ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE, *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	Case No. 09-1038 (and consolidated cases)

ERRATA TO THE PROOF JOINT BRIEF OF RESPONDENT-INTERVENORS CALIFORNIA COMMUNITIES AGAINST TOXICS, CLEAN AIR COUNCIL, COALITION FOR A SAFE ENVIRONMENT, LOUISIANA ENVIRONMENTAL ACTION NETWORK, SIERRA CLUB, ENVIRONMENTAL TECHNOLOGY COUNCIL, AND MOVANT-INTERVENOR GULF CHEMICAL AND METALLURGICAL CORP.

Respondent-Intervenors California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Louisiana Environmental Action Network, Sierra Club, Environmental Technology Council, and Movant-Intervenor Gulf Chemical and Metallurgical Corp. hereby notify the Court that, in addition to inserting citations to the Joint Appendix, correcting typographical errors, and updating their Table of Authorities, they have included the following non-typographical corrections in their final brief:

p.17, corrected text:

Original: hazardous wastes transport those

Corrected: hazardous wastes transfer those

p.20 n.4, corrected short citation:

Original: ("Market Force Study")

Corrected: ("Market Forces Study")

p.21, corrected short citation:

Original: Market Force Study

Corrected: Market Forces Study

p.22, corrected text:

Original: In response to comments on the study,

Corrected: In response to comments on the Correlation Study,

p.24, corrected short citation:

Original: Market Force Study

Corrected: Market Forces Study

p.27, corrected short citation:

Original: Market Force Study

Corrected: Market Forces Study

As a result of all the changes, the certificate regarding word limitation has been updated from 7,216 words to 7,220 words.

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DATED: June 20, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2016, I have served the foregoing **Errata to the Proof Joint Brief of Respondent-Intervenors California Communities Against Toxics, Clean Air Council, Coalition for a Safe Environment, Louisiana Environmental Action Network, Sierra Club, Environmental Technology Council, and Movant-Intervenor Gulf Chemical and Metallurgical Corp.** on all registered counsel through the court's electronic filing system (ECF).

/s/ James S. Pew
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ORAL ARGUMENT NOT YET SCHEDULED

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

No. 09-1038 (and consolidated cases)

AMERICAN PETROLEUM INSTITUTE,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of Final Administrative Actions of the
United States Environmental Protection Agency

FINAL JOINT BRIEF OF RESPONDENT-INTERVENORS CALIFORNIA COMMUNITIES AGAINST TOXICS, CLEAN AIR COUNCIL, COALITION FOR A SAFE ENVIRONMENT, LOUISIANA ENVIRONMENTAL ACTION NETWORK, SIERRA CLUB, ENVIRONMENTAL TECHNOLOGY COUNCIL, AND MOVANT-INTERVENOR GULF CHEMICAL AND METALLURGICAL CORP.

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ORAL ARGUMENT NOT YET SCHEDULED

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

AMERICAN PETROLEUM INSTITUTE, *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	Case No. 09-1038 (and consolidated cases)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Louisiana Environmental Action Network, and Sierra Club (collectively, "Environmental Intervenors"), the Environmental Technology Council ("ETC"), and Gulf Chemical and Metallurgical Corporation ("Gulf") hereby certify as follows:

(A) Parties and Amici

(i) Parties, Intervenors, and Amici Who Appeared in the District Court

This case is a petition for review of final agency action, not an appeal from the ruling of a district court.

(ii) Parties to This Case

Petitioners:

09-1038 American Petroleum Institute

15-1083 Utility Solid Waste Activities Group, Edison Electric Institute, National Rural Electric Cooperative Association, American Gas Association

15-1085 American Petroleum Institute

15-1088 Freeport-McMoRan Inc.

15-1089 National Association of Manufacturers, American Chemistry Council

15-1094 California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Louisiana Environmental Action Network, Sierra Club

Respondents:

The respondent in all cases is the United States Environmental Protection Agency. Also named as a respondent in case nos. 15-1089 and 15-1094 is Gina McCarthy, in her official capacity as Administrator of the U.S. Environmental Protection Agency.

Intervenors:

American Chemistry Council, American Coke and Coal Chemicals Institute, American Forest & Paper Association, American Gas Association, American Petroleum Institute, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Edison Electric Institute, Environmental

Technology Council, Inc., Freeport-McMoRan Inc., Louisiana Environmental Action Network, Metals Industry Recycling Coalition, National Association of Manufacturers, National Mining Association, National Rural Electric Cooperative Association, Sierra Club, Society of Chemical Manufacturers and Affiliates, Synthetic Organic Chemical Manufacturers Association, Inc., Treated Wood Council, and Utility Solid Waste Activities Group have intervened on behalf of the respondent in these consolidated cases.

Gulf Chemical and Metallurgical Corporation has moved to intervene on behalf of the respondent.

(iii) *Amici* in This Case

Eastman Chemical Company and Solvay USA Inc. have filed an *amici curiae* brief in support of Industry Petitioners.

(iv) Circuit Rule 26.1 Disclosures

See disclosure forms filed below.

(B) Rulings Under Review

Petitioners seek review of the final action taken by EPA at 80 Fed. Reg. 1694 (Jan. 13, 2015), and titled "Definition of Solid Waste; Final Rule." Petitioner American Petroleum Institute additionally seeks review of the final action taken by EPA at 73 Fed. Reg. 64,668 (Oct. 30, 2008), and titled "Revisions to the Definition of Solid Waste; Final Rule."

(C) Related Cases

Apart from the consolidated cases, Environmental Intervenors, ETC, and Gulf are unaware of any other currently pending related cases.

DATED: June 20, 2016

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

AMERICAN PETROLEUM INSTITUTE, *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	Case No. 09-1038 (and consolidated cases)

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Louisiana Environmental Action Network, and Sierra Club (collectively, "Environmental Intervenors") and the Environmental Technology Council ("ETC") make the following disclosures:

California Communities Against Toxics

Non-Governmental Party to this Action: California Communities Against Toxics ("CCAT").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: CCAT is a non-profit network that is a project of a non-profit corporation (Del Amo Action Committee) that is organized and existing under the laws of the State of California. It is an environmental justice network that aims to reduce exposure to pollution, to expand knowledge about the effects of toxic chemicals on human health and the environment, and to protect the most vulnerable people from harm.

Clean Air Council

Non-Governmental Corporate Party to this Action: Clean Air Council ("CAC").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: CAC is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. CAC is a not-for-profit organization focused on protection of public health and the environment.

Coalition For A Safe Environment

Non-Governmental Party to this Action: Coalition For A Safe Environment ("CFASE").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: CFASE is a not-for-profit organization based in Wilmington, California dedicated to improving the environment, public health,

public safety, and socio-economic justice through advocacy, community organizing, research, and public education.

Louisiana Environmental Action Network

Non-Governmental Corporate Party to this Action: Louisiana Environmental Action Network ("LEAN").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: LEAN is a corporation organized and existing under the laws of the State of Louisiana. LEAN is a nonprofit organization which works with citizens' groups throughout the state of Louisiana to develop, implement, protect, and enforce legislative and regulatory environmental safeguards.

Sierra Club

Non-Governmental Corporate Party to this Action: Sierra Club.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

Environmental Technology Council

Non-Governmental Corporate Party to this Action: Environmental Technology Council ("ETC").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Environmental Technology Council, a corporation organized and existing under the laws of the State of Delaware, is a national non-profit trade association of commercial firms that provide technologies and services for recycling, treatment, and secure disposal of industrial and hazardous wastes.

DATED: June 20, 2016

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

AMERICAN PETROLEUM INSTITUTE	)	
	)	
Petitioner,	)	
v.	)	Case No. 09-1038
	)	(and consolidated cases)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
Respondent.	)	
	)	

REVISED RULE 26.1 DISCLOSURE STATEMENT OF
GULF CHEMICAL AND METALLURGICAL CORPORATION

Pursuant to Fed. R. App. Pro. 26.1 and D.C. Cir. Rule 26.1, Movant-Intervenor Gulf Chemical and Metallurgical Corporation ("Gulf") hereby states that it is a nongovernmental corporation whose general nature and purpose is the recycling of spent petroleum catalysts and production of ferroalloys. Gulf further states that its only parent company or publicly-held company that has a 10% or greater ownership interest in Gulf is Comilog Holding.

Dated: June 20, 2016

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

Correlation Study	EPA, *Correlation of Recycling Damage Cases with Regulatory Exclusions, Exemptions or Alternative Standards* (June 2011), EPA-HQ-RCRA-2010-0742-0010
Damage Study	EPA, *An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials* (Dec. 10, 2014), EPA-HQ-RCRA-2010-0742-0370
EPA	U.S. Environmental Protection Agency and Gina McCarthy, Administrator
Envtl. Pet. Br.	Opening Brief for Environmental Petitioners
Gulf	Gulf Chemical and Metallurgical Corporation
Industry Br.	Opening Brief for Industry Petitioners
JA	Joint Appendix
Market Force Study	EPA, *A Study of Potential Effects of Market Forces on the Management of Hazardous Secondary Materials Intended for Recycling* (Nov. 2006), EPA-HQ-RCRA-2002-0031-0385
OMB	Office of Management and Budget
OMB Redline	OMB, *Record of Revisions to the Draft Final DSW Rule during White House Review Per EO 12866* (Nov. 10, 2014), EPA-HQ-RCRA-2010-0742-0373
RCRA	Resource Conservation and Recovery Act

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STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the briefs and addenda of the Environmental Petitioners ("Envtl. Pet. Br."), Industry Petitioners ("Industry Br."), and Respondents U.S. Environmental Protection Agency and Gina McCarthy.

ENVIRONMENTAL INTERVENORS' AND ENVIRONMENTAL TECHNOLOGY COUNCIL'S STATEMENT OF THE CASE

Through the Resource Conservation and Recovery Act ("RCRA"), Congress commanded the United States Environmental Protection Agency ("EPA") to protect human health and the environment from threats presented by the entire lifecycle of hazardous wastes – from their generation to disposal, or "cradle-to-grave." *Shell Oil Co. v. EPA*, 950 F.2d 741, 745 (D.C. Cir. 1991). Indeed, preventing toxic pollution caused by hazardous waste management was the clear "overriding concern" motivating RCRA's enactment, H.R. Rep. 94-1491, pt. I, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241, and EPA has acknowledged that the Act's other "goals of resource conservation and waste reduction must never occur at the expense of" this fundamental purpose. EPA, *Potential Adverse Impacts Under the Definition of Solid Waste Exclusions* at 2 (Dec. 2014), EPA-HQ-RCRA-2010-0742-0371, JA1066.

Nonetheless, over time EPA has allowed countless polluters claiming to "recycle" hazardous wastes to evade RCRA altogether by using any of more than

30 self-implementing regulatory exclusions and exemptions from the statute's definition of solid waste. From EPA's perspective, the exclusions and exemptions were appropriate because the agency assumed they would be used solely for actual or "legitimate" recycling, as opposed to "sham recycling," *i.e.*, "disposal in the guise of recycling." 80 Fed. Reg. 1694, 1720/1 (Jan. 13, 2015), JA0291. EPA also assumed that compliance with the terms and conditions of its many exclusions and exemptions would ensure against discard and adequately protect human health and the environment. Now, following decades of significant toxic contamination in and around hazardous waste recycling sites across the country, EPA has realized that its assumptions about its definition of solid waste exclusions and exemptions were incorrect.

In this rulemaking, EPA takes a few small steps to confront the fact that its deregulation of hazardous waste recycling has undermined RCRA and resulted in the very harm to human health and the environment that Congress sought to guard against. *Compare* H.R. Rep. 94-1491, pt. I, at 17-38, 1976 U.S.C.C.A.N. at 6254-61 (discussing dozens of cases of environmental harm from hazardous waste mismanagement)[1] *with* EPA, *An Assessment of Environmental Problems*

[1] *See also* H. Comm. on Interstate and Foreign Commerce, 96th Cong., Rep. on Hazardous Waste Disposal, 96-IFC 31, at 1-6, 9-18, 24-25, 54 (Comm. Print 1979) (discussing "seriousness of the hazardous waste problem" including issues with "improper recycling").

Associated with Recycling of Hazardous Secondary Materials app. 1 (Dec. 10, 2014), EPA-HQ-RCRA-2010-0742-0370 (discussing 250 cases of environmental harm from hazardous waste recycling activities) ("Damage Study"), JA0998.[2] Dismissing overwhelming record evidence of poisoned air, soils, and waters in communities near hazardous waste recycling facilities, Industry Petitioners ask the Court to block EPA from taking even these small steps to narrow existing, dangerous loopholes.

Environmental Intervenors incorporate by reference Environmental Petitioners' Statement of Facts. Envtl. Pet. Br. at 3-17. The following discussion addresses aspects of the record that are relevant to Industry Petitioners' claims.

In the 2011 proposed rule, EPA determined that under its 2008 Transfer-Based Exclusion, "hazardous secondary materials transferred to another party for reclamation" – *i.e.*, the hazardous wastes excluded from RCRA regulation by the 2008 Transfer-Based Exclusion – "are discarded and are best regulated under RCRA." 76 Fed. Reg. 44,094, 44,096/1-2 (July 22, 2011), JA0206. Accordingly, EPA proposed to withdraw the Transfer-Based Exclusion altogether and to

[2] This represents EPA's final Damage Study. The original version was completed in 2007 and covered 208 cases. EPA-HQ-RCRA-2002-0031-0355, JA0450. It was revised in response to public comments. 80 Fed. Reg. at 1698/3, n.3, JA0269.

regulate these materials as "hazardous waste" under RCRA Subtitle C. *Id.* at 44,110/1-2, JA0220.

EPA also expressly concluded that the conditions on which it previously relied to prevent the Transfer-Based Exclusion from allowing the discard of hazardous waste –from just being an unlawful loophole in RCRA's "cradle-to-grave" regulatory structure – would not prevent discard "when actually implemented" in the real world. *Id.* at 44,109/1, JA0219; 80 Fed. Reg. 1707/3, JA0278.

Although EPA drafted a final rule that followed through on the agency's proposal to eliminate the Transfer-Based Exclusion, the Office of Management and Budget reversed EPA's decision and inserted a new exclusion into the agency's final rule just one month before it was signed. OMB, *Record of Revisions to the Draft Final [Definition of Solid Waste] Rule during White House Review Per EO 12866* at 7 (Nov. 10, 2014), EPA-HQ-RCRA-2010-0742-0373 ("OMB Redline"), JA0955.[3] The new "Verified Recycler Exclusion" shares most of the flaws EPA

[3] The record indicates that OMB completed its redline revisions to EPA's final rule on November 10, 2014 and that the Administrator signed the final rule with OMB's revisions accepted on December 10, 2014. OMB Redline at 1, JA0951; 80 Fed. Reg. at 1771/1 (showing signature date), JA0342; *see also* https://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2010-0742-0373 (showing the "Received Date" for the OMB Redline to be December 9, 2014).

identified in the proposal as its reasons for withdrawing the Transfer-Based Exclusion and replacing it with hazardous waste regulation under RCRA Subtitle C. *See* Envtl. Pet. Br. at 30-39. However, it also includes some additional conditions that will provide people who live near and work in the facilities that generate, store, transport, and recycle hazardous wastes with an additional modicum of protection from exposure to toxic substances that have occurred all too routinely – as documented by EPA in the record – as a result of leaks, spills, fires, and explosions caused by the unsafe storage and handling of excluded hazardous wastes.

Moreover, to all pre-2008 exclusions and exemptions, EPA's final rule formally applies some of the conditions that EPA had identified as the "minimum requirements necessary" to prevent the unlawful discard of hazardous waste. 76 Fed. Reg. at 44,138/3-39/1, JA0248-49. These requirements, which EPA calls the "legitimacy criteria," similarly provide a modicum of additional assurance that the recycling conducted under all of those exclusions is actually legitimate, rather than a mere sham to circumvent hazardous waste regulation under RCRA and risk the kind of human health and environmental harm documented in the Damage Study.

SUMMARY OF THE ARGUMENTS

I. ARGUMENTS OF ENVIRONMENTAL INTERVENORS AND ENVIRONMENTAL TECHNOLOGY COUNCIL

Industry Petitioners attack the minimal protections against sham recycling in the legitimacy criteria. These requirements, although insufficient to prevent the discard of hazardous waste and protect human health and the environment, will help to protect against ongoing abuse and misuse of EPA's many recycling exclusions and exemptions. EPA's record of 250 cases of serious environmental damage and human health threats associated with these regulatory loopholes fully supports the application of the specific legitimacy factors challenged by Industry Petitioners.

The Court need not address Industry Petitioners' challenge to specific conditions in the Verified Recycler Exclusion if it determines that the Exclusion itself must be vacated as unlawful or arbitrary, as Environmental Petitioners contend. If the Court addresses Industry Petitioners' arguments, however, it should reject them. First, Industry Petitioners misrepresent EPA's rationale for these conditions as based on the notion that "transfer equals discard," and their attack on this straw-man rationale is irrelevant and without merit. Second, Industry Petitioners' attack on the studies supporting EPA's decision to withdraw the 2008 Transfer-Based Exclusion merely reflect their disagreement over the agency's methodology, but do not undermine the record support for EPA's decision or show

that the decision is, in any way, unlawful or arbitrary. Third, the conditions in the Verified Recycler Exclusion are not severable from the Exclusion itself. Thus, even if the Court accepts Industry Petitioners' challenge to the conditions in the Verified Recycler Exclusion, it should reject their request to strip out or invalidate those conditions and leave in place an exclusion that EPA plainly would not have promulgated on its own.

II. ARGUMENTS OF GULF CHEMICAL AND METALLURGICAL CORPORATION

In a separate argument, Movant-Intervenor Gulf Chemical and Metallurgical Corporation ("Gulf") asserts that EPA determined in 1998 that spent catalysts from petroleum refinery operations were "discarded" solid wastes, when it promulgated the final rule designating them as listed hazardous wastes K171 and K172. Therefore, Industry Petitioners' attempt to challenge this determination in this proceeding is an untimely "back-door" challenge barred by RCRA. Moreover, the conditions placed upon the reclamation of spent catalysts under the 2015 Definition of Solid Waste Rule exclusions are reasonable, consistent with RCRA's statutory purposes, and entitled to deference in light of their pyrophoric properties.

ARGUMENTS OF ENVIRONMENTAL INTERVENORS AND ENVIRONMENTAL TECHNOLOGY COUNCIL

I. THE LEGITIMACY FACTORS ARE REASONABLY SUPPORTED BY THE RECORD'S DOCUMENTATION OF DAMAGE CASES CAUSED BY SHAM RECYCLING.

Many of EPA's exclusions and exemptions from the definition of solid waste, including those revised in this rule, rely on the assumption that the excluded materials are being legitimately recycled. Assuming such exclusions and exemptions can ever be lawful, they depend on EPA being able to determine whether the recycling is legitimate or merely a "sham" to conceal the disposal of hazardous wastes. The legitimacy factors that Industry Petitioners attack are critical, especially for enforcement, to ensuring that recycling is not a guise for disposal.

Industry Petitioners do not contest the first and second legitimacy factors which require that (1) the materials provide a useful contribution to the recycling process or product, and (2) produce a valuable product or intermediate. 40 C.F.R. § 260.43(a)(1), (2) (80 Fed. Reg. 1773/1, JA0344). Thus, Industry Petitioners concede that these requirements are necessary to prevent sham recycling from becoming part of the waste disposal problem that Congress sought to address in RCRA. H.R. Rep. No. 1491, pt. I, at 3, 1976 U.S.C.C.A.N. at 6241.

A. The Third Legitimacy Factor Prevents Poor Management Of Hazardous Materials From Resulting In Disposal.

Industry Petitioners challenge the third legitimacy factor because it requires that hazardous materials be managed like analogous materials or be contained. Industry Br. at 18-19. Without this basic requirement, however, it is more likely that materials could be poorly managed rather than fully recycled, allowing hazardous contaminants to be disposed via releases to the air, soil, and water. As EPA reasonably stated in the third factor itself, "[h]azardous secondary materials that are released to the environment and are not recovered immediately are discarded." 40 C.F.R. § 260.43(a)(3) (80 Fed. Reg. 1773/1, JA0344).

In adopting the third legitimacy factor, EPA relied on many damage incidents that have resulted from sham recycling that involved improper management and lack of containment. 80 Fed. Reg. 1698/2-99/3, JA0269-70; Damage Study, JA0998-1064. Of the 208 damage cases presented in the original Damage Study, 81 cases (40%) primarily resulted from the mismanagement of recyclable hazardous secondary materials. 80 Fed. Reg. 1699/1, JA0270. As EPA explained, "the pattern of environmental damages that resulted from the mismanagement of recyclable materials (including contamination of soils, groundwater, surface water and air) is a strong indication that the hazardous secondary materials were generally not managed as valuable commodities and were discarded." *Id.* at 1698/3-99/1, JA0269-70.

Illustrative examples abound. Metachem in New Castle, Delaware, was a leading global producer of a chemical known as polychlorobenzene that was produced using some hazardous secondary materials such as iron catalysts, treatment chemicals, ethylene glycol, refrigerants, and lubricants. Damage Study app. 1 at 1-467, JA1056. Metachem allowed large quantities of allegedly recyclable materials to build up due to its low recycling rate, with resulting environmental releases from rail car spills, tank ruptures, and facility leaks. *Id.* app. 1 at 1-469, JA1058. Metachem clearly failed to "manage the hazardous secondary material as a valuable commodity" in a protective manner, as the third legitimacy factor would have required. 40 C.F.R. § 260.43(a)(3) (80 Fed. Reg. 1773/1, JA0344).

Similarly, Parramore Fertilizer in Tifton, Georgia, processed listed hazardous waste (K061 electric arc furnace dust) into micronutrients for fertilizers. Damage Study app. 1 at 1-461, JA1051. Over 60,000 tons of K061 waste was stored on the ground in piles up to 30 feet high, causing releases of cadmium and other toxic metals and chemicals to groundwater. *Id.* Ironically, the Damage Study notes that "the recycling was legitimate" under then applicable requirements, but the third legitimacy factor would have mandated better management and helped to prevent the significant environmental releases. *Id.*; *see also id.* app. 1 at 1-476 (Tetra Micronutrients in Fairbury, Nebraska (hazardous brass fume dust used in

fertilizer stored on the ground in open piles, causing air, soil, and groundwater contamination)), JA1061.

Another good example is Romarc Industries in Williston, Florida, which received hazardous wastes (flammable resins) to recycle into resin casts and molds for concrete products. *Id.* app. 1 at 1-408, JA1048. Hazardous wastes intended for recycling were stored outside in drums in various states of deterioration, releasing contaminants that caused soil contamination. *Id.* Also, Sentco Paints in Youngstown, Ohio, was a paint manufacturer that accepted hazardous waste paint to recycle into their products. *Id.* app. 1 at 1-451, JA1050. The waste paint was stored in leaking drums, buried under a loading dock, and burned in the open on site, hardly indicative of managing it as a valuable commodity for recycling. *Id.*

Many of the facility sites in the Damage Study where hazardous materials were not managed as a valuable commodity or otherwise properly contained involve mercury recycling from fluorescent lamps (*e.g.*, Quicksilver Products, Inc., Brisbane, California, *id.* app. 1 at 1-378, JA1046); solvent recycling (*e.g.*, Spectron, Inc., Elkton, Maryland, *id.* app. 1 at 1-464, JA1053); and electronics reclamation (*e.g.*, Echo Valley Recycling Enterprises, Rolla, Missouri, *id.* app. 1 at 1-175, JA1034).

Contrary to Industry Petitioners' claim, the third legitimacy factor does not conflict with *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1051

(D.C. Cir. 2000). Industry Br. at 19. Although materials managed in compliance with this factor may still be discarded, requiring that hazardous material intended for recycling be managed properly like a valuable commodity and not spilled, leaked, or released to the environment has a direct connection to discard. Such improperly managed materials are not recycled, but are instead disposed into the environment.

B. The Fourth Legitimacy Factor Prevents Toxic Constituents From Being Disposed By Incorporation Into The Recycled Product.

Industry Petitioners challenge the fourth legitimacy factor because it requires that the product of the recycling process be comparable to a legitimate product as determined by several alternative criteria. *Id.* at 20. Industry Petitioners appear to object mainly to the criterion that compares the chemical composition of the recycled product to analogous products or to commodity specifications. *Id.* at 20-25. If the recycled product has high levels of hazardous constituents that are not found in a product made from normal raw materials, then those hazardous constituents are effectively being disposed in the product and the so-called recycling is a sham.

Absent this fourth legitimacy factor, a recycled product that has hazardous constituents at high levels not comparable to a legitimate product can cause unexpected and serious harm. For example, Conbraco Industries in Pageland,

South Carolina, recycled its brass foundry sand and sold the resulting product, containing high levels of lead and copper, to unsuspecting buyers. Damage Study app. 1 at 1-128 to 1-129, JA1026-27. The sand was sold to horse farms as fill for their stable and riding areas, which required cleanup at 17 different sites in North and South Carolina, and, even more alarming, 375 tons of the sand was bagged and sold as play sand for children's sandboxes. *Id.*

Similar examples are Marine Shale Processors in Amelia, Louisiana, which burned hundreds of different hazardous wastes in its industrial furnace and sold the metal-laden product as fill material to the public for $1 per ton, *id.* app. 1 at 1-298, JA1041; and Circle Smelting Corporation in Beckemeyer, Illinois, which operated a secondary smelter for recycling of scrap metals and sold the resulting cinders to the Village of Beckemeyer as a surface material for walking paths, driveways, and alleys, *id.* app. 1, at 1-114, JA1022. These sham recyclers would not have been able to meet the fourth legitimacy factor, and the damage they caused could have been prevented.

Industry Petitioners focus their challenge on the application of the legitimacy factors to recycling that is part of a "continuous industrial process." Industry Br. at 16, 19. But the Damage Study reveals that such recycling, absent the legitimacy factors, can result in discard and environmental damage. For example, Old Bridge Chemicals, Inc. in Old Bridge, New Jersey, recycled its in-

process materials such as filter press cake and copper etchants as part of its ongoing production process and then sold the resulting micronutrients to fertilizer manufacturers. Damage Study app. 1 at 1-339, JA1044. The micronutrient product contained toxic levels of lead and cadmium, however, which contaminated the fertilizer. *Id. American Petroleum Institute v. EPA*, 216 F.3d 50, 55-58 (D.C. Cir. 2000), confirms that EPA may reasonably determine that recycling of residuals in an ongoing industrial process involves discard of hazardous contaminants.

EPA has explained that the higher contaminant levels must be significant in terms of risk to human health and the environment, not as the Industry Petitioners misleadingly assert only "slightly" different than analogous products or at "trace" concentrations. Industry Br. at 20-22. *See* 80 Fed. Reg. 1726/1-2 ("high levels" of hazardous constituents), JA0297; *id.* at 1727/2 ("comparable" means "not significantly elevated"), JA0298; *id.* at 1773/2 (40 C.F.R. § 260.43(a)(4)(iii)) ("the recycled product does not contain levels of hazardous constituents that pose a significant human health or environmental risk"), JA0344. Also, EPA has explained that the company can select the analogous product or commodity specification to demonstrate that the fourth legitimacy factor is satisfied. *Id.* at 1726/3-28/1, JA0297-99. Industry Petitioners provide no basis for their assumption that EPA will run around selecting inappropriate products or restrictive

specifications simply to defeat claims of legitimate recycling. Industry Br. at 21-22.

Finally, Industry Petitioners contest the catch-all criterion in the fourth legitimacy factor: "[t]he recycling can be shown to be legitimate based on lack of exposure from toxics in the product, lack of the bioavailability of the toxics in the product, or other relevant considerations which show that the recycled product does not contain levels of hazardous constituents that pose a significant human health or environmental risk." 40 C.F.R. § 260.43(a)(4)(iii) (80 Fed. Reg. 1773/2, JA0344). Industry Petitioners make the incredible claim that this criterion has "no relation" and "no connection" to whether material is discarded. Industry Br. at 24-25. A material can still be discarded even if all the criteria in the fourth factor are met. But if the material does not meet the criteria, then EPA's focus is on its hazardous constituents which, EPA reasonably concludes, are discarded in the recycled product precisely because they pose significant risks not posed by a legitimate product. "It is 'eminently reasonable to treat materials that are indistinguishable' from virgin materials as non-waste[s]," *Solvay USA v. EPA*, 608 Fed. Appx. 10, 13 (D.C. Cir. 2015) (citing *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1269 (D.C. Cir. 2003)), and likewise EPA can reasonably conclude that recycled products that are not like virgin materials involve discard of hazardous contaminants.

Industry Petitioners rely on the absurd analogy that pharmaceuticals are bioavailable and have toxic properties yet are not discarded. Industry Br. at 25. But of course such pharmaceuticals, like cancer treatment drugs, are specifically designed to have beneficial health effects, and a pharmaceutical that contains unwanted toxics from sham recycling could have devastating effects on patient health.

The point is that hazardous constituents in secondary materials are discarded, and not legitimately recycled, if simply transferred into a "product" that should not contain such toxics. The Damage Study that EPA relied on to adopt the legitimacy factors documents their necessity. The challenged legitimacy factors are reasonable and flexible criteria to assist industry in conducting legitimate and not sham recycling, and should be upheld.

II. THE COURT SHOULD DECLINE INDUSTRY PETITIONERS' REQUEST TO REWRITE THE VERIFIED RECYCLER EXCLUSION.

Industry Petitioners ask the Court to rewrite the Verified Recycler Exclusion by rendering ineffective or stripping out many of the conditions it contains. *Id.* at 66. Specifically, they seek to eliminate – one way or another – the following requirements:

- The requirements in 40 C.F.R. § 260.31(d) (80 Fed. Reg. at 1772/1-2, JA0343) that the excluded hazardous wastes be handled by a verified

reclamation facility that can demonstrate, *inter alia*, it is not "a significant non-complier under RCRA Subtitle C" or "will manage the hazardous secondary materials properly," that it has "the equipment and trained personnel needed to safely manage the hazardous secondary material," and that it has "address[ed] the potential for risk to proximate populations from unpermitted releases of hazardous secondary material";

- The requirements in 40 C.F.R. §§ 261.4(24)(v)(B), (E), .4(24)(vi)(G) (80 Fed. Reg. at 1775/2-76/2, JA0346-47) that generators of the excluded hazardous wastes transfer those wastes only to facilities that meet the requirements in 40 C.F.R. § 260.31(d) or have RCRA permits, and meet emergency preparedness conditions; and

- All requirements in 40 C.F.R. §§ 261.400-.420 (80 Fed. Reg. at 1780/3-83/2, JA0351-54) for emergency preparedness and response.

Industry Br. at 66. By asking the Court to strip out or invalidate these conditions, Industry Petitioners effectively seek to recreate the 2008 Transfer-Based Exclusion – despite EPA's conclusion in the record that it lacks conditions necessary to ensure that hazardous waste will not be discarded and that human health and the environment will be protected. For the reasons given below, Industry Petitioners' request should be denied.

A. Because The Verified Recycler Exclusion Is Unlawful And Arbitrary, The Court Need Not Address Industry Petitioners' Arguments About The Conditions It Imposes.

Environmental Petitioners contend the Verified Recycler Exclusion itself is unlawful and arbitrary, and should be vacated. Envtl. Pet. Br. at 30-43, 52-53. If the Court agrees, it need not address Industry Petitioners' attempt to invalidate any of the individual conditions included in the Verified Recycler Exclusion.

B. Industry Petitioners' Challenge To The Conditions In The Verified Recycler Exclusion Lacks Merit.

Even if it considers Industry Petitioners' challenge to the conditions in the Verified Recycler Exclusion, this Court should reject them. Industry Petitioners argue that these conditions apply to materials that are not "discarded" and are arbitrary and capricious. Industry Br. at 56. Rather than explaining why they believe any particular materials are not discarded, however, Industry Petitioners claim EPA simply "presume[ed]" that all materials transferred to third parties for recycling are discarded. *E.g.*, *id.* at 42 ("EPA's presumption that transfer equals 'discard'"); 47 ("EPA's current presumption that transfer equals discard"); 43 ("the Court must set aside EPA's presumption that transfer equals discard"). In doing so, they attack a straw man. EPA neither claimed nor presumed that "transfer equals discard." Rather, EPA found that listed or characteristic hazardous wastes under 40 C.F.R. §§ 261.31-.33 are typically discarded when they are transferred for

recycling by third parties, and EPA thoroughly explained this finding. 80 Fed. Reg. at 1707/1-08/3, JA0278-79; 76 Fed. Reg. at 44,108/2-10/1, JA0218-20.

Significantly, EPA's decision flowed directly from its earlier decision to deregulate these same hazardous wastes. In the 2008 rulemaking, EPA sought to "remov[e] hazardous waste regulatory controls over certain recycling practices" because it believed this "de-regulatory" action would encourage recycling of hazardous wastes. 68 Fed. Reg. 61,558, 61,560/2 (Oct. 28, 2003), JA0017. To that end, EPA created the "Transfer-Based" Exclusion, which deregulated "hazardous secondary materials (*i.e.*, spent materials, listed sludges, and listed by-products) that are generated and subsequently transferred to a different person or company for the purpose of reclamation" by deeming them not to be wastes if certain conditions were met. 73 Fed. Reg. 64,668, 64,669/2-70/2 (Oct. 30, 2008), JA0066-67. *See generally* Envtl. Pet. Br. at 5-9. But for the Transfer-Based Exclusion, these materials all met EPA's definition of "discarded materials" and were, therefore, solid and hazardous wastes. 40 C.F.R. §§ 261.2(a)(1), .2(a)(2)(i)(C). *See also* 80 Fed. Reg. at 1738/3-39/1 ("EPA's record for today's rulemaking demonstrates that third-party recycling of hazardous secondary materials has been and continues to be part of the waste disposal problem. EPA has already evaluated these hazardous secondary materials (for example, during a hazardous waste listing

determination) and determined them to be solid and hazardous wastes."), JA0309-10; 76 Fed. Reg. at 44,109/1 (same), JA0219.

In 2011, EPA concluded that deregulating these wastes had been a mistake. The agency acknowledged that listed and characteristic hazardous wastes are generally "discarded" materials when they are sent to third parties for recycling and, therefore, are hazardous wastes. EPA further acknowledged that exempting these hazardous wastes from RCRA regulation increases the likelihood that they will harm human health and the environment. 80 Fed. Reg. at 1707/1-08/3, JA0278-79; 76 Fed. Reg. at 44,108/2-10/1, JA0218-20. *See* Envtl. Pet. Br. at 10-11. The agency cited three separate studies that support its conclusion. 80 Fed. Reg. at 1698/2-99/3, 1707/1-08/3, 1738/2-41/2, JA0269-70, 0278-79, 0309-12; 76 Fed. Reg. at 44,108/2-10/1, JA0218-20.[4]

In particular, EPA explained that:

> Because of the low commercial value and the high potential liability associated with most types of hazardous secondary materials (*i.e.*, spent materials and listed hazardous waste by-products and sludges), <u>generators will typically pay the reclamation facility to accept these</u>

[4] They are: Damage Study, JA0998; EPA, *A Study of Potential Effects of Market Forces on the Management of Hazardous Secondary Materials Intended for Recycling* (Nov. 2006), EPA-HQ-RCRA-2002-0031-0358 ("Market Forces Study"), JA0427; and EPA, *Correlation of Recycling Damage Cases with Regulatory Exclusions, Exemptions or Alternative Standards* (June 2011), EPA-HQ-RCRA-2010-0742-0010 ("Correlation Study"), JA0561.

> hazardous secondary materials or receive a salvage fee that only partially offsets the cost of transporting and managing them.

80 Fed. Reg. at 1707/2 (emphasis added), JA0278; *see also* 76 Fed. Reg. at 44,108/3 (same), JA0218. Further, citing the Market Forces Study, EPA pointed out that "hazardous secondary materials recycling can involve generating revenue primarily from the receipt of hazardous secondary materials." 80 Fed. Reg. at 1707/2 (emphasis added), JA0278; 76 Fed. Reg. at 44,108/3 (same), JA0218. Industry Petitioners do not deny that the generators of hazardous secondary materials must pay reclamation facilities to accept them or that the recyclers generate revenue primarily from accepting these payments.[5] *See also* Envtl. Pet. Br. at 31-33, 38; *Safe Food*, 350 F.3d at 1269 ("market valuation" is an important indicator of whether a material has been discarded).

EPA also explained why imposing conditions on the 2008 Transfer-Based Exclusion did not prevent the discard of hazardous wastes and the resulting harm to human health and the environment. Although the 2008 Transfer-Based Rule "attempted to address [the] pattern of adverse impacts … from hazardous secondary materials transferred to a third party for recycling by setting conditions

[5] Industry Petitioner American Petroleum Institute confirms that this is precisely how it works with respect to refinery spent catalysts, the only materials that Industry Petitioners identify as even subject to the Verified Recycler Exclusion. *See* Industry Br. Deese Dec. at ¶¶ 5-9.

for the transfer-based exclusion," and although "the intent of these conditions was to define when transfers to third party recyclers would not result in discard," "EPA failed to take into account how the conditions of the 2008 Transfer-Based Exclusion would work when actually implemented." 76 Fed. Reg. 44,109/1, JA0219; 80 Fed. Reg. 1707/3 (emphasis added), JA0278. EPA went on to explain that:

> while other solid waste exclusions were developed based on EPA's knowledge of the specific hazardous secondary materials, the industries generating them, or the current recycling management practice for those hazardous secondary materials, the 2008 [Definition of Solid Waste] Transfer-Based Exclusion relied entirely on the conditions that were developed by EPA operating as the Agency anticipates they should.

80 Fed. Reg. at 1708/1 (emphasis added), JA0279. EPA then admitted it had lacked "evidence that they would work as intended (*i.e.* would not result in significant risk to human health and the environment from discarded materials)." *Id.*

Citing the Damage Study and the Correlation Study, EPA explained that 92 percent of the environmental damage cases EPA assessed came from "reclamation activities of third-party recyclers, with clear instances of discard resulting in risk to human health and the environment." *Id.* at 1739/1, JA0310. In response to comments on the Correlation Study, EPA confirmed that it could "with

confidence" correlate the environmental damage cases it studied with seven of its recycling exclusions. *Id.* at 1741/1, JA0312.[6]

In short, EPA did not "presume[e] that transfer equals discard." Industry Br. at 47. It found that the transfer of listed and characteristic hazardous wastes to third party recyclers generally is discard, largely because the generators of these hazardous wastes typically pay recyclers to accept these materials and because payment for accepting these wastes – rather than the sale of recycled products made from them – constitutes the recyclers' primary source of revenue. EPA further found that the discard of hazardous wastes and the resulting harm to human health and the environment could not be prevented by the conditions it imposed on the Transfer-Based exclusion. Industry Petitioners' lengthy attack on a straw-man "presumption" that "transfer equals discard," *id.* at 43, fails even to acknowledge the finding EPA actually reached, let alone show that finding to be either unlawful or arbitrary.[7]

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[6] These are the recycling exclusions and exemptions for lead-acid batteries, hazardous waste drums, mercury-containing wastes, other petroleum wastes, precious metal-containing wastes, scrap metals, and used oil. *See* Correlation Study at 12, JA0572.

[7] That EPA has the authority to establish the requirements contained in its Verified Recycler Exclusion does not mean the Exclusion itself is lawful. Nor can imposing conditions make it lawful to exclude hazardous waste from full RCRA regulations. *See* Envtl. Pet. Br. at 31-43. As EPA itself has explained, "EPA's attempt to define such material as 'not discarded' solely by setting additional management

Footnote Continues on Next Page

C. Industry Petitioners' Attacks On EPA's Studies Confirming Discard And Risk Are Baseless.

Apart from misrepresenting the agency rationale underlying the Verified Recycler Exclusion, Industry Petitioners rely on meritless attacks on the record evidence supporting the agency's decision. EPA's proposal to eliminate the 2008 Transfer-Based Exclusion was supported by a robust record showing a plain pattern of discard and significant toxic contamination of air, soil, surface water, and ground water at hazardous waste recycling sites across the country. Industry Petitioners complain about two particular pieces of that record they dislike and disagree with – EPA's Damage Study and its Market Forces Study – but fail to prove how EPA's reliance on those studies was arbitrary.[8]

In the Damage Study, EPA identified more than 250 documented cases of pollution at hazardous waste recycling facilities in 37 states and Puerto Rico, nearly all of which involved transfer-based recycling and clear evidence of discard along with serious threats to human health and the environment in surrounding

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conditions poses the danger of circular reason" and "is potentially counter to the original intent of RCRA." *Id.* at 11, 35-36 (quoting EPA, *Regulatory Impact Analysis: EPA's 2011 Proposed Revisions to the Industrial Recycling Exclusions of the RCRA Definition of Solid Waste* at 214 (June 30, 2011), EPA-HQ-RCRA-2010-0742-0002, JA0547).

[8] Notably, Industry Petitioners do not take any issue with the Correlation Study linking the damage cases "with confidence" to specific pre-2008 regulatory exclusions and exemptions. *See* 80 Fed. Reg. 1741/1, JA0312.

communities. 80 Fed. Reg. at 1739/1, JA0310; Damage Study at 5, app. 1 at 1-1 to 1-10, JA1004, 1010-19. Industry Petitioners do not dispute any of those findings. Instead, they argue that EPA did not prove they are "significant" in relation to environmental and human health damage caused by other industrial activities. Industry Br. at 39-42. This argument entirely misses the Damage Study's point, which was not to compare risks among different polluting practices and determine whether transfer-based recycling is "particularly risky," *id.* at 42, but to confirm that it results in discard requiring Subtitle C RCRA regulation.

With this argument, Industry Petitioners seek to substitute EPA's reasoned analysis with their own self-serving opinion that some level of harm to human health and the environment is acceptable. *But see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (court cannot "substitute its judgment for that of the agency"). Worse, they are unabashed in suggesting that an acceptable level of harm would include the kind of severe and costly toxic damage described in EPA's Damage Study, for example: ongoing releases of polychlorinated biphenlys, lead, arsenic, cyanide, and mercury into air, soil, and groundwater in nearby communities, *see, e.g.*, Damage Study app. 1 at 1-68 to 1-69, 1-166 to 1-167, 1-178, 1-521, JA1020-21, 1032-33, 1035, 1063; massive chemical spills and leaks costing many millions of dollars in government cleanup costs, *id.* app. 1 at 1-136 to 1-137, 1-467 to 1-470, JA1029-30, 1056-59; and

explosions and fires causing industry workers to suffer fatal burns and instant death, *id.* app. 1 at 1-226, 1-269, JA1037, 1039.

Industry Petitioners also fault EPA for not assessing all of the roughly estimated "10,254 facilities involved in recycling" in the Damage Study, as industry commenters requested. Industry Br. at 40. They offer no explanation or authority to show why the mere fact EPA did not perform the study the way industry commenters wanted it to renders the study arbitrary. *Mississippi v. EPA*, 744 F.3d 1334, 1345 (D.C. Cir. 2013) ("'That petitioners … find a basis to disagree' with EPA is 'hardly surprising.' … But that does not make EPA's decision … arbitrary.") (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 26 (D.C. Cir. 1976)). Their argument also ignores that EPA could not conduct that kind of assessment, even if sought to, because facilities are currently not required to notify authorities of their unregulated hazardous waste recycling activities – an excuse Industry Petitioners insisted on retaining in this rulemaking. 80 Fed. Reg. at 1766/2-3 ("Because the majority of the pre-2008 exclusions and exemptions do not include notification requirements, EPA does not have precise data regarding how many facilities are recycling hazardous secondary materials under these exclusions and exemptions."), JA0337; *see, e.g.*, Comments of American Chemistry Council at 26, EPA-HQ-RCRA-2010-0742-0238 (arguing that notification requirements should not be applied to pre-2008 exclusions and exemptions), JA0842.

Industry Petitioners launch a similarly misleading attack on the Market Forces Study, arguing that EPA's reliance on it was arbitrary solely because the Study's conclusions were not "empirical." Industry Br. at 44. Again, Industry Petitioners offer no support for their theory that EPA must rely only the type of empirical study they insist on – one that assesses all possible third-party recycling scenarios. *Id.* EPA used the Market Forces Study simply to demonstrate that transfer-based hazardous waste recyclers, as a general matter, have unique economic incentives to mismanage hazardous wastes in a manner that results in discard and environmental damage, *see* 80 Fed. Reg. at 1707/2-3, JA0278, and to confirm what is otherwise obvious: that because third-party recyclers, unlike traditional manufacturers, primarily generate their revenue from the receipt of other parties' hazardous wastes, they are more likely to "accumulate waste beyond their ability to deal with it." *Id.*

D. The Conditions In The Verified Recycler Exclusion Are Not Severable From The Exclusion Itself.

Even if the Court chooses to address Industry Petitioners' challenge to the conditions in the Verified Recycler Exclusion and finds them to be unlawful or arbitrary, it should deny Industry Petitioners' request to eliminate key requirements on which the Exclusion is conditioned while leaving the Exclusion in place.

"Severance and affirmance of a portion of an administrative regulation is improper if there is 'substantial doubt' that the agency would have adopted the severed portion on its own." *Davis Cnty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (quoting *North Carolina v. FERC*, 730 F.2d 790, 795-96 (D.C. Cir. 1984)). "If a reviewing court severed the regulation in that situation, it would be performing a function left to the agency." *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 963 (D.C. Cir. 2013), *overruled on other grounds sub nom. Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (*en banc*). Here, the record leaves no question that EPA relied on the conditions in the Verified Recycler Exclusion to prevent that Exclusion from allowing the discard of hazardous waste. Although Environmental Petitioners contend that EPA's reliance on those conditions was misplaced, Envtl. Pet. Br. at 31-39, it is plain that EPA would not have promulgated the Exclusion without them.

All the conditions Industry Petitioners seek to strip out – 40 C.F.R. §§ 260.31(d), 261.4(a)(24)(v)(B), (E), .4(a)(24)(vi)(G), .400-.420, Industry Br. at 66 – relate to non-RCRA-permitted facilities that wish to recycle the excluded hazardous wastes. They provide a process for EPA, States, and the public to have some assurance, albeit inadequate, that these wastes will be handled safely. 80 Fed. Reg. at 1709/1-2, JA0280. For example, they provide that the excluded hazardous wastes can be recycled only at facilities that "have the equipment and trained

personnel needed to safely manage the hazardous secondary material and … meet emergency preparedness and response requirements." *Id.* at 1772/1, 1775/2-3 (40 C.F.R. §§ 260.31(d)(4), 261.4(a)(24)), JA0343, 0346. Similarly, they require that facilities wishing to recycle the excluded wastes without obtaining RCRA permits must "address the potential for risk … from unpermitted releases of the hazardous secondary material to the environment" such as "precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures." *Id.* at 1772/1-2, 1775/2-76/2 (40 C.F.R. §§ 260.31(d)(6), 261.4(a)(24)), JA0343, 0346-47. EPA explained that these conditions (and the others Industry Petitioners seek to invalidate) "are needed to ensure that the hazardous secondary material is legitimately recycled and not discarded." *Id.* at 1709/1, JA0280.

It is virtually inconceivable that EPA would have promulgated the Verified Recycler Exclusion without the conditions it determined were "needed" to prevent unlawful discard. *See Davis Cnty. Solid Waste Mgmt.*, 108 F.3d at 1459. Moreover, stripping out these conditions would effectively recreate the 2008 Transfer-Based Exclusion. Apart from the fact that doing so would amount to "performing a function left to the agency," *National Association of Manufacturers*, 717 F.3d at 963, EPA expressly found that the exclusion "lack[ed] several important implementation provisions" that "increas[e] the likelihood of compliance and

decreas[e] the potential for risk to human health and the environment from discarded hazardous secondary material." 80 Fed. Reg. at 1708/1, JA0279. It was precisely to "address[] a major regulatory gap in the Transfer-Based Exclusion that could result in significant risk to human health and the environment from discarded hazardous secondary material" that EPA promulgated the conditions Industry Petitioners seek to invalidate. *Id.* at 1709/1-2, JA0280.

Because the conditions in the Verified Recycler Exclusion are not severable from the exclusion itself, the Court should not simply vacate selected provisions if it finds any such provision unlawful or arbitrary. *See Davis Cnty. Solid Waste Mgmt.*, 108 F.3d at 1459; *Nat'l Ass'n of Mfrs.*, 717 F.3d at 963. Further, if the Court vacates the Verified Recycler Exclusion, it should make clear that its decision does not restore the 2008 Transfer-Based Exclusion, for the reasons given above.

ARGUMENT OF MOVANT-INTERVENOR GULF

I. INDUSTRY PETITIONERS' CHALLENGE OF EPA'S AUTHORITY TO REGULATE SPENT CATALYSTS IS UNTIMELY AND EPA'S 1998 DISCARD DETERMINATION IS ENTITLED TO DEFERENCE.

The sole interest of Movant-Intervenor Gulf[9] in this appeal relates to spent catalysts from petroleum refinery operations, which have been listed as RCRA hazardous wastes since 1998. Industry Petitioners argue that EPA lacks authority to regulate spent catalysts as "discarded" wastes subject to RCRA when the 2015 Definition of Solid Waste Rule's exclusions are not met. Industry Br. at 58.

EPA has regulated spent catalysts as discarded wastes under RCRA since at least 1998, when it promulgated its final rule unconditionally listing them as hazardous wastes K171 and K172. 63 Fed. Reg. 42,110, 42,112 (Aug. 6, 1998), JA0014; *see also Am. Petroleum Inst. v. EPA* ("*API III*"), 683 F.3d 382, 385 (D.C. Cir. 2012) ("Since that time, all spent catalysts, whether destined for reclamation or not, have been classified as hazardous waste subject to stringent regulations."). "K-wastes" like K171 and K172 are hazardous wastes generated from specific sources and are listed in 40 C.F.R. § 261.32, which specifically states: "The following solid wastes are listed hazardous wastes from specific sources unless they are excluded

[9] Gulf moved to intervene in consolidated appeal No. 09-1038, and this motion remains pending. Gulf Motion for Leave to Intervene (Feb. 26, 2009) (Doc. #1167721). Gulf set forth the basis for its standing in its 7/25/11 Brief (Doc. #1320515) (pp. 22-28) and supporting Affidavit of Robert Stephan (*id.* at pp. 41-44).

under §§ 260.20 and 260.22 and listed in appendix IX." (Emphasis added). Thus, when it promulgated the 1998 final rule, EPA expressly determined that "spent Hydrotreating catalyst from petroleum refining operations" (K171) and "spent Hydrorefining catalyst from petroleum refining operations" (K172) were discarded "solid wastes" upon their generation from these specific processes.

American Petroleum Institute and other industry petitioners unsuccessfully challenged the 1998 final rule listing K171 and K172 in *American Petroleum Institute v. EPA (API II)*, 216 F.3d 50, 68 (D.C. Cir. 2000) (*per curiam*). By upholding EPA's listing rule, this Court necessarily upheld EPA's determination that such materials were discarded solid wastes. *See, e.g.*, *Am. Mining Cong. v. EPA (AMC II)*, 907 F.2d 1179, 1186 (D.C. Cir. 1990) ("'Because "hazardous waste" is defined as a subset of "solid waste," … the scope of EPA's jurisdiction is limited to those materials that constitute "solid waste."'") (quoting *Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987)); *see also* 42 U.S.C. § 6903(5) (definition of "hazardous waste"). Any attempt by Industry Petitioners to attack the 1998 final rule in this proceeding would be "an impermissible 'back-door' challenge … barred by the statutory requirement that petitions for review of RCRA rules be filed within 90 days of promulgation." *Safe Food*, 350 F.3d at 1269.

Moreover, this Court held in *API II* that "[w]here an industrial by-product may be characterized as discarded … material, EPA's choice of characterization is

entitled to deference." 216 F.3d at 57 (citing *AMC II*, 907 F.2d at 1186 (EPA's determination that material "'capable of posing a substantial present or potential hazard … when improperly treated, stored, transported or disposed of'" is "'discarded'" "is both reasonable and consistent with the statutory purposes of RCRA.")). This Court has previously held that the possibility a material later might be recycled does not preclude it from being "discarded" under RCRA. *AMC II*, 907 F.2d at 1186 ("Indeed, *API* explicitly rejected the very claim that petitioners assert in this case, … namely, that under RCRA, potential reuse of a material prevents the agency from reclassifying it as 'discarded.'") (citation omitted).

In promulgating the 2015 Definition of Solid Waste Rule, EPA noted that spent catalysts pose a unique "risk of … spontaneously igniting" and this "is not a property that most metal recyclers would be expected to address …." 80 Fed. Reg. at 1738, JA0309. Therefore, EPA determined that the conditions imposed on the 2015 Definition of Solid Waste Rule exclusions are necessary to "address[] the pyrophoric properties of the spent petroleum catalysts." *Id.* This Agency determination is reasonable, consistent with the statutory purposes of RCRA and entitled to deference.

CONCLUSION

For the reasons given above, Environmental Intervenors, Environmental Technology Council, and Gulf respectfully submit that Industry Petitioners'

petitions be denied. Environmental Intervenors and Environmental Technology Council further submit that, because the Verified Recycler Exclusion is not severable from the conditions on which it relies, the Court should vacate the Exclusion as a whole if it concludes that any of the Exclusion's individual conditions is unlawful or arbitrary. Finally, Environmental Intervenors request that, if the Court vacates the Verified Recycler Exclusion, it also make clear that its decision does not reinstate the 2008 Transfer-Based Exclusion.

DATED: June 20, 2016

Respectfully submitted,

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing **Final Joint Brief of Respondent-Intervenors California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Louisiana Environmental Action Network, Sierra Club, Environmental Technology Council, and Movant-Intervenor Gulf Chemical and Metallurgical Corp.** contains 7,220 words, as counted by counsel's word processing system, and thus complies with the applicable word limit established by the Court.

DATED: June 20, 2016

/s/James S. Pew
James S. Pew

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2016, I have served the foregoing **Final Joint Brief of Respondent-Intervenors California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Louisiana Environmental Action Network, Sierra Club, Environmental Technology Council, and Movant-Intervenor Gulf Chemical and Metallurgical Corp.** on all registered counsel through the Court's electronic filing system (ECF).

/s/James S. Pew
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ORAL ARGUMENT NOT YET SCHEDULED

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

No. 09-1038 (and consolidated cases)

AMERICAN PETROLEUM INSTITUTE,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of Final Administrative Actions of the
United States Environmental Protection Agency

FINAL REPLY BRIEF OF ENVIRONMENTAL PETITIONERS

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DATED: June 20, 2016

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

2009 Comments	EPA-HQ-RCRA-2009-0315-0242
2011 Comments	EPA-HQ-RCRA-2010-0742-0244
2011 RIA	EPA-HQ-RCRA-2010-0742-0002
ABR	Association of Battery Recyclers
ACC	American Chemistry Council
AMC	American Mining Congress
APA	Administrative Procedure Act
API	American Petroleum Institute
Br.	Environmental Petitioners' Opening Brief
Correlation Study	EPA-HQ-RCRA-2010-0742-0010
Damage Study	EPA-HQ-RCRA-2010-0742-0370
DEC	Environmental Petitioners' Opening Brief Declarations
EPA	U.S. Environmental Protection Agency and Gina McCarthy, Administrator
EPA Br.	Brief of Respondent EPA
Int. Br.	Brief of Industry Respondent-Intervenors
JA	Joint Appendix

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NACWA	National Association of Clean Water Agencies
NRDC	Natural Resources Defense Council
OMB	Office of Management and Budget
OMB Redline	EPA-HQ-RCRA-2010-0742-0373
RCRA	Resource Conservation and Recovery Act

SUMMARY

Verified Recycler Exclusion. EPA's brief confirms that the challenged rule excludes hazardous secondary materials that companies pay to get rid of. These materials are hazardous waste. Contrary to EPA's claims, this Court has never held or even suggested that paying to get rid of unwanted hazardous materials does not constitute discard. Indeed, Circuit precedent strongly suggests that hazardous secondary materials with negative value are wastes. Congress intended that hazardous wastes be recycled where possible, but made clear they must be managed in compliance with RCRA's cradle-to-grave safeguards for human health and the environment.

EPA's brief further confirms EPA never: (1) explained why it believes paying to get rid of unwanted hazardous materials is not discarding them; (2) grappled with its own stated concerns that excluding such materials may be irrational and at odds with Congressional intent; or (3) articulated any interpretation of the statute that might support its exclusion. EPA's lawyers attempt to repair the flaws in the record, but their arguments are *post hoc* and without merit.

Notice-And-Comment. Contrary to EPA's claims, the Verified Recycler Exclusion is not a logical outgrowth of EPA's proposal to eliminate any exclusion for the hazardous wastes at issue and regulate them under RCRA Subtitle C.

Pre-2008 Exclusions. EPA proposed revisions to 32 Pre-2008 Exclusions from RCRA. The revisions, on which EPA expressly solicited comment, would have amended these Exclusions to include new notification and containment requirements that the agency believes are "necessary" to prevent the unlawful discard of hazardous waste. Without changing its view that these additional requirements are necessary, however, EPA refused to finalize them. Contrary to arguments by EPA and Intervenors, EPA's decision is a reviewable final action and Environmental Petitioners have standing to challenge it. On the merits, EPA's brief confirms that EPA's rationale for refusing to finalize these undisputedly necessary requirements was unsupported by the record and arbitrary.

ARGUMENT

I. THE VERIFIED RECYCLER EXCLUSION IS UNLAWFUL AND ARBITRARY.

A. Companies Discard Hazardous Secondary Materials By Paying To Get Rid Of Them.

EPA argues that Environmental Petitioners have not explained why a company that complies with the conditions in the Verified Recycler Exclusion automatically discards hazardous secondary materials when it pays to have them "transferred to a third-party recycler to be made into a product." EPA Br. at 80.

Environmental Petitioners do not contend that materials are discarded just because someone must pay to have them "transferred" or "transporte[d]," but

because "companies cannot use or sell [them] and … must 'pay' other companies to accept" them. Br. at 31 (quoting 80 Fed. Reg. 1694, 1707/2 (Jan. 13, 2015), JA0278). As Environmental Petitioners explained – and as EPA itself has explained repeatedly – transfers of hazardous secondary materials to third-party recyclers "generally involve discard" precisely because the generators "typically pay" to get rid of them. 80 Fed. Reg. at 1707/1-2, JA0278; 76 Fed. Reg. 44,094, 44,108/2-3 (July 22, 2011) (same), JA0218; EPA-HQ-RCRA-2010-0742-0002 at 214 ("2011 RIA") (same), JA0547. Indeed, EPA concedes in its brief that generators are paying to "get[] rid of the hazardous secondary material." EPA Br. at 83-84 (quoting 72 Fed. Reg. 14,172, 14,201/1 (Mar. 25, 2007), JA0047) (emphasis added). Paying to "get[] rid of" a hazardous material is discarding it under "discard['s]" ordinary meaning of "dispose[] of, throw[] away, or abandon[]." *Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1184 & n.7 (D.C. Cir. 1987) ("*AMC I*") (quoting *Webster's Third New International Dictionary* (1981); internal quotations omitted). EPA agrees that the term "discarded" has this meaning. EPA Br. at 79-80.

Environmental Petitioners also explained that when companies pay to get rid of hazardous secondary materials they cannot use or sell, that transfer itself is discard. Br. at 32-33, 38. As EPA's brief confirms (at 86), the conditions in the

Verified Recycler Exclusion do not even relate to the transfer itself and, *a fortiori*, do not transform it into something other than discard. Br. at 32-33, 38.

EPA argues that *Solvay USA v. EPA*, 608 Fed. Appx. 10 (D.C. Cir. 2015) supports its position by rejecting an argument that the materials at issue there were "'discarded' within the ordinary meaning of the term" and by holding that EPA may "defin[e] solid waste to exclude certain secondary materials." EPA Br. at 78 (quoting *Solvay*, 608 Fed. Appx. at 12). The issue actually decided in *Solvay*, however, was whether the statute or caselaw precluded EPA from "defining solid waste to exclude certain non-hazardous secondary materials combusted for energy or used as an ingredient for fuel." 608 Fed. Appx. at 12. The issue presented here is whether hazardous secondary materials are "discarded" when companies pay to get rid of them. Br. at 31. This issue has never been decided by any court, and can scarcely have been resolved *sub silentio* in *Solvay*, a decision in which "the panel [saw] no precedential value." 608 Fed. Appx. at 13; D.C. Circuit Rule 36(e)(2).[1]

Further, contrary to EPA's suggestion, *Solvay* does not hold that no materials are ever discarded in the ordinary sense, or that EPA may define solid

[1] Nor is it relevant that, in the rule at issue in *Solvay*, "payment for a secondary material did not determine whether or not the secondary material is a waste." EPA Br. at 79 n.9. Nothing in *Solvay* suggests the Court even considered that aspect of the rule, let alone that it silently reached an unprecedented holding that paying to get rid of hazardous secondary materials is not discarding them. *See* D.C. Circuit Rule 36(e)(2).

waste to exclude any secondary materials it likes. Rather, *Solvay* cites precedent for the proposition that "discarded 'may be ambiguous as applied to some situations, but not as applied to others.'" 608 Fed. Appx. at 12 (quoting *Ass'n of Battery Recyclers v. EPA*, 208 F.3d 1047, 1056 (D.C. Cir. 2000) ("*ABR*")) (emphasis added). It goes on to hold that "EPA's characterizations of some types of non-hazardous secondary materials 'as discarded … is entitled to deference' under *Chevron*." *Id.* (quoting *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 57 (D.C. Cir. 2000) ("*API II*")) (emphasis added).[2]

EPA's extensive reliance (at 80-85) on *Safe Food and Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003), is misplaced as well. EPA first claims that because *Safe Food* rejected argument that the transfer of hazardous secondary materials is necessarily discard, it follows that paying to get rid of unwanted hazardous materials is not necessarily discard either. EPA Br. at 80-81. That does not follow. *Safe Food* upheld only the specific exemption before it and, in doing so, relied expressly on "EPA's explanation that … market participants treat the exempted materials more like valuable products than like negatively-valued wastes." 350

[2] Although *Solvay* cites *ABR* as holding "discarded" is ambiguous as applied to some situations but not others, the larger holding in *ABR* is that "discarded" remains unambiguous, as this Court held in *AMC I*. *ABR*, 208 F.3d at 1056. *See* Br. at 33 n.2 (citing *United States v. Old Dominion Boat Club*, 630 F.3d 1039, 1045 (D.C. Cir. 2011) ("when a conflict exists within our own precedent, we are bound by the earlier decision.")).

F.3d at 1269. Here, the opposite is true: as EPA itself explains, generators "typically pay" to get rid of the hazardous secondary materials at issue. 80 Fed. Reg. at 1707/1-2, JA0278. Further, reclaimers' primary source of revenue is fees for accepting these materials rather than profits from recycling them and, as a result, they "have economic incentives to accumulate waste beyond their ability to deal with it." *Id.* at 1707/2-3 (discussing market forces study), JA0278. In short, these materials are "negatively-valued." *Safe Food*, 350 F.3d at 1269. EPA's brief confirms that EPA failed to consider *Safe Food*'s holding and ignored its significance to the Verified Recycler Exclusion. *See* Br. at 38.

EPA next cites *Safe Food* for the proposition that hazardous materials are not discarded so long as "the end result … is the manufacture of a product that is indistinguishable from a product made from virgin materials." EPA Br. at 82-83. That was one factor the Court considered, but it also considered EPA's explanation that "market participants treat the exempted materials more like valuable products than like negatively valued wastes," *Safe Food*, 350 F.3d at 1269, which is not the case for materials that companies pay to get rid of. EPA has never disputed the obvious point that hazardous materials can be discarded – thus becoming hazardous waste – and <u>then be recycled</u>. Indeed, RCRA plainly contemplates that "hazardous waste," and not just undiscarded hazardous secondary materials, <u>will be recycled</u>. 42 U.S.C. § 6902(a)(6). *See* 80 Fed. Reg. at 1697/1, JA0268 (agreeing

that materials destined for future recycling may be considered discarded); *API v. EPA*, 906 F.2d 729, 741 (D.C. Cir. 1990) ("*API I*") (where a material is "'discarded' *before* being subject to … reclamation," it "*has* 'become part of the waste disposal problem'") (quoting *AMC I*, 824 F.2d 1186).

Equally misplaced is EPA's reliance on *ABR*. That case rejected EPA's argument that materials become waste if "placed on the ground for only a few minutes before being put back into the production process." *ABR*, 208 F.3d at 1051. Contrary to EPA's claim (at 80), *ABR* does not hold that no single factor can be dispositive of whether a material is a waste. Nor does it even suggest that paying to get rid of something is not discarding it.

B. EPA's Lawyers' Attempt To Repair The Record Is *Post Hoc* And Meritless.

Written by OMB and inserted into the final rule just one month before the rule was signed, the Verified Recycler Exclusion is a poor fit with the record. It is not supported by any statutory interpretation, and rests on claims that are either unsupported by the record or conflict with the record. *See* Br. at 12, 34-39. EPA's lawyers now seek to paper over the gaps in the record, explain away the contradictions, and supply a statutory interpretation *post hoc*. EPA Br. at 82-85.

EPA's lawyers do not point to any part of the record where EPA explains why it believes paying to get rid of hazardous materials is not discarding them.

Perhaps aware that this gap in the record is fatal, they try to cobble together an explanation from EPA's rationale for the 2008 Transfer-Based Exclusion. *Id.* at 83-85. They now claim "EPA did consider the economics involved when hazardous secondary materials are transferred," *id.* at 83 (citing 73 Fed. Reg. 64,688, 64,706/2, 64,707/1 (Oct. 30, 2008), JA0103-04), and found that "[e]ven though 'the generator's objective may be finding the least cost alternative for getting rid of the hazardous secondary material, the recycling may well be a legitimate recycling operation,'" *id.* at 83-84 (quoting 72 Fed. Reg. at 14,201/1, JA0047).

It is well established that a "court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (same). EPA's lawyers do not and cannot claim that EPA invoked those statements when it promulgated the Verified Recycler Exclusion in 2015. In any event, the 2007 and 2008 statements EPA's lawyers rely on address only whether a recycling operation is "legitimate." 73 Fed. Reg. at 64,706/2, 64,707/1, JA0103-04; 72 Fed. Reg. at 14,201/1, JA0047. It is undisputed that "legitimate recycling operations" can and do recycle hazardous wastes. Moreover, although "getting rid of" hazardous secondary materials by sending them to recyclers may be cheaper than "getting rid of" them by sending them to disposal companies, 72 Fed. Reg. at 14,201/1,

JA0047, that does not alter the fact that generators are paying to get rid of materials or even suggest that such materials are not discarded.

EPA's brief also confirms that EPA never grappled with its own acknowledgments that: (1) "attempt[ing] to define … material as 'not discarded' solely by setting additional management conditions poses the danger of circular reason"; and (2) "adding conditions, many of which resemble hazardous waste requirements, in order to attempt to prevent the discard of hazardous secondary materials that would otherwise be subject to full hazardous waste requirements, is potentially counter to the original intent of RCRA." 2011 RIA at 214, JA0547. *See* Br. at 35-36.

Although the Verified Recycler Exclusion exemplifies the very problem EPA describes, the agency's brief does not identify any part of the record where EPA recognizes the dissonance and explains its change of tune. Instead, EPA's lawyers seek to brush off the problem as a "hypothetical concern … mentioned once in passing." EPA Br. at 84. EPA's statement, however, expresses the agency's candid doubts about the rationality and legality of excluding the very materials at issue here from RCRA regulation based solely on agency-created conditions that are less protective than those required by RCRA. 2011 RIA at 214, JA0547. When EPA concedes that a regulatory exclusion may rest on circular reasoning and frustrate Congress's intent, the agency does not need to repeat itself

to create a concern that must be addressed in the record. An agency acts arbitrarily where, as here, it fails to explain an apparent contradiction between the positions taken in the proposed and final rules, or how its position can be reconciled with the statute. *See* Br. at 36; *Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1145-46 (D.C. Cir. 2013) ("*NACWA*"); *Mountain Commc'ns v. FCC*, 355 F.3d 644, 648-49 (D.C. Cir. 2004).

EPA's lawyers also seek to disavow EPA's concerns by claiming they "do[] not match the finding in *Safe Food* upholding EPA's use of conditions to define discard." EPA Br. at 84. EPA was well aware of *Safe Food* when it published the proposed rule and Regulatory Impacts Analysis in 2011. If the agency itself believed that its position was at odds with that case, it could have said so. EPA made no such claim and, as EPA's brief confirms, failed to address or even acknowledge its earlier position anywhere in the record. *See* Br. at 35-36. "[P]arties are entitled to the agency's analysis of its proposal, not post hoc salvage operations of counsel." *Florida Power & Light Co. v. FERC*, 85 F.3d 684, 689 (D.C. Cir. 1996).[3]

[3] In any event, *Safe Food* is not a blanket predictive holding that all of EPA's future conditional exclusions from the definition of solid waste will be lawful and reasonable, as EPA's lawyers suggest (at 84). *See supra* at 5-7.

EPA's brief also confirms EPA did not articulate any statutory interpretation to support the Exclusion. Br. at 36-37. If the term "discarded" is ambiguous as applied to some situations but not others, as EPA claims (at 80), it is plainly incumbent on EPA to say whether it is ambiguous as applied to materials that companies pay to get rid of and why it does not include them. *See UARG v. EPA*, 134 S. Ct. 2427, 2441 (2014) (an agency "must ground its reasons for action *or inaction* in the statute, rather than on reasoning divorced from the statutory text.") (internal quotation marks and citation omitted). EPA's brief does not cite to any part of the record where EPA does so. This is unsurprising; in the rulemaking EPA dismissed as irrelevant the question of whether "discarded" is ambiguous in any given situation and urged commenters to "put the discussion of ambiguity aside, as EPA has also." EPA-HQ-RCRA-2010-0742-0372 at 14, JA1091.

Now addressing for the first time the issue of ambiguity that EPA put aside, EPA's lawyers assert *post hoc* that: (1) the term "discard" is ambiguous as to materials transferred to third-party recyclers; and (2) "EPA reasonably determined that while such transfers are more likely to involve discard, the term does not foreclose situations where someone paying to have their secondary materials transferred for legitimate recycling is not discarding it." EPA Br. at 85. EPA's lawyers do not provide any citation or identify any part of the record where the agency itself made either of these claims. *See Council for Urological Interests v.*

Burwell, 790 F.3d 212, 222 (D.C. Cir. 2015) (in evaluating reasonableness of statutory interpretation, court "look[s] to what the agency said at the time of the rulemaking—not to its lawyers' post-hoc rationalizations"). In any event, merely saying the statute "does not foreclose" situations where generators pay to get rid of hazardous materials, EPA Br. at 85, is not articulating a statutory interpretation. EPA's lawyers do not indicate what "discarded" means, either generally or with respect to the materials at issue here, or how the term can be read to exclude unwanted hazardous materials that companies pay to get rid of.

II. BY PROMULGATING THE VERIFIED RECYCLER EXCLUSION WITHOUT NOTICE, EPA VIOLATED THE APA.

A. The Exclusion Is Not A "Logical Outgrowth."

EPA does not dispute that it failed to propose the Verified Recycler Exclusion. *See* Br. at 12, 30. Nonetheless, EPA claims excluding the hazardous wastes at issue from RCRA regulation is a "logical outgrowth" of its proposal to do just the opposite: eliminate any exclusion and to regulate them "as hazardous waste" under RCRA Subtitle C. EPA Br. at 75-76.

EPA first suggests that the description of its proposal "to replace the [transfer-based] exclusion with … Subtitle C regulation" was just an "introductory summary" and that its "actual discussion" of the issue shows a different intent. *Id.* at 75. To the contrary, EPA's actual discussion confirms that EPA's proposal was

to eliminate any exclusion for hazardous secondary materials transferred to third-party recyclers and "regulate these hazardous secondary materials as hazardous waste, unless there is specific information about a hazardous secondary material or reclamation practice that indicates discard is not occurring." 76 Fed. Reg. at 44,109/3-10/1, JA0219-20.

EPA next seeks to rely on its request for information about "alternative approaches" such as "adding more conditions" to the Transfer-Based Exclusion. EPA Br. at 76 (quoting 76 Fed. Reg. at 44,110/1, JA0220). EPA claims its new Exclusion adds "the very types of additional conditions on which EPA sought comment." *Id.* The record shows that EPA did not seek comment on any "types of additional conditions," and that the conditions EPA mentioned as examples – requiring that reclamation facilities be inspected every five years or certify annually that they had no releases, *id.* – are nothing like the conditions EPA actually promulgated. *Compare* 76 Fed. Reg. at 44,110/1, JA0220, *with* 40 C.F.R. § 261.4(a)(24)(v). Under the logical outgrowth test, the "final rule" that an agency actually promulgates – not just general concepts – must be what commenters "should have anticipated." *City of Portland, Or. v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007). *See Portland Cement Ass'n v. EPA*, 665 F.3d 177, 186 (D.C. Cir. 2011) (rejecting use of "strategic vagueness" to evade notice-and-comment requirements).

More fundamentally, the Exclusion marks a 180-degree reversal of the proposal that surprised even EPA. In the final rule that EPA sent to OMB for review, EPA's conclusion was not that conditions should be added to the 2008 Transfer-Based Exclusion, but that "hazardous secondary materials transferred off-site to third party reclaimers for the purpose of legitimate reclamation are most appropriately regulated under Subtitle C of RCRA." EPA-HQ-RCRA-2010-0742-0373 at 63-64 ("OMB Redline") (quoted language deleted by OMB), JA0964-65. EPA went on to explain that the record "demonstrates the need to regulate these hazardous secondary materials as hazardous waste, unless there is specific information about a hazardous secondary material or reclamation practice that demonstrates discard is not occurring" and that "EPA is therefore withdrawing the transfer-based exclusion found in 40 CFR 261.4(a)(24) and (25)." *Id.*[4]

B. Intervenors' Waiver Argument Lacks Merit.

In an argument that EPA does not make, Industry Intervenors claim (at 30-33) that Environmental Petitioners waived their challenge to the Verified Recycler Exclusion by failing to object to it during the public comment period. It is well

[4] The record indicates that OMB completed its redline revisions to EPA's final rule on November 10, 2014, and that the Administrator signed the final rule with OMB's revisions accepted on December 10, 2014. *Id.* at 1, JA0951; 80 Fed. Reg. at 1771/1, JA0342 (showing signature date); *see also* https://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2010-0742-0373 (showing December 9, 2014 "Received Date").

established that "[i]ntervenors may only argue issues that have been raised by the principal parties." *Association of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 675 (D.C. Cir. 2013) (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs. v. ICC*, 41 F.3d 721, 729 (D.C. Cir. 1994)). Because EPA does not raise the waiver argument, Intervenors cannot raise it. *Id.*[5] Further, by not raising the waiver issue, EPA has waived it. *See, e.g.*, *Se. Ala. Med. Ctr. v. Sebelius*, 572 F.3d 912, 920 n.7 (D.C. Cir. 2009); *Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 108 n.4 (D.C. Cir. 2003).

In any event, comments raise the objection presented in this litigation by pointing out that hazardous secondary materials are discarded when they are transferred to third-party recyclers and must therefore be regulated as hazardous waste under RCRA Subtitle C.[6] Sierra Club *et al.* 2011 Comments at 17-18, EPA-HQ-RCRA-2010-0742-0244 ("2011 Comments"), JA0847-48. *See also* Sierra Club *et al.* 2009 Comments at 6-7, EPA-HQ-RCRA-2009-0315-0242 ("2009 Comments"), JA539-40; 2011 Comments at 2 & n.1 (incorporating 2009 Comments), JA0844. Moreover, even if it had not been raised in comments, "the

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[5] Intervenors do not assert, nor could they, that exhaustion is a jurisdictional issue that cannot be waived. "[P]rocedural rules" are jurisdictional "only if Congress has clearly state[d] as much." *United States v. Wong*, 135 S. Ct. 1625, 1632 (2015) (internal quotation marks omitted).

[6] EPA's consideration of comments on this issue does not cure its failure to provide notice of the Verified Recycler Exclusion. 5 U.S.C. § 553(b); *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988).

issue was expressly addressed by EPA and is properly before the court." *NRDC v. EPA*, 755 F.3d 1010, 1023 (D.C. Cir. 2014) (citing *Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998). *See also NRDC v. EPA*, 824 F.2d 1146, 1150-51 (D.C. Cir. 1987) (*en banc*). As shown above, EPA itself repeatedly recognized that "transfers of hazardous secondary materials to third-party recyclers generally involve discard" because "generators will typically pay the reclamation facility to accept these hazardous secondary materials." 80 Fed. Reg. at 1707/1-2, JA0278; 76 Fed. Reg. at 44,108/2-3, JA0218.

III. EPA'S REFUSAL TO ESTABLISH NOTIFICATION AND CONTAINMENT REQUIREMENTS IN THE PRE-2008 EXCLUSIONS IS UNLAWFUL AND ARBITRARY.

A. EPA's Decision Not To Finalize The Notification And Containment Requirements Is Reviewable.

"The law in this circuit is clear that an agency decision not to amend long-standing rules after a notice and comment period is reviewable agency action." *Montana v. Clark*, 749 F.2d 740, 744 (D.C. Cir. 1984), *cert. denied sub nom. Montana v. Hodel*, 474 U.S. 919 (1985). *See also P&V Enters. v. U.S. Army Corps. of Eng'rs*, 516 F.3d 1021, 1024 (D.C. Cir. 2008) (same); *Gen. Motors v. EPA*, 363 F.3d 442, 449-50 (D.C. Cir. 2004)) (same); *Ohio v. EPA*, 838 F.2d 1325, 1328 (D.C. Cir. 1988) (same). That is precisely what happened here. After promulgating a new proposal that solicited comment on amending all 32 Pre-2008 Exclusions by

adding the notification and containment requirements, EPA decided not to amend them. *See Ohio*, 838 F.2d at 1328 (allowing review of unchanged portions of republished old rules under 42 U.S.C. § 9613(a)).

EPA admits (at 88) that it solicited comment on adding notification and containment requirements to the Pre-2008 Exclusions, but argues (at 89) it did not reconsider each of the Pre-2008 Exclusions individually. As the record shows, however, EPA specifically "request[ed] comment on codifying … the contained standard in 40 CFR 260.10 and the notification provision in 40 CFR 260.42 for 32 regulatory provisions that exclude or exempt certain types of recycling from full Subtitle C regulation." 76 Fed. Reg. at 44,138/3-39/2 (emphasis added), JA0248-49. Because EPA's proposed amendments would have changed all 32 Pre-2008 Exclusions, it is irrelevant that EPA did not evaluate each Exclusion individually. EPA's finalization of the legitimacy criteria and recordkeeping requirements, which it proposed with the notification and containment requirements, *id.*, further confirms that EPA reopened the Pre-2008 Exclusions on these issues.

EPA also characterizes its proposed notification and containment requirements as related to enforceability rather than "substantive." EPA Br. at 88-89. Regardless of how EPA chooses to describe them, the proposed amendments would have substantially altered the regulatory requirements of all 32 Pre-2008 Exclusions. The new notification language would have required any facility using

any of these Exclusions to identify and quantify the hazardous secondary materials they manage and to provide this information to EPA biannually. 76 Fed. Reg. at 44,150/1-2 (40 C.F.R. § 260.42(a)), JA0260. The new containment language would have required any facility using any of these Exclusions to "contain[]" any material not "analogous" to a raw material. *Id.* at 44,150/3 (40 C.F.R. § 260.43(a)(3)), 44,148/3-49/1 (40 C.F.R. § 260.10)), JA0260, 0258-59.[7] By proposing these amendments and soliciting comment on whether they are necessary to prevent the unlawful discard of hazardous waste, 76 Fed. Reg. at 44,138/2-39/3, JA0248-49, EPA engaged in "serious, substantive reconsideration" of the Pre-2008 Exclusions. *P&V Enters.*, 516 F.3d at 1024.

EPA next claims that its decision was only a "deferral" and is not reviewable. EPA Br. at 90 (quoting 80 Fed. Reg. at 1741/2, JA0312). This Court has made clear, however, that "an agency decision not to amend long-standing rules after a notice and comment period is reviewable." *Montana*, 749 F.2d at 744. Beyond that, EPA's only basis for claiming the decision did not mark the "consummation" of its decision-making is that it labeled the decision a deferral. EPA Br. at 90. EPA does not dispute that legal consequences flow from its

[7] Although the same regulatory text appears in the final rule, 80 Fed. Reg. at 1773/1, JA0344, EPA insists it did not promulgate this requirement, EPA Br. at 90 (quoting 80 Fed. Reg. at 1741/2, JA0312).

decision, or claim that any further rulemaking on the issue is underway or scheduled. *See* Br. at 44-45. That EPA might address the need for notification and containment requirements in a future rulemaking is irrelevant; EPA does not deny that "[t]he fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000). *See also Nat'l Envtl. Dev. Ass'n's Clean Air Proj. v. EPA*, 752 F.3d 999, 1006 (D.C. Cir. 2014) (same); Br. at 45.

EPA seeks to rely (at 90) on a generic holding in *API II* that the deferral of agency action is not reviewable. In *API II*, however, petitioners acknowledged the challenged action was a "deferral." 216 F.3d at 68. A ruling that deferrals are not reviewable says nothing about whether the decision challenged here is a deferral.

Similarly, Intervenors cite *American Portland Cement Alliance v. EPA*, 101 F.3d 772, 777 (D.C. Cir. 1996), for the proposition that "this Court cannot review EPA's deferral." Int. Br. at 4-6. The action at issue in *American Portland Cement*, however, was a statutorily-mandated "determin[ation] to promulgate regulations," 101 F.3d at 774 & n.4 (citing 42 U.S.C. § 6921(b)(3)(C)), that the Court described as an announcement of intent "to establish law and policy in the future." *Id.* at 777. The Court's finding that such action is a deferral has no bearing here, where EPA proposed regulatory amendments, solicited comment on them, and then decided not to promulgate them. It is this decision, not EPA's suggestion that it might take

further action in the future, that Environmental Petitioners challenge, and consistent Circuit precedent makes clear it is reviewable. *P&V Enters.*, 516 F.3d at 1024; *Montana*, 749 F.2d at 744.

B. Environmental Petitioners Have Established Injury-In-Fact.

In another argument not joined by EPA, Industry Intervenors argue that Environmental Petitioners' declarations do not show harm from "most" of the 32 Pre-2008 Exclusions. Int. Br. at 8-19. Intervenors do not dispute, however, that Environmental Petitioners have shown harm from EPA's decision not to amend at least three of these Exclusions to include the proposed notification and containment requirements. 40 C.F.R. §§ 273.2 & 266 subpt. G (lead-acid batteries) (DEC019); *id.* pt. 279 (used oil) (DEC011); *id.* § 261.7 (drums) (DEC019; DEC037-38). That harm suffices to show standing to challenge EPA's decision in this rulemaking not to finalize the notification and containment requirements. Further, as shown below, Intervenors' attack on the declarations for the other Exclusions lacks merit.

For four Exclusions – scrap metals (40 C.F.R. §§ 261.4(13), .6(a)(3)(ii)), petroleum refinery oils (40 C.F.R. § 261.4(a)(12)), and precious metals (40 C.F.R. § 266 subpt. F) – Industry Intervenors argue Environmental Petitioners' harm is speculative because they have not shown "increased risk." Int. Br. at 12-17. It is well established, however, "that environmental plaintiffs adequately allege injury

in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth v. Laidlaw Evntl. Servs*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). That is the situation here. The declarations show that Environmental Petitioners' members live, work, and recreate in close proximity to refineries, scrap metal recyclers, and a precious metal recycler. The ever-present danger of harmful air emissions, leaks, spills, fires, and explosions at these facilities diminishes these members' ability to enjoy everyday outdoor activities such as walking their dogs, going fishing, biking, and having barbecues. It causes them to engage in these activities less often and in some instances to forego them altogether. DEC010-12; DEC018-20; DEC027-30; DEC036-38. These injuries easily suffice to show standing. *Laidlaw*, 528 U.S. at 183. *See NRDC v. EPA*, 489 F.3d 1364, 1370-71 (D.C. Cir. 2007) (finding standing based on diminished enjoyment of outside recreational activities); *Ass'n of Battery Recyclers v. EPA*, 716 F.3d 667, 672-73 (D.C. Cir. 2013) (declarants "reduced their time outdoors in response to concerns about pollution"); *Sierra Club*, 699 F.3d at 533 ("some Sierra Club members unquestionably live within zones they claim are exposed to" hazardous air pollutants); *NRDC v. EPA*, 749 F.3d 1055, 1062 (D.C. Cir. 2014) ("Some of petitioners' members will suffer from those

higher emissions, according to their affidavits. A ruling in their favor would prevent those emissions and help alleviate that harm. That's good enough.").

Intervenors next argue that Environmental Petitioners' members' concerns are "subjective" and that, when they refrain from the outside activities they enjoy, their injuries are "self-inflicted." Int. Br. at 17-19. To the contrary, these members' concerns are all too real, and are substantiated by their own past experiences involving fires, explosions, and toxic emissions at the facilities near them (*e.g.*, DEC011-12; DEC019-20; DEC027-28; DEC036-38). Environmental Petitioners' concerns are also substantiated by the record, which confirms that such dangerous events do occur – and cause significant, long-lasting damage – at and around facilities using these Pre-2008 Exclusions. 80 Fed. Reg. at 1741/1, JA0311 (discussing EPA-HQ-RCRA-2010-0742-0370 ("Damage Study"), JA0998, and EPA-HQ-RCRA-2010-0742-0010 ("Correlation Study"), JA0561); Br. at 25. For example, Jane Williams lives and recreates close to Commodity Resource & Environmental, Inc., formerly Commodity Refining Exchange, which was included in EPA's Damage Study because it polluted the air and soil with toxic ash. DEC036; Damage Study app.1 at 1-126, JA1024; Correlation Study at 12, 18,

JA0572, 0578.[8] Her concerns and those of the other members "are the kinds of harms that the Supreme Court in *Laidlaw* determined were sufficient to show injury-in fact." *NRDC*, 489 F.3d at 1370-71. *See Ass'n of Battery Recyclers*, 716 F.3d at 672-73; *Sierra Club*, 699 F.3d at 533; *NRDC*, 749 F.3d at 1062.

Intervenors also argue that Environmental Petitioners have not proved the facilities identified in their declarations "actually rely" on the Exclusions. Int. Br. at 12. This Court considered a similar argument in *Sierra Club v. EPA*, 755 F.3d 968, 973-75 (D.C. Cir. 2014), which also involved a RCRA exclusion that excused facilities from providing notice of their excluded, hazardous waste activities. There, as here, intervenors argued that petitioners lacked standing because they had not proved the facilities they named actually relied on the exclusion. Rejecting that argument, the Court found that "once the EPA promulgated the [exclusion], it was 'a hardly-speculative exercise in naked capitalism' to predict that the facilities with existing gasification units on site would take advantage of the Exclusion for which they lobbied." *Id.* (quoting *Am. Trucking Ass'n v. Federal Motor Carrier Safety Admin.*, 724 F.3d 243, 248 (D.C. Cir. 2013) (quoting *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 135 (D.C. Cir.

[8] Contrary to Intervenors' claims (at 12-14 & n.4), Environmental Petitioners' concerns are not rendered any less reasonable by Intervenors' disagreement with the findings in EPA's studies.

2006))); *see also NRDC v. EPA*, 755 F.3d 1010, 1017 (D.C. Cir. 2014) (explaining it was predictable that facilities would take advantage of the comparable fuels exclusion, rather than "the more expensive" alternative).

Here, as in *Sierra Club*, Intervenors cannot dispute that because the facilities identified in the declarations handle the hazardous materials excused from regulation by the four Pre-2008 Exclusions, they are positioned to take advantage of these Exclusions, and would benefit financially by doing so. Indeed, comments from industry groups representing such facilities – including facilities identified in the declarations – opposed amending the Pre-2008 Exclusions to include the notification and containment requirements precisely because their members use these exclusions and wish to continue using them without having to meet any additional requirements. EPA-HQ-RCRA-2010-0742-0232 at 1, 32 (representing thousands of member facilities including scrap recyclers identified in Environmental Petitioners' declarations), JA0836, 0838 [9]; *see also* EPA-HQ-RCRA-2010-0742-0238 at 11 (noting that "numerous ACC facilities have used and continue to use a number of the [Pre-2008] exclusions/exemptions"), JA0841;

[9] The Institute for Scrap Recycling Industries' searchable membership directory includes several scrap recyclers named at DEC018, DEC010-11, and DEC027. *See* http://www.isri.org/about-isri/membership/member-directories#.VztaM1UrJD_. *See also* EPA-HQ-RCRA-2010-0742-0044 at 1 (discussed at DEC010-11) (explaining that EPA's proposal will require it to "meet extensive new requirements that [it] never had to meet before")), JA0583.

EPA-HQ-RCRA-2010-0742-0111 at 5 (explaining that National Mining Association members use at least 10 Pre-2008 exclusions), JA0586.

Intervenors' challenge to Environmental Petitioners' informational injury also lacks merit. "The Supreme Court has made clear … that a denial of access to information can work an injury in fact for standing purposes, at least where a statute (on the claimants' reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them." *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1148 (D.C. Cir. 2002) (internal quotations and citations omitted). Here, all the Pre-2008 Exclusions deprive Environmental Petitioners and their members of critical hazardous waste information to which RCRA provides a right, including, but not limited to, the "location and general description" of every facility's hazardous wastes and related activities, 42 U.S.C. § 6930, and the detailed information that is required for a hazardous waste permit,. *id.* § 6925(c). Under RCRA, this information would be available to the public if the Exclusions did not exist because the currently excluded hazardous materials would be hazardous wastes, *id.* §§ 6926(f), 6927(b)

and Environmental Petitioners and their members would undisputedly use it to protect the health and safety of the public. Br. at 29; DEC022.[10]

Moreover, the Exclusions' lack of notification deprives Environmental Petitioners of information that is necessary to their core missions to protect the public and the environment from toxic pollution. DEC021-22; DEC039. *See, e.g.*, *Abigail Alliance*, 469 F.3d at 133. EPA's refusal to require this information about which facilities are using the Pre-2008 Exclusions prevents Environmental Petitioners from educating their members and the public about where and how hazardous materials are being managed without RCRA protections, what risks those activities pose, or how to protect against those risks. It also impedes their work to advocate for stronger protections at these sites and engage in enforcement actions where necessary. DEC013; DEC021-22; DEC039; *see, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (finding standing where action denied organization information necessary for its counseling services); *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 936-39 (D.C. Cir. 1986) (finding

[10] Industry Intervenors argue irrelevantly that informational injury is not cognizable where the government merely denied "requests for information concerning 'whether a violation of law has occurred.'" Int. Br. at 11. That is not what Environmental Petitioners allege. *See* DEC022; *Ethyl Corp.*, 306 F.3d at 1148.

standing where organization's ability to inform its members about unlawful discrimination was diminished by restrictions on the flow of that information).

Finally, Industry Intervenors dispute Environmental Petitioners' procedural harm with respect to the refinery used oil Exclusion. Int. Br. at 16. As shown in the declaration of William Fontenot, this Exclusion deprives William, Sierra Club, and LEAN of any opportunity to participate in otherwise mandatory hazardous waste permitting processes. DEC011; *see also* DEC022; *e.g.*, 42 U.S.C. § 6974(b). This procedural injury impairs their concrete interest in preventing the hazardous exposures and harm at refineries that are subject to the Exclusion, which EPA has "correlate[d] with confidence" to environmental damage. 80 Fed. Reg. at 1741/1, JA0312, *City of Waukesha v. EPA*, 320 F.3d 228, 234 (D.C. Cir. 2003) (holding that a violation of procedural requirements affords standing "so long as the procedural requirement was 'designed to protect some threatened concrete interest' of the plaintiff.").

C. EPA's Decision Not To Finalize The Notification And Containment Requirements Was Arbitrary.

In the rulemaking, EPA failed to reconcile its decision not to finalize the notification and containment requirements with its description of these requirements as "minimum requirements necessary" to prevent the unlawful discard of hazardous waste. Br. at 48, 52. EPA now argues at length that this

description was not a final agency "conclusion." EPA Br. at 92-94. EPA also claims oddly that it related only to the generator-controlled exclusion, which is not at issue here. *Id.* at 91-92.

Regardless of whether EPA's description of the notification and containment requirements was a "conclusion," EPA stated they "constitute <u>what [EPA] believe[s] to be the minimum requirements necessary</u> to define when recycled hazardous secondary materials are not discarded." 76 Fed. Reg. at 44,138/3-39/1 (emphasis added), JA0248-49. By proposing to codify these requirements for all 32 Pre-2008 Exclusions, EPA made clear it believed them necessary to these Exclusions. *Id.* at 44,139/1-2, JA0249. To be sure, EPA was free to change its position, EPA Br. at 94, but to promulgate a non-arbitrary rule the agency needed to explain the change. *NACWA*, 734 F.3d at 1145-46. EPA's brief does not identify any part of the record where that explanation appears or, indeed, where EPA has even changed its belief that the notification and containment requirements are necessary to prevent the unlawful discard of hazardous waste. *See FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009) ("the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("the agency must examine the relevant data and articulate a satisfactory explanation for its action including a

'rational connection between the facts found and the choice made.'" (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

EPA also claimed in the rulemaking that because the Pre-2008 Exclusions never required notification, it does not know which facilities use the Pre-2008 Exclusions and cannot assess the relative benefits and burdens of requiring notification. Br. at 49-50. But if notification and containment requirements are "necessary" to prevent discard – as EPA stated it "believe[s]," 76 Fed. Reg. at 44,138/3, JA0248 – the statute requires them regardless of EPA's views about their relative benefits and burdens. *See* Br. at 48. Otherwise, by EPA's own logic, its Exclusions allow discarded hazardous materials – *i.e.*, hazardous waste – to evade RCRA regulation. *See id.* EPA's brief confirms that the agency failed to address this point anywhere in the record. *See State Farm*, 463 U.S. at 43.

