

stored or transported prior to disposal. In fact, EPA found that recycling operations have accounted for a number of notorious damage incidents. For example, materials destined for recycling were involved in one-third of the first 60 filings under RCRA's imminent and substantial endangerment authority, and 20 of the first sites listed under CERCLA. (48 FR 14474, April 4, 1983) (The Agency has not, however, compiled definitive data on more recent damage cases associated with recycling operations.) Congress also cited some damage cases which can be interpreted to involve recycling. H.R. Rep. 94-1491, 94th Cong., 2d Sess., at 17, 18, 22.

- Excluding all materials destined for recycling would allow materials to move in and out of the hazardous waste management system depending on what any person handling the material intended to do with it. This seems inconsistent with the mandate to track hazardous wastes and control them from "cradle to grave."

Interpreting the statute to confer jurisdiction over at least some materials destined for recycling, EPA has developed in part 261 of 40 CFR a definition of "solid waste" for Subtitle C regulatory purposes. (Note that this definition is narrower than the definition of "solid waste" for RCRA endangerment and information gathering authorities. See 40 CFR 261.1(b) and *Connecticut Coastal Fishermen's Association v. Remington Arms Co.*, 989 F.2d 1305, 1315 (2d Cir. 1993), holding that EPA's use of a broader and more specific definition of solid waste for Subtitle C purposes is a reasonable interpretation of the statute.)

Under its Subtitle C regulations, EPA classifies as solid wastes some—but not all—secondary materials that are recycled by "reclamation." The regulations define "spent materials" as being "discarded" if they are destined for reclamation. However, "commercial chemical products" are not defined as "discarded" when reclaimed. Byproducts and sludges are defined as "discarded" on a case-by-case basis. EPA regulates these materials when they are reclaimed, when it has listed them in the context of a hazardous waste listing determination. However, EPA does not regulate by-products and sludges being reclaimed that are not listed hazardous wastes. See Table 1 to 40 CFR 261.2. Finally, EPA has promulgated three exceptions from the Subtitle C definition for materials destined for reclamation. See 260.31(b) and (c); 40 CFR 261.4(a)(8).

In a reclamation operation, some components of a material are recovered and reused, while others are separated

and in some cases are discarded. The variety of regulatory approaches to reclamation reflects the fact that EPA has found that some reclamation processes involve discard (because they more closely resemble waste management), while other such processes do not (because they more closely resemble normal manufacturing).

Finally, EPA has always asserted that materials are not excluded from its jurisdiction simply because someone claims that they will be recycled. EPA has consistently considered materials destined for "sham recycling" to be discarded and, hence, to be solid wastes for Subtitle C purposes. See 45 FR 33093 (May 19, 1980), 50 FR 638-39 (Jan. 4, 1985). The U.S. Court of Appeals for the D.C. Circuit has agreed that materials undergoing sham recycling are discarded and, consequently, are solid wastes under RCRA. See *American Petroleum Institute v. EPA*, 216 F.3d 50, 58-59 (D.C. Cir. 2000);

## 2. A Series of D.C. Circuit Court Decisions

Trade associations representing mining and oil refining interests challenged EPA's 1985 regulatory definition of solid waste. In 1987, the D.C. Circuit held that EPA exceeded its authority "in seeking to bring materials that are not discarded or otherwise disposed of within the compass of 'waste.'" *American Mining Congress v. EPA* ("AMC I"), 824 F.2d 1177, 1178 (D.C. Cir. 1987). Although the Court clearly articulated this concept, it did not specify which portions of the rules exceeded EPA's authority. It more generally "granted the petition for review."

The Court held that some of the materials EPA was seeking to regulate were not "discarded materials" under section 1004(27). After reviewing numerous statutory provisions and portions of the legislative history, the Court held that Congress used the term "discarded" in its ordinary sense, to mean "disposed of" or "abandoned." 824 F.2d at 1188-89. The Court further held that the term "discarded materials" could not include materials \* \* \* *destined for beneficial reuse or recycling in a continuous process by the generating industry itself* (because they are not yet part of the waste disposal problem." 824 F.2d at 1190 (italics in original). The Court held that Congress had directly spoken to this issue, so that EPA's use of a conflicting definition was not entitled to deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). 824 F.2d at 1183, 1189-90, 1193.

At the same time, the Court did *not* hold that no recycled materials could be discarded. The Court mentioned at least two examples of recycled materials that EPA properly considered within its statutory jurisdiction, noting that used oil to be reused as fuel and metal-bearing secondary materials stored in open piles which leached into the environment while stored for reuse in metals recovery can be considered to be solid wastes. 824 F.3d at 1187 (fn 14) and 1191 (fn 20). Also, the Court suggested that materials disposed of and recycled as part of a waste management program are within EPA's jurisdiction. 824 F. 2d at 1179. Subsequent decisions by the D.C. Circuit also indicate that some materials destined for recycling are "discarded" and therefore within EPA's jurisdiction. The Court held that emission control dust from steelmaking operations listed as hazardous waste "K061" is a solid waste, even where sent to a metals reclamation facility, at least where that is the treatment method required under EPA's land disposal restrictions program. *American Petroleum Institute v. EPA* ("API I"), 906 F.2d 729 (D.C. Cir. 1990). The Court held that listed wastes managed in units that are part of wastewater treatment units are discarded materials (and solid wastes), especially where it is not clear that the industry actually reuses the materials. ("AMC II"), 907 F. 2d 1179 (D.C. Cir. 1990). Also, the Court found that EPA potentially had jurisdiction over oil-bearing wastewaters recycled at petroleum refineries, although in the rule under review EPA failed to provide a rational basis for asserting jurisdiction. *American Petroleum Institute v. EPA* ("API II"), 216 F.3d 50, 57-58 (D.C. Cir. 2000).

It is also worth noting that two other Circuits also have held that EPA has authority over at least some materials destined for reuse rather than final discard. The U.S. Court of Appeals for the 11th Circuit found that "[i]t is unnecessary to read into the term 'discarded' a congressional intent that the waste in question must finally and forever be discarded." *U.S. v. ILCO*, 996 F.2d 1126, 1132 (11th Cir. 1993) (finding that used lead batteries sent to a reclaimer have been "discarded once" by the entity that sent the battery to the reclaimer). The Fourth Circuit found that slag held on the ground untouched for six months before sale for use as road bed could be a solid waste. *Owen Electric Steel Co. v. EPA*, 37 F.3d 146, 150 (4th Cir. 1994).

Considering all of these decisions (except the *API* case decided in 2000), in 1998 EPA promulgated a rule adjusting its Subtitle C jurisdiction over