamation activities.

3. Whether EPA has the authority to regulate as a listed hazardous waste spent petroleum refining catalysts that are destined for reclamation.

4. Whether API is entitled to another round of notice and comment on EPA's deferral of a decision whether to make spent petroleum refining catalysts eligible for the definition of solid waste's general exclusions for reclamation activities.

5. Whether the administrative record excludes relevant documents that EPA considered during the 2008 rulemaking.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are provided in a separately bound addendum to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Petroleum refiners use catalysts to produce fuels and other products from crude oil, but over time these catalysts become contaminated and must be replaced. While spent petroleum refinery catalysts can be regenerated for reuse, or reclaimed for valuable metals, spent catalysts can spontaneously combust when in contact with air and require careful management at all stages of their handling, transportation, and storage. Based on their dangerous properties, and on documented examples of fires caused by spent catalysts, EPA in 1998 listed these materials as hazardous wastes.

In the agency action that API seeks to challenge, EPA promulgated general exclusions from the definition of solid waste, and therefore from regulation as hazardous waste, but decided to investigate further whether to make reclaimed spent petroleum refining catalysts eligible for these general exclusions or whether additional handling requirements, beyond those in the general exclusions, should instead apply to reclaimed spent catalysts. EPA later decided to reconsider the general exclusions, and has signed a settlement agreement establishing a schedule by which EPA will propose and then finalize its reconsideration decision.

API seeks to short-circuit the ongoing administrative processes and force EPA to deregulate these self-igniting materials without further agency analysis. For the reasons explained in this brief, the Court should reject that effort and uphold EPA's reasoned approach to the regulation of spent catalysts.

II. STATUTORY AND REGULATORY BACKGROUND

A. Overview Of Subtitle C And Statutory Definitions

The Resource Conservation and Recovery Act is a comprehensive environmental statute empowering EPA to regulate hazardous wastes in accordance with the "rigorous safeguards and waste management procedures of Subtitle C." *City of Chicago v. EDF*, 511 U.S. 328, 331 (1994). Subtitle C, 42 U.S.C. §§ 6921-6939f, establishes "a 'cradle-to-grave' regulatory structure

overseeing the safe treatment, storage and disposal of hazardous waste." *United Technologies Corp. v. EPA*, 821 F.2d 714, 716 (D.C. Cir. 1987).[1]

RCRA was also intended to "minimize[e] the generation of hazardous waste and the land disposal of hazardous waste" by "encouraging process substitution, materials recovery, [and] properly conducted recycling and reuse." 42 U.S.C. § 6902(a)(6); *see also id.* § 6901(c)(1), reciting relevant congressional findings ("millions of tons of recoverable material which could be used are needlessly buried each year"), (c)(2) ("methods are available to separate usable materials from solid waste"), and (c)(3) ("the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in the balance of payments").

Before a material can be considered a "hazardous waste" subject to Subtitle C regulation, it first must be a "solid waste." RCRA defines "solid waste" broadly to mean:

> 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 . . . .

[1] Subtitle C refers to subtitle C of Public Law No. 94-580, and was classified as subchapter III when codified.

42 U.S.C. § 6903(27) . RCRA defines a "hazardous waste," in turn, as a solid waste that may "(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." *Id.* § 6903(5). Solid wastes that are considered hazardous wastes fall into two classes: those exhibiting a characteristic property identified by EPA ("characteristic wastes"), and those that are found to be hazardous and specifically listed by EPA ("listed wastes"). *Chem. Waste Mgmt., Inc. v. EPA*, 976 F.2d 2, 8 (D.C. Cir. 1992).[2]

Once a hazardous waste is identified, EPA must determine whether to prohibit "one or more methods of land disposal," and must specify "those levels or methods of treatment, if any, which substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the

[2] EPA may list a waste as hazardous if it meets one of three regulatory criteria, such as whether the waste contains a listed hazardous constituent and EPA concludes that the waste "is capable of posing a substantial present or potential hazard to human health or the environment" when mismanaged. 40 C.F.R. § 261.11(a)(3). Solid wastes from non-specific sources are listed as "F wastes" under § 261.31, and wastes from specific processes or sources are listed as "K wastes" under § 261.32.

environment are minimized." 42 U.S.C. § 6924(g)(4), (m)(1). Wastes that meet these treatment standards can then "be disposed of in a land disposal facility which meets the requirements" of Subtitle C. *Id.* § 6924(m)(2).

B. Regulatory Background

1. EPA's Definition Of "Solid Waste" For Purposes Of Subtitle C

To determine whether a material is potentially subject to Subtitle C regulation, EPA has promulgated a regulatory definition of "solid waste." 40 C.F.R. § 261.2. *See generally Ass'n of Battery Recyclers v. EPA*, 208 F.3d 1047, 1050-51 (D.C. Cir. 2000). This regulation defines "solid waste" as "any discarded material" that is not excluded from the definition. 40 C.F.R. § 261.2(a). Excluded materials are not subject to Subtitle C regulation because, by virtue of their exclusion, they are not "solid wastes" and therefore not "hazardous wastes."

A discarded material is any material that is either abandoned, recycled, inherently waste-like, or (in specified circumstances) a military munition. 40 C.F.R. § 261.2(a)(2)(i). A material is recycled if it is "used, reused, or reclaimed," *id.* § 261.1(c)(7), and a material is reclaimed if it is "processed to recover a usable product, or if it is regenerated." *Id.* § 261.1(c)(4). Since 1980, EPA has recognized that some materials destined for recycling are not solid waste, because some recycling practices bear more resemblance to normal manufacturing. *See generally* 68 Fed. Reg. 61,558, 61,561 col.3, 61,562 col.2 (Oct. 28, 2003) (JA

0005, 0006). To recognize this distinction, EPA refers to "hazardous secondary materials," a class that includes both materials that are regulated as hazardous waste when recycled, and materials that are not considered wastes when recycled. *Id.* at 61,561 col.1-2 (JA 0005). "Secondary materials" are any materials that are not the primary product of a manufacturing or commercial process, and can include byproducts, spent materials, and sludges. 40 C.F.R. § 261.1(c)(1) - (3). A spent material is "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." *Id*. § 261.1(c)(1). The category of secondary materials pertinent to this case is spent materials that are reclaimed.

Under section 261.2, hazardous secondary materials that are either a sludge or a by-product exhibiting a characteristic of a hazardous waste, or that are a listed commercial chemical product, are excluded from the definition of "solid waste" when they are reclaimed. *Id.* § 261.2(c)(3) and Table 1. If the hazardous secondary material being reclaimed is a spent material, or is a sludge or by-product that is a listed hazardous waste, it is *not* automatically excluded when reclaimed. *Id.* Instead, to be excluded from the definition of solid waste, such hazardous secondary materials must either have a material-specific exclusion under section 261.4(a), or be granted a variance under sections 260.30 and 260.31. *See id.* §§

260.33, 261.2(a)(1). In addition, in the 2008 Rule, EPA adopted several additional exclusions for reclaimed materials, described below.

2. Regulatory history of spent petroleum refining catalysts

In 1994, EPA entered into a consent decree with the Environmental Defense Fund under which EPA agreed to make hazardous waste listing determinations by dates certain for 14 petroleum refining residuals, including spent hydrotreating and hydrorefining catalysts, the hazardous secondary materials at issue in API's present challenge. 60 Fed. Reg. 57,747, 57,748 col.2-3 (Nov. 20, 1995) (JA 0283). EPA issued its proposed determinations in 1995; in the same notice EPA announced that it would also conduct "a parallel effort to analyze the applicability of the definition of solid waste to these residuals, and to identify appropriate exemptions to the proposed listings that reflect the Agency's investigation (*i.e.*, the appropriate scope of the proposed listing) and that encourage responsible recycling activities." *Id*. at 57,750 col.1-2 (JA 0284). EPA also invited comment on whether the Agency should develop an exclusion from the definition of solid waste for metals reclaimed from spent petroleum catalysts. *Id*. at 57,781 col.2 (JA 0289).