Another problem with EPA's rule rationale was that the lack of information EPA described supports finalizing the notification requirements more than it supports EPA's decision to drop them. Br. at 49-50. EPA's brief just reiterates the claim that EPA was unsure whether notification is necessary and environmentally beneficial. EPA Br. at 97-98. The brief points to no part of the record addressing EPA's own finding that, although the agency relies entirely on compliance with the conditions in the Pre-2008 Exclusions to prevent the unlawful discard of hazardous waste, it has no idea whether facilities are actually in compliance. Br. at 49. Thus,

EPA's brief confirms that EPA has no idea whether its Exclusions are allowing the same type of environmental catastrophes documented in its Damage Study to continue unabated, and that EPA failed to draw a rational connection between this alarming fact and its decision to drop the notification requirement. *State Farm*, 463 U.S. at 43.

With respect to containment, EPA stated at proposal that it needed to address the "gap" caused by the absence of containment requirements by making the contained standard applicable to all 32 Pre-2008 Exclusions. 76 Fed. Reg. at 44,140/1, JA0250. In the final rule, it claimed that because some of these Exclusions already have containment requirements, it may not be efficient to make the contained standard applicable to all of them. 80 Fed. Reg. at 1766/1-2, JA0337. What EPA did not say anywhere in the record was why the mere fact that some of the Pre-2008 Exclusions already had containment requirements meant that the agency should not promulgate containment requirements for the rest. Br. at 51-52. EPA's brief confirms that explanation is nowhere in the record. *See State Farm*, 463 U.S. at 43.

CONCLUSION

For the reasons given in the opening brief and above, Environmental Petitioners respectfully request that this Court vacate the Verified Recycler

Exclusion codified at 40 C.F.R. § 261.4(a)(24) and the Pre-2008 Exclusions identified at 76 Fed. Reg. 44,139, JA0249.

DATED: June 20, 2016

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing **Final Reply Brief of Environmental Petitioners** contains 6,975 words, as counted by counsel's word processing system, and thus complies with the applicable word limit established by the Court.

DATED: June 20, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2016, I have served the foregoing **Final Reply Brief of Environmental Petitioners** on all registered counsel through the Court's electronic filing system (ECF).

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ORAL ARGUMENT NOT YET SCHEDULED

No. 09-1038
(and consolidated cases Nos. 15-1083, 15-1085, 15-1088, 15-1089, and 15-1094)

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

AMERICAN PETROLEUM INSTITUTE, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON PETITIONS FOR REVIEW OF FINAL REGULATIONS PROMULGATED BY THE ENVIRONMENTAL PROTECTION AGENCY

REPLY BRIEF OF INDUSTRY PETITIONERS

(AMERICAN PETROLEUM INSTITUTE; UTILITY SOLID WASTE ACTIVITIES GROUP, *et al.*; FREEPORT-MCMORAN INC.; and NATIONAL ASSOCIATION OF MANUFACTURERS and AMERICAN CHEMISTRY COUNCIL)

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GLOSSARY

As used herein,

APA means the Administrative Procedure Act;

API means petitioner American Petroleum Institute;

DOT means United States Department of Transportation;

EPA means respondent United States Environmental Protection Agency;

FAA means Federal Aviation Administration;

FCC means Federal Communications Commission;

FERC means Federal Energy Regulatory Commission;

Gulf means Movant-Intervenor Gulf Chemical and Metallurgical Corporation;

JA means the Joint Appendix; and

RCRA means the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k.

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SUMMARY OF ARGUMENT

I. EPA casts the 2015 rule as a reasonable incremental step, but it was a *stark* change for the primary-metals industry. Historically, that industry's valuable in-process materials, continuously reused within ongoing production processes, have never been understood as "discarded" and always fell outside RCRA's statutory jurisdiction as a matter of plain meaning and *Chevron* step 1. This Court so held. *E.g.*, *Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1181 (D.C. Cir. 1987) ("*American Mining*"). That conclusion applied regardless of the regulatory guidance, exclusions or exemptions that dominate EPA's Brief. But the 2015 rule dramatically expanded EPA's RCRA jurisdiction by making the "legitimacy" factors mandatory for *all* in-process, recycled or reused "hazardous secondary materials"—not just the narrow categories of materials addressed by the 2008 rule's two regulatory exclusions.

EPA cannot justify this violation of RCRA's unambiguous bounds. It argues that the legitimacy factors merely "determin[e] whether . . . materials really are being recycled." EPA.Br. 18. That unsupported assertion defies reality. For industry, the new legitimacy factors have the look, feel, and effect of substantive

regulations.[1] They restrict how industry may handle in-process materials and dictate acceptable chemical composition. EPA's heavy reliance on *Solvay USA Inc. v. EPA*, 608 F. App'x 10 (D.C. Cir. 2015) (per curiam), is misplaced. That unpublished opinion differs fundamentally as to the rulemakings at issue, challenges raised, and materials involved.

In-process materials in the mining and primary metals industry are so obviously not "discarded" that Environmental-Intervenors *do not even suggest* they fall within RCRA's scope. EPA appropriately recognizes that "large revert" is beyond RCRA jurisdiction, but confusingly asserts "fine revert" is not. EPA's first point is correct, because "large revert" is not "discarded." But EPA provides no principled ground to distinguish "fine revert"; none exists. "Fine reverts" encompass the "valuable metal-bearing and mineral-bearing dusts [that] are often released in processing a particular metal" and then reused in continuous industrial processes, which this Court found plainly not "discarded." *American Mining*, 824 F.2d at 1181.

II. The Court should vacate the specific requirements of the Verified Recycler Exclusion that Industry Petitioners challenge. Whether a material has

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[1] *Cf. Dole v. Williams Enters., Inc.*, 876 F.2d 186, 188 n.2 (D.C. Cir. 1989) ("WHEREAS it looks like a duck, and WHEREAS it walks like a duck, and WHEREAS it quacks like a duck, WE THEREFORE HOLD that it is a duck.").

been "discarded" cannot plausibly depend upon the granting of a permit or variance or similar "regulatory oversight."

Moreover, the record does not support the wished-for "pattern of discard" that EPA relied upon to support its presumption that materials transferred for recycling are "discarded." EPA's presumption also conflicts with precedent and represents an arbitrary departure from longstanding policy.

III. The Court may review the Response To Comments, because it was issued with, and serves to explain, the 2015 rule. EPA's position that off-specification products that are reprocessed before use are "secondary materials" subject to the legitimacy regulation intrudes into the manufacturing process. That is beyond EPA's RCRA authority, and represents an arbitrary departure from longstanding policy.

IV. Gulf has not established its standing.

ARGUMENT

I. THE NOW-MANDATORY LEGITIMACY FACTORS EXCEED EPA'S RCRA JURISDICTION.

A. The Legitimacy Factors Are Substantive Regulation Masquerading As A Jurisdictional Test.

EPA's mandatory legitimacy factors go beyond defining what is "discarded," and substantively regulate material that is not "discarded" under that term's plain meaning. Industry.Br. 16-34. EPA's response is semantic: asserting

(without substantiation) that the legitimacy factors are only a test to "determine[] whether the secondary materials are being 'recycled,'" not "conditions on secondary materials that are actually being recycled." EPA.Br. 24-25, 28-30, 35.

EPA is wrong for two reasons. *First:* Even non-discarded materials that *satisfy* all the legitimacy factors remain subject to *de facto* regulation under them. EPA has created a parallel regime, in the guise of a jurisdictional determination, that imposes regulatory obligations on unambiguously non-discarded materials. Those obligations have no basis in statutory text, but restrict how material is handled, and cap its chemical composition. *See* Industry.Br. 18-22. Environmental-Intervenors concede this point, praising Factor 3 as "mandat[ing] better management" of materials. Envtl.-Intervenors.Br. 10. *Second:* Any deviation from the legitimacy factors means material is deemed "sham" recycled and "discarded," including in-process materials that cannot be viewed as "discarded" within the ordinary (or any reasonable) meaning of that term. Revert sitting on open ground could be considered discarded for failing to meet the "contained" requirement, despite no portion ever having left the smelting facility. Industry.Br. 26-27.

The only specific authority EPA cites to support its legitimacy factors is *Solvay*. But *Solvay* involved *different legal challenges* to a rule involving the definition of a *different kind* of (i.e., *non*-hazardous) waste. *See* 608 F. App'x at

10. In that rulemaking, EPA explicitly refused to consider the definition of *hazardous* waste. *See* 74 Fed. Reg. 41, 50 (Jan. 2, 2009). EPA told parties interested in the hazardous-waste regime that their comments would not be addressed, and declared the non-hazardous-waste rulemaking would not revisit the definition of hazardous waste in "any way whatsoever." *Id.* EPA cannot now dismiss the distinction between hazardous and non-hazardous waste rules as "irrelevant." EPA.Br. 28.

Additionally, no party in *Solvay* raised the jurisdictional argument presented here—that the legitimacy factors (even if satisfied) constitute substantive regulation that exceed EPA's statutory jurisdiction. There, the relevant challenge to the legitimacy factors was a hard-look-review argument from environmental groups, not a *Chevron* Step 1 challenge questioning EPA's jurisdiction. *See* Opening Br. for Envtl.-Petitioners at 49-51, *Solvay*, 608 F. App'x 10. *Solvay* cannot be read as resolving unraised challenges to the legitimacy factors' jurisdictional status. *See Bismullah v. Gates*, 551 F.3d 1068, 1071 (D.C. Cir. 2009) (issues "which merely lurk in the record" of earlier decisions "are not to be considered as having been so decided" (citation omitted)).

Second, *Solvay* involved discrete categories of materials very different from those subject to the legitimacy factors here. The materials there were either already-"discarded" material being repurposed for fuel, or material being

combusted. 608 F. App'x at 11-12. *Solvay* found RCRA ambiguous as to whether already-"discarded" materials remain so when repurposed, and combusting certain materials amounts to "discard." *See id.* at 12. Here, the legitimacy factors are not limited to such ambiguous circumstances. They apply to *all* "hazardous secondary materials," including in-process materials within continuous, ongoing production processes, which are plainly not "discarded."

Finally, to the extent the unpublished *Solvay* decision conflicts with them, *American Mining* and other prior published decisions control. *See Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011).

B. Factor 3 Impermissibly Regulates Non-Discarded Material.

Factor 3 constitutes *de facto* regulation of how companies handle non-discarded materials during production processes. *See* Industry.Br. 18-19. For instance, where there is no "analogous raw material," Factor 3 requires "contain[ment]" *and* dictates the manner of containment. *Id.* In response, EPA asserts that the factor "does not impose conditions on materials actually destined for recycling." EPA.Br. 29.

But Factor 3 does not simply provide that material "released to the environment" is discarded—as EPA suggests. *Id.* It specifies the *manner* of containment and imposes new labeling and documentation requirements. Industry.Br. 18-19. Tellingly, Environmental-Intervenors do not even *attempt* to

defend the labeling and logging requirements, 40 C.F.R. § 260.10, which have no reasonable connection to whether material is "discarded" (*e.g.*, "abandoned"). *See Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1051 (D.C. Cir. 2000).

Many in-process materials, like copper revert, do not need to be handled in "units" meeting particular specifications to prevent release. *See* Industry.Br. 28-29. Similarly, *Battery Recyclers* gave no indication that the mining materials there needed to be "contained" to be non-"discarded." 208 F.3d at 1051. EPA tries to limit *Battery Recyclers* to its facts, but it imposes a "more general[]" jurisdictional limitation that is inconsistent with Factor 3. *See id.* at 1054 ("[S]econdary materials . . . cannot be considered discarded if they are 'reused within an ongoing industrial process.'" (citation omitted)).

Environmental-Intervenors try justifying Factor 3 through examples of materials that are readily seen as "discarded," such as "waste paint" and "electronics reclamation." Envtl.-Intervenors.Br. 10-11. But the examples prove *Industry-Petitioners'* point, because they do not include any in-process materials from the mining or primary metals industries, such as those in *American Mining*.

C. Factor 4 Impermissibly Regulates Non-Discarded Material.

Factor 4 impermissibly prescribes the chemical content of in-process materials, intermediates, and even "products." Industry.Br. 20-25. EPA attempts

to downplay how rigid and burdensome Factor 4 is. EPA.Br. 37-44.[2] But if Factor 4 exceeds EPA's statutory jurisdiction, its rigidity and burdensomeness are irrelevant.

1. *EPA's Attempts To Downplay Factor 4 Are Unavailing.*

EPA makes two main attempts to show that Factor 4 does not improperly force companies to change their management of non-discarded materials. Neither succeeds.

First, EPA repeatedly asserts that the legitimacy factors are "self-implementing." EPA claims industry can select the relevant analogous products or intermediates or commodity standards to assess the legitimacy of recycling. EPA.Br. 37, 39, 44. But EPA does not mean it.[3] The Agency concedes it can "always" "disagree with the generator's selection and bring an enforcement action." *Id.* at 51; *accord* Envtl.-Intervenors.Br. 14-15. Environmental-Intervenors dismiss concerns that in-process materials will be deemed "sham recycled" based on minor chemical differences. Envtl.-Intervenors Br. 14. They

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[2] EPA asserts that *amici*'s adulteration argument was forfeited. EPA.Br. 44-46. But commenters preserved it. *See* Soc. of Chem. Mfrs. & Affiliates Comments 15-18 (Oct. 20, 2011), EPA-HQ-RCRA-2010-0742-0266, JA 864-67.

[3] EPA says no testing is required for generators to compare the chemical composition of the product of their recycling with that of a relevant analogous product. 40 C.F.R. § 260.43(a)(4)(i)(A)-(B); EPA.Br. 38. But even if generators know the composition of *their products*, they cannot know the composition of *competitors'* products without testing them.

cite preamble language (but not the actual rule) to claim that only "high" or "significantly elevated" levels matter. *Id.* EPA offers no such assurances, limiting allowable deviation to a "small acceptable range," EPA.Br. 38—whatever that may mean. Besides EPA's second-guessing, generators face enforcement by state regulators and private plaintiffs. *See* 42 U.S.C. § 6972. The rule exceeds RCRA's scope by inviting enforcement against non-"discarded" in-process materials.

Second, EPA erroneously asserts that Factor 4 is flexible. For instance, EPA suggests that other parts of Factor 4 avoid the need to analyze hazardous constituent levels. EPA.Br. 39. But those options apply *only* "[w]here there is no analogous product." 40 C.F.R. § 260.43(a)(4)(ii). And EPA gives *itself* discretion to second-guess generators' determinations of whether products are "analogous."

Similarly, EPA trumpets § 260.43(a)(4)(iii)'s "alternative option" as a safety valve. EPA.Br. 41-44. But requiring generators to prove that "toxics in the product," "bioavailability" and "levels of hazardous constituents" do not pose environmental or health risks constitutes *de facto* regulation of non-discarded materials. Industry.Br. 24-25. EPA does not deny that. Instead, EPA cites *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1269 (D.C. Cir. 2003), for the proposition that health and environmental risks "can be" relevant to discard. EPA.Br. 42. But EPA does not suggest such risks are always or even often relevant, so the rule impermissibly sweeps in "at least some" non-discarded

material. *Battery Recyclers*, 208 F.3d at 1056. *Safe Food* relied on health and environmental risks in deciding whether EPA lawfully excluded recycled fertilizers despite chemical differences with virgin materials. *See* 350 F.3d at 1269. But by its terms, Factor 4's "alternative option" does not involve a comparative chemical assessment. *Cf.* Envtl.-Intervenors.Br. 15-16 (assuming otherwise). It asks in absolute terms whether recycled materials "contain levels of hazardous constituents that pose a significant human health or environmental risk." 40 C.F.R. § 260.43(a)(4)(iii).

EPA's assertion that Factor 4's "alternative option" is not "illusory" (EPA.Br. 44), depends on the same flawed "self-implementing" theory. EPA protests that regulated entities can obtain "a non-waste determination" under 40 C.F.R. § 260.34(c). EPA.Br. 44. But that merely emphasizes EPA's intrusion into ongoing production processes. And it retains the underlying defect; such determinations "will [again] be based on whether the hazardous secondary material is legitimately recycled as specified in § 260.43." 80 Fed. Reg. 1694, 1734 (Jan. 13, 2015).

2. *Safe Food Does Not Apply.*

EPA and Environmental-Intervenors erroneously analogize Factor 4 to the "identity" principle from *Safe Food.* EPA.Br. 34-35; Envtl.-Intervenors.Br. 15. *Safe Food* upheld a rule dealing with EPA's authority over material that EPA had

previously "classified" as "solid waste" (and thus was "discarded") absent a specific exemption. *See* 350 F.3d at 1265. Here, EPA regulates vast ranges of in-process hazardous secondary materials that are part of continuous production processes and never "discarded." While *Safe Food* may have found it reasonable to conclude that materials are not discarded if they are "indistinguishable" from virgin materials, the converse is not necessarily true. *Cf.* Envtl.-Intervenors.Br. 15 (arguing that recycled materials *are* discarded unless indistinguishable from virgin materials).

3. *EPA And Environmental-Intervenors' Examples Are Irrelevant.*

Contrary to EPA's suggestion (EPA.Br. 35), applying Factor 4 to all secondary materials is not necessary to prevent companies from, *e.g.*, disposing of lead-contaminated foundry sand by selling it as play sand. That example involves repurposing sand after it was no longer useable at a metal foundry. It does not involve in-process materials and intermediates used (and retained) in a continuous industrial process. Therefore, it does not support applying Factor 4 universally, including to in-process materials in the mining and primary metals industries. *See American Mining*, 824 F.2d at 1181.

Furthermore, the source cited in EPA's Brief shows Factor 4 is unnecessary to prevent such concerns. The example shows no "gap" in then-existing regulations, because the sand already qualified as "hazardous waste" under RCRA

in 2002—which is why EPA could address it through a RCRA § 7003 order. *See* Damage Cases from Recycling of Hazardous Secondary Materials, app. 1 at 1-128 (EPA-HQ-RCRA-2010-0742-0370) ("Damage Study"), JA 1026. Also, the sand in question was sold only because the company was *mistaken* about whether lead levels were acceptable, not because of inadequate regulations. *Id.* Factor 4 would not eliminate such mistakes.

The other examples Environmental-Intervenors (but not EPA) cite to justify Factor 4 involve materials that readily qualify as "discarded," or whose status is at best ambiguous. *See* Envtl.-Intervenors.Br. 13-14. For instance, the Marine Shale Processors example involved "hundreds of different hazardous wastes" being burned in an incinerator. *Id.* at 13 (citing Damage Study, app. 1 at 1-298). Similarly, a "secondary smelter" processing scrap material is very different than a primary metal smelter incrementally purifying natural ores and in-process intermediates into high-purity end products. *Id.* (citing Damage Study app. 1 at 1-114). Old Bridge Chemicals (*id.* at 13-14) stored materials for six years without re-use. Damage Study app. 1 at 1-339. Also, Environmental-Intervenors repeatedly suggest that materials can be deemed "discarded" if they "cause . . . harm." Envtl.-Intervenors.Br. 12. That is the wrong question; RCRA limits EPA to regulating materials that have been "discarded," not any substances that might be "harmful."

D. EPA Properly Recognizes That Freeport's In-Process Materials Are Beyond Its RCRA Jurisdiction, Yet Cannot Conceal the Rule's Overreach To Non-"Discarded" Materials.

1. *This Court Should Consider The Rule's Effect On Particular Materials.*

Contrary to EPA's suggestion, there are good reasons to consider how the 2015 rule affects particular materials. First, this Court has often used specific examples to illustrate EPA's overreach when analyzing challenges to past rules defining "solid waste." *E.g.*, *Battery Recyclers*, 208 F.3d at 1054 & n.2 (giving "example from the rulemaking record in th[at] case" to illustrate why rule "contradicts" *American Mining*); *see also Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1183, 1185 (D.C. Cir. 1990). *Battery Recyclers* vacated EPA's rule because it "s[ought] to regulate" "at least some" material that "is not abandoned or thrown away." 208 F.3d at 1056.

Second, EPA glosses over RCRA's judicial review provision, which provides that agency actions that "could have been" challenged in a petition for review "shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. § 6976(a). EPA's failure to commit here to withholding untimeliness objections to future challenges is a strong "reason to adjudicate specific materials." EPA.Br. 31.

Finally, EPA's current assurances do not preclude future enforcement. EPA relies heavily on language in the preamble (not published in the Code of Federal

Regulations) indicating that EPA is not revisiting prior legitimacy determinations. EPA.Br. 32. Elsewhere, EPA has been quick to assert that preamble language is not binding. *See Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1418 (D.C. Cir. 1998). EPA evidently has abandoned any such argument here—though it never expressly states the preamble is binding. Carefully-worded assurances that "EPA is not revisiting prior legitimacy determinations," EPA.Br. 32, overlook RCRA enforcement by states and private plaintiffs. Indeed, the rule warns that prior non-waste determinations "remain[] in effect, *unless the authorized state decides to revisit the[m]*." 80 Fed. Reg. at 1735 (emphasis added). Also, EPA could later decide the preamble is not binding because it is "no[t] so precise as . . . to have legal force." *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1223 (D.C. Cir. 1996).[4] Moreover, EPA's statements preserving prior legitimacy determinations are not relevant to the many thousands of hazardous secondary materials recycled daily that have never been subjected to a specific EPA or state legitimacy review.

2. *Asserting Jurisdiction Over "Fine Revert" Reveals The Extent Of EPA's Overreach.*

EPA recognizes that "the legitimacy test does not apply" to large reverts, which cannot plausibly be deemed "discarded." EPA.Br. 32. Confusingly, EPA

[4] The preamble should bind EPA—especially if this Court were to rely on it to decide that EPA stayed within its jurisdiction.

asserts the legitimacy test *does* apply to fine reverts, without explaining *why* or grounding that determination in the meaning of "discard." *Id.* at 32 n.6. Like "large reverts," "fine reverts" are not discarded in the ordinary sense of that term. EPA briefly suggests two possible distinctions—particle size and copper concentration. *Id.* But neither characteristic is relevant to whether fine revert is "discarded" (*e.g.*, abandoned).

To begin with, "fine revert" encompasses the "valuable metal-bearing and mineral-bearing dusts [that] are often released in processing a particular metal" held to be non-"discarded" in *American Mining*, 824 F.2d at 1181. Freeport undisputedly "recaptures, recycles, and reuses" such revert during incremental production processes. *Id.* "Large" and "fine" revert both contain broad ranges of copper materials recycled incrementally and continuously to generate high-purity end-product. *American Mining* recognized that extractive metallurgy requires such recycling, and that in-process materials are plainly not "discarded." The copper concentration in both "large" and "fine" revert far exceeds natural ores' low concentrations. *See* 2002 Inspection Report at 8, JA 931. "[F]ine revert" includes copper "sands" and "sweepings," which are recycled into the smelting process, not "discarded." *Id.* So both forms of revert are beyond RCRA jurisdiction, making it crucial to grant Industry-Petitioners' first request for relief as a straightforward application of *American Mining* and related cases. *See* Industry.Br. 65 ¶ 1.

3. *EPA's Other Arguments Fail.*

EPA downplays Factor 3's "containment" obligation, saying "some" runoff is allowed from a unit managing revert. EPA.Br. 33. Evidently, EPA believes that if a unit's releases exceed the "some" threshold, then *all* the material remaining in the unit is "discarded"—not simply the small percentage actually being released. EPA lacks authority to deem all in-process revert "discarded" just because "some" small amount might inadvertently be released. *See Battery Recyclers*, 208 F.3d at 1056.

EPA says the rule imposes no "continuous documentation" requirement. EPA.Br. 34. But the preamble explains that prudent generators must maintain documentation or risk RCRA liability for not keeping contemporaneous records. *See* 80 Fed. Reg. at 1755-56 (noting that, in enforcement actions, defendants "would have the burden to provide documentation showing" compliance with the factors).

4. *EPA Unlawfully Regulates Non-Discarded Weak Acid.*

The mandatory legitimacy factors also unlawfully regulate Freeport's weak acid stream. Industry.Br. 29-34. Nearly all of EPA's responses simply restate its general arguments about Factors 3 and 4. EPA.Br. 49-50. They fail for reasons previously given.

II. THE COURT SHOULD VACATE THOSE "VERIFIED RECYCLER" REQUIREMENTS THAT LACK RECORD SUPPORT AND DO NOT DEFINE "DISCARD."

A. The "Exclusion" Is A Renewed Assertion Of Authority.

Environmental Intervenors (Br. at 18-20) and EPA (80 Fed. Reg. 1707/3) imply that because EPA previously labeled certain materials "hazardous wastes," there is now a higher bar for those materials' exclusion from RCRA. But the original purpose of the rulemakings ultimately leading to the Verified Recycler Exclusion was to *re-examine the underlying premise* that certain materials that are reclaimed are "discarded." 72 Fed. Reg. 14,172, 14,175-78 (Mar. 26, 2007). That materials like recycled refinery catalysts were once considered hazardous wastes neither prevents EPA from reconsidering the "discard" question,[5] nor grants EPA license to reach conclusions on a less-than-adequate record, nor allows EPA to impose conditions unrelated to defining "discard."

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[5] EPA claims API's challenge to EPA's assertion of authority over reclaimed catalysts is time-barred. EPA.Br. 1, 71. This ignores EPA's reconsideration of the catalysts' "discard" status in the 2008 and 2015 rulemakings. *See API v. EPA*, 683 F.3d 382, 385 (D.C. Cir. 2012) ("[2007] proposed rule would have excluded spent refinery catalysts from the definition of solid waste"); 76 Fed. Reg. 44,094, 44,141/3 (July 22, 2011) (soliciting comment on the catalysts' exclusion). API challenged the 2008 rule in No. 09-1038, and now challenges EPA's revised assertion of authority in the 2015 rule. The catalysts' "discard" status was not litigated in *API v. EPA*, 216 F.3d 50 (D.C. Cir. 2000), and even had it been, EPA was free to reconsider.

B. A Presumption That Transfer Equals "Discard" Underlies EPA's Assertion Of Authority.

Environmental Intervenors deny EPA relied upon a presumption that transfer equals "discard." Envtl.-Intervenors.Br. 18. But EPA acknowledges the undeniable: "[T]he 2015 Rule . . . presumed that secondary materials that are transferred to a third-party for off-site recycling are discarded and therefore wastes." EPA.Br. 8. *See id.* at 19-20 ("It is reasonable for EPA to adopt a presumption that transferring secondary materials to a third-party for recycling is discard."); 80 Fed. Reg. 1707/1 (stating the presumption under the heading "*EPA's Rationale for Requiring Conditions for Transfers of Hazardous Secondary Materials Sent for Reclamation*").

EPA says Industry Petitioners are inconsistent in challenging the presumption when the same presumption purportedly underlay the Transfer-Based Exclusion (which, excepting its treatment of refinery catalysts, Industry Petitioners seek to preserve). EPA.Br. 56. But there is no inconsistency. While Industry Petitioners might have challenged any number of conditions of either exclusion, they have chosen only to challenge those conditions which are both plainly beyond the pale and unduly burdensome.[6]

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[6] EPA objects that Industry Petitioners challenge the 2015 rule's variance requirement, which EPA says is equivalent to the 2008 rule's audit requirement. *Id.* at 69. But there is a huge practical difference between an open-ended pre-approval process and a self-implementing audit.

C. *Post Hoc* Rationalization Cannot Resuscitate The Record.

EPA relied upon the Problems Study and the Market Study to support its presumption that transfer equals "discard." *See* 80 Fed. Reg. 1707. If that presumption is invalid, so are the challenged requirements of the Verified Recycler Exclusion. Those requirements do not define the absence of "discard," but depend on the presumption that transferred materials are *already* "discarded."

Industry Petitioners showed in their Brief (at 39-44) that EPA never placed the damage cases in the Problems Study into context. The 250 cases represent only about two percent of the number of facilities now involved in recycling, and, because the cases occurred over a period of at least 25 years, likely represent an even lower percentage of all recycling operations. API Comments 11-12, JA 603-04.

On Brief (at 62), EPA says "there is no 'acceptable' rate of environmental damage from discarded hazardous secondary materials." That is *post hoc* rationalization, for EPA never provided this response in the record. It is absurd, anyway. It means if there were only *one* damage case out of 10,254 recycling

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Gulf claims EPA found the 2015 rule's conditions necessary for catalysts. Envtl.-Intervenors.Br. 33. But the *only* condition EPA discussed respecting the catalysts was the "contained" definition's provision that all units "address[ ] any potential risks of fires or explosions." 80 Fed. Reg. 1738, 1771.

facilities, EPA still would conclude there is a "pattern of discard" requiring a presumption that transfer equals "discard."

EPA now says the Problems Study's real value is it "supports a presumption that a transfer is more likely to result in discard than is recycling that occurs within the generator's control." EPA.Br. 61. But EPA cannot know whether even this much is so, because the Problems Study itself says "it may also be that on-site recycling is simply a less common practice, or that these types of damage cases are less well documented." Problems Study 8, JA 1007.

Yet even *if* third-party recycling has a higher percentage of damage incidents than on-site recycling, that does not mean third-party recycling *generally* involves "discard." Just because A is larger than B does not mean either one is particularly large. Only if *among third-party recyclers* there were a high percentage of damage cases might EPA's conclusion make any sense. Two percent or less does not seem a very high percentage, and EPA has not even addressed the question.

Environmental Intervenors say Industry Petitioners' complaint merely reflects "disagreement over the agency's methodology." Envtl.-Intervenors.Br. 6. But that is not so. Industry Petitioners show that the information EPA relied upon does not support EPA's conclusions, and that EPA failed to respond to relevant comments. In fact, although EPA did not respond to comments, EPA evidently *agreed* that commenters had a valid point. Industry.Br. 42-43.

Moreover, EPA likely would not have taken the same action, absent reliance upon the Problems Study. EPA hypothesized that third-party recyclers lack incentives to manage materials carefully, but relied upon the study to prove that such recyclers generally *are* careless *in practice*. But the study does not provide such proof. Because it is not clear EPA would have taken the same action absent reliance upon the study, the Court may not uphold EPA's action. *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 330 (D.C. Cir. 2006).

The Market Study merely explains EPA's theories about third-party recyclers' "incentives." It is not really even a "study" (although EPA so characterizes it), but an essay in economic theory with references to wished-for empirical evidence. EPA's Brief (at 64) implies the study contains empirical evidence on the five materials "analyzed," but the study lacks *any* empirical evidence. EPA points to none. So the Market Study also cannot confirm the elusive "pattern of discard" to which EPA continues to refer. *Id.*

D. The "Discard" Presumption Conflicts With Precedent.

Even if the record were not so poor, EPA's presumption could not be upheld, because it conflicts with the *Safe Food* holding. EPA's attempt to demote that holding to *dicta* is misguided. EPA characterizes the Court's statement that "firm-to-firm transfers are hardly good indicia of a 'discard' as the term is ordinarily understood" as "one potential reason" why materials sent for recycling

to third parties are not necessarily "discarded." EPA.Br. 60. But the Court's statement about firm-to-firm transfers was the *only* reason it gave for that conclusion. Because that reason was integral to the Court's rejection of one of the plaintiff's theories and to the decision to deny relief, that reason was a holding. *See* Industry.Br. 38.

EPA cites *Safe Food*'s having largely upheld the exclusion at issue there. EPA.Br. 60. But *Safe Food* did not involve an industry claim that the exclusion exceeded EPA's authority. Nor did the Court endorse any presumption of "discard."

While *Safe Food* is precedent, *Solvay* is not. EPA *agrees* that *Solvay* "has no precedential value," EPA.Br. 27, but asserts this is because "the reasonableness of the presumption regarding transfers [was] so clear as to break no new ground," *id.* at 57.

But were it binding precedent, *Solvay would* have broken new ground. This Court had never reviewed any such presumption before. *Safe Food* held that transfer is not a good indicator of "discard." And even if *Safe Food*'s holding were merely *dicta,* it would still defeat any claim that the reasonableness of presuming "discard" is "clear."

Responding to Industry Petitioners' demonstration that *Solvay* departed from *American Mining, et al.*, EPA just says "the Court certainly gave no indication it

was doing that." EPA.Br. 28. But Industry Petitioners showed exactly how *Solvay* conflicts with earlier cases concerning EPA's burden of establishing "discard" when asserting jurisdiction, Industry.Br. 49-50, and EPA has no response to that.

The most important distinction between *Solvay* and the present case identified in Industry Petitioners' Brief (at 49) is that *Solvay* did not confront the grossly deficient record at issue here. Here, EPA never said its presumption that transfer equals "discard" is self-evident. Instead, EPA relied upon "studies," which, as demonstrated above, failed to support EPA's presumption.

E. EPA Departed Arbitrarily From Its Historical Position That Transfer Is Generally Unimportant.

EPA says its presumption is not inconsistent with its historical position, citing two exclusions limited to on-site recycling. EPA.Br. 66. But the point is that until now, EPA *generally* has not viewed transfer as relevant to the "discard" inquiry. Industry.Br. 46.

Both in the record and on brief, therefore, EPA does not recognize its policy shift. While an agency may not have to show the reasons for its new policy are better than the reasons for its old policy, *FCC v. Fox Television Studios, Inc.*, 556 U.S. 502, 515 (2009), the agency must at least show it is consciously changing its policy, *id.*

F. The Challenged Requirements Do Not Define "Discard" Or Its Absence.

As shown in Industry Petitioners' Brief (at 51-55), the variance and emergency preparedness/response requirements do not define "discard" or its absence. Instead, they operate to regulate non-discarded materials to *prevent* "discard." This is beyond EPA's authority.

EPA seems to concede materials must be "discarded" before they can be regulated: "The central organizing idea in defining solid waste is whether or not a material *has been* discarded." EPA.Br. 2 (emphasis added). Yet EPA admits that the variance requirement with its "regulatory oversight" allows regulators "to ensure that transferred materials *will not be* discarded." EPA.Br. 67-68 (emphasis added). This admission is consistent with all of EPA's references in the record to *preventing* "discard." *See* Industry.Br. 55.

Yet elsewhere, EPA says it is not regulating based on the potential for future "discard," but "to ensure that hazardous secondary materials are not discarded in the first place." EPA.Br. 70. There is no difference. However one puts it, EPA is regulating to *prevent* "discard."

Because anything – even products – can *become* "discarded," to accept EPA's regulating materials to *prevent* "discard" would be to remove any limit upon EPA's jurisdiction. That would be inconsistent with the statute and the law of the Circuit.

G. The Court Should Vacate Only Those Provisions It Finds Invalid.

Although Industry Petitioners could have challenged other conditions of the exclusion, as relevant here they seek reversal only of (1) the RCRA permit or variance requirement, and (2) the emergency preparedness/response requirements. Industry.Br. 51-54, 58, 66. Environmental Intervenors claim those provisions are not severable, so the Court must vacate the entire exclusion. Envtl.-Intervenors.Br. 27-30.

Environmental Intervenors are wrong. The Court should avoid exceeding its Administrative Procedure Act authority. *Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1127-28 (D.C. Cir. 1994). The APA empowers courts to set aside "agency action." 5 U.S.C. § 706(2)(C). "Agency action" means "the whole *or a part* of an agency rule." 5 U.S.C. § 551(13) (emphasis added). Thus,

> [C]ourts may "set aside" only the part of a rule found to be invalid—for that is the only "agency action" that exceeds statutory authority. It would, therefore, exceed the statutory scope of review for a court to set aside an entire rule where only a part is invalid, and where the remaining portion may sensibly be given independent life.

Catholic Soc. Serv., 12 F.3d at 1128.

Here, the exclusion can sensibly live, independent of the challenged requirements. As Environmental Intervenors state (Br. 29), vacatur of those requirements would "effectively recreate the 2008 Transfer-Based Exclusion."

Whatever its own flaws, that exclusion (or its equivalent) can operate "sensibly" without the permit/variance and emergency preparedness/response requirements.

This Court sometimes has found that invalid parts of a rule are not severable if there is "substantial doubt" the agency would have promulgated the rule without them. *E.g., Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997). No such doubt exists here.

In 2008, EPA effectively *did* promulgate the rule without the invalid parts, by promulgating the Transfer-Based Exclusion. In 2015, EPA adopted the new variance requirement and emergency preparedness/response requirements – not because of any admitted substantive problem with the Transfer-Based Exclusion – but to provide greater "oversight and public participation." 80 Fed. Reg. 1708. Surely, had EPA recognized that these new requirements carried it beyond its authority, it would not have added them, but simply left the Transfer-Based Exclusion in place.

Moreover, vacating the entire exclusion would create an additional complication. Vacatur would—contrary to Environmental Intervenors' claim—automatically result in a return to the *status quo ante, i.e.,* the Transfer-Based Exclusion. With rare exceptions, this Court has held that vacatur restores the prior rule. *See Air Transp. Ass'n of Canada v. FAA*, 254 F.3d 271, 277 (D.C. Cir. 2001), *modified on reh'g*, 276 F.3d 599 (D.C. Cir. 2001).

Complete restoration of the 2008 Transfer-Based Exclusion would resuscitate the problem that refinery catalysts were ineligible – a problem the 2015 rule mooted. The Court should avoid that complication by following the precedent discussed above and only vacate the challenged portions of the rule. Were the Court to depart from precedent and vacate the entire exclusion, the Court should either rule upon API's challenges to the 2008 rule (which have been briefed, and never withdrawn), or allow renewed briefing of those challenges.[7]

As a further alternative to the preferred, precedent-based approach of vacating only the challenged provisions, the Court could first vacate the language of the 2008 exclusion that rendered the catalysts ineligible,[8] under the doctrine that orders not reviewed because of mootness should be vacated to prevent them from causing any legal consequences. *Am. Family Life Assurance Co. v. FCC*, 129 F.3d 625, 631 (D.C. Cir. 1997). The Court may vacate that portion of the 2008 rule the challenge to which is mooted, while leaving the rest undisturbed. *Associated Gas*

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[7] Those challenges include: (1) EPA arbitrarily treated catalysts differently than similar materials; (2) it was arbitrary and *ultra vires* (a) to consider recycled catalysts "discarded" and (b) to consider catalysts meeting the Transfer-Based Exclusion "discarded;" and (3) EPA acted without notice and comment. API Br. in No. 09-1038 at 24-46 [Doc. #1319593]. Because the 2015 rule superseded the 2008 rule, it would have been pointless to repeat these arguments respecting the 2008 rule in the current briefing.

[8] The disqualifying language was in 40 C.F.R. §§ 261.2(a)(2)(ii) ("it does not meet the listing description for K171 or K172 in § 261.32"); 261.4(a)(23)(iv) (same); and 261.4(a)(24)(iii) (same) (2014).

Distribs. v. FERC, 899 F.2d 1250, 1264 (D.C. Cir. 1990). Then, the Court could vacate the Verified Recycler Exclusion in its entirety, thereby restoring the Transfer-Based Exclusion (minus the language rendering catalysts ineligible).

But the far more straightforward approach would be to vacate only those portions of the Verified Recycler Exclusion the Court finds invalid. That approach best comports with the APA scope of review and is justified on the facts of this case.

III. THE COURT SHOULD VACATE EPA'S ASSERTION OF AUTHORITY OVER OFF-SPECIFICATION PRODUCTS REPROCESSED BEFORE USE.

A. The Court Has Jurisdiction To Review EPA's Record Statements.

Industry Petitioners challenge EPA's interpretation in the Response To Comments accompanying the 2015 rule that "hazardous secondary material" includes commercial products that "are off-specification or otherwise unable to be sold as a product." Industry.Br. 63. Consistent with EPA's position in the proposal, *see id.* at 58-59 (quoting 76 Fed. Reg. 44139 (July 22, 2011)), this implied off-specification products that are reprocessed or "reclaimed" before being used in their normal manner are "hazardous secondary materials," and that their reprocessing is subject to the legitimacy regulation (40 C.F.R. § 260.43).

EPA's Brief confirms its position:

> Commercial chemical products, including off-specification products, are not solid wastes when recycled (40 C.F.R. § 261.2(c)(3) and Table

> 1), although, *as with all hazardous secondary material recycling, that recycling must meet the legitimacy test.*

EPA.Br. 74 (emphasis added).

EPA argues that because a Response To Comments is not a regulation, the Court lacks jurisdiction, relying upon *Molycorp v. EPA*, 197 F.3d 543 (D.C. Cir. 1999). EPA.Br. 72. But this case is nothing like *Molycorp*, where the challenged document was not issued in support of a rulemaking.

Rather, this case is like *United States Air Tour Ass'n v. FAA*, 298 F.3d 997, 1013 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 977 (2003), where the challenged document was part of the rulemaking record, issued with the rule, and relied upon in the Federal Register notice. *See* 80 Fed. Reg. 1720, 1738. The Court found jurisdiction:

> Just as we may examine other record material that provides the underpinnings for the [rule], so also may we review analytic documents issued by the agency that elaborate upon the rule's rationale and assess its impact.

Air Tour Ass'n, 298 F.3d at 1013.

Here, the rule's impact cannot be understood without the Response To Comments. The definition of "hazardous secondary material" in 40 C.F.R. § 260.10 does not refer to off-specification commercial products,[9] and, as

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[9] The definition of "secondary material" in 40 C.F.R. § 241.2 is inapplicable to the hazardous waste regulations at issue here. *See* 40 C.F.R. § 241.2 (providing definition of "secondary material" is for "purposes of this subpart").

explained in Industry Petitioners' Brief (at 59-62), EPA's long-held interpretation was that off-specification products are not "secondary materials" when used in their normal manner – *even if they must be reclaimed before such use.* The Response To Comments is therefore integral to EPA's assertion of authority over off-specification products that are reprocessed before use, and is reviewable just as is the rule's text. *Air Tour Ass'n*, 298 F.3d at 1013.

EPA also asserts a lack of ripeness, claiming there is no "concrete controversy." EPA.Br. 72. But as discussed above, EPA's Brief confirms EPA's assertion of authority over off-specification products that are reprocessed before use. Industry Petitioners contest that assertion.

B. EPA's Demand That Manufacturers Prove Their Products Are Products Is Indefensible On The Record And *Ultra Vires.*

It is self-evident that manufacturing sometimes yields products that fail to meet specifications. Where it is necessary to reprocess such products, EPA's rule effectively requires manufacturers to prove that their final products are products. EPA says such reprocessing must meet the legitimacy regulation. EPA.Br. 74.

EPA claims its position is not new. *Id.* at 73-74. But Industry Petitioners provided evidence that EPA's long-held position was that off-specification commercial products are not "secondary materials" – as long as they are used in their normal manner, and *even if they must first be reclaimed.* Industry.Br. 59-62. EPA does not refute that evidence.

Nor does EPA point to any evidence of its own. The section 260.10 definition of "hazardous secondary material" (applicable here) does not mention off-specification products, and the definition of "secondary material" in 40 C.F.R. § 241.2 is inapplicable. *See supra* note 9; *cf.* EPA.Br. 73 (quoting 40 C.F.R. § 241.2).

EPA's position (in the record and on brief) represents a failure to recognize EPA's major change in interpretation. That renders EPA's assertion of authority arbitrary and capricious. Even if an agency need not show the reasons for its new policy are better than the reasons for its old policy, *Fox Television Studios*, 556 U.S. at 515, it must at least demonstrate that it is consciously changing its policy, *id.*

Moreover, EPA adopted its position without responding to relevant comments. EPA says the comments Industry Petitioners rely upon merely said a product is only a "secondary material" when used differently from its normal manner, which EPA does not dispute. EPA.Br. 74 n.8. But the comment was not so limited.

The comment was *prompted* by EPA's proposal to apply the legitimacy factors to "[c]ommercial chemical products being reclaimed." API Comments 42, JA 613. The comment said "[a] commercial chemical product merely being reclaimed is not a secondary material, and the legitimacy criteria would not come

into play." *Id.* at 44, JA 615. EPA's failure to respond cogently to this comment is an independent basis to vacate EPA's action.

In any event, EPA lacks authority to require manufacturers to prove that their products are products, even where they must be reprocessed before use. Such products cannot plausibly be viewed as "discarded."

IV. GULF LACKS STANDING.

Although, as a RCRA permitee, Stephan Decl. ¶ 5 [Doc. #1320515], Gulf has a competitive interest in the requirement that catalyst reclaimers have RCRA permits (or equivalent), Gulf does not rely upon that interest. Instead, Gulf claims a consumer interest, asserting injury "if the existing regulatory safeguards for storage, transportation and handling of reclaimed spent catalysts were weakened or eliminated." Gulf.Br. 16 [Doc. #1320515].

But Gulf never specifies the safeguards it needs, nor how any harm in their absence would be traceable to the catalysts' deregulation. Thus, the Court must speculate about any injury and why Gulf could not protect itself through self-regulation or contract. *See Am. Chem. Council v. DOT*, 468 F.3d 810 (D.C. Cir. 2006).

Handling of the catalysts at refineries would not affect Gulf, and Gulf has offered no pertinent evidence. If Gulf needs regulation to operate its own facility safely, any harm is traceable to Gulf itself.

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That leaves transportation. Even in the absence of *any* RCRA regulation, DOT standards would apply were any shipment of catalysts to have the properties about which Gulf professes concern, *i.e.*, "pyrophoric or self-heating properties" (Gulf.Br. 13). *See* 49 C.F.R. §§ 173.1(b), 173.2, 173.124(b).

It was Gulf's burden to explain why these requirements do not protect it. Because Gulf has not identified a concrete injury traceable to vacatur of EPA's actions, Gulf lacks standing.

CONCLUSION

The Court should grant the relief requested in Industry Petitioners' Brief.

Date: June 20, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) and this Court's briefing order of September 4, 2015, because this brief contains 6,991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

DATED: June 20, 2016 *<u>/s/ Jeremy C. Marwell</u>*

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and D. C. Circuit Rule 25(c), I hereby certify that I have this 20th day of June 2016, served a copy of the foregoing *Reply Brief of Industry Petitioners* on all counsel of record electronically through the Court's CM/ECF system or by U.S. mail, postage prepaid.

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Part II

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40 CFR Parts 260 and 261
Definition of Solid Waste; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 260 and 261

[EPA–HQ–RCRA–2010–0742; FRL–9728–5–OSWER]

RIN 2050–AG62

Definition of Solid Waste

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA, or the Agency) is publishing a final rule that revises several recycling-related provisions associated with the definition of solid waste used to determine hazardous waste regulation under Subtitle C of the Resource Conservation and Recovery Act (RCRA). The purpose of these revisions is to ensure that the hazardous secondary materials recycling regulations, as implemented, encourage reclamation in a way that does not result in increased risk to human health and the environment from discarded hazardous secondary material.

DATES: This final rule is effective on July 13, 2015.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–RCRA–2010–0742. All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, such as Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically at *www.regulations.gov* or in hard copy at the RCRA Docket, EPA/DC, William Jefferson Clinton Building West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m. Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744 and the telephone number for the RCRA Docket is (202) 566–0276.

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SUPPLEMENTARY INFORMATION:

A. Does this action apply to me?

Entities potentially affected by today's action include over 5,000 industrial facilities in 634 industries (at the 6-digit North American Industry Classification System (NAICS) code level) that generate or recycle hazardous secondary materials (HSM). Most of these 634 industries have relatively few entities that are potentially affected. The top-5 economic sectors (at the 2-digit NAICS code level) with the largest number of potentially affected entities are as follows: (1) 41% in NAICS code 33—the manufacturing sector, which consists of metals, metal products, machinery, computer & electronics, electrical equipment, transportation equipment, furniture, and miscellaneous manufacturing subsectors, (2) 23% in NAICS code 32—the manufacturing sector, which consists of wood products, paper, printing, petroleum & coal products, chemicals plastics & rubber products, and nonmetallic mineral products manufacturing subsectors, (3) 3.0% in NAICS code 92—the public administration sector, (4) 2.9% in NAICS code 61—the educational services sector, and (5) 2.8% in NAICS code 54—the professional, scientific and technical services sector.

Information on the estimated future economic impacts of today's action is presented in section XXI of this notice, as well as in the RIA available in the docket for today's action.

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I. Statutory Authority

These regulations are promulgated under the authority of sections 2002, 3001, 3002, 3003, 3004, 3007, 3010, and 3017 of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. 6921, 6922, 6923, and 6924. This statute is commonly referred to as "RCRA."

II. Which revisions to the regulations is EPA finalizing?

In today's rule, EPA is revising a number of provisions related to the definition of solid waste as it applies to the regulation of hazardous waste under Subtitle C of RCRA (42 U.S.C. 6921 through 6939(e)). These revisions affect certain types of hazardous secondary materials that are currently conditionally excluded from the definition of solid waste when reclaimed. These exclusions were promulgated in October 2008 (73 FR 64688, October 30, 2008) and were intended to encourage the recovery and reuse of valuable resources as an alternative to land disposal or incineration, while at the same time maintaining protection of human health and the environment. In response to concerns raised by stakeholders about potential increases in risks to human health and the environment from hazardous secondary materials, today's rule revises the 2008 DSW final rule in order to ensure that the rule, as implemented, encourages reclamation in a way that protects human health and the environment from the

mismanagement of hazardous secondary materials.

The six major regulatory areas are summarized below.[1] The intent of this summary is to give a brief overview of the actions EPA is taking today. More detailed discussions, including the Agency's rationale for the changes, are found in later sections of this preamble.

A. Exclusion for Hazardous Secondary Materials That Are Legitimately Reclaimed Under the Control of the Generator

Under today's final rule, EPA is retaining the exclusion for hazardous secondary materials that are legitimately reclaimed under the control of the generator ("generator-controlled exclusion"), with certain revisions from the 2008 DSW final rule. These revisions include (1) adding a codified definition of "contained," (2) adding recordkeeping requirements for same-company and toll manufacturing reclamation, (3) making notification a condition of the exclusion, (4) adding a requirement to document that recycling under the exclusion is legitimate, and (5) adding emergency preparedness and response conditions. In addition, we have amended the speculative accumulation provisions to add a recordkeeping requirement. This requirement applies to all persons subject to speculative accumulation.

The generator-controlled exclusion (40 CFR 261.4(a)(23)) excludes certain hazardous secondary materials (*i.e.*, listed sludges, listed by-products, and spent materials) from the definition of solid waste if they are generated and legitimately reclaimed within the United States or its territories under the control of the generator. Specifically, hazardous secondary materials are excluded if (1) the reclamation process meets the definition of legitimate recycling under 40 CFR 260.43; (2) the materials are not speculatively accumulated as defined in 40 CFR 261.1(c)(8) (including a new recordkeeping requirement, being finalized today); (3) they meet the notification condition under 40 CFR 260.42; (4) they are managed in a unit that meets the new definition of "contained" in 40 CFR 260.10, which specifies that storage units must be in good condition, properly labeled, do not hold incompatible materials, and address potential risks of fires or explosions; and (5) the generator satisfies certain emergency preparedness and response conditions. Further discussion of the generator-controlled exclusion can be found in section V of this preamble.

B. Verified Recycler Exclusion Replacing the Exclusion for Hazardous Secondary Materials That Are Transferred for the Purpose of Legitimate Reclamation

EPA is replacing the exclusions at 40 CFR 261.4(a)(24) and (25) for hazardous secondary materials that are transferred from the generator to other persons for the purpose of reclamation with an exclusion for hazardous secondary materials sent for reclamation to a verified recycler. By this change, EPA intends to promote safe and sustainable reclamation of these materials. Under this new exclusion, generators who want to recycle their hazardous secondary materials without having them become hazardous wastes must send their materials to either a RCRA-permitted reclamation facility or to a verified recycler of hazardous secondary materials who has obtained a solid waste variance from EPA or the authorized state. In order to obtain a variance from EPA or the authorized state, the recycler must (1) demonstrate their recycling is legitimate; (2) have financial assurance in place to properly manage the hazardous secondary material when the facility closes; (3) not be subject to a formal enforcement action in the previous three years and not be classified as a significant non-complier under RCRA Subtitle C, or must provide credible evidence that the facility will manage the hazardous secondary materials properly; (4) have the proper equipment and trained personnel, and meet emergency preparedness and response conditions to safely recycle the material; (5) manage the residuals from recycling properly; and (6) take steps to protect nearby communities and reduce risk of potential unpermitted releases of the hazardous secondary material to the environment (*i.e.*, releases that are not covered by a permit (such as a permit to discharge to water or air). Further discussion of the replacement of the transfer-based exclusion with the verified recycler exclusion can be found in section VI of this preamble.

C. Remanufacturing Exclusion

EPA is also finalizing an exclusion from the definition of solid waste for certain higher-value solvents transferred from one manufacturer to another for the purpose of extending the useful life of the solvent by remanufacturing the spent solvent back into the commercial grade solvent. This remanufacturing exclusion will help promote sustainable materials management by extending the productive use of these materials, which reduces the need for raw materials used and the environmental impacts associated with production of these materials. In addition, EPA is also making clear that a rulemaking petition pursuant to 40 CFR 260.20 can be submitted for adding other higher-value hazardous secondary materials that are destined to be remanufactured into similarly higher-value products. Further discussion of this exclusion can be found in section VII of this preamble.

D. Prohibition of Sham Recycling and Revisions to the Definition of Legitimacy

In this final rulemaking, EPA is codifying in its regulations at 40 CFR 261.2(g) the long-standing policy that hazardous secondary materials found to be sham recycled are discarded and solid wastes, thereby prohibiting materials that are sham recycled from being excluded from the definition of solid waste.

In addition, EPA has changed the definition of legitimate recycling in § 260.43 to make clear that all four factors identified in § 260.43 must be met, but also to provide some flexibility in determining legitimacy for certain types of recycling. In particular, in cases where there is no analogous product made from raw materials, EPA has clarified that the product of recycling is still a legitimate product when it meets widely recognized commodity standards (*e.g.*, commodity-grade scrap metal) or when the hazardous secondary material is recycled back into the production process from which it was generated (*e.g.*, closed-loop recycling). In addition, for cases in which the product of the recycling process has levels of hazardous constituents that are not comparable to analogous products, the revised legitimacy standard includes a process that allows the facility to document and certify that the recycling is still legitimate, keep such documentation at the facility, and send a notification to the regulatory authority to that effect. Further discussion of legitimacy can be found in section VIII of this preamble.

E. Revisions to Solid Waste Variances and Non-Waste Determinations

Today's rule finalizes revisions to the solid waste variances and non-waste determinations found in 40 CFR 260.30–260.34 in order to ensure protection of human health and the environment and foster greater consistency on the part of implementing agencies. Revisions include (1) requiring facilities to send a notice to the Administrator (or State Director, if the state is authorized) and

[1] Any provisions promulgated in the 2008 DSW rule that are not addressed in this final rule remain in effect.

potentially re-apply for a variance in the event of a change in circumstances that affects how a hazardous secondary material meets the criteria upon which a solid waste variance has been based; (2) establishing a fixed term not to exceed ten years for variance and non-waste determinations, at the end of which facilities must re-apply for a variance or non-waste determination, (3) requiring facilities to re-notify every two years with updated information; (4) revising the criteria for the partial reclamation variance to clarify when the variance applies and to require, among other things, that all the criteria for this variance must be met; and (5) for the non-waste determinations in 40 CFR 260.34, requiring that petitioners demonstrate why the existing solid waste exclusions would not apply to their hazardous secondary materials. EPA is not finalizing the proposed change to designate the Regional Administrator as the EPA recipient of petitions for all variances and non-waste determinations. Further discussion of these revisions can be found in section IX of this preamble.

F. Deferral on Revisions to Pre-2008 Recycling Exclusions

EPA is not finalizing revisions to the pre-2008 recycling exclusions and exemptions to include the contained standard or to require notification.[2] EPA is instead deferring action until EPA can more adequately address commenters' concerns. For further discussion, see section X for more information.

III. History of the Definition of Solid Waste

A. Background

RCRA gives EPA the authority to regulate hazardous wastes (see RCRA sections 3001–3004). The original statutory designation of the subtitle for the hazardous waste program was Subtitle C and the national hazardous waste program is referred to as the RCRA Subtitle C program. Subtitle C is codified at 42 U.S.C. 6921 through 6939f. Subtitle C regulations are found at 40 CFR parts 260 through 279. Hazardous wastes are those that, because of their quantity, concentration, physical, or chemical characteristics, may (1) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or (2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed (see RCRA section 1004(5)). Hazardous wastes are a subset of solid wastes.

Materials that are not solid wastes are not subject to regulation as hazardous wastes under RCRA Subtitle C. Thus, the definition of solid waste plays a key role in defining the scope of EPA's authorities under Subtitle C of RCRA. The statute defines "solid waste" as ". . . any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material* . . . resulting from industrial, commercial, mining, and agricultural operations, and from community activities . . ." (RCRA section 1004 (27) (emphasis added)).

Since 1980, EPA has interpreted "solid waste" under its Subtitle C regulations to encompass both materials that are destined for final, permanent treatment and placement in disposal units, as well as certain materials that are destined for recycling (see 45 FR 33090–95, May 19, 1980; 50 FR 604–656, January 4, 1985 (see in particular pages 616–618)). EPA has offered three arguments in support of this interpretation:

- The statute and the legislative history suggest that Congress expected EPA to regulate certain materials that are destined for recycling as solid and hazardous wastes (see 45 FR 33091, citing numerous sections of the statute and *U.S. Brewers' Association* v. *EPA*, 600 F. 2d 974 (D.C. Cir. 1979); 48 FR 14502–04, April 3, 1983; and 50 FR 616–618, January 4, 1985).
- Hazardous secondary materials stored or transported prior to recycling have the potential to present the same types of threats to human health and the environment as hazardous wastes stored or transported prior to disposal. In fact, EPA has found that recycling operations have accounted for a number of significant damage incidents. For example, hazardous secondary materials destined for recycling were involved in one-third of the first 60 filings under RCRA's imminent and substantial endangerment authority and in 20 of the initial 160 hazardous material sites listed for potential clean up under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (48 FR 14474, April 4, 1983). Congress also cited some damage cases which involve recycling (H.R. Rep. 94–1491, 94th Cong., 2d Sess., at 17, 18, 22). Additional data (*i.e.*, information on damage incidents occurring after 1982) included in the rulemaking docket for today's rule corroborate the fact that recycling operations can and have resulted in significant damage incidents.
- Excluding all hazardous secondary 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 hazardous secondary materials intended to do with them, which is inconsistent with the RCRA mandate to track hazardous wastes and control them from "cradle to grave."

Hence, RCRA confers on EPA the authority to regulate discarded hazardous secondary materials even if they are destined for recycling and may be beneficially reused. The Agency has therefore developed in part 261 of 40 CFR a definition of "solid waste" for Subtitle C regulatory purposes. (Note: This definition is narrower than the definition of "solid waste" for RCRA endangerment and information-gathering authorities. (See 40 CFR 261.1(b)). Also *Connecticut Coastal Fishermen's Association* v. *Remington Arms Co.*, 989 F.2d 1305, 1315 (2d Cir. 1993) holds that EPA's use of a narrower and more specific definition of solid waste for Subtitle C purposes is a reasonable interpretation of the statute. (See also *Military Toxics Project* v. *EPA*, 146 F.3d 948 (D.C. Cir. 1998).))

EPA has consistently asserted that hazardous secondary materials are not excluded from regulation as solid wastes merely because of a claim that they will be recycled. EPA has consistently considered hazardous secondary materials intended for "sham recycling" (*i.e.*, disposal performed in the guise of recycling) to be discarded and, hence, to be solid wastes for Subtitle C purposes (see 45 FR 33093, May 19, 1980; 50 FR 638–639, January 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)).

B. A Series of D.C. Circuit Court Decisions on the Definition of Solid Waste

Because the interpretation of what constitutes a solid waste is the foundation of the hazardous waste regulatory program, there has been quite a bit of litigation over the meaning of "solid waste" under Subtitle C of RCRA. Specifically, industries representing mining and oil refining interests challenged EPA's January 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)). The Court held that certain materials EPA was seeking to regulate were not "discarded materials" under RCRA section

[2] EPA requested comment on adding these requirements to a list of 32 existing recycling exclusions in the 2011 proposed rule (76 FR 44139, July 22, 2011).

1004(27). The Court also 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). The Court held that Congress had directly spoken to this issue, so that EPA's 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 held that recycled materials could be regulated as discarded materials. The Court mentioned at least two examples of recycled materials that may be regulated as wastes, noting that used oil can be considered a solid waste (824 F.3d at 1187 (fn 14)). Also, the Court suggested that materials disposed of and recycled as part of a waste management program may be regulated as solid wastes (824 F. 2d at 1179).

Subsequent decisions by the D.C. Circuit also indicate that some materials destined for recycling may be considered "discarded." In particular, the Court held that emission control dust from steelmaking operations listed as hazardous waste "K061" is a solid waste, even when 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)). In addition, the Court held that it is reasonable for EPA to consider as discarded (and solid wastes) listed wastes managed in units that are in part wastewater treatment units, especially where it is not clear that the industry actually reuses the materials (*AMC II*, 907 F.2d 1179 (D.C. Cir. 1990)).

It also is worth noting that two other Circuits also have held that EPA may regulate as solid wastes under RCRA at least some materials destined for reclamation rather than final discard. The U.S. Court of Appeals for the Eleventh 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 (Eleventh 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)). In addition, 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)).

In 1998, EPA promulgated a rule in which EPA regulated hazardous secondary materials recycled by reclamation within the mineral processing industry, the "LDR Phase IV rule" (63 FR 28556, May 26, 1998), under Subtitle C of RCRA. In that rule, EPA promulgated a conditional exclusion for all types of mineral processing hazardous secondary materials destined for reclamation. As a condition of the exclusion, EPA prohibited the land-based storage of these mineral processing secondary materials prior to reclamation because it considered hazardous secondary materials from the mineral processing industry that were stored on the land to be solid wastes (63 FR 28581, May 26, 1998). 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 hazardous secondary materials that are removed from a production process for storage are not "immediately reused," and therefore are "discarded" (63 FR 28580, May 26, 1998).

The mining industry challenged the rule, and the D.C. Circuit vacated the provisions that expanded EPA regulation 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 this issue 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). The Court also did not find that storage before reclamation automatically makes materials discarded. Rather, it repeated that materials reused within an ongoing industrial process are neither disposed of nor abandoned (208 F.3d at 1051–52) and 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). 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).

In its most recent opinion dealing with the definition of solid waste, *Safe Food and Fertilizer* v. *EPA* ("*Safe Food*"), 350 F.3d 1263 (D.C. Cir. 2003), the D.C. Circuit upheld an EPA rule that excludes from the definition of solid waste hazardous secondary materials used to make zinc fertilizers, and the fertilizers themselves, as long as the hazardous secondary materials meet certain handling, storage, and reporting conditions and the resulting fertilizers have concentration levels for lead, arsenic, mercury, cadmium, chromium, and dioxins that fall below specified thresholds (Final Rule, "Zinc Fertilizers Made From Recycled Hazardous Secondary Materials" ("Fertilizer Rule"), 67 FR 48393, July 24, 2002). EPA determined that if these conditions are met, the hazardous secondary materials used to make such fertilizer have not been discarded. The conditions also apply to a number of recycled materials not produced in the fertilizer production industry, including certain zinc-bearing hazardous secondary materials, such as brass foundry dusts.

EPA's reasoning was that market participants, consistent with the EPA-required conditions in the rule, would treat the excluded materials more like valuable products than like negatively-valued wastes and, thus, would manage them in ways inconsistent with discard. In addition, the fertilizers derived from these recycled feedstocks are chemically indistinguishable from analogous commercial products made from raw materials (350 F.3d at 1269). The Court held that EPA's explanation that market participants manage materials in ways inconsistent with discard, and the fact that the levels of contaminants in the recycled fertilizers were "identical" to the fertilizers made with virgin raw materials (also called "the identity principle") as reasonable. The Court also held that this interpretation of "discard" was reasonable and consistent with the statutory purpose. The Court noted that the identity principle was defensible because the differences in health and environmental risks between the two types of fertilizers are so slight as to be substantively meaningless.

In addition, the Court stated that it "need not consider whether a material could be classified as a non-discard exclusively on the basis of the market-participation theory" (350 F.3d at 1269). The Court only determined that the combination of market participants' treatment of the materials, EPA-required management standards, and the "identity principle" constitutes a reasonable set of tools to establish that

the recycled hazardous secondary materials and fertilizers are not discarded.

C. October 2003 Proposal To Revise the Definition of Solid Waste

Prompted by concerns articulated in various Court opinions decided up to that point, in October 2003, EPA proposed a rule which defined those circumstances under which hazardous secondary materials would be excluded from RCRA's hazardous waste regulations because they are generated and reclaimed in a continuous process within the same industry. In addition, the Agency also clarified in a regulatory context the concept of "legitimate recycling," which has been a key component of RCRA's regulatory program for hazardous material recycling, but which up to that point, had been implemented without specific regulatory criteria (68 FR 61558, October 28, 2003).

In response to the October 2003 DSW proposal, a number of commenters criticized the Agency for not having conducted a study of the potential impacts of the proposed regulatory changes. These commenters expressed the general concern that deregulating hazardous secondary materials that are reclaimed in the manner proposed could result in the mismanagement of these materials and could create new cases of environmental damage that would require remedial action under federal or state authorities. Some of the commenters further cited a number of examples of environmental damage that were attributed to hazardous secondary material recycling, including sites listed on the Superfund National Priorities List (NPL).

Other commenters to the 2003 DSW proposal expressed the view that the great majority of these cases of recycling-related environmental problems occurred before RCRA, CERCLA, or other environmental programs were established in the early 1980s. These commenters argued that these environmental programs—most notably, RCRA's hazardous waste regulations and the liability provisions of CERCLA—have created strong incentives for proper management of recyclable hazardous secondary materials and recycling residuals. Several commenters further noted that, because of these developments, industrial recycling practices have changed substantially since the early 1980s and present day generators and recyclers are much better environmental stewards than in the pre-RCRA/-CERCLA era. Thus, they argued that cases of "historical" recycling-related environmental damage are not particularly relevant when modifying the current RCRA hazardous waste regulations for hazardous secondary materials recycling.

D. Recycling Studies

In light of these comments on the 2003 DSW proposal, and in deliberating on how to proceed with the rulemaking effort, the Agency decided that additional information on hazardous secondary material recycling would benefit its regulatory decision-making and would provide stakeholders with a clearer picture of the hazardous secondary material recycling industry in this country. Accordingly, the Agency examined three issues that we believed were of particular importance to revising the definition of solid waste:

- How do responsible generators and recyclers of hazardous secondary materials ensure that recycling is done in an environmentally safe manner?
- To what extent have hazardous secondary material recycling practices resulted in environmental problems since enactment of major waste management statutes, and why?
- Are there certain economic forces or incentives specific to hazardous secondary material recycling that can explain why environmental problems can sometimes originate from such recycling activities?

Reports documenting these studies are available in the docket for the 2008 DSW final rule under the following titles:

- *An Assessment of Good Current Practices for Recycling of Hazardous Secondary Materials* (EPA–HQ–RCRA–2002–0031–0354) ("study of successful recycling")
- *An Assessment of Environmental Problems Associated With Recycling of Hazardous Secondary Materials* (EPA–HQ–RCRA–2002–0031–0355) ("environmental problems study")
- *A Study of Potential Effects of Market Forces on the Management of Hazardous Secondary Materials Intended for Recycling* (EPA–HQ–RCRA–2002–0031–0358) ("market forces study")

In the study of successful recycling, EPA found that responsible recycling practices used by generators and recyclers to manage hazardous secondary materials fall into two general categories. The first category includes the audit activities and inquiries performed by a generator of a hazardous secondary material to determine whether the entity to which it is sending such material is equipped to manage it responsibly without the risk of releases or other environmental damage. These recycling and waste audits of other companies' facilities are common to those generators that responsibly recycle in the hazardous secondary materials market. The second category of responsible recycling practices consists of the control practices that ensure responsible management of any given shipment of hazardous secondary material, such as the contracts under which the transaction takes place and the tracking systems that can inform a generator that its hazardous secondary material has been properly managed.

The goal of the environmental problems study was to identify and characterize environmental problems associated with some types of hazardous secondary material recycling that are relevant for the purpose of this rulemaking effort. To address commenters' concerns that historic damages are irrelevant to current practices because environmental programs (post-RCRA and -CERCLA implementation) have created strong incentives for proper management of recyclable hazardous secondary materials, EPA only included cases where damages occurred after 1982. The study identifies 208 cases in which environmental damages of some kind occurred from some type of recycling activity and that otherwise fit the scope of the study.[3]

The Agency has determined that the occurrence of certain types of environmental problems associated with post-1982 recycling practices shows that discard has occurred. In particular, instances where hazardous secondary materials were abandoned (*e.g.*, in warehouses) and which required removal, oversight by a government agency and the expenditure of public funds clearly demonstrate that the hazardous secondary material was discarded. Of the 208 damage cases presented in the original damage case study, 69 cases (33%) involve abandoned materials. The relatively high incidence of abandoned materials likely reflects the fact that bankruptcies or other types of business failures were associated with 138 (66%) of the cases.

In addition, the pattern of environmental damages that resulted from the mismanagement of recyclable

[3] EPA initially identified over 800 potential damage cases, most of which were not included in the analysis because (1) the damages occurred before 1982, (2) the damages were not caused by recycling, or (3) there was not enough information to determine when the damages occurred or whether recycling contributed to the damages. The cases EPA considered, but did not include, were listed in an appendix to the report to allow the public to comment on whether additional cases should be included in the analysis. As a result of public comment to the 2011 DSW proposal, EPA has updated the damage case information using the same methodology, resulting in a total of 250 damage cases as of 2012. EPA has determined that the new damage case information is consistent with the damage cases previously cited in the study.

materials (including contamination of soils, groundwater, surface water and air) is a strong indication that the hazardous secondary materials were generally not managed as valuable commodities and were discarded. Of the 208 damage cases presented in the original damage case study, 81 cases (40%) primarily resulted from the mismanagement of recyclable hazardous secondary materials, while mismanagement of recycling residuals was the primary cause in 71 cases (34%). Often, in the case of mismanagement of recycling residuals, reclamation processes generated residuals in which the toxic components of the recycled materials were separated from the non-toxic components, and these portions of the hazardous secondary material were then mismanaged and discarded. Examples of this include a number of drum reconditioning facilities, where large numbers of used drums were cleaned out to remove small amounts of remaining product, such as solvent, and these wastes were then improperly stored or disposed, while the drums were reused or recycled.

The market forces study used accepted economic theory to describe how various market incentives can influence a firm's decision-making process when recycling hazardous secondary materials. This study helps explain some of the possible fundamental economic drivers of both successful and unsuccessful recycling practices.

As pointed out by some commenters to the 2003 DSW proposed rule, the economic forces shaping the behavior of firms that recycle hazardous secondary materials are often different from those at play in manufacturing processes using virgin materials. The market forces study used economic theory to provide information on how certain characteristics can influence three different recycling models to encourage or discourage an optimal outcome. The three recycling models examined were (1) commercial recycling, where the primary business of the firm is the recycling of hazardous secondary materials that are accepted from off-site industrial sources (which usually pay a fee); (2) industrial intra-company recycling, where firms generate hazardous secondary materials as by-products of their main production processes and recycle the hazardous secondary materials for sale or for their own reuse in production; and (3) industrial inter-company recycling, where firms either use or recycle hazardous secondary materials obtained from other firms, with the objective of reducing the cost of their production inputs. The report also looked at how the outcome from each model is potentially affected by three market characteristics: (1) The value of the recycled product, (2) the price stability of recycling output or inputs, and (3) the net worth of the firm.

An individual firm's decision-making is based on many factors and extrapolating a firm's likely behavior from a few factors could be an over-simplification. However, when used in conjunction with other information, the economic theory can be quite illuminating. For example, according to the market forces study, industrial intra- and inter-company recyclers have more flexibility in adjusting to unstable recycling markets (*e.g.*, during price fluctuations, these companies can more easily switch from recycling to disposal or from recycled inputs to virgin inputs). Therefore, they would be expected to be less likely to have environmental problems from over-accumulated materials.

On the other hand, in certain types of commercial recycling, the product has low value, the prices are unstable, and/or the firm has a low net worth. Facilities in these situations can be more susceptible to environmental problems from the over-accumulation or mishandling of hazardous secondary materials, especially when compared to recycling by a well-capitalized firm that yields a product with high value. In short, commercial recyclers depend on revenue from two sources: (1) Accepting hazardous secondary materials for recycling, and (2) selling the recycled product. When recycled product prices fall, commercial recyclers rely on profits from accepting hazardous waste, which can result in over-accumulation, mismanagement, sham recycling, and abandonment of hazardous secondary materials. Further, because these facilities often have little capital at risk, they can go bankrupt leaving environmental damages behind. These predicted outcomes appear to be supported by the results of the environmental problems study, which showed the vast majority of environmental damages—approximately 94%—occur at off-site commercial recyclers.

However, as shown by the study of successful recycling, generators who could otherwise bear a large liability from poorly-managed recycling at other companies have addressed this issue by carefully examining the recyclers to which they send their hazardous secondary materials, such as through audits to ensure that they are technically and financially capable of performing the recycling. In addition, we have seen that successful recyclers (both commercial and industrial) have often taken advantage of mechanisms, such as long-term contracts to help stabilize price fluctuations, allowing recyclers to plan their operations more effectively.

Further discussion of the recycling studies, including the methodology and limitations of the studies, can be found in the March 2007 DSW supplemental proposal (72 FR 14178–83) and the October 2008 DSW final rule (73 FR 64673–74), and the studies themselves can be found in the docket for the 2008 DSW final rule (EPA–HQ–RCRA–2002–0031–0355).

E. March 2007 Supplemental Proposal To Revise the Definition of Solid Waste

In March 2007, EPA published a supplemental proposal that provided the public the opportunity to comment on these studies. The Agency also re-structured the proposed rule and proposed (1) two exclusions for hazardous secondary materials recycled under the control of the generator (one exclusion would apply to hazardous secondary materials managed in non-land-based units, and the other exclusion would apply to hazardous secondary materials managed in land-based units) and (2) an exclusion for hazardous secondary materials transferred to another party for reclamation. The Agency also proposed a non-waste determination petition process, and re-proposed the legitimacy criteria, with certain modifications (72 FR 14172, March 26, 2007).

For the exclusions of hazardous secondary materials reclaimed under the control of the generator, EPA described three circumstances under which we believed that discard does not take place and where the potential for environmental releases is low. The three situations involve hazardous secondary materials that are generated and legitimately reclaimed at the generating facility, legitimately reclaimed at a different facility within the same company, or legitimately reclaimed through a tolling arrangement. Under all three circumstances, the hazardous secondary materials must be generated and reclaimed within the United States or its territories. Because the hazardous secondary material generator in these situations still retains control of the hazardous secondary materials, finds value in them, and intends to use them, EPA proposed to exclude these materials from the definition of solid waste and, thus, from regulation under Subtitle C of RCRA, provided the reclamation is legitimate and the

hazardous secondary materials are contained and not speculatively accumulated. In addition, EPA proposed that facilities generating and reclaiming hazardous secondary materials under the control of the generator must submit notification to their regulatory authority.

For the exclusion of hazardous secondary materials transferred to another party for reclamation (referred to as the transfer-based exclusion), the Agency proposed conditions that, when met, would indicate that these hazardous secondary materials were not discarded. Specifically, the generator would need to make reasonable efforts, a form of due diligence, to determine that its hazardous secondary materials would be properly and legitimately recycled (and that the hazardous secondary material would not be discarded). Another condition would require the reclamation facility to have adequate financial assurance (thus demonstrating that the hazardous secondary material would not be abandoned). In addition, EPA proposed that both the generator and reclaimer would be required to maintain shipping records (to demonstrate that the hazardous secondary material was sent for reclamation and was received by the reclaimer). Furthermore, the reclaimer would be subject to additional storage and residual management standards (to address the instances of discard observed at off-site reclamation facilities in the damage cases). Finally, facilities operating under the transfer-based exclusion must also submit notification to their regulatory authority.

In addition, the 2007 DSW supplemental proposal included a case-by-case non-waste determination petition process that would allow applicants to receive a formal determination from EPA that their hazardous secondary materials were not discarded and therefore were not solid wastes. The case-by-case petition process would allow EPA or the authorized state to take into account the particular fact pattern of the recycling and to determine that the hazardous secondary materials in question were not solid wastes. The petition process for the non-waste determination was the same as that for the variances from the definition of solid waste found at 40 CFR 260.31.

Finally, EPA proposed a definition of legitimate recycling that restructured the legitimacy factors originally proposed in October 2003. The proposed legitimacy factors would be used to determine that the recycling of hazardous secondary materials is not a "sham" and thus, does not constitute discard.

F. October 2008 Final Rule To Revise the Definition of Solid Waste

In October 2008, EPA promulgated a final rule largely as proposed in March 2007, with some revisions and clarifications, including (1) clarifying that hazardous secondary materials held at a transfer facility for less than 10 days are considered to be in transport (and therefore such transfer facilities are not considered to be storing the hazardous secondary materials for the purpose of the DSW exclusion), (2) allowing the use of intermediate facilities that store hazardous secondary materials for more than 10 days under the transfer-based exclusion, provided the facilities comply with the same conditions applicable to reclamation facilities, (3) codifying financial assurance language in 40 CFR 261 subpart H for the transfer-based exclusion applicable to intermediate and reclamation facilities without RCRA permits, (4) requiring facilities operating under the generator-controlled and/or the transfer-based exclusion to notify their regulatory authority prior to operating under the exclusion and every other year thereafter, and (5) making legitimacy a condition of the exclusions and the non-waste determinations in that rule, but not finalizing the legitimacy language for all recycling activities.

G. Section 7004 Petition Submitted by the Sierra Club and Industry Response

On January 29, 2009, the Sierra Club submitted an administrative petition under RCRA section 7004(a), 42 U.S.C. 6974(a), to the Administrator of EPA requesting that the Agency repeal the October 2008 revisions to the definition of solid waste rule and stay the implementation of the rule.

The administrative petition was submitted at the same time that the American Petroleum Institute (API) and Sierra Club filed judicial Petitions for Review under RCRA section 7006(a), 42 U.S.C. 6976(a) challenging the rule in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). These cases, designated as Docket Nos. 09–1038 and 1041, respectively, are currently before the D.C. Circuit.[4]

The Sierra Club petition argued that the revised regulations are unlawful and that they increase threats to public health and the environment without producing compensatory benefits and, therefore, should be repealed. Among other things, the petition singled out the lack of regulatory definitions for key conditions of the rule and disagreed with the Agency's findings that the rule would have no adverse environmental impacts, including the finding there would be no adverse impact to environmental justice communities or children's health.

On March 6, 2009, a coalition of industry associations ("industry coalition") submitted a letter to the Administrator of EPA in response to the Sierra Club petition. This letter requested that EPA deny Sierra Club's petition on the grounds that the 2008 DSW final rule comports with court cases construing the scope of the definition of solid waste under RCRA, and that the 2008 DSW final rule achieves significant economic and conservation benefits, while imposing significant controls on the hazardous secondary material recycling industry that are fully protective of the environment. The letter also responds to each of the specific points raised by Sierra Club in its petition.

H. June 2009 Public Meeting and the Draft DSW Environmental Justice Analysis Methodology

In response to Sierra Club's administrative petition and the industry coalition's letter to the Administrator of EPA, a May 27, 2009, **Federal Register** notice (74 FR 25200) was issued describing possible actions and optional paths forward, as well as announcing a public meeting on June 30, 2009, to allow the public and interested stakeholders the opportunity to provide input to the decision-making process.

In the May 27, 2009, **Federal Register** notice announcing the public meeting, EPA described the scope of possible actions, which is governed by the concept of "discard." As stated in RCRA section 1004(27), "solid waste" is defined as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material* . . . resulting from industrial, commercial, mining and agricultural

[4] In its lawsuit, API claimed that EPA had improperly decided that certain petroleum catalysts, when recycled are hazardous wastes. See 73 FR 64714 for EPA's decision to defer a decision on the eligibility of those catalysts for the 2008 DSW final rule. API argued, among other things, that these catalysts should be treated the same as other materials that were receiving the transfer-based exclusion. API's challenge proceeded to briefing and argument before the Court of Appeals. By order of June 8, 2012, the Court reconsidered and decided to hold API's challenge in abeyance until EPA issued this rule in final form. Since EPA is removing the transfer-based exclusion and making spent petroleum catalysts eligible for the generator-controlled and verified recycler exclusions, API's challenge that the Agency failed to treat the catalysts as other excluded materials is now moot. See section XI below for further discussion on the effect of this rule on spent petroleum catalysts.

activities." The May 2009 public meeting notice said that

> [b]ecause the final revisions to the definition of solid waste are closely tied to EPA's interpretation of the concept of "discard," EPA does not plan to repeal the rule in whole or stay its implementation. Such an action could result in hazardous secondary materials that are not discarded being regulated as hazardous waste. In particular, EPA does not expect to repeal either the exclusion for hazardous secondary materials reclaimed under the control of the generator or the non-waste determination petition process. However, EPA believes there may be other opportunities to revise or clarify the definition of solid waste rule, particularly with respect to the definition of legitimacy and the transfer-based exclusion, in ways that could improve implementation and enforcement of the provisions, thus increase environmental protection, while still appropriately defining when a hazardous secondary material being reclaimed is a solid waste and subject to hazardous waste regulation. (74 FR 25203).

Thirty-three people spoke at the public meeting and approximately 4,000 written comments were received, of which the majority were from private citizens who wrote in via a mass email campaign to repeal the rule. The remaining comments came from state and local governments (17), companies that generate hazardous secondary materials that are recycled (*i.e.,* the generating industry) (28), the waste management/recycling industry (15), environmental, public health and community organizations (12), and academics (2). Comments from the generating industry were uniformly in favor of denying the Sierra Club petition to repeal the rule, citing legal issues and the protectiveness of the rule's conditions. Environmental and community organizations, on the other hand, were uniformly in favor of repealing the rule, expressing concerns over the protectiveness, enforceability, and environmental justice and children's health impacts of the rule. Waste management/recycling industry comments were split, with hazardous waste recyclers generally advocating that EPA retain and improve the rule with more stringent standards. Other waste management industry comments, particularly those from companies representing landfills and incinerators, were in favor of repealing the rule. State comments expressed concerns about implementing the rule, particularly given the economic climate, and generally were in favor of repealing or significantly revising the transfer-based exclusion. A copy of the public meeting transcript and the comments submitted in response to the public meeting notice are available in the docket for the public meeting (Docket ID number EPA–HQ–RCRA–2009–0315).

Many of the commenters (including those at the public meeting and those who responded with written comments) expressed strong concerns that the Agency did not adequately address environmental justice in the rulemaking. In response to the concerns over the environmental justice analysis, EPA committed to perform a more rigorous and thorough analysis of the environmental justice impacts of the 2008 DSW final rule. On January 15, 2010, EPA released for public input a draft methodology for conducting the DSW Environmental Justice Analysis. The draft methodology was presented to the National Environmental Justice Advisory Committee (NEJAC) and discussed at three public roundtable meetings, and was used to develop the draft environmental justice analysis for the DSW rulemaking.

I. Settlement Agreement With the Sierra Club

1. Overview of Settlement Agreement

On September 7, 2010, EPA signed a settlement agreement with the Sierra Club under which the Sierra Club agreed to withdraw their administrative petition and EPA agreed to (1) prepare a notice of proposed rulemaking to be signed no later than June 30, 2011,[5] which would address, at a minimum, the issues raised in the Sierra Club's administrative petition and (2) take final administrative action concerning the notice of proposed rulemaking to be signed no later than December 31, 2012. The settlement agreement did not specify the outcome of the final rule or what regulatory changes EPA would propose. The settlement agreement was approved by the court on January 11, 2011. Although EPA was unable to make the settlement agreement deadline for a final administrative action, today's rule does address all issues raised in Sierra Club's administrative petition, including the four issues discussed in the May 27, 2009, public meeting **Federal Register** notice (74 FR 25200). Specifically, the four issues in the settlement agreement are (1) the definition of "contained" (which includes the issue of defining "significant releases") (addressed in section V of this preamble), (2) notification before operating under the exclusion (also addressed in section V of this preamble), (3) the definition of "legitimacy" (addressed in section VIII of this preamble) and (4) the transfer-based exclusion (addressed in section VI of this preamble). Other issues presented in the administrative petition are discussed below.

2. Request to Immediately Stay the Implementation of and Revoke the 2008 DSW Rule

The Sierra Club's administrative petition included a request to immediately stay and revoke the 2008 DSW final rule. To support this request, the petition asserted that the damage case study demonstrates that hazardous waste recycling has caused substantial harm to health and the environment and that the 2008 DSW final rule increases the likelihood of greater future harm. The petition also asserted that the 2008 DSW final rule does not account for the possibility that unstable recycling markets or financial conditions increase the risk of hazardous waste abandonment. In addition, the petition asserted that the 2008 DSW final rule will not substantially increase recycling and that the economic benefits are few and will only accrue to deregulated industries. Furthermore, the petition claimed that there would be job losses in the hazardous waste treatment industry and increased worker health problems as a result of the rule.

EPA addressed Sierra Club's request to revoke the 2008 DSW final rule in whole and stay its implementation in the May 27, 2009, public meeting notice, which continues to reflect EPA's current thinking. In that notice, EPA stated at 74 FR 25202:

> The scope of possible changes to the definition of solid waste is governed by the concept of "discard." As discussed in the preamble to the DSW final rule, EPA used the concept of discard as the central organizing idea behind the October 2008 revisions to the definition of solid waste. As stated in RCRA section 1004(27), "solid waste" is defined as ". . . any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material* . . . resulting from industrial, commercial, mining and agricultural activities" (emphasis added). Therefore, in the context of the DSW final rule, a key issue relates to the circumstances under which a hazardous secondary material that is recycled by reclamation is or is not discarded (73 FR 64675). In exercising its discretion in the DSW final rule to define what constitutes "discard" for hazardous secondary materials reclamation, EPA included an explanation of how each provision of the final rule relates to discard (73 FR 64676–64679).
>
> For example, in the DSW final rule, EPA determined that if the generator maintains control over the recycled hazardous secondary material and if the material is legitimately recycled under the standards established in the final rule and not

[5] The proposed rulemaking was signed by the Administrator of EPA on June 30, 2011.

speculatively accumulated within the meaning of EPA's regulations, then the hazardous secondary material is not discarded. This is because the hazardous secondary material is being treated as a valuable commodity rather than as a waste. By maintaining control over, and potential liability for, the reclamation process, the generator ensures that the hazardous secondary materials are not discarded. (See 73 FR 64676.)

Because the final revisions to the definition of solid waste are closely tied to EPA's interpretation of the concept of "discard," EPA does not plan to repeal the rule in whole or stay its implementation. Such an action could result in hazardous secondary materials that are not discarded being regulated as hazardous wastes. In particular, EPA does not expect to repeal either the exclusion for hazardous secondary materials reclaimed under the control of the generator or the non-waste determination petition process.

Today's final rule includes several changes to the generator-controlled exclusion and to the non-waste determination petition process, but, for the reasons stated above, EPA did not stay the rule and is not withdrawing either provision.

3. Adequacy of EPA's Analyses

Finally, the Sierra Club's petition asserted that EPA's conclusion that the 2008 DSW final rule would have no adverse environmental impacts, and therefore would have no disproportional adverse impacts to minority and low-income communities, is unsupported by the administrative record. In response to these comments and similar comments by other stakeholders at the June 2009 public meeting, EPA committed to producing an expanded analysis of the potential disproportionate impacts of the 2008 DSW final rule. A draft methodology for the analysis was shared with the public in January 2010, and three public roundtable discussions were held to discuss the draft methodology and were addressed in the development of the draft DSW environmental justice analysis.[6]

J. Draft DSW Environmental Justice Analysis

As part of the development of the 2011 DSW proposal, EPA conducted a revised environmental justice analysis, following the methodology discussed with stakeholders during the 2010 roundtable discussions. The purpose of the draft DSW environmental justice analysis was two-fold. First, the analysis represents a systematic examination of the potential for an increase in adverse impacts under the 2008 DSW final rule (considered independently from which communities might be impacted). Second, the analysis includes a demographic assessment, characterizing the extent any potential adverse impacts are likely to affect minority and/or low-income communities. The results of this analysis were intended to inform EPA's decision-making on which regulatory options to pursue, within the scope of the Agency's authority to regulate hazardous waste.

The results of the draft DSW environmental justice analysis demonstrate that hazardous secondary material recycling can pose significant potential hazards to human health and the environment, and that it is reasonable to conclude that the potential for hazards from hazardous secondary materials recycling adversely impacting human health and the environment could increase under the 2008 DSW final rule. Of particular concern are (1) the absence of required measures (*e.g.,* weekly inspections, training, contingency plans) at hazardous secondary materials reclaimers to prevent problems (*e.g.,* spills, fires, explosions), (2) the incentives to accumulate larger volumes of hazardous secondary materials due to longer storage time limits, and (3) the reduction in access to information and opportunity for public participation.

Moreover, the analysis demonstrates that some of the communities potentially impacted are minority and low-income communities, and in most cases, the populations potentially impacted are disproportionately minority and/or low income. In particular, the population-level analysis shows a statistically significant potential disproportionate impact to minority and low-income populations. In addition, underlying vulnerabilities traditionally associated with minority and low-income communities can pose the potential to exacerbate potential adverse impacts of the 2008 DSW final rule. The ability of communities to participate in the decision-making process and the potential for multiple and cumulative effects are of particular concern.

The analysis has undergone peer review, and the draft environmental justice analysis and peer review comments were presented for public comment as part of the supporting documentation for the 2011 DSW proposal.

K. July 2011 Proposal To Revise the Definition of Solid Waste

On July 22, 2011, EPA published a proposal to revise the definition of solid waste. Comments were requested, and the comment period was extended until October 20, 2011. In September 2011, EPA held two public meetings to accept public comment on the proposal in Philadelphia, PA and in Chicago, IL. The goal of the 2011 DSW proposal was to re-examine the 2008 DSW final rule to determine if any changes are needed to ensure that the rule, as implemented, protects human health and the environment from the mismanagement of hazardous secondary materials, while at the same time promote sustainability by encouraging the reclamation of such materials. The proposed rule consisted of six possible actions, which are summarized below.

1. Revisions to the Exclusion for Hazardous Secondary Materials Reclaimed Under the Control of the Generator

In the 2011 DSW proposal, EPA proposed to retain the exclusion for hazardous secondary materials reclaimed under the control of the generator found at 40 CFR 261.4(a)(23), with certain revisions. Proposed revisions to the 2008 DSW rule generator-controlled exclusion include (1) adding a regulatory definition of "contained," (2) making notification a condition of the exclusion, (3) adding a recordkeeping requirement for speculative accumulation, and (4) adding a recordkeeping requirement for reclamation under toll manufacturing agreements. In addition, EPA requested comment on other ways to strengthen the generator-controlled exclusion in order to protect human health and the environment.

2. Exclusion for Hazardous Secondary Materials That Are Transferred for the Purpose of Reclamation

EPA proposed to replace the exclusion for hazardous secondary materials that are transferred from the generator to other persons for the purpose of reclamation found at 40 CFR 261.4(a)(24) and(25) with an alternative Subtitle C regulatory scheme. EPA's analyses of potential hazards posed by the 2008 DSW rule indicate that, when implemented, the transfer-based exclusion may adversely impact human health and the environment from hazardous secondary materials that may become discarded, and that minority and low-income populations may be disproportionately affected by these impacts.

Under the proposed alternative Subtitle C requirements, the hazardous recyclable materials would be managed in accordance with the current RCRA Subtitle C requirements, including

[6] U.S. EPA. *Draft Environmental Justice Methodology for the Definition of Solid Waste Rule,* January 2010, *http://www.epa.gov/epawaste/hazard/dsw/ej.htm.*

manifesting and hazardous waste permits for storage. However, an exception to these proposed requirements would allow generators to accumulate hazardous recyclable materials for up to a year without a RCRA permit if they make advance arrangements for legitimate reclamation and document those arrangements in a reclamation plan.

EPA also requested comment on alternative approaches that would address the concerns regarding the potential risk under the transfer-based exclusion to human health and the environment from discarded hazardous secondary material, such as including additional conditions.

3. Remanufacturing Exclusion

In addition, EPA requested comment on an exclusion from the definition of solid waste for certain types of higher-value solvents sent for remanufacturing into similarly higher-value products. Further, the action requested comment on a petition process for adding other higher-value hazardous secondary materials that are destined to be remanufactured into similarly higher-value products.

