

materials recycled by reclamation within the mineral processing industry (the "LDR Phase IV rule"). 63 FR 28556 (May 26, 1998). In that rule, EPA promulgated a conditional exclusion for all types of mineral processing materials destined for reclamation. EPA imposed a condition prohibiting land-based storage prior to reclamation because it considered secondary materials from the mineral processing industry that were stored on the land to be part of the waste disposal problem. 63 FR at 28581. The conditional exclusion decreased regulation over spent materials stored prior to reclamation, but increased regulation over by-products and sludges that exhibit a hazardous characteristic, and that are stored prior to reclamation. EPA noted that the statute does not authorize it to regulate "materials that are destined for immediate reuse in another phase of the industry's ongoing production process." EPA, however, took the position that materials that are removed from a production process for storage are not "immediately reused," and therefore, are "discarded." 63 FR at 28580.

The mining industry challenged the rule, and the D.C. Circuit vacated the provisions that expanded jurisdiction over characteristic by-products and sludges destined for reclamation. *Association of Battery Recyclers v. EPA* ("ABR"), 208 F.3d 1047 (D.C. Cir. 2000). The Court held that it had already resolved the issue presented here in its opinion in *AMC I*, where it found that "* * * Congress 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." 208 F.2d at 1051. It repeated that materials reused within an ongoing industrial process are neither disposed of or abandoned. 208 F.3d at 1051-52. It explained that the intervening API I and AMC II decisions had not narrowed the holding in *AMC I*. 208 F.3d at 1054-1056.

At the same time, the Court did not hold that storage before reclamation automatically makes materials "discarded." Rather, it held that "* * * at least some of the secondary material EPA seeks to regulate as solid waste (in the mineral processing rule) is destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away." 208 F.3d at 1056.

3. Today's Action

EPA has promulgated a final rule removing from the *Code of Federal Regulations* the byproduct and sludge

provisions of the 1998 mineral processing exclusion that the Court vacated in *ABR*. 67 FR 11251 (Mar. 13, 2002). Nonetheless, EPA views *ABR* as creating an opportunity to re-examine its rules and interpretations and clarify whether they regulate certain materials that are not "discarded." In today's proposed rule, therefore, EPA is attempting to identify a certain class or category of materials that EPA has determined are *not* discarded for purposes of Subtitle C. As explained in more detail elsewhere in this notice, EPA generally believes that such materials may include those that are recycled by being reclaimed within the same industry in which they were generated. EPA thinks that other classes of recycling activities, such as "burning for energy recovery," "use constituting disposal," and recycling of materials classified as "inherently waste-like" clearly involve elements of discard.

EPA is today proposing that any material which is generated and reclaimed in a continuous process within the same industry (as defined in today's proposal) is not "discarded" for purposes of Subtitle C, provided that the recycling process is "legitimate." Guided by the *AMC I* and *ABR* opinions, EPA is proposing to exclude these materials from the definition of solid waste for purposes of Subtitle C. Under this approach, EPA is proposing that when generation and reclamation occur on a continuous basis within a single industry (as the terms are defined in this proposal), secondary materials would not be regulated as solid wastes.

Looking to the D.C. Circuit decisions for guidance, EPA is proposing today to exercise its discretion to interpret the statutory term "discard" for Subtitle C purposes. EPA is proposing that materials recycled in a continuous process within the generating industry would not be considered solid wastes for Subtitle C purposes. For reasons articulated later in this preamble, EPA believes that it must draw lines to provide a measure of regulatory certainty. EPA believes that the lines it is proposing today reflect reasonable judgments.

EPA notes that the term "solid waste" is used in several places in the statute in addition to Subtitle C. EPA, however, is limiting the specific definitions in today's proposal to its Subtitle C regulations. While the general concepts that the Court articulated may also play a role in other RCRA provisions, EPA does not think the detailed scheme involving "industry" classifications and time limits on processing which it has developed for this rule are necessarily appropriate for other RCRA provisions.

For example, RCRA section 7003 gives EPA authority to compel actions to abate conditions that may present an "imminent and substantial endangerment" involving solid wastes. EPA uses this authority on a case-by-case basis. The Agency can determine in a specific factual context whether a material which causes an endangerment is discarded. Finally, EPA notes that it continues to regard any material intended for recycling that escapes into the environment as "discarded" and, therefore, within its statutory jurisdiction.

E. What Suggestions Have Stakeholders Offered for Future Efforts To Reverse the Current Recycling Regulations?

In the final rule responding directly to the vacatur ordered by the United States Court of Appeals for the District of Columbia Circuit in *Association of Battery Recyclers, v. EPA* 208 F.3d 1047 (2000) (67 FR 11251-4, March 13, 2002), EPA asked stakeholders to submit suggestions for possible future revisions to the current recycling regulations.

The Agency received responses from both States and industry stakeholders. Some comments pertained to specific waste streams or industrial processes, but others were broader in nature. Although many of the broader suggestions are outside the scope of the current proposal, EPA would like to briefly summarize the comments here in order to continue the public dialogue on possible future efforts. In addition, the full set of these suggestions are included in the docket to today's proposed rulemaking. EPA requests comment on both these and any other possible revisions to the definition of solid waste that might be included in future proposals.

Most of the comments from industry stakeholders focused on the regulatory definition of "discarded material" found in 40 CFR 261.2(a)(2). Many of these stakeholders encouraged the Agency to address broadly the issue of when "discard" of recyclable materials occurs. Several commenters, including the American Chemistry Council (ACC), American Petroleum Institute (API), Chevron-Texaco and the International Precious Metals Institute (IPMI) suggested removing "recycled" from the definition of discarded materials. Commenters offered different regulatory alternatives to ensuring that "sham recycling" does not occur as a result of removing recycling from the definition of discard, including suggesting that EPA specify "legitimacy criteria" (ACC), suggesting EPA delineate material management factors that would indicate discard (IPMI), or including specific