EPA proposed in 1995 to list as hazardous waste spent catalysts from hydrotreating and from hydrorefining operations. Hydrotreating and hydrorefining are used in the petroleum refining process to remove sulfur and nitrogen compounds. *Id*. at 57,766 col.1 (JA 0285). Both processes convert, or crack, large

hydrocarbons into smaller molecules; the two processes, along with hydrocracking, differ based on their operating conditions, with hydrorefining using higher temperatures and pressures than hydrotreating, to treat heavier petroleum fractions. 63 Fed. Reg. 42,110, 42,155 col.1, 3 (Aug. 6, 1998) (JA 0301).[3] Hydrotreating and hydrorefining processes typically use catalysts made of nickel, cobalt, and/or molybdenum on an alumina base, held in place with ceramic, stainless steel, or other inert supports. 60 Fed. Reg. at 57,766 col.1, 57,768 col.1, 57,780 col.3 (JA 0285, 0287, 0288). The catalysts degrade over time and must be replaced, although the inert supports can be removed and reused. *Id*. at 57,766 col.1-2, 57,780 col.3 (JA 0285, 0288). Spent catalysts can be regenerated for reuse, or valuable metals contained in the spent catalysts can be extracted through reclamation. *Id*. at 57,780 col.1 (JA 0288). One such metal is vanadium. *See* 63 Fed. Reg. at 42,169 col.2 (referring to vanadium recovery and describing spent catalysts as "high vanadium wastes") (JA 0306).[4]

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[3] Hydrocracking uses low temperature and high pressure and is used to make high octane gasoline, jet fuel, and high grade fuel oil. 63 Fed. Reg. at 42,155 col.3 (JA 0301). EPA did not address spent hydrocracking catalysts in the 1995 proposal or the 1998 rule. 60 Fed. Reg. at 57,766 col.3 (JA 0285); 63 Fed. Reg. at 42,155 col.1 (JA 0301).

[4] API characterizes spent catalysts as the sole domestic source of vanadium, citing a 2005 posting on the website of the Vanadium Producers & Reclaimers Association. Pet. Br. at 8 and JA 0431. However, a more recent submission by the Vanadium Producers & Reclaimers Association states that "*[m]uch* of [the

To evaluate the spent petroleum refining catalysts, EPA collected six samples of spent hydrotreating catalysts and three samples of spent hydrorefining catalysts. 60 Fed. Reg. at 57,767 col.1, 57,768 col.2 (JA 0286, 0287). EPA noted that

> many refineries take great care to remove this residual from the process units under an inert atmosphere due to the potential for this residual to ignite spontaneously. On two occasions during sampling, the refineries determined that the risk associated with collecting catalyst samples from inert gas blanketed catalyst storage bins was too great to allow EPA to collect the samples directly. Specially trained refinery personnel collected these samples while being observed by EPA representatives.

Id. at 57,767 col.1 (JA 0286). In fact, the danger posed by the spent catalysts was so great that one refinery asked EPA not to collect a sample at all, due to the risks presented. *Id.*

EPA found that when spent petroleum refining catalysts ignite, they release "harmful quantities of toxic sulfur dioxide, carbon monoxide, and other toxic constituents such as nickel carbonyl . . . ." *Id.* Furthermore, EPA received reports of "fires, building evacuations, and metals reclamation process disturbances attributed to the ignition of these spent catalysts." *Id. See also* 63 Fed. Reg. at

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production of vanadium and vanadium compounds] is from facilities that reclaim vanadium from secondary materials, most significantly spent petroleum refinery hydroprocessing catalysts." Letter from John Hilbert, Vanadium Producers & Reclaimers Association, to Matthew Hale, U.S. EPA, March 9, 2006 (emphasis added) (attached as Exhibit A to EPA-HQ-RCRA-2002-0031-0475.1) (JA 0579).

42,154 col.3 (EPA observed smoke from catalyst storage areas at several reclaimers, and was told that fires occur "every few months" despite careful monitoring and controls), 42,157 col.2 (referring to "persistent smoldering fires") (JA 0300, 0303).

API submitted comments on a wide range of issues relating to the 1995 proposed rule. As pertinent to the issue of spent petroleum refining catalysts, API argued that EPA overestimated the risks associated with these materials, *id*. at 42,156 col.2 (JA 0302), that a hazardous waste listing wasn't warranted and would discourage recycling, *id*. at 42,157 (JA 0303), and that EPA should adopt a conditional listing so that only spent catalysts sent to a landfill would be a listed hazardous waste. *Id*. at 42,158 col.2 (JA 0304).

In its 1998 final rule, EPA determined that the spent petroleum refining catalysts should be listed as hazardous wastes K171 and K172. 63 Fed. Reg. at 42,120 col.1; *id*. at 42,154 col.1 (JA 0299, 0300). EPA exempted the inert support media for these catalysts from hazardous waste listing, but not from the definition of solid waste. *Id*. at 42,154 col.3; *see also* 60 Fed. Reg. at 57,780 col.3 (support media are solid waste, but are only hazardous waste if they exhibit a hazardous characteristic) (JA 0300, 0288). In the same rulemaking, EPA excluded from the definition of solid waste three types of hazardous secondary materials from

petroleum refining: certain oil-bearing secondary materials, certain recovered oil, and certain spent caustic solutions. 63 Fed. Reg. at 42,118-19 (JA 0297-0298).

Because EPA identified spent petroleum refining catalysts as hazardous wastes, EPA also promulgated treatment standards and a land disposal prohibition. *Id*. at 42,167 col.2, 42,186-87 (JA 0305, 0307-0308).

In 2003, the predecessor to the Vanadium Producers & Reclaimers Association submitted an administrative rulemaking petition requesting that EPA revise the treatment standards and clarify that the 1998 exclusion from the definition of solid waste for certain oil-bearing secondary materials does not encompass spent petroleum refining catalysts. 68 Fed. Reg. 59,935, 59,937 col.3 (Oct. 20, 2003) (JA 0315). The administrative petition also requested that EPA amend the treatment standards for spent catalysts, to prevent their mismanagement and to ensure the spent catalysts are properly treated prior to disposal. *Id*. at 59,938 col.1 (JA 0316). EPA published a notice of the administrative petition, and of the data the Vanadium Producers & Reclaimers Association submitted in support, and sought comments. *Id*. at 59,937 col.3 (JA 0315). API twice challenged the Vanadium Producers & Reclaimers Association's data and conclusions, and API repeated the argument that if spent catalysts were to be listed as a hazardous waste at all, that listing should be conditional so that spent catalysts sent to recycling facilities would be exempt. *See* Letter from Cindy Gordon, API,

to Ross Elliot, EPA (EPA-HQ-RCRA-2003-0023-0017) at 2 (Jan. 16, 2004) (JA 0320); Letter from Cindy Gordon, API, to Ross Elliot, EPA (EPA-HQ-RCRA-2003-0023-0032) at 4-5 (Apr. 14, 2004) (JA 0335-0336).

In 2005, API sent another set of comments, this time adding that EPA should "exercise its discretion to exclude such catalysts from the definition of *solid waste*." *Available Manufacturing Uses of Spent Hydrotreating and Hydrorefining Catalysts: How 40 C.F.R. Part 261 Could Be Amended To Promote Consistently High Rates of Resource Conservation and Recovery* (Sept. 19, 2005) ("API Catalyst Paper") (EPA-HQ-RCRA-2002-0031-0492.6) at 15 (emphasis added) (JA 0356). The API Catalyst Paper recognized that EPA was "in the process of overhauling the definition of solid waste," and that an "exclusion from the definition of solid waste for hydroprocessing catalysts that are recycled may well fit better into that longer term effort than into any short-term endeavor to address the adverse effects of the unconditional listings," and again suggested, this time as an "interim measure," a conditional exclusion of such spent catalysts from the definition of hazardous waste. *Id*. at 16 (JA 0357).

In December 2007, EPA announced that it would grant the vanadium association's petition and would propose revised treatment standards. 72 Fed. Reg. 69,922, 69,940-41 (Dec. 10, 2007) (JA 0617-0618). In the same Federal Register announcement, EPA explained that "in response to separate comments received by

petroleum industry representatives," EPA would propose regulatory changes "to help encourage consistent levels of recycling of spent hydrotreating and hydrorefining catalysts, in a manner that protects human health and the environment." *Id*. at 69,940 (JA 0617).