4. Proposed Revisions to the Definition of Legitimacy

EPA also proposed revisions to the definition of legitimacy found at 40 CFR 260.43 for the purpose of distinguishing genuine recycling from "sham recycling." Proposed revisions to the 2008 DSW final rule legitimacy definition include (1) applying the codified "legitimacy" definition to all hazardous secondary material recycling activities; (2) making all legitimacy factors mandatory, with a petition process for those instances that a factor is not met even when the recycling is legitimate; and (3) requiring documentation of legitimacy.

5. Proposed Revisions to Solid Waste Variances and Non-Waste Determinations

EPA also proposed revisions to the case-by-case solid waste variances and non-waste determinations found at 40 CFR 260.30–260.34 in order to ensure protection of human health and the environment and foster greater consistency among the implementing agencies. Proposed revisions affect both the non-waste determinations from the 2008 DSW final rule and pre-2008 existing variances. Specific proposed revisions include (1) requiring facilities which were granted a variance to re-apply for the variance in the event of a change in circumstances that affects how that hazardous secondary material meets the criteria for the variance; (2) requiring facilities to re-notify every two years with updated information; (3) revising the criteria for the partial reclamation variance to clarify when the variance applies and to require, among other things, that all the criteria for this variance must be met; (4) revising the criteria for the non-waste determination in 40 CFR 260.34 to require that petitioners demonstrate why the existing solid waste exclusions would not apply to their hazardous secondary materials; and (5) designating the Regional Administrator as the EPA recipient of petitions for variances and non-waste determinations.

6. Request for Comment on Revisions to Other Recycling Exclusions and Exemptions

Finally, EPA requested comment on revisions that would affect other (pre-2008) solid waste exclusions and hazardous waste exemptions for recyclable materials. These possible revisions include (1) recordkeeping for speculative accumulation as applicable; (2) requiring facilities to re-notify every two years with updated information on their operating status under the various exclusions and exemptions; and (3) containment standards for excluded hazardous secondary materials.

IV. When will the final rule become effective?

This final rule is effective on July 13, 2015.

V. Revisions to the Exclusion for Hazardous Secondary Materials That Are Legitimately Reclaimed Under the Control of the Generator

In today's final rule, EPA is retaining and revising the conditional exclusion from the definition of solid waste at 40 CFR 261.4(a)(23) for those hazardous secondary materials that are legitimately reclaimed within the United States or its territories under the control of the generator. Revisions to the generator-controlled exclusion include (1) adding a codified definition of "contained;" (2) adding recordkeeping requirements for same company and toll manufacturing reclamation; (3) making notification a condition of the exclusion; (4) adding a requirement to document that recycling under the exclusion is legitimate; and (5) adding emergency preparedness and response conditions. In addition, we have amended the speculative accumulation provisions to add a recordkeeping requirement. A discussion of the public comments on the July 2011 DSW proposal and the Agency's responses can be found in section XIV of this preamble and the full response to comment document in the docket for this rulemaking.

A. Scope of the Exclusion

The definition of "hazardous secondary material generated and reclaimed under the control of the generator" is found at 40 CFR 261.4(a)(23) for both land-based and non-land-based units, since the requirements for both types of units are the same. A land-based unit is defined in 40 CFR 260.10 as an area where hazardous secondary materials are placed in or on the land before recycling, but this definition does not include land-based production units. Examples of land-based units include surface impoundments and piles. Examples of non-land-based units include tanks, containers, and containment buildings.

Hazardous secondary materials are considered "under the control of the generator" under the following circumstances:

- They are generated and then reclaimed at the generating facility; or
- they are generated and reclaimed at different facilities, if the generator certifies that the hazardous secondary materials are sent either to a facility controlled by the generator or to a facility under common control with the generator, and that either the generator or the reclaimer has acknowledged responsibility for the safe management of the hazardous secondary materials. In addition, the generating and receiving facilities must maintain at their facilities for no less than three years records of hazardous secondary materials sent or received under this exclusion. The records must contain the name of the transporter, the date of the shipment, and the type and quantity of the hazardous secondary material shipped or received. The requirements may be satisfied by routine business records (*e.g.,* financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations); or
- they are generated and reclaimed pursuant to a written agreement between a tolling contractor and toll manufacturer, if the tolling contractor certifies that it has entered into a tolling contract with a toll manufacturer and that the tolling contractor retains ownership of, and responsibility for, the hazardous secondary materials generated during the course of the manufacture, including any releases of hazardous secondary materials that occur during the manufacturing process. The tolling contractor and the toll manufacturer must maintain at their facilities for no less than three years records of hazardous secondary materials sent or received under this exclusion. The records must contain the name of the transporter, the date of the shipment, and the type and quantity of the hazardous secondary material shipped or received. The requirements may be satisfied by routine business records (*e.g.,* financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations).

Materials subject to material-specific management conditions under the other exclusions of 40 CFR 261.4(a) when reclaimed and spent lead-acid batteries are not eligible for the generator-controlled exclusion at 40 CFR 261.4(a)(23).

In addition, materials managed under the generator-controlled exclusion at 40 CFR 261.4(a)(23) must be contained, may not be speculatively accumulated, and are subject to a notification provision and documentation of legitimacy determinations, which must be maintained on site. Furthermore, the generator must satisfy certain emergency preparedness and response conditions. These conditions and any changes from the 2008 DSW final rule are explained below.

B. EPA's Rationale for Retaining and Revising the Generator-Controlled Exclusion

In the 2008 DSW final rule, EPA determined that if the generator maintains control over the recycled hazardous secondary material, the material is legitimately recycled under the conditions of the exclusion, and the material is not speculatively accumulated within the meaning of EPA's regulations, then the hazardous secondary material is not discarded. Under these circumstances, the hazardous secondary material is being treated as a valuable commodity rather than as a waste. By maintaining control over, and potential liability for, the recycling process, the generator ensures that the hazardous secondary materials are not discarded (*see ABR* 208 F.3d 1051 ("Rather than throwing these materials [destined for recycling] away, the producers saves them; rather than abandoning them, the producer reuses them.")) (73 FR 64676–7).

In today's final rule, EPA reaffirms its determination that when a generator legitimately recycles hazardous secondary materials under its control under the conditions of the exclusion, the generator has not abandoned the material and has every opportunity and incentive to maintain oversight of, and responsibility for, the hazardous secondary material that is reclaimed.

EPA is however making several revisions to the generator-controlled exclusion, the rationale for each of which is explained below.

1. Contained Definition

Under the generator-controlled exclusion, hazardous secondary materials must be contained pursuant to the definition in 40 CFR 260.10, regardless of whether they are stored in land-based units or non-land-based units. Under that definition, a hazardous secondary material is contained if it is managed in a unit that meets the following criteria: (1) The unit is in good condition, with no leaks or other continuing or intermittent unpermitted releases of the hazardous secondary materials to the environment, and is designed, as appropriate for the hazardous secondary material, to prevent releases of the hazardous secondary materials to the environment. Unpermitted releases are releases that are not covered by a permit (such as a permit to discharge to water or air) and may include, but are not limited to, releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures; (2) the unit is properly labeled or otherwise has a system (such as a log) to immediately identify the hazardous secondary materials in the unit; and (3) the unit holds hazardous secondary materials that are compatible with other hazardous secondary materials placed in the unit and is compatible with the materials used to construct the unit and addresses any potential risks of fires or explosions. Hazardous secondary materials in units that meet the applicable requirements of 40 CFR parts 264 or 265 are presumptively contained.

The codification of these regulatory criteria will help regulatory authorities and facilities operating under the exclusion to determine whether a unit adequately controls the movement of hazardous secondary materials. The contained standard is a key provision for determining that a hazardous secondary material is not discarded. Hazardous secondary materials that are not contained and are instead released to the environment are not destined for recycling and are clearly discarded.

In today's final rule, EPA is retaining the "contained" condition based on the rationale that hazardous secondary materials released to the environment are not destined for recycling and are clearly discarded, but is adding a regulatory definition of contained to make it easier for implementing agencies and the regulatory community to determine that a material is contained. In the preamble to the 2008 DSW final rule (73 FR 64681), the Agency stated that a hazardous secondary material is "contained" if it is placed in a unit that controls the movement of the hazardous secondary materials out of the unit and into the environment. However, EPA did not provide more specific guidance on how an implementing agency or the regulated community would determine if a unit did adequately control the movement of hazardous secondary materials and meet the contained standard.

As EPA noted in the 2011 DSW proposal and as reflected in many of the public comments, of particular concern is the lack of preventative measures in the contained standard in the 2008 DSW final rule. This is noted as a major regulatory gap in EPA's assessment of the potential for adverse impacts from the 2008 DSW final rule, including adverse impacts to minority and low income communities. Given that the contained standard is one of the major requirements for determining that hazardous secondary materials reclaimed under the generator-controlled exclusion are not discarded, this lack of specificity could undermine the exclusion. That is, if the primary or only way to determine that the hazardous secondary material is not contained is to wait until it is released to the environment, then the 2008 DSW final rule increases the likelihood of discard for these materials.

The Agency therefore is adding a regulatory definition of "contained" that resolves this uncertainty without sacrificing the flexibility that would allow the implementing authority to take into account a wide variety of case-specific circumstances when necessary. This definition specifies factors which, if met, demonstrate that the hazardous secondary materials in a unit are handled as valuable raw materials, intermediates, or products and thus are not being discarded. We note that the elements of the contained definition are all measures that are used to prevent releases and ensure operation and maintenance of the storage unit in the same manner as a production unit.

If these criteria were not met, the materials remaining in the unit would be considered solid and hazardous wastes and the unit would be subject to the appropriate hazardous waste regulations.

Also, to clarify the regulatory status of units from which releases have occurred, the Agency is also adding to 40 CFR 261.4(a)(23) the following language: (1) A hazardous secondary material released to the environment is discarded and a solid waste unless it is immediately recovered for the purpose of reclamation; and (2) hazardous secondary material managed in a unit with leaks or other continuing or intermittent unpermitted releases of the hazardous secondary material to the environment is discarded and a solid waste.

2. Notification as a Condition

Under today's rule, generators, reclaimers, tolling contractors, and toll manufacturers operating under the generator-controlled exclusion at 40 CFR 261.4(a)(23) are required to submit a notification prior to operating under these exclusions and by March 1 of each even-numbered year thereafter to their regulatory authority. Facilities must also notify their regulatory authority within 30 days of stopping management of hazardous secondary materials under the rule. The notification provisions are found at 40 CFR 260.42.

The substance of the notification provisions is essentially the same as that under the 2008 DSW final rule. However, under today's rule, such notification is a condition of the exclusion rather than a requirement. At issue here are not the specifics of the notification in 40 CFR 260.42, but rather the consequences an entity would face for failing to notify. Thus, if notification is a requirement under the authority of RCRA section 3007 (as specified under the 2008 DSW final rule), it means that failure to notify would constitute a violation of the notification regulations. On the other hand, if notification is a condition of the exclusion, it means failure to notify would potentially result in the loss of the exclusion for the hazardous secondary materials (*i.e.,* the hazardous secondary materials may become solid and hazardous wastes and subject to full Subtitle C regulation).

EPA is finalizing the notification provision as a condition of the generator-controlled exclusion because it is the only formal indication of a facility's intent to reclaim a hazardous secondary material under the conditional exclusion rather than to discard it. For example, if during an inspection of a large quantity generator of hazardous waste, EPA were to discover a hazardous secondary material that had been stored on-site for more than 90 days without a RCRA permit (an act that would typically be a violation of the hazardous waste regulations), a previously filed notification would be an indication that the facility was planning to reclaim the hazardous secondary material under the conditions of the exclusion. Absent such a notification, it would be difficult for the facility to justify its true intentions for the hazardous secondary material. Failure to meet the notification provision would be a strong indication that the facility either did not intend to comply with or was unaware of the provisions of the exclusion, since it failed to comply with the first step for claiming the exclusion. In both cases, the lack of notification shows that the hazardous secondary material may be discarded. Making notification a condition of the rule would further discourage facilities from trying to evade enforcement by not notifying because the costs of not notifying could be significantly higher than if notification remains a requirement. Finally, notification is important for informing regulators and the public about hazardous secondary materials activity and, without such notification, regulators are unable to effectively monitor compliance. This notification condition will keep regulators and the public informed about hazardous secondary materials activity and will enable effective compliance monitoring.

3. Recordkeeping for Speculative Accumulation

Under today's rule, all persons subject to the speculative accumulation requirements at 40 CFR 261.1(c)(8) (including, but not limited to, persons operating under the generator-controlled exclusion at § 261.4(a)(23)) must place materials subject to those requirements in a storage unit with a label indicating the first date that the material began to be accumulated. If placing a label on the storage unit is not practicable, the accumulation period must be documented through an inventory log or other appropriate method. This provision will allow inspectors and other regulatory authorities to quickly ascertain how long a facility has been storing an excluded hazardous secondary material, and, therefore, whether that facility is in compliance with the accumulation time limits of § 261.1(c)(8).

EPA notes that the speculative accumulation provision only applies to persons who are accumulating hazardous secondary materials. Processes involving hazardous secondary materials being returned to the original process via pipes are not considered to accumulate hazardous secondary materials and thus the speculative accumulation provision (and recordkeeping therein) would not apply to these scenarios.

4. Other Recordkeeping

Today's exclusion for tolling and "same-company" recycling requires recordkeeping for shipments sent and received under the exclusion. The records must contain the name of the transporter, the date of the shipment, and the type and quantity of hazardous secondary material shipped or received. These records may consist of normal business records. Such recordkeeping will facilitate enforcement of the exclusion and will allow tracking of hazardous secondary materials to ensure that these materials remain under the control of the generator and are not discarded.

5. Documentation of Legitimacy Determinations

Persons performing the recycling of hazardous secondary materials under the generator-controlled exclusion of 40 CFR 261.4(a)(23) must maintain documentation of their legitimacy determination on-site. Documentation must be a written description of how the recycling meets all four factors in 40 CFR 260.43(a), except as otherwise noted in 40 CFR 260.43(d). Documentation must be maintained for three years after the recycling operation has ceased.

The Agency has determined that requiring documentation under the generator-controlled exclusion to demonstrate that the hazardous secondary materials are legitimately recycled and not discarded is appropriate because this exclusion is generic and can be used by a wide variety of industries recycling any of a number of hazardous secondary materials.

6. Emergency Preparedness and Response

Many of the environmental and human health damages identified by the environmental problems study were caused by fires and explosions and the lack of specific requirements to prevent and respond to such problems is a significant gap in the 2008 DSW exclusion.[7] Fires and explosions at industrial recyclers can threaten the lives and health of both facility employees and the general public and can cause lasting damage to the local environment. Recent catastrophic chemical accidents in the United States, such as the 2013 fire and explosion in West, Texas, that killed 15 people, the 2010 explosion and fire at Tesoro Refinery in Anacortes, Washington, that killed seven employees, and the 2012 Chevron Refinery hydrocarbon fire in Richmond, California, that affected 15,000 people in the surrounding area, highlight the need for continued improvement in a number of areas related to chemical facility safety. To address these concerns, the President issued Executive Order 13650—Improving Chemical Facility Safety and

[7] Taken together, leaks, spills, fires, explosions, or other accidents caused environmental damage at 19% of the 250 environmental damage sites. U.S. EPA "*An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials* (Updated)" December 2014.

Security (EO) on August 1, 2013. The EO directed the Department of Homeland Security, EPA, the Department of Labor, the Department of Justice, the Department of Agriculture, and the Department of Transportation to identify ways to improve operational coordination with state, local, tribal, and territorial partners; enhance federal agency coordination and information sharing; modernize policies, regulations, and standards to enhance safety and security in chemical facilities; and work with stakeholders to identify best practices to reduce safety and security risks in the production and storage of potentially harmful chemicals.

EPA finds that planning and preparing for an emergency demonstrates a generator's intent to not only protect human health and the environment but to reduce potential loss of valuable hazardous secondary materials. In the absence of such requirements, hazardous secondary materials pose a greater risk of being released and discarded to the environment.

Therefore, EPA is adding a condition to the generator-controlled exclusion that generators must follow certain emergency preparedness and response regulations, found in 40 CFR part 261 subpart M, which are dependent on the amount of hazardous secondary material the generator accumulates on site at any time. Under the final rule, generators that accumulate less than or equal to 6,000 kg of hazardous secondary material on site must meet regulations like the emergency preparedness and response regulations currently required for small quantity generators of hazardous waste. Generators that accumulate more than 6,000 kg of hazardous secondary material on site must meet regulations like the emergency preparedness regulations currently required for large quantity generators of hazardous waste. EPA chose to set the threshold at 6,000 kg based on the current hazardous waste generator regulations, which require generators that accumulate greater than 6,000 kg of hazardous waste on site to comply with large quantity generator regulations, including emergency preparedness and response regulations. EPA finds that generators that accumulate greater amounts of hazardous secondary material on site inherently pose greater risk to human health and the environment from a potential release caused by a fire or explosion and thus it is more appropriate for these generators to take additional steps to prepare for such events.

Specifically, EPA is requiring that generators that accumulate less than or equal to 6,000 kg of hazardous secondary material on site comply with the emergency preparedness and response requirements equivalent to those in part 265 subpart C, which discuss maintaining appropriate emergency equipment on site, having access to alarm systems, maintaining needed aisle space, and making arrangements with local emergency authorities. A generator must also have a designated emergency coordinator who must respond to emergencies and must post certain information next to the telephone in the event of an emergency.

For generators that accumulate more than 6,000 kg of hazardous secondary material on site, EPA is requiring that generators comply with requirements equivalent to those in part 265 subparts C and D, which includes all the requirements already discussed above for those accumulating less than or equal to 6,000 kg, as well as requiring a contingency plan and sharing the plan with local emergency responders. EPA recommends that the contingency plan be based on the National Response Team's Integrated Contingency Plan Guidance (One Plan), discussed in the **Federal Register** on June 5, 1996 (61 FR 28642). Under the One Plan Guidance, the generator can develop one contingency plan that meets all the regulatory standards for the various statutory and regulatory provisions for contingency planning, such as EPA's Oil Pollution Prevention Regulation or Risk Management Programs regulations, the U.S. Coast Guard's (USCG) Facility Response Plan regulations, OSHA's Hazardous Waste Operations and Emergency Response (HAZWOPER) regulations, and several others.

EPA has determined that adding these emergency preparedness and response conditions to the generator-controlled exclusion meets the goals of the Chemical Safety EO and also will ensure that those facilities managing hazardous secondary material under the exclusion will be doing so in a manner that allows them to safely recycle the hazardous secondary material and limit loss of materials that are supposed to be recycled into the environment. These provisions are the common-sense steps that a facility that manages hazardous materials should take to reduce risk to their workers and the public. Additionally, EPA has determined that structuring the emergency preparedness and response conditions of the generator-controlled exclusion after the existing hazardous waste requirements serves to reduce burden on generators, as generators are likely already familiar and complying with this regulations.

VI. Verified Recycler Exclusion Replacing the Exclusion for Hazardous Secondary Materials That Are Transferred for the Purpose of Reclamation

Based on comments received and further assessment, EPA has decided to replace the 2008 DSW exclusion for hazardous secondary materials that are transferred for the purpose of legitimate reclamation (*i.e.,* the transfer-based exclusion) with an exclusion for hazardous secondary materials sent for reclamation at a verified recycler (*i.e.,* the verified recycler exclusion). The verified recycler exclusion is being finalized instead of the proposed Subtitle C alternative recycling standards because EPA has determined that such an exclusion will address the regulatory gaps identified in the 2008 DSW rule in a way that appropriately identifies hazardous secondary materials that will be legitimately recycled and not discarded. Based on the evidence from states currently implementing the transfer-based exclusion, hazardous secondary materials transferred to another party for recycling can be legitimately recycled and not discarded, provided that there is a mechanism for adequate oversight at the recycling facility. Subtitle C regulation of this activity is unnecessary and would result in EPA regulating as hazardous waste some materials that have not been discarded. By adding the condition of requiring the recycler to obtain a solid waste variance or have a RCRA permit, EPA is addressing the potential for future discard while allowing the legitimate recycling activities that are already occurring to continue. (A discussion of the public comments on the July 2011 proposal and the Agency's responses can be found in section XV of this preamble and the full response to comment document is in the docket for this rulemaking.)

A. Summary of Transfer-Based Exclusion

The 2008 exclusion for hazardous secondary materials that are transferred for the purpose of legitimate reclamation, which EPA is withdrawing today and replacing with the verified recycler exclusion, applied to hazardous secondary materials (*i.e.,* spent materials, listed sludges, and listed by-products) that are generated and subsequently transferred to a different person or company for the purpose of

reclamation. This exclusion was found at 40 CFR 261.4(a)(24) and (25).[8]

General conditions for hazardous secondary material generators, reclaimers, and intermediate facilities[9] under this exclusion included the following:

- Entities must submit a notification prior to operating under the exclusion and by March 1 of each even-numbered year thereafter reporting types and quantities of hazardous secondary materials being reclaimed, and
- hazardous secondary materials managed at such facilities must not be speculatively accumulated as defined in § 261.1(c)(8) and must be legitimately reclaimed as specified in § 260.43.

Conditions applicable to generators of hazardous secondary materials included the following:

- Containment of such hazardous secondary materials,
- reasonable efforts, a form of due diligence, to ensure that the intermediate facility or reclaimer intends to properly manage and legitimately recycle the hazardous secondary material, and
- retention of records of off-site shipments for three years.

Conditions applicable to intermediate facilities and reclaimers included the following:

- Containment of hazardous secondary materials,
- transmittal of confirmations of receipt to generators,
- retention of records for hazardous secondary materials received and sent off-site,
- financial assurance equivalent to that required of hazardous waste facilities, and
- (for reclaimers) proper management of any residuals generated from the reclamation activities.

In addition, for any hazardous secondary materials excluded under 40 CFR 261.4(a)(24) generated and then exported to another country for reclamation, the exporter must notify and obtain consent from the receiving country and file an annual report per 40 CFR 261.4(a)(25).

B. EPA's Rationale for Requiring Conditions for Transfers of Hazardous Secondary Materials Sent for Reclamation

In the 2008 DSW rule, EPA determined that, absent specific conditions, it is reasonable to conclude that transfers of hazardous secondary materials to third-party recyclers generally involve discard except for instances where EPA has evaluated and promulgated a case-specific exclusion that a hazardous secondary material is not a solid waste. Generators of hazardous secondary materials who do not reclaim these materials themselves often ship these materials to a commercial facility or another manufacturer for reclamation in order to avoid the costs of disposing of the material. Because of the low commercial value and the high potential liability associated with most types of hazardous secondary materials (*i.e.,* spent materials and listed hazardous waste by-products and sludges), generators will typically pay the reclamation facility to accept these hazardous secondary materials or receive a salvage fee that only partially offsets the cost of transporting and managing them. In such situations, the generator has relinquished control of the hazardous secondary materials and the entity receiving such materials may not have the same incentives to manage them as a useful product. (Note that this determination is unchanged from the 2008 DSW final rule; see 73 FR 64675.)

Evidence of hazardous secondary materials not being managed as a valuable product is shown in the results of the environmental problems study, found in the docket of the 2008 DSW final rule. Of the 208 damage cases discussed in the 2008 DSW final rule, 195 (or approximately 94%) were from reclamation activities of off-site third-party recyclers, with clear instances of discard resulting in risk to human health and the environment, including cases of large-scale soil and ground water contamination with remediation costs in some instances in the tens of millions of dollars (73 FR 64673).

In addition, the market forces study in the docket for the 2008 DSW final rule supports the conclusion that the pattern of discard at off-site third-party reclaimers is a result of inherent differences between commercial recycling and normal manufacturing. As opposed to manufacturing, where the cost of raw materials or intermediates (or inputs) is greater than zero and revenue is generated primarily from the sale of the output, hazardous secondary materials recycling can involve generating revenue primarily from the receipt of the hazardous secondary materials. Recyclers of hazardous secondary materials in this situation thus respond differently than traditional manufacturers to economic forces and incentives, accumulating more inputs (hazardous secondary materials) than can be processed (reclaimed). In addition, commercial recyclers have less flexibility than in-house recyclers in changing how they manage their hazardous secondary materials (*e.g.,* during price fluctuations, in-house recyclers can more easily switch from recycling to disposal or from recycled inputs to virgin inputs, while commercial recyclers cannot switch to disposal without obtaining a RCRA permit) (73 FR 64674). In other words, third-party recyclers have economic incentives to accumulate waste beyond their ability to deal with it.

C. Regulatory Gaps in the 2008 DSW Rule

The 2008 DSW final rule attempted to address this pattern of adverse impacts to human health and the environment from hazardous secondary materials transferred to a third party for recycling by setting conditions for the transfer-based exclusion. The intent of these conditions was to define when transfers to third-party recyclers would not result in discard. The link between each of the conditions and their ability to prevent discard is discussed in detail in the 2008 DSW final rule preamble at 73 FR 64675–79.

However, EPA failed to take into account how the conditions of the 2008 transfer-based exclusion would work when actually implemented. EPA's analysis of the 2008 DSW final rule was based on the assumption that DSW conditions would be implemented to the same degree as Subtitle C hazardous waste regulations, without taking into consideration whether the 2008 DSW rule would provide EPA and the authorized states the ability for the same level of oversight as the fully applicable Subtitle C hazardous waste regulations, which leads to the second part of EPA's rationale for its 2011 proposal to replace the transfer-based exclusion with an alternative Subtitle C regulatory scheme.

Before excluding hazardous secondary materials that have already been determined to be hazardous wastes when discarded, the Agency needs adequate assurance that the conditional exclusion will not result in discarded hazardous materials posing significant risks to human health and the environment (*e.g.,* fires/explosion, soil and water contamination, air emissions, and abandoned hazardous secondary materials). Because EPA has already evaluated these hazardous secondary materials (for example, during a hazardous waste listing determination) and determined them to be solid and hazardous wastes when discarded, the Agency must be able to reasonably expect that hazardous secondary materials managed under a conditional exclusion will not be discarded.

[8] 40 CFR 261.4(a)(24) is the primary transfer-based exclusion and 40 CFR 261.4(a)(25) contains the export requirements for the transfer-based exclusion.

[9] Intermediate facilities are those facilities that do not reclaim hazardous secondary materials, but store them for more than 10 days.

Over the years, EPA has developed many such conditional exclusions (found in 40 CFR 261.4(a)). In each of these cases, EPA did so by examining the specific hazardous secondary material or the specific recycling practice, or both, before making a determination that the hazardous secondary material is not solid waste. However, unlike these types of specific transfer-based exclusions from the definition of solid waste, the 2008 transfer-based exclusion in 40 CFR 261.4(a)(24) and (25) did not focus on the chemical or physical properties of any particular type of hazardous secondary material or on how it is typically managed. Instead, the transfer-based exclusion is broadly applicable to a wide range of hazardous spent materials and listed by-products and sludges. Thus, while other solid waste exclusions were developed based on EPA's knowledge of the specific hazardous secondary materials, the industries generating them, or the current recycling management practice for those hazardous secondary materials, the 2008 DSW transfer-based exclusion relied entirely on the conditions that were developed by EPA operating as the Agency anticipates they should. The conditions themselves were developed in a reasoned manner,[10] but without evidence that they would work as intended (*i.e.*, would not result in significant risk to human health and the environment from discarded materials).

However, the conditions for the transfer-based exclusion in the 2008 DSW final rule lack several important implementation provisions that the Subtitle C requirements for treatment, storage, and disposal facilities provide. These provisions ensure a greater level of oversight, which ensures that EPA or the state has reviewed a facility's planned operations before management begins and which allows public participation in the environmental decision-making process, thereby increasing the likelihood of compliance and decreasing the potential for risk to human health and the environment from discarded hazardous secondary material. EPA has performed a detailed regulatory comparison of the 2008 DSW final rule with the fully applicable Subtitle C hazardous waste regulations, identifying significant differences that could lead to the potential for an increased likelihood of environmental and public health hazards, including fires/explosion, soil and water contamination, air emissions, and abandoned hazardous secondary materials.[11]

D. Rationale for the Verified Recycler Exclusion

Based on this reconsideration of the DSW transfer-based exclusion conditions, EPA has determined that hazardous secondary materials transferred off-site to third party reclaimers for the purpose of legitimate reclamation are most appropriately covered under a system that allows for oversight and public participation prior to the start of operations to help ensure that (1) the hazardous secondary material will be legitimately reclaimed and not discarded and (2) the potential risk of releases from the facility impacting the surrounding community will be minimized. The need for such additional oversight and public participation is demonstrated by (1) evidence of past damage cases leading to significant risk to human health and the environment from hazardous secondary materials originally intended for recycling and (2) the underlying perverse incentives of the recycling market to over-accumulate such hazardous secondary materials intended for recycling, resulting in discard of the material. In other words, the transfer-based exclusion can exacerbate financial incentives for small and/or inexperienced businesses to take in more hazardous secondary materials than they actually can use, mishandle it, and even go out of business, as shown by the fact that bankruptcies or other types of business failures were associated with 66% of the recycling damage cases, resulting in multi-million dollar cleanups.

At the same time, as EPA noted in the 2011 DSW proposal and as was echoed in the public comments, EPA has also carefully monitored the implementation of the 2008 DSW final rule since it came into effect in December 2008, and to date, no environmental problems have been reported by states related to 2008 transfer-based exclusion. As of April 2014, a total of 65 facilities are operating under the transfer-based exclusion, 56 of which are generators transferring off-site and 7 which are reclamation facilities.[12] All seven reclamation facilities are RCRA permitted. Of the 56 generators operating under the transfer-based exclusion, 32 generators appear to have either started or substantially increased their recycling as a result of the 2008 DSW exclusions. These include generators that had previously reported in their 2007, 2009, or 2011 biennial report that they sent their solvents off site for fuel blending, and then notified that they are sending their spent solvents for reclamation under the 2008 DSW final rule. In addition, in at least five cases, facilities have switched from sending spent pickle liquor to landfilling or deep well injection to recycling under the 2008 DSW rule. In total, the 2008 DSW notifications document that over 57,000 tons of hazardous secondary material were reclaimed under the 2008 DSW rule during 2011.[13]

In addition, it should be noted that the Department of Environmental Protection for the State of Pennsylvania (PA DEP), where 27 of the 65 facilities operating under the transfer-based exclusion are located, commented strongly in favor of keeping the transfer-based exclusion: "PA DEP has experienced no compliance problems or issues of any nature with those generators or reclamation facilities operating under this conditional exclusion, known as the transfer-based exclusion. In addition, under the transfer-based exclusion, large quantities of hazardous solvents have been diverted to reclamation and reuse rather than being burned for energy recovery, resulting in greater resource conservation." [14]

Given that the transfer-based exclusion has been achieving its intended purpose of encourage safe, legitimate recycling, withdrawing the transfer-based exclusion and replacing it with RCRA Subtitle C hazardous waste requirements is unnecessary and would result in hazardous secondary material that is currently being legitimately recycled and not discarded being regulated as hazardous waste. Because Subtitle C regulation would be more stringent that the current exclusion, if EPA were to finalize the alternative Subtitle C standards, Pennsylvania (and other states that have adopted the 2008 DSW rule) would have to regulate this material as hazardous waste, despite the

[10] See Chapter 11, *Regulatory Impact Analysis: EPA's 2008 Final Rule Amendments to the Industrial Recycling Exclusions of the RCRA Definition of Solid Waste*, EPA–HQ–RCRA–2002–0031–0602.

[11] See Chapter 2 and Appendix A of *Potential Adverse Impacts Under the Definition of Solid Waste Exclusions (Including Potential Disproportionate Adverse Impacts to Minority and Low-Income Populations): Volume 1—Hazard Characterization*, available in the docket for today's rule.

[12] Some of these facilities are also managing hazardous secondary materials under the generator-controlled exclusion.

[13] U.S. EPA, *EPA's Evaluation of Data Collected From Notifications Submitted Under the 2008 Definition of Solid Waste Exclusions*, April 11, 2014.

[14] Comment to the docket from Vincent J. Brisini, Acting Deputy Secretary for Waste, Air, Radiation and Remediation, Pennsylvania Department of Environmental Protection, October 20, 2011 (EPA–HQ–RCRA–2010–0742–0271).

fact that according to the state it is currently being legitimately recycled and not discarded.

However, it is important to note that the comments from PA DEP went on to recommend that the transfer-based exclusion be limited to RCRA-permitted facilities. Because all recycling under the transfer-based exclusion has been (to date) performed at RCRA-permitted facilities, EPA is unable to extrapolate what would happen at facilities without RCRA Subtitle C permits if the transfer-based exclusion were fully implemented. Given the evidence of past damage cases leading to significant risk to human health and the environment from hazardous secondary materials originally intended for recycling and the underlying perverse incentives of the recycling market to over-accumulate such hazardous secondary materials intended for recycling, resulting in discard of the material, additional oversight of recycling beyond the self-implementing measures of the transfer-based exclusion is needed to ensure that the hazardous secondary material is legitimately recycled and not discarded.

To address this issue, EPA is requiring as a condition of the new verified recycler exclusion that generators must send their hazardous secondary materials to a RCRA-permitted recycler or intermediate facility [15] or to a verified hazardous secondary materials recycler or intermediate facility who has obtained a solid waste variance from EPA or the authorized state using the procedures found in 40 CFR 260.33. The verified recycler exclusion uses the solid waste variance procedure to determine if a facility will properly manage the hazardous secondary materials as commodities and legitimately recycle rather than discard them. The variance addresses the same criteria currently required for the reasonable efforts environmental audit under the 2008 transfer-based exclusion (see discussion below). However, the variance process would allow EPA or the authorized state to evaluate the facility before it begins recycling hazardous secondary materials and would also give the affected community the opportunity to provide input prior to a decision as to whether the variance should be granted, thus addressing a major regulatory gap in the transfer-based exclusion that could result in significant risk to human health and the environment from discarded hazardous secondary material.

In addition, as described below, the verified recycler exclusion retains those conditions from the 2008 transfer-based exclusion that EPA determined are necessary to properly identify hazardous secondary material that is legitimately recycled and not discarded, and also includes the new conditions that apply to the generator-controlled exclusion being finalized today.

EPA expects that all facilities that are currently recycling hazardous secondary materials under the 2008 transfer-based exclusion will be able to continue to recycle these materials under the verified recycler exclusion, because all recycling under the transfer-based exclusion is being done at RCRA-permitted facilities, which also qualify for the verified recycler exclusion. Moreover, the additional conditions of the verified recycler exclusion address the regulatory gaps EPA identified in the 2011 DSW proposal that could have resulted in significant risk to human health and the environment from discarded material, if the 2008 DSW had been fully implemented to include facilities without RCRA permits or other regulatory oversight prior to beginning recycling.

Finally, EPA notes that facilities managing excluded hazardous secondary materials under the verified recycling exclusion are still potentially subject to RCRA enforcement actions if they fail to meet the conditions of the exclusion. Persons that handle these hazardous secondary materials are responsible for maintaining the exclusion by ensuring that the conditions are met. If the hazardous secondary materials are not managed pursuant to these restrictions, they are not excluded. They would then be considered solid and hazardous wastes if they were listed or they exhibited a hazardous waste characteristic for RCRA Subtitle C purposes.

E. Conditions of the Verified Recycler Exclusion

The conditions discussed below describe EPA's evaluation of each of the conditions under the 2008 transfer-based exclusion that EPA is retaining in the verified recycler exclusion, as well as the additional conditions EPA has determined are necessary to address the regulatory gaps identified in the transfer-based exclusion in order to ensure that the verified recycler exclusion identifies hazardous secondary materials that are legitimately recycled and not discarded. By including these conditions, EPA is identifying those hazardous secondary materials that will be legitimately recycled and not discarded.

1. Provisions Applicable to the Hazardous Secondary Materials Generator, the Reclamation Facility, and any Intermediate Facility

Prohibition on speculative accumulation. As a condition of the verified recycler exclusion, hazardous secondary materials cannot be speculatively accumulated (40 CFR 261.1(c)(8)) at the hazardous secondary material generator, reclamation facility, or intermediate facility. Restrictions on speculative accumulation have been an important element of the RCRA hazardous waste recycling regulations since they were promulgated on January 4, 1985. According to this regulatory provision, hazardous secondary materials are accumulated speculatively if the person accumulating them cannot show that the material is potentially recyclable. Further, the person accumulating the hazardous secondary material must show that during a calendar year (beginning January 1) the amount of such material that is recycled or transferred to a different site for recycling is at least 75% by weight or volume of the amount of the hazardous secondary material present at the beginning of the period. It is also the same prohibition that is being promulgated today for the generator-controlled exclusions.

Furthermore, under today's rule, all persons subject to the speculative accumulation requirements at 40 CFR 261.1(c)(8) (including, but not limited to, persons operating under the verified recycler exclusion at § 261.4(a)(24)) must place materials subject to those requirements in a storage unit with a label indicating the first date that the material began to be accumulated. If placing a label on the storage unit is not practicable, the accumulation period must be documented through an inventory log or other appropriate method.

This provision will allow inspectors and other regulatory authorities to quickly ascertain how long a facility has been storing an excluded hazardous secondary material, and, therefore, whether that facility is in compliance with the accumulation time limits of § 261.1(c)(8).This provision is being retained in the verified recycler exclusion to ensure that the hazardous secondary materials will be recycled rather than discarded through speculative accumulation and abandonment.

Notification. Under today's verified recycler exclusion, as a condition of the exclusion, hazardous secondary

[15] Intermediate facilities are those facilities that do not reclaim hazardous secondary materials, but store them for more than 10 days.

material generators, reclaimers, and intermediate facilities must send a notification prior to operating under this exclusion and by March 1 of each even-numbered year thereafter to the EPA Regional Administrator using EPA form 8700–12. In states authorized by EPA to administer the RCRA Subtitle C hazardous waste program, notifications may be sent to the State Director. The notice must include the following:

- The name, address, and EPA ID number (if applicable) of the facility;
- The name and telephone number of a contact person;
- The NAICS code of the facility;
- The exclusion under which the hazardous secondary materials will be managed;
- When the facility expects to begin managing the hazardous secondary materials in accordance with the exclusion;
- A list of hazardous secondary materials that will be managed according to the exclusion (reported as the EPA hazardous waste numbers that would apply if the hazardous secondary materials were managed as hazardous waste);
- For each hazardous secondary material, whether the material, or any portion thereof, will be managed in a land-based unit;
- The quantity of each hazardous secondary material to be managed annually; and
- The certification (included in EPA form 8700–12) signed and dated by an authorized representative of the facility.

If a facility has submitted a notification, but then subsequently stops managing hazardous secondary materials in accordance with the exclusion, the facility must re-notify the Regional Administrator within 30 days using the same EPA Form 8700–12. We consider a facility to have 'stopped' managing hazardous secondary materials when a facility no longer generates, manages and/or reclaims hazardous secondary materials under the exclusion and does not expect to manage any amount of hazardous secondary material under the exclusion for at least one year. Of course, a facility could certainly choose to begin managing hazardous secondary materials again and would simply have to submit a notification in compliance with 40 CFR 260.42.

This notification condition is the same as the notification condition for the generator-controlled exclusion and is an indication that the facility is planning to legitimately recycle the hazardous secondary materials and not discard them. As with the generator-controlled exclusion, EPA is finalizing the notification provision as a condition of the transfer-based exclusion because it is the only formal indication of a facility's intent to reclaim a hazardous secondary material under the conditional exclusion rather than to discard it. For further discussion on the notification, including examples of when a facility must re-notify that it has stopped managing hazardous secondary materials, see section V.B.2 of today's preamble.

Hazardous secondary materials must be contained. Another condition of the verified recycler exclusion applicable to hazardous secondary material generators, reclamation facilities, and intermediate facilities is that the hazardous secondary materials must be contained in their management units. This provision is the same as the restriction that is being promulgated for the generator-controlled exclusion and helps ensure that the hazardous secondary material remains in the management unit until it is ready to be recycled and is not discarded. Hazardous secondary materials released to the environment from any unit are discarded and would be subject to the hazardous waste regulations, unless they are immediately cleaned up. Hazardous secondary materials remaining in a unit that experiences a release may also be considered discarded in certain cases. For further discussion on the containment provisions, see section V.B.1 of today's preamble.

Emergency preparedness and response. As discussed above under the generator-controlled exclusion, one important cause of environmental and human health damages identified by the environmental problems study is fires, explosions, and accidents, with 19% of the environmental damage cases being associated with leaks, spills, fires, explosions, or other accidents, and the lack of conditions to address these problems is a significant regulatory gap in the 2008 DSW exclusions. In addition, the President recently released an Executive Order to address these types of concerns (EO 13650—Improving Chemical Facility Safety and Security). EPA finds that planning and preparing for an emergency demonstrates a generator's intent to not only protect human health and the environment, but also to reduce potential loss of valuable hazardous secondary materials. In the absence of such requirements, hazardous secondary materials pose a greater risk of being released and discarded to the environment.

Therefore, EPA is requiring that generators must follow certain emergency preparedness and response regulations under the verified recycler exclusion. These regulations are found in 40 CFR part 261 subpart M and are dependent on the amount of hazardous secondary material the generator accumulates on site at any time.[16] Under the final rule, generators that accumulate less than or equal to 6,000 kg of hazardous secondary material on site must meet regulations like the emergency preparedness and response regulations currently required for small quantity generators of hazardous waste. Generators that accumulate more than 6,000 kg of hazardous secondary material on site must meet regulations like the emergency preparedness and response regulations currently required for large quantity generators of hazardous waste. EPA chose to set the threshold at 6,000 kg based on the current hazardous waste generator regulations, which require generators that accumulate greater than 6,000 kg of hazardous waste on site to comply with large quantity generator regulations, including emergency preparedness and response regulations. EPA finds that generators that accumulate greater amounts of hazardous secondary material on site inherently pose greater risk to human health and the environment from a potential release caused by a fire or explosion and thus it is more appropriate for these generators to take additional steps to prepare for such events.

Specifically, EPA is requiring that generators that accumulate less than or equal to 6,000 kg of hazardous secondary material on site comply with the emergency preparedness and response requirements equivalent to those in part 265 subpart C, which discuss maintaining appropriate emergency equipment on site, having access to alarm systems, maintaining needed aisle space, and making arrangements with local emergency authorities. A generator must also have a designated emergency coordinator who must respond to emergencies and must post certain information next to the telephone in the event of an emergency.

For generators that accumulate more than 6,000 kg of hazardous secondary material on site, EPA is requiring that they comply with requirements equivalent to those in part 265 subparts C and D, which includes all the requirements already discussed above for those accumulating less than or equal to 6,000 kg, as well as requiring a contingency plan and sharing the plan with local emergency responders. EPA

[16] Intermediate facilities and reclamation facilities must also follow emergency prepared and response regulations, either through the requirement of their RCRA permit or through the criteria that must be met to obtain a verified recycler variance under 40 CFR 260.31(d).

recommends that the contingency plan be based on the National Response Team's Integrated Contingency Plan Guidance (One Plan), discussed in the **Federal Register** on June 5, 1996 (61 FR 28642). Under the One Plan Guidance, the generator can develop one contingency plan that meets all the regulatory standards for the various statutory and regulatory provisions for contingency planning, such as EPA's Oil Pollution Prevention Regulation or Risk Management Programs regulations, the U.S. Coast Guard's (USCG) Facility Response Plan regulations, OSHA's Hazardous Waste Operations and Emergency Response (HAZWOPER) regulations, and several others.

EPA has determined that adding these emergency preparedness and response conditions meets the goals of the Chemical Safety EO and also will ensure that those facilities managing hazardous secondary material under the exclusion will be doing so in a manner that allows them to safely recycle the hazardous secondary material and limit loss into the environment of materials that are supposed to be recycled. These provisions are the common-sense steps that a facility that manages hazardous materials should take to reduce risk to their workers and the public. Additionally, structuring the emergency preparedness and response conditions of the verified recycler exclusion after the existing hazardous waste requirements serves to reduce burden on generators, as generators are already familiar and complying with this regulations.

Exclusion is limited to recycling performed within the United States. Because the verified recycler exclusion requires that hazardous secondary materials are sent to a verified reclamation facility (or facilities) that has been granted either a RCRA permit or interim status that addresses the hazardous secondary material or has received a variance from EPA or the authorized state, this exclusion is limited to recycling performed within the United States or its territories. Because hazardous secondary materials that are exported for recycling passes out of the regulatory control of the federal government, it is not possible to verify whether the foreign reclaimer will safely and legitimately recycle the hazardous secondary material and not discard it.

2. Provisions Applicable to the Hazardous Secondary Material Generator

Transport to a Verified Recycler. The hazardous secondary material generator must transport hazardous secondary materials to a verified reclamation facility (or facilities) within the United States or its territories. A verified reclamation facility is a facility that has been granted a variance by EPA or an authorized state under § 260.31(d) or a reclamation facility where the management of the hazardous secondary materials is addressed under a RCRA Part B permit or interim status standards. If the hazardous secondary material will be passing through an intermediate facility, the intermediate facility must have been granted a variance under § 260.31(d) or the management of the hazardous secondary materials at that facility must be addressed under a RCRA Part B permit or interim status standards. The hazardous secondary material generator must also make contractual arrangements with the intermediate facility to ensure that the intermediate facility sends the hazardous secondary material to the verified reclamation facility identified by the hazardous secondary material generator.

Note that in the case of a permitted facility the management of the hazardous secondary materials must be addressed under the RCRA part B permit or interim status standards. In other words, if the permit standards do not extend to the hazardous secondary materials being reclaimed, then the reclamation or intermediate facility is required to either modify the permit to cover those materials or obtain a solid waste variance from EPA or the authorized state before operating under the exclusion.

This condition addresses the major regulatory gap in the transfer-based exclusion of lack of oversight and public participation for hazardous secondary material recycling facilities that do not have RCRA permits. Given the evidence of past damage cases leading to significant risk to human health and the environment from hazardous secondary materials originally intended for recycling and the underlying perverse incentives of the recycling market to over-accumulate such hazardous secondary materials intended for recycling, resulting in discard of the material, additional oversight of recycling beyond the self-implementing measures of the transfer-based exclusion are needed to ensure that the hazardous secondary material is legitimately recycled and not discarded.

This condition replaces the self-implementing "reasonable efforts" environmental audits of the recycling facility required under the 2008 transfer-based exclusion. EPA has determined that it more appropriate for the state or EPA to make the determination that a facility can safely and legitimately recycle hazardous secondary material. While EPA has found that many large companies do conduct environmental audits of recycling facilities, many smaller generators would not have the technical expertise or resources to conduct such an effort.[17] In addition, it is more efficient for the EPA or the authorized state to perform one evaluation of a recycler via the permit or variance process rather than have multiple evaluations of a recycler conducted by each generator using that recycler.

Recordkeeping. EPA is requiring hazardous secondary material generators to maintain at the generating facility certain records that document off-site shipments of hazardous secondary materials for a period of three years. Specifically, for each shipment of hazardous secondary material, the generator must maintain documentation of when the shipment occurred, who the transporter was, the name and address of the reclaimer(s) and, if applicable, each intermediate facility, and the type and quantity of the hazardous secondary materials in the shipment. This recordkeeping requirement may be fulfilled by ordinary business records, such as bills of lading.

In addition, hazardous secondary material generators are required to maintain confirmations of receipt from each reclaimer and intermediate facility for all off-site shipments of hazardous secondary materials in order to verify that the hazardous secondary materials reached their intended destination and were not discarded. These receipts must be maintained at the generating facility for a period of three years. Specifically, the hazardous secondary material generator must maintain documentation of receipt that includes the name and address of the reclaimer or intermediate facility, the type and quantity of hazardous secondary materials received, and the date which the hazardous secondary materials were received. The Agency is not requiring a specific template or format for confirmations of receipt and anticipates that routine business records (*e.g.,* financial records, bills of lading, copies of Department of Transportation (DOT) shipping papers, electronic confirmations of receipt) could contain the appropriate information sufficient for meeting this requirement.

We recognize that, in some cases, reclamation of a hazardous secondary material may involve more than one

[17] *An Assessment of Good Current Practices for Recycling of Hazardous Secondary Materials* (EPA–HQ–RCRA–2002–0031–0354).

reclamation step. In these cases, the recordkeeping condition under the terms of the exclusion applies for each reclaimer and intermediate facility, regardless of how many reclamation steps were involved. For example, if a hazardous secondary material generator shipped hazardous secondary materials to one reclaimer for partial reclamation and then arranged for the partially-reclaimed material to be subsequently sent to another reclaimer for ''final'' reclamation, the generator must maintain confirmations of receipt from each reclaimer involved in the reclamation process.

The recordkeeping requirements are the same as those in the 2008 transfer-based exclusion and Agency continues to believe that the recordkeeping requirements in today's rule comprise the minimum information needed to enable effective oversight to ensure the hazardous secondary materials were sent for reclamation and were not discarded.

3. Provisions Applicable to the Transportation of Hazardous Secondary Materials

Hazardous secondary materials may be stored for up to 10 days at a transfer facility and still be considered in transit. However, if the facility stores the hazardous secondary materials for more than 10 days, then it would be considered an intermediate facility and subject to the conditions in 40 CFR 261.4(a)(24)(vi). While at the transfer facility, the hazardous secondary materials must continue to meet all applicable DOT standards. Hazardous secondary materials may be consolidated for shipping, but cannot be intermingled in a way that would constitute waste management. This provision is unchanged from the 2008 transfer-based exclusion and describes the intersection of the RCRA and DOT requirements for these shipments.

4. Provisions Applicable to the Reclamation Facility and any Intermediate Facilities

Recordkeeping. Reclaimers and intermediate facilities who operate under the verified recycler exclusion must maintain certain records, similar to the records we are requiring for hazardous secondary material generators. Specifically, reclaimers and intermediate facilities must maintain at their facilities for a period of three years records of all shipments of hazardous secondary materials that were received at the facility and, if applicable, records of all shipments of hazardous secondary materials sent off-site from the facility. For hazardous secondary materials received at the reclamation and intermediate facility, such records must document the name and address of the hazardous secondary material generator, the type and quantity of hazardous secondary materials received at the facility, any intermediate facilities that managed the hazardous secondary materials, the name of the transporter that brought the hazardous secondary materials to the facility, and the date such materials were received at the facility.

For hazardous secondary materials that, after being received by the reclaimer or intermediate facility, are subsequently sent off-site for further reclamation, reclaimers and intermediate facilities must document the name and address of the hazardous secondary material generator, when the shipment occurred, who the transporter was, the name and address of the subsequent reclaimer and, if applicable, each subsequent intermediate facility, and the type and quantity of hazardous secondary materials in the shipment. This recordkeeping requirement may be fulfilled by ordinary business records, such as bills of lading.

Reclaimers and intermediate facilities must also send confirmations of receipt to the hazardous secondary material generator for all off-site shipments of hazardous secondary materials received at the facility in order to verify for the hazardous secondary material generator that their materials reached the intended destination and were not discarded. Specifically, the reclaimer (or each reclaimer, when more than one reclamation step is required) and, if applicable, each intermediate facility, must send documentation of receipt to the hazardous secondary material generator that includes the name and address of the reclaimer or intermediate facility, the type and quantity of the hazardous secondary materials received and the date which the hazardous secondary materials were received. The Agency is not requiring a specific template or format for confirmations of receipt and anticipates that routine business records (*e.g.*, financial records, bills of lading, copies of DOT shipping papers, electronic confirmations of receipt) could contain the appropriate information sufficient for meeting this requirement.

In addition, reclaimers and intermediate facilities must also meet the recordkeeping requirements under financial assurance discussed below in this section.

Storage of Hazardous Secondary Materials. In addition to the condition that the hazardous secondary materials must be contained (40 CFR 261.4(a)(24)(v)(A)), reclamation facilities and intermediate facilities must also manage the hazardous secondary materials in a manner that is at least as protective as that employed for the analogous raw material, where there is an analogous raw material. Where there is no analogous raw material, the hazardous secondary material must be contained.

An ''analogous raw material'' is a material for which a hazardous secondary material substitutes and which serves the same function and has similar physical and chemical properties as the hazardous secondary material. A raw material that has significantly different physical or chemical properties would not be considered analogous even if it serves the same function. For example, a metal-bearing ore might serve the same function as a metal-bearing air pollution control dust, but because the physical properties of the dust would make it more susceptible to wind dispersal, the two would not be considered analogous. Similarly, hazardous secondary materials with high levels of toxic volatile chemicals would not be considered analogous to a raw material that does not have these volatile chemicals or that has only minimal levels of volatile chemicals. Storage conditions for reclamation facilities and intermediate facilities that operate under today's exclusion demonstrate that the materials are not discarded, but instead are treated valuable commodities which would be used and not lost to the environment.

This condition is the same as the parallel condition in the 2008 transfer-based exclusion and is based on the fact that the great majority of damage cases documented in the environmental problems study occurred at commercial reclamation and intermediate storage facilities, and mismanagement of hazardous secondary materials was found to be a cause of environmental problems in approximately 40% of the incidents. Accordingly, EPA has determined that this condition for storage is necessary and appropriate for reclamation facilities and intermediate facilities that take advantage of this exclusion to show that storage of these materials is not just another way of disposing of them. In addition, it will establish an expectation for the owner/operators of such facilities that they must manage hazardous secondary materials in a manner at least as protective as they would an analogous raw material and in such a way that materials would not be released into the environment.

Management of recycling residuals. Another condition of the verified recycler exclusion is that any residuals that are generated from the reclamation processes must be managed in a manner that is protective of human health and the environment. If any residuals exhibit a hazardous characteristic according to subpart C of 40 CFR part 261, or themselves are listed hazardous wastes, they are hazardous wastes (if discarded) and must be managed according to the applicable requirements of 40 CFR parts 260 through 273.

This condition is the same as the parallel condition in the 2008 transfer-based exclusion and the purpose of this condition is to clarify the regulatory status of these waste materials and to emphasize in explicit terms that residuals that are generated from the reclamation of hazardous secondary materials must be managed properly so that the reclamation operation does not become another way of avoiding waste management and simply becomes another way of discarding unwanted material. The study of recent (*i.e.*, post-CERCLA and post-RCRA) recycling-related environmental problems revealed that mismanagement of residuals was the cause of such problems in one-third of the incidents that were documented. Some common examples of these mismanaged residuals were acids and casings from the processing of lead-acid batteries, solvents and other liquids generated from cleaning drums at drum reconditioning facilities, and PCBs and other oils generated from disassembled transformers. In many of these damage incidents, the residuals were simply disposed of on-site with little regard for the environmental consequences of such mismanagement or possible CERCLA liabilities associated with cleanup of these releases. By making proper management of the recycling residuals a condition of the exclusion, EPA ensures that the reclamation operation is not just another way of discarding hazardous constituents. This has the added benefit of ensuring that the reclamation operation does not pose a significant risk to human health and the environment.

Financial Assurance. The financial assurance condition is another condition that is the same as the parallel condition in the transfer-based exclusion. By obtaining financial assurance, the reclamation or intermediate facility is making a direct demonstration that it will not abandon the hazardous secondary materials, it will properly decontaminate equipment, and it will clean up any unacceptable releases, even if events beyond its control make its operations uneconomical. Moreover, financial assurance also addresses the correlation of the financial health of a reclamation or intermediate facility with the absence of discard. In essence, financial assurance will help demonstrate that the reclamation facility or intermediate facility owner/operators who would operate under the terms of this exclusion are financially sound and will not discard the hazardous secondary materials, or if the facility faces financial difficulties, that funds would have been set aside to address any issues and, therefore, these costs will not be imposed on the U.S. taxpayer.

The financial assurance requirement has been retained in 40 CFR part 261 subpart H because the substance of the requirement is unchanged from the financial assurance requirement for the 2008 DSW transfer-based exclusion. However, the financial assurance condition is now one of the criteria that is evaluated under the verified recycler solid waste variance, allowing the state or EPA to verify that the financial assurance obtained by the reclamation facility or intermediate facility is sufficient and accessible (in contrast, the financial assurance condition in the 2008 DSW transfer-based exclusion was self-implementing and not subject to review by EPA or the authorized state prior to the facility beginning operation).

A detailed discussion of the 40 CFR part 261 subpart H financial assurance provisions can be found in the 2008 DSW final rule at 73 FR 64692–8, October 30, 2008.

Verification of the Recycler. As discussed earlier, the condition requiring verification of the recycler is the one of the major differences between the transfer-based exclusion and the verified recycler exclusion and addresses the major regulatory gap in the transfer-based exclusion of lack of oversight and public participation for hazardous secondary material recycling facilities that do not have RCRA permits. The reclaimer and intermediate facility must have been granted a solid waste variance by EPA or an authorized state under § 260.31(d) or must have a RCRA Part B permit or interim status standards that address the management of the hazardous secondary materials. An intermediate or reclamation facility may apply for a solid waste variance to accept hazardous secondary materials by addressing the substantive criteria of the "reasonable efforts" condition that had previously applied to the hazardous secondary material generator under 40 CFR 261.4(a)(24)(B). In addition, the variance must address the potential for risk to proximate populations from unpermitted releases of the hazardous secondary material to the environment.

Specifically, to qualify for the solid waste variance, the facility must address the following criteria:

(1) The intermediate or reclamation facility must demonstrate that the reclamation process for the hazardous secondary materials is legitimate pursuant to § 260.43;

(2) The intermediate or reclamation facility must satisfy the financial assurance condition in § 261.4(a)(24)(vi)(F);

(3) The intermediate or reclamation facility must not be subject to a formal enforcement action in the previous three years and must not be classified as a significant non-complier under RCRA Subtitle C, or must provide credible evidence that the facility will manage the hazardous secondary materials properly. Credible evidence may include a demonstration that the facility has taken remedial steps to address the violations and prevent future violations, or that the violations are not relevant to the proper management of the hazardous secondary materials;

(4) The intermediate or reclamation facility must have the equipment and trained personnel to safely manage the hazardous secondary material and must meet emergency preparedness and response requirements;

(5) If residuals are generated from the reclamation of the excluded hazardous secondary materials, the reclamation facility must have the permits required (if any) to manage the residuals, have a contract with an appropriately permitted facility to dispose of the residuals, or present credible evidence that the residuals will be managed in a manner that is protective of human health and the environment; and

(6) The intermediate or reclamation facility must address the potential for risk to proximate populations from unpermitted releases of the hazardous secondary material to the environment (including releases that are not covered by a permit, such as a permit to discharge to water or air, and may include, but are not limited to, potential releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures), and must include consideration of potential cumulative risks from other nearby potential stressors.

The rationale for each of these criteria is discussed below.

Criterion (1) is based on the first reasonable efforts question in the 2008

transfer-based exclusion and focuses on whether the reclamation facility receiving hazardous secondary materials from a generator legitimately recycles such materials. Determining whether a recycling operation is legitimate is a fundamental basis for establishing that a generator's hazardous secondary materials will not be discarded. For further discussion of legitimate recycling, see section VIII.

Criterion (2) is based on the second reasonable efforts question in the 2008 transfer-based exclusion and addresses whether the facility has the necessary financial assurance to cover the costs of managing any hazardous secondary materials that remain if the facility closes. If a facility was found to have failed to meet the condition to have financial assurance, then it also would have failed to show a good faith effort towards demonstrating that it intends to recycle the hazardous secondary materials (or, in the case of the intermediate facility, properly store the hazardous secondary material) and not discard them. Note that the second reasonable efforts question also required the generator to verify that the regulatory authority had been notified by the recycler under the 2008 transfer-based exclusion, but under the verified recycler exclusion, the state or EPA can verify that directly, thus, it is not included here.

Criterion (3) is based on the third reasonable efforts question in the transfer-based exclusion and focuses on the compliance history of the recycler or the intermediate facility (to the extent that the hazardous secondary material generator uses an intermediate facility). The language of this requirement has been simplified from the corresponding reasonable efforts question because the information is submitted to the regulatory agency who already has access to the pertinent enforcement information, rather than obtained by the generator who would need to rely on publicly-available data. This criterion requires that the facility must either not be subject to a formal enforcement action in the previous three years and not be classified as a significant non-complier under RCRA Subtitle C, or must provide credible evidence that the facility will manage the hazardous secondary materials properly.

"Formal enforcement" is a written document that mandates compliance and/or initiates a criminal, civil or administrative process, with or without appeal rights before a trial of fact that results in an enforceable agreement or order and an appropriate sanction. For EPA, formal enforcement action is a referral to the U.S. Department of Justice for the commencement of a criminal or civil action in the appropriate U.S. District Court, or the filing of an administrative complaint, or the issuance of an order, requiring compliance and a sanction. For states, formal enforcement action is a referral to the state's Attorney General for the commencement of a criminal, civil or administrative action in the appropriate forum, or the filing of an administrative complaint, or the issuance of an order, requiring compliance and a sanction. "Significant non-complier" is a defined term in EPA's Hazardous Waste Civil Enforcement Response Policy and means the violators have caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents; are chronic or recalcitrant violators; or deviate substantially from the terms of a permit, order, agreement, or from the RCRA statutory or regulatory requirements. In evaluating whether there has been actual or likely exposure to hazardous waste or hazardous waste constituents, EPA and the states consider both the environmental and human health concerns, including the potential exposure of workers to hazardous waste or hazardous waste constituents. For both terms, see EPA's Hazardous Waste Civil Enforcement Response Policy (Dec. 2003) at *http://www.epa.gov/compliance/resources/policies/civil/rcra/finalerp1203.pdf.*

While a facility being designated as a significant non-complier and/or the subject of a formal enforcement action does not automatically mean that the facility would not reclaim the hazardous secondary materials properly, it does raise questions that we believe the facility requesting the variance should address. That is, if any formal enforcement actions were taken against the facility in the previous three years for such non-compliance and the facility was alleged to be a significant non-complier, the facility must adequately explain how it has resolved any issues or how the reclamation facility will properly manage the hazardous secondary materials to avoid future violations and/or enforcement actions.

Criterion (4) is based on the fourth reasonable efforts question from the 2008 transfer-based exclusion and addresses the technical capability of the recycler or intermediate facility, the most basic requirement for ensuring proper and legitimate recycling of hazardous secondary materials. If a reclamation or intermediate facility was found to have no equipment or inadequate equipment for storing the hazardous secondary material or was found to have personnel who have not been trained for reclaiming the hazardous secondary materials, it raises serious questions as to whether the facility would properly manage such materials and avoid discarding them to the environment. This criterion also includes the addition of verifying that the facility meets the new emergency preparedness and response condition discussed earlier.

Criterion (5) is based on the fifth reasonable efforts question in the 2008 transfer-based exclusion and addresses another major cause of environmental problems from recycling hazardous secondary materials: the management of residuals. This criterion relates to discard through the concept that a generator or reclaimer may actually be discarding hazardous secondary materials through the release of residuals from the recycling process. While the product made from recycling may be a legitimate product, the whole recycling process could be considered discard if hazardous constituents from the recycled hazardous secondary materials are released to the environment. Roughly one-third of the damage cases documented in EPA's environmental problems study were caused by mismanagement of the residuals from recycling. To address criterion (5), the petitioner would need to demonstrate that the reclamation facility has practices in place to ensure that residuals are managed in a manner that is protective of human health and the environment and according to applicable federal or state standards.

Criterion (6) is a new standard not included in the 2008 transfer-based exclusion and is a case-specific performance-based criterion that addresses the risk to proximate populations from unpermitted releases of the hazardous secondary material to the environment (including releases that are not covered by a permit, such as a permit to discharge to water or air, and may include, but are not limited to, potential releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures), and must include consideration of potential cumulative risks from other nearby potential stressors. The purpose of this criterion is to specifically address the differences in the preventative measures between a RCRA-permitted facility as compared to a facility managing excluded hazardous secondary material, including the lack of prescriptive standards for storage and containment (including air emissions standards). In addition, this criterion would address the finding that many of the populations

likely to be proximate to hazardous secondary materials recycling facilities are subject to multiple environmental stressors, including other industrial facilities, landfills, transportation-related air emissions, poor housing conditions (*e.g.*, lead-based paint), leaking underground tanks, pesticides, and incompatible land uses.

The steps the petitioner would take to address this criterion would depend on case-specific circumstances. For example, a facility that is recycling a hazardous secondary material that is not particularly mobile in the environment (*e.g.*, a non-liquid material that does not pose a risk of wind-blown dust) and is not located near population centers would simply need to document these facts in order to meet this criterion. On the other hand, a facility recycling a hazardous secondary material that is volatile, ignitable, or otherwise has a high potential to adversely impact nearby populations in case of a release would need to document the specific steps taken to prevent releases. EPA recommends that the petitioner engage the potentially affected community in developing this document to ensure that they have addressed the concerns expressed by the community.

E. Procedure for Obtaining a Verified Recycler Solid Waste Variance

The process for obtaining a verified recycler solid waste variance is the same as that for the other solid waste variances found in 40 CFR 260.30. In order to obtain a variance, a facility that manages hazardous secondary materials that would otherwise be regulated under 40 CFR part 261 as either a solid waste or a hazardous waste must apply to the Administrator or the authorized state per the procedures described in 40 CFR 260.33, which EPA is amending today to apply to verified recyclers and intermediate facilities. The application must address the relevant criteria discussed in detail above. The Administrator or authorized state will evaluate the submission and issue a draft notice tentatively granting or denying the application. Notification of this tentative decision will be provided by newspaper advertisement or radio broadcast in the locality where the facility is located. The Administrator or authorized state will accept comment on the tentative decision for 30 days and may also hold a public hearing. The Administrator or authorized state will issue a final decision after receipt of comments and after the hearing (if held). If the application is denied, the facility may still pursue a solid waste variance or exclusion (for example, one of the solid waste variances under 40 CFR 260.30 or solid waste exclusions under 40 CFR 261.4). (Note that today's rule includes several modifications to the variances procedure in 40 CFR 260.33, which would also apply in this case. For further discussion see Section IX of today's preamble).

F. Termination of the Exclusion

As with the generator-controlled exclusion (and the 2008 transfer-based exclusion), units managing hazardous secondary materials excluded under the verified recycler exclusion are not subject to the closure regulations in 40 CFR parts 264 and 265 subpart G. However, when the use of these units is ultimately discontinued, owners and operators of reclamation facilities and intermediate facilities must manage any remaining hazardous secondary materials, including any residues that are not reclaimed, as hazardous waste and remove or decontaminate contaminated containment system components, equipment structures, and soils. These hazardous secondary materials and residues, if no longer intended for reclamation, would also no longer be eligible for the exclusion (which only applies to hazardous secondary materials that are reclaimed). Failure to remove these materials within a reasonable time frame after operations cease could cause the facility to become subject to the full Subtitle C requirements if the Agency determines that reclamation is no longer feasible. While this final rule does not set a specific time frame for these activities, they typically should be completed within the time frames established for analogous activities. For example, the requirements for product tanks under 40 CFR 261.4(c) allow 90 days for removal of hazardous material after the unit ceases to be operated for manufacturing. This time frame should serve as a guideline for regulators in determining, on a case-by-case basis, whether owners and operators of reclamation facilities and intermediate facilities have completed these activities within a reasonable time frame. In any event, these hazardous secondary materials remain subject to the speculative accumulation restrictions in 40 CFR 261.4(a)(8), which includes both a time limitation of recycling 75% of the hazardous secondary material within a year and a requirement that the facility be able to show there is a feasible means of recycling the hazardous secondary material.

VII. Remanufacturing Exclusion

Today, EPA is also finalizing an exclusion from the definition of solid waste for higher-value solvents transferred from one manufacturer to another for the purpose of extending the useful life of the original solvent product by keeping such materials in commerce to reproduce a commercial grade of the original solvent product provided that certain conditions are met. For the purpose of this preamble discussion, EPA is defining this process as "remanufacturing." Remanufacturing that conforms to these conditions would not involve discard, and therefore the hazardous secondary materials would not be regulated as solid waste. As with all recycling-related exclusions and exemptions, such excluded hazardous secondary materials would also need to be recycled legitimately. (A discussion of the public comments on the July 2011 proposal and the Agency's responses can be found in section XVI of this preamble and the full response to comment document is in the docket for the rulemaking.)

A. Purpose of the Remanufacturing Exclusion

In finalizing this conditional exclusion, EPA's objective is to encourage sustainable materials management by identifying specific types of transfers of hazardous secondary materials to third parties, that under appropriate conditions, do not involve discard and can result in extending the useful life of a commercial-grade chemical. Remanufacturing these higher-value hazardous secondary materials can have a significantly lower environmental impact than manufacturing these chemicals for a one-time use and then transferring them for disposal. Thus, remanufacturing allows the hazardous secondary material product to be used again, lowering their life-cycle environmental impacts significantly.

Specifically, EPA has determined that, under appropriate conditions, the potential for discard in inter-company remanufacturing transfers for certain higher-value spent solvents would be low because they will be incorporated into the manufacturing process rather than accumulated or disposed of. Once these solvents are remanufactured to commercial grade, they can be used as replacements for virgin commercial grade solvents. The economic incentive for a company receiving the spent solvents would be to sell or directly use (avoiding purchase of virgin product) the remanufactured solvent products to realize an economic value. The company sending these higher-value spent solvents for remanufacturing is expected to have little economic incentive to pay the receiving company more than a nominal amount of money,

since it would already be transferring something of intrinsic market value (materials that can be easily remanufactured for profit). So, unlike the RCRA-permitted waste handler which can charge a considerable fee for receiving discarded waste, the company receiving these higher-value spent solvents for remanufacturing is expected to realize most of its profit from the sale or use of the remanufactured solvents.

Once remanufacturing processes are in place, EPA expects that solvent remanufacturers would be competitive with other solvent manufacturers even in the event of a downturn in the sizable chemical market. Companies would also have the flexibility to redirect remanufacturing capacity to manufacturing should it ever make economic sense to do so, leaving little economic reason to accumulate unsold or unused remanufactured solvents.

B. Scope and Applicability

1. Designated Solvents

The conditional exclusion for remanufacturing applies to hazardous spent solvents that are currently regulated as hazardous wastes because their recycling involves reclamation. Only the following 18 spent solvents are eligible for the remanufacturing exclusion: Toluene, xylenes, ethylbenzene, 1,2,4-trimethylbenzene, chlorobenzene, n-hexane, cyclohexane, methyl tert-butyl ether, acetonitrile, chloroform, chloromethane, dichloromethane, methyl isobutyl ketone, NN-dimethylformamide, tetrahydrofuran, n-butyl alcohol, ethanol, and/or methanol.

These 18 solvents are used in large volumes as chemical manufacturing aids, chemical processing aids, and chemical formulation aids (generally referred to as "processing aids" for the purpose of this rule). The processing aid solvents assist in the reaction, extraction, purification, and blending of ingredients and reactive products, but are not themselves reacted. These processing aid solvents, once used, can then be remanufactured to commercial grade again. These higher-value solvents were selected because there are existing markets for all these solvents to be remanufactured to serve similar purposes to those of the original commercial-grade materials.

Note that, as explained below, these hazardous spent solvents are only eligible if they are remanufactured to serve certain types of chemical functions, and if their originating use was of a specific type. This restriction limits the exclusion to higher-value materials and processes that resemble manufacturing rather than waste management.

Hazardous spent solvents are particularly appropriate for the remanufacturing exclusion because they are derived from a non-renewable resource (petroleum), and they are manufactured in the industrial chemicals sector, which, according to EPA's report on sustainable materials management, ranks third overall as far as direct adverse overall impact to the environment.[18]

In addition, remanufacturing these spent solvents represents an opportunity for risk reduction. Risk is a function of hazard and exposure, and, from a hazard perspective, all of these chemicals have suspected or recognized hazardous health effects associated with their manufacture, processing, and use.[19] Although EPA and industry have been working to find substitutes for the more hazardous of these solvents, or find ways to use less of them, this has not yet been fully achieved.[20] [21] With respect to the pharmaceutical sector in particular, complex chemical processes already registered with the Food and Drug Administration are involved, and EPA has found this a very challenging area to address.

In addition, some of these solvents are building block and primary intermediate chemicals, making them difficult to replace. Until lower-risk substitutes for these solvents are found, it is appropriate from a health risk standpoint to minimize the volume of solvents manufactured and to limit exposure to those already manufactured. This is the intention of the remanufacturing exclusion.

The exclusion can reduce exposure to these solvents in three ways. First, the exclusion would extend the useful life of existing solvents, which would reduce the health risks associated with their manufacture by slowing the rate at which they are manufactured. Second, the exclusion would reduce exposure to solvents already manufactured by reducing the fuel blending of spent solvents. That is, remanufacturing a spent solvent will eliminate the need for blending it with another spent solvent to satisfy the fuel-ratio requirements of incinerators and cement kilns. This, in turn, will reduce the fugitive emissions associated with unloading and loading containers of volatile solvents at fuel-blending facilities.[22] Third and finally, the exclusion can reduce the potential exposure from any transportation incidents, since it is likely that spent solvents can be transported shorter distances for remanufacturing purposes than they can for disposal purposes.[23]

2. Chemical Functions

After remanufacturing, the continuing use of the solvent is limited to reacting, extracting, purifying, or blending chemicals (or for rinsing out the process lines associated with these functions), or using them as ingredients in a product in the pharmaceutical, organic chemical, plastics and resins manufacturing sectors, or the paint and coatings sector. Furthermore, the continuing use of the solvent, after remanufacturing, cannot involve cleaning or degreasing oil, grease, or similar material from textiles, glassware, metal surfaces, or other articles.

EPA has selected these chemical functions because the remanufactured chemical product should serve a similar functional purpose as the original commercial-grade material so that it can substitute for virgin product, since it is this substitution that displaces some manufacturing of virgin product and fosters a system where the original solvent remains in commerce and is not discarded. In these functions, the solvents do not get contaminated by substances, such as inks and greases that are difficult to separate, but only get mixed with pure product ingredients, from which they can be separated readily in a commercially feasible manner.

Furthermore, manufacturing and processing operations can be more easily controlled in terms of exposure and releases, whereas the spent solvents from downstream uses, such as degreasing and cleaning operations are of inherently lower-value and these downstream operations result in more widespread exposure and releases and a higher potential for discard.

In addition, more environmental benefits will be obtained by maximizing the number of times a chemical product can be used at high-purity grade as an

[18] U.S. EPA. *2020 Vision Report: Sustainable Materials Management: The Road Ahead*, Table 1, page 25. *.www.epa.gov/waste/inforesources/pubs/vision.htm*. The other top ranked sectors are electric services (#1) and cotton production (#2).

[19] Allen, D., Shonnard, D, *Green Engineering: Environmentally Conscious Design of Chemical Processes, Risk Concepts*, chapter 2, pgs 35–62, Austin, S., US EPA Editor, Published by Prentice-Hall, 2001.

[20] For information on U.S. EPA's Green Chemistry Program, see *http://www.epa.gov/gcc/*.

[21] Information on the American Chemical Society's Green Chemistry Institute's Pharmaceutical Roundtable is available via the ACS Web site *http://portal.acs.org/portal/acs/corg/content*.

[22] All solvents are volatile, and virtually all spent solvents must go through the fuel-blending process prior to disposal (U.S. EPA, *Selection of Industry Sectors, Chemicals and Functions in the Remanufacturing Exclusion*, June 2011).

[23] Id.

aid to chemical manufacturing and processing, before it is used for at lower-purity as a cleaner or degreaser. While it is possible to extend the product life of a used chemical as a cleaner/degreaser, it takes significantly less energy to bring solvents used as chemical manufacturing aids back to commercial grade than to bring solvents used as cleaners and degreasers back to lower grade functionality, making remanufacturing of the higher-value solvents more economically feasible.

3. Manufacturing Sectors

The remanufacturing exclusion is limited to companies whose primary business is manufacturing, rather than waste management, as indicated by particular NAICS codes. Four manufacturing sectors are eligible for the remanufacturing exclusion: Pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and the paints and coatings manufacturing sectors (NAICS 325510). Manufacturers within these four sectors all use one or more of the 18 identified solvents as chemical manufacturing, processing, and formulation aids in high volumes. Based on the Toxics Release Inventory information, these four sectors are also closely associated with the chemical functions identified in the exclusion and currently use a high volume of the solvents for the functional purposes included in this exclusion.[24]

EPA is limiting the remanufacturing exclusion to companies whose business is primarily manufacturing because the nature of the exclusion relies on the fact that the eligible spent solvents are indistinguishable from a risk perspective from the virgin chemicals that manufacturers in these sectors are already accustomed to handling—no special equipment and personal training beyond what the facility already has would be needed. Chemical manufacturers in these sectors are also subject to the Occupational Safety and Health Act (OSHA) and Clean Air Act (CAA) standards that cover the management of these chemicals.

C. Conditions

Facilities operating under the remanufacturing exclusions must meet the following conditions.

1. Notification

Hazardous secondary material generators and remanufacturers must submit a notification prior to operating under the exclusion and by March 1 of each even-numbered year thereafter using EPA form 8700–12 to the EPA Regional Administrator or the State Director, in an authorized state. Additionally, these facilities would have to notify within 30 days of stopping management of hazardous secondary materials under the exclusion.

The intent of the notification condition is to provide basic information to the regulatory agencies about who will be managing the hazardous secondary spent solvents under the remanufacturing exclusion. The specific information included in the notification—that is, the information on EPA form 8700–12—enables regulatory agencies to monitor compliance and to ensure that the hazardous secondary spent solvents are managed in accordance with the exclusion and not discarded.[25]

2. Remanufacturing Plan

A key issue for the remanufacturing exclusion is how the facilities operating under the exclusion would demonstrate that they meet the requirements (*e.g.*, that the hazardous spent solvents, functions, and manufacturing sectors are those identified in the exclusion). A straightforward solution is requiring a remanufacturing plan to be prepared and maintained by both the hazardous secondary material generator and remanufacturer that includes information on the types and expected annual quantities of excluded spent solvents, the processes and industry sectors that generate the spent solvents, and the specific uses and industry sectors—for the remanufactured solvents.

The hazardous secondary material generator is also required to make arrangements with the remanufacturer to jointly develop this plan and to verify the appropriateness of the hazardous spent solvents for the remanufacturing process before claiming the exclusion, thus helping ensure that the hazardous spent solvents will be remanufactured and not discarded.

Finally, to help ensure that the remanufacturer is a legitimate remanufacturer, the plan must include a certification from the remanufacturer stating "on behalf of [insert remanufacturer facility name], I certify that this facility is a remanufacturer under the pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and/or the paints and coatings manufacturing sectors (NAICS 325510), and will accept the spent solvent(s) for the sole purpose of remanufacturing into commercial-grade solvent(s) that will be used for reacting, extracting, purifying, or blending chemicals (or for rinsing out the process lines associated with these functions) or for use as product ingredients. I also certify that the remanufacturing equipment, vents, and tanks are equipped with and are operating air emission controls in compliance with CAA regulations under 40 CFR part 60, part 61 or part 63,[26] or, absent such CAA standards for the particular operation or piece of equipment covered by the remanufacturing exclusion, are in compliance with the appropriate standards in 40 CFR part 261 subparts AA (vents), BB (equipment) and CC (tank storage)."

One of the issues raised in the comments was concern that the remanufacturing plan would stifle competitiveness by locking the generator into a single remanufacturer for their hazardous spent solvents. That was not the Agency's intention, and EPA would like to clarify that the remanufacturing plan can be updated any time to reflect a new remanufacturer without triggering a re-notification requirement on the part of the generator. (If the new remanufacturer has not notified before, then he would need to do so under the exclusion.) As long as the remanufacturing plan that is kept on-site reflects the current practices, including making sure that there is a remanufacturer that will accept the hazardous spent solvents, the generator would be in compliance with this condition.

3. Record of Shipments and Confirmation of Receipts

Under the remanufacturing exclusion, generators and remanufacturers need to maintain at the facility records of shipments of hazardous spent solvents for a period of three years. Specifically, for each shipment of hazardous spent solvent, the generator and remanufacturer need to maintain documentation of when the shipment occurred, who the transporter was, and the type and quantity of the hazardous spent solvent in the shipment. This recordkeeping requirement may be

[24] U.S. EPA, *Selection of Industry Sectors, Chemicals and Functions in the Remanufacturing Exclusion*, June 2011.

[25] As with the generator-controlled exclusion in 40 CFR 261.4(a)(23), notification is a condition of the remanufacturing exclusion. See section XIV.F for further discussion.

[26] This condition is parallel to the provisions found at 40 CFR 264.1030(e) for AA, 40 CFR 264.1064(m) for BB, and 40 CFR 264.1080(7) for CC.

fulfilled by ordinary business records, such as bills of lading.

In addition, generators must maintain confirmations of receipt for all off-site shipments of hazardous spent solvent in order to verify that the hazardous spent solvent reached their intended destination and were not discarded. These receipts must be maintained at the facility for a period of three years from when they were created. Specifically, the documentation of receipt would include the name and address of the remanufacturer, and the type and quantity of hazardous spent solvents and date that the hazardous spent solvents were received. The Agency is not requiring a specific template or format for confirmation of receipt since routine business records (*e.g.,* financial records, bills of lading, and electronic confirmation of receipt) would contain the appropriate information sufficient for meeting this requirement.

This provision is necessary so all parties responsible for the excluded hazardous spent solvent would be able to demonstrate that the materials were in fact sent for remanufacturing and arrived at the intended facility and were not discarded in transit.

4. Management in Tanks and Containers

Basic good management practices dictate that solvents, whether virgin or spent, are best stored in tanks or containers that possess inherent controls to address issues, such as volatile air emissions, leaks, and fires or explosions. Solvents present particular management challenges associated with the storage of liquids containing volatile organic chemicals and include both halogenated and non-halogenated organic chemicals, which represent a broad range of chemicals and associated hazards.

By focusing on higher-value spent solvents going to remanufacturing, the remanufacturing exclusion reduces the chance of mismanagement of the spent solvents. However, given the history of spent solvent mismanagement, as demonstrated in the damage cases found in environmental problems study, EPA has determined that it is appropriate to make an explicit condition that spent solvents excluded under the remanufacturing exclusion be stored prior to remanufacturing in tanks or containers that are labeled and that meet technical standards that will ensure the hazardous spent solvents will go to remanufacturing and will not be discarded via leaks, spills or explosions.[27]

For ease of implementation, EPA is establishing explicit tank and container standards in 40 CFR part 261 subparts I and J. These technical standards are the same as those found in 40 CFR part 264 subparts I and J, except that the part 261 subparts I and J specify that the material is "hazardous secondary material" rather than hazardous waste, omit references to RCRA permitting requirements, and include other minor conforming changes, as discussed below. Although the 40 CFR part 264 tank and container standards were developed for hazardous wastes, an analysis of the full set of technical requirements under subparts I and J shows that they are comparable to product storage standards, including regulations promulgated under OSHA, DOT, and industry standards.[28] In addition to being comparable to product storage standards, technical standards that mirror subparts I and J of 40 CFR part 264 have the benefit of being technical standards that the regulated community is familiar with, and are designed to prevent the spent solvents from being discarded through leaks or explosions.

During remanufacturing and storage prior to remanufacturing, good management practices also include effective controls of hazardous air emissions. Under the remanufacturing exclusion, this is ensured by requiring that the remanufacturer certifies, as part of the remanufacturing plan, that the remanufacturing equipment, vents, and tanks are equipped with and are operating air emission controls in compliance with CAA regulations under 40 CFR part 60, part 61 or part 63.[29] Absent such CAA standards for the particular operation or piece of equipment covered by the remanufacturing exclusion, then the appropriate standards in 40 CFR part 261 subparts AA (vents), BB (equipment) and CC (tank storage), which are equivalent to the technical standards found in 40 CFR part 264 and 265 subparts AA, BB, and CC, would apply.

The air emission requirements on remanufacturing equipment, vents, and tanks will ensure that the remanufactured solvents do not become discarded through fires and explosions, guard against the volatilization of hazardous spent solvents, and protect workers, handlers and transporters from spent solvent emissions. EPA notes that most manufacturers in the pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and the paints and coatings manufacturing sectors (NAICS 325510) will already have their solvent management practices covered under the CAA regulations, but for any remanufacturer that is not covered under CAA, 40 CFR part 261 subparts AA, BB, and CC will ensure that they meet good management practices appropriate for solvent management.

In modifying the tank and container standards and the air emission standards to apply specifically to solvents being remanufactured under the remanufacturing exclusion, EPA has made other minor conforming regulatory changes to 40 CFR part 261. These changes include (1) reserving certain subparts, such as subparts K through L and N though Z, in order to maintain the same numbering as is found in part 264 for the tank and container standards and the air emission standards, (2) codifying 40 CFR 261.197 to address termination of the remanufacturing exclusion (rather than closure, as is required in part 264), and (3) deleting references to the uniform hazardous waste manifest in 40 CFR 261.1086 because manifest requirements are not applicable under the remanufacturing exclusion.

5. Prohibition on Speculative Accumulation

In addition to the other conditions, hazardous spent solvents under the remanufacturing exclusion are subject to the speculative accumulation restrictions in 40 CFR 261.1(c)(8). Speculative accumulation ensures that the hazardous spent solvents are remanufactured and not discarded.

D. Closure of Tank Units

Units managing excluded hazardous spent solvent are not subject to the closure regulations in 40 CFR parts 264 and 265 subpart G. However, when the use of these units is ultimately discontinued, all owners and operators must manage any remaining hazardous spent solvents that are not remanufactured as hazardous waste and remove or decontaminate all hazardous residues and contaminated containment system components, equipment structures, and soils. These hazardous spent solvents and residues, if no longer

[27] U.S. EPA, *An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials (Updated),* December 2014.

[28] U.S. EPA *Equivalent Containment Standards for the Remanufacturing Exclusion,* June 2011.

[29] This condition is parallel to the provisions found at 40 CFR 264.1030(e) for subpart AA, 40 CFR 264.1064(m) for subpart BB, and 40 CFR 264.1080(7) for subpart CC.

intended for remanufacturing, would also no longer be eligible for the exclusion (which only applies to materials that will be remanufactured) and would therefore be hazardous waste. These systems would be subject to the requirements for product tanks under 40 CFR 261.4(c), which allow 90 days for removal of hazardous material after the unit ceases to be operated for manufacturing.

E. Petition Process for Additional Remanufacturing Exclusions

As EPA noted in the 2011 DSW proposal, it is possible that other hazardous secondary materials, industry sectors, and/or functional uses beyond those being finalized today may also be suitable candidates for the remanufacturing exclusion if they involve the transfer of a higher-value hazardous secondary material from one manufacturer to another, for the purpose of remanufacturing a material with significant commercial value. In the 2011 DSW proposal, EPA requested comment on whether to also include a specific petition process, similar to 40 CFR 260.20, where petitioners may apply to EPA to request a hazardous secondary material, industry sector, and/or functional use be added to the exclusion.

After reviewing the comments, EPA has determined that a separate rulemaking petition process is not necessary and that the current process in 40 CFR 260.20, including the administrative procedure for processing the petition would be the best vehicle for addressing additional hazardous secondary materials, industry sectors, and/or functional uses to the remanufacturing exclusion. Given the variety of hazardous secondary materials, manufacturing processes, and markets for potential remanufactured materials, a general process gives the most flexibility for petitioners to submit information on potential excluded materials.

In addition, the Agency would like to encourage the research, development, and demonstration of innovative recycling processes that could be used to recover higher-value hazardous secondary materials. Therefore EPA encourages companies to explore using the existing regulatory flexibilities, such as treatability study exemptions in 40 CFR 261.4(e) and (f) and research development and demonstration permits allowed under 40 CFR 270.65, to assess and develop recycling technologies to facilitate remanufacturing of higher-value materials.

In submitting a rulemaking petition under 40 CFR 260.20, petitioners must include (1) the petitioner's name and address, (2) a statement of the petitioner's interest in the proposed action, (3) a description of the proposed action, including (where appropriate) suggested regulatory language, and (4) a statement of the need and justification for the proposed action, including any supporting tests, studies, and other information. With respect to the fourth factor, EPA would encourage petitioners to provide any information they believe demonstrates that their hazardous secondary material is suited for a solid waste exclusion under the remanufacturing exclusion. Below are some considerations that may assist petitioners in developing their petitions; however, these are guidelines only and should not constrain suggested rulemaking revisions if the petitioner otherwise has information that the hazardous secondary material should be excluded from regulation.

(1) Is the hazardous secondary material generated from a manufacturing process that results in minimal contamination, and does the hazardous nature of the hazardous secondary material stem chiefly from the inherent nature of the commercial product that is to be recovered, and not from any contamination?

For example, the remanufacturing exclusion being promulgated today is focused on materials that originated from using commercial grade solvents for reacting, extracting, purifying, or blending chemicals (or for rinsing out the process lines associated with these functions) in the pharmaceutical manufacturing, organic chemical manufacturing, plastics and resins manufacturing, or paint and coatings sector. As a result, the solvents in question are only lightly contaminated, chiefly with other commercial-grade chemicals or minor impurities. Moreover, because the hazardous nature of the material stems from the recycled product (or at least a significant portion of the recycled product) and not from the contamination, the remanufacturing exclusion helps reduce overall risk by keeping hazardous chemicals in commerce, rather than discarding them.

(2) Does the hazardous secondary material present a similar risk profile as an analogous raw material or product and require no special storage or handling beyond what is normally used for the analogous raw material or product?

For example, the spent solvents eligible for the remanufacturing exclusion present the same risk profile as solvent products. The same tanks, containers, and transportation standards that are used for solvent products also work for the spent solvents intended for remanufacturing.

(3) Is there any special equipment or personnel training required for the remanufacturing of the material or for the management of the residuals?

For example, under the remanufacturing exclusion being promulgated today, the same distillation columns used to manufacture solvents from raw materials can be used to remanufacture spent solvents. The still bottoms generated from both processes can be managed in a similar fashion.

(4) Is the market for the remanufactured product stable enough to ensure that neither the hazardous secondary material nor the remanufactured products are over-accumulated?

For example, the remanufacturing exclusion being promulgated today focuses on solvents that are known to be widely used in a variety of industries for the purposes described.

VIII. Revisions to the Definition of Legitimacy and Prohibition of Sham Recycling

EPA has a long-standing policy that all recycling of hazardous secondary materials must be legitimate, including both excluded recycling and the recycling of regulated hazardous wastes. The legitimacy provision in today's final rule is designed to distinguish between real recycling activities—legitimate recycling—and "sham" recycling, an activity undertaken by an entity to avoid the requirements of managing a hazardous secondary material as a hazardous waste. Because of the economic advantages in managing hazardous secondary materials as recycled materials rather than as hazardous wastes, there is an incentive for some handlers to claim they are recycling when, in fact, they are conducting waste treatment and/or disposal.

In this final rulemaking, EPA is codifying in its regulations the requirement that all recycling must be legitimate by adding a prohibition on sham recycling to 40 CFR 261.2(g). In addition, EPA has changed the definition of legitimate recycling in § 260.43. The new definition specifies four factors that must be met for recycling to be legitimate. However, it also provides new ways that a facility can show that it meets factors 3 and 4 of the legitimacy standard.

The four legitimacy factors are as follows:

- Factor 1: Legitimate recycling must involve a hazardous secondary material that

provides a useful contribution to the recycling process or to a product or intermediate of the recycling process.

- Factor 2: The recycling process must produce a valuable product or intermediate.
- Factor 3: The generator and the recycler must manage the hazardous secondary material as a valuable commodity when it is under their control.
- Factor 4: The product of the recycling process must be comparable to a legitimate product or intermediate.

A. Background

Under the RCRA Subtitle C definition of solid waste, many existing hazardous secondary materials are not solid wastes and, thus, are not subject to RCRA's cradle to grave management system if they are recycled. The basic idea behind this construct is that recycling of such materials often more closely resembles normal industrial manufacturing than waste management. However, since there can be significant cost savings from managing hazardous secondary materials outside the RCRA Subtitle C regulatory system, some handlers may claim that they are recycling, when, in fact, they are conducting waste treatment and/or disposal in the guise of recycling. For example, a facility whose primary business was mixing electric arc furnace dust (K061) with agricultural lime for sale as a micronutrient lost its customers and could not sell its product, but continued to accept K061 even though there was no prospect of it being used to produce a product. To guard against practices like these, EPA has long articulated the need to distinguish between "legitimate" (*i.e.,* true) recycling and "sham" (*i.e.,* fake) recycling, beginning with the preamble to the 1985 regulations that established the definition of solid waste (50 FR 638, January 4, 1985).

The prohibition on sham recycling being finalized in this rulemaking is consistent with the Agency's longstanding policy and interpretation of legitimate recycling that has been expressed in those earlier preamble discussions and policy statements. The January 4, 1985, preamble to the definition of solid waste regulations established EPA's concept of legitimacy and described several indicators of sham recycling.

On April 26, 1989, the Office of Solid Waste (OSW) issued a memorandum that consolidated preamble statements concerning legitimate recycling that had been articulated previously into a list of criteria to be considered in evaluating legitimacy [OSWER directive 9441.1989(19)]. This memorandum, known to many as the "Lowrance Memo," has been a primary source of guidance for the regulated community and for implementing agencies in distinguishing between legitimate and sham recycling for many years. The October 2003 and March 2007 DSW proposals and the October 2008 DSW final rule also all include extensive discussions of EPA's legitimacy policy.

In the 2008 DSW final rule, EPA promulgated a codified legitimacy requirement for the specific exclusions in that rulemaking. Today's final rule expands that legitimacy requirement to all hazardous secondary material recycling, as the Agency proposed to do in the July 22, 2011, proposal (76 FR 44094). Section VIII.B discusses these final legitimacy provisions and describes the requirements. Section VIII.C discusses the changes EPA made from the proposed regulations. A discussion of the public comments on the July 2011 proposal and Agency responses can be found in section XVII of this preamble and the full response to comment document is in the docket for the rulemaking.

B. Legitimate Recycling Provisions Being Finalized

This section discusses the rationale and the requirements being finalized in this rulemaking for ensuring that all recycling of hazardous secondary material is legitimate.

1. Legitimacy for All Recycling

In today's final rule, EPA is retaining its long-standing policy that all recycling of hazardous secondary materials must be legitimate. If a facility is engaged in sham recycling, this, by definition, is not real recycling and that hazardous secondary material is being discarded and is a solid waste. Today, we are codifying that the legitimate recycling provision applies to all hazardous secondary materials that are excluded or exempted from Subtitle C regulation because they are recycled and that it also applies to recyclable hazardous wastes that remain subject to the hazardous waste regulations. However, instead of changing the language of each recycling exclusion or exemption to include the requirement as we proposed in the 2011 DSW proposal, we have instead added language in § 261.2(g) that specifically prohibits sham recycling to ensure that all recycling, including recycling under the pre-2008 exclusions is legitimate (*i.e.,* real recycling). We have also determined that documentation of legitimacy is not necessary or required for the pre-2008 recycling exclusions and exemptions, except in the rare case where the recycling is legitimate, but does not meet factor 4.

EPA has determined that the four legitimacy factors being codified in 40 CFR 260.43 are substantively the same as the existing legitimacy policy. These factors are a simplification and clarification of the policy statements in the 1989 Lowrance Memo and in various DSW **Federal Register** notices. This policy is well understood throughout the regulated community and among the state implementing agencies. By providing one standard of legitimacy for all recycling, the Agency expects there will be more clarity, consistency, and predictability for making legitimate recycling determinations. Having one standard in the regulations will also lead to increased knowledge and understanding of the basic requirement that any recycling must be legitimate, leading to better implementation and enforcement of the RCRA hazardous waste regulations.

In developing the codified legitimacy language, we did not intend to raise questions about the status of general legitimacy determinations that underlie existing exclusions from the definition of solid waste (*e.g.,* the solid waste exclusions in 40 CFR 261.4(a)), or about case-specific determinations that have already been made by EPA or the states. Current exclusions and other prior solid waste determinations or variances that are based on the hazardous secondary material being legitimately recycled, including determinations made in letters of interpretation and inspection reports, remain in effect.

Some stakeholders have raised concerns with the application of the codified legitimacy factors to these existing waste-specific and industry specific exclusions. In particular, as we noted in the October 2003 DSW proposal and the March 2007 DSW supplemental proposal, EPA has examined in depth a number of waste-specific and industry-specific recycling activities and has promulgated specific regulatory exclusions or provisions that address the legitimacy of these practices in much more specific terms than the general legitimacy factors as described in 40 CFR 260.43.

EPA expects that the vast majority of recycling being performed under these existing exclusions is currently being undertaken conscientiously and would be considered legitimate under the new legitimacy provision with no further action required on the part of the company. If a company is meeting the conditions of its exclusion while managing the hazardous secondary material responsibly and using it to make a legitimate product, that company would not have to change any

of its existing business practices or otherwise take action to show that its recycling meets the legitimacy factors. EPA is not requiring documentation of compliance with the four legitimacy factors, except in the case where the recycling does not meet factor 4 on its face, but the facility believes that its recycling operation is nonetheless legitimate. Many of the measures the companies take in order to meet the terms of the conditional exclusions or to follow best management practices are the same actions that indicate that a recycling process is legitimate. These measures and business practices were generally evaluated as part of the original legitimacy determination by the agency, and therefore employment of those or similar practices indicated legitimate recycling as addressed by the original legitimacy determinations.

One example is the regulation for zinc fertilizers made from recycled hazardous secondary materials. If the hazardous secondary material recycled under the exclusion contains recoverable amounts of zinc, which provides a useful contribution to the recycled product (factor 1) and results in a valuable product, *i.e.,* zinc micronutrient fertilizer (factor 2), EPA would consider these legitimacy factors to be met. In addition, under the exclusion, the generator and recycler must manage the zinc-containing hazardous secondary material as a valuable commodity (factor 3), that is, in compliance with 261.4(a)(20)(ii)(B): Store the excluded secondary material in tanks, containers, or buildings that are constructed and maintained in a way that prevents releases of the secondary materials into the environment. At a minimum, any building used for this purpose must be an engineered structure made of non-earthen materials that provide structural support, and must have a floor, walls and a roof that prevent wind dispersal and contact with rainwater. Tanks used for this purpose must be structurally sound and, if outdoors, must have roofs or covers that prevent contact with wind and rain. Containers used for this purpose must be kept closed except when it is necessary to add or remove material, and must be in sound condition. Containers that are stored outdoors must be managed within storage areas that: (*1*) Have containment structures or systems sufficiently impervious to contain leaks, spills and accumulated precipitation; and (*2*) provide for effective drainage and removal of leaks, spills and accumulated precipitation; and (*3*) prevent run-on into the containment system. Finally, in the zinc fertilizer regulation, among the requirements established by EPA are specific numerical limits on five heavy metal contaminants and dioxins in the zinc fertilizer product at 40 CFR 261.4(a)(21). If the zinc fertilizer product meets these concentrations, the product would meet factor 4 (assuming other hazardous secondary contaminants have not been added to the product).

Another example is shredded circuit boards excluded under 40 CFR 261.4(a)(14). Shredded circuit boards that contain recoverable metals that provide a useful contribution to the product of the recycling process (factor 1) and go to a recycling process that produces a valuable metal product (factor 2) would meet these legitimacy factors. In addition, under the exclusion, the shredded circuit boards must be stored in containers sufficient to prevent a release to the environment prior to recovery (factor 3) and must be free of mercury switches, mercury relays and nickel-cadmium and lithium batteries (factor 4).

Another example is hazardous secondary materials recycled in a "closed-loop" production process under 40 CFR 261.4(a)(8). Under this exclusion, the hazardous secondary material is reused within the production process from which it came, thus providing a useful contribution to the product (factor 1) and also producing a valuable product or intermediate (factor 2) (assuming that the production process is, by definition, producing a product). Since the closed-loop exclusion requires tank storage and that the entire process through completion of reclamation is closed by being entirely connected with pipes and other comparable enclosed means of conveyance, this management would be considered to meet factor 3, management of the hazardous secondary material as a valuable commodity. The product of this type of recycling process would be comparable to a legitimate product or intermediate because the hazardous secondary materials being recycled are returned to the original process from which they were generated to be reused (factor 4).

Another example is spent wood preserving solutions and wastewaters that have been reclaimed and reused onsite in the production process for their original intended purpose under § 261.4(a)(9). Reclaimed wood preservatives that are used to treat wood would be making a useful contribution to the product (factor 1) and would produce a valuable product (factor 2). The conditions of the exclusion include a requirement that they are managed to prevent releases, and include specific standards for drip pads that manage the material (factor 3). The product of this type of recycling process would be comparable to a legitimate product or intermediate because the hazardous secondary materials being recycled are returned to the original process from which they were generated to be reused (factor 4).

Another example is the long-standing exclusion for excluded scrap metal (processed scrap metal, unprocessed home scrap metal, and unprocessed prompt scrap metal) being recycled (40 CFR 261.4(a)(13)). Excluded scrap metal that contains recoverable metals would provide a useful contribution to the product of the recycling process (factor 1) and, as long as the recycling process produces a valuable metal product (factor 2), the recycling would meet the first two legitimacy factors. If the recycler uses appropriate handling and good management practices to store and manage the excluded scrap metal to prevent releases of hazardous secondary materials to the environment, the recycler would generally meet factor 3 for managing the scrap metal as a valuable commodity.

EPA notes that managing scrap metal as a valuable commodity can include situations where it is stored on the ground. Scrap metal stored on the ground is subject to occasional precipitation runoff that consists essentially of water, with trace amounts of hazardous constituents. As long as the hazardous secondary material itself is not swept away by the runoff, this transport via precipitation runoff would not generally be a concern. However, if metal dust, debris and pieces of scrap metal were released into the environment, for example, by metal falling into a waterway (as has happened in one damage case documented by EPA), this would not be considered managed as a valuable commodity. Finally, as long as the recovered metal meets widely-recognized commodity standards/specifications for the metal product, factor 4 would be satisfied.

The conditions developed for the recycling exclusions in § 261.4(a) were found to be necessary under material-specific rulemakings that determined when the particular hazardous secondary material in question is not a solid waste. When EPA originally made the decision that these materials are not solid waste, the Agency took into account the relevant factors about the hazardous secondary materials, including how the material was managed and what toxic chemicals were present.

In the 2011 DSW proposal, EPA explicitly did not reopen comment on any substantive provisions of the previous recycling exclusions or exemptions and facilities with pre-2008 exclusions can generally follow the normal good business practices that were considered when the exclusions were granted and still be considered to be legitimate recycling. If the facility is complying with the terms of the exclusion and following industry best practices to engage in legitimate recycling activity, this would generally not raise questions as to its legitimacy. All these examples support EPA's determination that most current recycling under existing exclusions is legitimate, and that companies complying with the conditions of exclusions would generally not need to take action to show that their recycling meets the legitimacy factors.

However, at the same time, these material-specific exclusions from the definition of solid waste do not negate the basic requirement that the hazardous secondary material must be legitimately recycled. Recycling that is not legitimate is not recycling at all, but rather "sham recycling"—discard in the guise of recycling. Regarding the existing exclusions in the regulations, EPA acknowledges that, in establishing a specific exclusion, we have already determined in the rulemaking record that the specific recycling practice is excluded from the definition of solid waste provided all the conditions of the rule are met. However, the Agency has always enforced its rules on the basis that any recycling must be legitimate (See *U.S.* v. *Self,* 2 F. 3d 1071, 1079 (10th Cir. 1993); *U.S.* v. *Marine Shale Processors,* 81 F. 3d 1361, 1366 (5th Cir. 1996): *Marine Shale Processors* v. *EPA,* 81 F. 3d 1371, 1381–83 (5th Cir. 1996)). This is meant to prevent a company from claiming to be operating under an existing exclusion and simply using that as a way to avoid full RCRA Subtitle C regulation.

For example, under EPA's historic guidance, a facility could not plausibly claim the zinc fertilizer product exclusion at 40 CFR 261.4(a)(21) for a hazardous secondary material that contained absolutely no or minimal levels of zinc, even if all the conditions of the zinc fertilizer exclusion were met. The exclusion was developed to encourage legitimate recycling of zinc-containing hazardous secondary materials and the legitimacy provision prevents hazardous waste from being discarded into purported fertilizer in the name of recycling when the hazardous secondary material provides no recognizable benefit to the product.

Similarly, if a facility accepted zinc-containing hazardous waste, claiming to make zinc fertilizer, but failed to produce a product that was actually sold or was otherwise valuable, such a process would not be legitimate recycling in the historic legitimacy guidance, even if the management conditions and the constituent levels in the zinc fertilizer exclusion were met. The consequences of the latter example are illustrated in one of the damage cases in the environmental problems study. A facility whose primary business was mixing electric arc furnace dust (K061) with agricultural lime for sale as a micronutrient lost its customers and could not sell its product. However, the facility continued to accept K061, and, after approximately seven months, the facility had accepted over 60,000 tons of this hazardous waste and stored it on the ground in piles up to 30 feet high, with no prospect of it being used to produce a product and, thus, legitimately recycled. While the initial recycling of the K061 hazardous waste was legitimate, when the facility failed to produce a product that was actually sold, the K061 could no longer be considered legitimately recycled. Even if the recycler were to claim that the material may be recycled at some point in the future, the material was being speculatively accumulated and thus, a solid and hazardous waste at that point.

In summary, all hazardous secondary materials recycling and hazardous waste recycling, whether such recycling remains under hazardous waste regulations or is excluded from the definition of solid waste, must be legitimate. This has been our long-standing policy and it is well known throughout the regulated community and the implementing state regulatory agencies. To reinforce that concept and make it clear in the regulations, we are today codifying our policy that hazardous secondary materials being sham recycled are discarded and thus, are solid waste. To do this, EPA has decided to codify the following statement in § 261.2 (the definition of solid waste) instead of adding a reference to legitimacy in each of the recycling exclusions and exemptions (as was suggested in the proposed rule): "A hazardous secondary material found to be sham recycled is considered discarded and a solid waste. Sham recycling is recycling that is not legitimate recycling as defined in § 260.43."

For persons interested in an in-depth analysis of the evolution of EPA's concept of legitimate recycling from policy and preamble statements to regulations, EPA provided this analysis in the 2008 DSW final rule that described how the promulgated legitimacy factors compare to the previous primary guidance on legitimacy and the Lowrance Memo. EPA continues to maintain that the legitimate recycling provision is substantively the same as existing policy because we developed the legitimacy factors in 40 CFR 260.43 by closely examining the questions and sub-questions in the Lowrance Memo and in the **Federal Register** preambles and converting them into four more direct factors. For a detailed explanation of how each of the four factors is derived from the Lowrance Memo and other existing policy statements, see 73 FR 64708 –64710, October 30, 2008.

2. All Factors Mandatory

The structure of the legitimacy standard codified in the 2008 DSW final rule (specifically for the exclusions promulgated in that rulemaking) had two parts. The first part included a requirement that hazardous secondary materials being recycled must provide a useful contribution to the recycling process or to the product of the recycling process and a requirement that the product of the recycling process must be valuable. At the time, EPA considered those two factors to make up the core of legitimacy and, therefore, a process that did not conform to them could not be a legitimate recycling process, but would be considered sham recycling. The second part of legitimacy in the 2008 DSW final rule included two factors that must be considered, but not necessarily met, when a recycler is making a legitimacy determination. In this final rule, the Agency is changing the structure and the application of the legitimate recycling provision so that all four factors are written as mandatory requirements that must be met, except as otherwise noted. The Agency has determined that this action will improve the effectiveness and protectiveness of the legitimacy provision. The Agency's experience with implementing the legitimate recycling structure finalized in the 2008 DSW final rule has led us to this realization. Even though we stressed the importance of considering each factor in the 2008 DSW final rule, some stakeholders continue to be under the mistaken impression that the factors defined as "to be considered" were actually optional and could be ignored. We made it clear in the 2008 DSW final rule that failing to meet a "non-mandatory" factor could, in some cases, be enough to determine that a recycling process is not legitimate. We did not intend for the "to-be-considered" factors

to be less important and thus, have determined that the only way to correct this perception and give these factors the proper weight is to make them requirements that must be met, except as otherwise noted, on equal footing with the other legitimacy factors.

However, to address concerns raised, both factor 3 (managed as a valuable commodity) and factor 4 (products must have comparable levels of hazardous constituents) have been revised from the 2008 DSW final rule to add flexibility to address situations where the recycling is legitimate, but the specific situation might not meet the legitimacy factor . For example, under factor 3, we proposed and are finalizing the following language to more closely reflect the intent of the provision: "Where there is an analogous raw material, the hazardous secondary material, must be managed, at a minimum, in a manner consistent with the management of the raw material or in an equally protective manner." Thus, a generator or recycler would meet this factor if their hazardous secondary material is stored in a different manner than the analogous raw material, as long as that storage is as protective as the way the analogous raw material is stored.

Under factor 4, we have also added more explanation and flexibility for situations where there is no analogous product to compare to the product made from hazardous secondary materials. For example, in some cases, the Agency will consider a product of a recycling process that meets widely-recognized commodity standards/specifications, such as scrap metal, to meet factor 4. Within factor 4, the Agency is also creating a provision for hazardous secondary materials that are recycled by being returned to the original process from which they were generated, such as in a closed-loop recycling process, to meet the factor. The specific changes to factor 3 and factor 4 are described in greater detail below.

In making all legitimacy factors mandatory requirements, the first sentence of the regulatory language of both factors was revised to indicate that these factors must be met. For factor 3, the first sentence now reads as follows: "The generator and the recycler must manage the hazardous secondary material as a valuable commodity when it is under their control." For factor 4, the first sentence now reads as follows: "The product of the recycling process must be comparable to a legitimate product or intermediate."

In the 2011 DSW proposal, we proposed a petition process for facilities that believe their recycling is legitimate despite not meeting one or both of these two factors. After review and consideration of the public comment on this issue, the Agency has decided that instead of a petition process, facilities that do not meet factor 4 and yet are still legitimately recycling must notify the Regional Administrator (or State Director, if the state is authorized) and keep documentation and a certification in their files explaining how the recycling is still legitimate.[30] See section VIII.B.6 below for a full discussion of the documentation and notification process under factor 4.

3. Factor 1: Useful Contribution—§ 260.43(a)(1)

(1) Legitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product or intermediate of the recycling process. The hazardous secondary material provides a useful contribution if it:

(i) Contributes valuable ingredients to a product or intermediate; or

(ii) Replaces a catalyst or carrier in the recycling process; or

(iii) Is the source of a valuable constituent recovered in the recycling process; or

(iv) Is recovered or regenerated by the recycling process; or

(v) Is used as an effective substitute for a commercial product.

This factor expresses the principle that hazardous secondary materials must contribute value to the recycling process. Providing a useful contribution is an essential element to legitimate recycling because real or legitimate recycling is not occurring if the hazardous secondary material being added or recovered does not add to the process. This factor is intended to prevent the practice of adding a hazardous secondary material to a recycling process simply as a means of disposing of it, or recovering only small amounts of a constituent, which EPA would consider sham recycling.

Paragraphs (i) through (v) of § 260.43(a)(1) list five ways that a hazardous secondary material can provide a useful contribution: (i) Contributing valuable ingredients to a product or intermediate; (ii) replacing a catalyst or carrier in the recycling process; (iii) providing a valuable constituent to be recovered; (iv) being regenerated; or (v) being used as an effective substitute for a commercial product. Any one of these can demonstrate that the hazardous secondary material provides a useful contribution.

An important note in applying this factor is that not every constituent or component of the hazardous secondary material has to make a contribution to the recycling activity to meet the useful contribution factor. For example, a legitimate recycling operation involving precious metals might not recover all of the components of the hazardous secondary material, but would recover precious metals with sufficient value to consider the recycling process legitimate. In addition, the recycling activity does not have to involve the hazardous component of the hazardous secondary materials if the value of the contribution of the non-hazardous component justifies the recycling activity. One example of this factor from an existing exemption is where hazardous secondary materials containing large amounts of zinc, a non-hazardous component, are recycled into zinc micronutrient fertilizers. However, in cases where the hazardous component is not being used or recycled, the Agency stresses that the recycler is responsible for the proper management of any hazardous residuals of the recycling process.

In a situation where more than one hazardous secondary material is used in a single recycling process and the hazardous secondary materials are mixed or blended as a part of the process, each hazardous secondary material would need to satisfy the useful contribution factor. This requirement prevents situations where a worthless hazardous secondary material could be mixed with valuable and useful hazardous secondary materials in an attempt to disguise and dispose of it. In addition, a situation in which hazardous secondary materials that can be useful to a process, but are added to that process in much greater amounts than needed to make the end-product or to otherwise provide its useful contribution, would also be sham recycling.

Another way the usefulness of the hazardous secondary material's contribution could be demonstrated is by looking at the efficiency of the material's use in the recycling process—that is, how much of the constituent in a hazardous secondary material is actually being used. As an example, if there is a constituent in the hazardous secondary material that could add value to the recycling process, but, due to process design, most of it is not being

[30] As noted above, and as described in more detail in Section VIII.B.6, products of a recycling process that meet widely-recognized commodity standards/specifications and hazardous secondary materials that are recycled by being returned to the original process from which they were generated are considered to meet factor 4 of the legitimacy standard.

recovered, but is being disposed of in the residuals, this would be a possible indicator of not meeting this factor and thus, could be sham recycling. However, this consideration must take the actual process being considered into account as there are certainly recycling scenarios where a low recovery rate could still be legitimate. For example, under an existing exclusion, if the concentration in a metal-bearing hazardous secondary material is low (*e.g.,* 2–4%) and a recycling process was able to recover a large percentage of the target metal, this factor could be met and the recycling may be legitimate (depending on the outcome of the analysis of the other legitimacy factors).

When evaluating a hazardous secondary material's useful contribution, the process can be compared to typical industry recovery rates from raw materials to determine if the recycling process is reasonably efficient. This method should involve an examination of the overall process, not just a single step of the process. For example, if one step in the process recovers a small percentage of the constituent, but the overall process recovers a much larger percentage, the Agency would consider the overall efficiency of the recycling process in determining whether hazardous secondary materials are providing a useful contribution.

4. Factor 2: Valuable Product or Intermediate—§ 260.43(a)(2)

The recycling process must produce a valuable product or intermediate. The product or intermediate is valuable if it is: (i) Sold to a third party or (ii) used by the recycler or the generator as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process.

This factor expresses the principle that the product or intermediate coming out of the recycling process should be a material of value, either to a third party who buys it from the recycler, or to the generator or recycler itself, who can use it as a substitute for another material that it would otherwise have to buy or obtain for its industrial process. Legitimate recycling is not occurring if the product or intermediate from the process is not of use to anyone and, therefore, is not a real product. This factor is intended to prevent the practice of running a hazardous secondary material through an industrial production process to make something just for the purpose of avoiding the costs of hazardous waste management, rather than for the purpose of using the product or intermediate of the recycling activity. Such a practice would be sham recycling.

For the purpose of this factor, a recyclable product may be considered "valuable" if it can be shown to have either economic value or intrinsic value to the end user. Evaluations of "valuable" for the purpose of this factor should be done on a case-by-case basis, but one way to determine that the recycling process yields a valuable product would be if the product of the recycling process is sold to a third party. This transaction could include money changing hands or, in other circumstances, may involve trade or barter. A recycler that has not yet arranged for the sale of its product to a third party could establish value by demonstrating that it can replace another product or intermediate that is available in the marketplace. A product of the recycling process may be sold at a loss in some circumstances, but the recycler should be able to demonstrate how the product is clearly valuable to the purchaser.

EPA also knows that many recycling processes produce outputs that are not sold or traded to another party, but are instead used by the generator or recycler. A product of the recycling process may be used as a feedstock in a manufacturing process, but have no established monetary value in the marketplace. Such recycled products or intermediates would be considered to have intrinsic value, though it might be less straightforward in this situation to demonstrate value if it is necessary to do so. Demonstrations of intrinsic value could involve showing that the product of the recycling process or intermediate replaces an alternative product that would otherwise have to be purchased or could involve a showing that the product of the recycling process or intermediate meets specific product specifications or specific industry standards. Another approach could be to compare the product or intermediate's physical and chemical properties or efficacy for certain uses with those of comparable products or intermediates made from raw materials.

Some recycling processes may consist of multiple steps that may occur at separate facilities. In some cases, each processing step will yield a valuable product or intermediate, such as when a metal-bearing hazardous secondary material is processed to reclaim a precious metal and is then put through another process to reclaim a different mineral. When each step in the process yields a valuable product or intermediate that is salable or usable in that form, the recycling activity would conform to this factor.

Like the other factors, this factor should be examined and evaluated on a case-by-case basis looking at the specific facts of a recycling activity. If, for instance, a recycling activity produces a product or intermediate that is used by the recycler itself, but does not serve any purpose and is just being used so that the product or intermediate appears valuable, that would be an indicator of sham recycling. An example of this would be a recycler that reclaims a hazardous secondary material and then uses that material to make blocks or building materials for which it has no market and then "uses" those building materials to make a warehouse in which it stores the remainder of the building materials that it is unable to sell.

5. Factor 3: Managed as a Valuable Commodity—§ 260.43(a)(3)

The generator and the recycler must manage the hazardous secondary material as a valuable commodity when it is under their control. Where there is an analogous raw material, the hazardous secondary material must be managed, at a minimum, in a manner consistent with the management of the raw material or in an equally protective manner. Where there is no analogous raw material, the hazardous secondary material must be contained. Hazardous secondary materials that are released to the environment and are not recovered immediately are discarded.

This factor expresses the principle that hazardous secondary materials being recycled should be managed in the same manner as other valuable materials. This factor requires those making a legitimacy determination to look at how the hazardous secondary material is managed before it enters the recycling process. In EPA's view, a recycler will value hazardous secondary materials that provide an important contribution to its process or product and, therefore, will manage those hazardous secondary materials in a manner consistent with how it manages a valuable feedstock. If, on the other hand, the recycler does not manage the hazardous secondary materials as it would a valuable feedstock, the hazardous secondary materials might not be recycled, but rather released into the environment and discarded, thereby indicating sham recycling.

This factor may be particularly important in the case where a recycler has been paid by a generator to take its materials as a result of the economic incentives in the hazardous secondary materials market. By looking at the management of the hazardous secondary material before it enters the recycler's process, the entity making the

legitimacy determination can tell that a material being managed like an analogous raw material is, in fact, valued by the recycler. If the hazardous secondary material is not being managed like a valuable raw material because it is uncontrolled or is being released, that indicates that the fee the recycler obtains for taking the hazardous secondary material may be its only value to that recycler. If the fee received were the only value to the recycler, it could mean that discard was taking place.

This factor addresses the management of hazardous secondary materials in two distinct situations. The first situation is when a hazardous secondary material is analogous to a raw material which it is replacing in the process. In this case, the hazardous secondary material should be managed prior to recycling similarly to the way the analogous raw materials are managed in the course of normal manufacturing, or in an equally protective manner.

EPA expects that all parties handling hazardous secondary materials destined for recycling—generators, transporters, intermediate facilities and reclamation facilities—will handle them in generally the same manner in which valuable raw materials would otherwise be handled if used in the process. "Analogous raw material" is a raw material for which the hazardous secondary material substitutes and which serves the same function and has similar physical and chemical properties as the hazardous secondary material.

EPA proposed and is finalizing an addition to the language of this factor as compared to the 2008 DSW final rule to include the words "or in an equally protective manner." This change means that a recycling process would meet this factor if the hazardous secondary material is stored in a different manner than the analogous raw material as long as that storage was as protective as the way the analogous raw material was stored.

For example, a hazardous secondary material in powder form that is shipped in a woven super sack in good condition (*i.e.,* that does not leak or spill) and stored in an indoor containment area would be considered managed "in an equally protective manner" as an analogous raw material that is shipped and stored in drums.

In addition, managing a hazardous secondary material in a manner consistent with the management of an analogous raw material can include situations where the raw material and the hazardous secondary material (*e.g.,* scrap metal) are both stored on the ground.

The second situation the factor addresses is the case where there is no analogous raw material that the hazardous secondary material is replacing. This could be either because the process is designed around a particular hazardous secondary material—that is, the hazardous secondary material is not replacing anything—or it could be because of physical or chemical differences between the hazardous secondary material and the raw material that are too significant for them to be considered "analogous."

Hazardous secondary materials that have significantly different physical or chemical properties when compared to the raw material would not be considered analogous even if they serve the same function because it may not be appropriate to manage them in the same way. In this situation, the hazardous secondary material would have to be contained for this factor to be met. The term "contained" as discussed in section V of this preamble, means that the unit in which the material is stored is in good condition, with no leaks or releases to the environment, and that the unit is designed to prevent such releases. In addition, to meet the contained standard, the unit must be labeled or have a system to identify the hazardous secondary material in it and must not hold incompatible materials or pose a risk of fires. Hazardous secondary materials in units that meet the applicable requirements of 40 CFR parts 264 or 265 are presumed to be contained. Land-based units can meet the definition of contained.

The requirement that a hazardous secondary material be contained when there is no analogous raw material to compare it to is consistent with the idea that normal manufacturing would ensure that the valuable material inputs are managed properly, rather than allow them to be released into the environment.

An example of when this provision would be used would be if a manufacturer decided to replace a dry raw material in its process with a liquid having the same constituents. It would not be sufficient, nor would it make sense, for the liquid to be managed in supersacks, like a dry material might. Instead, the liquid would have to be contained (for example, in a tank or container).

An important part of this factor is the statement in the regulatory text clarifying that hazardous secondary materials that are released to the environment and are not recovered immediately are discarded. Valuable feedstocks or products should not be allowed to escape into the environment through poor management and this factor clarifies that those hazardous secondary materials that are released (and are not immediately recovered) are clearly discarded and a solid waste. Either a large release or ongoing releases of smaller amounts could indicate that, in general, the hazardous secondary material is not being managed as a valuable product, which could indicate sham recycling. Hazardous secondary materials that are immediately recovered before they disperse into the environment—air, soil, or water—and are reintroduced in the recycling process are not discarded. This determination on factor 3 must be made on a case-by-case basis, however.

In EPA's 2008 DSW final rule, this factor was one of the two factors that was "to be considered" rather than one of the two mandatory factors because EPA believed that there may be some situations in which this factor was not met, but the recycling was still legitimate. With the addition of the language clarifying that the materials can be managed in a different way than the analogous raw material as long as that management system is equally protective, EPA has determined that there is no reason that a facility that is legitimately using a hazardous secondary material that has value to them in a recycling process would not meet this factor. EPA's intent with this factor is that hazardous secondary materials are managed in the same manner as materials that have been purchased or obtained at some cost, as raw materials are. Just as it is good business practice to ensure that raw materials enter the manufacturing process rather than being spilled or released, we would expect hazardous secondary materials to be managed effectively and efficiently in order that their full value to the manufacturing process would be realized.

6. Factor 4: Comparison of Toxics in the Product—§ 260.43(a)(4)

The product of the recycling process must be comparable to a legitimate product or intermediate:

(i) Where there is an analogous product or intermediate, the product of the recycling process is comparable to a legitimate product or intermediate if:

(A) The product of the recycling process does not exhibit a hazardous characteristic (as defined in part 261 subpart C) that analogous products do not exhibit, and

(B) The concentrations of any hazardous constituents found in Appendix VIII of part 261 of this chapter that are in the product or

intermediate are at levels that are comparable to or lower than those found in analogous products or at levels that meet widely-recognized commodity standards and specifications, in the case where the commodity standards and specifications include levels that specifically address those hazardous constituents.

(ii) Where there is no analogous product, the product of the recycling process is comparable to a legitimate product or intermediate if:

(A) The product of the recycling process is a commodity that meets widely recognized commodity standards and specifications (*e.g.,* commodity specification grades for common metals), or

(B) The hazardous secondary materials being recycled are returned to the original process or processes from which they were generated to be reused (*e.g.,* closed loop recycling).

(iii) If the product of the recycling process has levels of hazardous constituents that are not comparable to or unable to be compared to a legitimate product or intermediate per subparagraphs (i) or (ii) of this paragraph, the recycling still may be shown to be legitimate, if it meets the requirements specified below. The person performing the recycling must conduct the necessary assessment and prepare documentation showing why the recycling is, in fact, still legitimate. The recycling can be shown to be legitimate based on lack of exposure from toxics in the product, lack of the bioavailability of the toxics in the product, or other relevant considerations which show that the recycled product does not contain levels of hazardous constituents that pose a significant human health or environmental risk. The documentation must include a certification statement that the recycling is legitimate and must be maintained on-site for three years after the recycling operation has ceased. The person performing the recycling must notify the Regional Administrator of this activity using EPA Form 8700–12.

This factor requires that those making a legitimacy determination look at the concentrations of the hazardous constituents found in the product made from hazardous secondary materials and, except where otherwise specified, compare them to the concentrations of hazardous constituents in analogous products. A product that contains high levels of hazardous constituents that originate in a hazardous secondary material feedstock could indicate that the recycler incorporated hazardous constituents into the final product when they were not needed to make that product effective as a way to avoid proper disposal of that material, which would be sham recycling. This factor, therefore, is designed to determine when toxics that are "along for the ride" are discarded in a final product and the hazardous secondary material is not being legitimately recycled.

As proposed, factor 4 was unsatisfactory to many of the stakeholders of this rulemaking. Many representatives from the industrial sector argued that they would not be able to meet factor 4 or would not be able to easily know if they met factor 4. EPA had expected that a small number of facilities would have this concern and had proposed a petition process to address this problem, but many commenters argued that petitions would take a long time to be processed, creating uncertainty in the industrial sector, and that a petition process would be a drain on state and industry resources.

As a result of comments received on the proposal, EPA has made some revisions to this factor to ensure that long-standing legitimate recycling processes will still be considered legitimate under this factor. The requirements that are being promulgated today are described in full below and include different requirements for when there is an analogous product and when there is not, provisions for using widely-recognized commodity standards and specifications to meet this factor, a provision to address recycling that includes hazardous secondary materials being put back into the process from which they came, and a documentation, certification and notification process for facilities that cannot meet these requirements, but still believe their recycling is legitimate. A full description of how the requirement being finalized differs from what was proposed in the 2011 DSW proposal can be found in section VIII.C.3 of the preamble.

In addition to these changes, EPA has also retained the proposed language of this factor that states that the concentrations of hazardous constituents in the product of the recycling process must be "comparable to" or lower than those found in analogous products. This is a change from the 2008 DSW final rule, which used language stating that the concentrations of hazardous constituents should not be "significantly higher" than concentrations in analogous products.

Factor 4 starts with the statement that the product of the recycling process made from hazardous secondary materials must be comparable to a legitimate product or intermediate. It is important to note that the comparison that EPA is requiring here involves the product that comes out of a recycling process. That is, a recycler will ordinarily compare the product of the recycling process to an analogous product made of raw materials. For example, if a recycling process produces paint, the levels of hazardous constituents in the paint will be compared with the levels of the same constituents found in similar paint made from virgin raw materials.

However, a recycler is also allowed to perform this evaluation by comparing the hazardous constituents in the hazardous secondary material feedstock with those in an analogous raw material feedstock. If the hazardous secondary material feedstock contains concentrations of hazardous constituents that are comparable to or lower than the concentrations in the raw material feedstock, then the end product of the recycling process would not contain excess hazardous constituents "along for the ride" either. This method of showing that the product meets factor 4 is acceptable. There may be cases in which it is easier to compare feedstocks than it is to compare products because the recycler knows that the hazardous secondary material is very similar in profile to the raw material. A comparison of feedstocks may also be easier in cases where the recycler creates an intermediate which is later processed again and may end up in two or more products, when there is no analogous product, or when production of the product of the recycling process has not yet begun. Note, however, that EPA is allowing other ways to make the comparable demonstration in cases where there is no analogous product, as described below in section VIII.B.6.b.

a. Factor 4 when there is an analogous product. Paragraph 260.43(a)(4)(i) describes how a facility can meet factor 4 when the recycled product can be compared to an analogous product that is made without the use of hazardous secondary material as a feedstock. First, the product of the recycling process cannot exhibit any of the hazardous characteristics that analogous products do not exhibit. Most issues associated with "toxics along for the ride" involve the presence of hazardous constituents rather than the characteristics of hazardous waste. It is possible, however, that the use of hazardous secondary materials as an ingredient could cause a product to exhibit a hazardous characteristic, such as corrosivity, that is not exhibited by analogous products.

The hazardous characteristics are found in 40 CFR part 261 subpart C and are used to identify those materials that are hazardous wastes, but that EPA has not specifically listed in part 261 subpart D. The characteristics are ignitability, corrosivity, reactivity, and toxicity. The toxicity characteristic includes a list of 40 contaminants and the levels at which the material would be considered hazardous waste when tested using the Toxicity Characteristic Leaching Procedure. If a product produced with hazardous secondary material exhibited a characteristic of hazardous waste that an analogous product did not exhibit, this would be an indication that sham recycling could be occurring as a significant hazardous constituent or characteristic would be in the product only as a result of the recycling of the hazardous secondary material. This requirement is in § 260.43(a)(4)(i)(A). In most cases, a recycler will be familiar enough with the material it is producing to be able to easily determine whether it would meet any of these characteristics, but if there are any questions, the methods for testing for the characteristics are found in 40 CFR part 261 subpart C.

In addition to this requirement, the product of the recycling process must also meet § 260.43(a)(4)(i)(B). This paragraph can be met in two ways. The first way is if the concentrations of any hazardous constituent (as defined by Appendix VIII to part 261) that is in the recycled product is comparable to or lower than those found in analogous products. This provision is what EPA proposed in the 2011 DSW proposal, which included a discussion of how meeting product specifications could indicate that a recycling process is legitimate, as well as a request for comments on how EPA should determine what "comparable" levels of hazardous constituents are when determining the legitimacy of a recycling process. In response to comments received on this point, EPA has added to this paragraph that the product of the recycling process would be comparable if it meets widely-recognized commodity standards that include levels that specifically address the hazardous constituents that are in the product.

As stated above, the first part of § 260.43(a)(4)(i)(B) is similar to the provision that EPA proposed in the 2011 DSW proposal. In this provision, EPA has decided to finalize language replacing the terms "significant" and "significantly elevated," which were promulgated in the 2008 DSW final rule, with the phrase "comparable to or lower" because it more clearly reflects the intent of this factor. "Comparable to or lower than" means that any contaminants present in the product made from hazardous secondary materials are present at levels at or lower than the levels contained in an analogous product, or if higher, would be within a small acceptable range. This language is consistent with the Identification of Non-Hazardous Secondary Materials that are Solid Wastes final rule (76 FR 15456, March 21, 2011). However, we are not changing the basic meaning of this factor. Operationally, the terms "comparable" and "not significant" or "not significantly elevated" are the same for hazardous secondary materials recycling and the examples the Agency provided in the 2008 DSW final rule preamble that explained how the Agency envisions this factor working are still appropriate. Those examples are repeated here.

- If paint made from reclaimed solvent contains significant amounts of cadmium, but the same type of paint made from virgin raw materials does not contain cadmium, it could indicate that the cadmium serves no useful purpose and is being passed though the recycling process and discarded in the product. Thus, the levels of cadmium would not be considered "comparable" and the paint would fail this legitimacy factor, unless the recycler can conduct the necessary analysis and prepare documentation stating why the recycling is still legitimate. In addition, the recycler would need to certify and provide notice to the implementing agency of this activity.
- If a lead-bearing hazardous secondary material was reclaimed and then that material was used as an ingredient in making ceramic tiles and the amount of lead in the tiles was significantly higher than the amount of lead found in similar tiles made from virgin raw materials, the recycler should look more closely at the factors to determine the overall legitimacy of the process. The significantly higher levels of lead may indicate that the recycled product is not comparable to an analogous product and, thus, the recycling process is really a sham. Alternatively, the recycler may be able to demonstrate the recycling is still legitimate even though it does not contain lead at comparable levels by, for example, showing the toxics are not bioavailable. If this is the case, the recycler would need to document the analysis and certify the legitimacy of the recycling practice, as well as provide notice to the implementing agency.
- If zinc galvanizing metal made from hazardous secondary materials that are reclaimed contains 500 parts per million (ppm) of lead, while the same zinc product made from raw materials typically contains 475 ppm, the levels would be considered comparable since they are within a small acceptable range and, thus, the product would meet this factor. If, on the other hand, the lead levels in the zinc product made from reclaimed hazardous secondary materials were considerably higher, these levels may not be comparable, and would require the recycler to look more closely at this factor since it may indicate that the product was being used to illegally dispose of the lead and that the activity is sham recycling, unless the recycler can conduct the necessary assessment and prepare documentation stating why the recycling is still legitimate. In addition, the recycler would need to certify and provide notice to the implementing agency of this activity.
- If a "virgin" solvent contains no detectable amounts of barium, while spent solvent that has been reclaimed contains a minimal amount of barium (*e.g.*, 1 ppm), this difference would likely be considered comparable.

The second part of § 260.43(a)(4)(i)(B) relies not on a comparison of levels of hazardous constituents between a product of the recycling process and an analogous product, but on the product of the recycling process meeting widely-recognized commodity standards and specifications. In this case, meeting a widely-recognized standard and specification would indicate that the recycling is legitimate if that standard and specification includes levels for the hazardous constituents that are found in the product of the recycling process.

EPA decided that using a product's ability to meet product specifications as an indicator of legitimate recycling would make the determination of legitimate recycling straight-forward in many cases where the product of the recycling is clearly a commodity in wide use in commerce. Although not spelled out in the regulatory language used in the 2008 DSW final rule, consideration of whether the product of a recycling process meets quality specifications has been part of the legitimacy determination since the Lowrance Memo in 1989, which included several questions to this effect as part of its determination of whether there is a guaranteed market for the product (*i.e.*, Are there industry recognized product specifications for the product? Is it listed in industry news letters? Is the reclaimed product a recognized commodity?). Including this provision on product specifications as part of this final rulemaking will limit uncertainty from recyclers about whether their processes are legitimate.

However, despite the value of product standards, EPA did not want to state that meeting any product specification was an indicator of legitimacy because any recycler could design its own specification and point to that as a way to circumvent the requirement. Therefore, this requirement requires that the commodity standards being met be widely-recognized. By "widely-recognized commodity standard," EPA

means a standard that is used throughout an industry to describe a certain product and that is widely-available to anyone producing the product. A specific example of such a widely-recognized standard agency would be ASTM International, which has standards covering a wide variety of manufactured goods.[31] However, for specialty batch chemical manufacturers or other types of specialty manufacturing where widely-recognized commodity standards are not available, customer specifications would be sufficient.

In addition, for this part of factor 4, the commodity standards and specifications being referenced must specifically address those hazardous constituents that may be different between the analogous product and the product generated from using the hazardous secondary material in the recycling process. EPA is making this explicit in the regulations to avoid a situation in which a product from a process that is recycling hazardous secondary materials meets a widely-recognized product specification, but does not include any levels for the hazardous constituents that are in the hazardous secondary material. A product specification could have been developed without any thought that the feedstock for that product might include some hazardous constituents that could be toxic to human health and the environment and, therefore, not include them. We are concerned with the potential that the analogous product could be substituted with the recycled product without full disclosure of potential toxics that may be in the recycled product. Using a standard or specification that does not address the hazardous constituents of concern to demonstrate meeting factor 4 of the legitimacy requirements where there is an analogous product would ignore the primary concern of this factor and would allow elevated levels of toxics from the hazardous secondary material into the final product.

b. Factor 4 when there is no analogous product. Commenters on EPA's 2011 DSW proposal expressed concern that, in many cases of hazardous secondary materials recycling, there may not be an analogous product with which a facility can compare the product of the recycling process. Commenters described recycling processes that were designed to use a specific hazardous secondary material to make a useful product and processes that always incorporated a hazardous secondary material back into the generating process during manufacturing. Paragraph 260.43(a)(4)(ii) describes how a facility can meet factor 4 in these situations.

EPA had not previously identified a separate methodology for meeting factor 4 in the situation where there is no analogous product, but the support in the comments in response to EPA's request for input on the use of product specifications made it clear that this approach could be effective in the case where there is no analogous product. Therefore, EPA is stating in § 260.43(a)(4)(ii)(A) that a product of the recycling process is comparable to a legitimate product or intermediate when "the product of the recycling process is a commodity that meets widely-recognized commodity standards and specifications." EPA gives the example in the regulatory text of commodity specification grades for common metals, which would be relevant to scrap metal recyclers, among other metal recyclers.

As stated above for paragraph (A), EPA decided that using a product's ability to meet product standards and specifications as an indicator of legitimate recycling would make the determination of legitimate recycling more straight-forward in many cases where the product of the recycling is clearly a commodity in wide use in commerce. This would limit uncertainty from recyclers about whether their processes are legitimate.

However, despite the value of product standards and specifications, EPA did not want to state that meeting any product standard or specification was an indicator of legitimacy because any recycler could design its own specification and point to that as a way to circumvent the requirement. Therefore, this requirement requires that the commodity standards and specifications being met be widely-recognized. By "widely-recognized commodity standard and specification," EPA means a standard or specification that is used throughout an industry to describe a certain product and that is widely-available to anyone producing the product. A specific example of such a widely-recognized standard agency would be ASTM International, which has standards covering a wide variety of manufactured goods. Note, for this part of factor 4, the commodity standard or specification must be widely recognized, but would not necessarily address a specific hazardous constituent, since there is no analogous product to compare it to. EPA has determined that recycled products that do not have analogous products can "stand alone" in that they are not substitutes for virgin products and thus, either succeed or fail based on their inherent characteristics, including any hazardous constituents contained therein. Therefore, EPA has determined that market forces appropriately dictate whether these types of recycled products meet the technical provisions of factor 4.

EPA also wanted to address the situation in which a manufacturing process produces a hazardous secondary material that is then recycled back into the process from which they were generated. In some cases, the product is always manufactured using this kind of feedback loop and, therefore, there is no analogous product with which it can be compared. EPA has included in today's final rule a provision that states that when "hazardous secondary materials being recycled are returned to the original process or processes from which there were generated to be reused, the product of the recycling process is comparable to a legitimate product or intermediate." That is, in those situations, the recycling process meets factor 4.

Recycling that takes place under EPA's closed loop recycling exclusion at § 261.4(a)(8) would be an example of manufacturing that would consistently include the hazardous secondary material being returned to the original process from which it was generated and that would meet the legitimacy factors being discussed here. Another situation about which commenters expressed concern was mineral processing to produce primary metals, because these processes always include materials looping back into the process to ensure that all the valuable metals that can be extracted from the ore are being collected for use. For example, in precious metals production, hazardous secondary materials from various stages in the process contain concentrations of both precious metals and hazardous constituents that are higher than concentrations in ore. The concentrations of hazardous constituents and precious metals in these hazardous secondary materials vary depending on the makeup of the ore from which they came. In order to glean the most valuable product from processing the ore, these hazardous secondary materials are routinely put back into the production units that process the virgin materials and are put

[31] ASTM International, formerly known as the American Society for Testing and Materials (ASTM), develops and delivers international voluntary consensus standards. Its Web site states that 12,000 ASTM standards are used around the world to improve product quality, enhance safety, facilitate market access and trade, and build consumer confidence. *http://www.astm.org/ABOUT/aboutASTM.html.*

through the process again. Commenters from the precious metals industry argued in their comments that they consider this legitimate recycling of secondary materials (that may be hazardous) and that because of the variation in the makeup of the materials going back into the process, determining whether factor 4 has been met would be difficult. Thus, EPA has determined that the recycling process in these situations—that is, in which the hazardous secondary material is returned to the original production process, or the processes from which it was generated—would meet factor 4.

EPA has determined that recycling hazardous secondary materials in this manner is not a concern as far as "toxics along for the ride" are concerned because the hazardous secondary materials came out of the very same process and contain the same hazardous constituents that are already in the manufacturing process. These hazardous constituents originated in the raw materials of the process that are being used with or without the recycling loop. Prohibiting the recycling of hazardous secondary materials in these situations because of factor 4 would not be changing the amount or nature of hazardous constituents in the product that comes out of the manufacturing process. In addition, that kind of prohibition would be misguided from a resource conservation perspective because it could limit the recycling of these materials back into a process, which leads to a more efficient process and therefore conserves the use of raw materials in manufacturing.

c. Documentation, certification and notice process for factor 4. EPA designed the provisions above to make it more clear how a material can meet factor 4. In addition, they provide additional flexibility to this factor, where it makes environmental and economic sense. These added provisions address most of the comments that EPA received stating that a particular sector or industry would have trouble meeting factor 4.

EPA recognizes, however, that despite these changes, there may still be instances where recycling is legitimate, but is unable to meet the technical provisions of factor 4 as it is written because the product of the recycling process has levels that are not comparable to analogous products or because the product of the recycling process cannot be compared to an analogous product, but does not fit under § 260.43(a)(4)(ii).[32]

It is critical that the legitimacy regulations be flexible enough to allow for situations like this, particularly with the regulations applying to all recycling. In this final rulemaking, EPA has replaced the petition process that it proposed in the 2011 DSW proposal with a documentation, certification and notice process for factor 4.

Specifically, when a recycling facility has determined that it must take advantage of the documentation, certification and notice process, either because the product of the recycling process has levels that are not comparable to analogous products or because the product of the recycling process cannot be compared to an analogous product (and § 260.43(a)(4)(ii) does not apply), it must determine that its recycling process is legitimate despite the levels of hazardous constituents in the product. The regulatory text for this provision explains that in doing this analysis, the facility making the determination can consider "lack of exposure from toxics in the product, lack of the bioavailability of the toxics in the product, or other relevant considerations which show that the recycled product does not contain levels of hazardous constituents that pose a significant human health or environmental risk."

A consideration of lack of exposure from the toxics in a product would involve an assessment of the process to determine if the hazardous constituents are likely to come into contact with humans or the environment in a way that will harm them. For example, a product that is more of an intermediate in a recycling process and stays within an industrial setting where it is contained and where everyone coming into contact with it is familiar with any hazards that it poses could be considered a candidate for this certification because there is limited exposure to human health and the environment from the product. A consumer product, on the other hand, that will be leaving an industrial setting and entering the market where certain hazardous constituents may not be expected and may not have limited exposure to human health and the environment is unlikely to be eligible for this exception to factor 4.

For example, as previously explained in the 2008 DSW final rule and the 2011 DSW proposed rule, EPA has determined that the reuse of lead contaminated foundry sands may or may not be legitimate, depending on the use. The use and reuse of foundry sands for mold making in a facility's sand loop using a non-thermal reclamation process under normal industry practices has been found to be legitimate because the sand is part of an industrial process where there is little chance of the hazardous constituents being released into the environment or causing damage to human health and the environment when it is kept inside, because there is lead throughout the foundry's process, and because there is a clear value to reusing the sand, even though the levels of hazardous constituents in the sands may not be comparable to the analogous product. However, in the case of lead contaminated foundry sand used as children's play sand, the same high levels of lead would disqualify this use from being considered legitimate recycling.

An assessment of lack of the bioavailability of toxics in the product could be a more complicated analysis that would examine whether the hazardous constituents in the final product are bound up with the other constituents in such a way that they would not be released when coming into contact with humans or the environment over the lifetime of the product. Although this would be a sophisticated assessment, a facility wishing to perform this kind of analysis to inform a legitimacy determination under this certification process can do so.

EPA has included the phrase "other relevant considerations which show that the recycled product does not contain levels of hazardous constituents that pose a significant human health or environmental risk" in the regulation to account for other situations that may arise. An example that was submitted in the comments to the proposal that could be an "other relevant consideration" in making this determination is when the reclaimed product contains compounds that are not in analogous products, but the products exhibit similar physical and chemical risk profiles and therefore are not posing an increased risk. There may be other considerations regarding factor 4 like these that could also be relevant to the legitimacy of a recycling process; however, the Agency thinks these are limited.

After determining that its process is still legitimate, the recycling facility would prepare documentation explaining its assessment. This should take the form of a description of the process in question and an explanation of the analysis performed to determine legitimacy, including any relevant diagrams and flow charts, as well as any

[32] Note that a recycling facility can also compare the hazardous constituents in the hazardous secondary material to an analogous feedstock, if that approach works better for a particular recycling process.

relevant sampling data. In addition, the documentation must include a certification statement that states that recycling is legitimate and that is signed by the responsible official at the recycling facility. The language for the certification is not mandated in the regulations, but an acceptable example would be "I certify that the hazardous secondary recycling process described in these pages is a legitimate recycling process."

The documentation and certification of legitimate recycling would have to be maintained or available on-site for as long as the recycling process is operating at the site and for three years after the recycling operation has ceased.

In addition to preparing and maintaining this documentation, the recycling facility would notify its Regional Administrator (or State Director, in authorized states) that it is taking advantage of this provision by reporting the type of hazardous secondary material and the recycling process being used to produce a product with elevated levels of hazardous constituents (or a product that has no widely-known commodity standards for the hazardous constituents) through EPA Form 8700–12, otherwise known as the Site ID form.[33] When a facility documents, certifies, and submits notice under factor 4, it is addressing factor 4 for the purposes of the introductory language of § 260.43, which requires that all requirements of the paragraph be addressed.

EPA has decided to finalize this self-implementing certification process rather than the proposed petition process to reduce burden on facilities who are taking advantage of this provision, as well as on the regulatory agencies implementing the regulations. Because this requirement for documentation and a certification that must be maintained on-site does not include an approval process, facilities do not have to wait for any decisions from their implementing agencies about whether their recycling is legitimate.

However, the notification aspect of the legitimacy regulations being finalized today adds some limited, but important, oversight to a process that would otherwise be taking place out of sight of the regulating agencies all together, that is, the decision that a recycling process that does not meet factor 4 is still legitimate. The notification gives EPA and the authorized states information about which recycling facilities are producing products from recycled hazardous secondary materials that have elevated levels of hazardous constituents when compared to non-recycled products (or are producing recycled products that have no non-recycled analogue and no widely recognized commodity specifications). This notification facilitates oversight and inspections of the recycling facility concerning the legitimacy of the recycling process, allowing EPA and authorized states to continue to use existing authorities to determine whether the recycling is legitimate.

EPA has chosen this approach because it maintains the self-implementing nature of the regulations, while providing enough information to EPA and the authorized states to gather the necessary information. In these ways, this approach addresses the main concerns raised by the stakeholders in the comments to this rulemaking.

A facility that claims to be operating a recycling process that is legitimate under this provision could be subject to an enforcement action if the Agency determines that the recycling is sham. As always, a facility with questions about the regulated status of its hazardous secondary material can contact its implementing agency for assistance in making a waste determination.

C. Changes From the Proposal

1. Prohibition of Sham Recycling

In today's final rule, EPA is codifying the requirement that all hazardous secondary material recycling must be legitimate. However, instead of amending the text of each recycling exemption and exclusion, we are instead codifying a provision in § 261.2(g) that states that any hazardous secondary material found to be sham recycled is discarded and thus, a solid waste. This more clearly reflects our intent and our long-standing policy that only those facilities truly recycling should be eligible for an exclusion based on recycling the hazardous secondary materials. We did not intend to cause facilities that are legitimately recycling to revisit their practices or for state agencies to revisit past legitimacy determinations. However, we do want to make clear that sham recycling is not real recycling and thus, any hazardous secondary material being sham recycled is a solid and potentially a hazardous waste. By making a clear statement in the definition of solid waste, the Agency is placing the appropriate emphasis on this issue, that is, that sham recycling is discard.

2. Documentation

When the Agency codified the legitimacy standard in the 2008 DSW final rule, we did not require specific documentation regarding the legitimacy determination, although the regulatory language stated that persons claiming to be excluded from hazardous waste regulation because they are engaged in reclamation must be able to demonstrate that the recycling is legitimate. In the 2011 DSW proposal, we proposed to require that persons who perform recycling include documentation in their paperwork to explain how their hazardous secondary materials are legitimately recycled.

After reviewing the public comments, we have decided that, as a general matter, documentation of legitimacy is not necessary for most hazardous secondary materials recycling. Instead, we will continue to rely on the current provision in § 261.2(f) that requires respondents to demonstrate that the material is not a waste. Section 261.2(f) requires persons claiming that materials are not solid waste or are conditionally exempt from RCRA Subtitle C regulation to provide appropriate documentation of these claims.

However, we are finalizing two exceptions to the general case where documentation of legitimate recycling is not required. The first is that we are finalizing a requirement for facilities reclaiming hazardous secondary materials under the control of the generator, that is, any facility claiming the exclusion at § 261.4(a)(23), to document the legitimacy of the reclamation process. We have determined that it is important for those facilities to document the legitimacy of their recycling process, given the wide variety of hazardous secondary materials and industrial processes that can claim to be operating under the generator-controlled exclusion with relatively few conditions. After implementing the DSW exclusions in several states since its promulgation in October 2008, we have determined that documentation of legitimacy for this particular exclusion is important in ensuring compliance and will make oversight and enforcement more effective. We are therefore requiring that persons who perform reclamation under the control of the generator to include documentation and explain how their hazardous secondary materials are legitimately reclaimed. We expect this documentation to be a narrative description, which could include photographs or other illustrations or process diagrams of how the reclamation of their hazardous

[33] EPA will revise EPA form 8700–12 to incorporate this notification. In the interim, persons may notify using the "Comments" box on the form.

secondary materials meets the legitimacy factors. Reclaimers of hazardous secondary materials will need to maintain this documentation on-site where the reclamation occurs for the duration of the reclamation operations and for three years after the reclamation operations cease. Written documentation will provide an easily available explanation of the facility's rationale for the legitimacy of its process that is available to the implementing agency on regular inspections or as part of compliance assistance.

The other exception where documentation is required is for those facilities whose product made from recycled hazardous secondary materials does not meet factor 4, but would still be considered a legitimately recycled product. Those facilities would need to maintain documentation as to why, in fact, the recycling is still legitimate as it relates to factor 4. For a more detailed explanation of that documentation requirement, refer to section VIII.B.6 above.

3. Factor 4

In the 2011 DSW proposal, EPA's proposed factor 4 contained two main requirements to ensure that hazardous constituents were not "along for the ride" and being discarded in a final product under the guise of recycling. The proposed regulation stated that the product of the recycling process would have to have concentrations of hazardous constituents that are at levels comparable to or lower than those found in analogous products. In addition, the proposal stated that the product of the recycling process could not exhibit a hazardous characteristic that analogous products did not also exhibit.[34] EPA recognized that there would be some legitimate recycling operations that may not meet this requirement, and so proposed to address this situation through a petition process in which a facility that did not meet factor 4 could petition its implementing agency, whether that be a state environmental agency or an EPA Region, and get agreement from that agency that its operations were legitimate.

Although this approach would provide a way for operations that are legitimate, but don't meet factor 4 to still operate, commenters from both the industrial sector, as well as from state regulatory agencies, commented that this approach was not ideal. Commenters from industry suggested that there would be more petitioners under this provision than EPA had anticipated because certain large sectors of industry would likely be uncertain about whether their recycling would meet the factor as written and would be compelled to petition their implementing agencies. Commenters provided some real world examples to illustrate their concerns with factor 4 that EPA closely examined when redrafting the language for this provision.

Commenters also were concerned that the petition process itself might take too long if the implementing agencies receive petitions from many facilities and that the response time might end up being very lengthy. Several of the states that could be responsible for replying to these petitions also commented that they were not in favor of a petition process because the resources that would be required to respond to the petitions are not available in the state program offices.

EPA made several changes to factor 4 in response to these comments and has determined that factor 4, as we are finalizing it today, better addresses the wide variety of industrial recycling processes. There are four main changes to the final language of factor 4 as compared to the 2011 DSW proposed regulation.

First, instead of the two basic proposed provisions that depend on a comparison with an analogous product, factor 4 as finalized acknowledges that sometimes there is no analogous product available for a comparison. Subparagraph (i) covers how a recycling process meets the factor if there is an analogous product whereas subparagraph (ii), which was not part of the proposed regulatory language, covers how a product with no analogous product can meet factor 4.

Secondly, the finalized regulatory language has provisions for how widely-recognized industry standards and specifications can be used to meet factor 4. EPA took comment on the usefulness of specifications for evaluating hazardous constituents in the product and has determined that as long as the standards and specifications being relied upon are widely recognized industry wide standards and specifications for a product (and in the case of (i), that they address the hazardous constituents in question), meeting them would be appropriate to show that hazardous constituents are not being discarded under the guise of recycling. This should make determinations regarding factor 4 simpler for a wide range of industries producing common industrial commodities. EPA did not intend to interfere with long-standing legitimate recycling in these industries and this addition to the regulatory language should clarify for those industries that when they are meeting the extensive commodity standards and specifications for their products, they meet factor 4 as well.

The third change is the addition under § 260.43(a)(4)(ii)(B) of language that states that hazardous secondary materials that are being recycled by being returned to the original process(es) from which they were generated meet factor 4. In closed loop recycling and in several other kinds of recycling, such as in mining and mineral processing, hazardous secondary materials generated from an industrial process are regularly returned to that same process to remove more of the valuable constituent from them. The hazardous constituents in the secondary material are no different than what is already in the process and returning them makes the entire manufacturing process more efficient since it requires fewer raw materials.

EPA has stated in the past that it would not consider this practice a concern from the perspective of factor 4 because the comparison in question is supposed to be between final products, but it was clear from the comments to the proposal that this question was still a concern to many facilities. When adding subparagraph (ii) for situations where there is no analogous product for a comparison, EPA also added this language to make it clear that processes in which the hazardous secondary materials are returned to the original process do meet factor 4.

Collectively, these changes to the language of factor 4 are an improvement from EPA's 2011 proposal as the changes clarify when factor 4 is met for a wide variety of industrial processes. Furthermore, a generator can use its knowledge of the materials it uses and of the recycling process to make legitimacy determinations under factor 4. Thus, testing would be rarely required for a recycler to meet this factor because it would only be necessary when the product of the recycling does not meet widely-recognized specifications, is not an in-process material, and when the recycler does not sufficiently know what is in their final product to make a determination using generator knowledge.

Finally, EPA has changed proposed factor 4 to require any facility that does not meet the technical provisions of this

[34] The language in the proposed regulatory text for this paragraph mistakenly included an "or" instead of an "and" between these two requirements of factor 4 although the preamble discussion on page 76 FR 44124, column 2, correctly used "and." Several commenters pointed this error out to the Agency in their comments.

factor and yet is still legitimately recycling to document, certify, and provide notice that even though the recycling process does not meet the technical provisions of this factor, the recycling process is nevertheless legitimate. This requirement replaces the proposed petition process. The comments EPA received on the petition process expressed concern that the process would be expensive for facilities who wanted to take advantage of it and would place too much of a burden on implementing agencies. Comments also argued that EPA's estimate of the number of facilities that would be likely to submit petitions was overly conservative. Although the changes to factor 4 described here will address the concerns of many of the facilities who stated that they would have to submit a petition, the Agency also determined that a self-implementing process to allow those recyclers to address factor 4 would be more in keeping with the existing policy on legitimacy.

The certification process requires that a facility go through the same thought process and assessment about hazardous constituents that are incorporated into the final product that would have been required by the petition process (and that is currently consistent with the Agency's legitimacy policy in the Lowrance Memo). However, instead of having to submit a petition to an implementing agency when the process is legitimate despite not meeting the technical provisions of factor 4, the facility can document and certify the assessment that it has done and submit a notification on the Site ID form. This is a minimal burden, particularly as the Site ID form is a form that many of these facilities are already submitting to EPA for other reasons. In addition, these facilities are not left waiting for a response from an agency as they may have had to under the proposed petition procedure.

All in all, these changes to factor 4 will make this part of the legitimacy requirement consistent with the current policy in the Lowrance Memo and **Federal Register** preamble discussions and allow for all four legitimacy factors to be requirements that must be met without adversely affecting existing legitimate recycling.

IX. Revisions to Solid Waste Variances and Non-Waste Determinations

The Agency is finalizing today several modifications to the regulation of solid waste variances and non-waste determinations at 40 CFR 260.31(c), 40 CFR 260.33, and 40 CFR 260.34 to ensure protection of human health and the environment and foster greater consistency on the part of implementing agencies. These final revisions include:

(1) Revise 40 CFR 260.33(c) to require facilities to send a notice to the Administrator (or the State Director, if the state is authorized) in the event of a change in circumstances that affects how a hazardous secondary material meets the relevant criteria upon which a variance or non-waste determination has been based. The Administrator may issue a determination that the hazardous secondary material continues to meet the relevant criteria of the variance or non-waste determination or may require the facility to re-apply for the variance or non-waste determination;

(2) Include a provision at 40 CFR 260.33(d) that variances and non-waste determinations shall be effective for a fixed term not to exceed ten years. No later than six months prior to the end of this term, facilities must re-apply if they want to maintain the variance or non-waste determination;

(3) Include a provision at 40 CFR 260.33(e) stating that facilities receiving a variance or non-waste determination must provide notification as required by 40 CFR 260.42;

(4) Revise the criteria for the partial reclamation variance in 40 CFR 260.31(c) to clarify when the variance applies and to require, among other things, that the all criteria for this variance must met; and

(5) Revise the criteria for the non-waste determination in 40 CFR 260.34 to require that petitioners explain or demonstrate why their hazardous secondary materials cannot meet, or should not have to meet, the existing DSW exclusions under 40 CFR 261.2 or 261.4.

A discussion of the public comments on the 2011 DSW proposal and Agency responses can be found in section XVIII of this preamble and the full response to comment document is in the docket for the rulemaking.

A. Revisions to Procedures for Variances and Non-Waste Determinations in 40 CFR 260.33

Under the current regulatory framework, 40 CFR 260.30 provides the Administrator with the authority to grant a variance from the definition of solid waste or a non-waste determination on a case-by-case basis if the hazardous secondary materials are recycled in a particular manner. The practical effect of both the solid waste variances and the non-waste determinations is the same; once a petition is granted by EPA, or the authorized state, the hazardous secondary material is not regulated as a solid or hazardous waste. The procedures for these variances and non-waste determinations are found in 40 CFR 260.33.

In today's rule, EPA is finalizing three changes to 40 CFR 260.33. First, EPA is requiring in 40 CFR 260.33(c) that facilities send a notice to the Administrator (or the State Director, if the state is authorized) in the event of a change in circumstances that affect how a hazardous secondary material meets the relevant criteria upon which a variance or non-waste determination has been based. Second, EPA is establishing in 40 CFR 260.33(d) an effective term limit of ten years for variances and non-waste determinations unless the petitioner re-applies to the Agency to have the variance or non-waste determination renewed. Third, EPA is requiring in 40 CFR 260.33(e) that facilities re-notify every two years under 40 CFR 260.42.

1. Requirement That an Applicant Send Notice in the Event the Material No Longer Meets the Relevant Criteria

EPA is modifying 40 CFR 260.33(c) to require, in the event of a change in circumstances that affects how a hazardous secondary material meets the relevant criteria contained in 40 CFR 260.31, 260.32, or 260.34 upon which a variance or non-waste determination has been based, the applicant must send a description of the change in circumstances to the Administrator (or the State Director, if the state is authorized). The Administrator then may issue a determination that the hazardous secondary material continues to meet the relevant criteria of the variance or non-waste determination or may require the facility to re-apply for the variance or non-waste determination.

The requirement that the hazardous secondary materials must continue to meet the relevant criteria of a solid waste variance or non-waste determination is inherent in the regulations. Failure to meet the criteria could indicate that the hazardous secondary materials are discarded and a solid waste and would trigger the need to re-examine the circumstances of the recycling. EPA is codifying this change to 40 CFR 260.33(c) to ensure that if there are changes that may impact how the hazardous secondary material meets the relevant criteria, that such changes be considered by the regulatory authority to ensure that those criteria continue to be met. This requirement will ensure clarity and consistency by providing an administrative procedure for reconsidering a variance or non-waste determination in the event that

the hazardous secondary material no longer meets the relative criteria.

In some cases, a full re-application for a variance or non-waste determination may not be necessary. Under today's final rule, in the event of a change, the facility must send a description of the change in circumstances to the regulatory authority and it is the regulatory authority that will determine whether the facility must re-apply for a variance or non-waste determination. This change in procedure allows the regulatory authority to avoid spending unnecessary resources re-reviewing petitions where the change in circumstances is found to be of no consequence to the original variance or non-waste determination the regulatory authority has granted.

2. Term Limit on Variances and Non-Waste Determinations

EPA is adding a provision to 40 CFR 260.33(d) that solid waste variances and non-waste determinations shall be effective for a fixed term not to exceed ten years. No later than six months prior to the end of this term, facilities must re-apply for a variance or non-waste determination if they want to maintain the variance or non-waste determination. A facility may continue to operate under an expired variance or non-waste determination if they have submitted an application for a new variance or non-waste determination six months prior to the end of the term limit and have not yet received a final decision on that application from their regulatory authority.

Variances and non-waste determinations are granted based on the case-by-case circumstances of a particular hazardous secondary material being recycled. Many of the variance and non-waste determination criteria specifically consider factors such as, the manner in which the hazardous secondary material is recycled, the market factors of the recycling process, the value of the hazardous secondary material, and contractual arrangements. However, these factors do not remain static and, instead, tend to change and evolve over time. It is therefore prudent that regulatory authorities periodically review these case-by-case situations to ensure that the hazardous secondary material continues to meet the criteria of the variance or non-waste determination.

Variances and non-waste determinations are granted for a fixed term not to exceed ten years from the date the facility is granted a variance or non-waste determination. If, for example, due to a change in circumstances, a facility is required to re-apply for a variance or non-waste determination within the 10-year time limit of its initial petition, then an automatic re-application would not be initiated until ten years after its second variance or non-waste determination is granted, unless otherwise specified by the regulatory authority. Additionally, regulators may stipulate time limits of less than 10 years, if warranted.

3. Re-Notification Requirement

EPA is adding a provision to 40 CFR 260.33(e) to require facilities receiving variances or non-waste determinations to send a notification of this activity prior to operating under the regulatory provision and by March 1 of each even-numbered year thereafter to the Regional Administrator (or State Director, if the state is authorized) using EPA Form 8700–12 in compliance with 40 CFR 260.42. Additionally, these facilities must notify within 30 days of stopping management of hazardous secondary materials under the variance or non-waste determination.

The intent of the notification is to enable variances and non-waste determinations to be tracked nationally and over time, which facilitates state-to-state consistency in determinations. Additionally, notifications enable effective oversight of facilities receiving variances and non-waste determinations because it provides regulatory authorities with a mechanism for receiving regularly updated information (such as information regarding quantities of hazardous secondary materials managed under the determination). Additionally, this information can be used to identify facilities which may have undergone changes to their reclamation process significant enough to trigger a review of the determination under 40 CFR 260.33(c).

EPA finds that the notification requirement under 40 CFR 260.42 has worked well in enabling regulatory authorities to monitor compliance of facilities operating under the 2008 DSW final rule. Regulatory authorities receive information on the name and location of the facilities operating under the exclusion and the types and quantities of hazardous secondary materials the facility is managing, which allows the regulatory authority to prioritize inspections, as well as create a list of facilities that would benefit from training and compliance assistance on the rule. Additionally, notification has allowed regulatory authorities to identify problems so as to intervene early to prevent potential mismanagement. EPA is convinced of the value of the notification provision in ensuring proper implementation of its rules. Therefore, notification for variances and non-waste determinations will increase transparency and oversight of facilities receiving a variance or non-waste determination.

B. Revisions to Partial Reclamation Variance in 40 CFR 260.30(c)

The "partial reclamation" variance in 40 CFR 260.30(c) applies to hazardous secondary materials that have been reclaimed, but must be reclaimed further before the materials are completely recovered (*i.e.,* "partial reclamation"). In turn, 40 CFR 260.31(c) provides the specific standards that a partially-reclaimed material must meet in order to be eligible for a variance from classification from solid waste.

In this final rule, EPA is revising the partial reclamation variance provision of 40 CFR 260.31(c) to clarify when partially-reclaimed materials are not solid waste because they are commodity-like. The objectives of the revisions are to clarify the regulatory language, foster consistent application of the variance criteria, and emphasize that the variance should be granted only when partial reclamation has produced a commodity-like material. EPA's modifications to 40 CFR 260.31(c) include: (1) Revising the introductory text to clarify when the variance applies; (2) revising the introductory text to require that all of the decision criteria must be met; (3) revising the language of all of the decision criteria to provide greater clarity; and (4) eliminating the sixth criterion, "other relevant factors."

1. Purpose of Revisions to Partial Reclamation Variance

When the partial reclamation variance was promulgated in 1985, EPA's original intent was to provide a mechanism for determining if a hazardous secondary material had undergone sufficient reclamation (a type of processing) to produce a material that was more like a commodity than a solid waste. The variance would be applicable if the material was commodity-like, even though some further reclamation was required before the material became a commercial product. EPA intended that the variance would be applied at the point that the commodity-like material was produced. After that point, the material would be managed as a commodity rather than as a solid and hazardous waste. Prior to the point that partial reclamation produced a commodity-like material, the material would have to be managed as a hazardous waste.

However, EPA has become aware that authorized states across the country have applied the variance provision differently in similar circumstances. These differences may be due to: (1) The wide discretion allowed to the regulatory authority to weigh any or all of the decision criteria in any way it sees fit; (2) lack of clarity in the decision criteria themselves; or (3) the general sixth criterion "other relevant factors."

As a result, variances have been granted under 40 CFR 260.31(c) for some materials that are not commodity-like. Therefore, EPA is finalizing revisions to the variance criteria to address the inconsistency among authorized states, remove ambiguities, and clearly convey the intent of the partial reclamation variance that only partially reclaimed hazardous secondary materials that have produced commodity-like materials are eligible for a variance from classification as solid waste. Consistent and appropriate application of the partial reclamation variance is necessary so that the hazardous waste program provides the level of protection of human health and the environment required by the RCRA statute in all communities in all areas of the country.

An illustration of how the revised variance provision would be applied to a commonly reclaimed hazardous waste example is included in the "Background Document: Providing Context—The Example of F006 Electroplating Sludges," [35] which is included in the docket for this rulemaking. This document includes a detailed description of how the revised variance provision would be used to make determinations about whether a variance would be appropriate for the listed hazardous waste F006 (wastewater treatment sludges from electroplating operations) at various steps in the reclamation process.

2. Revisions to Introductory Text of 40 CFR 260.31(c)

EPA revised the introductory text of 40 CFR 260.31(c) to clarify when a partial reclamation variance is applicable and to identify what factors must be used to make a determination that a partially-reclaimed material is commodity-like. The revised text states:

> The Administrator may grant requests for a variance from classifying as a solid waste those hazardous secondary materials that have been partially reclaimed, but must be reclaimed further before recovery is completed, if the partial reclamation has produced a commodity-like material. A determination that a partially-reclaimed material for which the variance is sought is commodity-like will be based on whether the hazardous secondary material is legitimately recycled as specified in § 260.43 of this part and on whether all of the following decision criteria are satisfied:

As noted above, the revised text replaces the word "reclaimed" with "partially-reclaimed" and clarifies that the variance is applicable at the point that partial reclamation "has produced a commodity-like material." These changes clarify and reflect EPA's intent that the variance applies only after partial reclamation has produced a commodity-like material and does not apply prior to producing a commodity-like material.

To make a determination that a partially-reclaimed material is commodity-like, EPA revised the introductory text to require that such a determination will be based on whether the hazardous secondary material is legitimately recycled and whether all the decision criteria are satisfied.

3. Revisions to Criteria for Partial Reclamation Variance

Each criterion under 40 CFR 260.31(c) has been revised to begin with the word "whether" to require that the regulatory authority must make a yes or no determination as to whether the material meets each criterion. In addition, each criterion has been revised to clarify and incorporate the characteristics of a commodity-like material.

The first criterion in 40 CFR 260.31(c)(1) asks whether the degree of partial reclamation the material has undergone is substantial as demonstrated by using a partial reclamation process other than the process that generated the hazardous waste. By using a partial reclamation process other than the process that generated the hazardous waste, the more likely that the material will be commodity-like. Changes from the original language of the criterion include (1) replacing the general word "processing" with the words "partial reclamation"; and (2) removing from the criterion ambiguity that could lead a regulatory authority to apply the variance after the initial partial reclamation process when a commodity-like material is not produced until completion of further reclamation.

The second criterion in 40 CFR 261.31(c)(2) asks whether the partially-reclaimed material has sufficient economic value that it will be purchased for further reclamation. Changes from the original language of the criteria include: (1) Adding the word "partially-" before the word "reclaimed" to clarify that the criterion applies to the partially-reclaimed material, not the fully-reclaimed material produced later in the process; and (2) revising the wording to reflect the fundamental characteristic that a commodity-like material has sufficient economic value that it will be purchased for further reclamation. EPA notes that the value of a material produced at a later stage of reclamation cannot be used to justify a variance for the partially-reclaimed material produced earlier in the process. In other words, the criterion must be applied to the "partially-reclaimed" material at the specific point in the reclamation process where application of the variance is requested. Evidence to support this criterion may include sales information; demand for the materials; and business contracts, such as contracts specifying quantities of material sold, details of the transaction, and the effective price paid for the partially-reclaimed material by purchasers. The price paid for the partially-reclaimed material should be calculated after subtracting transportation costs and any other goods or services rendered in exchange for the material purchased.

The third criterion in 40 CFR 260.31(c)(3) asks whether the partially-reclaimed material is a viable substitute for a product or intermediate produced from virgin or raw materials and which is used in subsequent production steps. Changes from the original language of the criteria include (1) adding the word "partially-" before the word "reclaimed" to clarify that the criterion applies to the partially-reclaimed material, not the fully-reclaimed material produced later in the process; and (2) replacing the phrase "is like an analogous raw material" with the phrase "is a viable substitute for a product or intermediate produced from virgin or raw materials which is used in subsequent production steps." This revision is intended to demonstrate that a partially-reclaimed, commodity-like material is one that will be used as a viable substitute for a product or intermediate in production. Evidence to support this criterion would include a comparison of the physical and chemical characteristics of the partially-reclaimed material being considered for the variance to those of products or intermediates produced from virgin raw materials.

The fourth criterion in 40 CFR 260.31(c)(4) asks whether there is a market for the partially-reclaimed material as demonstrated by known customer(s) who are further reclaiming the material (*e.g.*, records of sales and/or contracts and evidence of subsequent

[35] Docket ID: EPA–HQ–RCRA–2010–0742–0016.

use, such as bills of lading). Changes from the original language of the criteria include (1) adding the word "partially-" before the word "reclaimed" to clarify that the criterion applies to the partially-reclaimed material, not the fully-reclaimed material produced later in the process; (2) deleting the word "guaranteed" since markets are often unpredictable; (3) deleting the word "end" prior to the word "market" since the partially-reclaimed material could be sold to another reclaimer before it is sold to a final manufacturer or final reclaimer; and (4) adding the phrase, "as demonstrated by known customer(s) who are further reclaiming the material (*e.g.* record of sales and/or contracts, and evidence of subsequent use, such as bills of lading)," to clarify how a facility may demonstrate a market for the partially-reclaimed material. Additionally, this change ensures that the partially-reclaimed material is being shipped for further reclamation rather than being potentially stockpiled by the partial reclaimer. Evidence to support this criterion may include the material's value as an input to a production process; traditional usage of quantities of the partially-reclaimed material; and the likely stability of markets for the material. A market for further reclaimed material produced at a later stage of reclamation cannot be used to justify a variance for a partially-reclaimed material. For example, if a facility requests a variance for an incoming partially-reclaimed hazardous waste, the market that would have to be evaluated is the market for the incoming partially-reclaimed hazardous waste itself, not the final product.

The fifth criterion in 40 CFR 260.31(c)(5) asks whether the partially-reclaimed material is handled to minimize loss. Changes from the original language of the criteria includes adding the word "partially-" before the word "reclaimed" to clarify that the criterion applies to the partially-reclaimed material, not the fully-reclaimed material produced later in the process. Specifically, this criterion requires evaluation of how the partially-reclaimed material is handled before it is further reclaimed. Handling a partially-reclaimed material to minimize loss indicates that the material is commodity-like. Generally, persons handling hazardous secondary materials with little or no economic value do not have the same incentives to minimize loss as persons handling commodities. The management of materials produced at later stages of the reclamation process is not relevant to whether the partially-reclaimed material is eligible for a variance. Evidence to support this criterion may include documentation of facility procedures used to minimize loss (*e.g.,* inspections, training) and storage and management equipment designed to minimize loss.

Finally, in today's final rule, EPA is removing the sixth criterion in 40 CFR 260.31(c)(6), which allowed the regulatory authority to consider other relevant factors when deciding whether a partially-reclaimed materials is commodity-like. When the partial reclamation variance was promulgated in 1985, EPA believed that this criterion could help determine whether a material is commodity-like. However, based on experience with the variance provision, EPA has learned that this criterion may have contributed to different determinations of whether the same partially-reclaimed material is commodity-like. Accordingly, EPA has determined that the appropriate and complete set of criteria to consider when determining whether a partially-reclaimed material is commodity-like are criteria (1)–(5).

C. Revisions to Non-Waste Determinations Found in 40 CFR 260.34

In today's final rule, EPA is adding a criterion to non-waste determinations in 40 CFR 260.34 that require facilities applying for a non-waste determination to explain or demonstrate why they cannot meet, or should not have to meet, the existing DSW exclusions under 40 CFR 261.2 or 261.4.[36] Commenters to the 2009 DSW public meeting notice have argued that the non-waste determinations may be burdensome to states, and thus, requiring applicants to formally consider and explain why they are not eligible for an existing DSW exclusion will reduce the burden on states in two ways: (1) It requires facilities to consider existing exclusions and standards first, before pursuing a non-waste determination, which can, in turn, lead to facilities discovering that their intended recycling fits under an existing exclusion and therefore a non-waste determination petition is not needed; and (2) this criterion informs the regulatory authority why a facility believes it cannot meet an existing exclusion, which is likely to be the regulatory authority's first question before evaluating a non-waste determination petition. Petitioners also would be allowed to seek a non-waste determination if they could demonstrate that they should not have to meet the conditions of another exclusion, but rather should be allowed to operate under a non-waste determination with fewer or different conditions. However, if EPA or the authorized state determines that an applicant may, in fact, use an existing solid waste exclusion under 40 CFR 261.2 or 261.4, this may be grounds for denying a non-waste determination on the basis that regulatory relief has already been provided.

[36] The two types of non-waste determinations are (1) a determination for hazardous secondary materials reclaimed in a continuous industrial process and (2) a determination for hazardous secondary materials that are indistinguishable in all relevant aspects from a product or intermediate.

X. Effect on Facilities Currently Operating Under Solid Waste Exclusions

A. Effect on Pre-2008 Solid Waste Exclusions

The final rule does not supersede any of the pre-2008 solid waste exclusions or other prior solid waste determinations or variances, including determinations made in letters of interpretation and inspection reports. If a hazardous secondary material has been determined not to be a solid waste for whatever reason, such a determination remains in effect, unless the authorized state decides to revisit the regulatory determination under their current authority. In addition, if a hazardous secondary material has been excluded from hazardous waste regulations—for example, under the Bevill exclusion in 40 CFR 261.4(b)(7)—the regulatory status of that material will not be affected by today's rule.

However, there are two revisions to the regulations that, while they do not directly affect the regulatory status of excluded hazardous secondary materials, may impact facilities' responsibilities under an existing exclusion. These two revisions are (1) a new recordkeeping requirement for speculative accumulation; and (2) a documentation, certification, and notification requirement for recycling processes which are legitimate despite having levels of hazardous constituents that are not comparable to or unable to be compared to a legitimate product. These requirements must be met by the effective date of the rule, which is July 13, 2015.

1. Revised Speculative Accumulation Requirement

Under the revised speculative accumulation requirement in § 261.1(c)(8), all persons subject to the speculative accumulation requirements (for example, persons reclaiming characteristic by-products and sludges under 40 CFR 261.2(c)(3) and persons reclaiming hazardous secondary

materials under a definition of solid waste exclusion under 40 CFR 261.4(a), such as the sulfuric acid exclusion at § 261.4(a)(7) or the generator-controlled exclusion at § 261.4(a)(23)) must label their storage unit(s) by indicating the first date that the material began to be accumulated. If placing a label on the storage unit is not practicable, the accumulation period must be documented through an inventory log or other appropriate method.

2. Prohibition of Sham Recycling and Definition of Legitimate Recycling

The codification of the prohibition of sham recycling (§ 261.2(g)), and the definition of legitimate recycling (§ 260.43) being finalized today will not impose any new requirements on persons recycling under the pre-2008 recycling exclusions, except in the case where the product of the recycling process (1) has levels of hazardous constituents that are not comparable to or lower than those in a legitimate product (*i.e.,* are significantly elevated) or (2) is unable to be compared to a legitimate product and the product of the recycling process is not a widely recognized commodity (*e.g.,* scrap metal) and is not returned to the original production process (*e.g.,* closed loop recycling).

In this case, the person performing the recycling must conduct the necessary analysis and prepare documentation stating why the recycling is still legitimate. Persons may consider exposure from toxics in the product, the bioavailability of the toxics in the product, and other relevant considerations which show that the recycled product does not contain levels of hazardous constituents that pose a significant human health or environmental risk. The documentation must include a certification statement that the recycling is legitimate and must be maintained on-site. The person performing the recycling must also notify his Regional Administrator (or State Director, if the state is authorized) of this activity using EPA Form 8700–12.

B. Effect on Facilities Operating Under the 2008 Solid Waste Exclusions

1. Facilities Operating Under Generator-Controlled Exclusion (40 CFR 261.2(a)(2)(ii) or 261.4(a)(23)) [37]

Because today's rule includes more stringent standards for the generator-controlled exclusion at 40 CFR 261.4(a)(23), facilities that are currently managing hazardous secondary materials under these provisions must ensure they are complying with the more stringent standards by the effective date of the rule, which is July 13, 2015 (or in an authorized state, by the effective date in that state). The new provisions include (1) complying with the regulatory definition of "contained" found in 40 CFR 260.10; (2) maintaining shipping records for reclamation under same-company and toll manufacturing agreements; (3) (for the person performing the recycling) documenting how the recycling meets all four factors of the legitimacy definition in 40 CFR 260.43,[38] and (4) meeting the new emergency preparedness and response conditions.

Under the new regulatory definition of contained, a hazardous secondary material is contained if it is managed in a unit (which can include a land-based unit such as a pile) that meets the following criteria: (1) The unit is in good condition, with no leaks or other continuing or intermittent unpermitted releases of the hazardous secondary materials to the environment, and is designed, as appropriate for the hazardous secondary material, to prevent releases of the hazardous secondary material to the environment. Unpermitted releases are releases that are not covered by a permit (such as a permit to discharge to water or air) and may include, but are not limited to, releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures; (2) the unit is properly labeled or otherwise has a system (such as a log) to immediately identify the hazardous secondary materials in the unit; and (3) the unit holds hazardous secondary materials that are compatible with other hazardous secondary materials placed in the unit and is compatible with the materials used to construct the unit and addresses any potential risks of fires or explosions. Hazardous secondary materials in units that meet the applicable requirements of 40 CFR part 264 or 265 (*e.g.,* tanks and containers) are presumptively contained.

Under the new requirements to document shipments for reclamation performed under the same-company and toll manufacturing provisions of the generator-controlled exclusion at 40 CFR 261.4(a)(23), generating and receiving facilities must maintain records of hazardous secondary materials sent or received under this exclusion at their facilities for no less than three years. The records must contain the name of the transporter, the date of the shipment, and the type and quantity of the hazardous secondary material shipped or received. The requirements may be satisfied by routine business records (*e.g.,* financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations).

Persons performing the recycling of hazardous secondary materials under the generator-controlled exclusion of 40 CFR 261.4(a)(23) must also maintain documentation of their legitimacy determination on-site. Documentation must be a written description of how the recycling meets all four factors in 40 CFR 260.43(a). Documentation must be maintained for three years after the recycling operation has ceased.

The Agency is not requiring any particular format for the documentation of legitimacy; however, we expect that the recycler would have written documentation describing the recycling process and how it meets each legitimacy factor. For example:

- Useful contribution legitimacy factor—the recycler would document how the hazardous secondary material(s) provides a useful contribution to the recycling process or to the product or intermediate of the recycling process. The regulatory text for this factor provides five ways in which a useful contribution can be achieved. The recycler would need to document how the hazardous secondary material(s) add value and/or are useful to the recycling process in one or more of these ways: (i) Contributing valuable ingredients to a product or intermediate; (ii) replacing a catalyst or carrier in the recycling process; (iii) providing a valuable constituent to be recovered; (iv) being regenerated; or (v) being used as an effective substitute for a commercial product. For example, if the hazardous secondary material is a source of a valuable constituent, such as a precious metal, the document would explain the specific precious metal(s) recovered and their value to the process.
- Valuable product or intermediate legitimacy factor—the recycler would explain how the product or intermediate made from hazardous secondary material is valuable, either in a monetary sense or through its intrinsic value. If the product made from hazardous secondary material is sold, the

[37] Today's rule consolidates the 2008 generator-controlled exclusion at 40 CFR 261.2(a)(2)(ii) and 40 CFR 261.4(a)(23) into one exclusion at 40 CFR 261.4(a)(23).

[38] As part of the requirement of meeting 40 CFR 260.43, if the product of recycling contains levels of hazardous constituents that are not comparable to or are unable to be compared to a legitimate product, the person performing the recycling must document, certify and notify the appropriate Regional Administrator of why the recycling is still legitimate. Where there is no analogous product made from virgin materials, the product of the recycling process is comparable to a legitimate product or intermediate if the product of the recycling process is a commodity that meets widely recognized commodity standards and specifications, or the hazardous secondary materials being recycled are returned to the original process or processes from which they were generated to be reused.

documentation of sale could be proof of the value of the material to a third party. Such documentation could be in the form of a selection of receipts or contracts and agreements that establish the terms of the sale or transaction. A recycler that has not yet arranged for the sale also could demonstrate value by showing that the product or intermediate can replace another product or intermediate that is available in the marketplace. Demonstrating intrinsic value may be less straightforward than demonstrating the value of products that are sold in the marketplace, but could involve an explanation of the industrial process that shows how the product of the recycling process or intermediate replaces an alternative product that would otherwise have to be purchased.

• Managed as a valuable commodity legitimacy factor—the recycler would include a description of how the hazardous secondary material is managed and explain how this management is similar or provides equivalent protection to the management of an analogous raw material. That is, the documentation would describe how the hazardous secondary material is stored and handled prior to being inserted into the recycling process. Where there is no analogous raw material, the recycler would explain how the management of the hazardous secondary material ensures that the material is contained as discussed in 40 CFR 260.10.

Comparison of comparability of the product of recycling to a legitimate product factor—the recycler would include any data or information that shows that (1) the levels of hazardous constituents in the product are comparable to or lower than those found in analogous products, or are comparable to levels that meet widely-recognized commodity standards (in the case where the commodity standards include levels that specifically address those hazardous constituents), or (2) if there is no analogous product, that the product meets widely recognized commodity standards, or that hazardous secondary materials being recycled are returned to the original process or processes from which they were generated to be reused. If the product of the recycling process has levels of hazardous constituents that are not comparable to or unable to be compared to a legitimate product, but the recycling is still legitimate, the person performing the recycling must conduct the necessary analysis and prepare documentation stating why the recycling is, in fact, still legitimate. Persons can consider exposure from toxics in the product, the bioavailability of the toxics in the product, and other relevant considerations which show that the recycled product does not contain levels of hazardous constituents that pose a significant human health or environmental risk. The documentation must include a certification statement that the recycling is legitimate and must be maintained on-site. In addition, the person performing the recycling must notify his Regional Administrator (or the State Director, if the state is authorized) of this activity using EPA Form 8700–12.

Finally, under the new standards for emergency preparedness and response found in 40 CFR part 261 subpart M, generators that accumulate less than or equal to 6,000 kg of hazardous secondary material on site must comply with the emergency preparedness and response requirements equivalent to those in part 265 subpart C, which discuss maintaining appropriate emergency equipment on site, having access to alarm systems, maintaining needed aisle space, and making arrangements with local emergency authorities. A generator must also have a designated emergency coordinator who must respond to emergencies and must post certain information next to the telephone in the event of an emergency. For generators that accumulate more than 6,000 kg of hazardous secondary material on site, EPA is requiring that generators comply with requirements equivalent to those in part 265 subparts C and D, which includes all the requirements already discussed above for those accumulating less than or equal to 6,000 kg, as well as requiring a contingency plan and sharing the plan with local emergency responders.

2. Facilities Operating Under Transfer-Based Exclusion (40 CFR 261.4(a)(24) or (25))

Because today's rule replaces the transfer-based exclusion at 40 CFR 261.4(a)(24) and (25) with a verified recycler exclusion, facilities that are currently managing hazardous secondary materials under the transfer-based exclusion at 40 CFR 261.4(a)(24) must meet the terms of the verified recycler exclusion by the effective date of the rule, which is July 13, 2015 (or in an authorized state, by the effective date in that state). That is, facilities operating under the transfer-based exclusion who wish to continue operating under the verified recycler exclusion must send in a new notification form and meet the additional conditions in the verified recycler exclusion, including the emergency preparedness and response condition. In addition, any reclamation facility or intermediate facility that does not have a RCRA permit or is not operating under interim status must stop managing the hazardous secondary material under the transfer-based exclusion until they apply for and receive a variance from either EPA or the authorized state under the verified recycling exclusion. (As of February 2014, there were no facilities without a RCRA Subtitle C permit recycling under the transfer-based exclusion, so EPA does not expect this impact to occur).

Because the verified recycler exclusion is limited to recycling in the United States, facilities exporting hazardous secondary material under 40 CFR 261.4(a)(25) must cease operating under this exclusion by the effective date of the rule. The facility must notify his Regional Administrator (or State Director, if the state is authorized) using EPA Form 8700–12 that they have stopped managing hazardous secondary materials under the exclusion in accordance with 40 CFR 260.42(b). Facilities must submit this notification within 30 days of stopping management of hazardous secondary materials under this exclusion. Note that facilities that manage hazardous secondary materials under both the export exclusion at 40 CFR 261.4(a)(25) and the transfer-based exclusion at 40 CFR 261.4(a)(24) and/or and the generator-controlled exclusion at 40 CFR 261.4(a)(23) would not notify that they have stopped managing hazardous secondary materials, but would instead update their notification to make it clear they are no longer using the export exclusion at 40 CFR 261.4(a)(25).