3. The 2008 Rule

The effort by EPA to revisit the definition of solid waste, referred to in the API Catalyst Paper, began in 2003 with a proposal to "define those circumstances under which materials would be excluded from RCRA's hazardous waste regulations because they are generated and reclaimed in a continuous process within the same industry." 68 Fed. Reg. at 61,560 (JA 0004).[5] API submitted comments that supported the goals of the 2003 proposal, but argued that the proposal did not go far enough, particularly with regards to encouraging inter-industry recycling. EPA issued a supplemental proposal in 2007, in which EPA restructured its approach. Rather than focus on whether reclamation occurs in a continuous process within the same industry, EPA instead proposed to exclude "hazardous secondary materials that are generated and then reclaimed under the

[5] EPA issued a direct final rule in March 2002, to implement this Court's decision in *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000). EPA noted its decision "to undertake a separate future rulemaking to propose additional revisions to its current recycling regulations," but it did not issue a proposal or solicit comments at that time. *See* 67 Fed. Reg. 11,251, 11,252 (Mar. 13, 2002) (JA 0310).

control of the generator," and to conditionally exclude "hazardous secondary materials that are generated and then transferred to another person" for reclamation. 72 Fed. Reg. 14,172, 14,175 col.1-2 (Mar. 26, 2007) (JA 0048). EPA also proposed to create an administrative petition process, similar to the pre-existing variance provisions, for persons to obtain "a case-specific non-waste determination for certain hazardous secondary materials that are recycled." *Id*. (JA 0048).[6] EPA noted that the existing definition of solid waste provides "specific exemptions and exclusions" for "particular recycling practices," sometimes subject to specific conditions, and that hazardous secondary materials "that are currently excluded with specific requirements or conditions should be required to continue to meet those requirements," rather than the newly proposed exclusions. *Id*. at 14,175 col.3 – 14,176 col.1 (JA 0048-0049).

API submitted comments on the 2007 supplemental proposal, and resubmitted the API Catalyst Paper in which API argued for, among other things, a specific exclusion from the definition of solid waste for spent catalysts. *See* Letter from Thomas Purcell, API, to Susan Parker Bodine, EPA (EPA-HQ-RCRA-2002-0031-0492) at 2 (June 22, 2007) (JA 0513).

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[6] EPA's prior variance regulation was limited in the types of recycled materials the Administrator could determine would not be considered solid waste. *See, e.g.*, 40 C.F.R. § 260.30(c) (1995) (materials that have been reclaimed, but must be reclaimed further before the materials are completely recovered).

In 2008 EPA issued its final rule, which was largely based on the 2007 supplemental proposal. The 2008 Rule excludes from the RCRA definition of solid waste materials that are generated and legitimately reclaimed under the control of the generator and meet the conditions of the exclusion, as well as materials that are generated and transferred to another company for legitimate reclamation under specific conditions. 73 Fed. Reg. at 64,669 col.2 – 64,670 col.1 (JA 0094-0095). The 2008 Rule also creates a petition process by which EPA or an authorized State can determine, on a case-by-case basis, whether a particular hazardous secondary material is not discarded and therefore not a solid waste when reclaimed, and includes provisions for determining whether recycling activities are legitimate under the new exclusions and the non-waste determination process. *Id*. at 64,670 col.2 (JA 0095).

As for spent petroleum refining catalysts, EPA noted that it had announced in 2007 that it would issue a separate proposal to conditionally exclude from the definition of solid waste spent hydrotreating and hydrorefining catalysts when these materials are reclaimed. *Id*. at 64,714 col.2 (JA 0139). In light of that separate administrative process, spent catalysts "will not be eligible" for the 2008 Rule's general reclamation exclusions. *Id*.; *see also id.* at 64,760-61 (promulgating amendments to 40 C.F.R. §§ 261.2(a)(1) and 261.4(a)) (JA 0185-0186).

III. PROCEDURAL HISTORY

API filed this petition for judicial review on January 27, 2009. Gulf Chemical and Metallurgical Corporation, a spent catalyst recycler, moved to intervene; API objected, arguing that Gulf lacks standing, and the Court referred to the merits panel the motion to intervene. API has filed a motion to correct or supplement the administrative record, which the Court has also referred to the merits panel.

The Sierra Club also filed a petition for judicial review of the 2008 Rule, which the Court consolidated with API's petition. In addition, Sierra Club petitioned EPA to reconsider and repeal the 2008 Rule, asserting that the exclusions are unlawful, vague, and not sufficiently protective of human health and the environment. Although all parties agreed to hold the consolidated petitions for review in abeyance for a brief initial period, to May 4, 2009, API opposed EPA's and the Sierra Club's two subsequent motions to continue the abeyance period while EPA decided whether to grant the Sierra Club's administrative petition. The Court granted the first motion, over API's objection, but on February 1, 2010, removed the cases from abeyance and ordered the parties to file proposed briefing formats. The parties did so in April 2010, and the Court issued a briefing schedule in which petitioners' opening briefs were due September 16, 2010.

However, on September 10, 2010, EPA and Sierra Club informed the Court that they had settled and accordingly moved to sever and suspend briefing on Sierra Club's petition for review. Under the settlement agreement, EPA has agreed to propose, by June 30, 2011, a new rule addressing the issues raised by Sierra Club, and to take final action on that proposed rule by December 31, 2012. On January 11, 2011, the Court granted the motion to sever Sierra Club's petition for review and ordered it held in abeyance, with status reports every 90 days. EPA submitted a status report on April 7, 2011, informing the Court that EPA is on schedule to issue a proposal by June 30.

Gulf filed a motion to dismiss both Sierra Club's and API's petitions for review, arguing they are moot in light of EPA's and Sierra Club's settlement, and that motion has also been referred to the merits panel.

SUMMARY OF THE ARGUMENT

API's complaint is not about the general exclusions for reclamation activities, but about EPA's deferral of a decision on whether spent petroleum refining catalysts should be eligible for those general exclusions or should instead be governed by a specific exclusion with conditions tailored to that particular material. This claim is not ripe. API asserts that if EPA had not deferred a decision on whether to exclude spent catalysts and instead allowed them to be eligible for the general reclamation exclusions, API's members would incur lower

costs in handling spent catalysts because the spent catalysts would no longer be regulated as solid or hazardous waste. API's argument ignores the fact that no relevant State has adopted the general reclamation exclusions, and no State is likely to do so while EPA is reconsidering the 2008 Rule. Until EPA completes its reconsideration, any future cost savings from a possible exclusion of spent catalysts are speculative and do not meet the requirement to demonstrate an injury that is present or certainly impending. API's argument also ignores the fact that EPA has not completed its decisionmaking with respect to spent catalysts and the general reclamation exclusions.

Even if API's claim were ripe, EPA reasonably deferred making a decision so that it could further consider whether spent catalysts' admitted pyrophoric properties merit individualized handling requirements. Numerous hazardous secondary materials have material-specific conditions, and the record amply supports EPA's decision to investigate further whether spent catalysts merit the same, especially in light of the catalysts' ability to spontaneously combust in contact with air and the damage incidents attributed to their improper storage and handling.

API's argument that spent petroleum refining catalysts are beyond RCRA's reach when reclaimed comes far too late, as API could and should have made this argument when EPA listed spent catalysts in 1998. Moreover, EPA does have the

authority under RCRA to ensure that spent catalysts are properly contained, and therefore not discarded, throughout the reclamation process.

API is not entitled to another round of notice and comment on EPA's deferral, because EPA's deferral is a logical outgrowth of its proposal and because API knew or should have known that spent catalysts might be addressed under a material-specific exclusion rather than a general reclamation exclusion. Finally, API is not entitled to add to the administrative record documents that EPA did not consider and that are not relevant to the merits of the deferral of spent catalysts' eligibility for exclusion.

STANDARD OF REVIEW

Under RCRA, 42 U.S.C. § 6976(a), judicial review of EPA's promulgation of final regulations is governed by the Administrative Procedure Act ("APA"). The applicable standard of review under the APA is whether EPA's actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). While the Court must conduct a "substantial inquiry" when considering whether agency action is arbitrary or capricious, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), the standard of review "is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* at 416. Rather, the Court's role is to ensure that the agency's decision is based on relevant factors and not a "clear error of judgment."

Id. If the "agency's reasons and policy choices . . . conform to 'certain minimal standards of rationality' . . . the rule is reasonable and must be upheld." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520-21 (D.C. Cir. 1983) (citation omitted).

In reviewing an agency's interpretation of a statute which it administers, the Court must first consider whether Congress has "directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842 (1984). If so, "that is the end of the matter," and Congress's intent must be given effect. *Id.* at 842-43. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. To uphold EPA's interpretation, "[the Court] need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of [the] very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA." *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985) (citation omitted).

ARGUMENT

I. API'S CHALLENGE TO EPA'S DECISION TO DEFER ACTION ON SPENT PETROLEUM REFINING CATALYSTS IS NOT RIPE.

Courts cannot entertain the claims of a litigant unless they are "constitutionally and prudentially ripe." *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 48 (D.C. Cir. 1999) (quoting *Louisiana Envtl. Action Network v. Browner*, 87 F.3d 1379, 1381 (D.C. Cir. 1996)). Constitutional ripeness requires litigants to demonstrate a "present injury," or an injury that is "certainly impending." *Id*. (quoting *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996)); *see also Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("[a]llegations of possible future injury do not satisfy the requirements of Art. III"); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (a "regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation *in a fashion that harms or threatens to harm him*") (emphasis added).

Constitutional ripeness overlaps with standing, which requires an injury that is "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citation omitted). As this Court has explained, "if a threatened injury is sufficiently 'imminent' to establish standing,

the constitutional requirements of the ripeness doctrine will necessarily be satisfied," but "the converse is not true. One may be able to demonstrate that an injury is 'imminent' (*i.e.*, that the claim is constitutionally ripe), but be unable to demonstrate that the injury is 'concrete and particularized,' 'fairly traceable' to the challenged action, or 'likely to be redressed by a favorable decision.'" *Nat'l Treasury Employees Union*, 101 F.3d at 1428 & n.1.

In contrast, prudential ripeness examines the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Wyoming Outdoor Council*, 165 F.3d at 48 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)); *see also Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998) (courts must consider "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented"). The "primary focus" of the prudential aspect of the ripeness doctrine is to balance "the petitioner's interest in prompt consideration of allegedly unlawful agency action against the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Wyoming Outdoor*

Council, 165 F.3d at 49 (quoting *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985).

When considering whether an issue is fit for judicial review, a court examines whether the issue "is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Utility Air Regulatory Group v. EPA*, 320 F.3d 272, 279 (D.C. Cir. 2003) (citations and internal quotations omitted).

API's challenge to EPA's deferral of a decision whether spent petroleum refining catalysts should be eligible for the definition of solid waste's general exclusions for reclamation activities fails the requirements for both constitutional and prudential ripeness.

A. API's Challenge Is Not Constitutionally Ripe Because API Has No Present or Certainly Impending Injury.

API asserts its members are injured because the cost of managing spent petroleum refining catalysts is higher than it would be if such catalysts were excluded from the definition of solid waste. Pet. Br. at 22. However, EPA's deferral of a decision on whether spent catalysts are eligible for the general reclamation exclusions does not alter the cost of managing those materials. Spent petroleum refining catalysts had to be managed as hazardous waste before the 2008 Rule, and likewise have to be managed as hazardous waste after the 2008 Rule. As

applied to spent catalysts, the 2008 Rule does not change the status quo in any way and thus does not harm API's members.

The only potential injury that can be traced to the 2008 Rule is the possible loss of future savings that API's members could arguably have realized if spent catalysts were eligible for the general reclamation exclusions. However, these savings are hypothetical because eligibility for the exclusions is only one of several necessary steps before such savings could be realized. First and foremost, the States in which both the generator of the spent catalyst and the reclamation facility operate must adopt the federal definition of solid waste, including the general exclusions, which is not obligatory. Only then could individual generators or reclaimers seek to take advantage of the exclusions and realize any potential savings.

The 2008 Rule does not go into effect in States that are authorized to manage their own RCRA programs unless and until the State adopts the rule. Under RCRA, States need only adopt new federal requirements that are more stringent than existing requirements; States can choose to be more stringent than federal requirements, but they cannot choose to be less stringent. 73 Fed. Reg. at 64,753 col.3 (JA 0178). Because the 2008 Rule is "deregulatory in nature," in that some materials that were subject to the RCRA Subtitle C hazardous waste regulations no longer are, 72 Fed. Reg. at 14,174 col.3 (JA 0047), States may, but

are not required to, adopt the general reclamation exclusions in the 2008 Rule. *Id*. at 14,209 col.1-2 (JA 0082); 73 Fed. Reg. at 64,754 col.1 (JA 0179). If a State does not adopt the federal rule, then the material in question remains hazardous waste in that State.

None of the facilities that reclaim spent refining catalysts are in States that have adopted the 2008 Rule. In other words, even if spent catalysts were eligible for the general reclamation exclusions, API's members would still not realize cost savings from the 2008 Rule because spent catalysts going to reclamation would remain subject to *state* hazardous waste regulations. API's affidavits mention facilities in Texas, Louisiana, and Oklahoma. *See* Decl. of Jason M. Colletti ¶4; Decl. of Thomas P. Yarnick) ¶4 (Addendum 2 to API's Opening Brief). Since its publication in the *Federal Register* two and a half years ago, only four States have adopted the 2008 Rule (Idaho, Illinois, New Jersey and Pennsylvania), and it is additionally effective in two States (Iowa and Alaska) where EPA administers the hazardous waste program. *See* map of States that have adopted the 2008 Rule: http://www.epa.gov/epawaste/hazard/dsw/statespf.htm (last visited May 5, 2011) (Suppl. Appendix 0040).

While most States eventually adopt federal RCRA regulations, in this situation, States are unlikely to invest the resources to adopt the 2008 Rule's definition of solid waste and general reclamation exclusions while EPA is actively

reconsidering the 2008 Rule, particularly since EPA plans to issue a new proposal in the very near term. As API has noted, Pet. Br. at 1, EPA has committed to reexamine the 2008 Rule and issue a proposal by June 30, 2011, and take final action on that proposal by December 31, 2012. EPA's proposal will respond to the issues raised by Sierra Club, including Sierra Club's assertion that the 2008 Rule should be withdrawn entirely. *See EPA's And Sierra Club's Joint Status Report*, No. 09-1041 (filed Apr. 8, 2011).

Although EPA has made no commitment regarding the substance of its pending proposal, much less its final agency action, this uncertainty – whether the 2008 Rule will be revised – makes it even less likely that a State will adopt the general reclamation exclusions in the 2008 Rule before EPA takes final action on reconsideration in 2012. Therefore, API's claims that its members would have realized any savings if the spent catalysts were eligible for the 2008 Rule's general reclamation exclusions are utterly speculative and are exceedingly unlikely given EPA's plan to propose and take final action on a new rule. *See, e.g., Nat'l Treasury Employees Union*, 101 F.3d at 1431 (alleged injury traceable to Presidential veto power, but that power "is not only unexercised, but is as yet unavailable").

API also notes the possibility that if spent catalysts were not considered solid and hazardous wastes, reclamation costs would decrease as new entities enter

the reclamation market without the need to obtain RCRA permits. Pet. Br. at 22. That possibility is also speculative, given EPA's ongoing reexamination of the 2008 Rule. API provides no evidence that any facility is likely to invest in a new business under these uncertain conditions.

API's alleged injuries depend on the assumption that its members' spent catalysts would have been excluded from the definition of solid waste, but for EPA's decision to defer the eligibility of those materials. The hypothetical future cost savings that API claims its members could have realized do not exist, and likely won't exist, at least until EPA takes final action in December 2012. Because API's alleged injuries are neither present nor certainly impending, *Wyoming Outdoor Council*, 165 F.3d at 48, API's challenge is not constitutionally ripe.

B. API's Challenge is Not Prudentially Ripe Because EPA's Deferral is Not Sufficiently Final.

Even if API's claimed injuries were more certain, EPA's decision-making process regarding reclaimed spent catalysts is not sufficiently final for the Court to adjudicate API's challenge at this time.

In *Utility Air Regulatory Group v. EPA*, 320 F.3d at 274, petitioner sought review of EPA's interpretation of two regulations. The Court found that even if petitioner had standing, the challenge was not ripe because EPA's position was not sufficiently final. *Id*. Even though EPA's interpretation was set forth in an

instruction manual and had been applied in two permit adjudications, EPA "is currently undertaking a rulemaking to amend" the regulations, *id*. at 279, and it would be "a waste of judicial resources for us to reach the merits of UARG's petition while the rulemaking is pending." *Id*.