XI. Effect on Spent Petroleum Catalysts

In the 2008 DSW final rule, EPA deferred the question of whether spent petroleum catalysts should be eligible for the exclusions pending further consideration of the pyrophoric properties of the spent petroleum catalysts (73 FR 64714). EPA noted that the Agency was planning to propose—in a separate rulemaking from the 2008 DSW final rule—an amendment to 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. Spent hydrotreating and hydrorefining catalysts generated in the petroleum refining industry are routinely recycled by regenerating the catalyst so that it may be used again as a catalyst. When regeneration is no longer possible, these spent catalysts are either treated and disposed of as listed hazardous wastes or sent to RCRA-permitted reclamation facilities, where metals, such as vanadium, molybdenum, cobalt, and nickel are reclaimed from the spent catalysts. EPA originally added spent

hydrotreating and hydrorefining catalysts (waste codes K171 and K172) to the list of RCRA hazardous wastes found in 40 CFR 261.31 on the basis of toxicity (*i.e.*, these materials were shown to pose unacceptable risk to human health and the environment when mismanaged) (63 FR 42110, August 6, 1998). In addition, EPA based its decision to list these materials as hazardous due to the fact that these spent catalysts can at times exhibit pyrophoric properties (*i.e.*, can ignite spontaneously in contact with air).

It was largely because of these pyrophoric properties that the spent petroleum catalysts exhibit that EPA deferred the question of whether spent petroleum catalysts should be included in the 2008 DSW final rule exclusions. While spent petroleum catalysts can be a valuable source of recoverable metals, the risk of these hazardous secondary materials spontaneously igniting when in contact with air is not a property that most metal recyclers would be expected to address, and thus, present additional risks that are not presented by other types of metal-bearing hazardous secondary materials and therefore may be most appropriately managed as hazardous waste when recycled.

Under today's final rule, EPA has added a regulatory definition of the "contained" standard as it applied to the generator controlled exclusion (40 CFR 261.4(a)(23)) and to the verified recycler exclusion (40 CFR 261.4(a)(24)). This new definition includes a requirement to address the risk of fires and explosions. This provision addresses the pyrophoric properties of the spent petroleum catalysts (as well as other types of ignitibility or reactivity) for the purposes of the generator-controlled exclusion and the verified recycler exclusion. Therefore, EPA has revised the generator-controlled exclusion to allow spent petroleum catalysts to be eligible for that exclusion, and is also allowing spent petroleum catalysts to be eligible for the verified recycler exclusion.

XII. Effect on CERCLA

A primary purpose of today's final rule is to encourage the safe, beneficial reclamation of hazardous secondary materials. In 1999, Congress enacted the Superfund Recycling Equity Act (SREA), explicitly defining those hazardous substance recycling activities that may be exempted from liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (CERCLA section 127). Today's final rule does not change the universe of recycling activities that could be exempted from CERCLA liability pursuant to CERCLA section 127. Today's final rule only changes the definition of solid waste for purposes of the RCRA Subtitle C requirements. The final rule also does not limit or otherwise affect EPA's ability to pursue potentially responsible persons under section 107 of CERCLA for releases or threatened releases of hazardous substances.

XIII. General Comments on the 2011 Proposed Revisions to the Definition of Solid Waste

EPA received hundreds of comments on the July 2011 DSW proposal, most of which were quite detailed and raised multiple issues. Below is an overview of some of the major comments on general aspects of the proposals and a summary of EPA's responses to those comments. For a complete discussion of all the comments and EPA's responses to those comments, please see *2014 Revisions to the Definition of Solid Waste Final Rule Response to Comment Document* found in the docket for today's rulemaking.

A. EPA's Legal Authority To Regulate Hazardous Waste Recycling

Comments: EPA's Authority

EPA received many comments that asserted that EPA has no authority to regulate legitimate recycling, because commenters believe that hazardous secondary materials sent for recycling are not discarded and therefore, are not solid wastes. The comments state that EPA has misread the intent of Congress, citing previous court cases, noting the "analysis of the statute reveals clear Congressional intent to extend EPA's authority only to materials that are truly discarded, disposed of, thrown away, or abandoned" (*AMC I*, 824 F.2d at 1190). They go on to argue that materials being recycled do not fall into one of these enumerated activities.

Specifically, many of the comments cite the *ABR* decision (which in turn cites earlier court decisions), where the court noted that EPA's authority is "limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away" and that "[s]econdary materials destined for recycling are obviously not of that sort. Rather than throwing them away, the producer saves them, rather than abandoning them, the producer reuses them" (*ABR* 208 F.3d at 1051). The court also noted that "To say that when something is saved it is thrown away is an extraordinary distortion of the English language" (Id. at 1053).

Many commenters took issue with EPA's decision to withdraw the transfer-based exclusion. These comments criticize EPA's rationale that "subsequent activities are more likely to involve discard, given that the generator has relinquished control of the hazardous secondary material" (72 FR 14178). In particular, commenters cited Safe Food and Fertilizer, stating that the D.C. Circuit addressed an argument by the petitioners in the case that "material that is transferred to another firm or industry for subsequent recycling" is discarded and subject to RCRA regulation. 350 F.3d 1263, 1268 (D.C. Cir. 2003). The court said:

> [W]e have never said that RCRA compels the conclusion that material destined for recycling in another industry is necessarily 'discarded.' . . . Although ordinary language seems inconsistent with treating immediate reuse within an industry's ongoing industrial process as a 'discard' . . . the converse is not true. As firms have ample reasons to avoid complete vertical integration . . . firm-to-firm transfers are hardly good indicia of a 'discard' as the term is ordinarily understood. Id.

EPA's Response: EPA's Authority

EPA disagrees with the comments that Congress did not intend to give EPA the authority to regulate hazardous waste recycling. As EPA noted in the July 2011 DSW proposal, the RCRA statute and the legislative history suggest that Congress expected EPA to regulate as solid and hazardous wastes certain materials that are destined for recycling (*see* 76 FR 44097, citing numerous sections of the statute and *U.S. Brewers' Association* v. *EPA*, 600 F. 2d 974 (D.C. Cir. 1979); 48 FR 14502–04, April 3, 1983; and 50 FR 616–618). Moreover, the case law discussed above clearly shows instances where EPA properly regulated the recycling of solid and hazardous wastes.

EPA also disagrees with comments that EPA cannot consider the fact that the generator has relinquished control of the hazardous secondary material (along with other factors that indicate discard) in deciding to withdraw the transfer-based exclusion. EPA's authority to regulate such transfers is clear: As the Court noted in *Safe Food*, "materials destined for future recycling by another industry *may* be considered 'discarded'; the statutory definition does not preclude application of RCRA to such materials if they can reasonably be considered part of the waste disposal problem" (350 F.3d at 1268).

EPA's record for today's rulemaking demonstrates that third-party recycling of hazardous secondary materials has been and continues to be part of the waste disposal problem. As noted in the July 2011 DSW proposal, EPA has already evaluated these hazardous

secondary materials (for example, during a hazardous waste listing determination) and determined them to be solid and hazardous wastes. (76 FR 44109) Therefore, a conditional exclusion must reasonably be expected not to result in the excluded hazardous secondary material being discarded. Of the 250 damage cases evaluated in the 2014 environmental problems study, 229 (or approximately 92%) were from reclamation activities of off-site third-party recyclers, with clear instances of discard resulting in risk to human health and the environment, including cases of large-scale soil and ground water contamination with remediation costs in some instances in the tens of millions of dollars.[39]

In addition, the market forces study in the docket for the 2008 DSW final rule supports the conclusion that the pattern of discard at off-site, third-party reclaimers is a result of inherent differences between commercial recycling and normal manufacturing. As opposed to manufacturing, where the cost of raw materials or intermediates (or inputs) is greater than zero and revenue is generated primarily from the sale of the output, hazardous secondary materials recycling can involve generating revenue primarily from the receipt of the hazardous secondary materials. Recyclers of hazardous secondary materials in this situation may thus respond differently from traditional manufacturers to economic forces and incentives, accumulating more inputs (hazardous secondary materials) than can be processed (reclaimed). In addition, commercial third-party recyclers have less flexibility than in-house recyclers in changing how they manage their hazardous secondary materials (*e.g.,* during price fluctuations, in-house recyclers can more easily switch from recycling to disposal or from recycled inputs to virgin inputs, while commercial third-party recyclers cannot switch to disposal without obtaining a RCRA permit) (73 FR 64674).

B. Supporting Record

Comments: Environmental Problems Study

Many commenters raised issues with EPA's use of the environmental problems study as part of the record for today's rule.[40] Some commenters argued that EPA should not use 1982 as the cut-off year for investigating "relatively recent" damage cases. These commenters said that, given that the first major set of Subtitle C regulations were promulgated in 1980, going back to 1982 unfairly and inappropriately stacks the deck in favor of finding a higher number of damage cases because it took many years for companies to figure out who was subject to the RCRA Subtitle C regulations. Additionally, these commenters noted that the vast majority of damage cases began operation prior to 1982 and thus contamination on these sites was likely the result of historic poor management during a period of little to no oversight. Commenters believed that the early 1990s would be a more appropriate cut-off date than 1982. One of the commenters also argued that the damage cases are not reliable, either from a lack of information, because they reflect outdated and inapplicable management practices, or have been greatly mischaracterized and should not be used to support any of the proposed changes to the DSW rule.

Other commenters argued that the large majority of damage cases identified by EPA were caused by either a lack of knowledge of RCRA, blatant disregard for the law, or unavoidable accidents. These commenters noted that many of the damage cases involved civil or criminal violations, indicating that the problem was non-compliance with the regulations, not from a lack of regulations.

Another commenter disagreed with EPA's negative portrayal of the waste management industry and argued that EPA should have conducted more research to obtain an understanding of the necessary and positive role of the hazardous waste management industry.

EPA's Response: Environmental Problems Study

The Agency maintains that the scope of the environmental problems study is appropriate for the purpose of the DSW rulemaking effort. Specifically, we continue to find that 1982 is an appropriate cut-off year for the damage case study as it best reflects the point where companies became aware of their responsibilities and liabilities for safe management of their hazardous secondary materials intended for recycling.[41] While the CERCLA statute and the initial RCRA hazardous waste regulations became effective in 1980, there was an initial "phase in" period during which industry and other affected entities began to change their practices with regard to hazardous material recycling, and during which federal and state agencies were developing guidelines and procedures for implementing these new authorities. Thus, we deliberately did not include a number of recycling damage cases that occurred during the early 1980s that appeared to have been caused by companies and individuals who were not cognizant of their new responsibilities and potential liabilities under RCRA and CERCLA.

As to the issue that there are facilities in the report that began operations prior to 1982, we agree that the facilities themselves may have begun operating earlier than the timeframe. However, the methodology for the analysis only includes facilities where the recycling operations occurred after 1982, and the environmental damages associated with those operations occurred after 1982. As a result, more than 600 damage cases were removed from consideration, leaving only those cases that EPA was confident have a clear link between post-1982 recycling practices and environmental damage.

Of the damage cases that met our criteria, we agree that for certain types of damage, such as groundwater or soil contamination, determining when exactly the damage occurred and which property owner caused the damage is difficult. However, in general, the damage cases include multiple types of damage and certain damage, such as abandonment of materials or observed violations of proper storage and containment, can be easily attributed to current facility owners and to post-1982 activities. For example, Alco Pacific, a lead recycling facility may have started operations in 1954, but it was 1990 when the company abandoned 98 drums and left over 1,300 cubic yards of lead-contaminated rubber debris and sand with no containment to prevent dispersal from wind or rainwater. Additionally, it was 1989 when Myers Drum, a drum reconditioning facility, was found to be storing 95% of their 20,000 drums on their side and that spillage, sump overflows, and structural failures were observed. In 1986, Continental Steel, which manufactured wire and rod products from scrap metal, abandoned their facility leaving 220 drums of product material and 50 containers of lead-cadmium batteries on-site. These damages occurred well after RCRA and CERCLA became effective.

Regarding the lack of information in some of its damage cases, as EPA stated in its 2007 environmental problem

[39] U.S. EPA, *An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials* (Updated) December 2014.

[40] *An Assessment of Environmental Problems Associated With Recycling of Hazardous Secondary Materials* (EPA–HQ–RCRA–2002–0031–0355).

[41] We would note, however, that even if EPA changed the date to the 1990's, EPA still identified dozens of damage cases, and thus, changing the cut-off date, as some commenters suggest, would not impact the study's overall findings.

study, many of the cases that were investigated were well documented. This was the case, for example, for many of the Superfund National Priority List (NPL) sites. However, in many other cases, it was not possible given the limitations of the study to document all facts. Often, there was considerable technical information as to the nature and extent of the contamination at the site, but relatively little information regarding the activities and circumstances that originally caused it. For some of the sites, we were able to collect only very basic information. However, for each site that was identified in the environmental problems study, we had sufficient information to determine that the damage resulted from recycling operations. Thus, we continue to maintain that the environmental problems study is appropriate to use in the development of the final rule.

EPA also disagrees with the commenter who argued that the environmental problems study only demonstrates non-compliance of existing regulations and therefore does not justify the promulgation of tighter requirements under today's final rule. On the contrary, the frequency of the damage cases, including violations of regulations demonstrates the need for greater, not less, oversight.

Furthermore, as part of a separate analysis, EPA has considered whether recycling of hazardous secondary materials under the 2008 DSW final rule could result in increased risk to human health and the environment and determined it is a complex issue because of the interactions between how the regulations are written and how they are implemented. Under the 2008 DSW final rule, EPA presumed that the conditions of the rule would prevent any increase in risk. However, what the 2008 DSW analysis failed to take into account was whether the conditions of the rule would operate as effectively in the real world as the more detailed requirements of the RCRA hazardous waste regulations.

A more detailed comparative analysis of the regulatory requirements under the 2008 DSW final rule with the hazardous waste regulations reveals potentially significant gaps in environmental protection under the 2008 DSW final rule. Examples of these gaps include the absence of measures to ensure compliance, incentives to accumulate larger volumes of hazardous secondary materials, the potential for increased releases, such as during storage and transportation of the hazardous secondary materials, the lack of prescriptive standards for storage and containment, potential issues associated with the interstate transport of hazardous secondary materials for recycling, and reduction in access to information and the opportunity for public participation. RCRA is a preventative statute and by design seeks to prevent damage before it occurs; relying solely on enforcement without addressing the root causes of the damage could needlessly increase the frequency, severity, and cost of damage cases. Therefore, EPA has chosen to finalize the changes to the 2008 DSW final rule being promulgated today.

Finally, EPA disagrees with comments stating we have not considered the positive role of the hazardous waste management industry. In development of the DSW rulemakings, the Agency specifically conducted a study of successful recycling that examined how responsible generators and recyclers of hazardous secondary materials ensures that recycling is done in an environmentally safe manner.[42] However, as EPA noted in the 2008 DSW final rule, the successful recycling study indicates that many responsible generators examine the recycler's technical capabilities, business viability, environmental track record, and other relevant questions before sending hazardous secondary materials for recycling. Currently, these recycler audits, which can be thought of as a form of environmental "due diligence," are in essence a precaution to minimize the prospect of incurring CERCLA liability in the event that the recycling, or lack thereof, results in the release of material to the environment. However, the fact that these companies are willing to incur the expense of auditing recyclers as a business practice is of itself a marketplace affirmation that sending hazardous secondary materials to other companies for recycling involves some degree of risk. (73 FR 64683)

Comments: Correlation of Recycling Damage Cases With Regulatory Exclusions, Exemptions or Alternative Standards

Although at least one commenter supported the analysis titled "Correlation of Recycling Damage Cases with Regulatory Exclusions, Exemptions, or Alternative Standards,"[43] which is included in the docket for this rulemaking. However, most commenters argued that this analysis was flawed and that EPA should gather information in a more responsible manner, such as with an information collection request (ICR).

Many commenters pointed out that EPA only identified seven exclusions that were "likely" correlated to some damage cases, yet EPA in its 2011 DSW proposal considered adding requirements to 32 exclusions. These commenters argued that this record was insufficient for justifying additional conditions.

Some commenters also took issue with how EPA assigned regulatory exclusions to certain damage cases. For example, a few commenters said that none of the five damage cases correlated to precious metals involved recycling of in-process secondary materials as part of precious metals mining and primary mineral processing, but rather involved off-site entities that were attempting to recover precious metals from photographic film, circuit boards, and other secondary materials generated by industry.

One commenter said that EPA identifies 35 cases that allegedly involve spent batteries; however, two of these involve non-lead batteries and thus are irrelevant and a third involves printed circuit boards. This commenter goes on to say that, of the remaining 32 lead-acid battery-related facilities for which EPA has identified known dates of operation, none began business operations after the 1982 and 1985 adoption of the RCRA regulations that control lead-acid battery collection and recycling. This commenter believed that the primary contamination at these sites almost certainly pre-dated RCRA and thus EPA cannot use these cases to support changes to 40 CFR 266.80. Another commenter said that none of the environmental damage associated with 52 damage cases could be shown to be the result of companies "likely" operating under the 261.4(a)(13) scrap metal exclusion and/or the 261.6(a)(3)(ii) scrap metal recycling exemption.

A few commenters argued that EPA has not compared the number of damage cases to the total number of recyclers and thus we do not know what percentage of all facilities the damage cases represent. Another commenter noted that the 132 damage cases that EPA correlated to the pre-2008 recycling exclusions makes up only 2.5% of the 5,321 facilities that EPA estimates are using the exclusions (a total number which this commenter believes EPA underestimates).

[42] U.S. EPA, *An Assessment of Good Current Practices for Recycling of Hazardous Secondary Materials*, November 2006 (EPA–HQ–RCRA–2002–0031–0354).

[43] Docket ID: EPA–HQ–RCRA–2010–0742–0010.

EPA's Response: Correlation of Recycling Damage Cases With Regulatory Exclusions, Exemptions or Alternative Standards

The goal of EPA's analysis to correlate damage cases with existing exclusions was to assess whether certain hazardous secondary material recycling exclusions, exemptions, or alternate standards are adequately protecting human health and the environment. Because the majority of exclusions, exemptions, and alternative standards do not include notification requirements, EPA does not have precise data regarding which and how many facilities are recycling hazardous secondary materials under reduced regulation. This lack of data hinders EPA's ability to collect information regarding what regulations a specific facility was operating under when damage occurred. Because this information is limited, the Agency had developed a methodology that correlates the type of hazardous secondary materials identified in the damage cases to regulations that likely governed the management of the hazardous secondary material. EPA used this methodology to identify patterns related to the types of hazardous secondary material involved in damage cases and whether those materials were likely to be managed under an exclusion, exemption, or alternate standard.

EPA understands commenters' concerns regarding the limitations of this analysis, including that EPA could only correlate with confidence 7 of the 32 recycling exclusions to damage cases in its environmental problems study. This result is more a lack of precision in the data and less that some recycling exclusions have no damage cases. For example, because notification is not required for these exclusions, we can only conservatively identify damage case correlations where the type of hazardous secondary material very clearly matches to an exclusion (*e.g.*, scrap metal). We lack information to make inferences for broadly applicable exclusions, (*e.g.*, use/reuse) or for broadly defined hazardous secondary materials (*e.g.*, metal-bearing wastes). Therefore, by virtue of some exclusions' broad applicability, we were unable to correlate them to specific damage cases. Additionally, due to the lack of data, it is difficult to analyze current trends in damage cases, and thus even more difficult to accurately project what the number of future damage cases might be under different scenarios. However, although it is difficult to assign specific damage cases to certain exclusions, we note that in the environmental problems study only nine of the damage cases were operating under a RCRA permit at the time of damage. Thus, EPA can generally conclude that the majority of the damage cases at third party recyclers were operating outside of RCRA, inferring these facilities were either operating illegally or operating under an exclusion, exemption, or alternate standard, or no standard.

Regarding other comments on the analysis, including comments on specific damage case-to-exclusion pairings and on comparing the number of damage cases to the total number of affected entities, EPA agrees with commenters that more information is needed prior to taking final action on specific conditions of the pre-2008 recycling provisions. EPA finds it may need to consider each exclusion in terms of evaluating specific regulatory gaps and whether additional conditions are needed to ensure protection of human health and the environment. Therefore, we are not finalizing specific conditions for the pre-2008 recycling provisions in today's rule and are instead deferring action until EPA can more adequately address commenters' concerns, including comments on the record. Before the Agency would take any such action, the Agency would provide the regulated community, as well as other stakeholders the opportunity for notice and comment.

XIV. Major Comments on the Exclusion for Hazardous Secondary Materials Legitimately Reclaimed Under the Control of the Generator and Recordkeeping for Speculative Accumulation

A. Proposed Changes to 2008 Final Rule

In its July 2011 DSW proposal, EPA proposed or solicited comment on certain changes to the 2008 DSW exclusion from the definition of solid waste for hazardous secondary materials legitimately reclaimed under the control of the generator. The first change was adding a regulatory definition of "contained" for units storing hazardous secondary materials. The definition included factors which, if met, would demonstrate that the unit was contained. Under the proposal, a storage unit is contained if it is in good condition, with no leaks or other continuing or intermittent unpermitted releases of the hazardous secondary material to the environment, and is designed, as appropriate for the hazardous secondary materials to prevent releases of hazardous secondary material to the environment. Such releases may include, but are not limited to, releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures. The unit must also be properly labeled or otherwise have a system (such as a log) to immediately identify the hazardous secondary materials in the unit. Finally, the unit must not hold incompatible materials and must address any potential risks of fires or explosions. The definition also stated that hazardous secondary materials stored in units that meet the applicable requirements of 40 CFR parts 264 or 265 are considered to be contained.

The second change concerned new recordkeeping requirements for speculative accumulation, "same-company" recycling, and recycling under certain tolling arrangements. With respect to speculative accumulation, EPA proposed to require generators and reclaimers operating under the generator-controlled exclusion to post accumulation start dates to allow inspectors and other regulatory authorities to quickly ascertain how long hazardous secondary materials had been in storage. If placing a label on the storage unit is not practicable, the first date that the excluded hazardous secondary material began to be accumulated must be entered in an inventory log. We also solicited comment on whether to add the proposed recordkeeping requirement to the general speculative accumulation provision at 40 CFR 261.1(c)(8), thereby extending the requirement to all recyclers subject to that provision. We also proposed a recordkeeping requirement for tolling contractors and toll manufacturers operating under the tolling exclusion, which would require maintaining records of hazardous secondary materials sent or received pursuant to the tolling contract. We also solicited comment on whether to add a similar recordkeeping requirement to generators and reclaimers operating under the "same-company" exclusion.

The third change concerned making notification a condition rather than a requirement of the exclusions. In addition, we proposed two structural changes. These were (1) placing the requirements for land-based units and non-land-based units in one regulatory provision (40 CFR 261.4(a)(23)), since the requirements for both types of units are the same; and (2) placing most definitions applicable to the generator-controlled exclusion in 40 CFR 261.4(a)(23) (together with the requirements) instead of in 40 CFR 260.10.

Comments: Authority for Proposed Changes

Many commenters supported all or some of these changes, either as proposed or with suggested modifications. Their comments are discussed below in reference to the specific changes that the Agency proposed. Some commenters, however, stated that EPA did not have the authority to impose conditions (particularly the ''contained'' standard) on hazardous secondary materials recycled under the control of the generator. These commenters generally believed that materials recycled under these exclusions are not discarded, and that EPA provided no new evidence that would justify the proposed changes. According to these commenters, the proposed changes are tantamount to treating the materials as wastes instead of valuable commodities, and are inconsistent with the ABR decision. One commenter noted that generators already have incentives to prevent releases of hazardous secondary materials because of potential liability, corporate values of stewardship and environmental responsibility, and public relations.

EPA's Response: Authority for Proposed Changes

The Agency has determined that the conditions proposed in our July 2011 DSW proposal are needed in order to ensure that the exclusion operates as intended and does not result in discarded hazardous secondary material posing significant risk to human health and the environment. We agree that generators and reclaimers operating under the generator-controlled exclusion have incentives to ensure that the hazardous secondary materials are safely managed. Nevertheless, the conditions we proposed are needed to ensure that the generator-controlled exclusion will correctly function to exclude only hazardous secondary material that is not discarded.

Specifically, the proposed ''contained'' requirement is a key provision for determining whether a hazardous secondary material is being managed as a valuable commodity. Such materials that are not contained and are instead released to the environment are not destined for recycling and are clearly discarded. The proposed definition specifies factors which, if met, demonstrate that the hazardous secondary materials in a unit are handled as valuable raw materials, intermediates, or products and thus are not discarded. We note that the criteria in proposed 40 CFR 261.4(a)(23)(i) are all performance measures, as opposed to specific technical standards, suggested by commenters in response to the June 2009 public meeting on the 2008 DSW final rule. These criteria also exemplify practices discussed in the preamble to the 2008 DSW final rule regarding containment of hazardous secondary materials, such as ways to prevent releases and operation and maintenance of the storage unit in the same manner as a production unit.

The proposed recordkeeping requirement for speculative accumulation (which would require posting of accumulation start dates on the storage unit or in an inventory log) would allow inspectors and other regulatory authorities to quickly ascertain how long a facility has been storing an excluded hazardous secondary material, and whether the storage time exceeds existing limits under 40 CFR 261.1(c)(8). If such limits have been exceeded, the material would be discarded. The proposed recordkeeping requirement for the tolling exclusion (which would require records of shipments sent and received under tolling contracts) would also aid regulatory agencies in determining if tolling contractors and manufacturers are in compliance with the requirements for the exclusion and whether the hazardous secondary materials in question have been properly accounted for. A similar requirement to keep records of shipments sent and received under ''same-company'' recycling (for which the Agency solicited comment in the July 2011 DSW proposal) would serve the same purpose. Finally, submitting a notification to EPA is the only formal indication of a facility's prospective intent to reclaim a hazardous secondary material under this exclusion. For these reasons, EPA has determined that its proposed changes to the generator-controlled exclusion are necessary to demonstrate that hazardous secondary materials have not been discarded. The changes are therefore within the Agency's RCRA authority.

Comments: Scope of Proposed Changes

One commenter noted that the proposed rule would allow lead-acid battery recyclers to operate under the generator-controlled exclusion instead of the requirements in 40 CFR 266.80(b). This commenter believed that the latter requirements, specifically tailored to battery recyclers, are more appropriate for these facilities.

EPA's Response: Scope of Proposed Changes

In response to this comment, it was not the Agency's intent that spent lead-acid batteries be managed under the generator-controlled exclusion. The 2008 DSW final rule contained a provision (40 CFR 261.2(c)(4)(iv)) stating that spent lead-acid batteries were not eligible for the generator-controlled exclusion (nor were materials subject to material-specific standards under 261.4(a) or the listed hazardous wastes K171 or K172). The omission of this provision from the July 2011 DSW proposal as related to spent lead-acid batteries and material-specific standards was inadvertent, and EPA is therefore retaining it in this final rule (see 40 CFR 261.4(a)(23)(ii)(E)). However, for reasons discussed in section XI of this preamble, listed hazardous wastes K171 and K172 should be eligible for the generator-controlled exclusion; therefore, we are not including those wastes in this provision.

Comments: Exports

Another commenter noted that the text of proposed 40 CFR 261.4(a)(23)(i)(B) could initially be read to suggest that hazardous secondary materials may be transferred to a location outside the United States or its territories as long as the foreign receiving facility is under the control of the generator. It is not until one reads proposed 40 CFR 261.4(a)(23)(ii)(A) that the reader learns that the receiving facility must be in the United States or its territories. This commenter suggested revising the introductory text of 40 CFR 261.4(a)(23) to refer to recycling within the United States or its territories and deleting the subsequent condition.

EPA's Response: Exports

EPA agrees with this commenter who suggested modifying the introductory text of the generator-controlled exclusion to include a reference to the requirement that hazardous secondary materials legitimately reclaimed under the exclusions must be recycled within the United States or its territories. We have therefore revised 40 CFR 261.4(a)(23) to read as follows: ''Hazardous secondary material generated and legitimately reclaimed within the United States or its territories and under the control of the generator, provided that the material complies with paragraphs (a)(23)(i) and (ii) of this section.'' We have also deleted the condition in proposed CFR 261.4(a)(23)(ii)(A) and renumbered the following subparagraphs.

B. Exclusion for Materials Recycled On-Site

Comments: On-Site Exclusion

In the 2008 DSW final rule, EPA promulgated an exclusion from the definition of solid waste for hazardous secondary materials that are generated and legitimately reclaimed at the generating facility. In the July 2011 DSW proposal, the Agency did not propose any changes to the scope of this exclusion. Commenters on the proposal generally supported excluding on-site recycling from the definition of solid waste, stating that such recycling did not involve discard and was not likely to pose environmental risks. However, one commenter argued that the exclusion for hazardous secondary materials recycled under the control of the generator was too broad and should be narrowed to materials recycled under a "continuous industrial process," *i.e.*, recycled in the same process of which they are a byproduct, by the same generator, and at the same generating facility. If the exclusion was narrowed to this extent, it would preclude "same-company" or tolling recycling from being eligible for the exclusions. It would presumably also preclude certain types of on-site recycling that might involve different processes from being excluded under the definition of solid waste.

EPA's Response: On-Site Exclusion

EPA has determined that if hazardous secondary materials are generated and legitimately reclaimed at the generating facility (as well as a facility within the same company) under the conditions specified in today's rule, these materials have not been discarded. We do not agree with the comment that the exclusion should be limited to recycling of hazardous secondary materials under a "continuous industrial process," *i.e.*, it takes place in the same process of which the materials are a byproduct, by the same generator and at the same generating facility. If hazardous secondary materials are recycled on-site at the generating facility using different processes, this circumstance does not mean that the generator has relinquished control of the materials or that they have been discarded. We are therefore finalizing this provision as proposed at 40 CFR 261.4(23)(i)(A).

C. Exclusion for Materials Recycled by the Same Company

In the 2008 DSW final rule, EPA promulgated an exclusion from the definition of solid waste for hazardous secondary materials that were generated and legitimately reclaimed off-site by the same "person" as defined in 40 CFR 260.10, if the generator performed one of two certifications. Under the first certification, the generating facility certified that it controlled the reclaiming facility; under the second certification, the generating facility certified that it was under common control with the reclaiming facility. In the July 2011 DSW proposal, the Agency solicited comment on whether to add a recordkeeping requirement to this exclusion that would require both the generating and reclaiming facilities to retain records for no less than three years of all hazardous secondary material shipped under the exclusion. The records would have to contain information which could be satisfied by routine business records (*e.g.*, financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations). There was general support for this condition from those commenters who addressed it.

Comments: Same-Company Exclusion

Some commenters supported this exclusion. They believed that generators using the exclusion have strong incentives to ensure that hazardous secondary materials are not discarded by maintaining control over, and potential liability for, the reclamation process. However, other commenters believed that any off-site transport of hazardous secondary materials involved environmental risks that should be addressed by (at the least) requiring a hazardous waste manifest or by subjecting "same-company" off-site recycling to the proposed alternative Subtitle C standards for hazardous secondary materials that are transferred for the purpose of reclamation. Some commenters said that when hazardous secondary materials are transported off-site, the generator has little de facto control over such materials.

One commenter noted that proposed 40 CFR 261.4(a)(23)(i)(B) omitted the alternative certification for same-company recycling that occurs when the generating facility and the reclaiming facility are under common control. This certification was included in the 2008 DSW final rule.

EPA's Response: Same-Company Exclusion

The Agency continues to find that same-company recycling does not involve discard since it occurs under the control of the generator. Such control means that both the generating facility and the reclamation facility are familiar with the hazardous secondary materials and the company would be ultimately liable for any mismanagement of the hazardous secondary materials. Under these circumstances, the incentive to avoid such mismanagement would be sufficiently strong to greatly reduce the risks of transport, thus rendering unnecessary the use of the hazardous waste manifest or requiring the hazardous secondary materials to be reclaimed under the verified recycling exclusion. However, as noted above, the Agency solicited comment in its July 2011 DSW proposal on a recordkeeping requirement that would require both the generating and reclaiming facilities to retain records for no less than three years of all hazardous secondary material shipped under the exclusion. The records would have to contain the name of the transporter, the date of the shipment, and the type and quantity of the hazardous secondary material shipped or received under the exclusion. This requirement could be satisfied by routine business records (*e.g.*, financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations). Such a provision would facilitate enforcement of the same-company exclusion and would allow tracking of all hazardous secondary materials recycled under the exclusion to ensure that such materials were properly accounted for. EPA agrees with the commenters who supported this requirement and finds that adding this recordkeeping requirement to the same-company exclusion is sufficient to address any risks involved in off-site transport of hazardous secondary materials. We are therefore finalizing the same company exclusion to include this requirement (see 40 CFR 261.4(a)(23)(i)(B)).

The Agency also agrees with the commenter who suggested that the alternative certification for facilities under common control that was included in the 2008 DSW final rule should be added to the exclusion. The omission of this provision from the July 2011 DSW proposal was inadvertent and the Agency will therefore simply retain the alternative certification in the regulations (see 40 CFR 261.4(a)(23)(i)(B)).

D. Tolling Exclusion

In its July 2011 DSW proposal, EPA proposed to add a recordkeeping requirement to the exclusion for hazardous secondary materials legitimately reclaimed under certain contractual tolling arrangements. Specifically, we proposed to require the tolling contractor to maintain at its facility for no less than three years records of all hazardous secondary materials received pursuant to the

written contract with the tolling manufacturer. It would also require the tolling manufacturer to maintain at its facility for no less than three years records of materials shipped pursuant to its written contract with the tolling contractor. In both cases, the records must contain the name of the transporter, the date of the shipment, and the type and quantity of the hazardous secondary material shipped or received pursuant to the written contract. These requirements may be satisfied by routine business records (*e.g.*, financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations). EPA solicited comment on whether the proposed requirement would make the exclusion easier to enforce. We also solicited comment on whether the tolling exclusion should be retained or eliminated. We noted that no facilities appeared to be operating under the tolling exclusion as of the date of the proposed rule, and that the definitions and certifications involved in this exclusion were complicated. However, we also noted that if the tolling exclusion were eliminated, the tolling contractor conducting the reclamation might need to obtain a RCRA storage permit. This necessity could discourage recycling under tolling arrangements and prevent sustainable reclamation practices.

Comments: Tolling Exclusion

Those commenters who addressed the proposed recordkeeping requirement generally supported it, but many commenters believed that the tolling exclusion should be eliminated and that tolling should be regulated under EPA's proposed alternative Subtitle C regulatory standards for hazardous recyclable materials. Another commenter argued that if the Agency retained the tolling exclusion, we should require use of the hazardous waste manifest, financial assurance, and other Subtitle C requirements. Some of these commenters emphasized the absence of utilization of the tolling exclusion and said that federal regulations should address activities of national importance. One commenter noted that the exclusion could result in an inefficient use of enforcement resources as regulators would have to be trained and familiar with a regulatory concept with which they are not familiar. Another commenter argued that the assumption of liability for mismanagement by the tolling contractor was unlikely and could result in litigation. Other commenters emphasized environmental concerns with the tolling exclusion. These commenters doubted that recycling under tolling arrangements was actually under the "control" of the tolling contractor, given that a different corporate entity at a different physical location operates the production process. Some commenters raised similar concerns with the risks involved in off-site transportation of hazardous secondary materials that were raised in connection with "same-company" recycling.

Some commenters, on the other hand, urged EPA to retain the exclusion for tolling contracts. These commenters argued that hazardous secondary materials legitimately reclaimed under the tolling exclusion are managed as valuable products and not discarded. They also said that utilization of the exclusion could increase with time, particularly if more states picked up EPA's revisions to the definition of solid waste and if regulatory uncertainty were avoided. One commenter noted that the economic incentives under tolling contracts are such that there is no incentive for discard, since the tolling manufacturer is paid when it returns the hazardous secondary material to the contractor. Some commenters indicated that eliminating the tolling exclusion, by requiring tolling contractors to obtain RCRA storage permits, would operate as a severe disincentive to reclamation under tolling arrangements.

EPA's Response: Tolling Exclusion

EPA generally agrees with the commenters who supported retention of the tolling exclusion. We find that hazardous secondary materials are not discarded if they are legitimately reclaimed under the conditions specified in our tolling exclusion, particularly since participants in tolling contracts have strong incentives to handle such materials as valuable commodities rather than mismanage them. We also have determined that the conditions of the generator-controlled tolling exclusion, including the recordkeeping requirement for hazardous secondary materials sent and received under tolling contracts, are sufficient to prevent discard, thus rendering unnecessary the use of the hazardous waste manifest or other RCRA permit requirements for reclaimers. We have also concluded that retention or elimination of this exclusion should not depend on how frequently the exclusion is currently utilized, because determining frequency of utilization in the future is necessarily speculative. Additional states could pick up EPA's revisions to the definition of solid waste, and tolling arrangements could become more common due to increases in certain kinds of manufacturing or other technological developments. Regulatory authorities would then become more familiar with implementation of the provision. We are also concerned that eliminating the tolling exclusion could discourage the reclamation of valuable hazardous secondary materials that might otherwise be destroyed by incineration. This result would be inconsistent with our goal of encouraging the sustainable management of hazardous secondary materials. For these reasons, we are retaining the tolling exclusion in this final rule and finalizing the proposed recordkeeping requirement for this exclusion (see 40 CFR 261.4(a)(23)(i)(C)).

E. The Contained Standard

In its July 2011 DSW proposal, EPA proposed a regulatory definition of the contained standard. Under this proposed definition, a unit storing hazardous secondary materials is "contained" if it is in good condition, with no leaks or other continuing or intermittent unpermitted releases of the hazardous secondary materials to the environment, and is designed, as appropriate for the hazardous secondary materials, to prevent releases of hazardous secondary materials to the environment. Such releases may include, but are not limited to, releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures. The unit must also be properly labeled or otherwise have a system (such as a log) to immediately identify the hazardous secondary materials in the unit. Finally, the unit must not hold incompatible materials and must address any potential risks of fires or explosions. Hazardous secondary materials stored in units that meet the applicable requirements of 40 CFR parts 264 or 265 are considered to be contained.

In addition, the Agency also proposed placing the requirements for land-based units and non-land-based units in one regulatory provision (40 CFR 261.4(a)(23)), since the requirements for both types of units are the same. To clarify the regulatory status of units from which releases have occurred, the Agency also proposed a provision stating that: (1) A hazardous secondary material released to the environment is discarded and a solid waste unless it is immediately recovered for the purpose of reclamation and (2) hazardous secondary material managed in a unit with leaks or other continuing or intermittent releases of the hazardous

secondary material to the environment is discarded and a solid waste.

Comments: Codification of the Contained Standard

Many commenters (particularly states) supported the codification of the contained standard. Under the 2008 DSW final rule, these commenters argued the only definitive way to determine whether a material was contained was an evaluation after a release had already occurred. They believed that codifying a definition of "contained" would make it easier for regulatory authorities and the regulated community to decide whether a unit meets the standard. Some commenters, however, believed that a regulatory definition of "contained" was not needed because the concept of what is contained was self-evident: To the extent clarification is needed, it could be provided in guidance.

EPA's Response: Codification of the Contained Standard

EPA agrees with those commenters who argued that codification of the contained standard is desirable. Based on comments and inquiries received from regulatory authorities and the regulated community after promulgation of the 2008 DSW final rule, we have determined that merely requiring that a unit be "contained" (without providing a regulatory definition) does not give regulatory certainty about how to comply with the standard. The number of comments and inquiries to this effect would seem to refute the idea that the concept of contained is self-evident. It was never the Agency's intent that violation of the standard could be addressed only after a significant release and subsequent environmental damage had occurred. More detailed regulatory criteria, such as those proposed in our July 2011 DSW proposal, will help all affected parties determine whether a unit adequately controls the movement of hazardous secondary materials. Such determinations will be of great benefit to regulatory authorities and to facilities operating under the generator-controlled exclusion. We are therefore retaining the codification of contained in this final rule.

Comments: Land-Based Storage

Some commenters believed that storage in land-based units should be prohibited completely under the generator-controlled exclusion. Other commenters supported allowing land-based units, but only if the Agency required periodic inspections, groundwater monitoring, or other measures. Other commenters emphasized that the Agency had no jurisdiction over land-based production units, and requested that EPA clarify in the preamble that we do not regulate such units.

EPA's Response: Land-Based Storage

EPA does not agree that land-based units should be categorically prohibited under the generator-controlled exclusion. We have determined that hazardous secondary materials, if they are stored in land-based units that meet the conditions specified in today's rule, have not been discarded. That is, if they are legitimately reclaimed as specified in today's rule, if they are contained and not speculatively accumulated, and if they have submitted the required notification, they are being managed as valuable commodities, rather than wastes. Indeed, the ABR decision expressed criticism of EPA for prohibiting any land placement, even "for a few minutes". 208 F.3rd at 1051. EPA interprets the court's discussion as a warning to the Agency to examine all factors, not just one (*e.g.*, land placement), when deciding whether a material is a waste. For the same reason, we do not find that it is necessary or appropriate to require groundwater monitoring, inspections at specified intervals, or other Subtitle C controls for hazardous secondary materials that are legitimately reclaimed under the control of the generator under these conditions, even for land-based units. These hazardous secondary materials are being managed under the control of the generator; by maintaining control over, and potential liability for, the hazardous secondary materials and the reclamation process, the generator ensures that such materials have not been discarded. We also note that the definition of "land-based unit" in 40 CFR 260.10 means an area where hazardous secondary materials are placed in or on the land before recycling, but the definition explicitly excludes land-based production units. Examples of land-based units include surface impoundments and piles.

Comments: Requirements for Non-Land-Based Units

Some commenters believed that the proposed standard was still too imprecise, or not sufficiently protective. These commenters generally suggested that EPA require storage units to meet the standards of 40 CFR 262.34(a)(1), or parts 264 or 265 for tanks, containers, or containment buildings. Some of these commenters argued that since hazardous secondary materials sent for reclamation were identical in composition to analogous materials sent for disposal, the storage standards should be the same for both disposal and recycling. Another commenter noted that EPA was considering tank standards for solvents under the proposed remanufacturing exclusion, and said that standards at least as stringent should be considered for other hazardous secondary materials sent for reclamation. Commenters also emphasized the ease of enforceability and implementation of standards with which the regulatory authorities and the regulated community are already familiar.

EPA's Response: Requirements for Non-Land-Based Units

In response to those commenters who suggested Subtitle C requirements for non-land-based units (such as tanks, containers and containment buildings) that store hazardous secondary materials under the generator-controlled exclusion, the Agency also finds that imposing these requirements is unnecessary for such materials meeting the conditions of the exclusion promulgated today. EPA is aware that implementation of program requirements would be simpler if units storing hazardous waste and those storing hazardous secondary materials were subject to the same requirements, and we are also aware that the chemical composition of hazardous secondary materials sent for disposal can be similar to that of hazardous secondary materials sent for legitimate recycling. Nevertheless, hazardous secondary materials that are legitimately reclaimed under the control of the generator have not been discarded, and such materials have value that provides generators with strong incentives to maintain safe management and handling. Imposing the Subtitle C requirements on these hazardous secondary materials could discourage legitimate reclamation, encourage disposal, and would be inconsistent with EPA's goal of fostering sustainable materials management. In response to the commenter who suggested that such requirements should be imposed because the Agency was considering them for the remanufacturing exclusion, we note that the generator-controlled exclusion covers a wide variety of hazardous secondary materials, rather than the solvents covered by the remanufacturing exclusion, for which tanks or container standards are appropriate for reasons described in section VII of this preamble.

Comments: Releases

Some commenters believed that the proposed regulatory definition of

"contained" constituted a "no-leak" standard (including storm water runoff or fugitive air emissions) and that even a single release that was immediately recovered could lead to the hazardous secondary material remaining in the unit being considered discarded and a solid waste. Other commenters, however, said that all units will suffer a release at some point and that it would be unreasonable to categorically classify any release of whatever nature as discard.

In the preamble to the 2011 DSW proposal, EPA stated that certain units may be subject to occasional precipitation runoff that consists essentially of water, with trace amounts of hazardous constituents. The Agency noted that as long as such runoff does not contain hazardous secondary materials (*e.g.,* it is essentially rainwater with trace amounts of metals), it would not be considered a "release of a hazardous secondary material." On the other hand, if the hazardous secondary material itself is swept away by the runoff (*e.g.,* if the hazardous secondary material consists of fine particulate matter, such as electric arc furnace dust), this transport via precipitation runoff could be considered a "release of a hazardous secondary material" and that pile may not be considered contained. Some commenters argued that even trace amounts of hazardous substances (such as through stormwater runoff) should be considered illegal releases from storage units. One of these commenters objected to our regulatory definition partly because it would allow releases that were not "continuing" or "intermittent."

Another commenter, however, argued that the existence of stormwater runoff (regulated under the Clean Water Act) or fugitive air emissions and dust (regulated under the Clean Air Act) does not mean that materials are not being managed as a valuable commodity and so cannot be used to justify a determination that a hazardous secondary material is subject to the fully applicable Subtitle C RCRA requirements. This interpretation would amount to an illegal expansion of RCRA authority, according to the commenter. The commenter also noted that EPA's distinction between runoff containing hazardous constituents and runoff containing the waste itself was irrelevant and that EPA should return to the "significant release" standard of the 2008 DSW final rule. Another commenter suggested that the Agency specify what concentration of hazardous secondary material would need to be detected to constitute a release.

EPA's Response: Releases

EPA does not agree with those commenters who argued that the proposed definition of "contained" imposed a strict, categorical, and impracticable "no leaks" standard, either for land-based units or non-land-based units. We note that the language of the proposed definition reads that the unit must be in good condition, "with no leaks or *other continuing or intermittent unpermitted releases* of hazardous secondary materials to the environment. . ." (emphasis added). This language clearly does not mean that any single release of whatever nature would automatically place the hazardous secondary materials remaining in the unit under Subtitle C regulation. In fact, we agree with those commenters who argue that most units will suffer a release at some point and that it would be unreasonable to categorically classify any release of whatever nature as discard.

Nor does EPA agree with those commenters who appeared to believe that any release should lead to loss of the generator-controlled exclusion and full regulation under RCRA Subtitle C. A single release that is quickly cleaned up would not generally affect the regulatory status of the hazardous secondary materials still contained in the unit. For example, sometimes a hazardous secondary material may escape from primary containment and may be captured by secondary containment or some other mechanism that would prevent the hazardous secondary materials from being released to the environment or would allow immediate recovery of the materials. In that case, the unit would not be subject to the RCRA hazardous waste regulations and the hazardous secondary materials in the unit would still be excluded from the definition of solid waste, even though any such materials that had been released and not immediately recovered would be considered discarded.

With respect to precipitation runoff, the Agency does not agree with those commenters who said that even trace amounts of hazardous substances (such as through stormwater runoff) should be considered illegal releases from storage units. Some units are inevitably subject to occasional precipitation runoff that consists essentially of water, with trace amounts of hazardous constituents. As long as the hazardous secondary material itself is not swept away by the runoff, this transport via precipitation runoff would not be a release of such a material and the unit could be considered contained. A contrary interpretation could place all such units under Subtitle C regulation and eliminate their eligibility for the generator-controlled exclusion, which is not the Agency's intent. EPA has determined that hazardous secondary materials placed in such units that are destined for legitimate recycling have not been discarded if they meet the conditions of these exclusions. EPA also agrees with the commenter who said that the existence of stormwater runoff (regulated under the Clean Water Act) and fugitive air emissions and dust (regulated under the Clean Air Act) does not automatically mean that materials are not being managed as a valuable commodity.

EPA also does not agree with the commenter who suggested that the Agency should return to the "significance" criterion for determining whether a release has occurred (in part to distinguish between runoff containing hazardous constituents and runoff containing the hazardous secondary material itself). The Agency does not agree that using this criterion, without further definition, would clarify this distinction. We also do not find that it is practicable to establish a concentration of hazardous secondary materials that could be used to determine whether a release has occurred, since such appropriate concentrations would vary for different materials and a single concentration limit would not be flexible enough to allow an accurate determination of "contained" for the wide variety of hazardous secondary materials.

Comments: Other "Contained" Issues

A few commenters suggested that EPA establish a petition process or a site-specific variance for facilities to demonstrate the appropriateness of site-specific alternative storage standards for their units (including land-based units). Some commenters believed that our reference to 40 CFR parts 264 and 265 meant that units were required to comply with those provisions. One of these commenters suggested that we specify that units meeting the requirements of 40 CFR parts 264 or 265 are "presumptively" contained. Other commenters said that the proposed definition of "contained" seemed more appropriate for hazardous secondary materials in flowable form, but not for solid materials such as scrap metal, for which a container is not necessarily needed. One of these commenters suggested that we clarify that a "unit" may include a designated location.

A few commenters suggested editorial revisions to the definition of contained. One commenter said that EPA should

clarify this provision to better indicate that the unit must not contain materials that are incompatible with the other wastes or materials placed in the unit or the materials of construction that comprise the unit. Another commenter said the examples of release should include soil contamination because contamination should not be allowed to pass through the soil to the groundwater before it is considered a release. Two commenters said the proposed text at 40 CFR 261.4(a)(23)(ii)(B) uses the word "recycling" in place of "reclamation" and omits the phrase "or intermittent unpermitted," which does not comport with the preamble language.

EPA's Response: Other "Contained" Issues

In response to those commenters who suggested a mechanism (such as a petition process or variance) to provide alternative or site-specific containment requirements for certain facilities, such a mechanism is unnecessary because the definition of "contained' in today's rule establishes minimum requirements that all units storing hazardous secondary materials should be able to meet. We have designed the "contained" criteria to be flexible enough to cover a wide range of units.

In response to comments that suggested the reference to 40 CFR parts 264 and 265 means that units were required to comply with those provisions, EPA did not intend to imply that meeting such standards was required. In response to the commenter who suggested stating that units meeting the applicable requirements of 40 CFR parts 264 or 265 are "presumptively" contained, EPA agrees that this language better reflects EPA's intent than the proposed language and is changing the proposed definition of "contained" accordingly. However, we do not agree with the commenter who suggested adding that solid hazardous secondary materials may be stored in "designated locations." We have determined that our definition of "contained" (which includes land-based units) is sufficiently flexible to cover solid material, such as scrap metal or furnace bricks which are not stored in tanks, containers, or containment buildings. We have also made clear in the preamble the circumstances under which such materials could be considered "contained."

For the reasons stated above, EPA is finalizing the definition of "contained" as proposed, but replacing the statement that "hazardous secondary materials meeting the applicable requirements of 40 CFR parts 264 or 265 are considered to be contained" with "hazardous secondary materials that meet the applicable requirements of 40 CFR parts 264 or 265 are presumptively contained" (see 40 CFR 260.10).

EPA agrees with commenters who suggested editorial changes to the definition of contained and has incorporated these changes into today's rule.

F. Notification as a Condition

In the July 2011 proposal, EPA proposed to make the notification requirement in 40 CFR 260.42 a condition, rather than a requirement, of the generator-controlled exclusion in 40 CFR 261.4(a)(23). At issue are the consequences an entity would face for failing to notify. Thus, notification as a requirement of the exclusion means that failure to notify would constitute a violation of the notification regulations. On the other hand, notification as a condition of the exclusion means failure to notify could potentially result in the loss of the exclusion for the hazardous secondary materials (*i.e.,* the hazardous secondary materials would become solid and hazardous wastes and subject to full Subtitle C requirements). EPA also requested comment on whether notification should be a condition of the remanufacturing exclusion and of the pre-2008 recycling exclusions. (For EPA's response to comments for notification as a condition of the pre-2008 recycling exclusions, see section XIX.)

Comments: Notification as a Condition

Commenters were split on this issue. Many commenters supported EPA's proposed change to make notification a condition of the exclusion. These commenters argued that notification as a condition would decrease the incentives for a facility to evade enforcement by not notifying. A few commenters agreed that states would use enforcement discretion to distinguish between facilities that failed to notify due to an inadvertent oversight or from a blatant disregard for the requirement. One commenter urged EPA to clarify that a facility submitting a notification does not need to wait for any response from the implementing agency prior to using exclusion.

On the other hand, many commenters did not support this proposed change and argued that notification should remain a requirement of the exclusion, as it is currently. These commenters argued that notification, or the absence thereof, is not indicative of discard and that the information of who is using the exclusion should not impact the determination of whether a material is discarded. Some commenters argued that enforcement discretion is not exercised in a consistent and reasonable manner and that the proposed change would subject generators who are legitimately recycling their hazardous secondary materials to undue severe enforcement consequences. Other commenters argued that there are innocent reasons why a facility would not notify, for example, because of confusion surrounding the point when a virgin material becomes a secondary material. Still other commenters believed that it is highly unrealistic to believe that any facility operating under the provisions would intentionally fail to notify EPA in an attempt to evade enforcement. Other commenters argued that there is already sufficient incentive to notify because facilities' would already incur significant penalties under RCRA 3007 for failing to notify. Additionally, one commenter noted that making notification a condition of the exclusion differs from how other paperwork violations are treated.

EPA's Response: Notification as a Condition

EPA agrees with commenters who supported making notification a condition of the exclusion. The notification provision is the only formal indication of a facility's intent to reclaim a hazardous secondary material under the conditional exclusion. For example, if during an inspection of a large quantity generator of hazardous waste, EPA were to discover a hazardous secondary material that had been stored on-site for more than 90 days without a RCRA permit (an act that would typically be a violation of the hazardous waste regulations), a previously filed notification would be an indication that the facility was planning to reclaim the hazardous secondary material under the conditions of the exclusion. Absent such notification, it would be difficult for the facility to justify its true intentions for the hazardous secondary material. Failure to meet the notification provision is a strong indication that the facility either did not intend to comply with or was unaware of the provisions of the exclusion. In both cases, the lack of notification could indicate that the hazardous secondary material was being mismanaged.

EPA agrees with commenters that making notification a condition of the rule would further discourage facilities from trying to evade enforcement by not notifying because, under the final rule, the costs and consequences of not notifying are significantly higher than if notification remains a requirement. Notification is essential to keep

regulators and the public informed about hazardous secondary materials activity and to enable effective compliance monitoring. Making notification a condition provides states and EPA the ability to properly enforce those that intentionally fail to notify in order to evade enforcement, while leaving the flexibility to tailor enforcement appropriately in those cases involving an unintentional oversight. Therefore, EPA is making the notification provision in 40 CFR 260.42 a condition of the generator-controlled exclusion in 40 CFR 261.4(a)(23), as well as a condition of the remanufacturing exclusion in 40 CFR 261.4(a)(27).

In response to opposing comments, EPA does not agree that failing to notify is not indicative of discard. As noted, notification serves as a formal declaration that a facility is not managing a hazardous waste but, rather, an excluded hazardous secondary material under the conditions of the exclusion. Notification, thus, documents the generator's decision to not discard its hazardous secondary materials, which is the inherent first step in any exclusion from the definition of solid waste.

EPA also does not agree that the notification condition would be inappropriately enforced. EPA notes that notification as a condition subjects only those generators who failed to notify to enforcement consequences; generators who submit notifications as required, and meet the conditions of the final rule exclusions, would not face enforcement consequences. EPA does not find this to be unduly burdensome to the regulated community.

EPA also finds that the commenter's example of an innocent reason for failing to notify (because of confusion surrounding the point when a virgin material becomes a secondary material) as further reason to strengthen the notification provision. That is, in order to comply with the final rule, a generator must know which hazardous secondary materials are being managed according to the specific conditions of the exclusion. In other words, a generator has to make a choice to manage hazardous secondary materials under the conditions of the rule before they are considered "excluded." (Notification, in fact, clearly documents this choice.) Therefore, EPA finds it difficult to believe that a generator could innocently fail to notify under the final rule because the generator is unclear about when a virgin material becomes a hazardous secondary material that it must manage under the exclusion. These ambiguities must be resolved prior to the facility availing itself of the exclusion.

EPA also disagrees with commenters that argued it is highly unrealistic to believe that any facility operating under the provisions would intentionally fail to notify EPA, as well as commenters that argued that sufficient incentives to notify already exist. We note that there is likely an economic incentive for some facilities to fail to notify and simply consider the paperwork violation as a cost of doing business. Where an economic incentive exists, EPA maintains that regulation is appropriate in order to adequately discourage undesirable behavior.

Finally, although notification as a condition may differ from how other paperwork requirements are applied in the hazardous waste regulations, it does not differ from how other paperwork requirements are applied in conditional exclusions from the definition of solid waste. For example, notification is a condition of the zinc fertilizer exclusion in 40 CFR 261.4(a)(20). Additionally, EPA confirms that the conditional exclusions at 40 CFR 261.4(a)(23) and 40 CFR 261.4(a)(27) are self-implementing and thus facilities do not need to wait for any response from the implementing agency prior to using exclusion.

G. Recordkeeping for Speculative Accumulation

In the July 2011 DSW proposal, EPA proposed to amend the generator-controlled exclusion to require persons operating under the exclusion to place a label on the storage unit indicating the first date that the excluded hazardous secondary material began to be accumulated. In cases where placing a label on the storage unit is not practicable (*e.g.,* if the hazardous secondary materials are stored in a surface impoundment), we proposed as an alternative to require persons operating under the generator-controlled exclusion to document in an inventory log the first date that the excluded hazardous secondary material began to be accumulated. EPA noted that enforcement personnel had suggested that ease of enforcement would be greatly facilitated if persons subject to the speculative accumulation requirement were required to post a start date for the accumulation. In this way, inspectors and other regulatory authorities could quickly ascertain how long a facility has been storing an excluded hazardous secondary material, and, therefore, whether that facility was in compliance with the applicable storage time. The Agency also noted that placing labels on storage units or entering accumulation start dates in inventory logs is likely to be already part of normal business operations at many facilities. For this reason, the proposed requirement would not be unduly burdensome and would provide a greater degree of clarity both to the regulated community and to regulatory authorities who need to determine whether excluded hazardous secondary materials meet the speculative accumulation limits.

Since the same arguments for tracking accumulation start dates could be made more broadly for all recycling subject to the speculative accumulation limits, EPA also requested comment on whether to add this recordkeeping requirement to the speculative accumulation provision in 40 CFR 261.1(c)(8) itself. The Agency did not propose or solicit comment on changing the substantive requirements of the speculative accumulation provision, such as the time allowed for storage or the amount that is required to be recycled within a calendar year.

Comments: Recordkeeping for Speculative Accumulation

Many commenters, particularly states, supported the proposed recordkeeping requirement and also supported extending the requirement to all persons currently subject to the speculative accumulation requirements at 40 CFR 261.1(c)(8). These commenters generally believed that posting accumulation start dates (or using some other mechanism, such as an inventory log) provides assurance both to generators and inspectors that the generator in question is in compliance with the speculative accumulation provision, and that the proposed requirement would not be burdensome to the regulated community. One commenter supported requiring accumulation start dates to be posted in storage areas within a specified number of feet from the storage unit, since reference to logs distant from storage units could make enforcement difficult. Facilities that prefer a centrally located log could maintain such a "master" log in addition to the record maintained near the actual storage unit, this commenter suggested.

Some commenters, however, opposed the proposed recordkeeping provision for speculative accumulation, either for the generator-controlled exclusion or for other persons subject to 40 CFR 261.1(c)(8). Some of these commenters argued that 40 CFR 261.2(f) already requires respondents in enforcement actions who are claiming that a material is not a solid waste to demonstrate that they meet the terms of an exclusion or

exemption, by, among other things, providing appropriate documentation. Some commenters apparently believed that the proposed requirement would mandate sending a notification to EPA, or posting the quantity of the hazardous secondary material and the precise time it was generated, or posting "finish" dates, as well as "start" dates for accumulation. In addition, some commenters expressed concern about the potential difficulty of posting accumulation start dates for hazardous secondary materials that are recycled rapidly in continuous processes with little or no prior storage.

EPA's Response: Recordkeeping for Speculative Accumulation

After evaluating the comments received, EPA has concluded that the proposed recordkeeping requirements for speculative accumulation provide considerable benefits to both regulatory authorities and the regulated community and that the burden on the regulated community will be minimal. Posting accumulation start dates (or using another mechanism, such as an inventory log) is a simple and effective way to provide useful information about likely compliance with the speculative accumulation provision, and that the cost to facilities does not outweigh this benefit. We also find that all of the reasons for adopting this requirement for the generator-controlled exclusion apply equally to the question of whether to adopt it for all persons subject to 40 CFR 261.1(c)(8). In response to the commenter who supported also requiring the posting of accumulation start dates in storage areas within a specified number of feet from the storage unit, EPA is not convinced that such a requirement would be necessary for all facilities, and the appropriate distance from the storage unit might also vary for different facilities. We are therefore not adopting this requirement.

In response to those commenters who argued that the proposed recordkeeping requirement is redundant with § 261.2(f), we note that that provision applies to respondents in enforcement actions and does not provide specific guidance on how to determine compliance with the speculative accumulation provisions in the case of routine inspections. We therefore do not agree that the proposed recordkeeping requirement is redundant with 40 CFR 261.2(f). Today's revision to the speculative accumulation provision at 40 CFR 261.1(c)(8) does not entail submitting notifications to EPA, posting the quantity of the hazardous secondary material and the time it was generated, or posting finish dates. The final definition of "contained" specifies that a unit must be properly labeled or otherwise have a system (such as a log) to immediately identify the hazardous secondary materials in the unit. Neither such a label nor the posting of an accumulation start date requires detailed information. In response to the commenters who were concerned about hazardous secondary materials that were continuously recycled without prior storage, we agree with those commenters and are revising the proposed recordkeeping requirement to allow "other appropriate methods" to be used to document the accumulation period.

For the reasons given above, EPA is amending 40 CFR 261.1(c)(8) to require that all persons subject to that provision must place materials in a storage unit with a label indicating the first date that the excluded hazardous secondary material began to be accumulated. If placing a label on the storage unit is not practicable, the accumulation period must be documented through an inventory log or other appropriate method.

XV. Major Comments on the Replacement of the Exclusion for Hazardous Secondary Materials That Are Transferred for the Purpose of Reclamation

Summary of Comments: Replacement of the Transfer-Based Exclusion With the Alternative Subtitle C Recycling Standards

Environmental and community organizations, as well as many state commenters, supported withdrawing the transfer-based exclusion because this would remove the possibility of hazardous secondary materials being sent to unpermitted reclaimers without a manifest. These commenters agreed with EPA's rationale that transfers of most types of hazardous secondary materials to other companies for reclamation involve discard, and that the 2008 DSW transfer-based exclusion could result in adverse impacts to human health and the environment from discarded material. Commenters noted that, prior to reclamation occurring, hazardous secondary materials have limited inherent value. Some commenters in particular were concerned about how the transfer-based exclusion made the generator responsible for verifying the safety and legitimacy of the recycler's operations, when most generators would not have the expertise to make such a determination. One commenter examined the compliance history of the facilities currently operating under the 2008 DSW exclusions and noted that a large percentage have been the subject of enforcement actions in the past five years, and many have been subject to clean-up authorities under either RCRA or CERCLA for past contamination.

Most states supported the alternative hazardous waste standards as a replacement for the transfer-based exclusion as an approach that would help encourage recycling, while maintaining protection of human health and the environment. States generally supported the longer accumulation period, but some state commenters suggested replacing it with the speculative accumulation limits. Finally, while, as noted above, environmental groups supported removing the transfer-based exclusion because of the potential hazards from third-party recycling, they did not support the alternative standards because they believed that the longer accumulation times would not be as protective as full Subtitle C regulation.

In contrast, most industry commenters and a few states opposed replacing the transfer-based exclusion with alternative hazardous waste standards. These commenters argued that the withdrawal would significantly hinder reclamation and therefore, the lifecycle environmental benefits from recycling, contrary to the resource conservation goals of RCRA. One commenter reported that retaining the generator-controlled exclusion but not allowing off-site transfers limits generator flexibility if, due to unforeseen circumstances (*e.g.,* equipment malfunctions), the generator is not able to recycle on-site. Several industry commenters opposed the alternative standards, saying that the added compliance requirements (*e.g.,* the reclamation plan) are likely to outweigh any benefit provided by the relaxed accumulation time limits. Two commenters suggested that EPA apply the alternative standards to the reclamation facility, but reduce the requirements that apply to the generator, given that the majority of the damage cases occurred at the recycling facility.

Commenters also argued that EPA's record does not support repealing the transfer-based exclusion, stating that EPA did not present any new data that the 2008 DSW transfer-based exclusion would cause environmental harm and noting that the 2011 DSW proposal stated that facilities currently operating under the exclusion do not appear to have any problems from hazardous materials recycling. Comments included discussions of the conditions of the 2008 DSW transfer-based exclusion and

why such conditions would be adequate to protect human health and the environment, and suggested if EPA was concerned about the conditions, the solution would be to strengthen the conditions, not withdraw the exclusion. In particular, the Pennsylvania Department of Environmental Protection, which oversees 27 of the 65 facilities operating under the transfer-based exclusion, commented strongly in favor of keeping the transfer-based exclusion and suggested that EPA add a condition that recyclers have a RCRA Subtitle C permit.

EPA's Response: EPA agrees with those comments stating that the 2008 transfer-based exclusion could result in adverse impacts to human health and the environment from discarded material, but disagrees that all off-site transfers for reclamation requires Subtitle C hazardous waste regulation, because imposing Subtitle C hazardous waste regulation would result in regulating hazardous secondary material that is currently being legitimately recycled and not discarded as hazardous waste. Instead, EPA agrees with those commenters that support retaining an exclusion from the definition of solid waste for off-site recycling with additional conditions which will address the potential for discard happening in the future.

As discussed in more detail in Section VI of this preamble, EPA has identified several regulatory gaps in the 2008 transfer-based exclusion that could result in significant risk to human health and the environment from discarded material. Specifically, the conditions for the transfer-based exclusion for recyclers lack the ability to provide oversight before management begins and do not allow public participation in the environmental decision-making process, thereby decreasing the likelihood of compliance and increasing the potential for risk to human health and the environment from discarded hazardous secondary material. The evidence of past damage cases at third-party recycling facilities leading to significant risk to human health and the environment from hazardous secondary materials originally intended for recycling and the underlying perverse incentives of the recycling market to over-accumulate such hazardous secondary materials intended for recycling, resulting in discard of the material, demonstrates the need for such additional oversight and public participation. In other words, the transfer-based exclusion can exacerbate financial incentives for small and/or inexperienced businesses to take in more hazardous secondary materials than they actually can use, mishandle it, and even go out of business, as shown by the fact that bankruptcies or other types of business failures were associated with 66% of the recycling damage cases, resulting in multi-million dollar cleanups.

At the same time, as EPA noted in the 2011 DSW proposal and as was echoed in the public comments, EPA has also carefully monitored the implementation of the 2008 DSW final rule since it came into effect in December 2008, and to date, no environmental problems have been reported at facilities claiming the DSW exclusions. As of April 2014, a total of 65 facilities are operating under the transfer-based exclusion, 56 of which are generators transferring off-site and 7 which are reclamation facilities.[44] All seven reclamation facilities are RCRA permitted. (There are no reclaimers without a Subtitle C permit currently operating under the transfer-based exclusion). Of the 56 generators operating under the transfer-based exclusion, 32 generators appear to have either started or substantially increased their recycling as a result of the 2008 DSW exclusions. These include generators that had previously reported in their 2007, 2009, or 2011 biennial report that they sent their solvents offsite for fuel blending, and then notified that they are sending their spent solvents for reclamation under the 2008 DSW final rule. In addition, in at least five cases, facilities have switched from sending spent pickle liquor to landfilling or deep well injection to recycling under the 2008 DSW rule. In total, the 2008 DSW notifications document that over 57,000 tons of hazardous secondary material were reclaimed under the 2008 DSW rule during 2011.[45] In addition, the fact that the Pennsylvania Department of Environmental Protection (PA DEP), which oversees 27 of the 65 facilities operating under the transfer-based exclusion, commented strongly in favor of keeping the transfer-based exclusion, supports the idea that an exclusion for off-site reclamation can be safely implemented. At the same time, given that the transfer-based exclusion has been achieving its intended purpose of encourage safe, legitimate recycling, withdrawing the transfer-based exclusion and replacing it with RCRA Subtitle C hazardous waste requirements is unnecessary and would result in hazardous secondary material that is currently being legitimately recycled and not discarded being regulated as hazardous waste. Because Subtitle C regulation would be more stringent than the current exclusion, if EPA were to finalize the alternative Subtitle C standards, Pennsylvania (and other states that have adopted the 2008 DSW rule) would have to change their programs and regulate this material as hazardous waste, despite the fact that it is currently being legitimately recycled and not discarded.

However, the fact that the comments from PA DEP went on to recommend that the transfer-based exclusion be limited to RCRA-permitted recycling facilities also supports EPA's determination that the self-implementing measures of the transfer-based exclusion have the potential to result in significant risk to human health and the environment. Because all recycling under the transfer-based exclusion has been (to date) performed at RCRA permitted facilities, EPA is unable to extrapolate what would happen at facilities without a RCRA Subtitle C permit if the transfer-based exclusion were fully implemented. Given the evidence of past damage cases leading to significant risk to human health and the environment from hazardous secondary materials originally intended for recycling and the underlying perverse incentives of the recycling market to over-accumulate such hazardous secondary materials intended for recycling, resulting in discard of the material, additional oversight of recycling beyond the self-implementing measures of the transfer-based exclusion are needed to ensure that the hazardous secondary material is legitimately recycled and not discarded.

EPA is therefore replacing the transfer-based exclusion currently found in 40 CFR 261.4(a)(24) and (25) with the verified recycler exclusion in 40 CFR 261.4(a)(24). This replacement strikes an appropriate balance between encouraging the safe and legitimate recycling of hazardous secondary materials and allowing the appropriate oversight to ensure the exclusion works as intended. It also addresses the issue of allowing a generator flexibility to recycle on site or off site as circumstances require (as long as the generator notifies under both the generator-controlled exclusion and the verified recycler exclusion). As discussed in section VI. D of the preamble, the verified recycler exclusion retains the conditions from the transfer-based exclusion that were intended to help identify hazardous secondary material that is legitimate

[44] Some of these facilities are also managing hazardous secondary materials under the generator-controlled exclusion.

[45] U.S. EPA, *EPA's Evaluation of Data Collected from Notifications Submitted under the 2008 Definition of Solid Waste Exclusions*, April 11, 2014.

recycled and not discarded, and adds conditions that address the regulatory gaps identified in the 2011 DSW proposal.

XVI. Major Comments on the Remanufacturing Exclusion

A. List of Eligible Solvents

In the July 2011 DSW proposal, EPA requested comments on excluding 18 spent solvents when they are remanufactured back into higher value commercial-grade solvents under the conditions of the exclusion. The solvents were: Toluene, xylenes, ethylbenzene, 1,2,4-trimethylbenzene, chlorobenzene, n-hexane, cyclohexane, methyl tert-butyl ether, acetonitrile, chloroform, chloromethane, dichloromethane, methyl isobutyl ketone, N,N-dimethylformamide, tetrahydrofuran, n-butyl alcohol, ethanol, and methanol. EPA chose these 18 spent solvent chemicals to limit the exclusion to higher-value materials and processes that resemble manufacturing more than waste management. EPA also requested comment on whether there are other solvents, chemicals or other types of hazardous secondary materials that should be included in the remanufacturing exclusion. In particular, EPA requested comments on opportunities for remanufacturing other types of non-renewable hazardous secondary materials, such as metal catalysts or other types of metal-bearing hazardous secondary materials.

Comments: List of Eligible Solvents

Many commenters supported the current list of spent solvents and did not support expanding the list in any way. These commenters cautioned against expanding the list of chemicals until EPA could determine the effectiveness of this exclusion. Several other comments did not focus on adding solvents or other hazardous secondary materials, but focused on the toxicity or market structure of the 18 listed spent solvents. One commenter questioned the claim of "higher-value" for chloroform, chloromethane, ethyl benzene, xylene, methanol and MTBE. Another commenter stated they no longer use many of the 18 listed spent solvents because the solvents are defined as a toxic substance and a hazardous air pollutant under other environmental statutes. The commenter continued by saying that members of their association now use more "environmentally friendly" solvents.

The remaining commenters discussed adding solvents or other hazardous secondary materials. Some commenters suggested expanding the solvent list to include benzene, acetone, isopropyl alcohol, or all solvents used in reactors, extractors, purifiers or blending equipment in pharmaceutical, organic, chemical, or plastics and resins manufacturing. Finally other commenters suggested adding additional hazardous secondary materials that were not solvents. The hazardous secondary materials suggested for addition were metal-bearing hazardous secondary material, F006 and spent hydroprocessing catalysts.

EPA's Response: List of Eligible Solvents

EPA agrees with those commenters who supported the remanufacturing exclusion and limiting it to the list of 18 spent solvents, at least at this point in time. EPA determined that these 18 spent solvents are good candidates for remanufacturing because they are used in large volumes as processing aids and because there are existing markets for all these solvents to be remanufactured to serve similar purposes to those of the original commercial-grade materials. EPA does not agree with comments that suggested adding chemicals to the list, but did not provide specific data or information that would lead the Agency to add these chemicals to the list at this point in time. While EPA may expand the list of eligible hazardous secondary materials for the remanufacturing exclusion based on additional data (see section VII of this preamble), the currently available information only supports the inclusion of the proposed list of 18 spent solvents.

EPA disagrees with those commenters who did not support including many of the identified solvents on the list because of their toxicity. In the 2011 DSW proposal, EPA acknowledged that the eligible solvents have suspected or recognized hazardous health effects associated with their manufacture, processing, and use.[46] Although EPA and industry have been working to find substitutes for the more hazardous of these solvents, or find ways to use less of them, this has not yet been widely achieved.[47] [48] With respect to the pharmaceutical sector in particular, complex chemical processes already registered with the Food and Drug Administration are involved, and EPA has found this a very challenging area to address in terms of chemical substitution and process changes. In addition, some of these solvents are building blocks and primary intermediate chemicals, making them difficult to replace. Until lower-risk substitutes for these solvents are found, it is helpful from a health risk standpoint to minimize the volume of solvents manufactured and to limit exposure to those already manufactured. This is something that the remanufacturing exclusion can achieve.

B. List of Eligible Industry Sectors

Under the 2011 DSW proposal, EPA identified the operations of four manufacturing sectors as candidates for the remanufacturing exclusion. The eligible sectors were pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and the paints and coatings manufacturing sector (NAICS 325510). These four sectors were selected because their primary business is manufacturing rather than waste management. Furthermore, these sectors are closely associated with the chemical functions identified in the remanufacturing exclusion and currently use a high volume of the solvents identified for the functional purposes included in this exclusion. EPA also asked for comment on whether there were other industry sectors that should be included in the remanufacturing exclusion.

Comments: List of Eligible Industry Sectors

Several commenters suggested specific industries for EPA to add to the remanufacturing exclusion. The suggested industries were K061 recyclers, the biofuels sector, recyclers with a part B permit like Safety-Kleen, petroleum refineries (NAICS 324110), petrochemical manufacturers (NAICS 325110), synthetic rubber manufacturers (NAICS 325212), fiber glass manufacturers, and electronic manufacturers. K061 recyclers and the biofuels sector were suggested due to their active markets and potential impacts on the environment if hazardous secondary materials were managed improperly. Companies, such as Safety-Kleen, with a part B permit, were suggested because these recyclers encourage sustainable materials management through remanufacturing. Petroleum refineries (NAICS 324110), petrochemical manufacturers (NAICS 325110) and synthetic rubber

[46] Allen, D., Shonnard, D., *Green Engineering: Environmentally Conscious Design of Chemical Processes, Risk Concepts,* chapter 2, pgs 35–62, Austin, S., U.S. EPA Editor, Published by Prentice-Hall, 2001.

[47] For information on U.S. EPA's Green Chemistry Program, see *http://www.epa.gov/gcc/.*

[48] Information on the American Chemical Society's Green Chemistry Institute's Pharmaceutical Roundtable is available via the ACS Web site *http://portal.acs.org/portal/acs/corg/content.*

manufacturers (NAICS 325212) were suggested due to their significant generation of spent solvents. The commenter believed these industry sectors' spent solvents should be eligible just like the solvents from the proposed industry sectors. Another commenter suggested adding fiber glass manufacturers because they operate refractory recycling programs and refractories are higher-value hazardous secondary materials. Finally, the electronics sector was recommended for its recycling of precious metals.

EPA's Response: List of Eligible Industry Sectors

EPA acknowledges that the industry sectors that were nominated for inclusion in the remanufacturing exclusion participate in recycling activities; however, these sectors' recycling activities do not include the types of practices or functions that were within the scope of the remanufacturing exclusion. Under the remanufacturing exclusion, a manufacturer may send their hazardous secondary material to another manufacturer, from one of the permissible industry sectors, provided that the remanufacturer uses the hazardous secondary material in one of the four permissible functions. The commenters all suggested industries that send their hazardous secondary materials to a third party, who is not necessarily a manufacturer, but a facility that would recover the solvent or other hazardous secondary material and who would then sell the recycled product to another person.

As discussed in the market forces study, it is generally in the best interest of commercial third party recyclers to maximize the amount of hazardous secondary material they can accept to increase profits. This market structure creates a perverse market incentive to over-accumulate hazardous secondary materials, which can result in discard, which the remanufacturing exclusion seeks to avoid. In contrast, the market forces study shows that facilities engaged in industrial intra-company recycling, where companies generate hazardous secondary materials as by-products of their main production processes and recycle the hazardous secondary materials used in production, have more flexibility in waste management decisions than a commercial recycler does. When a commercial recycler's primary or entire income is from accepting hazardous secondary materials for recycling and selling recycled products, there is no economic alternative if the market crashes to stay in business unless the company can afford the cost of a hazardous waste management permit and the cost of becoming a hazardous waste disposal facility. Remanufacturers, on the other hand, as a type of intra-industry recycler, profit primarily from the sale of their product and can switch their inputs between raw materials and hazardous secondary materials if market conditions shift.

It is also not clear that the suggested industry sectors will know what function their hazardous secondary materials will be used for after remanufacturing. As discussed previously, the remanufacturing exclusion encourages higher-value materials to be remanufactured and then used in high-value processes again. Furthermore, this exclusion focuses on the functions of aiding chemical manufacturing and processing because the solvents performing these functions retain their original physical and chemical properties. In these functions, the solvents are not contaminated by substances, such as inks and greases, which are difficult to separate, but only mixed with pure product ingredients, from which they can be separated readily in a commercially feasible manner. Unfortunately, the suggested industry sectors provided by commenters do not appear to coincide with the intent of remanufacturing hazardous secondary materials that retain their original physical and chemical properties. Therefore, these additional sectors will not be included in the remanufacturing exclusion.

However, EPA notes that these sectors would be eligible to participate in the verified recycler exclusion (40 CFR 261.4(a)(24)) if they meet the conditions of that exclusion.

C. Regulatory Language

In the July 2011 DSW proposal, EPA did not specifically include regulatory language for the remanufacturing exclusion, but EPA did include a streamlined version of the scope, applicability and conditions of the exclusion followed by a very detailed explanation of the exclusion that included the reasoning for each condition.

Comments: Regulatory Language

Many commenters said they were unable to comment on the remanufacturing exclusion because there was no regulatory language included in the proposal. Almost all commenters supported the concept of the remanufacturing exclusion, but requested that EPA re-propose the remanufacturing exclusion in a separate rulemaking with regulatory text, so commenters could accurately comment on the exclusion.

EPA's Response: Regulatory Language

The preamble language discussing the remanufacturing exclusion contained adequate detail and information to allow comment on the proposed remanufacturing exclusion. In the July 2011 DSW proposal, the remanufacturing exclusion was presented in a narrative form that closely resembles the regulatory language being finalized today. The proposed rule also included a large amount of detail on the scope, applicability, and conditions of the remanufacturing exclusion. The proposal laid out exactly what solvents, industry sectors, and chemical functions were permissible in the remanufacturing exclusion. The proposal then clearly stated what was required for the notification, remanufacturing plan, records of shipments and confirmations of receipts, tanks and container management standards and the speculative accumulation requirement. EPA has determined that between the narrative and detailed explanation of the remanufacturing exclusion, commenters were provided more than enough information to comment on the remanufacturing exclusion, and thus, we are finalizing it in today's final rule.

XVII. Major Comments on Legitimacy

A. Codifying Legitimacy for All Recycling

Comments: Codification of Legitimacy

Comments from industry across the board (including waste management companies) vehemently opposed codifying the legitimacy provision at § 260.43 for the pre-2008 recycling exclusions and exemptions, arguing that this action, combined with making factor 3 and factor 4 mandatory, is a drastic change in policy and likely will end much of the current recycling that is occurring under RCRA. Industry commenters argued that this would be a huge administrative burden with little environmental benefit and that recycling has been taking place under these exclusions largely without problems for many years. Some industry commenters expressed their opinion that the codified legitimacy factors are significantly different than EPA's existing legitimacy policy and therefore, the legitimacy analysis that would have to be undertaken is not substantively the same. Other commenters opined that applying the codified legitimacy standard to the pre-2008 exclusions and exemptions would function as a disincentive to recycling by adding

paperwork burden and increasing compliance difficulties, especially for generators who would be exposed to potential RCRA enforcement due to subsequent noncompliance by the recycler. One commenter stated that inspectors could miss the more obvious cases of sham recycling because Agency resources would be expended in reviewing the large amount of required documentation and inspecting the more frequently used pre-existing exclusions, such as the use/reuse exclusion in 261.2(e) and the closed loop recycling exclusion in 261.4(a)(8) to the detriment of investigating other potentially more problematic recycling.

Many of the specific industry commenters on this issue were scrap metal recyclers who argued that although they have been legitimately recycling for decades, expecting them to prove that their recycling operations were legitimate for the first time would be prohibitively expensive, time-consuming and unworkable. The scrap metal recycling industry had particular issues with factor 4 as drafted in the 2011 DSW proposal and had many questions on how to do the comparable demonstration.

With respect to the states, a number of states were supportive of codifying one legitimacy standard for all hazardous secondary material recycling activities. They argued that codifying the legitimacy provision would give industry and states a definitive standard to evaluate recycling and that industries operating under the pre-2008 recycling exclusions and exemptions should not have any problems documenting compliance with the legitimate recycling provision of § 260.43, if their recycling is truly legitimate. On the other hand, a number of states, the Association of State and Territorial Solid Waste Management Officials (ASTSWMO), and the Northeast Waste Management Officials' Association (NEWMOA) all expressed concerns over applying the codified legitimacy standard to certain long-standing recycling exclusions, including lead-acid batteries, circuit boards, scrap metal, and closed loop recycling, with one state arguing that this additional regulatory burden was not necessary for the 2008 pre-existing exclusions and exemptions.

Several environmental and community organizations supported codification of the legitimate recycling provision for all hazardous secondary materials recycling, but did not provide a detailed explanation of their position. In addition, whereas one environmental organization acknowledged that EPA did not solicit comment on the elimination of these exclusions, this organization stated that they believed a re-examination of all of the exclusions by the Agency, including the pre-2008 exclusions and exemptions should be conducted as soon as possible.

EPA's Response: Codification of Legitimacy

In response to the many comments that were submitted, the Agency is making a number of changes to the 2011 DSW proposal. Specifically, EPA is codifying a general statement in § 261.2(g) that makes it clear that a hazardous secondary material found to be sham recycled is discarded and thus, is a solid waste. However, we are not codifying a reference to the legitimacy provisions at 40 CFR 260.43 in each of the pre-2008 recycling exclusions/exemptions, as we proposed to do in the 2011 DSW proposal. On further reflection, we have determined that the sham recycling prohibition in § 261.2(g) more clearly defines the Agency's view on legitimate recycling and the pre-2008 recycling exclusions and exemptions. We also agree with those commenters who pointed out that we generally looked at the legitimacy of the recycling activity when we promulgated the material-specific or industry-specific exclusions and, therefore, we are not requiring facilities to revisit past legitimacy determinations. However, by codifying a prohibition on sham recycling that applies to all hazardous secondary materials being recycled, we are confirming that we expect anyone operating under a recycling exclusion or exemption to do so legitimately. (As we discuss later in this section and in section VIII, the Agency also has made a number of other revisions to the legitimacy standard to address the concerns raised in the comments.)

Comments: Effect on Existing Legitimacy Determinations

Many industry commenters argued that EPA or the states have already made legitimate recycling determinations for their specific recyclable materials. Some commenters also noted that EPA considered legitimacy at the time their material-specific exclusion was promulgated and had already made legitimacy determinations for those recyclable materials (*e.g.*, the zinc fertilizer exclusion, precious metal exclusion, etc.). These commenters also argued that as part of rulemaking for the material-specific exclusions, the Agency had determined what conditions were necessary to ensure legitimacy. Some argued that overlaying the general legitimacy factors on the 2008 pre-existing conditional exclusions and exemptions is unnecessary and duplicative and would create significant disincentives to recycling.

EPA's Response: Effect on Current Legitimacy Determinations

In response to the concerns expressed that the codified legitimacy factors would lead to practices previously considered legitimate now being considered sham operations, in general, the Agency is clarifying that it does not intend for the current recycling legitimacy determinations to change due to the codification of the legitimacy factors. We consider the factors we are finalizing today to be consistent with the criteria in the Lowrance Memo and previous preamble statements on legitimate recycling. Therefore, we generally do not anticipate that implementing agencies will revisit past legitimacy determinations. If recycling was considered legitimate under the Lowrance Memo, its status should not change as a result of today's rule. To make its intent more clear, the Agency is codifying a prohibition against sham recycling in § 261.2(g) instead of adding a provision in each of the pre-2008 exclusions and exemptions referring to the legitimacy provision in § 260.43. This codification will give implementing agencies a clear regulatory statement that can be used to enforce against sham recyclers, yet not require the vast majority of recyclers that are performing legitimate recycling under the pre-2008 exclusions and exemptions to revisit previously-made legitimacy determinations.

Any existing legitimate recycling determination should not change due to the codification of the legitimacy factors. In addition, examples that were provided in the public comments helped inform our decision-making and led us to revise factor 4 significantly to address this issue. The final regulatory text is consistent with the pre-existing legitimacy guidance and the manner in which legitimacy determinations have been made by the EPA Regions and authorized states. Thus, we do not expect implementing agencies to revisit past legitimacy determinations.

Regarding the existing exclusions and exemptions in the regulations, EPA acknowledges that, in establishing a specific exclusion or exemption, we have already determined in the rulemaking record that the specific recycling practice is excluded from the definition of solid waste provided all the conditions of the rule are met. However, the Agency has always enforced its rules on the basis that any recycling must be legitimate (See *U.S.* v.

Self, 2 F.3d 1071, 1079 (10th Cir. 1993); *U.S.* v. *Marine Shale Processors,* 81 F.3d 1361, 1366 (5th Cir. 1996); *Marine Shale Processors* v. *EPA,* 81 F.3d 1371, 1381–83 (5th Cir. 1996)). This is meant to prevent a company from claiming to be operating under an existing exclusion or exemption and simply using that as a way to avoid full RCRA Subtitle C regulation. Thus, since EPA is not modifying the existing exclusions and exemptions, there is no change regarding legitimacy determinations, except that the factors are now codified. A company's ability to claim a recycling exclusion or exemption has always depended on the recycling being legitimate.

B. Making All Four Legitimacy Factors Mandatory

Comments: Mandatory Factors

For the most part, states commenting on this part of the proposal supported all the legitimacy factors being mandatory (the exceptions being Tennessee and Louisiana), although several states went on to say that they either opposed the petition process or are concerned about it for the following reasons: (1) The resources necessary for addressing incoming petitions, (2) the possibility of using the petition process as a potential backdoor out of legitimacy, and/or (3) the potential for the petition process to lead to inconsistencies among states on legitimacy determinations. Most states have supported making all four factors mandatory in past proposals and continue to do so here, arguing that codifying the legitimacy factors in the rule (instead of only in rule preamble and in policy documents) will provide clearer instruction to the regulated community and will strengthen the ability of state programs to enforce the criteria in situations where recycling is not legitimate. This, the states claim, will reduce the potential risk to human health and the environment from mismanagement of hazardous secondary materials and from elevated concentrations of contaminants in recycled products. They also argue that making all four factors mandatory will remove a serious flaw in the enforceability of legitimacy. Other commenters noted that requiring all four legitimacy factors to be met is critical to ensure reclamation is being conducted at a qualified facility and to minimize the potential for creation of future damage cases. Most states found it hard to conceive of a legitimate recycler that would not be able to satisfy all four factors.

Although some commenters representing the hazardous waste recycling industry did support making all the factors mandatory, the majority of industry commenters did not support this provision. Those commenters who did support a requirement that all four factors be met argued that this structure would be fairer and more enforceable. On the other hand, many of the commenters that argued against making all factors mandatory stated that this would discourage much of the current recycling and would be too hard to meet. Commenters particularly singled out factor 4 (toxics along for the ride) as problematic for implementation. Specifically, we got comments from multiple members of the mining and mineral processing industry arguing that factor 4 is not applicable to their industry and from scrap metal recyclers asking how factor 4 would apply at their facilities.

Many commenters also argued that the petition process was not an adequate mechanism for those processes that do not meet all four factors because there will be too many petitions for the states and EPA to be able to process and because shutting down recycling operations during the time spent waiting for petitions to be processed would be very expensive and wasteful.

Another important consideration is what the Agency has learned since implementing the 2008 DSW final rule, which finalized the legitimacy factors as a condition of the generator-controlled and transfer-based exclusions, with two factors that are mandatory and two factors that must be considered. Since that rule became effective, the Agency has become aware of a misconception regarding the "to be considered" factors. It has become clear that some industry stakeholders believe those factors to be less important, stating that they are optional or even can be ignored. This was not the Agency's intention at all. The Agency tried to make it clear that they must be considered and could, in fact, indicate sham recycling on their own. However, through public comment and stakeholder meetings, we have repeatedly heard that industry views these factors as optional.

Another argument against making all the factors mandatory requirements is that the overall determination is made on a case-by-case basis, which is often facility-specific, and not all legitimate recycling can fit into such a rigid system. Commenters argue that making all four factors mandatory removes the flexibility necessary for the broad universe of hazardous secondary materials being recycled.

EPA's Response: Mandatory Factors

After much consideration and review of the public comments, the Agency has decided to make all four legitimacy factors mandatory with adjustments to the factors themselves to account for the variability and diversity of legitimate hazardous secondary material recycling. As explained above in sections VIII.B.5 and VIII.B.6, we have adjusted the regulatory language of factor 4 to build in more flexibility for meeting this factor,[49] but are also making it clear in the regulatory language that it is important that each factor be met, except as otherwise noted.[50] Since finalizing the legitimacy factors in the 2008 DSW final rule, our experience with implementation has made us realize the importance of requiring all factors be met. Even though we stressed the importance of considering each factor in the 2008 DSW final rule, many of the stakeholders are under the misimpression that the factors that were to be considered could actually be ignored. We did not mean to give the impression that factor 3 and factor 4 were optional and thus, have decided that the best way to give the proper weight to these factors is to make them mandatory with additional flexibility to address the various recycling scenarios.

In addition, instead of a petition process for those legitimate recycling scenarios that don't meet factor 4, we are finalizing a documentation, certification, and notification process. We continue to find that legitimacy determinations are best made on a case-by-case basis, which has always been the case, with the facts of a specific recycling situation in hand. If a person has any questions as to the legitimacy of a particular recycling activity, he can always approach the appropriate regulatory agency for assistance in making a legitimacy determination.

C. Documentation of Legitimate Recycling

When the Agency codified the legitimacy standard in the 2008 DSW final rule, we did not require specific documentation regarding the legitimate recycling determination. In the 2011 DSW proposal, in addition to proposing that the legitimacy standard apply to all

[49] In addition, we are also finalizing in the regulatory language the additional flexibility that was proposed in factor 3 to the legitimacy provision.

[50] As we discuss in Section VIII.B.6.c, the Agency has included a self-implementing process that would allow the person performing the recycling to document, certify, and notify the appropriate Regional Administrator that even though the hazardous secondary material does not meet factor 4, the recycling is still considered legitimate.

hazardous secondary material recycling and that all four legitimacy factors must be met, EPA proposed a new documentation requirement for persons performing the recycling. We proposed that the recyclers include a narrative description of how their hazardous secondary materials are legitimately recycled and that this documentation be maintained on-site for the duration of the recycling operations and for three years after the recycling operations cease. However, as explained above in section VIII.C.2, we are only finalizing the requirement to document a legitimate recycling determination for those recyclers operating under the generator-controlled exclusion and for those recyclers that are legitimately recycling, but do not meet factor 4—that is, they must document why the recycling operation is legitimate even if they do not meet factor 4.

Comments: Documentation

ASTSWMO, NEWMOA, and most other states supported requiring documentation of legitimate recycling for both the generator and recycler (with exceptions noted in their comments about certain long-standing recycling exclusions and exemptions, including lead-acid batteries, circuit boards, scrap metal, and closed loop recycling). Most state environmental agencies cited the ability to implement and enforce the RCRA recycling program as the primary reason why documentation is needed. However, a few states did not support requiring documentation for any of the pre-2008 recycling exclusions and exemptions. One state agreed that some documentation may be necessary for inspections, but also stated that common business records would likely suffice in most cases. An environmental organization coalition suggested we provide a consistent format and require documentation of both generators and recyclers. Industry generally opposed the documentation requirement and felt that it would pose significant practical challenges, especially for factor 4. Some industry commenters felt that "up-front" documentation is not necessary since EPA can rely on § 261.2(f) for documentation. Other commenters argued that for companies that rely heavily on the existing exclusions and exemptions, it would be easy to inadvertently miss documenting every instance (*i.e.,* closed loop recycling) and the consequences could be severe. In fact, one industry association argued that documentation may actually cause more non-compliance due to the huge administrative burden, especially for large facilities that utilize many of the recycling exclusions and that the voluminous paperwork could result in inspectors missing more obvious sham recycling.