Similar to *Utility Air Regulatory Group*, EPA has committed to undertake a rulemaking to address spent catalysts. EPA reiterated in the preamble to the 2008 Rule what EPA had announced the prior year, that

> EPA is planning to propose – in a separate rulemaking from today's final rule – to amend its hazardous waste regulations to conditionally exclude from the definition of solid waste spent hydrotreating and hydrorefining catalysts generated in the petroleum refining industry when these hazardous secondary materials are reclaimed (*see* entry in the *Introduction to the Fall 2007 Regulatory Plan*, 72 FR 69940, December 10, 2007).

73 Fed. Reg. at 64,714 col.2 (JA 0139). Furthermore, EPA explained in clear and unequivocal language that EPA was *not* prepared to address spent catalysts in the 2008 Rule. Instead, EPA wants to "consider and seek comment on specific conditions to address the pyrophoric properties of these hazardous secondary materials, particularly during transportation and storage prior to reclamation." *Id*. That is precisely the type of technical inquiry which administrative agencies should be permitted to address in the first instance. *See, e.g., Pub. Citizen Health Research Group v. FDA*, 740 F.2d 21, 33 (D.C. Cir. 1984) (finding that proposed rule withdrawn by the agency prior to publication in the Federal Register was not

ripe for judicial review, and that evaluation of scientific evidence "is precisely the question now before the agency in an ongoing proceeding, and is precisely the genre of question the resolution of which Congress has entrusted to the agency in the first instance").

The 2008 Rule is explicitly not EPA's final position on whether spent catalysts should be eligible for the definition of solid waste's general exclusions for reclamation. As this Court cautioned in *Continental Air Lines, Inc. v. Civil Aeronautics Board*,

> The interest in postponing review is strong if the agency position whose validity is in issue is not in fact the agency's final position. If the position is likely to be abandoned or modified before it is actually put into effect, then its review wastes the court's time and interferes with the process by which the agency is attempting to reach a final decision.

522 F.2d 107, 125 (D.C. Cir. 1974) (finding on rehearing *en banc* that a Civil Aeronautics Board order regarding airline fares was ripe for judicial review).

In the 2008 Rule, EPA noted that it intends to propose "a conditional exclusion specifically for these spent catalysts." 73 Fed. Reg. at 64,714 col.2 (JA 0139). After evaluating public comments, EPA may adopt such a material-specific exclusion. *Id.* However, EPA stated that it may instead decide that the 2008 Rule's general reclamation exclusions "are fully adequate for the management of these spent catalysts when recycled, and therefore would remove the restriction preventing these spent catalysts from being eligible for today's exclusions." *Id.*

This is precisely the result that API seeks to have the Court compel EPA to adopt. EPA should be allowed to "crystalliz[e] its policy before that policy is subjected to judicial review." *Wyoming Outdoor Council*, 165 F.3d at 49 (quoting *Eagle-Picher Indus.*, 759 F.2d at 915).

Withholding review until EPA completes its pending rulemaking will not impose undue hardship on API's members. As explained above, none of API's members would currently be able to take advantage of the general reclamation exclusions from the definition of solid waste, even if spent catalysts were eligible, because no relevant State has or is likely to adopt those exclusions while EPA is reconsidering the 2008 Rule. Furthermore, hardship "considerations will rarely overcome the finality and fitness problems inherent in attempts to review tentative positions." *Pub. Citizen Health Research Group*, 740 F.2d at 33. *See also CTIA-The Wireless Ass'n v. FCC*, 530 F.3d 984, 988 (D.C. Cir. 2008) (claims of regulatory uncertainty and unnecessary compliance costs insufficient to show hardship).

Because API's members have demonstrated neither the present or certainly impending injury necessary for constitutional ripeness, nor a sufficiently final agency decision necessary for prudential ripeness, the Court should dismiss API's petition for lack of jurisdiction.

II. EPA REASONABLY DECIDED TO DEFER ACTION ON SPENT PETROLEUM REFINING CATALYSTS

If the Court reaches the merits, it should uphold EPA's decision to defer regulatory action on spent petroleum refining catalysts because EPA reasonably decided to evaluate, before determining how to regulate spent catalysts, whether additional conditions are necessary to ensure spent catalysts are not discarded when reclaimed.

A. The Exclusions From The Definition of Solid Waste Take Into Account the Hazardous Nature of Specific Materials.

API asserts that because the reclamation exclusions in the 2008 Rule are "generic" and not based on the hazardous nature of specific materials, EPA arbitrarily and impermissibly singled out spent petroleum refining catalysts for special scrutiny. Pet. Br. at 25-26. API overlooks the numerous, material-specific exclusions that EPA has already adopted and that remain in place even with the 2008 Rule. While API is correct that the general reclamation exclusions adopted in the 2008 Rule do not address specific hazardous secondary materials, Pet. Br. at 26, EPA has never approached the definition of solid waste, and the exclusions from that definition, in solely a generic manner. Instead, EPA has always recognized that for some materials a "one size fits all" approach does not work. Twenty-two separate materials have individual exclusions from the definition of solid waste. 40 C.F.R. § 261.4(a)(1)-(22) (listing material-specific exclusions from

the definition of solid waste). These materials are not eligible for the 2008 Rule's general reclamation exclusions. 73 Fed. Reg. at 64,713 col.3 (JA 0138). Spent catalysts thus are hardly the only hazardous secondary material that might be the subject of material-specific conditions.

Neither are spent catalysts the only materials given "special scrutiny" in the 2008 Rule, as API asserts. Pet. Br. at 26. In addition to spent catalysts, EPA also separately addressed spent lead acid batteries and precious metals reclamation. EPA determined that spent lead acid batteries would continue to be regulated as solid and hazardous waste under separate provisions, and not be eligible for the general reclamation exclusions, 73 Fed. Reg. at 64,714 col.3. (JA 0139). EPA also determined that precious metals reclaimers would have the choice either to continue to use an existing exclusion from the separate hazardous waste regulations, or to use the general reclamation exclusions from the definition of solid waste. *Id*. at 64,715 col.1 (JA 1040).

The general reclamation exclusions cannot be read in isolation, as API would do. Instead, those exclusions are part of a broader program of solid and hazardous waste regulation, containing both general and specific exclusions from both the definition of solid waste and the definition of hazardous waste. In the 2008 Rule, EPA simply decided to evaluate further whether to address spent catalysts with material-specific requirements and deferred its determination of

whether to exclude spent catalysts from the definition of solid waste pending the completion of that evaluation. EPA's decision to consider such requirements for spent catalysts is not arbitrary, and is consistent with how EPA has dealt with other hazardous secondary materials.

B. Spent Petroleum Refining Catalysts Have Properties That Merit Specific Consideration.

API next argues that even if EPA can address some materials with individual conditions, nothing about spent petroleum refining catalysts justifies such different treatment. Pet. Br. at 29, 34. API first asserts that spent catalysts are no different from numerous other materials that are eligible for the general reclamation exclusions. Pet. Br. at 27-29. Although API presents a long list of hazardous secondary materials that are eligible for the general exclusions when reclaimed, Pet. Br. at 27-28, API's main point is that "there is nothing unique about the properties of the catalysts that could justify this special scrutiny." *Id.* at 29. API is incorrect.

As API notes, spent petroleum refining catalysts are pyrophoric, *i.e.*, they can ignite spontaneously. *Id.* While API is correct that pyrophoricity is a type of ignitability, Pet. Br. at 30, it is a particularly dangerous type and merits special consideration when evaluating whether a material is discarded. Ignitability for a solid material (such as spent catalysts) exists when the material

> is capable, under standard temperature and pressure, of causing fire through friction, absorption of moisture or spontaneous chemical changes and, when ignited, burns so vigorously and persistently that it creates a hazard.

40 C.F.R. § 261.21(a)(2). The contact of a non-pyrophoric ignitable material with air would not be enough to cause a fire. In contrast, spent catalysts can spontaneously combust simply by contact with air. 63 Fed. Reg. at 42,154 col.2 (spent catalysts "also present a hazard because of their potential to spontaneously ignite when removed from the processing unit and exposed to air") (JA 0300). Thus, within the universe of ignitable materials, there are different degrees of hazard posed, and EPA's caution in determining whether to exclude spent petroleum refining catalysts from strict regulation is warranted.

API asserts that aside from spent catalysts, any other hazardous secondary material exhibiting pyrophoric properties is eligible for the general exclusions in the 2008 Rule when reclaimed. Pet. Br. at 30. API points specifically to magnesium, which API says can be pyrophoric. *Id*. This misreads the relevant regulation, because the magnesium wastestream API refers to is a *characteristic* by-product. Sludges or by-products (when reclaimed) exhibiting a hazardous waste characteristic have been addressed differently from listed hazardous wastes since EPA first defined solid waste in 1985. *Compare* 40 C.F.R. § 261.2(c)(3) and Table 1 (1985) *with* 40 C.F.R. § 261.2(c)(3) and Table 1 (sludges and by-products that exhibit a hazardous characteristic, such as ignitability, are not solid wastes

when reclaimed). The 2008 Rule's general reclamation exclusions, in contrast, address *listed* hazardous sludges and by-products, not characteristic hazardous sludges and by-products. Within the categories of listed hazardous sludges and by-products, spent catalysts stand alone; EPA is not aware of any other listed hazardous sludges or by-products that are pyrophoric, and API points to none.

API counters with the example of two spent solvents listed for ignitability, F003 and F005. Pet. Br. at 31. The general reclamation exclusions in the 2008 Rule do encompass spent solvents, whether listed or characteristic, but these solvents are not comparable to spent petroleum refining catalysts. Although these solvents can present a fire hazard under certain conditions, they are not pyrophoric, and thus do not present the degree of risk that merits special consideration. Furthermore, solvents present a fire hazard whether they are products or waste. A facility that produces new solvents from the distillation of spent solvents faces the same types of fire hazards faced by a facility that produces new solvents from raw materials.[7]

[7] Spent solvents do present other potential hazards besides ignitability due to their contaminated nature, but those are addressed by the conditions in the 2008 Rule, including the condition that the recycling be legitimate and that the hazardous secondary materials are contained.

Spent petroleum refining catalysts are a different matter. As API notes in its brief, Pet. Br. at 7-8, the catalysts can be a source of valuable metals.[8] Unlike other sources of metals, the spent catalysts' pyrophoric property presents a hazard that is not ordinarily faced during metals extraction. This fact was illustrated during the 1998 rulemaking in which EPA listed the spent catalysts as hazardous waste. Due to the pyrophoric nature of the spent catalyst, two refineries would not allow EPA representatives to collect samples of the spent catalyst from the flow-bins after they had been sealed; another refused to allow EPA to collect a sample at all, due to the risks presented. *See* 60 Fed. Reg. at 57,767 col.1 (JA 0286).

Responding to an argument raised by the Vanadium Producers & Reclaimers Association during the 2008 rulemaking, API makes the similar argument that even assuming that spent catalysts are reactive as well as pyrophoric, other hazardous secondary materials listed as hazardous waste based on reactivity are eligible for the general reclamation exclusions, while spent petroleum refining catalysts are not. Pet. Br. at 32. API cites spent cyanide plating bath solutions from electroplating operations, listed as F007, and spent carbon from the treatment of wastewater containing explosives, listed as K045. *Id*. at 32-33. EPA did not

[8] Even though a hazardous waste has or may have value, it can still be a solid waste. *See, e.g., American Petroleum Inst. v. EPA*, 906 F.2d 740, 741 n.16 (D.C. Cir. 1990); *United States v. ILCO Inc.*, 996 F.2d 1126, 1131-32 (11th Cir. 1993); *Owen Elec. Steel Co. v. Browner*, 37 F.3d 146, 150 (4th Cir. 1994).

defer the eligibility of spent catalysts for exclusion based on concerns about the reactivity characteristics, but even if that were relevant to whether the spent catalysts are discarded, API has not shown disparate treatment. Specifically, while spent cyanide plating bath solutions from electroplating operations, listed as F007, do contain high concentrations of cyanide, which under certain conditions can produce deadly cyanide gas, the cyanide originates from the original plating bath solutions, and is recycled back into the original operations. *See Guidance Manual on the RCRA Regulation of Recycled Hazardous Wastes* (March 1986) at 87, 117, 119 (JA 0222, 0232, 0233).[9] In this example, the spent solution contains the same cyanide as does the original process, and is managed by a facility that has experience with it, and is capable of handling the dangers posed by this chemical.

In contrast, if spent catalysts are excluded under the general reclamation exclusions without further conditions, petroleum refineries would be allowed to send the pyrophoric spent catalysts to entities new to the reclamation market, who could begin operations without obtaining a RCRA Subtitle C permit. *See, e.g.,* Decl. of Thomas P. Yarnick (Addendum 2 to API's Opening Brief) ¶6

[9] This guidance manual is not in the administrative record and should therefore be in a supplemental appendix. *See* Jan 11, 2011, Order at 2. EPA cites the 1986 guidance manual only to rebut API's argument regarding listed hazardous waste F007, Pet. Br. at 32, and only to the extent the Court considers API's argument.

("reclamation and regeneration facilities would no longer be required to undergo the lengthy and costly process of obtaining a RCRA Subtitle C permit in order to handle the spent catalysts"). In other words, API is anticipating that its members could send a hazardous secondary material that is capable of spontaneously igniting when exposed to the air, to reclamation facilities that have no prior experience with handling such materials.

The risks to human health and the environment from fires caused by the potential mismanagement of the spent petroleum catalysts at these potentially inexperienced and unpermitted reclamation facilities could be substantial, and it is exactly this type of scenario that the RCRA hazardous waste program was designed to prevent. *See* 63 Fed. Reg. at 42,154 col.3 (prior to spent catalysts being listed as hazardous waste in 1998, EPA observed smoke at several spent catalyst reclaimers' storage areas, and one facility reported that "fires occur every few months") (JA 0300).

As for the regeneration of spent carbon from the treatment of wastewater containing explosives (listed waste K045), EPA considers carbon regeneration (*i.e.*, the process of removing pollutants by adsorption followed by destruction) to be waste management, not recycling. *See* 56 Fed. Reg. 7134, 7200 col.3 (Feb. 21, 1991) ("EPA does not believe that these [carbon regeneration units] are recycling units, but rather that regeneration is a continuation of the waste treatment process,

that process consisting of removal of pollutants by adsorption followed by their destruction.") (JA 0250). Because the general exclusions in the 2008 Rule only apply to hazardous secondary materials being *reclaimed*, waste treatment is not eligible for the exclusions, and the K045 example is not relevant.

API also asserts that any distinctions between spent petroleum refining catalysts and other hazardous secondary materials are irrelevant to whether the spent catalysts should be eligible for the general reclamation exclusions. Pet. Br. at 34. But the pyrophoric property of spent catalysts is relevant: because spent petroleum refining catalysts can self-combust in contact with air, EPA is concerned that the conditions required to meet the general reclamation exclusions might not be sufficient to ensure that the spent catalysts remain properly contained, especially during transport and storage. Proper containment, along with other conditions, ensures that hazardous secondary materials are not inadvertently discarded. *See* 73 Fed. Reg. at 64,685 col.3 (transfer-based exclusion requires containment, because released materials are discarded) (JA 0110); *see also id.* at 64,680 col.3-64,681 col.3 (discussing why materials that are contained are not discarded) (JA 0105-0106). API concedes that containment, along with the other conditions in the general reclamation exclusions, "logically defines 'discard' and is environmentally protective." Pet. Br. at 25. As API notes, "if a secondary material is not contained, it is considered discarded and is subject to the full panoply of

RCRA regulation." *Id.*; *see also id.* at 40 (no disposal problem "*if* the refiner contains the catalysts") (emphasis added). The pyrophoric properties of spent catalysts are therefore relevant to whether those materials are discarded.

Their pyrophoric property is an important distinction between spent catalysts and other hazardous secondary materials being reclaimed, including materials that may be ignitable and reactive (for reasons other than pyrophoricity), and a distinction that is relevant to whether spent catalysts are discarded and therefore are solid wastes. EPA therefore reasonably deferred a decision on whether spent catalysts are eligible for the general exclusions from the definition of solid waste for reclamation activities pending further examination.