Other commenters objected to any recordkeeping requirements documenting that a recycling activity is legitimate, arguing the policy is not new so, therefore, no new documentation should be required. They argued that since EPA already believes most recycling is legitimate, requiring documentation for all recycling is overly burdensome, expensive, and not necessary. Some industry commenters argued that EPA offered no evidence in the record that documenting the legitimacy of a recycling practice would have any additional environmental benefit. A few commenters asserted that requiring documentation for all recycling might actually cause more non-compliance, especially for the more frequently used recycling exclusions, such as the use/reuse and closed-loop recycling exclusions.

Finally, there was ample confusion in the comments on who would be required to put together and provide the documentation. The Agency proposed that the requirement would apply to the "persons performing the recycling." That is, if the generator sent his hazardous secondary materials off-site to a recycler, then the recycler would be the one responsible for maintaining the documentation. If, on the other hand, the generator recycled his hazardous secondary materials on-site, then the generator would be responsible for documenting that the recycling activity was legitimate. However, some commenters still expressed confusion over who would be responsible for the documentation.

EPA's Response: Documentation

As discussed previously, the Agency has determined that, for purposes of the existing pre-2008 recycling exclusions and exemptions, documentation is not required, unless the facility has determined it is legitimately recycling, but does not meet Factor 4. In the vast majority of cases, recycling under the existing exclusions is legitimate and documentation is not necessary. The Agency has previously acknowledged the legitimacy of these recycling practices when it first promulgated the material-specific and industry-specific exclusions and exemptions, when at that time it took into consideration the legitimacy of the recycling practices. After review of the public comment, the Agency has determined that routine documentation of legitimacy is an unnecessary burden for persons legitimately recycling under the pre-2008 recycling exclusions and exemptions.

However, the Agency is requiring documentation on legitimacy determinations under two circumstances: (1) Persons operating under the generator-controlled exclusion originally finalized in the 2008 DSW final rule, and (2) persons legitimately recycling under any recycling exclusion or exemption where the hazardous constituents in the recycled products are not comparable or are unable to be compared to those in analogous products (unless the recycled product meets widely recognized commodity specifications or the hazardous secondary material is returned to the production process). In these cases, the persons recycling would be required to keep documentation of the legitimacy of their recycling.

Specifically, the Agency has determined that requiring documentation under the generator-controlled exclusion is appropriate because this exclusion is generic and can be used by a wide variety of industries recycling any of a number of hazardous secondary materials. In addition, as explained above in section VIII.B.6.c, the Agency has also determined that documentation is necessary for those rare cases of legitimate recycling that has significantly higher levels of hazardous constituents in the recycled product than in an analogous product, or has no analogous product, has no widely-recognized commodity specifications for the recycled product, and is not returned to the production process. In those cases, due to the self-implementing nature of the legitimacy determinations, it is important that the recycler perform the proper assessment and document how the recycling is still legitimate.

Finally we would note that 40 CFR 261.2(f) applies whenever a person is claiming that a hazardous secondary material is not a solid waste, which oftentimes is because the material is being recycled. Section 261.2(f) states that, in the context of an enforcement action to implement Subtitle C of RCRA, a person claiming that a material is not a solid waste or is conditionally exempt from regulation is responsible for showing that they meet the terms of the exclusion or exemption and must provide appropriate documentation to show why they are eligible. For the legitimacy requirement finalized today, under § 261.2(f), in the event of an enforcement action, persons claiming that their recycling activity is legitimate would have the burden to provide documentation showing how the

recycling meets all four factors, except as otherwise noted. That is, they would need to show how the recyclable hazardous secondary materials provide a useful contribution to the recycling process and are stored as valuable commodities, and how the product of the recycling activity is valuable and comparable to a legitimate product.

D. Factor 3: Language and Implementation

Comments: Factor 3

Many commenters supported the regulatory language revisions to factor 3, particularly the following additional italicized language: ''Where there is an analogous raw material, the hazardous secondary material, must be managed, at a minimum, in a manner consistent with the management of the raw material *or in an equally protective manner.*'' Some commenters argued, however, that the real change to factor 3 was the proposed revision to the contained standard because the second part of factor 3 reads: ''Where there is no analogous raw material, the hazardous secondary material must be contained.'' These commenters expressed concern that by making factor 3 mandatory and by revising the contained definition, the Agency was in effect making factor 3 more stringent.

EPA's Response: Factor 3

The Agency disagrees with the comments that the revised contained standard is more stringent and thus, results in a more stringent factor 3. First, as noted by the commenters, the contained standard only applies in cases where there is no analogous raw material to compare the management of the hazardous secondary material to. More importantly, however, as explained in more detail is section V, while the revised contained standard is more clear and more definitive, it is not more stringent, but is consistent with the contained standard previously discussed and described in the preamble to the 2008 DSW final rule. Thus, EPA finds that overall the revisions to factor 3 are reasonable and consistent with the Agency's previous positions on legitimacy. Therefore, the Agency is finalizing the regulatory language for factor 3 as proposed and has determined the added flexibility will allow existing legitimate recycling to continue without any negative impact on environmental protection.

E. Factor 4: Language and Implementation

In the 2011 DSW proposal, EPA proposed to change the wording within the regulatory language for factor 4 from ''significant'' and ''significantly elevated'' to ''comparable to or lower than'' and explained that this language more clearly reflects the intent of this factor. In addition to this language change, other proposed changes to the legitimacy provision impact the design and implementation of factor 4. The proposal to make all four legitimacy factors mandatory led many commenters to discuss specific concerns they had about factor 4 and what problems they would have meeting the factor as it was proposed. In this section, EPA examines some of those comments, as well as provides the Agency's responses and the changes that were made to the proposal in this final rule to make factor 4 more workable.

In concert with many of the comments about the difficulties of meeting the proposed factor 4, EPA also received many comments about its proposed petition process for when a recycling process does not meet either factor 3 or factor 4. EPA is thus, also addressing those comments in this section of the preamble because the documentation, certification and notification process that will be replacing the proposed petition process is found within factor 4 of the legitimacy provision.

Comments: ''Comparable''

EPA's proposal to change the language within factor 4 that describes the comparison of levels of contaminants between products made from recycling of hazardous secondary materials and products using raw materials was supported by most of the states that commented on factor 4 and opposed by many of the industry commenters. The states that supported the change stated that the term ''comparable'' is better because it is more specific, though several of these commenters also asked for further guidance on the language.

Industry commenters who opposed this change to factor 4 stated that there was not a good reason in the preamble for the change in the language and that they do not think that ''comparable'' means the same thing as ''not significantly higher,'' arguing that if the terms mean the same thing there was no reason for EPA to change them. Several commenters argued that this change in language makes the factor more stringent and/or less flexible.

EPA's Response: ''Comparable''

EPA is finalizing the proposed language in this factor and using the term ''comparable'' in discussing levels of hazardous constituents. This term means any contaminants present in the product made from hazardous secondary materials are present at levels comparable to or lower than the levels in the analogous product, although levels can be slightly higher than those found in the analogous product, but must be within a small acceptable range. This change in language is not a change from its long-standing policy and it is also consistent with the legitimacy provisions in the Identification of Non-Hazardous Secondary Materials that are Solid Wastes final rule (76 FR 15456, March 21, 2011).

In response to comments requesting further guidance and those that state that this language change is making factor 4 too stringent, first we have repeated in section VIII of the preamble the examples that we included in the 2008 DSW final rule which explains how the Agency envisions this factor working. Moreover, the additional changes that it made to factor 4 in this final rule, describing several situations under which a product of a recycling process would be considered comparable to a legitimate product or intermediate, address both these concerns. As EPA determined in previous rulemakings, promulgating an exact numerical cut-off for what would be considered ''comparable'' is not practicable for the legitimacy provision because it applies to a wide variety of recycling scenarios. EPA may provide future guidance on the application of this provision if needed.

Comments: Uncertainty About Compliance

Many of the comments that EPA received from industry regarding factor 4 stated that facilities are concerned about this factor, particularly if it were to become mandatory, because it would be difficult to determine if a given recycling process is in compliance. Many of these commenters stated the high cost of testing for 40 CFR part 261 Appendix VIII constituents as one of their concerns.

EPA's Response: Uncertainty About Compliance

First, we are reiterating in this final rule that testing of the recycled product is generally not required under factor 4 of legitimacy. A generator can use its knowledge of the materials it uses and of the recycling process to make legitimacy determinations, although they may choose to test if they are uncertain if the product from their hazardous secondary materials contains elevated levels of hazardous constituents when compared to non-recycled products. In addition, factor 4

as finalized today presents no greater compliance issues than it would under the 2008 DSW final rule, because under the 2008 legitimacy definition, a facility still had to consider the hazardous constituents in Appendix VIII of part 261 in determining whether factor 4 is met, and be able to demonstrate why recycling was still legitimate even if it was not met. Furthermore, as we have noted elsewhere, we have made certain revisions to factor 4, in response to comments, for facilities to determine that they are in compliance with this factor. Specifically, the provisions in § 260.43(a)(4) state that products that meet widely recognized commodity standards and specifications would be considered comparable and meet factor 4 and hazardous secondary materials that are recycled back into the original generating process would be considered comparable and also meet factor 4, which is intended to make compliance with factor 4 simpler across many of the industries in which much industrial recycling takes place.

Comments: No Analogous Product To Compare

Many of the comments regarding factor 4, including many of the examples that were sent in to describe the difficulties of complying with factor 4, described recycling situations in which there is no analogous product and argued that it would be very difficult to meet the proposed factor 4 in a situation where there is no analogous product.

EPA's Response: No Analogous Product To Compare

After examining the comments submitted, including the examples provided, EPA agrees with the commenters that the design of proposed factor 4 did not adequately take into consideration recycling scenarios that either always includes some form of recycled hazardous secondary material or that would be considered closed loop recycling. As a result of these comments, EPA modified the structure of factor 4 to include provisions specifically for the situation where there are no analogous products, (found in § 260.43(a)(4)(ii)). The finalized provisions state that when there is no analogous product, the product of the recycling process is comparable to a legitimate product or intermediate when the product is a commodity meeting widely recognized commodity standards and specifications or when the hazardous secondary materials being recycling are returned to the original process or processes from which they were generated.

This change to factor 4 provides the necessary flexibility to those persons who recycle hazardous secondary materials for which there is not an analogous product for comparison. However, EPA has also included a documentation, certification, and notice provision for cases that do not fit these two scenarios. Under this provision, the recycler can perform an assessment of the hazardous secondary material and still determine that its recycling is legitimate despite not meeting factor 4. This finding must be documented and certified by a responsible facility official and a copy kept on-site for as long as the recycling continues, and for 3 years after the recycling operations cease. Also, a notice of this finding must be sent to the appropriate Regional Administrator (or State Director, in an authorized state), using the Site ID form.

Comments: Petition Process

As stated above in this section, many commenters argued that the petition process was not an adequate mechanism for relief for those processes that do not meet all four factors and therefore, they opposed the proposed petition process. They argued that there would be too many petitions for the states and EPA to process efficiently, which could result in shutting down recycling operations during the time spent waiting for petitions to be processed, which would be very expensive and wasteful. States were particularly concerned about the amount of resources that would be needed to process the incoming petitions.

EPA's Response: Petition Process

In response to the arguments presented by the commenters in opposition to the petition process and the concerns with how implementation of the petition process could impact recycling, EPA is not finalizing the petition process in this final rule. Instead, EPA has made two changes to its proposal to account for the situations that the petition process was meant to cover. The first is the additional provisions in factor 4 (already discussed above in this section) that describe the specific situations in which EPA considers a product of a recycling process to be comparable to an analogous product or intermediate. The second is the documentation, certification, and notice provision for products that have levels of hazardous constituents that are not comparable to or lower than an analogous product or intermediate or that are unable to be compared, but which are not covered by the new provisions.

Under the documentation, certification, and notice process, a recycler must determine that its recycling is still legitimate despite the levels of hazardous constituents in the recycled product not being comparable to those in an analogous product or intermediate. This determination can take into account exposure of toxics in the product, bioavailability of toxics in the product or other relevant considerations that show the recycled product does not contain levels of hazardous constituents that pose a risk to human health or the environment. The facility then must prepare documentation explaining its assessment and include a certification that the recycling is legitimate. In addition, the facility would need to notify the appropriate Regional Administrator (or State Director, in an authorized state) of this finding.

This provision is a less burdensome process for both recyclers and the states implementing the RCRA program because it maintains the self-implementing nature of the legitimacy requirement. However, because facilities will still have to provide notice to the regulatory agency, it also allows implementing agencies to perform oversight and inspections of recycling facilities if they are concerned about the legitimacy of a specific recycling process.

XVIII. Major Comments on the Revisions to Solid Waste Variances and Non-Waste Determinations

In the July 2011 DSW proposed rule, EPA proposed several modifications to the existing regulations for solid waste variances and non-waste determinations in 40 CFR 260.31(c), 40 CFR 260.33 and 40 CFR 260.34 to ensure protection of human health and the environment and foster greater consistency on the part of implementing agencies.

A. Requiring Facilities To Re-Apply for a Variance or Non-Waste Determination

In the July 2011 DSW proposal, EPA proposed to revise 40 CFR 260.33(c) to require facilities to re-apply for a variance in the event of a change in circumstances that affects how a material meets the criteria upon which a solid waste variance has been based, as is currently required for non-waste determinations. Additionally, EPA requested comment on whether to require variances and non-waste determinations to be renewed periodically, and, if so, what time period would be appropriate (*e.g.,* two or five years as suggested in the preamble to the 2011 July DSW proposal).

Comments: Re-Apply for a Variance in the Event of a Change

The majority of commenters supported EPA's proposed change to require facilities to re-apply for a variance in the event of change in circumstances that affects how a hazardous secondary material meets the criteria upon which a solid waste variance has been based. The commenters believe the change promoted clarity and consistency in the regulations and that it made sense to ensure the hazardous secondary materials continued to meet the conditions of the exclusion over time. Other commenters, however, while supporting such a provision, urged EPA to require a re-certification rather than a full application process so as to reduce the burden on states and the regulated community.

A few commenters disagreed with this provision, as they argued that administrative authorities already use discretion to review changes in circumstances.

EPA's Response: Re-Apply for a Variance in the Event of a Change

EPA agrees with the majority of commenters that finalizing a requirement to require facilities to take action in the event of a change in circumstances will ensure the hazardous secondary material remains eligible for a variance and continues to meet the variance criteria over time. EPA also agrees with those commenters that suggested ways to reduce the administrative burden on states and the regulated community. Therefore, in today's final rule, EPA is requiring that, in the event of a change, the facility must send a description of the change to the regulatory authority and the regulatory authority will determine whether the facility must re-apply for a variance. This change in procedure allows both the regulatory authority and regulated community to avoid spending unnecessary resources where the change in circumstances is found to be of no consequence to the original variance that the regulatory authority has granted. EPA notes that re-applying for a variance should be less burdensome than the initial application because a facility would only have to update its original application.

EPA disagrees with those commenters who opposed this change on the basis that regulatory authorities already use discretion to review changes in circumstances. First, the changes that EPA made to the final rule would not automatically require a person to re-apply for the variance, but make the regulatory authority aware of the change so that an informed decision could be made as to whether the variance is still appropriate. Moreover, relying on case-by-case discretion to require notice in the event of a change could allow certain hazardous secondary materials to remain excluded from regulation under Subtitle C of RCRA, even though based on the changed circumstances, the variance is no longer appropriate, and could present a risk to human health and the environment. It would also contradict the Agency's goal to foster greater consistency on the part of implementing agencies.

Comments: Periodic Renewal of Variances and Non-Waste Determinations

A number of commenters did not support requiring periodic renewals of variances and non-waste determinations. Commenters opposed this change because of the additional burden on both the states and the regulated community and the fact that this would not be needed if EPA finalized its proposed change to require a renewal or recertification in the event of a change. Additionally, some commenters argued that the administrative authority already has discretion to set renewal timeframes as a condition of the variance. One commenter argued that facilities make significant business investments based on regulatory certainty and, thus, if variances are subject to repeal, this may prevent investment in recycling activities.

A few commenters, however, supported a renewal requirement and argued that reapplying in the event of a change is not the same as a periodic renewal. This commenter argued that the requirement to re-apply in the event of a change relies almost entirely on the facility to self-report on a change in circumstances, of which the facility may have an economic incentive not to do. Other commenters suggested that generators "re-certify," rather than re-apply, on an annual or biennial basis that they continue to meet the conditions of a variance or non-waste determination in order to reduce administrative burden.

EPA's Response: Periodic Renewal of Variances and Non-Waste Determinations

EPA agrees with the commenters that supported a renewal requirement for solid waste variances and non-waste determinations. Variances and non-waste determinations are granted based on case-specific circumstances of a particular hazardous secondary material being recycled. Many of the variance and non-waste determination criteria specifically consider factors such as, the manner in which the hazardous secondary material is recycled, the market factors of the recycling process, the value of the hazardous secondary material, and contractual arrangements. However, these factors are not static and, instead, change and evolve over time. It is therefore prudent that regulatory authorities periodically review these case-specific situations to ensure that the hazardous secondary material continues to meet the criteria of the variance or non-waste determination. Therefore, EPA is adding a provision to 40 CFR 260.33(d) that solid waste variances and non-waste determinations shall be effective for a fixed term not to exceed 10 years, which is the same term limit for RCRA hazardous waste permits under 40 CFR 270.50(a).

EPA is establishing a time limit of 10 years (rather than two or five years, as suggested in the July 2011 proposal) considering the need to provide regulatory certainty to support business investment, as well as the fact that 10 years is the same as the duration of RCRA permits under 40 CFR 270.50(a). The 10-year time frame also ensures that renewals occur regularly enough in order to evaluate significant changes in recycling processes, technologies, and market factors that may affect the terms of a variance or non-waste determination.

EPA disagrees with those commenters who argued that periodic renewals would not be needed if EPA finalized the proposed change to require notice in the event of a change in circumstances that affect how a hazardous secondary material meets the conditions of a variance or, as currently required for a non-waste determination. As one commenter noted, the requirement to provide notice in the event of a change relies on a facility self-reporting that change and thus, this requirement may not be consistently implemented. A periodic time limit, in this case 10 years, however, triggers a re-review of the circumstances without relying on self-reporting by the facility. Furthermore, EPA disagrees with commenters who opposed this change on the basis that regulatory authorities already use discretion to review changes in circumstances. (See response to this comment in EPA's Response to "Re-Apply for a Variance in the Event of a Change.) Regarding the commenter that argued that periodic renewals would disrupt business investment, EPA finds that a time limit of ten years (rather than two or five years, as suggested in the

July 2011 proposal) is a sufficient amount of time to provide regulatory certainty to support business investment, given that ten years is the same as the duration of RCRA permits.

B. Requiring Notification for Facilities Operating Under Variances and Non-Waste Determinations

In the July 2011 DSW proposal, EPA proposed to add a provision under 40 CFR 260.33 stating that facilities receiving a variance or non-waste determination must provide notification as required under 40 CFR 260.42. This would require facilities to send a notification prior to operating under the regulatory provision and by March 1 of each even-numbered year thereafter to the EPA or the State Director, if the state was authorized, using EPA Form 8700–12.

Comments: Requiring Notification for Facilities Operating Under Variances and Non-Waste Determinations

Commenters were split on this issue. Many commenters supported requiring facilities receiving a solid waste variance or non-waste determination to submit notifications in compliance with 40 CFR 260.42. These commenters believed that the notification would provide updated information about a facility's activities and would enable better compliance monitoring. These commenters also agreed that notification would improve transparency, because the notifications could be available online.

However, many commenters opposed requiring facilities that receive a variance from being a solid waste or non-waste determination to submit notifications. These commenters argued that the act of applying for and receiving a variance or non-waste determination constitutes adequate notification for regulatory authorities. These commenters also argued that notification would increase the burden on facilities and was not necessary if EPA finalized its proposal to require facilities to re-apply in the event of a change.

EPA's Response: Requiring Notification for Facilities Operating Under Variances and Non-Waste Determinations

Although EPA recognizes the arguments both for and against notification, EPA agrees with those commenters who support notification in order to enable better compliance monitoring and to improve transparency. Therefore, EPA is finalizing a requirement in 40 CFR 260.33(e) that facilities receiving a variance or non-waste determination must provide notification as required by 40 CFR 260.42.

This requirement serves to meet EPA's goal to foster greater consistency on the part of implementing agencies and to help ensure the proper implementation of the solid waste variances and non-waste determinations. The intent of the notification is to enable variances and non-waste determinations to be tracked nationally and over time, which facilitates state-to-state consistency in determinations. Additionally, notification enables effective oversight of facilities receiving solid waste variances and non-waste determinations because it provides regulatory authorities with a mechanism for receiving regularly updated information (such as information regarding quantities of hazardous secondary materials managed under the determination). Furthermore, this information can be used to identify facilities which may have undergone changes to their reclamation process significant enough to trigger a review of the determination under 40 CFR 260.33(c).

EPA does not agree that the solid waste variance or non-waste determination application itself constitutes adequate notification. Currently, individual facility applications are not tracked nationally and there exist no consolidated list of facilities operating under a solid waste variance or non-waste determination. Notification, using EPA Form 8700–12, ensures that standard information regarding facilities receiving solid waste variances and non-waste determinations can be collected, stored, and used to enable compliance monitoring and to foster consistency in implementing the regulations.

We also do not agree that the notification requirement is duplicative of the requirement to send notice in the event of a change because the two requirements serve different purposes and require different information. In the event of a change, facilities must send a description of the change in circumstances to EPA or the authorized state, who then make an evaluation as to whether a facility should re-apply for a solid waste variance or non-waste determination. Under 40 CFR 260.42, facilities submit information, such as type and quantity of hazardous secondary material being managed, using EPA Form 8700–12, which enables the information to be entered into EPA's database where it can be accessed by both EPA and state regulatory authorities.

Furthermore, EPA does not agree that notification using EPA Form 8700–12 poses an undue burden. The form is relatively simple to complete and is currently being used for facilities excluded from the definition of solid waste under 40 CFR 261.4(a)(23). Additionally, EPA is currently developing an electronic submission process, which will further reduce reporting burden.

C. Revisions to the Partial Reclamation Variance

In the July 2011 DSW proposal, EPA proposed to revise the partial reclamation variance provision of 40 CFR 260.31(c) to clarify when partially-reclaimed materials are not solid waste because they are commodity-like. Specifically, EPA proposed to: (1) Revise the introductory text to clarify when the variance applies; (2) revise the introductory text to require that all of the decision criteria must be met; (3) revise the language of all of the decision criteria; and (4) eliminate the sixth criterion, that is, "other relevant factors."

Comments: General Comments on Proposed Changes to Partial Reclamation Variance

Many commenters supported EPA's proposed changes to the partial reclamation variance. In fact, two of these commenters argued that existing variances that do not meet the new criteria should be rescinded or revised.

A few commenters, however, did not support the proposed changes. These commenters argued that EPA does not have the record to support its finding that states are inconsistently and incorrectly applying the partial reclamation variance criteria and that variances granted by the states are not protective of human health and the environment. Additionally, one commenter argued that EPA provided no documentation for public review to substantiate how EPA intended the variance criteria to apply when it promulgated the variance in 1985. Another commenter argued that the proposed changes will restrict recycling.

EPA's Response: General Comments on Proposed Changes to Partial Reclamation Variance

EPA agrees with commenters who supported the proposed changes. Not finalizing the proposed revisions to the partial reclamation variance would only result in a continuation of inconsistency among state determinations, which in some cases, allow partially-reclaimed materials to be excluded from the definition of solid waste when they are

clearly not commodity-like, but rather hazardous wastes. EPA notes, however, that the final changes to the partial reclamation variance criteria only apply to facilities receiving variances after the effective date of today's rule. The changes are not retroactive and thus would not apply to facilities currently operating under existing partial reclamation variances, unless and until the facility's variance came up for renewal. Thus, the Agency does not agree with those commenters who suggested that any variance that does not meet the revised criteria should be rescinded or revised immediately.

EPA estimates that the states have granted between 15 to 20 partial reclamation variances, including variances granted in Indiana, Louisiana, Ohio, Oregon, Pennsylvania, Texas and Washington. EPA itself has also issued a partial reclamation variance to World Resource Company (WRC) in Arizona. (See list of partial reclamation variances issues by the states in today's docket.) Some of the partial reclamation variances were granted as the Agency intended and have required RCRA Part B storage and treatment permits for the incoming hazardous waste material. Other states, however, have issued partial reclamation variances which contradict the intention of the partial reclamation variance. For example, EPA publicly expressed its disagreement in a November 18, 2010, letter to Indiana's Department of Environmental Management (IDEM) concerning the tentative approval of a facility's request for a partial reclamation variance, a copy of which is found in today's docket. In our letter, we made clear that we did not believe IDEM should grant a partial reclamation variance to incoming hazardous wastes that were not "sufficiently commodity-like to qualify for the variance."

EPA also disagrees with commenters who argued that EPA's record does not provide adequate basis for how the Agency intended the partial reclamation variance to operate. In the preamble to the 1985 DSW final rule (January 4, 1985; 50 FR 655), the Agency made clear that incoming materials to a partial reclamation facility were hazardous wastes and that the facility processing these incoming materials must obtain appropriate RCRA Part B storage and treatment permits. (Furthermore, these facilities are also subject to biennial reporting under 40 CFR 264.75.) Additionally, the Agency points to the partial reclamation variance it issued to WRC on August 13, 2002 (67 FR 52617) as a public example of the how the Agency intended for the partial reclamation variance to be implemented. In this case, the Agency's partial reclamation variance to WRC for the partial reclamation of F006 electroplating sludges required WRC to obtain RCRA Part B storage and treatment permits for the incoming hazardous waste.

In addition, EPA disagrees that the final rule changes will unnecessarily restrict recycling. Today's changes clarify how the partial reclamation variance has always been intended to operate; thus, any recycling that is consequentially restricted from the variance as a result of the changes was never intended to be excluded from hazardous waste requirements. EPA maintains that hazardous waste must be managed under appropriate hazardous waste requirements in order to ensure protection of human health and the environment.

Comments: Revisions to Introductory Text

Most commenters supported the proposed changes to the introductory text, including requiring that all criteria must be met and requiring compliance with the legitimacy criteria in 40 CFR 260.43. One commenter, while supporting the proposed changes said that EPA should define vague words such as "commodity-like," "sufficient economic value," and "substantial." Another commenter said that commodity-like partially-reclaimed material must be marketable to the general public, that is, it must be a material that could be marketed to more than one facility.

Some commenters did not agree that all the criteria must be met. One commenter argued that this conflicts with EPA's 1985 preamble in which EPA said the Regional Administrator can weigh factors and may rely on any or all of them to reach a decision. Additionally, the WRC variance that EPA issued acknowledged that the partial reclamation steps being performed were "not elaborate." However, the partial reclamation involved by WRC was sufficiently substantial to produce a commodity-like material as verified by contracts, sales, and subsequent management of the commodity-like material. Other commenters believed EPA's proposed changes to the introductory text imposed prescriptive conditions which conflict with the intent of the variance by restricting the administrative authority's decision-making discretion.

EPA's Response: Revisions to Introductory Text

EPA agrees with those commenters who supported the proposed changes to the introductory text, including requiring that all criteria must be met and requiring compliance with the legitimacy factors in 40 CFR 260.43. In response to the one commenter who believed that certain terms are vague, it is EPA's intent with this final rule to clarify how the partial reclamation variance should be applied. Although, specific definitions would be difficult to promulgate given the broad applicability of the terms, EPA notes that today's preamble discussion along with today's regulatory revisions to the variance criteria serve to better define how EPA is using these terms in the partial reclamation variance, particularly when a material becomes commodity-like. For example, EPA notes in its preamble that criteria 2–5 define the fundamental characteristics that indicate whether a partially-reclaimed material is "commodity-like."

Regarding comments that argued against requiring all criteria to be met, EPA has determined that in order to reduce the inconsistency in state-to-state partial reclamation variances, the criteria must be made more prescriptive. Balancing the factors, as was EPA's original direction in 1985, has resulted in subjective interpretations that differ across states and which, in some cases, do not align with the original intent of the partial reclamation variance. EPA finds that requiring all criteria to be met is a more effective framework for determining when a partially-reclaimed material is commodity-like and therefore not a solid waste.

Comments: General Comments on Revisions to Variance Criteria

Many commenters supported the changes to the criteria of the partial reclamation variance. However, a few commenters disagreed with inserting the word "whether" at the beginning of each criterion because it implied the criterion was more prescriptive. A few commenters also argued that EPA's proposed insertion of the word "partially" before "reclaimed" disregards the fact that EPA has acknowledged that more than one processing step may be necessary before the inherent value of a usable product is recovered.

EPA's Response: General Comments on Revisions to Variance Criteria

EPA agrees with the many commenters that supported the proposed changes to the variance criteria. Regarding EPA's proposed insertion of the word "whether" in each criterion, the intent of this change is to make the criteria more prescriptive in order to reduce the inconsistency of

partial reclamation variance determinations. EPA also disagrees that adding the word "partially" in front of "reclaimed" disregards the fact that EPA has acknowledged that more than one processing step may be necessary before the inherent value of a usable product is recovered. EPA recognizes that reclamation of hazardous secondary materials may involve multiple steps and hazardous waste may be recycled in any number of steps in accordance with the hazardous waste regulations. However, EPA maintains that a variance from the definition of solid waste is appropriate only for partially-reclaimed material that is commodity-like, as demonstrated by satisfaction of the partial reclamation criteria.

Comments: Proposed Criterion (1)—Whether the Degree of Partial Reclamation the Material Has Undergone Is Substantial

For the first proposed criterion, two commenters argued that EPA's use of "partial reclamation" in place of "processing" did not provide additional clarification. Another commenter stated the criterion should state EPA's intent on 76 FR 44129 and read "whether the degree of partial reclamation the material has undergone is substantial and the material produced is not the original hazardous waste." Other commenters were concerned regarding the term "substantial," because it is subjective and needs a better definition. These commenters argued that EPA has not provided a standard regarding when a material is "no longer the original hazardous waste."

EPA's Response: Proposed Criterion (1)—Whether the Degree of Partial Reclamation the Material Has Undergone Is Substantial

EPA disagrees with those commenters who argued that EPA's use of "partial reclamation" in place of "processing" did not provide additional clarification. The term "processing" is a broad, general term that can refer to a number of processes, such as the process used to generate the hazardous waste. However, the intention of the partial reclamation variance is to evaluate, specifically, the degree of partial reclamation and therefore it makes sense to use "partial reclamation" in criterion 1. Additionally, this revised language for the first criterion conforms to the revised changes in the introductory text of the partial reclamation variance.

EPA agrees with commenters that adding a clarifying statement to criterion (1) is helpful and has added "as demonstrated by using a partial reclamation process other than the process that generated the hazardous waste" after "substantial." We believe this language clarifies (and responds to the comment regarding the term "substantial") that the process used to generate the hazardous waste (such as dewatering of sludge) would not be considered "substantial" under this criterion. Therefore, by emphasizing that the partial reclamation process must be substantial in the first criterion, the Agency is reiterating that the material produced by the partial reclamation process must be commodity-like as supported by also meeting criteria (2)–(5).

Under the final rule, EPA is finalizing the first criterion to read: "Whether the degree of partial reclamation the material has undergone is substantial as demonstrated by using a partial reclamation process other than the process that generated the hazardous waste."

Comments: Proposed Criterion (2)—Whether the Partially-Reclaimed Material Has Sufficient Economic Value That it Will Be Purchased for Final Reclamation

For the second proposed criterion, one commenter supported EPA's emphasis in the preamble on the existence of contracts for the sale of the partially-reclaimed material. This commenter argued that such emphasis is important to ensure that partial reclaimers do not accumulate significant quantities of material without assurance that a willing buyer actually exists. This commenter stated that an example of excess accumulation risk is shown by the variance recently granted by IDEM to the facility, ShoreMet, in which the variance was granted on the basis that a market for the partially-reclaimed material would exist solely because other reclaimers had sold fully-reclaimed F006 (wastewater treatment sludges from electroplating operations) and F019 (wastewater treatment sludges from aluminum coating processes). This commenter argued that such an analysis does not ensure that ShoreMet can market its partially-reclaimed material.

Another commenter argued that reclamation may involve more than one processing step and that the proposed changes to this criterion limit the administrative authority's ability to consider the value of the partially-reclaimed material and the usable end products. This commenter also argued that the term "value" in 40 CFR 260.43 means sold to a third party or used as an effective substitute, which may not apply here. Still another commenter noted the F006 reclamation guidance [51] allows the use of theoretical "on paper" value of precious metals present, despite that substantial processing might be needed before those precious metals realize market value.

EPA's Response: Proposed Criterion (2)—Whether the Partially-Reclaimed Material Has Sufficient Economic Value That it Will Be Purchased for Final Reclamation

EPA agrees with the commenter that supported EPA's emphasis in the preamble on the existence of contracts for the sale of the partially-reclaimed material as demonstrating the second criterion is being met.

As we have stated previously, the partial reclamation variance is for those hazardous secondary materials that have been partially-reclaimed but, must be reclaimed further, as long as the partial reclamation has produced a commodity-like material. That is, if the partially-reclaimed material is being purchased for further reclamation, the Agency considers the partially-reclaimed material to have sufficient economic value, regardless of how each party calculates the value to be paid. Evidence to support this criterion may include sales information; demand for the materials; and business contracts, such as contracts specifying quantities of material sold, details of the transaction, and the effective price paid for the partially reclaimed material by purchasers (*i.e.,* after subtracting transportation costs and any other goods or services rendered in exchange for the material purchased).

EPA is making one change to the proposed second criterion. As noted above, EPA understands that reclamation of hazardous waste may involve multiple steps and thus EPA finds it is more appropriate to ensure that the partially-reclaimed material is purchased for "further reclamation" rather than "final reclamation" to allow for processes that use more than one reclamation step in processing the partially-reclaimed material. Therefore, the final second criterion in today's rule reads: "Whether the partially-reclaimed material has sufficient economic value that it will be purchased for further reclamation."

[51] U.S. EPA, "Background Document: Providing Context—The Example of F006 Electroplating Sludges," June 2011. Docket ID: EPA–HQ–RCRA–2010–0742–0016.

Comments: Proposed Criterion (3)—Whether the Partially-Reclaimed Material Is a Viable Substitute for a Product or Intermediate Produced From Virgin or Raw Materials Which Feeds Subsequent Production Steps

For the third criterion, one commenter disagreed with the proposed wording change because it restricts the authority's ability to consider the benefit provided by subsequent processing of the partially-reclaimed material and directs the authority only to consider whether it is immediately a substitute or product before further processing. Another commenter suggested replacing the phrase "which feed subsequent production steps" with the phrase "that is used in a subsequent manufacturing process" to be more clear. Still another commenter suggested that this criterion should state more plainly that "it is a substitute for ingredients, intermediates, or commercially available virgin/raw materials."

EPA's Response: Proposed Criterion (3)—Whether the Partially-Reclaimed Material Is a Viable Substitute for a Product or Intermediate Produced From Virgin or Raw Materials Which Feeds Subsequent Production Steps

EPA maintains that the partial reclamation variance is for those materials that have been partially-reclaimed, but must be reclaimed further, as long as the partial reclamation has produced a commodity-like material. Thus, whether or not a material is produced at a later stage of reclamation as a viable substitute for a product or intermediate is not relevant in determining whether a partially-reclaimed material produced earlier is commodity-like.

EPA agrees with the commenter who suggested replacing the phrase "which feed subsequent production steps," with the commenters suggested wording, with certain modifications, in order to improve clarity. Therefore, the Agency is modifying this criterion to read, "whether the partially-reclaimed material is a viable substitute for a product or intermediate produced from virgin or raw materials, which is used in subsequent production steps." With this clarification, the Agency is making clear that, while multiple steps may be involved in producing a commodity-like material, it is only when the partially-reclaimed material is a viable substitute for a product or intermediate is it considered "commodity-like."

EPA is not making the suggested change to state that the partially-reclaimed material "is a substitute for ingredients, intermediates, or commercially available virgin/raw materials" because EPA is concerned that this language may introduce confusion in distinguishing between when a partially-reclaimed material is "commodity-like" as compared to raw or virgin material that would need to undergo substantial processing before meeting this definition. Therefore, EPA is maintaining the proposed language to read "is a viable substitute for a product or intermediate produced from virgin or raw materials."

Comments: Proposed Criterion (4)—Whether There Is a Guaranteed Market for the Partially-Reclaimed Material

For the fourth proposed criterion, whether there is a guaranteed market for the partially-reclaimed material, a few commenters argued that EPA is not specific enough to meet its objective and suggested that the criterion should read "whether there is a guaranteed and secure long-term market for the partially-reclaimed material." These commenters also stated that EPA should include in the final rule more empirical and measurable ways to define this concept, for example including markets with consistent positive profit margins for a minimum of ten years.

EPA's Response: Proposed Criterion (4)—Whether There Is a Guaranteed Market for the Partially-Reclaimed Material

EPA agrees that clarity is needed and has modified the fourth criterion to include examples of how a market for the partially-reclaimed material can be demonstrated. The fourth criterion now reads, "whether there is a market for the partially-reclaimed material as demonstrated by known customer(s) who are further reclaiming the material (*e.g.* record of sales and/or contracts, and evidence of subsequent use, such as bills of lading)." In response to the commenter who urged EPA to include more empirical and measurable ways to define this concept, the Agency has determined that examination of the contracts, record of sales, and bills of lading between the partial reclaimer and its customers will provide adequate evidence of whether this criterion is satisfied.

Comments: Proposed Criterion (5)—Whether the Partially-Reclaimed Material Is Handled To Minimize Loss

For the fifth proposed criterion, one commenter argued that "minimize loss" should be better defined and that, at a minimum, the partially-reclaimed material should meet the "contained" standard for hazardous secondary materials and be managed exactly like any other commodity.

EPA's Response: Proposed Criterion (5)—Whether the Partially-Reclaimed Material Is Handled To Minimize Loss

EPA does not find that the phrase "minimize loss" needs to be better defined. As we have discussed elsewhere and in the preamble to the 2011 July DSW proposal, evidence to support this criterion may include documentation of facility procedures used to minimize loss (*e.g.,* inspections, training) and storage and management equipment designed to minimize loss. Additionally, under today's final rule, partially-reclaimed materials must meet the legitimate recycling standard in 40 CFR 260.43, which requires that the hazardous secondary materials be managed as a valuable commodity. This criterion explains that, where there is an analogous raw material, the hazardous secondary materials must be managed, at a minimum, in a manner consistent with the management of the raw material or in an equally protective manner. Where there is no analogous raw material, the hazardous secondary material should be contained, as defined in 40 CFR 260.10.

Comments: Revision To Eliminate Sixth Criterion

Many commenters supported EPA's proposal to eliminate the sixth criterion concerning other relevant factors. One commenter stated that criterion six has been and is currently being used as a primary basis for granting partial reclamation variances for hazardous secondary materials, and has led to the creation of unfair and illegal advantages for some reclaimers.

A few commenters, however, disagreed with the proposed change. One commenter argued that removing criterion six conflicts with the intent of the partial reclamation variance by restricting the administrative authority's discretion. Other commenters argued that the overall situation should be considered and that an applicant's history of compliance would be an "other relevant factor" that should be considered when evaluating an application for a partial reclamation variance.

EPA's Response: Revision To Eliminate Sixth Criterion

EPA agrees with those commenters that supported the elimination of the sixth criterion. The sixth criterion has resulted in subjective interpretations which have led, in the Agency's view, to incorrect application of the partial reclamation variance and therefore, EPA

is removing it from the list of criteria. We do not agree with the commenter who argued that removing this criterion would restrict the administrative authority's discretion. For example, EPA agrees with those commenters who said that an applicant's history of compliance could be considered as part of a partial reclamation variance determination. However, rather than requiring that compliance be considered under a sixth criterion, EPA notes that compliance would likely be a factor in determining how the facility is meeting the legitimate recycling factors in 40 CFR 260.43 and the partial reclamation variance criteria (1)–(5). For example, regulatory compliance could be used regarding whether the partially-reclaimed material is handled to minimize loss.

D. Revision to the Criteria for Non-Waste Determinations To Require Petitioners To Demonstrate Why Their Material Cannot Meet an Existing Exclusion

EPA proposed to revise the criteria for the non-waste determination in 40 CFR 260.34 to require that petitioners explain or demonstrate why their hazardous secondary materials cannot meet, or should not have to meet, the existing DSW exclusions under 40 CFR 261.2 or 40 CFR 261.4.

Comments: Non-Waste Determination Criteria To Require Petitioners To Demonstrate Why Their Material Cannot Meet an Existing Exclusion

Many commenters agreed with this proposed change. These commenters noted that, as a practical matter, it would seem facilities seeking such a determination would have already evaluated the existing exclusions and thus, requiring this information should not be overly burdensome.

A few commenters, however, disagreed with this proposed change. One commenter argued that petitioners will be unwilling to provide justification at the risk of disqualification of an accepted exclusion in another state or EPA region for the same process. Another commenter noted that there may be legitimate reasons where the use of an exclusion might be too close to call and the facility wants greater comfort in a determination. A third commenter argued it is unreasonable for EPA to place the burden of interpreting EPA's regulations on those who are regulated prior to consenting to review a request for a non-waste determination.

EPA's Response: Non-Waste Determination Criteria To Require Petitioners To Demonstrate Why Their Material Cannot Meet an Existing Exclusion

EPA agrees with those commenters who supported this proposed change to require that petitioners explain or demonstrate why their hazardous secondary materials cannot meet, or should not have to meet, the existing DSW exclusions under 40 CFR 261.2 or 40 CFR 261.4. EPA agrees that this type of evaluation should already have been conducted by facilities that are formally petitioning the state or EPA for a non-waste determination. This provision provides the regulatory authority with the information it needs, while helping to reduce the number of applications because facilities will be forced to evaluate whether an existing self-implementing exclusion may be used.

EPA does not agree with the opposing arguments presented by the commenters as a basis for not finalizing the proposed change. These arguments, including that a facility may want more comfort in a determination and that EPA shouldn't put the burden on facilities to interpret regulations, are precisely why EPA and authorized states would benefit from receiving an explanation or demonstration from the facility why they cannot or should not have to meet an existing exclusion. This information would enable regulatory authorities to review and resolve questions regarding whether a non-waste determination may be warranted. Additionally, EPA does not find convincing the argument that a facility may be unwilling to provide justification at the risk of disqualification of an accepted exclusion in another state or EPA region. In fact, by finalizing this change, EPA is fostering greater consistency in state-to-state interpretations.

E. Designation of the Regional Administrator as the EPA Recipient of Petitions for Variances and Non-Waste Determinations

In the July 2011 DSW proposal, EPA proposed to change the word "Administrator" to "Regional Administrator" in 40 CFR 260.30, 260.31, 260.32, 260.33, and 260.34. Due to the case-specific nature of the variances and non-waste determinations, EPA believed that these decisions may be better made by the Regional Administrator.

Comments: Designation of the Regional Administrator as the EPA Recipient of Petitions for Variance and Non-Waste Determinations

Most of the comments on this issue opposed the proposed change arguing that there are significant differences in regional interpretations just as there are differences in state interpretations and that the change will lead to increased inconsistency in the implementation of variances and non-waste determinations. Other commenters urged EPA to clarify that petitions for solid waste variances and non-waste determinations may be sent to Directors of authorized states, just as the petition process works currently. These commenters argued that states are delegated by EPA to administer the hazardous waste regulations and, therefore, states have a role in reviewing solid waste variance and non-waste determination petitions.

Only a few commenters supported the proposed change.

EPA's Response: Designation of the Regional Administrator as the EPA Recipient of Petitions for Variance and Non-Waste Determinations

EPA recognizes the commenters' concerns who argued that designating the Regional Administrator, rather than the Administrator, as the person responsible for evaluating such petitions and deciding whether to grant a solid waste variance or a non-waste determination may increase inconsistency by virtue of there being ten Regional Administrators as compared to the one Administrator. Because the Agency is striving for as much consistency as possible, we have decided not to finalize this proposed change. We would also note that the rule does not change in any way the delegation of authority to states authorized to administer the hazardous waste regulations and thus, authorized states that have adopted these provisions may continue to evaluate and decide whether to grant a solid waste variance or a non-waste determination, as they do currently.

F. Requirement To Share Copies of Variances and Non-Waste Determinations

In the July 2011 DSW proposal, EPA requested comment on whether to require states to share copies of any solid waste variance and non-waste determination petitions and the tentative decisions with EPA for review and comment in order to encourage collaboration and national consistency. Formalizing collaboration would have

the benefit of reinforcing existing working relationships between EPA and the states.

Comments: Requirement To Share Copies of Variances and Non-Waste Determinations

A number of comments did not support a requirement for states to share copies of solid waste variance and non-waste determination petitions with EPA for comment. These commenters argued that another layer of bureaucracy would delay the process. One commenter was concerned with protecting a company's confidential business information. Another commenter argued that EPA has not made an adequate case for the need for national approvals and that there may be legitimate reasons for arriving at different conclusions, for different variance petitions.

Some commenters, however, supported EPA's efforts to collect solid waste variance and non-waste determination decisions and to share the information with other states.

EPA's Response: Requirement To Share Copies of Variances and Non-Waste Determinations

EPA recognizes commenters' concerns who argued that requiring states to share copies of solid waste variance and non-waste determination petitions with EPA for review and comment would likely increase the duration of the petition process. Therefore, EPA is not codifying this requirement in the final rule. EPA, however, will likely continue to work with the states in order to increase state-to-state consistency in such determinations and may pursue non-regulatory efforts to collect and share solid waste variances and non-waste determinations as part of implementing the final rule.

XIX. Major Comments on the Proposed Revisions to Pre-2008 Recycling Exclusions

In the 2011 DSW proposed rule, EPA considered whether additional requirements should be codified for recycling exclusions and exemptions that EPA promulgated prior to the 2008 DSW final rule. Specifically, EPA requested comment on codifying the legitimate recycling standard in 40 CFR 260.43, the contained standard in 40 CFR 260.10, and the notification provision in 40 CFR 260.42 for 32 regulatory provisions that exclude or exempt certain types of recycling from full Subtitle C regulations.[52]

However, EPA explicitly did not reopen comment on any substantive provisions of the regulatory exclusions or exemptions. The inclusion of requirements for legitimacy, containment, and notification were strictly meant as means to better enforce the regulations.

The request for comment stemmed from EPA's analysis of a report it developed as part of the DSW rulemaking, "An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials" (environmental problems study), which analyzed 218 recycling damage cases.[53] The goal of the environmental problems study was to identify and characterize environmental problems that have been attributed to hazardous secondary material recycling activities. EPA then used the findings from this study to craft a number of conditions for the 2008 DSW final rule, which were specifically designed to target the major causes of damage and thus help define "discard" of hazardous secondary materials. These conditions, however, were applied only to the 2008 DSW exclusions.

EPA reviewed and analyzed each damage case in the environmental problems study and determined the regulatory provision that likely, or potentially, governed the management of the hazardous secondary materials.[54] This analysis was based on the type of hazardous secondary material and the date of the damage case related to the effective date of the regulatory provision. From this analysis, EPA had concluded that over half of the damage cases in the environmental problems study were associated with hazardous secondary materials that were likely excluded or exempted from Subtitle C regulation under an existing (pre-2008) regulatory provision.[55] For example, EPA reported in the 2011 DSW proposed rule that 52 damage cases (23%) are associated with scrap metal that is likely excluded under § 261.4(a)(13) and/or § 261.6(a)(3)(ii), while drum reconditioning accounted for 23 damage cases (10%), in which the residuals are likely excluded under 40 CFR 261.7. Additionally, 35 damage cases (16%) were associated with batteries that are likely managed under 40 CFR 273.2 and/or 40 CFR part 266 subpart G. Based on these results, and given that many of the pre-2008 recycling exclusions do not directly specify conditions that are necessary to ensure discard is not occurring, we concluded that these provisions may not be adequately enforceable in order to protect human health and the environment. Thus, in the 2011 DSW proposal, we requested comment on whether EPA should codify additional conditions for these recycling exclusions.

Many comments in response to EPA's request for comment on whether the Agency should codify additional conditions to the pre-2008 recycling provisions were unfavorable, although a number of comments indicated support for the codification.

Comments: Potential Impact of Additional Requirements

Industry commenters, and scrap metal recyclers in particular, strongly opposed adding conditions, arguing that the additional conditions will pose an undue burden on businesses without any environmental benefit and will discourage recycling. For example, commenters argued that scrap metal recyclers go to great lengths to ensure that they do not handle hazardous waste. These commenters said that, if EPA were to add conditions to the scrap metal exclusion, a scrap metal recycler would be required to obtain additional insurance, local licenses, training, new inspection procedures, lawyers, and consultants in order to maintain compliance and to prepare for an inadvertent loss of the exclusion, which would make it a handler of hazardous waste. Commenters argued that many scrap metal businesses are small and family-owned and cannot afford these new requirements and thus, these regulations will severely affect business and jobs.

Many commenters also argued that the contained standard is not necessary or practical and would be expensive. Commenters believed that the one-size-

[52] EPA also proposed additional recordkeeping requirements in the speculative accumulation standard in 40 CFR 261.1(c)(8). See section XIV for responses to these comments.

[53] The original environmental problems study, published January 11, 2007, reviewed 208 damage cases. Based on information submitted by commenters to the 2007 DSW supplemental proposed rule, EPA reviewed an additional ten recycling damage cases in an addendum to the environmental problems study, published July 14, 2008. A second addendum was published in June 2011. As part of this DSW final rule, EPA updated the environmental problems study to combine all of the information compiled from the 2007 study, the 2008 and 2011 addenda, and new information collected by EPA since June 2011. This 2014 updated study includes information on 250 damage cases and can be found in the docket for today's rule.

[54] U.S. EPA *Correlation of Recycling Damage Cases with Regulatory Exclusions, Exemptions or Alternative Standards.*

[55] The determination that the hazardous secondary materials were "likely" associated with pre-2008 recycling exclusions and exemptions was based on the waste description and the fact that most recyclers did not appear to have a RCRA permit. EPA did not specifically verify if the damage case facility was operating under an exclusion or exemption.

fits-all approach that EPA requested comment on fails to reflect EPA's recognition over the years of the need to tailor any conditions for regulatory exclusions to the specific characteristics of the recycling activities. For example, one commenter argued that the contained standard is redundant for the spent wood preservatives exclusion under 40 CFR 261.4(a)(9), which already requires facilities to manage solutions and wastewater "to prevent release to either land or groundwater or both" and to construct recycling units so "prior to reuse they can be visually or otherwise determined to prevent such release." This commenter also noted that drip pads must comply with 40 CFR part 265 subpart W. Other commenters noted that applying the contained standard to lead-acid batteries is inappropriate and unnecessary because EPA, on several occasions, has recognized that individual lead-acid batteries qualify as "containers," citing a November 17, 1989, memo from Sylvia Lowrance (RO 13339). Furthermore, these commenters argued that the contained standard duplicates § 266.80(b).

Regarding notification, many commenters did not support adding notification to the pre-2008 exclusions. These commenters argued that the EPA Form 8700–12 (Site Identification Form) and, in particular the Addendum to the Site Identification Form, which is used to notify under 40 CFR 260.42, is too burdensome for facilities operating under a pre-2008 exemption/exclusion. For example, the Addendum requires facilities to list their hazardous secondary materials using EPA hazardous waste codes. In some cases, particularly for scrap metal recyclers, facilities would be required to determine which secondary material would be considered a hazardous secondary material, which may involve extensive testing in order to determine which hazardous waste code to report on the form. Additionally, the Addendum also requires facilities to report quantities of hazardous secondary material managed under the exclusions, but commenters explained that facilities operating under a pre-2008 exclusion have not generally determined which secondary material would be considered a hazardous secondary material, and therefore, any quantity estimates, which are required on the Addendum, would not be reliable for programmatic decisions. Moreover, commenters argued that notification would be difficult for facilities with multiple excluded processes. For example, one commenter explained that one facility in Tennessee has more than a hundred closed-loop recycling processes and thus it would be extremely onerous to report each process on a notification.

Commenters also argued that it is difficult to estimate the number of facilities operating under the exclusions and thus the impact on the state implementers of the notification program is uncertain. For example, notification would impact all forms of scrap metal handling (junk yards, scrap dealers, steel-makers), generators and handlers managing lead-acid batteries (vehicle repair facilities, retailers) and precious metals destined for reclamation (x-ray facilities, dentists, vets, jewelers). These commenters argued that most states are already under resource constraints and will be unable to cope with the tens of thousands of new forms that would need processing if EPA were to codify notification as a condition of the exclusions. Some state commenters suggested ways to reduce the burden on states, including not requiring periodic notifications on the same day that biennial reports are due and by implementing a process whereby notifications could be submitted electronically. Commenters also noted that the re-notification requirement for excluded facilities would be more stringent than what is currently required for hazardous waste small quantity generators.

EPA's Response: Potential Impact of Additional Requirements

EPA did not believe at the time of the proposal that the additional requirements—meeting the legitimate recycling standard, the contained standard, and the notification requirement—would present an undue burden on facilities. As discussed in more detail below, this is because EPA considers certain requirements, like legitimate recycling and containment, inherent in the definition of solid waste recycling exclusions and assumes that the regulated community already meets these standards. Notification was considered to be a simple reporting requirement that would pose minimal additional burden.

However, upon reviewing the comments, EPA has determined that more study is needed before taking action. Therefore, EPA is not making any changes to the language of the 32 recycling exclusions and exemptions at this time. In the case of the legitimacy provision, EPA is instead codifying a general prohibition against sham recycling. In the case of the contained standard and notification requirement, EPA is deferring any action until further study is conducted. EPA's response to comments regarding burden implications of each of the provisions is discussed in more detail below.

(1) *Legitimacy.* With respect to legitimacy, it has been EPA's long-standing policy that all recycling of hazardous secondary materials must be legitimate. If a facility is engaged in sham recycling, this, by definition, is not real recycling and that material is being discarded. Additionally, EPA considers the four legitimacy factors codified in 40 CFR 260.43 to be substantively the same as the existing legitimacy policy, which has been articulated in the 1989 Lowrance Memo and in various DSW **Federal Register** notices.

In proposing to codify the legitimate recycling standard for all exclusions, we did not intend to raise questions about the status of general legitimacy determinations that underlie these existing exclusions from the definition of solid waste, or about case-specific determinations that have already been made by EPA or the states. As noted in the comments, EPA generally considered the legitimacy of the recycling process when the original determinations were promulgated, and the Agency did not intend to force companies to have to reexamine long standing legitimate recycling practices. Therefore EPA is not revising the pre-2008 exclusions and exemptions to include a legitimacy requirement.

However, as discussed in section VIII, these material-specific exclusions from the definition of solid waste do not negate the basic requirement that the hazardous secondary material must be legitimately recycled. Therefore, EPA is codifying a general statement in § 261.2(g) that makes it clear that a hazardous secondary material found to be sham recycled is discarded and thus, is a solid waste. By codifying a prohibition on sham recycling that applies to all hazardous secondary materials being recycled, we are confirming that we expect anyone operating under a recycling exclusion or exemption to be doing so legitimately. EPA finds that this will give implementing agencies a clear regulatory statement that can be used to enforce against sham recyclers, yet not require the vast majority of recyclers that are performing legitimate recycling under the pre-2008 exclusions and exemptions to revisit previously-made legitimacy determinations.

Additionally, the Agency has, based on the public comments, made adjustments to the legitimacy factors to build in more flexibility for meeting each factor and thus, ease the use of the

standard. For example, EPA has modified factor 4 to rely on widely-recognized commodity standards and specifications in the case where there is no analogous product as a way of recognizing industry standards that ensure their products are legitimate. EPA gives the example in the regulatory text of commodity specification grades for common metals, which would be relevant to scrap metal recyclers, among other metal recyclers. EPA has also included a provision that states that when "hazardous secondary materials being recycled are returned to the original process or processes from which they were generated to be reused, the product of the recycling process is comparable to a legitimate product or intermediate," and thus would meet factor 4. This revision addresses concerns regarding the closed loop exemption at § 261.4(a)(8), as well as mineral processing to produce primary metals, because these processes always include materials looping back into the process to ensure that all the valuable metals that can be extracted from the ore are being collected for use.

For more information and responses to comments on legitimacy, please see section XVII in today's preamble.

(2) *Contained.* With respect to the contained standard, EPA has long determined that hazardous secondary materials that are released to the environment and are not destined for recycling are clearly discarded. Based on the environmental problems study, the results of which showed mismanagement of hazardous secondary materials as one of the major causes of damage, EPA requested comment in the 2011 DSW proposed rule on applying the proposed contained standard to all hazardous secondary materials. EPA assumes that the vast majority of recycling facilities "contain" their hazardous secondary materials and thus would already meet the contained standard. Therefore, EPA assumed that the contained standard would not present any additional burden to the regulated community, especially since the contained standard is "performance-based" and provides much flexibility, but could be used to enforce against those facilities that were mismanaging their materials.

However, as the commenters' noted, EPA has already promulgated certain management standards for some exclusions based on the case-specific characteristics of the hazardous secondary material or recycling process (*e.g.,* drip pads used to manage wastewaters and/or spent wood preserving solutions under 40 CFR 261.4(a)(9)). Thus, EPA understands that simply applying the contained standard wholesale across the 32 recycling provisions, may not be the most efficient or effective course of action as EPA would not be considering how the contained standard would work within each specific exclusion and its existing conditions. Therefore, EPA is deferring action on applying the contained standard to the pre-2008 exclusions and exemptions until we can more adequately address commenters' concerns.

(3) *Notification.* With respect to notification, EPA's intent was to provide basic information to regulatory authorities in order to enable adequate compliance monitoring of the exclusions. EPA had requested comment on requiring notification under 40 CFR 260.42 using the Site ID Form (EPA Form 8700–12), which is the same provision used for the 2008 DSW final rule exclusions. Given that this form is familiar to the regulated community, we had not considered this requirement to pose an undue burden.

However, based on comments we received, we understand that using the same notification requirement developed for hazardous secondary materials that were recently excluded in 2008 presents challenges when used for hazardous secondary materials that have been excluded for many decades. For example, the notification provision in 40 CFR 260.42 requires information on types of hazardous secondary materials (using hazardous waste codes) and quantities of these materials. However, as noted by commenters, this is difficult, for example, for scrap metal recyclers, because these facilities currently do not distinguish between non-hazardous scrap metal and scrap metal that would be hazardous waste were it not for the exclusion. Requiring notification in this instance may infer that scrap metal recyclers would be required to extensively test their hazardous secondary material in order to determine if the scrap metal was hazardous, and therefore excluded, and to determine which hazardous waste code to report on the form. Additionally, the notification presents challenges for facilities with numerous closed-loop recycling processes because the form would require these facilities to specifically list each process. We also understand commenters' concerns regarding the burden on states that must review and process these forms. Because the majority of the pre-2008 exclusions and exemptions do not include notification requirements, EPA does not have precise data regarding how many facilities are recycling hazardous secondary materials under these exclusions and exemptions. This lack of data hinders EPA's ability to more precisely estimate the burden on states and whether such a requirement would be environmentally beneficial. Therefore, EPA is deferring action on applying notification to the pre-2008 exclusions and exemptions until we can more adequately address commenters' concerns.

Comments: EPA's Authority To Add Requirements to Pre-2008 Exclusions

Commenters stated that EPA lacks jurisdiction to add requirements to materials that are not solid wastes and, if EPA is changing its position on the waste status of these materials, the Agency must provide a reasoned explanation for disregarding facts and circumstances that underlay the prior policy. Some commenters argued that EPA had evaluated each of the hazardous secondary materials at the time it promulgated the exclusions and thus, EPA must demonstrate why management in compliance with the existing conditions constitutes discard.

EPA's Response: EPA's Authority To Add Requirements to Pre-2008 Exclusions

EPA disagrees with comments that argue that EPA does not have the authority to require conditions for hazardous secondary materials being recycled. As noted in the Background section of this preamble, in the Safe Food court case, the D.C. Circuit upheld an EPA rule that excludes from the definition of solid waste hazardous secondary materials used to make zinc fertilizers, and the fertilizers themselves, as long as the recycled materials meet certain handling, storage, and reporting conditions and the resulting fertilizers have concentration levels for certain hazardous constituents that fall below specified thresholds. It is therefore within EPA's discretion to determine conditions under which a hazardous secondary material is not being discarded and thus may be excluded from hazardous waste regulation.

However, EPA agrees that more information is needed before determining whether adding requirements to the pre-2008 exclusions and exemptions is needed to make them more enforceable. EPA's request for comment on this issue was based on conclusions drawn from the environmental problems study, which evaluated over 200 damage cases, and the *Correlation of Recycling Damage Cases with Regulatory Exclusions, Exemptions or Alternative Standards,* which analyzed which damage cases

were likely operating under a pre-2008 exclusion and exemption. From these studies, EPA concluded that over half of the damage cases were likely operating under an existing exclusion and exemption. However, EPA did not examine the specific underlying causes of the damage cases (whether they were based on the lack of oversight of the pre-2008 exclusions and exemptions or on other causes). Thus EPA has decided that additional information is needed to determine whether additional regulatory action is needed, or whether the problems should be addressed through some other method, such as outreach and compliance assistance.

Comments: Record Support

Many commenters argued that EPA's record does not support this regulatory change and that EPA failed to conduct a thorough analysis. For example, commenters argued that EPA's record needs to show that significant environmental problems have been caused by a meaningful number of facilities operating in compliance with the pre-2008 exclusions and exemptions. These commenters noted that many of the damage cases involve civil or criminal violations, indicating that the problem was non-compliance with the regulations, not from a lack of regulations. Thus, these commenters believed that EPA already has sufficient authority to enforce against bad actors. Additionally, EPA's own analysis only links damage cases to just seven exclusions, yet EPA is considering adding conditions to 32 exclusions.

EPA's Response: Record Support

EPA disagrees with comments that argue that since the environmental problems study includes cases with civil or criminal violations, this demonstrates existing regulations are adequately enforceable. On the contrary, the frequency of violations in the damage cases may demonstrate the need for greater, not less, oversight, particularly in the case of sham recycling, where discard via over-accumulation of material can become a major problem before the Agency can take action.

For example, in one of the damage cases, a facility whose primary business was mixing electric arc furnace dust (K061) with agricultural lime for sale as a micronutrient lost its customers and could not sell its product. However, the facility continued to accept K061, and, after approximately seven months, the facility had accepted over 60,000 tons of this hazardous waste and stored it on the ground in piles up to 30 feet high, with no prospect of it being used to produce a product and, thus, legitimately recycled. While the initial recycling of the K061 hazardous waste was legitimate, when the facility failed to produce a product that was actually sold, the K061 could no longer be considered legitimately recycled, resulting in significant risk to human health and the environment from discarded material. Therefore EPA is codifying a general probation against sham recycling, in order to prevent such cases from occurring.

However, in the case of containment and notification, EPA agrees with commenters and has determined that additional information about the underlying causes of the damage cases would be useful to determine whether additional regulatory action is needed, or whether the problems should be addressed through some other method, such as outreach and compliance assistance.

EPA also understands commenters' concerns regarding the limitations of the correlation analysis, including the fact that EPA could only correlate with confidence 7 of the 32 recycling exclusions and exemptions to damage cases in its environmental problems study. The analysis was hampered by a lack of precision in the data. For example, because notification is not required for the majority of pre-2008 exclusions and exemptions, we can only conservatively identify damage case correlations where the type of hazardous secondary material very clearly matches to an exclusion (*e.g.,* scrap metal). We lack information to make inferences for broadly applicable exclusions, (*e.g.,* use/reuse) or for broadly defined hazardous secondary materials (*e.g.,* metal-bearing wastes). Therefore, by virtue of some exclusions' broad applicability, we were unable to correlate them to specific damage cases.

Although it is difficult to assign specific damage cases to certain exclusions, we note that in the environmental problems study only nine of the damage cases were operating under a RCRA permit at the time of damage. Thus, EPA can generally conclude that the majority of the damage cases were operating outside of RCRA, inferring these facilities were either operating illegally or likely operating under an exclusion, exemption, alternate standard, or no standard at all. In the case of containment and notification, EPA has determined that additional information about the underlying causes of the damage cases would be useful to determine whether additional regulatory action is needed, or whether the problems should be addressed through some other method, such as outreach and compliance assistance.

Comments: Time To Comment

Industry commenters argued that they did not have adequate time to comment. Further, they had no forewarning of the changes EPA was considering before the proposal was issued. EPA's request for comment did not involve prior discussions with stakeholders, as is typical when developing proposed rules. Moreover, this issue was not part of the 2008 DSW final rulemaking, Sierra Club's petition, or part of EPA's settlement agreement with the Sierra Club. Many commenters urged EPA to meet with industry representatives in order to better understand industry practices.

Commenters also argued that if EPA codified a notification as a condition of the exclusions, thousands of facilities would be at risk of losing the exclusion due to failure to notify, which could result in civil fines and solid waste management fees for the facility. These commenters stated that notification as a condition in this instance presents acute risks to facilities operating under an exclusion, because, up to this point, these facilities have not been required to comply with the RCRA hazardous waste requirements. Thus, commenters said many facilities may fail to notify simply because they were unaware the regulations had changed.

EPA's Response: Time To Comment

EPA understands commenters that argued they did not have adequate time to comment on applying the contained standard and notification for pre-2008 recycling exclusions and exemptions. Contrary to the legitimate recycling standard, which has been EPA's long-standing policy and has been articulated in the 1989 Lowrance memo and various **Federal Register** notices, EPA had not previously indicated it was considering the contained standard and notification for pre-2008 exclusions and exemptions prior to the 2011 DSW proposal. Although the 2011 proposed rule provided an opportunity for public comment, EPA understands commenters' concerns, with notification in particular, as these provisions would impact thousands of businesses, many of which may not be closely following DSW rulemaking activity. EPA agrees that a more inclusive approach to a potential rulemaking that involves stakeholders in upfront discussions would likely result in gainful information, more effective strategies for addressing issues, and better communication with the regulated community.

Comments: Support for Adding Requirements to Existing Exclusions

Some commenters, including environmental organizations, supported adding conditions to the pre-2008 exclusions and exemptions, arguing that EPA must adopt the regulatory conditions, including the legitimacy standard in light of the risks posed by the 32 recycling exclusions and the historical pattern of environmental contamination at facilities that are exempt from RCRA. These commenters believed that the prevention of one damage case every two years would more than offset the compliance costs. Some state commenters also supported adding conditions to the pre-2008 exclusions and exemptions, although some argued that EPA should exempt certain types of hazardous secondary materials, like scrap metal, spent lead-acid batteries, closed-loop recycling, and printed circuit boards, from the requirements.

Other commenters supported adding notification to the pre-2008 recycling provisions. These commenters argued that states may not be aware of excluded activities unless they are occurring at facilities that are otherwise regulated or are the subject of a citizen complaint. These commenters said that notifications would allow states to periodically evaluate these facilities to ensure they are meeting the terms of the exclusion and that, while the initial burden on states might be quite heavy, the long-term benefit of knowing where these facilities are justifies this burden.

EPA's Response: Support for Adding Requirements to Existing Exclusions

EPA acknowledges commenters who support additional requirements for the pre-2008 exclusions and exemptions in order to avoid potential damage cases and protect human health and the environment. However, based on the comments received, the EPA has determined that it does not have enough information to determine if adding requirements to the existing pre-2008 recycling exclusions and exemptions would be the most effective method for addressing the damage cases or whether a more targeted approach would be more appropriate.

Regarding legitimacy, in lieu of adding a legitimacy requirement to the specific recycling exclusions, EPA is instead codifying a general statement in § 261.2(g) that makes it clear that a hazardous secondary material found to be sham recycled is discarded and thus, is a solid waste. EPA finds that this will give implementing agencies a clear regulatory statement that can be used to enforce against sham recyclers, yet not require the vast majority of recyclers that are performing legitimate recycling under the pre-2008 exclusions and exemptions to revisit previously-made legitimacy determinations. EPA also notes that today's final legitimacy standard includes modifications that address implementation concerns for certain hazardous secondary materials and processes, such as scrap metal and closed-loop recycling. For more information on these modifications, please see the other sections on legitimacy in this preamble.

Regarding the contained standard and notification, for reasons stated above, the Agency is deferring action on applying the contained standard and notification to the pre-2008 exclusions and exemptions in order to consider how best to implement these conditions in the context of the case-specific circumstances of the regulatory provisions.

XX. State Authorization

A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize a qualified state to administer and enforce a hazardous waste program within the state in lieu of the federal program, and to issue and enforce permits in the state. A state may receive authorization by following the approval process described in 40 CFR 271.21 (see 40 CFR part 271 for the overall standards and requirements for authorization). EPA continues to have independent authority to bring enforcement actions under RCRA sections 3007, 3008, 3013, and 7003. An authorized state also continues to have independent authority to bring enforcement actions under state law.

After a state receives initial authorization, new federal requirements promulgated under RCRA authority existing prior to the 1984 Hazardous and Solid Waste Amendments (HSWA) do not apply in that state until the state adopts and receives authorization for equivalent state requirements. In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), new federal requirements and prohibitions promulgated pursuant to HSWA provisions take effect in authorized states at the same time that they take effect in unauthorized states. As such, EPA carries out the HSWA requirements and prohibitions in authorized states, including the issuance of new permits implementing those requirements, until EPA authorizes the state to do so.

Authorized states are required to modify their programs only when EPA enacts federal requirements that are more stringent or broader in scope than the existing federal requirements. RCRA section 3009 allows the states to impose standards more stringent than those in the federal program (see also 40 FR 271.1(i)). Therefore, authorized states are not required to adopt federal regulations, both HSWA and non-HSWA, that are considered less stringent than previous federal regulations or that narrow the scope of the RCRA program and Subtitle C hazardous waste regulations would continue to apply in those states.

B. Effect on State Authorization of Final Rule

The regulations finalized in today's notice are not promulgated under the authority of HSWA. Thus, the standards will be applicable on the effective date only in those states that do not have final authorization of their base RCRA programs. Moreover, authorized states are required to modify their programs only when EPA promulgates federal regulations that are more stringent or broader in scope than the authorized state regulations. For those changes that are less stringent, states are not required to modify their program. This is a result of section 3009 of RCRA, which allows states to impose more stringent regulations than the federal program.

The revisions to the definition of solid waste being finalized today are more stringent than those promulgated under the 2008 DSW final rule, so those states which have adopted the 2008 DSW final rule would be required to modify their programs. However, when compared to the federal program that was in place when the 2008 DSW final rule was finalized, many of today's revisions would be considered less stringent (*e.g.,* the revised generator-controlled exclusion, the verified recycler exclusion, and the remanufacturing exclusion). Therefore, authorized states that have not adopted the 2008 DSW final rule are not required to modify their programs to adopt these exclusions and the federally authorized state hazardous waste regulations applying the full subtitle C requirements will continue to apply in those states. As noted in footnote 58 of the proposed rule, final decisions regarding whether a state rule is more stringent under 40 CFR 271.1(i)(1) or broader in scope than the federal program under 40 CFR 271.1(i)(2) are made when the Agency authorizes state programs. However, the revisions to the definition of legitimacy and the prohibition of sham recycling, as discussed in section VIII of the preamble, are more stringent than the current federal hazardous waste

program because they codify implicit requirements that have been largely implemented through guidance. Also, the additional recordkeeping requirement in the speculative accumulation provision in 40 CFR 261.1(c)(8), as discussed in section V of the preamble, is also more stringent than the current federal hazardous waste program. Finally, the changes to the standards and criteria for variances from classification as a solid waste discussed in section IX are more stringent than the current federal hazardous waste program. In these cases, all authorized states will be required to modify their programs to adopt equivalent, consistent and no less stringent requirements.

XXI. Statutory and Executive Order (EO) Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it is likely to "raise novel legal or policy issues" under section 3(f)(4) of Executive Order 12866. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in EPA's background document for today's action titled "Regulatory Impact Analysis" (RIA). A copy of the analysis is available in the docket for this action and the analysis is briefly summarized here. EPA estimates that the 2014 DSW rule will result in a future annual costs savings of $1.0 to $2.0 million per year, depending on discount rate used, as compared to a baseline of full implementation of the 2008 DSW rule. This cost savings is based on the assumption that same number of states would adopt the 2014 DSW rule as would adopt the 2008 DSW rule. However, because the 2014 DSW rule addresses many of the concerns states raised about the 2008 DSW rule, there is a potential that more states would adopt it, thus increasing the upper bound of annual cost savings to $17.5 million to $59 million per year.

In addition to estimating the cost savings of today's action, the RIA also provides qualitative (*i.e.,* non-monetized) descriptions of three categories of expected future benefits for today's action consisting of: (1) Reduction in future environmental damages associated with industrial recycling of hazardous secondary materials; (2) improved industry environmental compliance; (3) indirect legal & financial benefits to industry consisting of reduced liability, less uncertainty for regulated entities, and lower legal and financial credit costs.

B. Paperwork Reduction Act (Information Collection Request)

The information collection requirements in this rule will be submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them. The information collection request has been updated since the July 22 proposed rule to reflect the final rule requirements and to respond to public comments. The EPA ICR number for this next submission will be 2310.03 and the OMB control number will be 2050–0202.

Several information requirements established for this action are voluntary to the extent that the conditional exclusions being finalized today are voluntary and represent an overall reduction in burden, as compared with the alternative information requirements associated with managing hazardous secondary materials as hazardous waste. The information requirements help ensure that: (1) Entities operating under today's rule are held accountable to the applicable requirements; and (2) inspectors can verify compliance with the conditions of today's rule when needed.

EPA estimates the total annual burden to respondents under the new paperwork requirements as a result of the final rule changes to be 34,454 hours and $68,071 in operations and maintenance costs ($2,378,111, including labor costs), respectively. Burden and costs continuing from the 2008 ICR No. 2310.02 include 2,034 hours and $299 in operations and maintenance ($144,235, including labor costs), respectively. The total annual burden and operations and maintenance costs are estimated at 36,488 hours and $68,370 in operations and maintenance costs, or 109,464 hours and $205,110 in operations and maintenance over three years. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business based on small size standards defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201 for 27 NAICS codes with the largest number of affected entities; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The small entities directly regulated by this final rule are primarily small businesses in the manufacturing sector (*i.e.,* NAICS codes 32 and 33). We have determined that the average annual impact on small businesses is estimated to be significantly less than 1% of annual business sales for all small entities.

Although this final rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this rule on small entities. Comments were requested, and the comment period was extended once until October 20, 2011. In September 2011, EPA held two public meetings to accept public comment on the proposal in Philadelphia, PA and in Chicago, IL.

D. Unfunded Mandates Reform Act

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for state, local, and Tribal governments, in the aggregate, or the private sector in any one year. EPA's RIA for today's action estimates the maximum state government share of future direct costs for complying with today's action is $0.3 million per year. No impacts are expected for local or Tribal governments. Because these direct costs are well below the $100 million annual direct cost threshold, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

The RIA estimates that the state government share of future annualized direct costs is $0.3 million per year. No added costs are expected for local or tribal governments. Because these direct costs are well below the $25 million Federalism test threshold, EPA concludes that Executive Order 13132 does not apply to today's action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Subject to the Executive Order 13175 (65 FR 67249, November 9, 2000), EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the regulation and develops a tribal summary impact statement.

EPA has concluded that this action may have tribal implications. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law. Under the RCRA statute, the federal government implements hazardous waste regulations directly in Indian Country. Thus, the changes to the hazardous waste regulations promulgated today would not impose any direct costs on tribal governments. In addition, currently there are no facilities operating on land controlled by tribal governments, but if such facilities did locate in such areas, then this action could have tribal implications, to the extent that the rule is intended to address potential adverse impacts of the 2008 DSW final rule.

EPA consulted with tribal officials early in the process of developing this regulation to ensure they had an opportunity for meaningful and timely input into its development. Specifically, tribal representatives participated in the public meetings EPA held on the draft environmental justice methodology and noted that the Bureau of Census data used as the basis for the demographic analysis may undercount indigenous populations. EPA also sent a consultation letter to all federally recognized tribes requesting a consultation on the 2011 DSW proposal and held a tribes-only live webinar on August 11, 2011 to allow tribal official the opportunity to ask questions and offer input into the proposed rule. EPA did not receive formal comments from tribal officials during the consultation process.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in EO 12866, and because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action's health and risk assessments are contained in the *Potential Adverse Impacts Under the Definition of Solid Waste Exclusions (Including Potential Disproportionate Adverse Impacts to Minority and Low-Income Populations)* in the docket for today's rule.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. EPA does not expect today's final rule to adversely affect the supply, distribution, or use of energy.

On the contrary, EPA expects that at least two elements of today's final rule may provide future annual energy savings by (a) inducing under today's solvent remanufacturing exclusion larger future annual quantities of industrial processing solvents which get recycled rather than disposed (*i.e.*, incinerated) thereby reducing the relatively higher lifecycle energy and other lifecycle resource impacts associated with manufacturing virgin solvents, and (b) inducing more state governments to adopt the other DSW exclusions which are revised under today's final rule, thereby generally stimulating other types of industrial recycling of hazardous secondary materials (HSM), which EPA also expects may reduce adverse lifecycle impacts on the economy and environment compared to the lifecycle impacts of producing virgin materials for which larger future annual quantities of recycled HSM may substitute. Thus, Executive Order 13211 does not apply to this rule.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Environmental Justice

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or

environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. The purpose of this final rule is to revise the 2008 DSW final rule in such a way that reduces potential adverse impacts, including potential disproportionate impacts to minority and low-impact communities. For further information on the potential for disproportionate impacts to minority and low-income populations, see the *Potential Adverse Impacts Under the Definition of Solid Waste Exclusions (Including Potential Disproportionate Adverse Impacts to Minority and Low-Income Populations)* in the docket for today's rule.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective on July 13, 2015.

List of Subjects

40 CFR Part 260

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Reporting and recordkeeping requirements.

40 CFR Part 261

Environmental protection, Hazardous waste, Incorporation by reference, Recycling, Solid waste.

Dated: December 10, 2014.

Gina McCarthy,

Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

■ 1. The authority citation for part 260 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921–6927, 6930, 6935, 6937, 6938, 6939 and 6974.

Subpart B—Definitions

■ 2. Section 260.10 is amended as follows:

■ a. Add in alphabetical order the definition of "Contained;"

■ b. Remove the definition of "Hazardous secondary material generated and reclaimed under the control of the generator;" and

■ c. Add in alphabetical order the definition of "Remanufacturing,"

The additions read as follows:

§ 260.10 Definitions

* * * * *

Contained means held in a unit (including a land-based unit as defined in this subpart) that meets the following criteria:

(1) The unit is in good condition, with no leaks or other continuing or intermittent unpermitted releases of the hazardous secondary materials to the environment, and is designed, as appropriate for the hazardous secondary materials, to prevent releases of hazardous secondary materials to the environment. Unpermitted releases are releases that are not covered by a permit (such as a permit to discharge to water or air) and may include, but are not limited to, releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures;

(2) The unit is properly labeled or otherwise has a system (such as a log) to immediately identify the hazardous secondary materials in the unit; and

(3) The unit holds hazardous secondary materials that are compatible with other hazardous secondary materials placed in the unit and is compatible with the materials used to construct the unit and addresses any potential risks of fires or explosions.

(4) Hazardous secondary materials in units that meet the applicable requirements of 40 CFR parts 264 or 265 are presumptively contained.

* * * * *

Remanufacturing means processing a higher-value hazardous secondary material in order to manufacture a product that serves a similar functional purpose as the original commercial-grade material. For the purpose of this definition, a hazardous secondary material is considered higher-value if it was generated from the use of a commercial-grade material in a manufacturing process and can be remanufactured into a similar commercial-grade material.

* * * * *

Subpart C—Rulemaking Petitions

■ 3. Section 260.30 is amended by adding paragraph (f) to read as follows:

§ 260.30 Non-waste determinations and variances from classification as a solid waste.

* * * * *

(f) Hazardous secondary materials that are transferred for reclamation under § 261.4(a)(24) and are managed at a verified reclamation facility or intermediate facility where the management of the hazardous secondary materials is not addressed under a RCRA Part B permit or interim status standards.

■ 4. Section 260.31 is amended by revising paragraph (c) and adding paragraph (d) to read as follows:

§ 260.31 Standards and criteria for variances from classification as a solid waste.

* * * * *

(c) The Administrator may grant requests for a variance from classifying as a solid waste those hazardous secondary materials that have been partially reclaimed, but must be reclaimed further before recovery is completed, if the partial reclamation has produced a commodity-like material. A determination that a partially-reclaimed material for which the variance is sought is commodity-like will be based on whether the hazardous secondary material is legitimately recycled as specified in § 260.43 of this part and on whether all of the following decision criteria are satisfied:

(1) Whether the degree of partial reclamation the material has undergone is substantial as demonstrated by using a partial reclamation process other than the process that generated the hazardous waste;

(2) Whether the partially-reclaimed material has sufficient economic value that it will be purchased for further reclamation;

(3) Whether the partially-reclaimed material is a viable substitute for a product or intermediate produced from virgin or raw materials which is used in subsequent production steps;

(4) Whether there is a market for the partially-reclaimed material as demonstrated by known customer(s) who are further reclaiming the material (*e.g.*, records of sales and/or contracts

and evidence of subsequent use, such as bills of lading);

(5) Whether the partially-reclaimed material is handled to minimize loss.

(d) The Administrator may grant requests for a variance from classifying as a solid waste those hazardous secondary materials that are transferred for reclamation under § 261.4(a)(24) and are managed at a verified reclamation facility or intermediate facility where the management of the hazardous secondary materials is not addressed under a RCRA Part B permit or interim status standards. The Administrator's decision will be based on the following criteria:

(1) The reclamation facility or intermediate facility must demonstrate that the reclamation process for the hazardous secondary materials is legitimate pursuant to § 260.43;

(2) The reclamation facility or intermediate facility must satisfy the financial assurance condition in § 261.4(a)(24)(vi)(F);

(3) The reclamation facility or intermediate facility must not be subject to a formal enforcement action in the previous three years and not be classified as a significant non-complier under RCRA Subtitle C, or must provide credible evidence that the facility will manage the hazardous secondary materials properly. Credible evidence may include a demonstration that the facility has taken remedial steps to address the violations and prevent future violations, or that the violations are not relevant to the proper management of the hazardous secondary materials;

(4) The intermediate or reclamation facility must have the equipment and trained personnel needed to safely manage the hazardous secondary material and must meet emergency preparedness and response requirements under 40 CFR part 261 subpart M;

(5) If residuals are generated from the reclamation of the excluded hazardous secondary materials, the reclamation facility must have the permits required (if any) to manage the residuals, have a contract with an appropriately permitted facility to dispose of the residuals or present credible evidence that the residuals will be managed in a manner that is protective of human health and the environment, and

(6) The intermediate or reclamation facility must address the potential for risk to proximate populations from unpermitted releases of the hazardous secondary material to the environment (*i.e.,* releases that are not covered by a permit, such as a permit to discharge to water or air), which may include, but are not limited to, potential releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures), and must include consideration of potential cumulative risks from other nearby potential stressors.

■ 5. Section 260.33 is amended by revising paragraph (c) and adding paragraphs (d) and (e) to read as follows:

§ 260.33 Procedures for variances from classification as a solid waste, for variances to be classified as a boiler, or for non-waste determinations.

* * * * *

(c) In the event of a change in circumstances that affect how a hazardous secondary material meets the relevant criteria contained in § 260.31, § 260.32, or § 260.34 upon which a variance or non-waste determination has been based, the applicant must send a description of the change in circumstances to the Administrator. The Administrator may issue a determination that the hazardous secondary material continues to meet the relevant criteria of the variance or non-waste determination or may require the facility to re-apply for the variance or non-waste determination.

(d) Variances and non-waste determinations shall be effective for a fixed term not to exceed ten years. No later than six months prior to the end of this term, facilities must re-apply for a variance or non-waste determination. If a facility re-applies for a variance or non-waste determination within six months, the facility may continue to operate under an expired variance or non-waste determination until receiving a decision on their re-application from the Administrator.

(e) Facilities receiving a variance or non-waste determination must provide notification as required by § 260.42 of this chapter.

■ 6. Section 260.34 is amended by revising paragraphs (b)(4) and (c)(5) to read as follows:

§ 260.34 Standards and criteria for non-waste determinations.

* * * * *

(b) * * *

(4) Other relevant factors that demonstrate the hazardous secondary material is not discarded, including why the hazardous secondary material cannot meet, or should not have to meet, the conditions of an exclusion under § 261.2 or § 261.4 of this chapter.

(c) * * *

(5) Other relevant factors that demonstrate the hazardous secondary material is not discarded, including why the hazardous secondary material cannot meet, or should not have to meet, the conditions of an exclusion under § 261.2 or § 261.4 of this chapter.

■ 7. Section 260.42 is amended by revising paragraphs (a) introductory text, (a)(4) through (9), removing paragraph (a)(10), and revising paragraph (b).

The revisions read as follows:

§ 260.42 Notification requirement for hazardous secondary materials.

(a) Facilities managing hazardous secondary materials under §§ 260.30, 261.4(a)(23), 261.4(a)(24), or 261.4(a)(27) must send a notification prior to operating under the regulatory provision and by March 1 of each even-numbered year thereafter to the Regional Administrator using EPA Form 8700–12 that includes the following information:

* * * * *

(4) The regulation under which the hazardous secondary materials will be managed;

(5) When the facility began or expects to begin managing the hazardous secondary materials in accordance with the regulation;

(6) A list of hazardous secondary materials that will be managed according to the regulation (reported as the EPA hazardous waste numbers that would apply if the hazardous secondary materials were managed as hazardous wastes);

(7) For each hazardous secondary material, whether the hazardous secondary material, or any portion thereof, will be managed in a land-based unit;

(8) The quantity of each hazardous secondary material to be managed annually; and

(9) The certification (included in EPA Form 8700–12) signed and dated by an authorized representative of the facility.

(b) If a facility managing hazardous secondary materials has submitted a notification, but then subsequently stops managing hazardous secondary materials in accordance with the regulation(s) listed above, the facility must notify the Regional Administrator within thirty (30) days using EPA Form 8700–12. For purposes of this section, a facility has stopped managing hazardous secondary materials if the facility no longer generates, manages and/or reclaims hazardous secondary materials under the regulation(s) above and does not expect to manage any amount of hazardous secondary materials for at least 1 year.

■ 8. Section 260.43 is amended by revising the section heading and

paragraph (a) and removing and reserving paragraphs (b) and (c).

The revision reads as follows:

§ 260.43 Legitimate recycling of hazardous secondary materials.

(a) Recycling of hazardous secondary materials for the purpose of the exclusions or exemptions from the hazardous waste regulations must be legitimate. Hazardous secondary material that is not legitimately recycled is discarded material and is a solid waste. In determining if their recycling is legitimate, persons must address all the requirements of this paragraph.

(1) Legitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product or intermediate of the recycling process. The hazardous secondary material provides a useful contribution if it:

(i) Contributes valuable ingredients to a product or intermediate; or

(ii) Replaces a catalyst or carrier in the recycling process; or

(iii) Is the source of a valuable constituent recovered in the recycling process; or

(iv) Is recovered or regenerated by the recycling process; or

(v) Is used as an effective substitute for a commercial product.

(2) The recycling process must produce a valuable product or intermediate. The product or intermediate is valuable if it is:

(i) Sold to a third party; or

(ii) Used by the recycler or the generator as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process.

(3) The generator and the recycler must manage the hazardous secondary material as a valuable commodity when it is under their control. Where there is an analogous raw material, the hazardous secondary material must be managed, at a minimum, in a manner consistent with the management of the raw material or in an equally protective manner. Where there is no analogous raw material, the hazardous secondary material must be contained. Hazardous secondary materials that are released to the environment and are not recovered immediately are discarded.

(4) The product of the recycling process must be comparable to a legitimate product or intermediate:

(i) Where there is an analogous product or intermediate, the product of the recycling process is comparable to a legitimate product or intermediate if:

(A) The product of the recycling process does not exhibit a hazardous characteristic (as defined in part 261 subpart C) that analogous products do not exhibit, and

(B) The concentrations of any hazardous constituents found in appendix VIII of part 261 of this chapter that are in the product or intermediate are at levels that are comparable to or lower than those found in analogous products or at levels that meet widely-recognized commodity standards and specifications, in the case where the commodity standards and specifications include levels that specifically address those hazardous constituents.

(ii) Where there is no analogous product, the product of the recycling process is comparable to a legitimate product or intermediate if:

(A) The product of the recycling process is a commodity that meets widely recognized commodity standards and specifications (*e.g.,* commodity specification grades for common metals), or

(B) The hazardous secondary materials being recycled are returned to the original process or processes from which they were generated to be reused (*e.g.,* closed loop recycling).

(iii) If the product of the recycling process has levels of hazardous constituents that are not comparable to or unable to be compared to a legitimate product or intermediate per paragraph (a)(4)(i) or (ii) of this section, the recycling still may be shown to be legitimate, if it meets the following specified requirements. The person performing the recycling must conduct the necessary assessment and prepare documentation showing why the recycling is, in fact, still legitimate. The recycling can be shown to be legitimate based on lack of exposure from toxics in the product, lack of the bioavailability of the toxics in the product, or other relevant considerations which show that the recycled product does not contain levels of hazardous constituents that pose a significant human health or environmental risk. The documentation must include a certification statement that the recycling is legitimate and must be maintained on-site for three years after the recycling operation has ceased. The person performing the recycling must notify the Regional Administrator of this activity using EPA Form 8700–12.

* * * * *

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

■ 9. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y) and 6938.

Subpart A—General

■ 10. Section 261.1 is amended by revising paragraphs (c)(4) and (8) to read as follows:

§ 261.1 Purpose and scope.

* * * * *

(c) * * *

(4) A material is "reclaimed" if it is processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents. In addition, for purposes of § 261.4(a)(23) and (24), smelting, melting, and refining furnaces are considered to be solely engaged in metals reclamation if the metal recovery from the hazardous secondary materials meets the same requirements as those specified for metals recovery from hazardous waste found in § 266.100(d)(1) through (3) of this chapter, and if the residuals meet the requirements specified in § 266.112 of this chapter.

* * * * *

(8) A material is "accumulated speculatively" if it is accumulated before being recycled. A material is not accumulated speculatively, however, if the person accumulating it can show that the material is potentially recyclable and has a feasible means of being recycled; and that—during the calendar year (commencing on January 1)—the amount of material that is recycled, or transferred to a different site for recycling, equals at least 75 percent by weight or volume of the amount of that material accumulated at the beginning of the period. Materials must be placed in a storage unit with a label indicating the first date that the material began to be accumulated. If placing a label on the storage unit is not practicable, the accumulation period must be documented through an inventory log or other appropriate method. In calculating the percentage of turnover, the 75 percent requirement is to be applied to each material of the same type (*e.g.,* slags from a single smelting process) that is recycled in the same way (*i.e.,* from which the same material is recovered or that is used in the same way). Materials accumulating in units that would be exempt from regulation under § 261.4(c) are not to be included in making the calculation. Materials that are already defined as solid wastes also are not to be included in making the calculation. Materials are no longer in this category once they are removed from accumulation for recycling, however.

* * * * *

■ 11. Section 261.2 is amended as follows:
■ a. Remove and reserve paragraph (a)(2)(ii);
■ b. Revise paragraph (b)(3);
■ c. Add paragraph (b)(4);
■ d. Revise paragraph (c)(3) and table 1 in paragraph (c)(4); and
■ e. Add paragraph (g).

The revisions and additions text reads as follows:

§ 261.2 Definition of solid waste.

* * * * *

(b) * * *

(3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned or incinerated; or

(4) Sham recycled, as explained in paragraph (g) of this section.

* * * * *

(c) * * *

(3) *Reclaimed.* Materials noted with a "–" in column 3 of Table 1 are not solid wastes when reclaimed. Materials noted with an "*" in column 3 of Table 1 are solid wastes when reclaimed unless they meet the requirements of §§ 261.4(a)(17), or 261.4(a)(23), 261.4(a)(24), or 261.4(a)(27).

(4) * * *

TABLE 1

	Use constituting disposal (§ 261.2(c)(1))	Energy recovery/fuel (§ 261.2(c)(2))	Reclamation (§ 261.2(c)(3)), except as provided in §§ 261.4(a)(17), 261.4(a)(23), 261.4(a)(24) or 261.4(a)(27)	Speculative accumulation (§ 261.2(c)(4))
	1	2	3	4
Spent Materials	(*)	(*)	(*)	(*)
Sludges (listed in 40 CFR Part 261.31 or 261.32)	(*)	(*)	(*)	(*)
Sludges exhibiting a characteristic of hazardous waste	(*)	(*)	.....	(*)
By-products (listed in 40 CFR 261.31 or 261.32)	(*)	(*)	(*)	(*)
By-products exhibiting a characteristic of hazardous waste	(*)	(*)	.....	(*)
Commercial chemical products listed in 40 CFR 261.33	(*)	(*)	.....	.....
Scrap metal that is not excluded under 40 CFR 261.4(a)(13)	(*)	(*)	(*)	(*)

Note: The terms "spent materials," "sludges," "by-products," and "scrap metal" and "processed scrap metal" are defined in § 261.1.