III. EPA HAS THE AUTHORITY TO REGULATE SPENT PETROLEUM REFINING CATALYSTS.

A. API Is Too Late To Challenge EPA's Authority To Regulate Spent Petroleum Refining Catalysts.

API next argues that spent petroleum refining catalysts are not within EPA's authority to regulate. Pet. Br. at 41. The time to raise that argument was in API's challenge to the 1998 Rule, in which EPA first listed spent catalysts as hazardous wastes. API did challenge the 1998 Rule, and lost. Pet. Br. at 9 ("API challenged EPA's inclusion of recycled catalysts within the scope of the listings" as hazardous wastes); *see American Petroleum Inst. v. EPA*, 216 F.3d 50, 59 (D.C. Cir. 2000) ("*API II*"). API's specific challenge to the 1998 Rule was whether spent catalysts

were properly listed as a hazardous waste, not whether spent catalysts are solid wastes. However, API argued at that time that *other* secondary materials from petroleum refining were not solid wastes. *API II*, 216 F.3d at 54-59. API could have also argued at that time that spent catalysts that are reclaimed are not solid waste. A hazardous secondary material must first be a solid waste in order for it to be a hazardous waste, so the question of whether spent catalysts destined for reclamation are discarded (and therefore solid waste) was certainly available to API. API raised substantially the same issue in its comments on the 1998 Rule, arguing that spent catalysts destined for reclamation should not be listed as hazardous waste. EPA rejected that suggestion due to, among other factors, the spent catalysts' pyrophoric properties. 63 Fed. Reg. at 42,158 col.2 (JA 0304). In the end, though, API did not advance this argument in its challenge to the 1998 Rule.

As a consequence, API's attack on EPA's authority to regulate spent catalysts that are reclaimed comes too late, because API is well beyond the 90 days allowed under RCRA to challenge the 1998 Rule. 42 U.S.C. § 6976(a)(1); *see generally Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1267 (D.C. Cir. 2003) (untimely challenges to RCRA rules barred by statutory requirement that petition for review be filed within 90 days of promulgation), *pet. for reh'g granted in part*, 365 F.3d 46 (D.C. Cir. 2004). The only way API could litigate in this lawsuit its

challenge to EPA's authority to regulate spent catalysts that are reclaimed would be if EPA had reopened that issue in the 2008 Rule. API does not even attempt to argue that the 2008 Rule reopened that issue, and arguments not raised in a petitioner's opening brief are waived. *See, e.g., Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000).

Even if API could belatedly make the reopener argument, the 2008 Rule did not reopen EPA's authority. The reopening doctrine allows an otherwise stale challenge to proceed when "the agency opened the issue up anew," and then "reexamined . . . and reaffirmed its [prior] decision." *Pub. Citizen v. Nuclear Reg. Comm'n*, 901 F.2d 147, 150-51 (D.C. Cir. 1990) (*quoting Ass'n of Am. R.R. v. ICC*, 846 F.2d 1465, 1473 (D.C. Cir. 1988)). The doctrine only applies, however, where "the entire context," *id.* at 150, demonstrates that the agency "ha[s] undertaken a serious, substantive reconsideration of the [existing] rule," *Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 70 F.3d 1345, 1352 (D.C. Cir. 1995). The reopening doctrine thus ensures that judicial review is available "when the agency . . . by some new promulgation creates the opportunity for renewed comment and objection." *Ohio v. EPA*, 838 F.2d 1325, 1328 (D.C. Cir. 1988); *see generally American Iron & Steel Inst. v. EPA*, 886 F.2d 390, 398 (D.C. Cir. 1989) (the reopening rule "is not a license for bootstrap procedures by which petitioners can

comment on matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency had re-opened the issue").

EPA did not take any of the steps that lead to reopening a resolved issue. EPA simply noted that it was deferring a decision on whether spent catalysts should be eligible for the general reclamation exclusions, or should be required to meet additional specific conditions to demonstrate that the spent catalysts are not discarded when reclaimed. Because EPA's overall *authority* to regulate spent catalysts was already litigated in 1998, and not reopened in the 2008 Rule, API cannot now challenge EPA's authority to regulate spent petroleum refining catalysts as solid (and therefore hazardous) wastes.

B. EPA Has The Authority To Regulate Spent Petroleum Refining Catalysts.

Even if API could challenge EPA's authority, its claim lacks merit. API asserts that reclamation of spent petroleum refining catalysts is not "part of the waste disposal problem," and therefore that spent catalysts are not discarded. Pet. Br. at 36-39, 41. However, API assumes the answer to the problem EPA identified, *i.e.*, that the spent catalysts will be properly contained throughout the reclamation process and thus not inadvertently discarded due to their pyrophoric properties. *See, e.g.*, Pet. Br. at 40 ("[w]here is the waste disposal problem *if* the refiner contains the catalysts . . .") (emphasis added).

EPA was not willing in the 2008 Rule to make API's preferred assumption, that spent catalysts destined for reclamation will always be properly contained. If spent catalysts are not contained during the reclamation process, they *can* (and will) become part of the waste disposal problem due to their pyrophoric properties. In 1998, EPA documented specific incidents of damage caused by spent catalysts, and noted that it is unusual to trace damage directly to a particular material. 63 Fed. Reg. at 42,154 col.3 (JA 0300); *id*. at 42,157 col.2 (JA 0303). In 2008, EPA indicated that it might be necessary to impose "specific conditions to address the pyrophoric properties of these hazardous secondary materials, particularly during transportation and storage prior to reclamation, in order for the Agency to determine that they are not being discarded." 73 Fed. Reg. at 64,714 col.2 (JA 0139). EPA reasonably decided that further consideration of specific handling requirements is necessary, to ensure that spent catalysts destined for reclamation are not discarded.

API points to *Safe Food*, 350 F.3d at 1268, asserting that "the transfer of a secondary material to a third party is not a good indicator of discard." Pet. Br. at 38. *Safe Food* was a challenge to an EPA rule excluding from the definition of solid waste certain recycled materials used to make zinc fertilizers, and the fertilizers themselves, so long as they were not speculatively accumulated, they met certain handling, storage and reporting conditions, and the fertilizers had

concentration levels for certain chemicals that fell below specified thresholds. 350 F.3d at 1265. If these conditions were met, the rule at issue in *Safe Food* provided that the recycled materials would not be considered to have been discarded.

API is correct that this Court rejected the argument that, as a matter of plain meaning, recycled material destined for immediate reuse within an ongoing industrial process is never considered "discarded," whereas material that is transferred to another firm or industry for subsequent recycling must always be solid waste. *Id*. at 1268.

However, API fails to mention that, as with previous cases, this Court evaluated "whether the agency's interpretation of . . . 'discarded' . . . is reasonable and consistent with the statutory purpose." *Id*. (internal quotations and citation omitted). In *Safe Food*, the Court evaluated the validity of EPA's explanation that market participants treat the exempted materials more like valuable products than like negatively-valued wastes, managing them in ways inconsistent with discard, and that the fertilizers themselves that are derived from these recycled feedstocks are chemically indistinguishable from analogous commercial products made from virgin materials. *Id*. Much of the *Safe Food* opinion discusses EPA's particular analyses of whether specific chemical contaminant levels in the recycled fertilizer are "identical" to the levels in products made with virgin materials. *Id*. at 1269-72.

In other words, the fertilizer rule that was the subject of *Safe Food* is precisely the type of material-specific regulation that EPA wishes to consider before EPA determines whether spent catalysts should be eligible for the general reclamation exclusions from the definition of solid waste.

C. EPA's Assertion of Jurisdiction Over Spent Petroleum Refining Catalysts Is Not Arbitrary.

API next asserts that because meeting the conditions of the general reclamation exclusions tends to establish the absence of discard, Pet. Br. at 41-42, the only reason why spent petroleum refining catalysts are ineligible for those exclusions must be their pyrophoric properties, *id*. at 42, but those pyrophoric properties are irrelevant to discard. *Id*. This is nothing more than a rehash of API's prior argument.

API also argues that the potential for environmental harm is irrelevant to whether a material is discarded, and that reliance solely on the material's hazardousness reads out of the statute the concept of "waste." Pet. Br. at 42-43. As explained above, EPA does not consider spent catalysts to be waste solely because of the material's pyrophoricity. Rather, pyrophoricity calls into question whether the spent catalysts will be properly *contained*, especially during transport and storage prior to reclamation. 73 Fed. Reg. at 64,714 col.2 (JA 0139). As API concedes, containment is an appropriate condition to ensure that a material is not discarded.

In sum, even if API could challenge EPA's authority to regulate as solid waste spent petroleum refining catalysts destined for reclamation, EPA has that authority because spent catalysts can be discarded if not properly contained, and EPA reasonably decided to consider in a future rulemaking whether specific handling requirements should be imposed to ensure proper containment.

IV. API IS NOT ENTITLED TO A SEPARATE ROUND OF NOTICE AND COMMENT ON EPA'S DEFERAL OF SPENT PETROLEUM REFINING CATALYSTS' ELIGIBILITY FOR THE GENERAL RECLAMATION EXCLUSIONS.

API argues that it lacked notice and an opportunity to comment on EPA's deferral of a decision on whether spent petroleum refining catalysts are eligible for the general reclamation exclusions, and that EPA's final action is not a logical outgrowth of EPA's proposal. Pet. Br. at 44. API is wrong for three reasons.

First, as API recognizes, Pet. Br. at 44, one logical outgrowth of a proposal to take a step is surely to decline to take that proposed step. *American Iron & Steel Inst.*, 886 F.2d at 400. That is what EPA did here. EPA proposed to make all spent hazardous secondary materials and all listed sludges and by-products eligible for the general reclamation exclusions, but elected to refrain from taking that step for spent petroleum refining catalysts, pending further consideration.

Second, API should have been aware that material-specific requirements for spent catalysts were a possibility. The Vanadium Producers & Reclaimers Association suggested that precise alternative, and although comments do not

provide notice, *Small Refiner*, 705 F.2d at 549, they do shed light on what possibilities are entailed in a given notice. *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1992) ("comments raising a foreseeable possibility of agency action can be a factor in providing notice"). *See also NRDC v. Thomas*, 838 F.2d 1224, 1242-43 (D.C. Cir. 1988) (finding a logical outgrowth where, among other factors, the "primary concern" that motivated EPA to select its final alternative "was obvious at an early stage," the "public comments raised the possibility" of the final alternative EPA adopted, and "there was a clearly foreseeable risk" that EPA would reject a commenter's view of the law but adopt the commenter's suggested alternative "as a matter of choice," but noting that industry did have "at least a limited opportunity . . . to file objections" and that these facts stretch the concept of logical outgrowth "to its limits").

Third and most importantly, API itself knew or reasonably should have known that a material-specific exclusion of spent catalysts was a possibility. API has repeatedly pressed EPA for a material-specific exclusion for spent catalysts from the definition of *hazardous* waste, arguing, similar to its argument here, that spent catalysts that are reclaimed should not be listed as a hazardous waste. API submitted the API Catalyst Paper in 2005 in response to a petition submitted by the Vanadium Producers & Reclaimers Association seeking more stringent land disposal restrictions for spent catalysts. In the API Catalyst Paper, API advocated

that as an interim measure, spent catalysts that are regenerated or used as feedstock to extract metals should be excluded from the definition of hazardous waste. But API also argued, among other things, that the long-term solution is "for EPA to exercise its discretion to exclude such catalysts from the definition of *solid waste*." API Catalyst Paper at 15 (emphasis added) (JA 0356). API suggested that

> [r]easonable conditions may be imposed on any exclusion from the definition of solid waste, such as secure storage to minimize releases, and recordkeeping – consistent with handling of the catalysts as valuable feedstocks. Also, while risk considerations do not technically come into play in determining what is 'discarded,' *see* 67 Fed. Reg. 48393, 48404 (July 24, 2002), the same reasonable management conditions in fact could serve to ensure that any unacceptable risks are properly managed.

Id. at 16 (JA 0357).

API re-submitted the API Catalyst Paper in 2007, as an attachment to its comments *in this rulemaking*. *See* EPA-HQ-RCRA-2002-0031-0492.6 (JA 0337). API's 2005 position is precisely what EPA wants to further consider: a material-specific exclusion with "reasonable management conditions" that would ensure the risks posed by spent catalysts, especially regarding storage, "are properly managed." API cannot reasonably assert that it was unaware of the possibility that EPA might explore a conditional exclusion specific to reclaimed spent catalysts given its prior position. *See, e.g.*, *Small Refiner*, 705 F.2d at 548-49 (the "test, imperfectly captured in the phrase 'logical outgrowth,' is whether [a party] should have anticipated that such a requirement might be imposed").

API also argues that EPA "changed its entire approach" to the general reclamation exclusions, rather than simply deferring a decision on whether spent catalysts are eligible for the general exclusions. Pet. Br. at 44-45. But that is not the case; as described above, material-specific conditions are nothing new in the definition of solid waste, and EPA simply deferred a decision on whether to create another tailored exclusion with additional conditions specific to reclaimed spent catalysts.

Even if the Court concluded that EPA somehow failed to provide API adequate notice and opportunity for comment, the remedy would be to remand to EPA to allow interested parties an opportunity to comment and EPA an opportunity to respond. *Shell*, 950 F.2d at 752. The Court should not, in such instances, proceed to the merits, contrary to API's contention.

Moreover, any such remand should leave EPA's deferral in place pending completion of proceedings on remand. Vacating the deferral would leave unaddressed EPA's concerns that the conditions in the general reclamation exclusions might not be sufficient to ensure that spent catalysts are properly contained. The Court "has traditionally not vacated [a] rule if doing so would have serious adverse implications for public health and the environment." *NRDC v. EPA*, 489 F.3d 1250, 1265 (D.C. Cir. 2007) (Rogers, J., concurring in part and dissenting in part).

Because EPA's deferral is a logical outgrowth of EPA's proposal, and because API knew or should have known that a material-specific exclusion for spent catalysts was a possibility, API is not entitled to another round of notice and opportunity to comment. Even if API were entitled to an additional opportunity to comment on the deferral, the Court should not vacate the deferral, which would have the unintended effect of deregulating spent petroleum refining catalysts. The remedy instead should be a remand to allow API to submit and EPA to consider API's comments.

V. THE ADMINISTRATIVE RECORD DOES NOT EXCLUDE RELEVANT ADVERSE DOCUMENTS.

The certified index to the administrative record of the 2008 Rule includes the docket of the 1998 rulemaking in which EPA listed spent petroleum refining catalysts as hazardous waste. EPA's certification of the index to the record is entitled to a presumption of regularity. *See, e.g., Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (the "task of the reviewing court is to apply the appropriate APA standard of review . . . *based on the record the agency presents to the reviewing court*") (emphasis added) (citation omitted); *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993) ("the designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity).

API asserts that the record should also include three background documents from other rulemakings, in which certain materials were listed as hazardous wastes F003 and F005, F007, and K045. Pet. Br. at 50. API also cites a 1986 guidance manual, which is not in the administrative record. *Id*. at 29, 32, 33. According to API, EPA is trying to "have it both ways," *id*. at 49, and must either ignore the hazardous properties of the spent catalysts or must take into account other materials that API asserts have hazardous properties that are "functionally indistinguishable" from the spent catalysts, yet are eligible for the general reclamation exclusions. *Id*. at 49-50. First, the 1998 docket is part of the record for the 2008 rule because EPA specifically referred to the 1998 docket in the preamble to the 2008 rule. *See* 73 Fed. Reg. at 64,714 col.2 (JA 0139). Neither the three background documents nor the 1986 manual that API cites were referred to in the preamble, and EPA did not consider them in this rulemaking. It is an elementary principle of administrative law that a reviewing court should not consider more information than was before the agency at the time of its decision. *Florida Power & Light*, 470 U.S. at 744.

Second, EPA did not, as API asserts, Pet. Br. at 51, deal with individual materials according to their relative hazards. It is not the spent petroleum refining catalysts' relative hazardousness that is relevant, it is the particular nature of the hazard – spontaneous self-combustion in air – that merits a closer look at the

conditions to ensure spent catalysts are not discarded. Because EPA did not evaluate that by comparing one material to another, the background documents regarding other listed hazardous wastes are not relevant.

Finally, even if API were right that other materials that are eligible for the general reclamation exclusions have hazardous properties similar to spent petroleum refining catalysts, the logical conclusion is that EPA should take a closer look at those other materials and consider material-specific conditions for them as well. Any failure by EPA to address some aspects of the problem does not mean that EPA should not address any aspects of it. Any under-regulation should not become a "free pass" to further compound the problem.

CONCLUSION

The Court should dismiss API's petition for lack of jurisdiction, or deny API's petition for review for lack of merit.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,568 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced type face using Microsoft Word 2007 in Times New Roman and 14 point font.

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CERTIFICATE OF SERVICE

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