* * * * *

(g) *Sham recycling.* A hazardous secondary material found to be sham recycled is considered discarded and a solid waste. Sham recycling is recycling that is not legitimate recycling as defined in § 260.43.

■ 12. Section 261.4 is amended as follows:
■ a. Republish paragraph (a) introductory text;
■ b. Revise paragraph (a)(23) and (24);
■ c. Remove and reserve paragraph (a)(25); and
■ d. Add paragraph (a)(27).

The revisions and addition as follows:

§ 261.4 Exclusions.

(a) Materials which are not solid wastes. The following materials are not solid wastes for the purpose of this part:

* * * * *

(23) Hazardous secondary material generated and legitimately reclaimed within the United States or its territories and under the control of the generator, provided that the material complies with paragraphs (a)(23)(i) and (ii) of this section:

(i)(A) The hazardous secondary material is generated and reclaimed at the generating facility (for purposes of this definition, generating facility means all contiguous property owned, leased, or otherwise controlled by the hazardous secondary material generator); or

(B) The hazardous secondary material is generated and reclaimed at different facilities, if the reclaiming facility is controlled by the generator or if both the generating facility and the reclaiming facility are controlled by a person as defined in § 260.10 of this chapter, and if the generator provides one of the following certifications: "on behalf of [insert generator facility name], I certify that this facility will send the indicated hazardous secondary material to [insert reclaimer facility name], which is controlled by [insert generator facility name] and that [insert name of either facility] has acknowledged full responsibility for the safe management of the hazardous secondary material," or "on behalf of [insert generator facility name], I certify that this facility will send the indicated hazardous secondary material to [insert reclaimer facility name], that both facilities are under common control, and that [insert name of either facility] has acknowledged full responsibility for the safe management of the hazardous secondary material." For purposes of this paragraph, "control" means the power to direct the policies of the facility, whether by the ownership of stock, voting rights, or otherwise, except that contractors who operate facilities on behalf of a different person as defined in § 260.10 shall not be deemed to "control" such facilities. The generating and receiving facilities must both maintain at their facilities for no less than three years records of hazardous secondary materials sent or received under this exclusion. In both cases, the records must contain the name of the transporter, the date of the shipment, and the type and quantity of the hazardous secondary material shipped or received under the exclusion. These requirements may be satisfied by routine business records (*e.g.,* financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations); or

(C) The hazardous secondary material is generated pursuant to a written contract between a tolling contractor and a toll manufacturer and is reclaimed by the tolling contractor, if the tolling contractor certifies the following: "On behalf of [insert tolling contractor name], I certify that [insert tolling contractor name] has a written contract with [insert toll manufacturer name] to manufacture [insert name of product or intermediate] which is made from specified unused materials, and that [insert tolling contractor name] will reclaim the hazardous secondary materials generated during this manufacture. On behalf of [insert tolling contractor name], I also certify that [insert tolling contractor name] retains ownership of, and responsibility for, the

hazardous secondary materials that are generated during the course of the manufacture, including any releases of hazardous secondary materials that occur during the manufacturing process''. The tolling contractor must maintain at its facility for no less than three years records of hazardous secondary materials received pursuant to its written contract with the tolling manufacturer, and the tolling manufacturer must maintain at its facility for no less than three years records of hazardous secondary materials shipped pursuant to its written contract with the tolling contractor. In both cases, the records must contain the name of the transporter, the date of the shipment, and the type and quantity of the hazardous secondary material shipped or received pursuant to the written contract. These requirements may be satisfied by routine business records (*e.g.,* financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations). For purposes of this paragraph, tolling contractor means a person who arranges for the production of a product or intermediate made from specified unused materials through a written contract with a toll manufacturer. Toll manufacturer means a person who produces a product or intermediate made from specified unused materials pursuant to a written contract with a tolling contractor.

(ii)(A) The hazardous secondary material is contained as defined in § 260.10 of this chapter. A hazardous secondary material released to the environment is discarded and a solid waste unless it is immediately recovered for the purpose of reclamation. Hazardous secondary material managed in a unit with leaks or other continuing or intermittent unpermitted releases is discarded and a solid waste.

(B) The hazardous secondary material is not speculatively accumulated, as defined in § 261.1(c)(8).

(C) Notice is provided as required by § 260.42 of this chapter.

(D) The material is not otherwise subject to material-specific management conditions under paragraph (a) of this section when reclaimed, and it is not a spent lead-acid battery (see § 266.80 and § 273.2 of this chapter).

(E) Persons performing the recycling of hazardous secondary materials under this exclusion must maintain documentation of their legitimacy determination on-site. Documentation must be a written description of how the recycling meets all four factors in § 260.43(a). Documentation must be maintained for three years after the recycling operation has ceased.

(F) The emergency preparedness and response requirements found in subpart M of this part are met.

(24) Hazardous secondary material that is generated and then transferred to a verified reclamation facility for the purpose of reclamation is not a solid waste, provided that:

(i) The material is not speculatively accumulated, as defined in § 261.1(c)(8);

(ii) The material is not handled by any person or facility other than the hazardous secondary material generator, the transporter, an intermediate facility or a reclaimer, and, while in transport, is not stored for more than 10 days at a transfer facility, as defined in § 260.10 of this chapter, and is packaged according to applicable Department of Transportation regulations at 49 CFR parts 173, 178, and 179 while in transport;

(iii) The material is not otherwise subject to material-specific management conditions under this paragraph (a) when reclaimed, and it is not a spent lead-acid battery (see §§ 266.80 and 273.2 of this chapter);

(iv) The reclamation of the material is legitimate, as specified under § 260.43 of this chapter;

(v) The hazardous secondary material generator satisfies all of the following conditions:

(A) The material must be contained as defined in § 260.10. A hazardous secondary material released to the environment is discarded and a solid waste unless it is immediately recovered for the purpose of recycling. Hazardous secondary material managed in a unit with leaks or other continuing releases is discarded and a solid waste.

(B) The hazardous secondary material generator must arrange for transport of hazardous secondary materials to a verified reclamation facility (or facilities) in the United States. A verified reclamation facility is a facility that has been granted a variance under § 260.31(d), or a reclamation facility where the management of the hazardous secondary materials is addressed under a RCRA Part B permit or interim status standards. If the hazardous secondary material will be passing through an intermediate facility, the intermediate facility must have been granted a variance under § 260.31(d) or the management of the hazardous secondary materials at that facility must be addressed under a RCRA Part B permit or interim status standards, and the hazardous secondary material generator must make contractual arrangements with the intermediate facility to ensure that the hazardous secondary material is sent to the reclamation facility identified by the hazardous secondary material generator.

(C) The hazardous secondary material generator must maintain at the generating facility for no less than three (3) years records of all off-site shipments of hazardous secondary materials. For each shipment, these records must, at a minimum, contain the following information:

(*1*) Name of the transporter and date of the shipment;

(*2*) Name and address of each reclaimer and, if applicable, the name and address of each intermediate facility to which the hazardous secondary material was sent;

(*3*) The type and quantity of hazardous secondary material in the shipment.

(D) The hazardous secondary material generator must maintain at the generating facility for no less than three (3) years confirmations of receipt from each reclaimer and, if applicable, each intermediate facility for all off-site shipments of hazardous secondary materials. Confirmations of receipt must include the name and address of the reclaimer (or intermediate facility), the type and quantity of the hazardous secondary materials received and the date which the hazardous secondary materials were received. This requirement may be satisfied by routine business records (*e.g.,* financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations of receipt);

(E) The hazardous secondary material generator must comply with the emergency preparedness and response conditions in subpart M of this part.

(vi) Reclaimers of hazardous secondary material excluded from regulation under this exclusion and intermediate facilities as defined in § 260.10 of this chapter satisfy all of the following conditions:

(A) The reclaimer and intermediate facility must maintain at its facility for no less than three (3) years records of all shipments of hazardous secondary material that were received at the facility and, if applicable, for all shipments of hazardous secondary materials that were received and subsequently sent off-site from the facility for further reclamation. For each shipment, these records must at a minimum contain the following information:

(*1*) Name of the transporter and date of the shipment;

(*2*) Name and address of the hazardous secondary material generator and, if applicable, the name and address of the reclaimer or intermediate facility

which the hazardous secondary materials were received from;

(*3*) The type and quantity of hazardous secondary material in the shipment; and

(*4*) For hazardous secondary materials that, after being received by the reclaimer or intermediate facility, were subsequently transferred off-site for further reclamation, the name and address of the (subsequent) reclaimer and, if applicable, the name and address of each intermediate facility to which the hazardous secondary material was sent.

(B) The intermediate facility must send the hazardous secondary material to the reclaimer(s) designated by the hazardous secondary materials generator.

(C) The reclaimer and intermediate facility must send to the hazardous secondary material generator confirmations of receipt for all off-site shipments of hazardous secondary materials. Confirmations of receipt must include the name and address of the reclaimer (or intermediate facility), the type and quantity of the hazardous secondary materials received and the date which the hazardous secondary materials were received. This requirement may be satisfied by routine business records (*e.g.,* financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations of receipt).

(D) The reclaimer and intermediate facility must manage the hazardous secondary material in a manner that is at least as protective as that employed for analogous raw material and must be contained. An ''analogous raw material'' is a raw material for which a hazardous secondary material is a substitute and serves the same function and has similar physical and chemical properties as the hazardous secondary material.

(E) Any residuals that are generated from reclamation processes will be managed in a manner that is protective of human health and the environment. If any residuals exhibit a hazardous characteristic according to subpart C of 40 CFR part 261, or if they themselves are specifically listed in subpart D of 40 CFR part 261, such residuals are hazardous wastes and must be managed in accordance with the applicable requirements of 40 CFR parts 260 through 272.

(F) The reclaimer and intermediate facility have financial assurance as required under subpart H of 40 CFR part 261,

(G) The reclaimer and intermediate facility have been granted a variance under § 260.31(d) or have a RCRA Part B permit or interim status standards that address the management of the hazardous secondary materials; and

(vii) All persons claiming the exclusion under this paragraph (a)(24) of this section provide notification as required under § 260.42 of this chapter.

* * * * *

(27) Hazardous secondary material that is generated and then transferred to another person for the purpose of remanufacturing is not a solid waste, provided that:

(i) The hazardous secondary material consists of one or more of the following spent solvents: Toluene, xylenes, ethylbenzene, 1,2,4-trimethylbenzene, chlorobenzene, n-hexane, cyclohexane, methyl tert-butyl ether, acetonitrile, chloroform, chloromethane, dichloromethane, methyl isobutyl ketone, NN-dimethylformamide, tetrahydrofuran, n-butyl alcohol, ethanol, and/or methanol;

(ii) The hazardous secondary material originated from using one or more of the solvents listed in paragraph (a)(27)(i) of this section in a commercial grade for reacting, extracting, purifying, or blending chemicals (or for rinsing out the process lines associated with these functions) in the pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and/or the paints and coatings manufacturing sectors (NAICS 325510).

(iii) The hazardous secondary material generator sends the hazardous secondary material spent solvents listed in paragraph (a)(27)(i) of this section to a remanufacturer in the pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and/or the paints and coatings manufacturing sectors (NAICS 325510).

(iv) After remanufacturing one or more of the solvents listed in paragraph (a)(27)(i) of this section, the use of the remanufactured solvent shall be limited to reacting, extracting, purifying, or blending chemicals (or for rinsing out the process lines associated with these functions) in the pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and the paints and coatings manufacturing sectors (NAICS 325510) or to using them as ingredients in a product. These allowed uses correspond to chemical functional uses enumerated under the Chemical Data Reporting Rule of the Toxic Substances Control Act (40 CFR parts 704, 710–711), including Industrial Function Codes U015 (solvents consumed in a reaction to produce other chemicals) and U030 (solvents become part of the mixture);

(v) After remanufacturing one or more of the solvents listed in paragraph (a)(27)(i) of this section, the use of the remanufactured solvent does not involve cleaning or degreasing oil, grease, or similar material from textiles, glassware, metal surfaces, or other articles. (These disallowed continuing uses correspond to chemical functional uses in Industrial Function Code U029 under the Chemical Data Reporting Rule of the Toxics Substances Control Act.); and

(vi) Both the hazardous secondary material generator and the remanufacturer must:

(A) Notify EPA or the State Director, if the state is authorized for the program, and update the notification every two years per 40 CFR 260.42;

(B) Develop and maintain an up-to-date remanufacturing plan which identifies:

(*1*) The name, address and EPA ID number of the generator(s) and the remanufacturer(s),

(*2*) The types and estimated annual volumes of spent solvents to be remanufactured,

(*3*) The processes and industry sectors that generate the spent solvents,

(*4*) The specific uses and industry sectors for the remanufactured solvents, and

(*5*) A certification from the remanufacturer stating ''on behalf of [insert remanufacturer facility name], I certify that this facility is a remanufacturer under pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and/or the paints and coatings manufacturing sectors (NAICS 325510), and will accept the spent solvent(s) for the sole purpose of remanufacturing into commercial-grade solvent(s) that will be used for reacting, extracting, purifying, or blending chemicals (or for rinsing out the process lines associated with these functions) or for use as product ingredient(s). I also certify that the remanufacturing equipment, vents, and tanks are equipped with and are operating air emission controls in compliance with the appropriate Clean Air Act regulations under 40 CFR part 60, part 61 or part 63, or, absent such Clean Air Act standards for the particular operation or piece of equipment covered by the remanufacturing exclusion, are in compliance with the appropriate standards in 40 CFR part 261, subparts

AA (vents), BB (equipment) and CC (tank storage),'';

(C) Maintain records of shipments and confirmations of receipts for a period of three years from the dates of the shipments;

(D) Prior to remanufacturing, store the hazardous spent solvents in tanks or containers that meet technical standards found in subparts I and J of 40 CFR part 261, with the tanks and containers being labeled or otherwise having an immediately available record of the material being stored;

(E) During remanufacturing, and during storage of the hazardous secondary materials prior to remanufacturing, the remanufacturer certifies that the remanufacturing equipment, vents, and tanks are equipped with and are operating air emission controls in compliance with the appropriate Clean Air Act regulations under 40 CFR part 60, part 61 or part 63; or, absent such Clean Air Act standards for the particular operation or piece of equipment covered by the remanufacturing exclusion, are in compliance with the appropriate standards in 40 CFR part 261 subparts AA (vents), BB (equipment) and CC (tank storage); and

(F) Meet the requirements prohibiting speculative accumulation per 40 CFR 261.1(c)(8).

* * * * *

■ 13. Part 261 is amended by:

■ a. Adding Subparts I and J;

■ b. Adding reserved Subparts K and L;

■ c. Adding Subpart M;

■ d. Adding reserved Subparts N through Z; and

■ e. Adding Subparts AA through CC.

The additions read as follows:

Subpart I—Use and Management of Containers

Sec.
261.170 Applicability.
261.171 Condition of containers.
261.172 Compatibility of hazardous secondary materials with containers.
261.173 Management of containers.
261.175 Containment.
261.176 Special requirements for ignitable or reactive hazardous secondary material.
261.177 Special requirements for incompatible materials.
261.179 Air emission standards.

Subpart J—Tank Systems

261.190 Applicability.
261.191 Assessment of existing tank system's integrity.
261.192 [Reserved]
261.193 Containment and detection of releases.
261.194 General operating requirements.
261.195 [Reserved]
261.196 Response to leaks or spills and disposition of leaking or unfit-for-use tank systems.
261.197 Termination of remanufacturing exclusion.
261.198 Special requirements for ignitable or reactive materials.
261.199 Special requirements for incompatible materials.
261.200 Air emission standards.

Subparts K–L [Reserved]

Subpart M—Emergency Preparedness and Response for Management of Excluded Hazardous Secondary Materials

261.400 Applicability.
261.410 Preparedness and prevention
261.411 Emergency procedures for facilities generating or accumulating of 6000 kg or less of hazardous secondary material.
261.420 Contingency planning and emergency procedures for facilities generating or accumulating more than 6000 kg of hazardous secondary material.

Subparts N–Z [Reserved]

Subpart AA—Air Emission Standards for Process Vents

261.1030 Applicability.
261.1031 Definitions.
261.1032 Standards: Process vents.
261.1033 Standards: Closed-vent systems and control devices.
261.1034 Test methods and procedures.
261.1035 Recordkeeping requirements.
261.1036–261.1049 [Reserved]

Subpart BB—Air Emission Standards for Equipment Leaks

261.1050 Applicability.
261.1051 Definitions.
261.1052 Standards: Pumps in light liquid service.
261.1053 Standards: Compressors.
261.1054 Standards: Pressure relief devices in gas/vapor service.
261.1055 Standards: Sampling connection systems.
261.1056 Standards: Open-ended valves or lines.
261.1057 Standards: Valves in gas/vapor service or in light liquid service.
261.1058 Standards: Pumps and valves in heavy liquid service, pressure relief devices in light liquid or heavy liquid service, and flanges and other connectors.
261.1059 Standards: Delay of repair.
261.1060 Standards: Closed-vent systems and control devices.
261.1061 Alternative standards for valves in gas/vapor service or in light liquid service: percentage of valves allowed to leak.
261.1062 Alternative standards for valves in gas/vapor service or in light liquid service: skip period leak detection and repair.
261.1063 Test methods and procedures.
261.1064 Recordkeeping requirements.
261.1065–261.1079 [Reserved]

Subpart CC—Air Emission Standards for Tanks and Containers

261.1080 Applicability.
261.1081 Definitions.
261.1082 Standards: General.
261.1083 Material determination procedures.
261.1084 Standards: Tanks.
261.1085 [Reserved]
261.1086 Standards: Containers.
261.1087 Standards: Closed-vent systems and control devices.
261.1088 Inspection and monitoring requirements.
261.1089 Recordkeeping requirements.
261.1090 [Reserved]

Subpart I—Use and Management of Containers

§ 261.170 Applicability.

This subpart applies to hazardous secondary materials excluded under the remanufacturing exclusion at § 261.4(a)(27) and stored in containers.

§ 261.171 Condition of containers.

If a container holding hazardous secondary material is not in good condition (*e.g.*, severe rusting, apparent structural defects) or if it begins to leak, the hazardous secondary material must be transferred from this container to a container that is in good condition or managed in some other way that complies with the requirements of this part.

§ 261.172 Compatibility of hazardous secondary materials with containers.

The container must be made of or lined with materials which will not react with, and are otherwise compatible with, the hazardous secondary material to be stored, so that the ability of the container to contain the material is not impaired.

§ 261.173 Management of containers.

(a) A container holding hazardous secondary material must always be closed during storage, except when it is necessary to add or remove the hazardous secondary material.

(b) A container holding hazardous secondary material must not be opened, handled, or stored in a manner which may rupture the container or cause it to leak.

§ 261.175 Containment.

(a) Container storage areas must have a containment system that is designed and operated in accordance with paragraph (b) of this section.

(b) A containment system must be designed and operated as follows:

(1) A base must underlie the containers which is free of cracks or gaps and is sufficiently impervious to contain leaks, spills, and accumulated precipitation until the collected material is detected and removed;

(2) The base must be sloped or the containment system must be otherwise

designed and operated to drain and remove liquids resulting from leaks, spills, or precipitation, unless the containers are elevated or are otherwise protected from contact with accumulated liquids;

(3) The containment system must have sufficient capacity to contain 10% of the volume of containers or the volume of the largest container, whichever is greater.

(4) Run-on into the containment system must be prevented unless the collection system has sufficient excess capacity in addition to that required in paragraph (b)(3) of this section to contain any run-on which might enter the system; and

(5) Spilled or leaked material and accumulated precipitation must be removed from the sump or collection area in as timely a manner as is necessary to prevent overflow of the collection system.

§ 261.176 Special requirements for ignitable or reactive hazardous secondary material.

Containers holding ignitable or reactive hazardous secondary material must be located at least 15 meters (50 feet) from the facility's property line.

§ 261.177 Special requirements for incompatible materials.

(a) Incompatible materials must not be placed in the same container.

(b) Hazardous secondary material must not be placed in an unwashed container that previously held an incompatible material.

(c) A storage container holding a hazardous secondary material that is incompatible with any other materials stored nearby must be separated from the other materials or protected from them by means of a dike, berm, wall, or other device.

§ 261.179 Air emission standards.

The remanufacturer or other person that stores or treats the hazardous secondary material shall manage all hazardous secondary material placed in a container in accordance with the applicable requirements of subparts AA, BB, and CC of this part.

Subpart J—Tank Systems

§ 261.190 Applicability.

(a) The requirements of this subpart apply to tank systems for storing or treating hazardous secondary material excluded under the remanufacturing exclusion at § 261.4(a)(27).

(b) Tank systems, including sumps, as defined in § 260.10, that serve as part of a secondary containment system to collect or contain releases of hazardous secondary materials are exempted from the requirements in § 261.193(a).

§ 261.191 Assessment of existing tank system's integrity.

(a) Tank systems must meet the secondary containment requirements of § 261.193, or the remanufacturer or other person that handles the hazardous secondary material must determine that the tank system is not leaking or is unfit for use. Except as provided in paragraph (c) of this section, a written assessment reviewed and certified by a qualified Professional Engineer must be kept on file at the remanufacturer's facility or other facility that stores or treats the hazardous secondary material that attests to the tank system's integrity.

(b) This assessment must determine that the tank system is adequately designed and has sufficient structural strength and compatibility with the material(s) to be stored or treated, to ensure that it will not collapse, rupture, or fail. At a minimum, this assessment must consider the following:

(1) Design standard(s), if available, according to which the tank and ancillary equipment were constructed;

(2) Hazardous characteristics of the material(s) that have been and will be handled;

(3) Existing corrosion protection measures;

(4) Documented age of the tank system, if available (otherwise, an estimate of the age); and

(5) Results of a leak test, internal inspection, or other tank integrity examination such that:

(i) For non-enterable underground tanks, the assessment must include a leak test that is capable of taking into account the effects of temperature variations, tank end deflection, vapor pockets, and high water table effects, and

(ii) For other than non-enterable underground tanks and for ancillary equipment, this assessment must include either a leak test, as described above, or other integrity examination that is certified by a qualified Professional Engineer that addresses cracks, leaks, corrosion, and erosion.

Note to paragraph (b)(5)(ii): The practices described in the American Petroleum Institute (API) Publication, Guide for Inspection of Refinery Equipment, Chapter XIII, "Atmospheric and Low-Pressure Storage Tanks," 4th edition, 1981, may be used, where applicable, as guidelines in conducting other than a leak test.

(c) If, as a result of the assessment conducted in accordance with paragraph (a) of this section, a tank system is found to be leaking or unfit for use, the remanufacturer or other person that stores or treats the hazardous secondary material must comply with the requirements of § 261.196.

§ 261.192 [Reserved]

§ 261.193 Containment and detection of releases.

(a) Secondary containment systems must be:

(1) Designed, installed, and operated to prevent any migration of materials or accumulated liquid out of the system to the soil, ground water, or surface water at any time during the use of the tank system; and

(2) Capable of detecting and collecting releases and accumulated liquids until the collected material is removed.

Note to paragraph (a): If the collected material is a hazardous waste under part 261 of this chapter, it is subject to management as a hazardous waste in accordance with all applicable requirements of parts 262 through 265, 266, and 268 of this chapter. If the collected material is discharged through a point source to waters of the United States, it is subject to the requirements of sections 301, 304, and 402 of the Clean Water Act, as amended. If discharged to a Publicly Owned Treatment Works (POTW), it is subject to the requirements of section 307 of the Clean Water Act, as amended. If the collected material is released to the environment, it may be subject to the reporting requirements of 40 CFR part 302.

(b) To meet the requirements of paragraph (a) of this section, secondary containment systems must be at a minimum:

(1) Constructed of or lined with materials that are compatible with the materials(s) to be placed in the tank system and must have sufficient strength and thickness to prevent failure owing to pressure gradients (including static head and external hydrological forces), physical contact with the material to which it is exposed, climatic conditions, and the stress of daily operation (including stresses from nearby vehicular traffic);

(2) Placed on a foundation or base capable of providing support to the secondary containment system, resistance to pressure gradients above and below the system, and capable of preventing failure due to settlement, compression, or uplift;

(3) Provided with a leak-detection system that is designed and operated so that it will detect the failure of either the primary or secondary containment structure or the presence of any release of hazardous secondary material or accumulated liquid in the secondary containment system at the earliest practicable time; and

(4) Sloped or otherwise designed or operated to drain and remove liquids

resulting from leaks, spills, or precipitation. Spilled or leaked material and accumulated precipitation must be removed from the secondary containment system within 24 hours, or in as timely a manner as is possible to prevent harm to human health and the environment.

(c) Secondary containment for tanks must include one or more of the following devices:

(1) A liner (external to the tank);

(2) A vault; or

(3) A double-walled tank.

(d) In addition to the requirements of paragraphs (a), (b), and (c) of this section, secondary containment systems must satisfy the following requirements:

(1) External liner systems must be:

(i) Designed or operated to contain 100 percent of the capacity of the largest tank within its boundary;

(ii) Designed or operated to prevent run-on or infiltration of precipitation into the secondary containment system unless the collection system has sufficient excess capacity to contain run-on or infiltration. Such additional capacity must be sufficient to contain precipitation from a 25-year, 24-hour rainfall event.

(iii) Free of cracks or gaps; and

(iv) Designed and installed to surround the tank completely and to cover all surrounding earth likely to come into contact with the material if the material is released from the tank(s) (*i.e.,* capable of preventing lateral as well as vertical migration of the material).

(2) Vault systems must be:

(i) Designed or operated to contain 100 percent of the capacity of the largest tank within its boundary;

(ii) Designed or operated to prevent run-on or infiltration of precipitation into the secondary containment system unless the collection system has sufficient excess capacity to contain run-on or infiltration. Such additional capacity must be sufficient to contain precipitation from a 25-year, 24-hour rainfall event;

(iii) Constructed with chemical-resistant water stops in place at all joints (if any);

(iv) Provided with an impermeable interior coating or lining that is compatible with the stored material and that will prevent migration of material into the concrete;

(v) Provided with a means to protect against the formation of and ignition of vapors within the vault, if the material being stored or treated is ignitable or reactive; and

(vi) Provided with an exterior moisture barrier or be otherwise designed or operated to prevent migration of moisture into the vault if the vault is subject to hydraulic pressure.

(3) Double-walled tanks must be:

(i) Designed as an integral structure (*i.e.,* an inner tank completely enveloped within an outer shell) so that any release from the inner tank is contained by the outer shell;

(ii) Protected, if constructed of metal, from both corrosion of the primary tank interior and of the external surface of the outer shell; and

(iii) Provided with a built-in continuous leak detection system capable of detecting a release within 24 hours, or at the earliest practicable time.

Note to paragraph (d)(3): The provisions outlined in the Steel Tank Institute's (STI) "Standard for Dual Wall Underground Steel Storage Tanks" may be used as guidelines for aspects of the design of underground steel double-walled tanks.

(e) [Reserved]

(f) Ancillary equipment must be provided with secondary containment (*e.g.,* trench, jacketing, double-walled piping) that meets the requirements of paragraphs (a) and (b) of this section except for:

(1) Aboveground piping (exclusive of flanges, joints, valves, and other connections) that are visually inspected for leaks on a daily basis;

(2) Welded flanges, welded joints, and welded connections that are visually inspected for leaks on a daily basis;

(3) Sealless or magnetic coupling pumps and sealless valves that are visually inspected for leaks on a daily basis; and

(4) Pressurized aboveground piping systems with automatic shut-off devices (*e.g.,* excess flow check valves, flow metering shutdown devices, loss of pressure actuated shut-off devices) that are visually inspected for leaks on a daily basis.

§ 261.194 General operating requirements.

(a) Hazardous secondary materials or treatment reagents must not be placed in a tank system if they could cause the tank, its ancillary equipment, or the containment system to rupture, leak, corrode, or otherwise fail.

(b) The remanufacturer or other person that stores or treats the hazardous secondary material must use appropriate controls and practices to prevent spills and overflows from tank or containment systems. These include at a minimum:

(1) Spill prevention controls (*e.g.,* check valves, dry disconnect couplings);

(2) Overfill prevention controls (*e.g.,* level sensing devices, high level alarms, automatic feed cutoff, or bypass to a standby tank); and

(3) Maintenance of sufficient freeboard in uncovered tanks to prevent overtopping by wave or wind action or by precipitation.

(c) The remanufacturer or other person that stores or treats the hazardous secondary material must comply with the requirements of § 261.196 of this subpart if a leak or spill occurs in the tank system.

§ 261.195 [Reserved]

§ 261.196 Response to leaks or spills and disposition of leaking or unfit-for-use tank systems.

A tank system or secondary containment system from which there has been a leak or spill, or which is unfit for use, must be removed from service immediately, and the remanufacturer or other person that stores or treats the hazardous secondary material must satisfy the following requirements:

(a) *Cessation of use; prevent flow or addition of materials.* The remanufacturer or other person that stores or treats the hazardous secondary material must immediately stop the flow of hazardous secondary material into the tank system or secondary containment system and inspect the system to determine the cause of the release.

(b) *Removal of material from tank system or secondary containment system.* (1) If the release was from the tank system, the remanufacturer or other person that stores or treats the hazardous secondary material must, within 24 hours after detection of the leak or, if the remanufacturer or other person that stores or treats the hazardous secondary material demonstrates that it is not possible, at the earliest practicable time, remove as much of the material as is necessary to prevent further release of hazardous secondary material to the environment and to allow inspection and repair of the tank system to be performed.

(2) If the material released was to a secondary containment system, all released materials must be removed within 24 hours or in as timely a manner as is possible to prevent harm to human health and the environment.

(c) *Containment of visible releases to the environment.* The remanufacturer or other person that stores or treats the hazardous secondary material must immediately conduct a visual inspection of the release and, based upon that inspection:

(1) Prevent further migration of the leak or spill to soils or surface water; and

(2) Remove, and properly dispose of, any visible contamination of the soil or surface water.

(d) *Notifications, reports.* (1) Any release to the environment, except as provided in paragraph (d)(2) of this section, must be reported to the Regional Administrator within 24 hours of its detection. If the release has been reported pursuant to 40 CFR part 302, that report will satisfy this requirement.

(2) A leak or spill of hazardous secondary material is exempted from the requirements of this paragraph if it is:

(i) Less than or equal to a quantity of 1 pound, and

(ii) Immediately contained and cleaned up.

(3) Within 30 days of detection of a release to the environment, a report containing the following information must be submitted to the Regional Administrator:

(i) Likely route of migration of the release;

(ii) Characteristics of the surrounding soil (soil composition, geology, hydrogeology, climate);

(iii) Results of any monitoring or sampling conducted in connection with the release (if available). If sampling or monitoring data relating to the release are not available within 30 days, these data must be submitted to the Regional Administrator as soon as they become available.

(iv) Proximity to downgradient drinking water, surface water, and populated areas; and

(v) Description of response actions taken or planned.

(e) *Provision of secondary containment, repair, or closure.* (1) Unless the remanufacturer or other person that stores or treats the hazardous secondary material satisfies the requirements of paragraphs (e)(2) through (4) of this section, the tank system must cease to operate under the remanufacturing exclusion at 40 CFR 261.4(a)(27).

(2) If the cause of the release was a spill that has not damaged the integrity of the system, the remanufacturer or other person that stores or treats the hazardous secondary material may return the system to service as soon as the released material is removed and repairs, if necessary, are made.

(3) If the cause of the release was a leak from the primary tank system into the secondary containment system, the system must be repaired prior to returning the tank system to service.

(4) If the source of the release was a leak to the environment from a component of a tank system without secondary containment, the remanufacturer or other person that stores or treats the hazardous secondary material must provide the component of the system from which the leak occurred with secondary containment that satisfies the requirements of § 261.193 before it can be returned to service, unless the source of the leak is an aboveground portion of a tank system that can be inspected visually. If the source is an aboveground component that can be inspected visually, the component must be repaired and may be returned to service without secondary containment as long as the requirements of paragraph (f) of this section are satisfied. Additionally, if a leak has occurred in any portion of a tank system component that is not readily accessible for visual inspection (*e.g.,* the bottom of an inground or onground tank), the entire component must be provided with secondary containment in accordance with § 261.193 of this subpart prior to being returned to use.

(f) *Certification of major repairs.* If the remanufacturer or other person that stores or treats the hazardous secondary material has repaired a tank system in accordance with paragraph (e) of this section, and the repair has been extensive (*e.g.,* installation of an internal liner; repair of a ruptured primary containment or secondary containment vessel), the tank system must not be returned to service unless the remanufacturer or other person that stores or treats the hazardous secondary material has obtained a certification by a qualified Professional Engineer that the repaired system is capable of handling hazardous secondary materials without release for the intended life of the system. This certification must be kept on file at the facility and maintained until closure of the facility.

Note 1 to § 261.196: The Regional Administrator may, on the basis of any information received that there is or has been a release of hazardous secondary material or hazardous constituents into the environment, issue an order under RCRA section 7003(a) requiring corrective action or such other response as deemed necessary to protect human health or the environment.

Note 2 to § 261.196: 40 CFR part 302 may require the owner or operator to notify the National Response Center of certain releases.

§ 261.197 Termination of remanufacturing exclusion.

Hazardous secondary material stored in units more than 90 days after the unit ceases to operate under the remanufacturing exclusion at 40 CFR 261.4(a)(27) or otherwise ceases to be operated for manufacturing, or for storage of a product or a raw material, then becomes subject to regulation as hazardous waste under parts 261 through 266, 268, 270, 271, and 124 of this chapter, as applicable.

§ 261.198 Special requirements for ignitable or reactive materials.

(a) Ignitable or reactive material must not be placed in tank systems, unless the material is stored or treated in such a way that it is protected from any material or conditions that may cause the material to ignite or react.

(b) The remanufacturer or other person that stores or treats hazardous secondary material which is ignitable or reactive must store or treat the hazardous secondary material in a tank that is in compliance with the requirements for the maintenance of protective distances between the material management area and any public ways, streets, alleys, or an adjoining property line that can be built upon as required in Tables 2–1 through 2–6 of the National Fire Protection Association's "Flammable and Combustible Liquids Code," (1977 or 1981), (incorporated by reference, see § 260.11).

§ 261.199 Special requirements for incompatible materials.

(a) Incompatible materials must not be placed in the same tank system.

(b) Hazardous secondary material must not be placed in a tank system that has not been decontaminated and that previously held an incompatible material.

§ 261.200 Air emission standards.

The remanufacturer or other person that stores or treats the hazardous secondary material shall manage all hazardous secondary material placed in a tank in accordance with the applicable requirements of subparts AA, BB, and CC of this part.

Subparts K–L [Reserved]

Subpart M—Emergency Preparedness and Response for Management of Excluded Hazardous Secondary Materials

§ 261.400 Applicability.

The requirements of this subpart apply to those areas of an entity managing hazardous secondary materials excluded under § 261.4(a)(23) and/or (24) where hazardous secondary materials are generated or accumulated on site.

(a) A generator of hazardous secondary material, or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d), that accumulates 6000 kg or

less of hazardous secondary material at any time must comply with §§ 261.410 and 261.411.

(b) A generator of hazardous secondary material, or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) that accumulates more than 6000 kg of hazardous secondary material at any time must comply with §§ 261.410 and 261.420.

§ 261.410 Preparedness and prevention.

(a) *Maintenance and operation of facility.* Facilities generating or accumulating hazardous secondary material must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous secondary materials or hazardous secondary material constituents to air, soil, or surface water which could threaten human health or the environment.

(b) *Required equipment.* All facilities generating or accumulating hazardous secondary material must be equipped with the following, *unless* none of the hazards posed by hazardous secondary material handled at the facility could require a particular kind of equipment specified below:

(1) An internal communications or alarm system capable of providing immediate emergency instruction (voice or signal) to facility personnel;

(2) A device, such as a telephone (immediately available at the scene of operations) or a hand-held two-way radio, capable of summoning emergency assistance from local police departments, fire departments, or state or local emergency response teams;

(3) Portable fire extinguishers, fire control equipment (including special extinguishing equipment, such as that using foam, inert gas, or dry chemicals), spill control equipment, and decontamination equipment; and

(4) Water at adequate volume and pressure to supply water hose streams, or foam producing equipment, or automatic sprinklers, or water spray systems.

(c) *Testing and maintenance of equipment.* All facility communications or alarm systems, fire protection equipment, spill control equipment, and decontamination equipment, where required, must be tested and maintained as necessary to assure its proper operation in time of emergency.

(d) *Access to communications or alarm system.* (1) Whenever hazardous secondary material is being poured, mixed, spread, or otherwise handled, all personnel involved in the operation must have immediate access to an internal alarm or emergency communication device, either directly or through visual or voice contact with another employee, unless such a device is not required under paragraph (b) of this section.

(2) If there is ever just one employee on the premises while the facility is operating, he must have immediate access to a device, such as a telephone (immediately available at the scene of operation) or a hand-held two-way radio, capable of summoning external emergency assistance, *unless* such a device is not required under paragraph (b) of this section.

(e) *Required aisle space.* The hazardous secondary material generator or intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) must maintain aisle space to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination equipment to any area of facility operation in an emergency, unless aisle space is not needed for any of these purposes.

(f) *Arrangements with local authorities.* (1) The hazardous secondary material generator or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) must attempt to make the following arrangements, as appropriate for the type of waste handled at his facility and the potential need for the services of these organizations:

(i) Arrangements to familiarize police, fire departments, and emergency response teams with the layout of the facility, properties of hazardous secondary material handled at the facility and associated hazards, places where facility personnel would normally be working, entrances to roads inside the facility, and possible evacuation routes;

(ii) Where more than one police and fire department might respond to an emergency, agreements designating primary emergency authority to a specific police and a specific fire department, and agreements with any others to provide support to the primary emergency authority;

(iii) Agreements with state emergency response teams, emergency response contractors, and equipment suppliers; and

(iv) Arrangements to familiarize local hospitals with the properties of hazardous waste handled at the facility and the types of injuries or illnesses which could result from fires, explosions, or releases at the facility.

(2) Where state or local authorities decline to enter into such arrangements, the hazardous secondary material generator or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) must document the refusal in the operating record.

§ 261.411 Emergency procedures for facilities generating or accumulating 6000 kg or less of hazardous secondary material.

A generator or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) that generates or accumulates 6000 kg or less of hazardous secondary material must comply with the following requirements:

(a) At all times there must be at least one employee either on the premises or on call (*i.e.,* available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures specified in paragraph (d) of this section. This employee is the emergency coordinator.

(b) The generator or intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) must post the following information next to the telephone:

(1) The name and telephone number of the emergency coordinator;

(2) Location of fire extinguishers and spill control material, and, if present, fire alarm; and

(3) The telephone number of the fire department, unless the facility has a direct alarm.

(c) The generator or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) must ensure that all employees are thoroughly familiar with proper waste handling and emergency procedures, relevant to their responsibilities during normal facility operations and emergencies;

(d) The emergency coordinator or his designee must respond to any emergencies that arise. The applicable responses are as follows:

(1) In the event of a fire, call the fire department or attempt to extinguish it using a fire extinguisher;

(2) In the event of a spill, contain the flow of hazardous waste to the extent possible, and as soon as is practicable, clean up the hazardous waste and any contaminated materials or soil;

(3) In the event of a fire, explosion, or other release which could threaten human health outside the facility or when the generator or an intermediate or reclamation facility operating under a verified recycler variance under

§ 260.31(d) has knowledge that a spill has reached surface water, the generator or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) must immediately notify the National Response Center (using their 24-hour toll free number 800/424–8802). The report must include the following information:

(i) The name, address, and U.S. EPA Identification Number of the facility;

(ii) Date, time, and type of incident (*e.g.,* spill or fire);

(iii) Quantity and type of hazardous waste involved in the incident;

(iv) Extent of injuries, if any; and

(v) Estimated quantity and disposition of recovered materials, if any.

§ 261.420 Contingency planning and emergency procedures for facilities generating or accumulating more than 6000 kg of hazardous secondary material.

A generator or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) that generates or accumulates more than 6000 kg of hazardous secondary material must comply with the following requirements:

(a) *Purpose and implementation of contingency plan.* (1) Each generator or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) that accumulates more than 6000 kg of hazardous secondary material must have a contingency plan for his facility. The contingency plan must be designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous secondary material or hazardous secondary material constituents to air, soil, or surface water.

(2) The provisions of the plan must be carried out immediately whenever there is a fire, explosion, or release of hazardous secondary material or hazardous secondary material constituents which could threaten human health or the environment.

(b) *Content of contingency plan.* (1) The contingency plan must describe the actions facility personnel must take to comply with paragraphs (a) and (f) in response to fires, explosions, or any unplanned sudden or non-sudden release of hazardous secondary material or hazardous secondary material constituents to air, soil, or surface water at the facility.

(2) If the generator or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) accumulating more than 6000 kg of hazardous secondary material has already prepared a Spill Prevention, Control, and Countermeasures (SPCC) Plan in accordance with part 112 of this chapter, or some other emergency or contingency plan, he need only amend that plan to incorporate hazardous waste management provisions that are sufficient to comply with the requirements of this part. The hazardous secondary material generator or an intermediate or reclamation facility operating under a verified recycler variance under § 260.31(d) may develop one contingency plan which meets all regulatory requirements. EPA recommends that the plan be based on the National Response Team's Integrated Contingency Plan Guidance ("One Plan"). When modifications are made to non-RCRA provisions in an integrated contingency plan, the changes do not trigger the need for a RCRA permit modification.

(3) The plan must describe arrangements agreed to by local police departments, fire departments, hospitals, contractors, and State and local emergency response teams to coordinate emergency services, pursuant to § 262.410(f).

(4) The plan must list names, addresses, and phone numbers (office and home) of all persons qualified to act as emergency coordinator (see paragraph (e) of this section), and this list must be kept up-to-date. Where more than one person is listed, one must be named as primary emergency coordinator and others must be listed in the order in which they will assume responsibility as alternates.

(5) The plan must include a list of all emergency equipment at the facility (such as fire extinguishing systems, spill control equipment, communications and alarm systems (internal and external), and decontamination equipment), where this equipment is required. This list must be kept up to date. In addition, the plan must include the location and a physical description of each item on the list, and a brief outline of its capabilities.

(6) The plan must include an evacuation plan for facility personnel where there is a possibility that evacuation could be necessary. This plan must describe signal(s) to be used to begin evacuation, evacuation routes, and alternate evacuation routes (in cases where the primary routes could be blocked by releases of hazardous waste or fires).

(c) *Copies of contingency plan.* A copy of the contingency plan and all revisions to the plan must be:

(1) Maintained at the facility; and

(2) Submitted to all local police departments, fire departments, hospitals, and State and local emergency response teams that may be called upon to provide emergency services.

(d) *Amendment of contingency plan.* The contingency plan must be reviewed, and immediately amended, if necessary, whenever:

(1) Applicable regulations are revised;

(2) The plan fails in an emergency;

(3) The facility changes—in its design, construction, operation, maintenance, or other circumstances—in a way that materially increases the potential for fires, explosions, or releases of hazardous secondary material or hazardous secondary material constituents, or changes the response necessary in an emergency;

(4) The list of emergency coordinators changes; or

(5) The list of emergency equipment changes.

(e) *Emergency coordinator.* At all times, there must be at least one employee either on the facility premises or on call (*i.e.,* available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures. This emergency coordinator must be thoroughly familiar with all aspects of the facility's contingency plan, all operations and activities at the facility, the location and characteristics of waste handled, the location of all records within the facility, and the facility layout. In addition, this person must have the authority to commit the resources needed to carry out the contingency plan. The emergency coordinator's responsibilities are more fully spelled out in paragraph (f). Applicable responsibilities for the emergency coordinator vary, depending on factors such as type and variety of hazardous secondary material(s) handled by the facility, and type and complexity of the facility.

(f) *Emergency procedures.* (1) Whenever there is an imminent or actual emergency situation, the emergency coordinator (or his designee when the emergency coordinator is on call) must immediately:

(i) Activate internal facility alarms or communication systems, where applicable, to notify all facility personnel; and

(ii) Notify appropriate State or local agencies with designated response roles if their help is needed.

(2) Whenever there is a release, fire, or explosion, the emergency coordinator must immediately identify the character, exact source, amount, and

areal extent of any released materials. He may do this by observation or review of facility records or manifests and, if necessary, by chemical analysis.

(3) Concurrently, the emergency coordinator must assess possible hazards to human health or the environment that may result from the release, fire, or explosion. This assessment must consider both direct and indirect effects of the release, fire, or explosion (*e.g.,* the effects of any toxic, irritating, or asphyxiating gases that are generated, or the effects of any hazardous surface water run-offs from water or chemical agents used to control fire and heat-induced explosions).

(4) If the emergency coordinator determines that the facility has had a release, fire, or explosion which could threaten human health, or the environment, outside the facility, he must report his findings as follows:

(i) If his assessment indicates that evacuation of local areas may be advisable, he must immediately notify appropriate local authorities. He must be available to help appropriate officials decide whether local areas should be evacuated; and

(ii) He must immediately notify either the government official designated as the on-scene coordinator for that geographical area, or the National Response Center (using their 24-hour toll free number 800/424–8802). The report must include:

(A) Name and telephone number of reporter;

(B) Name and address of facility;

(C) Time and type of incident (*e.g.,* release, fire);

(D) Name and quantity of material(s) involved, to the extent known;

(E) The extent of injuries, if any; and

(F) The possible hazards to human health, or the environment, outside the facility.

(5) During an emergency, the emergency coordinator must take all reasonable measures necessary to ensure that fires, explosions, and releases do not occur, recur, or spread to other hazardous secondary material at the facility. These measures must include, where applicable, stopping processes and operations, collecting and containing released material, and removing or isolating containers.

(6) If the facility stops operations in response to a fire, explosion or release, the emergency coordinator must monitor for leaks, pressure buildup, gas generation, or ruptures in valves, pipes, or other equipment, wherever this is appropriate.

(7) Immediately after an emergency, the emergency coordinator must provide for treating, storing, or disposing of recovered secondary material, contaminated soil or surface water, or any other material that results from a release, fire, or explosion at the facility. Unless the hazardous secondary material generator can demonstrate, in accordance with § 261.3(c) or (d) of this chapter, that the recovered material is not a hazardous waste, the owner or operator becomes a generator of hazardous waste and must manage it in accordance with all applicable requirements of parts 262, 263, and 265 of this chapter.

(8) The emergency coordinator must ensure that, in the affected area(s) of the facility:

(i) No secondary material that may be incompatible with the released material is treated, stored, or disposed of until cleanup procedures are completed; and

(ii) All emergency equipment listed in the contingency plan is cleaned and fit for its intended use before operations are resumed.

(9) The hazardous secondary material generator must note in the operating record the time, date, and details of any incident that requires implementing the contingency plan. Within 15 days after the incident, he must submit a written report on the incident to the Regional Administrator. The report must include:

(i) Name, address, and telephone number of the hazardous secondary material generator;

(ii) Name, address, and telephone number of the facility;

(iii) Date, time, and type of incident (*e.g.,* fire, explosion);

(iv) Name and quantity of material(s) involved;

(v) The extent of injuries, if any;

(vi) An assessment of actual or potential hazards to human health or the environment, where this is applicable; and

(vii) Estimated quantity and disposition of recovered material that resulted from the incident.

Subparts N–Z [Reserved]

Subpart AA—Air Emission Standards for Process Vents

§ 261.1030 Applicability.

The regulations in this subpart apply to process vents associated with distillation, fractionation, thin-film evaporation, solvent extraction, or air or stream stripping operations that manage hazardous secondary materials excluded under the remanufacturing exclusion at § 261.4(a)(27) with concentrations of at least 10 ppmw, unless the process vents are equipped with operating air emission controls in accordance with the requirements of an applicable Clean Air Act regulation codified under 40 CFR part 60, part 61, or part 63.

§ 261.1031 Definitions.

As used in this subpart, all terms not defined herein shall have the meaning given them in the Resource Conservation and Recovery Act and parts 260–266.

Air stripping operation is a desorption operation employed to transfer one or more volatile components from a liquid mixture into a gas (air) either with or without the application of heat to the liquid. Packed towers, spray towers, and bubble-cap, sieve, or valve-type plate towers are among the process configurations used for contacting the air and a liquid.

Bottoms receiver means a container or tank used to receive and collect the heavier bottoms fractions of the distillation feed stream that remain in the liquid phase.

Closed-vent system means a system that is not open to the atmosphere and that is composed of piping, connections, and, if necessary, flow-inducing devices that transport gas or vapor from a piece or pieces of equipment to a control device.

Condenser means a heat-transfer device that reduces a thermodynamic fluid from its vapor phase to its liquid phase.

Connector means flanged, screwed, welded, or other joined fittings used to connect two pipelines or a pipeline and a piece of equipment. For the purposes of reporting and recordkeeping, connector means flanged fittings that are not covered by insulation or other materials that prevent location of the fittings.

Continuous recorder means a data-recording device recording an instantaneous data value at least once every 15 minutes.

Control device means an enclosed combustion device, vapor recovery system, or flare. Any device the primary function of which is the recovery or capture of solvents or other organics for use, reuse, or sale (*e.g.,* a primary condenser on a solvent recovery unit) is not a control device.

Control device shutdown means the cessation of operation of a control device for any purpose.

Distillate receiver means a container or tank used to receive and collect liquid material (condensed) from the overhead condenser of a distillation unit and from which the condensed liquid is pumped to larger storage tanks or other process units.

Distillation operation means an operation, either batch or continuous, separating one or more feed stream(s)

into two or more exit streams, each exit stream having component concentrations different from those in the feed stream(s). The separation is achieved by the redistribution of the components between the liquid and vapor phase as they approach equilibrium within the distillation unit.

Double block and bleed system means two block valves connected in series with a bleed valve or line that can vent the line between the two block valves.

Equipment means each valve, pump, compressor, pressure relief device, sampling connection system, open-ended valve or line, or flange or other connector, and any control devices or systems required by this subpart.

Flame zone means the portion of the combustion chamber in a boiler occupied by the flame envelope.

Flow indicator means a device that indicates whether gas flow is present in a vent stream.

First attempt at repair means to take rapid action for the purpose of stopping or reducing leakage of organic material to the atmosphere using best practices.

Fractionation operation means a distillation operation or method used to separate a mixture of several volatile components of different boiling points in successive stages, each stage removing from the mixture some proportion of one of the components.

Hazardous secondary material management unit shutdown means a work practice or operational procedure that stops operation of a hazardous secondary material management unit or part of a hazardous secondary material management unit. An unscheduled work practice or operational procedure that stops operation of a hazardous secondary material management unit or part of a hazardous secondary material management unit for less than 24 hours is not a hazardous secondary material management unit shutdown. The use of spare equipment and technically feasible bypassing of equipment without stopping operation are not hazardous secondary material management unit shutdowns.

Hot well means a container for collecting condensate as in a steam condenser serving a vacuum-jet or steam-jet ejector.

In gas/vapor service means that the piece of equipment contains or contacts a hazardous secondary material stream that is in the gaseous state at operating conditions.

In heavy liquid service means that the piece of equipment is not in gas/vapor service or in light liquid service.

In light liquid service means that the piece of equipment contains or contacts a material stream where the vapor pressure of one or more of the organic components in the stream is greater than 0.3 kilopascals (kPa) at 20 °C, the total concentration of the pure organic components having a vapor pressure greater than 0.3 kilopascals (kPa) at 20 °C is equal to or greater than 20 percent by weight, and the fluid is a liquid at operating conditions.

In situ sampling systems means nonextractive samplers or in-line samplers.

In vacuum service means that equipment is operating at an internal pressure that is at least 5 kPa below ambient pressure.

Malfunction means any sudden failure of a control device or a hazardous secondary material management unit or failure of a hazardous secondary material management unit to operate in a normal or usual manner, so that organic emissions are increased.

Open-ended valve or line means any valve, except pressure relief valves, having one side of the valve seat in contact with hazardous secondary material and one side open to the atmosphere, either directly or through open piping.

Pressure release means the emission of materials resulting from the system pressure being greater than the set pressure of the pressure relief device.

Process heater means a device that transfers heat liberated by burning fuel to fluids contained in tubes, including all fluids except water that are heated to produce steam.

Process vent means any open-ended pipe or stack that is vented to the atmosphere either directly, through a vacuum-producing system, or through a tank (*e.g.,* distillate receiver, condenser, bottoms receiver, surge control tank, separator tank, or hot well) associated with hazardous secondary material distillation, fractionation, thin-film evaporation, solvent extraction, or air or steam stripping operations.

Repaired means that equipment is adjusted, or otherwise altered, to eliminate a leak.

Sampling connection system means an assembly of equipment within a process or material management unit used during periods of representative operation to take samples of the process or material fluid. Equipment used to take non-routine grab samples is not considered a sampling connection system.

Sensor means a device that measures a physical quantity or the change in a physical quantity, such as temperature, pressure, flow rate, pH, or liquid level.

Separator tank means a device used for separation of two immiscible liquids.

Solvent extraction operation means an operation or method of separation in which a solid or solution is contacted with a liquid solvent (the two being mutually insoluble) to preferentially dissolve and transfer one or more components into the solvent.

Startup means the setting in operation of a hazardous secondary material management unit or control device for any purpose.

Steam stripping operation means a distillation operation in which vaporization of the volatile constituents of a liquid mixture takes place by the introduction of steam directly into the charge.

Surge control tank means a large-sized pipe or storage reservoir sufficient to contain the surging liquid discharge of the process tank to which it is connected.

Thin-film evaporation operation means a distillation operation that employs a heating surface consisting of a large diameter tube that may be either straight or tapered, horizontal or vertical. Liquid is spread on the tube wall by a rotating assembly of blades that maintain a close clearance from the wall or actually ride on the film of liquid on the wall.

Vapor incinerator means any enclosed combustion device that is used for destroying organic compounds and does not extract energy in the form of steam or process heat.

Vented means discharged through an opening, typically an open-ended pipe or stack, allowing the passage of a stream of liquids, gases, or fumes into the atmosphere. The passage of liquids, gases, or fumes is caused by mechanical means such as compressors or vacuum-producing systems or by process-related means such as evaporation produced by heating and not caused by tank loading and unloading (working losses) or by natural means such as diurnal temperature changes.

§ 261.1032 Standards: Process vents.

(a) The remanufacturer or other person that stores or treats hazardous secondary materials in hazardous secondary material management units with process vents associated with distillation, fractionation, thin-film evaporation, solvent extraction, or air or steam stripping operations managing hazardous secondary material with organic concentrations of at least 10 ppmw shall either:

(1) Reduce total organic emissions from all affected process vents at the facility below 1.4 kg/h (3 lb/h) and 2.8 Mg/yr (3.1 tons/yr), or

(2) Reduce, by use of a control device, total organic emissions from all affected

process vents at the facility by 95 weight percent.

(b) If the remanufacturer or other person that stores or treats the hazardous secondary material installs a closed-vent system and control device to comply with the provisions of paragraph (a) of this section the closed-vent system and control device must meet the requirements of § 261.1033.

(c) Determinations of vent emissions and emission reductions or total organic compound concentrations achieved by add-on control devices may be based on engineering calculations or performance tests. If performance tests are used to determine vent emissions, emission reductions, or total organic compound concentrations achieved by add-on control devices, the performance tests must conform with the requirements of § 261.1034(c).

(d) When a remanufacturer or other person that stores or treats the hazardous secondary material and the Regional Administrator do not agree on determinations of vent emissions and/or emission reductions or total organic compound concentrations achieved by add-on control devices based on engineering calculations, the procedures in § 261.1034(c) shall be used to resolve the disagreement.

§ 261.1033 Standards: Closed-vent systems and control devices.

(a)(1) The remanufacturer or other person that stores or treats the hazardous secondary materials in hazardous secondary material management units using closed-vent systems and control devices used to comply with provisions of this part shall comply with the provisions of this section.

(2) [Reserved]

(b) A control device involving vapor recovery (*e.g.,* a condenser or adsorber) shall be designed and operated to recover the organic vapors vented to it with an efficiency of 95 weight percent or greater unless the total organic emission limits of § 261.1032(a)(1) for all affected process vents can be attained at an efficiency less than 95 weight percent.

(c) An enclosed combustion device (*e.g.,* a vapor incinerator, boiler, or process heater) shall be designed and operated to reduce the organic emissions vented to it by 95 weight percent or greater; to achieve a total organic compound concentration of 20 ppmv, expressed as the sum of the actual compounds, not carbon equivalents, on a dry basis corrected to 3 percent oxygen; or to provide a minimum residence time of 0.50 seconds at a minimum temperature of 760 °C. If a boiler or process heater is used as the control device, then the vent stream shall be introduced into the flame zone of the boiler or process heater.

(d)(1) A flare shall be designed for and operated with no visible emissions as determined by the methods specified in paragraph (e)(1) of this section, except for periods not to exceed a total of 5 minutes during any 2 consecutive hours.

(2) A flare shall be operated with a flame present at all times, as determined by the methods specified in paragraph (f)(2)(iii) of this section.

(3) A flare shall be used only if the net heating value of the gas being combusted is 11.2 MJ/scm (300 Btu/scf) or greater if the flare is steam-assisted or air-assisted; or if the net heating value of the gas being combusted is 7.45 MJ/scm (200 Btu/scf) or greater if the flare is nonassisted. The net heating value of the gas being combusted shall be determined by the methods specified in paragraph (e)(2) of this section.

(4)(i) A steam-assisted or nonassisted flare shall be designed for and operated with an exit velocity, as determined by the methods specified in paragraph (e)(3) of this section, less than 18.3 m/s (60 ft/s), except as provided in paragraphs (d)(4)(ii) and (iii) of this section.

(ii) A steam-assisted or nonassisted flare designed for and operated with an exit velocity, as determined by the methods specified in paragraph (e)(3) of this section, equal to or greater than 18.3 m/s (60 ft/s) but less than 122 m/s (400 ft/s) is allowed if the net heating value of the gas being combusted is greater than 37.3 MJ/scm (1,000 Btu/scf).

(iii) A steam-assisted or nonassisted flare designed for and operated with an exit velocity, as determined by the methods specified in paragraph (e)(3) of this section, less than the velocity, V_{max}, as determined by the method specified in paragraph (e)(4) of this section and less than 122 m/s (400 ft/s) is allowed.

(5) An air-assisted flare shall be designed and operated with an exit velocity less than the velocity, V_{max}, as determined by the method specified in paragraph (e)(5) of this section.

(6) A flare used to comply with this section shall be steam-assisted, air-assisted, or nonassisted.

(e)(1) Reference Method 22 in 40 CFR part 60 shall be used to determine the compliance of a flare with the visible emission provisions of this subpart. The observation period is 2 hours and shall be used according to Method 22.

(2) The net heating value of the gas being combusted in a flare shall be calculated using the following equation:

$$H_T = K\left[\sum_{i=1}^{n} C_i H_i\right]$$

Where:

H_T = Net heating value of the sample, MJ/scm; where the net enthalpy per mole of offgas is based on combustion at 25 °C and 760 mm Hg, but the standard temperature for determining the volume corresponding to 1 mol is 20 °C;

K = Constant, 1.74×10^{-7} (1/ppm) (g mol/scm) (MJ/kcal) where standard temperature for (g mol/scm) is 20 °C;

C_i = Concentration of sample component i in ppm on a wet basis, as measured for organics by Reference Method 18 in 40 CFR part 60 and measured for hydrogen and carbon monoxide by ASTM D 1946–82 (incorporated by reference as specified in § 260.11); and

H_i = Net heat of combustion of sample component i, kcal/9 mol at 25 °C and 760 mm Hg. The heats of combustion may be determined using ASTM D 2382–83 (incorporated by reference as specified in § 260.11) if published values are not available or cannot be calculated.

(3) The actual exit velocity of a flare shall be determined by dividing the volumetric flow rate (in units of standard temperature and pressure), as determined by Reference Methods 2, 2A, 2C, or 2D in 40 CFR part 60 as appropriate, by the unobstructed (free) cross-sectional area of the flare tip.

(4) The maximum allowed velocity in m/s, V_{max}, for a flare complying with paragraph (d)(4)(iii) of this section shall be determined by the following equation:

$$\mathrm{Log}_{10}(V_{max}) = (H_T + 28.8)/31.7$$

Where:

28.8 = Constant,

31.7 = Constant,

H_T = The net heating value as determined in paragraph (e)(2) of this section.

(5) The maximum allowed velocity in m/s, V_{max}, for an air-assisted flare shall be determined by the following equation:

$$V_{max} = 8.706 + 0.7084\ (H_T)$$

Where:

8.706 = Constant,

0.7084 = Constant,

H_T = The net heating value as determined in paragraph (e)(2) of this section.

(f) The remanufacturer or other person that stores or treats the hazardous secondary material shall monitor and inspect each control device required to comply with this section to ensure proper operation and maintenance of the control device by implementing the following requirements:

(1) Install, calibrate, maintain, and operate according to the manufacturer's specifications a flow indicator that provides a record of vent stream flow

from each affected process vent to the control device at least once every hour. The flow indicator sensor shall be installed in the vent stream at the nearest feasible point to the control device inlet but before the point at which the vent streams are combined.

(2) Install, calibrate, maintain, and operate according to the manufacturer's specifications a device to continuously monitor control device operation as specified below:

(i) For a thermal vapor incinerator, a temperature monitoring device equipped with a continuous recorder. The device shall have an accuracy of ±1 percent of the temperature being monitored in °C or ±0.5 °C, whichever is greater. The temperature sensor shall be installed at a location in the combustion chamber downstream of the combustion zone.

(ii) For a catalytic vapor incinerator, a temperature monitoring device equipped with a continuous recorder. The device shall be capable of monitoring temperature at two locations and have an accuracy of ±1 percent of the temperature being monitored in °C or ±0.5 °C, whichever is greater. One temperature sensor shall be installed in the vent stream at the nearest feasible point to the catalyst bed inlet and a second temperature sensor shall be installed in the vent stream at the nearest feasible point to the catalyst bed outlet.

(iii) For a flare, a heat sensing monitoring device equipped with a continuous recorder that indicates the continuous ignition of the pilot flame.

(iv) For a boiler or process heater having a design heat input capacity less than 44 MW, a temperature monitoring device equipped with a continuous recorder. The device shall have an accuracy of ±1 percent of the temperature being monitored in °C or ±0.5 °C, whichever is greater. The temperature sensor shall be installed at a location in the furnace downstream of the combustion zone.

(v) For a boiler or process heater having a design heat input capacity greater than or equal to 44 MW, a monitoring device equipped with a continuous recorder to measure a parameter(s) that indicates good combustion operating practices are being used.

(vi) For a condenser, either:

(A) A monitoring device equipped with a continuous recorder to measure the concentration level of the organic compounds in the exhaust vent stream from the condenser, or

(B) A temperature monitoring device equipped with a continuous recorder. The device shall be capable of monitoring temperature with an accuracy of ±1 percent of the temperature being monitored in degrees Celsius (°C) or ±0.5 °C, whichever is greater. The temperature sensor shall be installed at a location in the exhaust vent stream from the condenser exit (*i.e.,* product side).

(vii) For a carbon adsorption system that regenerates the carbon bed directly in the control device such as a fixed-bed carbon adsorber, either:

(A) A monitoring device equipped with a continuous recorder to measure the concentration level of the organic compounds in the exhaust vent stream from the carbon bed, or

(B) A monitoring device equipped with a continuous recorder to measure a parameter that indicates the carbon bed is regenerated on a regular, predetermined time cycle.

(3) Inspect the readings from each monitoring device required by paragraphs (f)(1) and (2) of this section at least once each operating day to check control device operation and, if necessary, immediately implement the corrective measures necessary to ensure the control device operates in compliance with the requirements of this section.

(g) A remanufacturer or other person that stores or treats hazardous secondary material in a hazardous secondary material management unit using a carbon adsorption system such as a fixed-bed carbon adsorber that regenerates the carbon bed directly onsite in the control device shall replace the existing carbon in the control device with fresh carbon at a regular, predetermined time interval that is no longer than the carbon service life established as a requirement of § 261.1035(b)(4)(iii)(F).

(h) A remanufacturer or other person that stores or treats hazardous secondary material in a hazardous secondary material management unit using a carbon adsorption system such as a carbon canister that does not regenerate the carbon bed directly onsite in the control device shall replace the existing carbon in the control device with fresh carbon on a regular basis by using one of the following procedures:

(1) Monitor the concentration level of the organic compounds in the exhaust vent stream from the carbon adsorption system on a regular schedule, and replace the existing carbon with fresh carbon immediately when carbon breakthrough is indicated. The monitoring frequency shall be daily or at an interval no greater than 20 percent of the time required to consume the total carbon working capacity established as a requirement of § 261.1035(b)(4)(iii)(G), whichever is longer.

(2) Replace the existing carbon with fresh carbon at a regular, predetermined time interval that is less than the design carbon replacement interval established as a requirement of § 261.1035(b)(4)(iii)(G).

(i) An alternative operational or process parameter may be monitored if it can be demonstrated that another parameter will ensure that the control device is operated in conformance with these standards and the control device's design specifications.

(j) A remanufacturer or other person that stores or treats hazardous secondary material at an affected facility seeking to comply with the provisions of this part by using a control device other than a thermal vapor incinerator, catalytic vapor incinerator, flare, boiler, process heater, condenser, or carbon adsorption system is required to develop documentation including sufficient information to describe the control device operation and identify the process parameter or parameters that indicate proper operation and maintenance of the control device.

(k) A closed-vent system shall meet either of the following design requirements:

(1) A closed-vent system shall be designed to operate with no detectable emissions, as indicated by an instrument reading of less than 500 ppmv above background as determined by the procedure in § 261.1034(b) of this subpart, and by visual inspections; or

(2) A closed-vent system shall be designed to operate at a pressure below atmospheric pressure. The system shall be equipped with at least one pressure gauge or other pressure measurement device that can be read from a readily accessible location to verify that negative pressure is being maintained in the closed-vent system when the control device is operating.

(l) The remanufacturer or other person that stores or treats the hazardous secondary material shall monitor and inspect each closed-vent system required to comply with this section to ensure proper operation and maintenance of the closed-vent system by implementing the following requirements:

(1) Each closed-vent system that is used to comply with paragraph (k)(1) of this section shall be inspected and monitored in accordance with the following requirements:

(i) An initial leak detection monitoring of the closed-vent system shall be conducted by the remanufacturer or other person that stores or treats the hazardous secondary

material on or before the date that the system becomes subject to this section. The remanufacturer or other person that stores or treats the hazardous secondary material shall monitor the closed-vent system components and connections using the procedures specified in § 261.1034(b) of this subpart to demonstrate that the closed-vent system operates with no detectable emissions, as indicated by an instrument reading of less than 500 ppmv above background.

(ii) After initial leak detection monitoring required in paragraph (l)(1)(i) of this section, the remanufacturer or other person that stores or treats the hazardous secondary material shall inspect and monitor the closed-vent system as follows:

(A) Closed-vent system joints, seams, or other connections that are permanently or semi-permanently sealed (*e.g.,* a welded joint between two sections of hard piping or a bolted and gasketed ducting flange) shall be visually inspected at least once per year to check for defects that could result in air pollutant emissions. The remanufacturer or other person that stores or treats the hazardous secondary material shall monitor a component or connection using the procedures specified in § 261.1034(b) of this subpart to demonstrate that it operates with no detectable emissions following any time the component is repaired or replaced (*e.g.,* a section of damaged hard piping is replaced with new hard piping) or the connection is unsealed (*e.g.,* a flange is unbolted).

(B) Closed-vent system components or connections other than those specified in paragraph (l)(1)(ii)(A) of this section shall be monitored annually and at other times as requested by the Regional Administrator, except as provided for in paragraph (o) of this section, using the procedures specified in § 261.1034(b) of this subpart to demonstrate that the components or connections operate with no detectable emissions.

(iii) In the event that a defect or leak is detected, the remanufacturer or other person that stores or treats the hazardous secondary material shall repair the defect or leak in accordance with the requirements of paragraph (l)(3) of this section.

(iv) The remanufacturer or other person that stores or treats the hazardous secondary material shall maintain a record of the inspection and monitoring in accordance with the requirements specified in § 261.1035 of this subpart.

(2) Each closed-vent system that is used to comply with paragraph (k)(2) of this section shall be inspected and monitored in accordance with the following requirements:

(i) The closed-vent system shall be visually inspected by the remanufacturer or other person that stores or treats the hazardous secondary material to check for defects that could result in air pollutant emissions. Defects include, but are not limited to, visible cracks, holes, or gaps in ductwork or piping or loose connections.

(ii) The remanufacturer or other person that stores or treats the hazardous secondary material shall perform an initial inspection of the closed-vent system on or before the date that the system becomes subject to this section. Thereafter, the remanufacturer or other person that stores or treats the hazardous secondary material shall perform the inspections at least once every year.

(iii) In the event that a defect or leak is detected, the remanufacturer or other person that stores or treats the hazardous secondary material shall repair the defect in accordance with the requirements of paragraph (l)(3) of this section.

(iv) The remanufacturer or other person that stores or treats the hazardous secondary material shall maintain a record of the inspection and monitoring in accordance with the requirements specified in § 261.1035 of this subpart.

(3) The remanufacturer or other person that stores or treats the hazardous secondary material shall repair all detected defects as follows:

(i) Detectable emissions, as indicated by visual inspection, or by an instrument reading greater than 500 ppmv above background, shall be controlled as soon as practicable, but not later than 15 calendar days after the emission is detected, except as provided for in paragraph (l)(3)(iii) of this section.

(ii) A first attempt at repair shall be made no later than 5 calendar days after the emission is detected.

(iii) Delay of repair of a closed-vent system for which leaks have been detected is allowed if the repair is technically infeasible without a process unit shutdown, or if the remanufacturer or other person that stores or treats the hazardous secondary material determines that emissions resulting from immediate repair would be greater than the fugitive emissions likely to result from delay of repair. Repair of such equipment shall be completed by the end of the next process unit shutdown.

(iv) The remanufacturer or other person that stores or treats the hazardous secondary material shall maintain a record of the defect repair in accordance with the requirements specified in § 261.1035 of this subpart.

(m) Closed-vent systems and control devices used to comply with provisions of this subpart shall be operated at all times when emissions may be vented to them.

(n) The owner or operator using a carbon adsorption system to control air pollutant emissions shall document that all carbon that is a hazardous waste and that is removed from the control device is managed in one of the following manners, regardless of the average volatile organic concentration of the carbon:

(1) Regenerated or reactivated in a thermal treatment unit that meets one of the following:

(i) The owner or operator of the unit has been issued a final permit under 40 CFR part 270 which implements the requirements of subpart X of this part; or

(ii) The unit is equipped with and operating air emission controls in accordance with the applicable requirements of subparts AA and CC of either this part or of 40 CFR part 265; or

(iii) The unit is equipped with and operating air emission controls in accordance with a national emission standard for hazardous air pollutants under 40 CFR part 61 or 40 CFR part 63.

(2) Incinerated in a hazardous waste incinerator for which the owner or operator either:

(i) Has been issued a final permit under 40 CFR part 270 which implements the requirements of subpart O of this part; or

(ii) Has designed and operates the incinerator in accordance with the interim status requirements of 40 CFR part 265, subpart O.

(3) Burned in a boiler or industrial furnace for which the owner or operator either:

(i) Has been issued a final permit under 40 CFR part 270 which implements the requirements of 40 CFR part 266, subpart H; or

(ii) Has designed and operates the boiler or industrial furnace in accordance with the interim status requirements of 40 CFR part 266, subpart H.

(o) Any components of a closed-vent system that are designated, as described in § 261.1035(c)(9) of this subpart, as unsafe to monitor are exempt from the requirements of paragraph (l)(1)(ii)(B) of this section if:

(1) The remanufacturer or other person that stores or treats the hazardous secondary material in a hazardous secondary material management unit using a closed-vent

system determines that the components of the closed-vent system are unsafe to monitor because monitoring personnel would be exposed to an immediate danger as a consequence of complying with paragraph (l)(1)(ii)(B) of this section; and

(2) The remanufacturer or other person that stores or treats the hazardous secondary material in a hazardous secondary material management unit using a closed-vent system adheres to a written plan that requires monitoring the closed-vent system components using the procedure specified in paragraph (l)(1)(ii)(B) of this section as frequently as practicable during safe-to-monitor times.

§ 261.1034 Test methods and procedures.

(a) Each remanufacturer or other person that stores or treats the hazardous secondary material subject to the provisions of this subpart shall comply with the test methods and procedural requirements provided in this section.

(b) When a closed-vent system is tested for compliance with no detectable emissions, as required in § 261.1033(l) of this subpart, the test shall comply with the following requirements:

(1) Monitoring shall comply with Reference Method 21 in 40 CFR part 60.

(2) The detection instrument shall meet the performance criteria of Reference Method 21.

(3) The instrument shall be calibrated before use on each day of its use by the procedures specified in Reference Method 21.

(4) Calibration gases shall be:

(i) Zero air (less than 10 ppm of hydrocarbon in air).

(ii) A mixture of methane or n-hexane and air at a concentration of approximately, but less than, 10,000 ppm methane or n-hexane.

(5) The background level shall be determined as set forth in Reference Method 21.

(6) The instrument probe shall be traversed around all potential leak interfaces as close to the interface as possible as described in Reference Method 21.

(7) The arithmetic difference between the maximum concentration indicated by the instrument and the background level is compared with 500 ppm for determining compliance.

(c) Performance tests to determine compliance with § 261.1032(a) and with the total organic compound concentration limit of § 261.1033(c) shall comply with the following:

(1) Performance tests to determine total organic compound concentrations and mass flow rates entering and exiting control devices shall be conducted and data reduced in accordance with the following reference methods and calculation procedures:

(i) Method 2 in 40 CFR part 60 for velocity and volumetric flow rate.

(ii) Method 18 or Method 25A in 40 CFR part 60, appendix A, for organic content. If Method 25A is used, the organic HAP used as the calibration gas must be the single organic HAP representing the largest percent by volume of the emissions. The use of Method 25A is acceptable if the response from the high-level calibration gas is at least 20 times the standard deviation of the response from the zero calibration gas when the instrument is zeroed on the most sensitive scale.

(iii) Each performance test shall consist of three separate runs; each run conducted for at least 1 hour under the conditions that exist when the hazardous secondary material management unit is operating at the highest load or capacity level reasonably expected to occur. For the purpose of determining total organic compound concentrations and mass flow rates, the average of results of all runs shall apply. The average shall be computed on a time-weighted basis.

(iv) Total organic mass flow rates shall be determined by the following equation:

(A) For sources utilizing Method 18.

$$E_h = Q_{2sd}\left\{\sum_{i=1}^{n} C_i MW_i\right\}[0.0416]\left[10^{-6}\right]$$

Where:

E_h= Total organic mass flow rate, kg/h;

Q_{2sd}= Volumetric flow rate of gases entering or exiting control device, as determined by Method 2, dscm/h;

n = Number of organic compounds in the vent gas;

C_i= Organic concentration in ppm, dry basis, of compound i in the vent gas, as determined by Method 18;

MW_i= Molecular weight of organic compound i in the vent gas, kg/kg-mol;

0.0416 = Conversion factor for molar volume, kg-mol/m3 (@293 K and 760 mm Hg);

10^{-6} = Conversion from ppm

(B) For sources utilizing Method 25A.

E_h= (Q)(C)(MW)(0.0416)(10^{-6})

Where:

E_h= Total organic mass flow rate, kg/h;

Q = Volumetric flow rate of gases entering or exiting control device, as determined by Method 2, dscm/h;

C = Organic concentration in ppm, dry basis, as determined by Method 25A;

MW = Molecular weight of propane, 44;

0.0416 = Conversion factor for molar volume, kg-mol/m3 (@293 K and 760 mm Hg);

10^{-6} = Conversion from ppm.

(v) The annual total organic emission rate shall be determined by the following equation:

E_A=(E_h)(H)

Where:

E_A=Total organic mass emission rate, kg/y;

E_h=Total organic mass flow rate for the process vent, kg/h;

H=Total annual hours of operations for the affected unit, h.

(vi) Total organic emissions from all affected process vents at the facility shall be determined by summing the hourly total organic mass emission rates (E_h, as determined in paragraph (c)(1)(iv) of this section) and by summing the annual total organic mass emission rates (E_A, as determined in paragraph (c)(1)(v) of this section) for all affected process vents at the facility.

(2) The remanufacturer or other person that stores or treats the hazardous secondary material shall record such process information as may be necessary to determine the conditions of the performance tests. Operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of a performance test.

(3) The remanufacturer or other person that stores or treats the hazardous secondary material at an affected facility shall provide, or cause to be provided, performance testing facilities as follows:

(i) Sampling ports adequate for the test methods specified in paragraph (c)(1) of this section.

(ii) Safe sampling platform(s).

(iii) Safe access to sampling platform(s).

(iv) Utilities for sampling and testing equipment.

(4) For the purpose of making compliance determinations, the time-weighted average of the results of the three runs shall apply. In the event that a sample is accidentally lost or conditions occur in which one of the

three runs must be discontinued because of forced shutdown, failure of an irreplaceable portion of the sample train, extreme meteorological conditions, or other circumstances beyond the remanufacturer's or other person's that stores or treats the hazardous secondary material control, compliance may, upon the Regional Administrator's approval, be determined using the average of the results of the two other runs.

(d) To show that a process vent associated with a hazardous secondary material distillation, fractionation, thin-film evaporation, solvent extraction, or air or steam stripping operation is not subject to the requirements of this subpart, the remanufacturer or other person that stores or treats the hazardous secondary material must make an initial determination that the time-weighted, annual average total organic concentration of the material managed by the hazardous secondary material management unit is less than 10 ppmw using one of the following two methods:

(1) Direct measurement of the organic concentration of the material using the following procedures:

(i) The remanufacturer or other person that stores or treats the hazardous secondary material must take a minimum of four grab samples of material for each material stream managed in the affected unit under process conditions expected to cause the maximum material organic concentration.

(ii) For material generated onsite, the grab samples must be collected at a point before the material is exposed to the atmosphere such as in an enclosed pipe or other closed system that is used to transfer the material after generation to the first affected distillation, fractionation, thin-film evaporation, solvent extraction, or air or steam stripping operation. For material generated offsite, the grab samples must be collected at the inlet to the first material management unit that receives the material provided the material has been transferred to the facility in a closed system such as a tank truck and the material is not diluted or mixed with other material.

(iii) Each sample shall be analyzed and the total organic concentration of the sample shall be computed using Method 9060A (incorporated by reference under 40 CFR 260.11) of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW–846, or analyzed for its individual organic constituents.

(iv) The arithmetic mean of the results of the analyses of the four samples shall apply for each material stream managed in the unit in determining the time-weighted, annual average total organic concentration of the material. The time-weighted average is to be calculated using the annual quantity of each material stream processed and the mean organic concentration of each material stream managed in the unit.

(2) Using knowledge of the material to determine that its total organic concentration is less than 10 ppmw. Documentation of the material determination is required. Examples of documentation that shall be used to support a determination under this provision include production process information documenting that no organic compounds are used, information that the material is generated by a process that is identical to a process at the same or another facility that has previously been demonstrated by direct measurement to generate a material stream having a total organic content less than 10 ppmw, or prior speciation analysis results on the same material stream where it can also be documented that no process changes have occurred since that analysis that could affect the material total organic concentration.

(e) The determination that distillation, fractionation, thin-film evaporation, solvent extraction, or air or steam stripping operations manage hazardous secondary materials with time-weighted, annual average total organic concentrations less than 10 ppmw shall be made as follows:

(1) By the effective date that the facility becomes subject to the provisions of this subpart or by the date when the material is first managed in a hazardous secondary material management unit, whichever is later, and

(2) For continuously generated material, annually, or

(3) Whenever there is a change in the material being managed or a change in the process that generates or treats the material.

(f) When a remanufacturer or other person that stores or treats the hazardous secondary material and the Regional Administrator do not agree on whether a distillation, fractionation, thin-film evaporation, solvent extraction, or air or steam stripping operation manages a hazardous secondary material with organic concentrations of at least 10 ppmw based on knowledge of the material, the dispute may be resolved by using direct measurement as specified at paragraph (d)(1) of this section.

§ 261.1035 Recordkeeping requirements.

(a)(1) Each remanufacturer or other person that stores or treats the hazardous secondary material subject to the provisions of this subpart shall comply with the recordkeeping requirements of this section.

(2) A remanufacturer or other person that stores or treats the hazardous secondary material of more than one hazardous secondary material management unit subject to the provisions of this subpart may comply with the recordkeeping requirements for these hazardous secondary material management units in one recordkeeping system if the system identifies each record by each hazardous secondary material management unit.

(b) The remanufacturer or other person that stores or treats the hazardous secondary material must keep the following records on-site:

(1) For facilities that comply with the provisions of § 261.1033(a)(2), an implementation schedule that includes dates by which the closed-vent system and control device will be installed and in operation. The schedule must also include a rationale of why the installation cannot be completed at an earlier date. The implementation schedule must be kept on-site at the facility by the effective date that the facility becomes subject to the provisions of this subpart.

(2) Up-to-date documentation of compliance with the process vent standards in § 261.1032, including:

(i) Information and data identifying all affected process vents, annual throughput and operating hours of each affected unit, estimated emission rates for each affected vent and for the overall facility (*i.e.,* the total emissions for all affected vents at the facility), and the approximate location within the facility of each affected unit (*e.g.,* identify the hazardous secondary material management units on a facility plot plan).

(ii) Information and data supporting determinations of vent emissions and emission reductions achieved by add-on control devices based on engineering calculations or source tests. For the purpose of determining compliance, determinations of vent emissions and emission reductions must be made using operating parameter values (*e.g.,* temperatures, flow rates, or vent stream organic compounds and concentrations) that represent the conditions that result in maximum organic emissions, such as when the hazardous secondary material management unit is operating at the highest load or capacity level reasonably expected to occur. If the remanufacturer or other person that stores or treats the

hazardous secondary material takes any action (*e.g.,* managing a material of different composition or increasing operating hours of affected hazardous secondary material management units) that would result in an increase in total organic emissions from affected process vents at the facility, then a new determination is required.

(3) Where a remanufacturer or other person that stores or treats the hazardous secondary material chooses to use test data to determine the organic removal efficiency or total organic compound concentration achieved by the control device, a performance test plan must be developed and include:

(i) A description of how it is determined that the planned test is going to be conducted when the hazardous secondary material management unit is operating at the highest load or capacity level reasonably expected to occur. This shall include the estimated or design flow rate and organic content of each vent stream and define the acceptable operating ranges of key process and control device parameters during the test program.

(ii) A detailed engineering description of the closed-vent system and control device including:

(A) Manufacturer's name and model number of control device.

(B) Type of control device.

(C) Dimensions of the control device.

(D) Capacity.

(E) Construction materials.

(iii) A detailed description of sampling and monitoring procedures, including sampling and monitoring locations in the system, the equipment to be used, sampling and monitoring frequency, and planned analytical procedures for sample analysis.

(4) Documentation of compliance with § 261.1033 shall include the following information:

(i) A list of all information references and sources used in preparing the documentation.

(ii) Records, including the dates, of each compliance test required by § 261.1033(k).

(iii) If engineering calculations are used, a design analysis, specifications, drawings, schematics, and piping and instrumentation diagrams based on the appropriate sections of "APTI Course 415: Control of Gaseous Emissions" (incorporated by reference as specified in § 260.11) or other engineering texts acceptable to the Regional Administrator that present basic control device design information. Documentation provided by the control device manufacturer or vendor that describes the control device design in accordance with paragraphs (b)(4)(iii)(A) through (G) of this section may be used to comply with this requirement. The design analysis shall address the vent stream characteristics and control device operation parameters as specified below.

(A) For a thermal vapor incinerator, the design analysis shall consider the vent stream composition, constituent concentrations, and flow rate. The design analysis shall also establish the design minimum and average temperature in the combustion zone and the combustion zone residence time.

(B) For a catalytic vapor incinerator, the design analysis shall consider the vent stream composition, constituent concentrations, and flow rate. The design analysis shall also establish the design minimum and average temperatures across the catalyst bed inlet and outlet.

(C) For a boiler or process heater, the design analysis shall consider the vent stream composition, constituent concentrations, and flow rate. The design analysis shall also establish the design minimum and average flame zone temperatures, combustion zone residence time, and description of method and location where the vent stream is introduced into the combustion zone.

(D) For a flare, the design analysis shall consider the vent stream composition, constituent concentrations, and flow rate. The design analysis shall also consider the requirements specified in § 261.1033(d).

(E) For a condenser, the design analysis shall consider the vent stream composition, constituent concentrations, flow rate, relative humidity, and temperature. The design analysis shall also establish the design outlet organic compound concentration level, design average temperature of the condenser exhaust vent stream, and design average temperatures of the coolant fluid at the condenser inlet and outlet.

(F) For a carbon adsorption system such as a fixed-bed adsorber that regenerates the carbon bed directly onsite in the control device, the design analysis shall consider the vent stream composition, constituent concentrations, flow rate, relative humidity, and temperature. The design analysis shall also establish the design exhaust vent stream organic compound concentration level, number and capacity of carbon beds, type and working capacity of activated carbon used for carbon beds, design total steam flow over the period of each complete carbon bed regeneration cycle, duration of the carbon bed steaming and cooling/drying cycles, design carbon bed temperature after regeneration, design carbon bed regeneration time, and design service life of carbon.

(G) For a carbon adsorption system such as a carbon canister that does not regenerate the carbon bed directly onsite in the control device, the design analysis shall consider the vent stream composition, constituent concentrations, flow rate, relative humidity, and temperature. The design analysis shall also establish the design outlet organic concentration level, capacity of carbon bed, type and working capacity of activated carbon used for carbon bed, and design carbon replacement interval based on the total carbon working capacity of the control device and source operating schedule.

(iv) A statement signed and dated by the remanufacturer or other person that stores or treats the hazardous secondary material certifying that the operating parameters used in the design analysis reasonably represent the conditions that exist when the hazardous secondary material management unit is or would be operating at the highest load or capacity level reasonably expected to occur.

(v) A statement signed and dated by the remanufacturer or other person that stores or treats the hazardous secondary material certifying that the control device is designed to operate at an efficiency of 95 percent or greater unless the total organic concentration limit of § 261.1032(a) is achieved at an efficiency less than 95 weight percent or the total organic emission limits of § 261.1032(a) for affected process vents at the facility can be attained by a control device involving vapor recovery at an efficiency less than 95 weight percent. A statement provided by the control device manufacturer or vendor certifying that the control equipment meets the design specifications may be used to comply with this requirement.

(vi) If performance tests are used to demonstrate compliance, all test results.

(c) Design documentation and monitoring, operating, and inspection information for each closed-vent system and control device required to comply with the provisions of this part shall be recorded and kept up-to-date at the facility. The information shall include:

(1) Description and date of each modification that is made to the closed-vent system or control device design.

(2) Identification of operating parameter, description of monitoring device, and diagram of monitoring sensor location or locations used to comply with § 261.1033 (f)(1) and (2).

(3) Monitoring, operating, and inspection information required by § 261.1033(f) through (k).

(4) Date, time, and duration of each period that occurs while the control device is operating when any monitored parameter exceeds the value established in the control device design analysis as specified below:

(i) For a thermal vapor incinerator designed to operate with a minimum residence time of 0.50 second at a minimum temperature of 760 °C, period when the combustion temperature is below 760 °C.

(ii) For a thermal vapor incinerator designed to operate with an organic emission reduction efficiency of 95 weight percent or greater, period when the combustion zone temperature is more than 28 °C below the design average combustion zone temperature established as a requirement of paragraph (b)(4)(iii)(A) of this section.

(iii) For a catalytic vapor incinerator, period when:

(A) Temperature of the vent stream at the catalyst bed inlet is more than 28 °C below the average temperature of the inlet vent stream established as a requirement of paragraph (b)(4)(iii)(B) of this section, or

(B) Temperature difference across the catalyst bed is less than 80 percent of the design average temperature difference established as a requirement of paragraph (b)(4)(iii)(B) of this section.

(iv) For a boiler or process heater, period when:

(A) Flame zone temperature is more than 28 °C below the design average flame zone temperature established as a requirement of paragraph (b)(4)(iii)(C) of this section, or

(B) Position changes where the vent stream is introduced to the combustion zone from the location established as a requirement of paragraph (b)(4)(iii)(C) of this section.

(v) For a flare, period when the pilot flame is not ignited.

(vi) For a condenser that complies with § 261.1033(f)(2)(vi)(A), period when the organic compound concentration level or readings of organic compounds in the exhaust vent stream from the condenser are more than 20 percent greater than the design outlet organic compound concentration level established as a requirement of paragraph (b)(4)(iii)(E) of this section.

(vii) For a condenser that complies with § 261.1033(f)(2)(vi)(B), period when:

(A) Temperature of the exhaust vent stream from the condenser is more than 6 °C above the design average exhaust vent stream temperature established as a requirement of paragraph (b)(4)(iii)(E) of this section; or

(B) Temperature of the coolant fluid exiting the condenser is more than 6 °C above the design average coolant fluid temperature at the condenser outlet established as a requirement of paragraph (b)(4)(iii)(E) of this section.

(viii) For a carbon adsorption system such as a fixed-bed carbon adsorber that regenerates the carbon bed directly on-site in the control device and complies with § 261.1033(f)(2)(vii)(A), period when the organic compound concentration level or readings of organic compounds in the exhaust vent stream from the carbon bed are more than 20 percent greater than the design exhaust vent stream organic compound concentration level established as a requirement of paragraph (b)(4)(iii)(F) of this section.

(ix) For a carbon adsorption system such as a fixed-bed carbon adsorber that regenerates the carbon bed directly on-site in the control device and complies with § 261.1033(f)(2)(vii)(B), period when the vent stream continues to flow through the control device beyond the predetermined carbon bed regeneration time established as a requirement of paragraph (b)(4)(iii)(F) of this section.

(5) Explanation for each period recorded under paragraph (c)(4) of the cause for control device operating parameter exceeding the design value and the measures implemented to correct the control device operation.

(6) For a carbon adsorption system operated subject to requirements specified in § 261.1033(g) or (h)(2), date when existing carbon in the control device is replaced with fresh carbon.

(7) For a carbon adsorption system operated subject to requirements specified in § 261.1033(h)(1), a log that records:

(i) Date and time when control device is monitored for carbon breakthrough and the monitoring device reading.

(ii) Date when existing carbon in the control device is replaced with fresh carbon.

(8) Date of each control device startup and shutdown.

(9) A remanufacturer or other person that stores or treats the hazardous secondary material designating any components of a closed-vent system as unsafe to monitor pursuant to § 261.1033(o) of this subpart shall record in a log that is kept at the facility the identification of closed-vent system components that are designated as unsafe to monitor in accordance with the requirements of § 261.1033(o) of this subpart, an explanation for each closed-vent system component stating why the closed-vent system component is unsafe to monitor, and the plan for monitoring each closed-vent system component.

(10) When each leak is detected as specified in § 261.1033(l) of this subpart, the following information shall be recorded:

(i) The instrument identification number, the closed-vent system component identification number, and the operator name, initials, or identification number.

(ii) The date the leak was detected and the date of first attempt to repair the leak.

(iii) The date of successful repair of the leak.

(iv) Maximum instrument reading measured by Method 21 of 40 CFR part 60, appendix A after it is successfully repaired or determined to be nonrepairable.

(v) "Repair delayed" and the reason for the delay if a leak is not repaired within 15 calendar days after discovery of the leak.

(A) The remanufacturer or other person that stores or treats the hazardous secondary material may develop a written procedure that identifies the conditions that justify a delay of repair. In such cases, reasons for delay of repair may be documented by citing the relevant sections of the written procedure.

(B) If delay of repair was caused by depletion of stocked parts, there must be documentation that the spare parts were sufficiently stocked on-site before depletion and the reason for depletion.

(d) Records of the monitoring, operating, and inspection information required by paragraphs (c)(3) through (10) of this section shall be maintained by the owner or operator for at least 3 years following the date of each occurrence, measurement, maintenance, corrective action, or record.

(e) For a control device other than a thermal vapor incinerator, catalytic vapor incinerator, flare, boiler, process heater, condenser, or carbon adsorption system, the Regional Administrator will specify the appropriate recordkeeping requirements.

(f) Up-to-date information and data used to determine whether or not a process vent is subject to the requirements in § 261.1032 including supporting documentation as required by § 261.1034(d)(2) when application of the knowledge of the nature of the hazardous secondary material stream or the process by which it was produced is used, shall be recorded in a log that is kept at the facility.

§§ 261.1036–261.1049 [Reserved]

Subpart BB—Air Emission Standards for Equipment Leaks

§ 261.1050 Applicability.

(a) The regulations in this subpart apply to equipment that contains

hazardous secondary materials excluded under the remanufacturing exclusion at § 261.4(a)(27), unless the equipment operations are subject to the requirements of an applicable Clean Air Act regulation codified under 40 CFR part 60, part 61, or part 63.

§ 261.1051 Definitions.

As used in this subpart, all terms shall have the meaning given them in § 261.1031, the Resource Conservation and Recovery Act, and 40 CFR parts 260–266.

§ 261.1052 Standards: Pumps in light liquid service.

(a)(1) Each pump in light liquid service shall be monitored monthly to detect leaks by the methods specified in § 261.1063(b), except as provided in paragraphs (d), (e), and (f) of this section.

(2) Each pump in light liquid service shall be checked by visual inspection each calendar week for indications of liquids dripping from the pump seal.

(b)(1) If an instrument reading of 10,000 ppm or greater is measured, a leak is detected.

(2) If there are indications of liquids dripping from the pump seal, a leak is detected.

(c)(1) When a leak is detected, it shall be repaired as soon as practicable, but not later than 15 calendar days after it is detected, except as provided in § 261.1059.

(2) A first attempt at repair (*e.g.,* tightening the packing gland) shall be made no later than five calendar days after each leak is detected.

(d) Each pump equipped with a dual mechanical seal system that includes a barrier fluid system is exempt from the requirements of paragraph (a) of this section, provided the following requirements are met:

(1) Each dual mechanical seal system must be:

(i) Operated with the barrier fluid at a pressure that is at all times greater than the pump stuffing box pressure, or

(ii) Equipped with a barrier fluid degassing reservoir that is connected by a closed-vent system to a control device that complies with the requirements of § 261.1060, or

(iii) Equipped with a system that purges the barrier fluid into a hazardous secondary material stream with no detectable emissions to the atmosphere.

(2) The barrier fluid system must not be a hazardous secondary material with organic concentrations 10 percent or greater by weight.

(3) Each barrier fluid system must be equipped with a sensor that will detect failure of the seal system, the barrier fluid system, or both.

(4) Each pump must be checked by visual inspection, each calendar week, for indications of liquids dripping from the pump seals.

(5)(i) Each sensor as described in paragraph (d)(3) of this section must be checked daily or be equipped with an audible alarm that must be checked monthly to ensure that it is functioning properly.

(ii) The remanufacturer or other person that stores or treats the hazardous secondary material must determine, based on design considerations and operating experience, a criterion that indicates failure of the seal system, the barrier fluid system, or both.

(6)(i) If there are indications of liquids dripping from the pump seal or the sensor indicates failure of the seal system, the barrier fluid system, or both based on the criterion determined in paragraph (d)(5)(ii) of this section, a leak is detected.

(ii) When a leak is detected, it shall be repaired as soon as practicable, but not later than 15 calendar days after it is detected, except as provided in § 261.1059.

(iii) A first attempt at repair (*e.g.,* relapping the seal) shall be made no later than five calendar days after each leak is detected.

(e) Any pump that is designated, as described in § 261.1064(g)(2), for no detectable emissions, as indicated by an instrument reading of less than 500 ppm above background, is exempt from the requirements of paragraphs (a), (c), and (d) of this section if the pump meets the following requirements:

(1) Must have no externally actuated shaft penetrating the pump housing.

(2) Must operate with no detectable emissions as indicated by an instrument reading of less than 500 ppm above background as measured by the methods specified in § 261.1063(c).

(3) Must be tested for compliance with paragraph (e)(2) of this section initially upon designation, annually, and at other times as requested by the Regional Administrator.

(f) If any pump is equipped with a closed-vent system capable of capturing and transporting any leakage from the seal or seals to a control device that complies with the requirements of § 261.1060, it is exempt from the requirements of paragraphs (a) through (e) of this section.

§ 261.1053 Standards: Compressors.

(a) Each compressor shall be equipped with a seal system that includes a barrier fluid system and that prevents leakage of total organic emissions to the atmosphere, except as provided in paragraphs (h) and (i) of this section.

(b) Each compressor seal system as required in paragraph (a) of this section shall be:

(1) Operated with the barrier fluid at a pressure that is at all times greater than the compressor stuffing box pressure, or

(2) Equipped with a barrier fluid system that is connected by a closed-vent system to a control device that complies with the requirements of § 261.1060, or

(3) Equipped with a system that purges the barrier fluid into a hazardous secondary material stream with no detectable emissions to atmosphere.

(c) The barrier fluid must not be a hazardous secondary material with organic concentrations 10 percent or greater by weight.

(d) Each barrier fluid system as described in paragraphs (a) through (c) of this section shall be equipped with a sensor that will detect failure of the seal system, barrier fluid system, or both.

(e)(1) Each sensor as required in paragraph (d) of this section shall be checked daily or shall be equipped with an audible alarm that must be checked monthly to ensure that it is functioning properly unless the compressor is located within the boundary of an unmanned plant site, in which case the sensor must be checked daily.

(2) The remanufacturer or other person that stores or treats the hazardous secondary material shall determine, based on design considerations and operating experience, a criterion that indicates failure of the seal system, the barrier fluid system, or both.

(f) If the sensor indicates failure of the seal system, the barrier fluid system, or both based on the criterion determined under paragraph (e)(2) of this section, a leak is detected.

(g)(1) When a leak is detected, it shall be repaired as soon as practicable, but not later than 15 calendar days after it is detected, except as provided in § 261.1059.

(2) A first attempt at repair (*e.g.,* tightening the packing gland) shall be made no later than 5 calendar days after each leak is detected.

(h) A compressor is exempt from the requirements of paragraphs (a) and (b) of this section if it is equipped with a closed-vent system capable of capturing and transporting any leakage from the seal to a control device that complies with the requirements of § 261.1060, except as provided in paragraph (i) of this section.

(i) Any compressor that is designated, as described in § 261.1064(g)(2), for no

detectable emissions as indicated by an instrument reading of less than 500 ppm above background is exempt from the requirements of paragraphs (a) through (h) of this section if the compressor:

(1) Is determined to be operating with no detectable emissions, as indicated by an instrument reading of less than 500 ppm above background, as measured by the method specified in § 261.1063(c).

(2) Is tested for compliance with paragraph (i)(1) of this section initially upon designation, annually, and at other times as requested by the Regional Administrator.

§ 261.1054 Standards: Pressure relief devices in gas/vapor service.

(a) Except during pressure releases, each pressure relief device in gas/vapor service shall be operated with no detectable emissions, as indicated by an instrument reading of less than 500 ppm above background, as measured by the method specified in § 261.1063(c).

(b)(1) After each pressure release, the pressure relief device shall be returned to a condition of no detectable emissions, as indicated by an instrument reading of less than 500 ppm above background, as soon as practicable, but no later than 5 calendar days after each pressure release, except as provided in § 261.1059.

(2) No later than 5 calendar days after the pressure release, the pressure relief device shall be monitored to confirm the condition of no detectable emissions, as indicated by an instrument reading of less than 500 ppm above background, as measured by the method specified in § 261.1063(c).

(c) Any pressure relief device that is equipped with a closed-vent system capable of capturing and transporting leakage from the pressure relief device to a control device as described in § 261.1060 is exempt from the requirements of paragraphs (a) and (b) of this section.

§ 261.1055 Standards: Sampling connection systems.

(a) Each sampling connection system shall be equipped with a closed-purge, closed-loop, or closed-vent system. This system shall collect the sample purge for return to the process or for routing to the appropriate treatment system. Gases displaced during filling of the sample container are not required to be collected or captured.

(b) Each closed-purge, closed-loop, or closed-vent system as required in paragraph (a) of this section shall meet one of the following requirements:

(1) Return the purged process fluid directly to the process line;

(2) Collect and recycle the purged process fluid; or

(3) Be designed and operated to capture and transport all the purged process fluid to a material management unit that complies with the applicable requirements of §§ 261.1084 through 264.1086 of this subpart or a control device that complies with the requirements of § 261.1060 of this subpart.

(c) *In-situ* sampling systems and sampling systems without purges are exempt from the requirements of paragraphs (a) and (b) of this section.

§ 261.1056 Standards: Open-ended valves or lines.

(a)(1) Each open-ended valve or line shall be equipped with a cap, blind flange, plug, or a second valve.

(2) The cap, blind flange, plug, or second valve shall seal the open end at all times except during operations requiring hazardous secondary material stream flow through the open-ended valve or line.

(b) Each open-ended valve or line equipped with a second valve shall be operated in a manner such that the valve on the hazardous secondary material stream end is closed before the second valve is closed.

(c) When a double block and bleed system is being used, the bleed valve or line may remain open during operations that require venting the line between the block valves but shall comply with paragraph (a) of this section at all other times.

§ 261.1057 Standards: Valves in gas/vapor service or in light liquid service.

(a) Each valve in gas/vapor or light liquid service shall be monitored monthly to detect leaks by the methods specified in § 261.1063(b) and shall comply with paragraphs (b) through (e) of this section, except as provided in paragraphs (f), (g), and (h) of this section and §§ 261.1061 and 261.1062.

(b) If an instrument reading of 10,000 ppm or greater is measured, a leak is detected.

(c)(1) Any valve for which a leak is not detected for two successive months may be monitored the first month of every succeeding quarter, beginning with the next quarter, until a leak is detected.

(2) If a leak is detected, the valve shall be monitored monthly until a leak is not detected for two successive months,

(d)(1) When a leak is detected, it shall be repaired as soon as practicable, but no later than 15 calendar days after the leak is detected, except as provided in § 261.1059.

(2) A first attempt at repair shall be made no later than 5 calendar days after each leak is detected.

(e) First attempts at repair include, but are not limited to, the following best practices where practicable:

(1) Tightening of bonnet bolts.

(2) Replacement of bonnet bolts.

(3) Tightening of packing gland nuts.

(4) Injection of lubricant into lubricated packing.

(f) Any valve that is designated, as described in § 261.1064(g)(2), for no detectable emissions, as indicated by an instrument reading of less than 500 ppm above background, is exempt from the requirements of paragraph (a) of this section if the valve:

(1) Has no external actuating mechanism in contact with the hazardous secondary material stream.

(2) Is operated with emissions less than 500 ppm above background as determined by the method specified in § 261.1063(c).

(3) Is tested for compliance with paragraph (f)(2) of this section initially upon designation, annually, and at other times as requested by the Regional Administrator.

(g) Any valve that is designated, as described in § 261.1064(h)(1), as an unsafe-to-monitor valve is exempt from the requirements of paragraph (a) of this section if:

(1) The remanufacturer or other person that stores or treats the hazardous secondary material determines that the valve is unsafe to monitor because monitoring personnel would be exposed to an immediate danger as a consequence of complying with paragraph (a) of this section.

(2) The remanufacturer or other person that stores or treats the hazardous secondary material adheres to a written plan that requires monitoring of the valve as frequently as practicable during safe-to-monitor times.

(h) Any valve that is designated, as described in § 261.1064(h)(2), as a difficult-to-monitor valve is exempt from the requirements of paragraph (a) of this section if:

(1) The remanufacturer or other person that stores or treats the hazardous secondary material determines that the valve cannot be monitored without elevating the monitoring personnel more than 2 meters above a support surface.

(2) The hazardous secondary material management unit within which the valve is located was in operation before January 13, 2015.

(3) The owner or operator of the valve follows a written plan that requires monitoring of the valve at least once per calendar year.

§ 261.1058 Standards: Pumps and valves in heavy liquid service, pressure relief devices in light liquid or heavy liquid service, and flanges and other connectors.

(a) Pumps and valves in heavy liquid service, pressure relief devices in light liquid or heavy liquid service, and flanges and other connectors shall be monitored within five days by the method specified in § 261.1063(b) if evidence of a potential leak is found by visual, audible, olfactory, or any other detection method.

(b) If an instrument reading of 10,000 ppm or greater is measured, a leak is detected.

(c)(1) When a leak is detected, it shall be repaired as soon as practicable, but not later than 15 calendar days after it is detected, except as provided in § 261.1059.

(2) The first attempt at repair shall be made no later than 5 calendar days after each leak is detected.

(d) First attempts at repair include, but are not limited to, the best practices described under § 261.1057(e).

(e) Any connector that is inaccessible or is ceramic or ceramic-lined (*e.g.,* porcelain, glass, or glass-lined) is exempt from the monitoring requirements of paragraph (a) of this section and from the recordkeeping requirements of § 261.1064 of this subpart.

§ 261.1059 Standards: Delay of repair.

(a) Delay of repair of equipment for which leaks have been detected will be allowed if the repair is technically infeasible without a hazardous secondary material management unit shutdown. In such a case, repair of this equipment shall occur before the end of the next hazardous secondary material management unit shutdown.

(b) Delay of repair of equipment for which leaks have been detected will be allowed for equipment that is isolated from the hazardous secondary material management unit and that does not continue to contain or contact hazardous secondary material with organic concentrations at least 10 percent by weight.

(c) Delay of repair for valves will be allowed if:

(1) The remanufacturer or other person that stores or treats the hazardous secondary material determines that emissions of purged material resulting from immediate repair are greater than the emissions likely to result from delay of repair.

(2) When repair procedures are effected, the purged material is collected and destroyed or recovered in a control device complying with § 261.1060.

(d) Delay of repair for pumps will be allowed if:

(1) Repair requires the use of a dual mechanical seal system that includes a barrier fluid system.

(2) Repair is completed as soon as practicable, but not later than 6 months after the leak was detected.

(e) Delay of repair beyond a hazardous secondary material management unit shutdown will be allowed for a valve if valve assembly replacement is necessary during the hazardous secondary material management unit shutdown, valve assembly supplies have been depleted, and valve assembly supplies had been sufficiently stocked before the supplies were depleted. Delay of repair beyond the next hazardous secondary material management unit shutdown will not be allowed unless the next hazardous secondary material management unit shutdown occurs sooner than 6 months after the first hazardous secondary material management unit shutdown.

§ 261.1060 Standards: Closed-vent systems and control devices.

(a) The remanufacturer or other person that stores or treats the hazardous secondary material in a hazardous secondary material management units using closed-vent systems and control devices subject to this subpart shall comply with the provisions of § 261.1033 of this part.

(b)(1) The remanufacturer or other person that stores or treats the hazardous secondary material at an existing facility who cannot install a closed-vent system and control device to comply with the provisions of this subpart on the effective date that the facility becomes subject to the provisions of this subpart must prepare an implementation schedule that includes dates by which the closed-vent system and control device will be installed and in operation. The controls must be installed as soon as possible, but the implementation schedule may allow up to 30 months after the effective date that the facility becomes subject to this subpart for installation and startup.

(2) Any unit that begins operation after July 13, 2015 and is subject to the provisions of this subpart when operation begins, must comply with the rules immediately (*i.e.,* must have control devices installed and operating on startup of the affected unit); the 30-month implementation schedule does not apply.

(3) The remanufacturer or other person that stores or treats the hazardous secondary material at any facility in existence on the effective date of a statutory or regulatory amendment that renders the facility subject to this subpart shall comply with all requirements of this subpart as soon as practicable but no later than 30 months after the amendment's effective date. When control equipment required by this subpart cannot be installed and begin operation by the effective date of the amendment, the facility owner or operator shall prepare an implementation schedule that includes the following information: Specific calendar dates for award of contracts or issuance of purchase orders for the control equipment, initiation of on-site installation of the control equipment, completion of the control equipment installation, and performance of any testing to demonstrate that the installed equipment meets the applicable standards of this subpart. The remanufacturer or other person that stores or treats the hazardous secondary material shall keep a copy of the implementation schedule at the facility.

(4) Remanufacturers or other persons that store or treat the hazardous secondary materials at facilities and units that become newly subject to the requirements of this subpart after January 13, 2015, due to an action other than those described in paragraph (b)(3) of this section must comply with all applicable requirements immediately (*i.e.,* must have control devices installed and operating on the date the facility or unit becomes subject to this subpart; the 30-month implementation schedule does not apply).

§ 261.1061 Alternative standards for valves in gas/vapor service or in light liquid service: percentage of valves allowed to leak.

(a) A remanufacturer or other person that stores or treats the hazardous secondary material subject to the requirements of § 261.1057 may elect to have all valves within a hazardous secondary material management unit comply with an alternative standard that allows no greater than 2 percent of the valves to leak.

(b) The following requirements shall be met if a remanufacturer or other person that stores or treats the hazardous secondary material decides to comply with the alternative standard of allowing 2 percent of valves to leak:

(1) A performance test as specified in paragraph (c) of this section shall be conducted initially upon designation, annually, and at other times requested by the Regional Administrator.

(2) If a valve leak is detected, it shall be repaired in accordance with § 261.1057(d) and (e).

(c) Performance tests shall be conducted in the following manner:

(1) All valves subject to the requirements in § 261.1057 within the

hazardous secondary material management unit shall be monitored within 1 week by the methods specified in § 261.1063(b).

(2) If an instrument reading of 10,000 ppm or greater is measured, a leak is detected.

(3) The leak percentage shall be determined by dividing the number of valves subject to the requirements in § 261.1057 for which leaks are detected by the total number of valves subject to the requirements in § 261.1057 within the hazardous secondary material management unit.

§ 261.1062 Alternative standards for valves in gas/vapor service or in light liquid service: skip period leak detection and repair.

(a) A remanufacturer or other person that stores or treats the hazardous secondary material subject to the requirements of § 261.1057 may elect for all valves within a hazardous secondary material management unit to comply with one of the alternative work practices specified in paragraphs (b)(2) and (3) of this section.

(b)(1) A remanufacturer or other person that stores or treats the hazardous secondary material shall comply with the requirements for valves, as described in § 261.1057, except as described in paragraphs (b)(2) and (3) of this section.

(2) After two consecutive quarterly leak detection periods with the percentage of valves leaking equal to or less than two percent, a remanufacturer or other person that stores or treats the hazardous secondary material may begin to skip one of the quarterly leak detection periods (*i.e.,* monitor for leaks once every six months) for the valves subject to the requirements in § 261.1057 of this subpart.

(3) After five consecutive quarterly leak detection periods with the percentage of valves leaking equal to or less than two percent, a remanufacturer or other person that stores or treats the hazardous secondary material may begin to skip three of the quarterly leak detection periods (*i.e.,* monitor for leaks once every year) for the valves subject to the requirements in § 261.1057 of this subpart.

(4) If the percentage of valves leaking is greater than two percent, the remanufacturer or other person that stores or treats the hazardous secondary material shall monitor monthly in compliance with the requirements in § 261.1057, but may again elect to use this section after meeting the requirements of § 261.1057(c)(1).

§ 261.1063 Test methods and procedures.

(a) Each remanufacturer or other person that stores or treats the hazardous secondary material subject to the provisions of this subpart shall comply with the test methods and procedures requirements provided in this section.

(b) Leak detection monitoring, as required in §§ 261.1052–261.1062, shall comply with the following requirements:

(1) Monitoring shall comply with Reference Method 21 in 40 CFR part 60.

(2) The detection instrument shall meet the performance criteria of Reference Method 21.

(3) The instrument shall be calibrated before use on each day of its use by the procedures specified in Reference Method 21.

(4) Calibration gases shall be:

(i) Zero air (less than 10 ppm of hydrocarbon in air).

(ii) A mixture of methane or n-hexane and air at a concentration of approximately, but less than, 10,000 ppm methane or n-hexane.

(5) The instrument probe shall be traversed around all potential leak interfaces as close to the interface as possible as described in Reference Method 21.

(c) When equipment is tested for compliance with no detectable emissions, as required in §§ 261.1052(e), 261.1053(i), 261.1054, and 261.1057(f), the test shall comply with the following requirements:

(1) The requirements of paragraphs (b)(1) through (4) of this section shall apply.

(2) The background level shall be determined as set forth in Reference Method 21.

(3) The instrument probe shall be traversed around all potential leak interfaces as close to the interface as possible as described in Reference Method 21.

(4) The arithmetic difference between the maximum concentration indicated by the instrument and the background level is compared with 500 ppm for determining compliance.

(d) A remanufacturer or other person that stores or treats the hazardous secondary material must determine, for each piece of equipment, whether the equipment contains or contacts a hazardous secondary material with organic concentration that equals or exceeds 10 percent by weight using the following:

(1) Methods described in ASTM Methods D 2267–88, E 169–87, E 168–88, E 260–85 (incorporated by reference under § 260.11);

(2) Method 9060A (incorporated by reference under 40 CFR 260.11) of "Test Methods for Evaluating Solid Waste," EPA Publication SW–846, for computing total organic concentration of the sample, or analyzed for its individual organic constituents; or

(3) Application of the knowledge of the nature of the hazardous secondary material stream or the process by which it was produced. Documentation of a material determination by knowledge is required. Examples of documentation that shall be used to support a determination under this provision include production process information documenting that no organic compounds are used, information that the material is generated by a process that is identical to a process at the same or another facility that has previously been demonstrated by direct measurement to have a total organic content less than 10 percent, or prior speciation analysis results on the same material stream where it can also be documented that no process changes have occurred since that analysis that could affect the material total organic concentration.

(e) If a remanufacturer or other person that stores or treats the hazardous secondary material determines that a piece of equipment contains or contacts a hazardous secondary material with organic concentrations at least 10 percent by weight, the determination can be revised only after following the procedures in paragraph (d)(1) or (2) of this section.

(f) When a remanufacturer or other person that stores or treats the hazardous secondary material and the Regional Administrator do not agree on whether a piece of equipment contains or contacts a hazardous secondary material with organic concentrations at least 10 percent by weight, the procedures in paragraph (d)(1) or (2) of this section can be used to resolve the dispute.

(g) Samples used in determining the percent organic content shall be representative of the highest total organic content hazardous secondary material that is expected to be contained in or contact the equipment.

(h) To determine if pumps or valves are in light liquid service, the vapor pressures of constituents may be obtained from standard reference texts or may be determined by ASTM D–2879–86 (incorporated by reference under § 260.11).

(i) Performance tests to determine if a control device achieves 95 weight percent organic emission reduction shall comply with the procedures of § 261.1034(c)(1) through (4).

§ 261.1064 Recordkeeping requirements.

(a)(1) Each remanufacturer or other person that stores or treats the hazardous secondary material subject to the provisions of this subpart shall comply with the recordkeeping requirements of this section.

(2) A remanufacturer or other person that stores or treats the hazardous secondary material in more than one hazardous secondary material management unit subject to the provisions of this subpart may comply with the recordkeeping requirements for these hazardous secondary material management units in one recordkeeping system if the system identifies each record by each hazardous secondary material management unit.

(b) Remanufacturer's and other person's that store or treat the hazardous secondary material must record and keep the following information at the facility:

(1) For each piece of equipment to which subpart BB of part 261 applies:

(i) Equipment identification number and hazardous secondary material management unit identification.

(ii) Approximate locations within the facility (*e.g.,* identify the hazardous secondary material management unit on a facility plot plan).

(iii) Type of equipment (*e.g.,* a pump or pipeline valve).

(iv) Percent-by-weight total organics in the hazardous secondary material stream at the equipment.

(v) Hazardous secondary material state at the equipment (*e.g.,* gas/vapor or liquid).

(vi) Method of compliance with the standard (*e.g.,* ''monthly leak detection and repair'' or ''equipped with dual mechanical seals'').

(2) For facilities that comply with the provisions of § 261.1033(a)(2), an implementation schedule as specified in § 261.1033(a)(2).

(3) Where a remanufacturer or other person that stores or treats the hazardous secondary material chooses to use test data to demonstrate the organic removal efficiency or total organic compound concentration achieved by the control device, a performance test plan as specified in § 261.1035(b)(3).

(4) Documentation of compliance with § 261.1060, including the detailed design documentation or performance test results specified in § 261.1035(b)(4).

(c) When each leak is detected as specified in §§ 261.1052, 261.1053, 261.1057, and 261.1058, the following requirements apply:

(1) A weatherproof and readily visible identification, marked with the equipment identification number, the date evidence of a potential leak was found in accordance with § 261.1058(a), and the date the leak was detected, shall be attached to the leaking equipment.

(2) The identification on equipment, except on a valve, may be removed after it has been repaired.

(3) The identification on a valve may be removed after it has been monitored for two successive months as specified in § 261.1057(c) and no leak has been detected during those two months.

(d) When each leak is detected as specified in §§ 261.1052, 261.1053, 261.1057, and 261.1058, the following information shall be recorded in an inspection log and shall be kept at the facility:

(1) The instrument and operator identification numbers and the equipment identification number.

(2) The date evidence of a potential leak was found in accordance with § 261.1058(a).

(3) The date the leak was detected and the dates of each attempt to repair the leak.

(4) Repair methods applied in each attempt to repair the leak.

(5) ''Above 10,000'' if the maximum instrument reading measured by the methods specified in § 261.1063(b) after each repair attempt is equal to or greater than 10,000 ppm.

(6) ''Repair delayed'' and the reason for the delay if a leak is not repaired within 15 calendar days after discovery of the leak.

(7) Documentation supporting the delay of repair of a valve in compliance with § 261.1059(c).

(8) The signature of the remanufacturer or other person that stores or treats the hazardous secondary material (or designate) whose decision it was that repair could not be effected without a hazardous secondary material management unit shutdown.

(9) The expected date of successful repair of the leak if a leak is not repaired within 15 calendar days.

(10) The date of successful repair of the leak.

(e) Design documentation and monitoring, operating, and inspection information for each closed-vent system and control device required to comply with the provisions of § 261.1060 shall be recorded and kept up-to-date at the facility as specified in § 261.1035(c). Design documentation is specified in § 261.1035(c)(1) and (2) and monitoring, operating, and inspection information in § 261.1035(c)(3) through (8).

(f) For a control device other than a thermal vapor incinerator, catalytic vapor incinerator, flare, boiler, process heater, condenser, or carbon adsorption system, the Regional Administrator will specify the appropriate recordkeeping requirements.

(g) The following information pertaining to all equipment subject to the requirements in §§ 261.1052 through 261.1060 shall be recorded in a log that is kept at the facility:

(1) A list of identification numbers for equipment (except welded fittings) subject to the requirements of this subpart.

(2)(i) A list of identification numbers for equipment that the remanufacturer or other person that stores or treats the hazardous secondary material elects to designate for no detectable emissions, as indicated by an instrument reading of less than 500 ppm above background, under the provisions of §§ 261.1052(e), 261.1053(i), and 261.1057(f).

(ii) The designation of this equipment as subject to the requirements of §§ 261.1052(e), 261.1053(i), or 261.1057(f) shall be signed by the remanufacturer or other person that stores or treats the hazardous secondary material.

(3) A list of equipment identification numbers for pressure relief devices required to comply with § 261.1054(a).

(4)(i) The dates of each compliance test required in §§ 261.1052(e), 261.1053(i), 261.1054, and 261.1057(f).

(ii) The background level measured during each compliance test.

(iii) The maximum instrument reading measured at the equipment during each compliance test.

(5) A list of identification numbers for equipment in vacuum service.

(6) Identification, either by list or location (area or group) of equipment that contains or contacts hazardous secondary material with an organic concentration of at least 10 percent by weight for less than 300 hours per calendar year.

(h) The following information pertaining to all valves subject to the requirements of § 261.1057(g) and (h) shall be recorded in a log that is kept at the facility:

(1) A list of identification numbers for valves that are designated as unsafe to monitor, an explanation for each valve stating why the valve is unsafe to monitor, and the plan for monitoring each valve.

(2) A list of identification numbers for valves that are designated as difficult to monitor, an explanation for each valve stating why the valve is difficult to monitor, and the planned schedule for monitoring each valve.

(i) The following information shall be recorded in a log that is kept at the facility for valves complying with § 261.1062:

(1) A schedule of monitoring.

(2) The percent of valves found leaking during each monitoring period.

(j) The following information shall be recorded in a log that is kept at in the facility:

(1) Criteria required in §§ 261.1052(d)(5)(ii) and 261.1053(e)(2) and an explanation of the design criteria.

(2) Any changes to these criteria and the reasons for the changes.

(k) The following information shall be recorded in a log that is kept at the facility for use in determining exemptions as provided in the applicability section of this subpart and other specific subparts:

(1) An analysis determining the design capacity of the hazardous secondary material management unit.

(2) A statement listing the hazardous secondary material influent to and effluent from each hazardous secondary material management unit subject to the requirements in §§ 261.1052 through 261.1060 and an analysis determining whether these hazardous secondary materials are heavy liquids.

(3) An up-to-date analysis and the supporting information and data used to determine whether or not equipment is subject to the requirements in §§ 261.1052 through 261.1060. The record shall include supporting documentation as required by § 261.1063(d)(3) when application of the knowledge of the nature of the hazardous secondary material stream or the process by which it was produced is used. If the remanufacturer or other person that stores or treats the hazardous secondary material takes any action (*e.g.,* changing the process that produced the material) that could result in an increase in the total organic content of the material contained in or contacted by equipment determined not to be subject to the requirements in §§ 261.1052 through 261.1060, then a new determination is required.

(l) Records of the equipment leak information required by paragraph (d) of this section and the operating information required by paragraph (e) of this section need be kept only three years.

(m) The remanufacturer or other person that stores or treats the hazardous secondary material at a facility with equipment that is subject to this subpart and to regulations at 40 CFR part 60, part 61, or part 63 may elect to determine compliance with this subpart either by documentation pursuant to § 261.1064 of this subpart, or by documentation of compliance with the regulations at 40 CFR part 60, part 61, or part 63 pursuant to the relevant provisions of the regulations at 40 part 60, part 61, or part 63. The documentation of compliance under regulations at 40 CFR part 60, part 61, or part 63 shall be kept with or made readily available at the facility.

§§ 261.1065–261.1079 [Reserved]

Subpart CC—Air Emission Standards for Tanks and Containers

§ 261.1080 Applicability.

(a) The regulations in this subpart apply to tanks and containers that contain hazardous secondary materials excluded under the remanufacturing exclusion at § 261.4(a)(27), unless the tanks and containers are equipped with and operating air emission controls in accordance with the requirements of an applicable Clean Air Act regulations codified under 40 CFR part 60, part 61, or part 63.

(b) [Reserved]

§ 261.1081 Definitions.

As used in this subpart, all terms not defined herein shall have the meaning given to them in the Resource Conservation and Recovery Act and parts 260 through 266 of this chapter.

Average volatile organic concentration or *average VO concentration* means the mass-weighted average volatile organic concentration of a hazardous secondary material as determined in accordance with the requirements of § 261.1084 of this subpart.

Closure device means a cap, hatch, lid, plug, seal, valve, or other type of fitting that blocks an opening in a cover such that when the device is secured in the closed position it prevents or reduces air pollutant emissions to the atmosphere. Closure devices include devices that are detachable from the cover (*e.g.,* a sampling port cap), manually operated (*e.g.,* a hinged access lid or hatch), or automatically operated (*e.g.,* a spring-loaded pressure relief valve).

Continuous seal means a seal that forms a continuous closure that completely covers the space between the edge of the floating roof and the wall of a tank. A continuous seal may be a vapor-mounted seal, liquid-mounted seal, or metallic shoe seal. A continuous seal may be constructed of fastened segments so as to form a continuous seal.

Cover means a device that provides a continuous barrier over the hazardous secondary material managed in a unit to prevent or reduce air pollutant emissions to the atmosphere. A cover may have openings (such as access hatches, sampling ports, gauge wells) that are necessary for operation, inspection, maintenance, and repair of the unit on which the cover is used. A cover may be a separate piece of equipment which can be detached and removed from the unit or a cover may be formed by structural features permanently integrated into the design of the unit.

Empty hazardous secondary material container means:

(1) A container from which all hazardous secondary materials have been removed that can be removed using the practices commonly employed to remove materials from that type of container, *e.g.,* pouring, pumping, and aspirating, and no more than 2.5 centimeters (one inch) of residue remain on the bottom of the container or inner liner;

(2) A container that is less than or equal to 119 gallons in size and no more than 3 percent by weight of the total capacity of the container remains in the container or inner liner; or

(3) A container that is greater than 119 gallons in size and no more than 0.3 percent by weight of the total capacity of the container remains in the container or inner liner.

Enclosure means a structure that surrounds a tank or container, captures organic vapors emitted from the tank or container, and vents the captured vapors through a closed-vent system to a control device.

External floating roof means a pontoon-type or double-deck type cover that rests on the surface of the material managed in a tank with no fixed roof.

Fixed roof means a cover that is mounted on a unit in a stationary position and does not move with fluctuations in the level of the material managed in the unit.

Floating membrane cover means a cover consisting of a synthetic flexible membrane material that rests upon and is supported by the hazardous secondary material being managed in a surface impoundment.

Floating roof means a cover consisting of a double deck, pontoon single deck, or internal floating cover which rests upon and is supported by the material being contained, and is equipped with a continuous seal.

Hard-piping means pipe or tubing that is manufactured and properly installed in accordance with relevant standards and good engineering practices.

In light material service means the container is used to manage a material for which both of the following conditions apply: The vapor pressure of one or more of the organic constituents in the material is greater than 0.3 kilopascals (kPa) at 20 °C; and the total concentration of the pure organic

constituents having a vapor pressure greater than 0.3 kPa at 20 °C is equal to or greater than 20 percent by weight.

Internal floating roof means a cover that rests or floats on the material surface (but not necessarily in complete contact with it) inside a tank that has a fixed roof.

Liquid-mounted seal means a foam or liquid-filled primary seal mounted in contact with the hazardous secondary material between the tank wall and the floating roof continuously around the circumference of the tank.

Malfunction means any sudden, infrequent, and not reasonably preventable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner. Failures that are caused in part by poor maintenance or careless operation are not malfunctions.

Material determination means performing all applicable procedures in accordance with the requirements of § 261.1084 of this subpart to determine whether a hazardous secondary material meets standards specified in this subpart. Examples of a material determination include performing the procedures in accordance with the requirements of § 261.1084 of this subpart to determine the average VO concentration of a hazardous secondary material at the point of material origination; the average VO concentration of a hazardous secondary material at the point of material treatment and comparing the results to the exit concentration limit specified for the process used to treat the hazardous secondary material; the organic reduction efficiency and the organic biodegradation efficiency for a biological process used to treat a hazardous secondary material and comparing the results to the applicable standards; or the maximum volatile organic vapor pressure for a hazardous secondary material in a tank and comparing the results to the applicable standards.

Maximum organic vapor pressure means the sum of the individual organic constituent partial pressures exerted by the material contained in a tank, at the maximum vapor pressure-causing conditions (*i.e.,* temperature, agitation, pH effects of combining materials, etc.) reasonably expected to occur in the tank. For the purpose of this subpart, maximum organic vapor pressure is determined using the procedures specified in § 261.1084(c) of this subpart.

Metallic shoe seal means a continuous seal that is constructed of metal sheets which are held vertically against the wall of the tank by springs, weighted levers, or other mechanisms and is connected to the floating roof by braces or other means. A flexible coated fabric (envelope) spans the annular space between the metal sheet and the floating roof.

No detectable organic emissions means no escape of organics to the atmosphere as determined using the procedure specified in § 261.1084(d) of this subpart.

Point of material origination means as follows:

(1) When the remanufacturer or other person that stores or treats the hazardous secondary material is the generator of the hazardous secondary material, the point of material origination means the point where a material produced by a system, process, or material management unit is determined to be a hazardous secondary material excluded under § 261.4(a)(27).

Note to paragraph (1) of the definition of *Point of material origination:* In this case, this term is being used in a manner similar to the use of the term "point of generation" in air standards established under authority of the Clean Air Act in 40 CFR parts 60, 61, and 63.

(2) When the remanufacturer or other person that stores or treats the hazardous secondary material is not the generator of the hazardous secondary material, point of material origination means the point where the remanufacturer or other person that stores or treats the hazardous secondary material accepts delivery or takes possession of the hazardous secondary material.

Safety device means a closure device such as a pressure relief valve, frangible disc, fusible plug, or any other type of device which functions exclusively to prevent physical damage or permanent deformation to a unit or its air emission control equipment by venting gases or vapors directly to the atmosphere during unsafe conditions resulting from an unplanned, accidental, or emergency event. For the purpose of this subpart, a safety device is not used for routine venting of gases or vapors from the vapor headspace underneath a cover such as during filling of the unit or to adjust the pressure in this vapor headspace in response to normal daily diurnal ambient temperature fluctuations. A safety device is designed to remain in a closed position during normal operations and open only when the internal pressure, or another relevant parameter, exceeds the device threshold setting applicable to the air emission control equipment as determined by the remanufacturer or other person that stores or treats the hazardous secondary material based on manufacturer recommendations, applicable regulations, fire protection and prevention codes, standard engineering codes and practices, or other requirements for the safe handling of flammable, ignitable, explosive, reactive, or hazardous materials.

Single-seal system means a floating roof having one continuous seal. This seal may be vapor-mounted, liquid-mounted, or a metallic shoe seal.

Vapor-mounted seal means a continuous seal that is mounted such that there is a vapor space between the hazardous secondary material in the unit and the bottom of the seal.

Volatile organic concentration or *VO concentration* means the fraction by weight of the volatile organic compounds contained in a hazardous secondary material expressed in terms of parts per million (ppmw) as determined by direct measurement or by knowledge of the material in accordance with the requirements of § 261.1084 of this subpart. For the purpose of determining the VO concentration of a hazardous secondary material, organic compounds with a Henry's law constant value of at least 0.1 mole-fraction-in-the-gas-phase/mole-fraction-in the liquid-phase (0.1 Y/X) (which can also be expressed as 1.8×10^{-6}atmospheres/gram-mole/m^3) at 25 degrees Celsius must be included.

§ 261.1082 Standards: General.

(a) This section applies to the management of hazardous secondary material in tanks and containers subject to this subpart.

(b) The remanufacturer or other person that stores or treats the hazardous secondary material shall control air pollutant emissions from each hazardous secondary material management unit in accordance with standards specified in §§ 261.1084 through 261.1087 of this subpart, as applicable to the hazardous secondary material management unit, except as provided for in paragraph (c) of this section.

(c) A tank or container is exempt from standards specified in §§ 261.1084 through 261.1087 of this subpart, as applicable, provided that the hazardous secondary material management unit is a tank or container for which all hazardous secondary material entering the unit has an average VO concentration at the point of material origination of less than 500 parts per million by weight (ppmw). The average VO concentration shall be determined using the procedures specified in § 261.1083(a) of this subpart. The remanufacturer or other person that stores or treats the hazardous secondary

material shall review and update, as necessary, this determination at least once every 12 months following the date of the initial determination for the hazardous secondary material streams entering the unit.

§ 261.1083 Material determination procedures.

(a) *Material determination procedure to determine average volatile organic (VO) concentration of a hazardous secondary material at the point of material origination.* (1) *Determining average VO concentration at the point of material origination.* A remanufacturer or other person that stores or treats the hazardous secondary material shall determine the average VO concentration at the point of material origination for each hazardous secondary material placed in a hazardous secondary material management unit exempted under the provisions of § 261.1082(c)(1) of this subpart from using air emission controls in accordance with standards specified in §§ 261.1084 through 261.1087 of this subpart, as applicable to the hazardous secondary material management unit.

(i) An initial determination of the average VO concentration of the material stream shall be made before the first time any portion of the material in the hazardous secondary material stream is placed in a hazardous secondary material management unit exempted under the provisions of § 261.1082(c)(1) of this subpart from using air emission controls, and thereafter an initial determination of the average VO concentration of the material stream shall be made for each averaging period that a hazardous secondary material is managed in the unit; and

(ii) Perform a new material determination whenever changes to the source generating the material stream are reasonably likely to cause the average VO concentration of the hazardous secondary material to increase to a level that is equal to or greater than the applicable VO concentration limits specified in § 261.1082 of this subpart.

(2) *Determination of average VO concentration using direct measurement or knowledge.* For a material determination that is required by paragraph (a)(1) of this section, the average VO concentration of a hazardous secondary material at the point of material origination shall be determined using either direct measurement as specified in paragraph (a)(3) of this section or by knowledge as specified in paragraph (a)(4) of this section.

(3) *Direct measurement to determine average VO concentration of a hazardous secondary material at the point of material origination*—(i) *Identification.* The remanufacturer or other person that stores or treats the hazardous secondary material shall identify and record in a log that is kept at the facility the point of material origination for the hazardous secondary material.

(ii) *Sampling.* Samples of the hazardous secondary material stream shall be collected at the point of material origination in a manner such that volatilization of organics contained in the material and in the subsequent sample is minimized and an adequately representative sample is collected and maintained for analysis by the selected method.

(A) The averaging period to be used for determining the average VO concentration for the hazardous secondary material stream on a mass-weighted average basis shall be designated and recorded. The averaging period can represent any time interval that the remanufacturer or other person that stores or treats the hazardous secondary material determines is appropriate for the hazardous secondary material stream but shall not exceed 1 year.

(B) A sufficient number of samples, but no less than four samples, shall be collected and analyzed for a hazardous secondary material determination. All of the samples for a given material determination shall be collected within a one-hour period. The average of the four or more sample results constitutes a material determination for the material stream. One or more material determinations may be required to represent the complete range of material compositions and quantities that occur during the entire averaging period due to normal variations in the operating conditions for the source or process generating the hazardous secondary material stream. Examples of such normal variations are seasonal variations in material quantity or fluctuations in ambient temperature.

(C) All samples shall be collected and handled in accordance with written procedures prepared by the remanufacturer or other person that stores or treats the hazardous secondary material and documented in a site sampling plan. This plan shall describe the procedure by which representative samples of the hazardous secondary material stream are collected such that a minimum loss of organics occurs throughout the sample collection and handling process, and by which sample integrity is maintained. A copy of the written sampling plan shall be maintained at the facility. An example of acceptable sample collection and handling procedures for a total volatile organic constituent concentration may be found in Method 25D in 40 CFR part 60, appendix A.

(D) Sufficient information, as specified in the "site sampling plan" required under paragraph (a)(3)(ii)(C) of this section, shall be prepared and recorded to document the material quantity represented by the samples and, as applicable, the operating conditions for the source or process generating the hazardous secondary material represented by the samples.

(iii) *Analysis.* Each collected sample shall be prepared and analyzed in accordance with Method 25D in 40 CFR part 60, appendix A for the total concentration of volatile organic constituents, or using one or more methods when the individual organic compound concentrations are identified and summed and the summed material concentration accounts for and reflects all organic compounds in the material with Henry's law constant values at least 0.1 mole-fraction-in-the-gas-phase/mole-fraction-in-the-liquid-phase (0.1 Y/X) [which can also be expressed as 1.8×10^{-6}atmospheres/gram-mole/m^3] at 25 degrees Celsius. At the discretion of the remanufacturer or other person that stores or treats the hazardous secondary material, the test data obtained may be adjusted by any appropriate method to discount any contribution to the total volatile organic concentration that is a result of including a compound with a Henry's law constant value of less than 0.1 Y/X at 25 degrees Celsius. To adjust these data, the measured concentration of each individual chemical constituent contained in the material is multiplied by the appropriate constituent-specific adjustment factor (f_{m25D}). If the remanufacturer or other person that stores or treats the hazardous secondary material elects to adjust the test data, the adjustment must be made to all individual chemical constituents with a Henry's law constant value greater than or equal to 0.1 Y/X at 25 degrees Celsius contained in the material. Constituent-specific adjustment factors (f_{m25D}) can be obtained by contacting the Waste and Chemical Processes Group, Office of Air Quality Planning and Standards, Research Triangle Park, NC 27711. Other test methods may be used if they meet the requirements in paragraph (a)(3)(iii)(A) or (B) of this section and provided the requirement to reflect all organic compounds in the material with Henry's law constant values greater than or equal to 0.1 Y/X [which can also be

expressed as 1.8×10^{-6}atmospheres/gram-mole/m^3] at 25 degrees Celsius, is met.

(A) Any EPA standard method that has been validated in accordance with "Alternative Validation Procedure for EPA Waste and Wastewater Methods," 40 CFR part 63, appendix D.

(B) Any other analysis method that has been validated in accordance with the procedures specified in Section 5.1 or Section 5.3, and the corresponding calculations in Section 6.1 or Section 6.3, of Method 301 in 40 CFR part 63, appendix A. The data are acceptable if they meet the criteria specified in Section 6.1.5 or Section 6.3.3 of Method 301. If correction is required under section 6.3.3 of Method 301, the data are acceptable if the correction factor is within the range 0.7 to 1.30. Other sections of Method 301 are not required.

(iv) *Calculations.* (A) The average VO concentration (C) on a mass-weighted basis shall be calculated by using the results for all material determinations conducted in accordance with paragraphs (a)(3)(ii) and (iii) of this section and the following equation:

$$\bar{C} = \frac{1}{Q_T} \times \sum_{i=1}^{n} (Q_i \times C_i)$$

Where:

C = Average VO concentration of the hazardous secondary material at the point of material origination on a mass-weighted basis, ppmw.

i = Individual material determination "i" of the hazardous secondary material.

n = Total number of material determinations of the hazardous secondary material conducted for the averaging period (not to exceed 1 year).

Q_i = Mass quantity of hazardous secondary material stream represented by C_i, kg/hr.

Q_T = Total mass quantity of hazardous secondary material during the averaging period, kg/hr.

C_i = Measured VO concentration of material determination "i" as determined in accordance with the requirements of paragraph (a)(3)(iii) of this section (*i.e.* the average of the four or more samples specified in paragraph (a)(3)(ii)(B) of this section), ppmw.

(B) For the purpose of determining C_i, for individual material samples analyzed in accordance with paragraph (a)(3)(iii) of this section, the remanufacturer or other person that stores or treats the hazardous secondary material shall account for VO concentrations determined to be below the limit of detection of the analytical method by using the following VO concentration:

(*1*) If Method 25D in 40 CFR part 60, appendix A is used for the analysis, one-half the blank value determined in the method at section 4.4 of Method 25D in 40 CFR part 60, appendix A.

(*2*) If any other analytical method is used, one-half the sum of the limits of detection established for each organic constituent in the material that has a Henry's law constant values at least 0.1 mole-fraction-in-the-gas-phase/mole-fraction-in-the-liquid-phase (0.1 Y/X) [which can also be expressed as 1.8×10^{-6}atmospheres/gram-mole/m^3] at 25 degrees Celsius.

(4) *Use of knowledge by the remanufacturer or other person that stores or treats the hazardous secondary material to determine average VO concentration of a hazardous secondary material at the point of material origination.* (i) Documentation shall be prepared that presents the information used as the basis for the knowledge by the remanufacturer or other person that stores or treats the hazardous secondary material of the hazardous secondary material stream's average VO concentration. Examples of information that may be used as the basis for knowledge include: Material balances for the source or process generating the hazardous secondary material stream; constituent-specific chemical test data for the hazardous secondary material stream from previous testing that are still applicable to the current material stream; previous test data for other locations managing the same type of material stream; or other knowledge based on information included in shipping papers or material certification notices.

(ii) If test data are used as the basis for knowledge, then the remanufacturer or other person that stores or treats the hazardous secondary material shall document the test method, sampling protocol, and the means by which sampling variability and analytical variability are accounted for in the determination of the average VO concentration. For example, a remanufacturer or other person that stores or treats the hazardous secondary material may use organic concentration test data for the hazardous secondary material stream that are validated in accordance with Method 301 in 40 CFR part 63, appendix A as the basis for knowledge of the material.

(iii) A remanufacturer or other person that stores or treats the hazardous secondary material using chemical constituent-specific concentration test data as the basis for knowledge of the hazardous secondary material may adjust the test data to the corresponding average VO concentration value which would have been obtained had the material samples been analyzed using Method 25D in 40 CFR part 60, appendix A. To adjust these data, the measured concentration for each individual chemical constituent contained in the material is multiplied by the appropriate constituent-specific adjustment factor (f_{m25D}).

(iv) In the event that the Regional Administrator and the remanufacture or other person that stores or treats the hazardous secondary material disagree on a determination of the average VO concentration for a hazardous secondary material stream using knowledge, then the results from a determination of average VO concentration using direct measurement as specified in paragraph (a)(3) of this section shall be used to establish compliance with the applicable requirements of this subpart. The Regional Administrator may perform or request that the remanufacturer or other person that stores or treats the hazardous secondary material perform this determination using direct measurement. The remanufacturer or other person that stores or treats the hazardous secondary material may choose one or more appropriate methods to analyze each collected sample in accordance with the requirements of paragraph (a)(3)(iii) of this section.

(b) [Reserved]

(c) *Procedure to determine the maximum organic vapor pressure of a hazardous secondary material in a tank.* (1) A remanufacturer or other person that stores or treats the hazardous secondary material shall determine the maximum organic vapor pressure for each hazardous secondary material placed in a tank using Tank Level 1 controls in accordance with standards specified in § 261.1084(c) of this subpart.

(2) A remanufacturer or other person that stores or treats the hazardous secondary material shall use either direct measurement as specified in paragraph (c)(3) of this section or knowledge of the waste as specified by paragraph (c)(4) of this section to determine the maximum organic vapor pressure which is representative of the hazardous secondary material composition stored or treated in the tank.

(3) Direct measurement to determine the maximum organic vapor pressure of a hazardous secondary material.

(i) *Sampling.* A sufficient number of samples shall be collected to be representative of the hazardous secondary material contained in the tank. All samples shall be collected and handled in accordance with written procedures prepared by the remanufacturer or other person that stores or treats the hazardous secondary

material and documented in a site sampling plan. This plan shall describe the procedure by which representative samples of the hazardous secondary material are collected such that a minimum loss of organics occurs throughout the sample collection and handling process and by which sample integrity is maintained. A copy of the written sampling plan shall be maintained at the facility. An example of acceptable sample collection and handling procedures may be found in Method 25D in 40 CFR part 60, appendix A.

(ii) *Analysis.* Any appropriate one of the following methods may be used to analyze the samples and compute the maximum organic vapor pressure of the hazardous secondary material:

(A) Method 25E in 40 CFR part 60 appendix A;

(B) Methods described in American Petroleum Institute Publication 2517, Third Edition, February 1989, "Evaporative Loss from External Floating-Roof Tanks," (incorporated by reference—refer to § 260.11 of this chapter);

(C) Methods obtained from standard reference texts;

(D) ASTM Method 2879–92 (incorporated by reference—refer to § 260.11 of this chapter); and

(E) Any other method approved by the Regional Administrator.

(4) Use of knowledge to determine the maximum organic vapor pressure of the hazardous secondary material. Documentation shall be prepared and recorded that presents the information used as the basis for the knowledge by the remanufacturer or other person that stores or treats the hazardous secondary material that the maximum organic vapor pressure of the hazardous secondary material is less than the maximum vapor pressure limit listed in § 261.1085(b)(1)(i) of this subpart for the applicable tank design capacity category. An example of information that may be used is documentation that the hazardous secondary material is generated by a process for which at other locations it previously has been determined by direct measurement that the hazardous secondary material's waste maximum organic vapor pressure is less than the maximum vapor pressure limit for the appropriate tank design capacity category.

(d) Procedure for determining no detectable organic emissions for the purpose of complying with this subpart:

(1) The test shall be conducted in accordance with the procedures specified in Method 21 of 40 CFR part 60, appendix A. Each potential leak interface (*i.e.,* a location where organic vapor leakage could occur) on the cover and associated closure devices shall be checked. Potential leak interfaces that are associated with covers and closure devices include, but are not limited to: The interface of the cover and its foundation mounting; the periphery of any opening on the cover and its associated closure device; and the sealing seat interface on a spring-loaded pressure relief valve.

(2) The test shall be performed when the unit contains a hazardous secondary material having an organic concentration representative of the range of concentrations for the hazardous secondary material expected to be managed in the unit. During the test, the cover and closure devices shall be secured in the closed position.

(3) The detection instrument shall meet the performance criteria of Method 21 of 40 CFR part 60, appendix A, except the instrument response factor criteria in section 3.1.2(a) of Method 21 shall be for the average composition of the organic constituents in the hazardous secondary material placed in the hazardous secondary management unit, not for each individual organic constituent.

(4) The detection instrument shall be calibrated before use on each day of its use by the procedures specified in Method 21 of 40 CFR part 60, appendix A.

(5) Calibration gases shall be as follows:

(i) Zero air (less than 10 ppmv hydrocarbon in air), and

(ii) A mixture of methane or n-hexane and air at a concentration of approximately, but less than, 10,000 ppmv methane or n-hexane.

(6) The background level shall be determined according to the procedures in Method 21 of 40 CFR part 60, appendix A.

(7) Each potential leak interface shall be checked by traversing the instrument probe around the potential leak interface as close to the interface as possible, as described in Method 21 of 40 CFR part 60, appendix A. In the case when the configuration of the cover or closure device prevents a complete traverse of the interface, all accessible portions of the interface shall be sampled. In the case when the configuration of the closure device prevents any sampling at the interface and the device is equipped with an enclosed extension or horn (*e.g.,* some pressure relief devices), the instrument probe inlet shall be placed at approximately the center of the exhaust area to the atmosphere.

(8) The arithmetic difference between the maximum organic concentration indicated by the instrument and the background level shall be compared with the value of 500 ppmv except when monitoring a seal around a rotating shaft that passes through a cover opening, in which case the comparison shall be as specified in paragraph (d)(9) of this section. If the difference is less than 500 ppmv, then the potential leak interface is determined to operate with no detectable organic emissions.

(9) For the seals around a rotating shaft that passes through a cover opening, the arithmetic difference between the maximum organic concentration indicated by the instrument and the background level shall be compared with the value of 10,000 ppmw. If the difference is less than 10,000 ppmw, then the potential leak interface is determined to operate with no detectable organic emissions.

§ 261.1084 Standards: tanks.

(a) The provisions of this section apply to the control of air pollutant emissions from tanks for which § 261.1082(b) of this subpart references the use of this section for such air emission control.

(b) The remanufacturer or other person that stores or treats the hazardous secondary material shall control air pollutant emissions from each tank subject to this section in accordance with the following requirements as applicable:

(1) For a tank that manages hazardous secondary material that meets all of the conditions specified in paragraphs (b)(1)(i) through (iii) of this section, the remanufacturer or other person that stores or treats the hazardous secondary material shall control air pollutant emissions from the tank in accordance with the Tank Level 1 controls specified in paragraph (c) of this section or the Tank Level 2 controls specified in paragraph (d) of this section.

(i) The hazardous secondary material in the tank has a maximum organic vapor pressure which is less than the maximum organic vapor pressure limit for the tank's design capacity category as follows:

(A) For a tank design capacity equal to or greater than 151 m^3, the maximum organic vapor pressure limit for the tank is 5.2 kPa.

(B) For a tank design capacity equal to or greater than 75 m^3 but less than 151 m^3, the maximum organic vapor pressure limit for the tank is 27.6 kPa.

(C) For a tank design capacity less than 75 m^3, the maximum organic vapor pressure limit for the tank is 76.6 kPa.

(ii) The hazardous secondary material in the tank is not heated by the

remanufacturer or other person that stores or treats the hazardous secondary material to a temperature that is greater than the temperature at which the maximum organic vapor pressure of the hazardous secondary material is determined for the purpose of complying with paragraph (b)(1)(i) of this section.

(2) For a tank that manages hazardous secondary material that does not meet all of the conditions specified in paragraphs (b)(1)(i) through (iii) of this section, the remanufacturer or other person that stores or treats the hazardous secondary material shall control air pollutant emissions from the tank by using Tank Level 2 controls in accordance with the requirements of paragraph (d) of this section. An example of tanks required to use Tank Level 2 controls is a tank for which the hazardous secondary material in the tank has a maximum organic vapor pressure that is equal to or greater than the maximum organic vapor pressure limit for the tank's design capacity category as specified in paragraph (b)(1)(i) of this section.

(c) Remanufacturers or other persons that store or treats the hazardous secondary material controlling air pollutant emissions from a tank using Tank Level 1 controls shall meet the requirements specified in paragraphs (c)(1) through (4) of this section:

(1) The remanufacturer or other person that stores or treats that hazardous secondary material shall determine the maximum organic vapor pressure for a hazardous secondary material to be managed in the tank using Tank Level 1 controls before the first time the hazardous secondary material is placed in the tank. The maximum organic vapor pressure shall be determined using the procedures specified in § 261.1083(c) of this subpart. Thereafter, the remanufacturer or other person that stores or treats the hazardous secondary material shall perform a new determination whenever changes to the hazardous secondary material managed in the tank could potentially cause the maximum organic vapor pressure to increase to a level that is equal to or greater than the maximum organic vapor pressure limit for the tank design capacity category specified in paragraph (b)(1)(i) of this section, as applicable to the tank.

(2) The tank shall be equipped with a fixed roof designed to meet the following specifications:

(i) The fixed roof and its closure devices shall be designed to form a continuous barrier over the entire surface area of the hazardous secondary material in the tank. The fixed roof may be a separate cover installed on the tank (*e.g.,* a removable cover mounted on an open-top tank) or may be an integral part of the tank structural design (*e.g.,* a horizontal cylindrical tank equipped with a hatch).

(ii) The fixed roof shall be installed in a manner such that there are no visible cracks, holes, gaps, or other open spaces between roof section joints or between the interface of the roof edge and the tank wall.

(iii) Each opening in the fixed roof, and any manifold system associated with the fixed roof, shall be either:

(A) Equipped with a closure device designed to operate such that when the closure device is secured in the closed position there are no visible cracks, holes, gaps, or other open spaces in the closure device or between the perimeter of the opening and the closure device; or

(B) Connected by a closed-vent system that is vented to a control device. The control device shall remove or destroy organics in the vent stream, and shall be operating whenever hazardous secondary material is managed in the tank, except as provided for in paragraphs (c)(2)(iii)(B)(*1*) and (*2*) of this section.

(*1*) During periods when it is necessary to provide access to the tank for performing the activities of paragraph (c)(2)(iii)(B)(*2*) of this section, venting of the vapor headspace underneath the fixed roof to the control device is not required, opening of closure devices is allowed, and removal of the fixed roof is allowed. Following completion of the activity, the remanufacturer or other person that stores or treats the hazardous secondary material shall promptly secure the closure device in the closed position or reinstall the cover, as applicable, and resume operation of the control device.

(*2*) During periods of routine inspection, maintenance, or other activities needed for normal operations, and for removal of accumulated sludge or other residues from the bottom of the tank.

(iv) The fixed roof and its closure devices shall be made of suitable materials that will minimize exposure of the hazardous secondary material to the atmosphere, to the extent practical, and will maintain the integrity of the fixed roof and closure devices throughout their intended service life. Factors to be considered when selecting the materials for and designing the fixed roof and closure devices shall include: organic vapor permeability, the effects of any contact with the hazardous secondary material or its vapors managed in the tank; the effects of outdoor exposure to wind, moisture, and sunlight; and the operating practices used for the tank on which the fixed roof is installed.

(3) Whenever a hazardous secondary material is in the tank, the fixed roof shall be installed with each closure device secured in the closed position except as follows:

(i) Opening of closure devices or removal of the fixed roof is allowed at the following times:

(A) To provide access to the tank for performing routine inspection, maintenance, or other activities needed for normal operations. Examples of such activities include those times when a worker needs to open a port to sample the liquid in the tank, or when a worker needs to open a hatch to maintain or repair equipment. Following completion of the activity, the remanufacturer or other person that stores or treats the hazardous secondary material shall promptly secure the closure device in the closed position or reinstall the cover, as applicable, to the tank.

(B) To remove accumulated sludge or other residues from the bottom of tank.

(ii) Opening of a spring-loaded pressure-vacuum relief valve, conservation vent, or similar type of pressure relief device which vents to the atmosphere is allowed during normal operations for the purpose of maintaining the tank internal pressure in accordance with the tank design specifications. The device shall be designed to operate with no detectable organic emissions when the device is secured in the closed position. The settings at which the device opens shall be established such that the device remains in the closed position whenever the tank internal pressure is within the internal pressure operating range determined by the remanufacturer or other person that stores or treats the hazardous secondary material based on the tank manufacturer recommendations, applicable regulations, fire protection and prevention codes, standard engineering codes and practices, or other requirements for the safe handling of flammable, ignitable, explosive, reactive, or hazardous materials. Examples of normal operating conditions that may require these devices to open are during those times when the tank internal pressure exceeds the internal pressure operating range for the tank as a result of loading operations or diurnal ambient temperature fluctuations.

(iii) Opening of a safety device, as defined in § 261.1081, is allowed at any time conditions require doing so to avoid an unsafe condition.

(4) The remanufacturer or other person that stores or treats the hazardous secondary material shall inspect the air emission control equipment in accordance with the following requirements.

(i) The fixed roof and its closure devices shall be visually inspected by the remanufacturer or other person that stores or treats the hazardous secondary material to check for defects that could result in air pollutant emissions. Defects include, but are not limited to, visible cracks, holes, or gaps in the roof sections or between the roof and the tank wall; broken, cracked, or otherwise damaged seals or gaskets on closure devices; and broken or missing hatches, access covers, caps, or other closure devices.

(ii) The remanufacturer or other person that stores or treats the hazardous secondary material shall perform an initial inspection of the fixed roof and its closure devices on or before the date that the tank becomes subject to this section. Thereafter, the remanufacturer or other person that stores or treats the hazardous secondary material shall perform the inspections at least once every year except under the special conditions provided for in paragraph (l) of this section.

(iii) In the event that a defect is detected, the remanufacturer or other person that stores or treats the hazardous secondary material shall repair the defect in accordance with the requirements of paragraph (k) of this section.

(iv) The remanufacturer or other person that stores or treats the hazardous secondary material shall maintain a record of the inspection in accordance with the requirements specified in § 261.1089(b) of this subpart.

(d) Remanufacturers or other persons that store or treat the hazardous secondary material controlling air pollutant emissions from a tank using Tank Level 2 controls shall use one of the following tanks:

(1) A fixed-roof tank equipped with an internal floating roof in accordance with the requirements specified in paragraph (e) of this section;

(2) A tank equipped with an external floating roof in accordance with the requirements specified in paragraph (f) of this section;

(3) A tank vented through a closed-vent system to a control device in accordance with the requirements specified in paragraph (g) of this section;

(4) A pressure tank designed and operated in accordance with the requirements specified in paragraph (h) of this section; or

(5) A tank located inside an enclosure that is vented through a closed-vent system to an enclosed combustion control device in accordance with the requirements specified in paragraph (i) of this section.

(e) The remanufacturer or other person that stores or treats the hazardous secondary material who controls air pollutant emissions from a tank using a fixed roof with an internal floating roof shall meet the requirements specified in paragraphs (e)(1) through (3) of this section.

(1) The tank shall be equipped with a fixed roof and an internal floating roof in accordance with the following requirements:

(i) The internal floating roof shall be designed to float on the liquid surface except when the floating roof must be supported by the leg supports.

(ii) The internal floating roof shall be equipped with a continuous seal between the wall of the tank and the floating roof edge that meets either of the following requirements:

(A) A single continuous seal that is either a liquid-mounted seal or a metallic shoe seal, as defined in § 261.1081; or

(B) Two continuous seals mounted one above the other. The lower seal may be a vapor-mounted seal.

(iii) The internal floating roof shall meet the following specifications:

(A) Each opening in a noncontact internal floating roof except for automatic bleeder vents (vacuum breaker vents) and the rim space vents is to provide a projection below the liquid surface.

(B) Each opening in the internal floating roof shall be equipped with a gasketed cover or a gasketed lid except for leg sleeves, automatic bleeder vents, rim space vents, column wells, ladder wells, sample wells, and stub drains.

(C) Each penetration of the internal floating roof for the purpose of sampling shall have a slit fabric cover that covers at least 90 percent of the opening.

(D) Each automatic bleeder vent and rim space vent shall be gasketed.

(E) Each penetration of the internal floating roof that allows for passage of a ladder shall have a gasketed sliding cover.

(F) Each penetration of the internal floating roof that allows for passage of a column supporting the fixed roof shall have a flexible fabric sleeve seal or a gasketed sliding cover.

(2) The remanufacturer or other person that stores or treats the hazardous secondary material shall operate the tank in accordance with the following requirements:

(i) When the floating roof is resting on the leg supports, the process of filling, emptying, or refilling shall be continuous and shall be completed as soon as practical.

(ii) Automatic bleeder vents are to be set closed at all times when the roof is floating, except when the roof is being floated off or is being landed on the leg supports.

(iii) Prior to filling the tank, each cover, access hatch, gauge float well or lid on any opening in the internal floating roof shall be bolted or fastened closed (*i.e.,* no visible gaps). Rim space vents are to be set to open only when the internal floating roof is not floating or when the pressure beneath the rim exceeds the manufacturer's recommended setting.

(3) The remanufacturer or other person that stores or treats the hazardous secondary material shall inspect the internal floating roof in accordance with the procedures specified as follows:

(i) The floating roof and its closure devices shall be visually inspected by the remanufacture or other person that stores or treats the hazardous secondary material to check for defects that could result in air pollutant emissions. Defects include, but are not limited to: The internal floating roof is not floating on the surface of the liquid inside the tank; liquid has accumulated on top of the internal floating roof; any portion of the roof seals have detached from the roof rim; holes, tears, or other openings are visible in the seal fabric; the gaskets no longer close off the hazardous secondary material surface from the atmosphere; or the slotted membrane has more than 10 percent open area.

(ii) The remanufacturer or other person that stores or treats the hazardous secondary material shall inspect the internal floating roof components as follows except as provided in paragraph (e)(3)(iii) of this section:

(A) Visually inspect the internal floating roof components through openings on the fixed-roof (*e.g.,* manholes and roof hatches) at least once every 12 months after initial fill, and

(B) Visually inspect the internal floating roof, primary seal, secondary seal (if one is in service), gaskets, slotted membranes, and sleeve seals (if any) each time the tank is emptied and degassed and at least every 10 years.

(iii) As an alternative to performing the inspections specified in paragraph (e)(3)(ii) of this section for an internal floating roof equipped with two continuous seals mounted one above the

other, the remanufacturer or other person that stores or treats the hazardous secondary material may visually inspect the internal floating roof, primary and secondary seals, gaskets, slotted membranes, and sleeve seals (if any) each time the tank is emptied and degassed and at least every five years.

(iv) Prior to each inspection required by paragraph (e)(3)(ii) or (iii) of this section, the remanufacturer or other person that stores or treats the hazardous secondary material shall notify the Regional Administrator in advance of each inspection to provide the Regional Administrator with the opportunity to have an observer present during the inspection. The remanufacturer or other person that stores or treats the hazardous secondary material shall notify the Regional Administrator of the date and location of the inspection as follows:

(A) Prior to each visual inspection of an internal floating roof in a tank that has been emptied and degassed, written notification shall be prepared and sent by the remanufacturer or other person that stores or treats the hazardous secondary material so that it is received by the Regional Administrator at least 30 calendar days before refilling the tank except when an inspection is not planned as provided for in paragraph (e)(3)(iv)(B) of this section.

(B) When a visual inspection is not planned and the remanufacturer or other person that stores or treats the hazardous secondary material could not have known about the inspection 30 calendar days before refilling the tank, the remanufacturer or other person that stores or treats the hazardous secondary material shall notify the Regional Administrator as soon as possible, but no later than seven calendar days before refilling of the tank. This notification may be made by telephone and immediately followed by a written explanation for why the inspection is unplanned. Alternatively, written notification, including the explanation for the unplanned inspection, may be sent so that it is received by the Regional Administrator at least seven calendar days before refilling the tank.

(v) In the event that a defect is detected, the remanufacturer or other person that stores or treats the hazardous secondary material shall repair the defect in accordance with the requirements of paragraph (k) of this section.

(vi) The remanufacturer or other person that stores or treats the hazardous secondary material shall maintain a record of the inspection in accordance with the requirements specified in § 261.1089(b) of this subpart.

(4) Safety devices, as defined in § 261.1081, may be installed and operated as necessary on any tank complying with the requirements of paragraph (e) of this section.

(f) The remanufacturer or other person that stores or treats the hazardous secondary material who controls air pollutant emissions from a tank using an external floating roof shall meet the requirements specified in paragraphs (f)(1) through (3) of this section.

(1) The remanufacturer or other person that stores or treats the hazardous secondary material shall design the external floating roof in accordance with the following requirements:

(i) The external floating roof shall be designed to float on the liquid surface except when the floating roof must be supported by the leg supports.

(ii) The floating roof shall be equipped with two continuous seals, one above the other, between the wall of the tank and the roof edge. The lower seal is referred to as the primary seal, and the upper seal is referred to as the secondary seal.

(A) The primary seal shall be a liquid-mounted seal or a metallic shoe seal, as defined in 40 CFR 261.1081. The total area of the gaps between the tank wall and the primary seal shall not exceed 212 square centimeters (cm^2) per meter of tank diameter, and the width of any portion of these gaps shall not exceed 3.8 centimeters (cm). If a metallic shoe seal is used for the primary seal, the metallic shoe seal shall be designed so that one end extends into the liquid in the tank and the other end extends a vertical distance of at least 61 centimeters above the liquid surface.

(B) The secondary seal shall be mounted above the primary seal and cover the annular space between the floating roof and the wall of the tank. The total area of the gaps between the tank wall and the secondary seal shall not exceed 21.2 square centimeters (cm^2) per meter of tank diameter, and the width of any portion of these gaps shall not exceed 1.3 centimeters (cm).

(iii) The external floating roof shall meet the following specifications:

(A) Except for automatic bleeder vents (vacuum breaker vents) and rim space vents, each opening in a noncontact external floating roof shall provide a projection below the liquid surface.

(B) Except for automatic bleeder vents, rim space vents, roof drains, and leg sleeves, each opening in the roof shall be equipped with a gasketed cover, seal, or lid.

(C) Each access hatch and each gauge float well shall be equipped with a cover designed to be bolted or fastened when the cover is secured in the closed position.

(D) Each automatic bleeder vent and each rim space vent shall be equipped with a gasket.

(E) Each roof drain that empties into the liquid managed in the tank shall be equipped with a slotted membrane fabric cover that covers at least 90 percent of the area of the opening.

(F) Each unslotted and slotted guide pole well shall be equipped with a gasketed sliding cover or a flexible fabric sleeve seal.

(G) Each unslotted guide pole shall be equipped with a gasketed cap on the end of the pole.

(H) Each slotted guide pole shall be equipped with a gasketed float or other device which closes off the liquid surface from the atmosphere.

(I) Each gauge hatch and each sample well shall be equipped with a gasketed cover.

(2) The remanufacturer or other person that stores or treats the hazardous secondary material shall operate the tank in accordance with the following requirements:

(i) When the floating roof is resting on the leg supports, the process of filling, emptying, or refilling shall be continuous and shall be completed as soon as practical.

(ii) Except for automatic bleeder vents, rim space vents, roof drains, and leg sleeves, each opening in the roof shall be secured and maintained in a closed position at all times except when the closure device must be open for access.

(iii) Covers on each access hatch and each gauge float well shall be bolted or fastened when secured in the closed position.

(iv) Automatic bleeder vents shall be set closed at all times when the roof is floating, except when the roof is being floated off or is being landed on the leg supports.

(v) Rim space vents shall be set to open only at those times that the roof is being floated off the roof leg supports or when the pressure beneath the rim seal exceeds the manufacturer's recommended setting.

(vi) The cap on the end of each unslotted guide pole shall be secured in the closed position at all times except when measuring the level or collecting samples of the liquid in the tank.

(vii) The cover on each gauge hatch or sample well shall be secured in the closed position at all times except when the hatch or well must be opened for access.

(viii) Both the primary seal and the secondary seal shall completely cover the annular space between the external floating roof and the wall of the tank in a continuous fashion except during inspections.

(3) The remanufacturer or other person that stores or treats the hazardous secondary material shall inspect the external floating roof in accordance with the procedures specified as follows:

(i) The remanufacturer or other person that stores or treats the hazardous secondary material shall measure the external floating roof seal gaps in accordance with the following requirements:

(A) The remanufacturer or other person that stores or treats the hazardous secondary material shall perform measurements of gaps between the tank wall and the primary seal within 60 calendar days after initial operation of the tank following installation of the floating roof and, thereafter, at least once every 5 years.

(B) The remanufacturer or other person that stores or treats the hazardous secondary material shall perform measurements of gaps between the tank wall and the secondary seal within 60 calendar days after initial operation of the tank following installation of the floating roof and, thereafter, at least once every year.

(C) If a tank ceases to hold hazardous secondary material for a period of 1 year or more, subsequent introduction of hazardous secondary material into the tank shall be considered an initial operation for the purposes of paragraphs (f)(3)(i)(A) and (B) of this section.

(D) The remanufacturer or other person that stores or treats the hazardous secondary material shall determine the total surface area of gaps in the primary seal and in the secondary seal individually using the following procedure:

(*1*) The seal gap measurements shall be performed at one or more floating roof levels when the roof is floating off the roof supports.

(*2*) Seal gaps, if any, shall be measured around the entire perimeter of the floating roof in each place where a 0.32-centimeter (cm) diameter uniform probe passes freely (without forcing or binding against the seal) between the seal and the wall of the tank and measure the circumferential distance of each such location.

(*3*) For a seal gap measured under paragraph (f)(3) of this section, the gap surface area shall be determined by using probes of various widths to measure accurately the actual distance from the tank wall to the seal and multiplying each such width by its respective circumferential distance.

(*4*) The total gap area shall be calculated by adding the gap surface areas determined for each identified gap location for the primary seal and the secondary seal individually, and then dividing the sum for each seal type by the nominal diameter of the tank. These total gap areas for the primary seal and secondary seal are then compared to the respective standards for the seal type as specified in paragraph (f)(1)(ii) of this section.

(E) In the event that the seal gap measurements do not conform to the specifications in paragraph (f)(1)(ii) of this section, the remanufacturer or other person that stores or treats the hazardous secondary material shall repair the defect in accordance with the requirements of paragraph (k) of this section.

(F) The remanufacturer or other person that stores or treats the hazardous secondary material shall maintain a record of the inspection in accordance with the requirements specified in § 261.1089(b) of this subpart.

(ii) The remanufacturer or other person that stores or treats the hazardous secondary material shall visually inspect the external floating roof in accordance with the following requirements:

(A) The floating roof and its closure devices shall be visually inspected by the remanufacturer or other person that stores or treats the hazardous secondary material to check for defects that could result in air pollutant emissions. Defects include, but are not limited to: Holes, tears, or other openings in the rim seal or seal fabric of the floating roof; a rim seal detached from the floating roof; all or a portion of the floating roof deck being submerged below the surface of the liquid in the tank; broken, cracked, or otherwise damaged seals or gaskets on closure devices; and broken or missing hatches, access covers, caps, or other closure devices.

(B) The remanufacturer or other person that stores or treats the hazardous secondary material shall perform an initial inspection of the external floating roof and its closure devices on or before the date that the tank becomes subject to this section. Thereafter, the remanufacturer or other person that stores or treats the hazardous secondary material shall perform the inspections at least once every year except for the special conditions provided for in paragraph (l) of this section.

(C) In the event that a defect is detected, the remanufacturer or other person that stores or treats the hazardous secondary material shall repair the defect in accordance with the requirements of paragraph (k) of this section.

(D) The remanufacturer or other person that stores or treats the hazardous secondary material shall maintain a record of the inspection in accordance with the requirements specified in § 261.1089(b) of this subpart.

(iii) Prior to each inspection required by paragraph (f)(3)(i) or (ii) of this section, the remanufacturer or other person that stores or treats the hazardous secondary material shall notify the Regional Administrator in advance of each inspection to provide the Regional Administrator with the opportunity to have an observer present during the inspection. The remanufacturer or other person that stores or treats the hazardous secondary material shall notify the Regional Administrator of the date and location of the inspection as follows:

(A) Prior to each inspection to measure external floating roof seal gaps as required under paragraph (f)(3)(i) of this section, written notification shall be prepared and sent by the remanufacturer or other person that stores or treats the hazardous secondary material so that it is received by the Regional Administrator at least 30 calendar days before the date the measurements are scheduled to be performed.

(B) Prior to each visual inspection of an external floating roof in a tank that has been emptied and degassed, written notification shall be prepared and sent by the remanufacturer or other person that stores or treats the hazardous secondary material so that it is received by the Regional Administrator at least 30 calendar days before refilling the tank except when an inspection is not planned as provided for in paragraph (f)(3)(iii)(C) of this section.

(C) When a visual inspection is not planned and the remanufacturer or other person that stores or treats the hazardous secondary material could not have known about the inspection 30 calendar days before refilling the tank, the owner or operator shall notify the Regional Administrator as soon as possible, but no later than seven calendar days before refilling of the tank. This notification may be made by telephone and immediately followed by a written explanation for why the inspection is unplanned. Alternatively, written notification, including the explanation for the unplanned inspection, may be sent so that it is received by the Regional Administrator

at least seven calendar days before refilling the tank.

(4) Safety devices, as defined in § 261.1081, may be installed and operated as necessary on any tank complying with the requirements of paragraph (f) of this section.

(g) The remanufacturer or other person that stores or treats the hazardous secondary material who controls air pollutant emissions from a tank by venting the tank to a control device shall meet the requirements specified in paragraphs (g)(1) through (3) of this section.

(1) The tank shall be covered by a fixed roof and vented directly through a closed-vent system to a control device in accordance with the following requirements:

(i) The fixed roof and its closure devices shall be designed to form a continuous barrier over the entire surface area of the liquid in the tank.

(ii) Each opening in the fixed roof not vented to the control device shall be equipped with a closure device. If the pressure in the vapor headspace underneath the fixed roof is less than atmospheric pressure when the control device is operating, the closure devices shall be designed to operate such that when the closure device is secured in the closed position there are no visible cracks, holes, gaps, or other open spaces in the closure device or between the perimeter of the cover opening and the closure device. If the pressure in the vapor headspace underneath the fixed roof is equal to or greater than atmospheric pressure when the control device is operating, the closure device shall be designed to operate with no detectable organic emissions.

(iii) The fixed roof and its closure devices shall be made of suitable materials that will minimize exposure of the hazardous secondary material to the atmosphere, to the extent practical, and will maintain the integrity of the fixed roof and closure devices throughout their intended service life. Factors to be considered when selecting the materials for and designing the fixed roof and closure devices shall include: Organic vapor permeability, the effects of any contact with the liquid and its vapor managed in the tank; the effects of outdoor exposure to wind, moisture, and sunlight; and the operating practices used for the tank on which the fixed roof is installed.

(iv) The closed-vent system and control device shall be designed and operated in accordance with the requirements of § 261.1087 of this subpart.

(2) Whenever a hazardous secondary material is in the tank, the fixed roof shall be installed with each closure device secured in the closed position and the vapor headspace underneath the fixed roof vented to the control device except as follows:

(i) Venting to the control device is not required, and opening of closure devices or removal of the fixed roof is allowed at the following times:

(A) To provide access to the tank for performing routine inspection, maintenance, or other activities needed for normal operations. Examples of such activities include those times when a worker needs to open a port to sample liquid in the tank, or when a worker needs to open a hatch to maintain or repair equipment. Following completion of the activity, the remanufacturer or other person that stores or treats the hazardous secondary material shall promptly secure the closure device in the closed position or reinstall the cover, as applicable, to the tank.

(B) To remove accumulated sludge or other residues from the bottom of a tank.

(ii) Opening of a safety device, as defined in § 261.1081, is allowed at any time conditions require doing so to avoid an unsafe condition.

(3) The remanufacturer or other person that stores or treats the hazardous secondary material shall inspect and monitor the air emission control equipment in accordance with the following procedures:

(i) The fixed roof and its closure devices shall be visually inspected by the remanufacturer or other person that stores or treats the hazardous secondary material to check for defects that could result in air pollutant emissions. Defects include, but are not limited to, visible cracks, holes, or gaps in the roof sections or between the roof and the tank wall; broken, cracked, or otherwise damaged seals or gaskets on closure devices; and broken or missing hatches, access covers, caps, or other closure devices.

(ii) The closed-vent system and control device shall be inspected and monitored by the remanufacturer or other person that stores or treats the hazardous secondary material in accordance with the procedures specified in § 261.1087 of this subpart.

(iii) The remanufacturer or other person that stores or treats the hazardous secondary material shall perform an initial inspection of the air emission control equipment on or before the date that the tank becomes subject to this section. Thereafter, the remanufacturer or other person that stores or treats the hazardous secondary material shall perform the inspections at least once every year except for the special conditions provided for in paragraph (l) of this section.

(iv) In the event that a defect is detected, the remanufacture or other person that stores or treats the hazardous secondary material shall repair the defect in accordance with the requirements of paragraph (k) of this section.

(v) The remanufacturer or other person that stores or treats the hazardous secondary material shall maintain a record of the inspection in accordance with the requirements specified in § 261.1089(b) of this subpart.

(h) The remanufacturer or other person that stores or treats the hazardous secondary material who controls air pollutant emissions by using a pressure tank shall meet the following requirements.

(1) The tank shall be designed not to vent to the atmosphere as a result of compression of the vapor headspace in the tank during filling of the tank to its design capacity.

(2) All tank openings shall be equipped with closure devices designed to operate with no detectable organic emissions as determined using the procedure specified in § 261.1083(d) of this subpart.

(3) Whenever a hazardous secondary material is in the tank, the tank shall be operated as a closed system that does not vent to the atmosphere except under either or the following conditions as specified in paragraph (h)(3)(i) or (h)(3)(ii) of this section.

(i) At those times when opening of a safety device, as defined in § 261.1081 of this subpart, is required to avoid an unsafe condition.

(ii) At those times when purging of inerts from the tank is required and the purge stream is routed to a closed-vent system and control device designed and operated in accordance with the requirements of § 261.1087 of this subpart.

(i) The remanufacturer or other person that stores or treats the hazardous secondary material who controls air pollutant emissions by using an enclosure vented through a closed-vent system to an enclosed combustion control device shall meet the requirements specified in paragraphs (i)(1) through (4) of this section.

(1) The tank shall be located inside an enclosure. The enclosure shall be designed and operated in accordance with the criteria for a permanent total enclosure as specified in "Procedure T—Criteria for and Verification of a Permanent or Temporary Total Enclosure" under 40 CFR 52.741, appendix B. The enclosure may have

permanent or temporary openings to allow worker access; passage of material into or out of the enclosure by conveyor, vehicles, or other mechanical means; entry of permanent mechanical or electrical equipment; or direct airflow into the enclosure. The remanufacturer or other person that stores or treats the hazardous secondary material shall perform the verification procedure for the enclosure as specified in Section 5.0 to "Procedure T—Criteria for and Verification of a Permanent or Temporary Total Enclosure" initially when the enclosure is first installed and, thereafter, annually.

(2) The enclosure shall be vented through a closed-vent system to an enclosed combustion control device that is designed and operated in accordance with the standards for either a vapor incinerator, boiler, or process heater specified in § 261.1087 of this subpart.

(3) Safety devices, as defined in § 261.1081, may be installed and operated as necessary on any enclosure, closed-vent system, or control device used to comply with the requirements of paragraphs (i)(1) and (2) of this section.

(4) The remanufacturer or other person that stores or treats the hazardous secondary material shall inspect and monitor the closed-vent system and control device as specified in § 261.1087 of this subpart.

(j) The remanufacturer or other person that stores or treats the hazardous secondary material shall transfer hazardous secondary material to a tank subject to this section in accordance with the following requirements:

(1) Transfer of hazardous secondary material, except as provided in paragraph (j)(2) of this section, to the tank from another tank subject to this section shall be conducted using continuous hard-piping or another closed system that does not allow exposure of the hazardous secondary material to the atmosphere. For the purpose of complying with this provision, an individual drain system is considered to be a closed system when it meets the requirements of 40 CFR part 63, subpart RR—National Emission Standards for Individual Drain Systems.

(2) The requirements of paragraph (j)(1) of this section do not apply when transferring a hazardous secondary material to the tank under any of the following conditions:

(i) The hazardous secondary material meets the average VO concentration conditions specified in § 261.1082(c)(1) of this subpart at the point of material origination.

(ii) The hazardous secondary material has been treated by an organic destruction or removal process to meet the requirements in § 261.1082(c)(2) of this subpart.

(iii) The hazardous secondary material meets the requirements of § 261.1082(c)(4) of this subpart.

(k) The remanufacturer or other person that stores or treats the hazardous secondary material shall repair each defect detected during an inspection performed in accordance with the requirements of paragraph (c)(4), (e)(3), (f)(3), or (g)(3) of this section as follows:

(1) The remanufacturer or other person that stores or treats the hazardous secondary material shall make first efforts at repair of the defect no later than 5 calendar days after detection, and repair shall be completed as soon as possible but no later than 45 calendar days after detection except as provided in paragraph (k)(2) of this section.

(2) Repair of a defect may be delayed beyond 45 calendar days if the remanufacturer or other person that stores or treats the hazardous secondary material determines that repair of the defect requires emptying or temporary removal from service of the tank and no alternative tank capacity is available at the site to accept the hazardous secondary material normally managed in the tank. In this case, the remanufacturer or other person that stores or treats the hazardous secondary material shall repair the defect the next time the process or unit that is generating the hazardous secondary material managed in the tank stops operation. Repair of the defect shall be completed before the process or unit resumes operation.

(l) Following the initial inspection and monitoring of the cover as required by the applicable provisions of this subpart, subsequent inspection and monitoring may be performed at intervals longer than 1 year under the following special conditions:

(1) In the case when inspecting or monitoring the cover would expose a worker to dangerous, hazardous, or other unsafe conditions, then the remanufacturer or other person that stores or treats the hazardous secondary material may designate a cover as an "unsafe to inspect and monitor cover" and comply with all of the following requirements:

(i) Prepare a written explanation for the cover stating the reasons why the cover is unsafe to visually inspect or to monitor, if required.

(ii) Develop and implement a written plan and schedule to inspect and monitor the cover, using the procedures specified in the applicable section of this subpart, as frequently as practicable during those times when a worker can safely access the cover.

(2) In the case when a tank is buried partially or entirely underground, a remanufacturer or other person that stores or treats the hazardous secondary material is required to inspect and monitor, as required by the applicable provisions of this section, only those portions of the tank cover and those connections to the tank (*e.g.*, fill ports, access hatches, gauge wells, etc.) that are located on or above the ground surface.

§ 261.1085 [Reserved]

§ 261.1086 Standards: containers.

(a) *Applicability.* The provisions of this section apply to the control of air pollutant emissions from containers for which § 261.1082(b) of this subpart references the use of this section for such air emission control.

(b) *General requirements.* (1) The remanufacturer or other person that stores or treats the hazardous secondary material shall control air pollutant emissions from each container subject to this section in accordance with the following requirements, as applicable to the container.

(i) For a container having a design capacity greater than 0.1 m^3 and less than or equal to 0.46 m^3, the remanufacturer or other person that stores or treats the hazardous secondary material shall control air pollutant emissions from the container in accordance with the Container Level 1 standards specified in paragraph (c) of this section.

(ii) For a container having a design capacity greater than 0.46 m^3 that is not in light material service, the remanufacturer or other person that stores or treats the hazardous secondary material shall control air pollutant emissions from the container in accordance with the Container Level 1 standards specified in paragraph (c) of this section.

(iii) For a container having a design capacity greater than 0.46 m^3 that is in light material service, the remanufacturer or other person that stores or treats the hazardous secondary material shall control air pollutant emissions from the container in accordance with the Container Level 2 standards specified in paragraph (d) of this section.

(2) [Reserved]

(c) *Container Level 1 standards.* (1) A container using Container Level 1 controls is one of the following:

(i) A container that meets the applicable U.S. Department of Transportation (DOT) regulations on

packaging hazardous materials for transportation as specified in paragraph (f) of this section.

(ii) A container equipped with a cover and closure devices that form a continuous barrier over the container openings such that when the cover and closure devices are secured in the closed position there are no visible holes, gaps, or other open spaces into the interior of the container. The cover may be a separate cover installed on the container (*e.g.,* a lid on a drum or a suitably secured tarp on a roll-off box) or may be an integral part of the container structural design (*e.g.,* a "portable tank" or bulk cargo container equipped with a screw-type cap).

(iii) An open-top container in which an organic-vapor suppressing barrier is placed on or over the hazardous secondary material in the container such that no hazardous secondary material is exposed to the atmosphere. One example of such a barrier is application of a suitable organic-vapor suppressing foam.

(2) A container used to meet the requirements of paragraph (c)(1)(ii) or (iii) of this section shall be equipped with covers and closure devices, as applicable to the container, that are composed of suitable materials to minimize exposure of the hazardous secondary material to the atmosphere and to maintain the equipment integrity, for as long as the container is in service. Factors to be considered in selecting the materials of construction and designing the cover and closure devices shall include: Organic vapor permeability; the effects of contact with the hazardous secondary material or its vapor managed in the container; the effects of outdoor exposure of the closure device or cover material to wind, moisture, and sunlight; and the operating practices for which the container is intended to be used.

(3) Whenever a hazardous secondary material is in a container using Container Level 1 controls, the remanufacturer or other person that stores or treats the hazardous secondary material shall install all covers and closure devices for the container, as applicable to the container, and secure and maintain each closure device in the closed position except as follows:

(i) Opening of a closure device or cover is allowed for the purpose of adding hazardous secondary material or other material to the container as follows:

(A) In the case when the container is filled to the intended final level in one continuous operation, the remanufacturer or other person that stores or treats the hazardous secondary material shall promptly secure the closure devices in the closed position and install the covers, as applicable to the container, upon conclusion of the filling operation.

(B) In the case when discrete quantities or batches of material intermittently are added to the container over a period of time, the remanufacturer or other person that stores or treats the hazardous secondary material shall promptly secure the closure devices in the closed position and install covers, as applicable to the container, upon either the container being filled to the intended final level; the completion of a batch loading after which no additional material will be added to the container within 15 minutes; the person performing the loading operation leaving the immediate vicinity of the container; or the shutdown of the process generating the hazardous secondary material being added to the container, whichever condition occurs first.

(ii) Opening of a closure device or cover is allowed for the purpose of removing hazardous secondary material from the container as follows:

(A) For the purpose of meeting the requirements of this section, an empty hazardous secondary material container may be open to the atmosphere at any time (*i.e.,* covers and closure devices on such a container are not required to be secured in the closed position).

(B) In the case when discrete quantities or batches of material are removed from the container, but the container is not an empty hazardous secondary material container, the remanufacturer or other person that stores or treats the hazardous secondary material shall promptly secure the closure devices in the closed position and install covers, as applicable to the container, upon the completion of a batch removal after which no additional material will be removed from the container within 15 minutes or the person performing the unloading operation leaves the immediate vicinity of the container, whichever condition occurs first.

(iii) Opening of a closure device or cover is allowed when access inside the container is needed to perform routine activities other than transfer of hazardous secondary material. Examples of such activities include those times when a worker needs to open a port to measure the depth of or sample the material in the container, or when a worker needs to open a manhole hatch to access equipment inside the container. Following completion of the activity, the remanufacturer or other person that stores or treats the hazardous secondary material shall promptly secure the closure device in the closed position or reinstall the cover, as applicable to the container.

(iv) Opening of a spring-loaded pressure-vacuum relief valve, conservation vent, or similar type of pressure relief device which vents to the atmosphere is allowed during normal operations for the purpose of maintaining the internal pressure of the container in accordance with the container design specifications. The device shall be designed to operate with no detectable organic emissions when the device is secured in the closed position. The settings at which the device opens shall be established such that the device remains in the closed position whenever the internal pressure of the container is within the internal pressure operating range determined by the remanufacturer or other persons that stores or treats the hazardous secondary material based on container manufacturer recommendations, applicable regulations, fire protection and prevention codes, standard engineering codes and practices, or other requirements for the safe handling of flammable, ignitable, explosive, reactive, or hazardous materials. Examples of normal operating conditions that may require these devices to open are during those times when the internal pressure of the container exceeds the internal pressure operating range for the container as a result of loading operations or diurnal ambient temperature fluctuations.

(v) Opening of a safety device, as defined in 40 CFR 261.1081, is allowed at any time conditions require doing so to avoid an unsafe condition.

(4) The remanufacturer or other person that stores or treats the hazardous secondary material using containers with Container Level 1 controls shall inspect the containers and their covers and closure devices as follows:

(i) In the case when a hazardous secondary material already is in the container at the time the remanufacturer or other person that stores or treats the hazardous secondary material first accepts possession of the container at the facility and the container is not emptied within 24 hours after the container is accepted at the facility (*i.e.,* is not an empty hazardous secondary material container) the remanufacturer or other person that stores or treats the hazardous secondary material shall visually inspect the container and its cover and closure devices to check for visible cracks, holes, gaps, or other open spaces into the interior of the container when the cover and closure devices are

secured in the closed position. The container visual inspection shall be conducted on or before the date that the container is accepted at the facility (*i.e.,* the date the container becomes subject to the subpart CC container standards).

(ii) In the case when a container used for managing hazardous secondary material remains at the facility for a period of 1 year or more, the remanufacturer or other person that stores or treats the hazardous secondary material shall visually inspect the container and its cover and closure devices initially and thereafter, at least once every 12 months, to check for visible cracks, holes, gaps, or other open spaces into the interior of the container when the cover and closure devices are secured in the closed position. If a defect is detected, the remanufacturer or other person that stores or treats the hazardous secondary material shall repair the defect in accordance with the requirements of paragraph (c)(4)(iii) of this section.

(iii) When a defect is detected for the container, cover, or closure devices, the remanufacturer or other person that stores or treats the hazardous secondary material shall make first efforts at repair of the defect no later than 24 hours after detection and repair shall be completed as soon as possible but no later than 5 calendar days after detection. If repair of a defect cannot be completed within 5 calendar days, then the hazardous secondary material shall be removed from the container and the container shall not be used to manage hazardous secondary material until the defect is repaired.

(5) The remanufacturer or other person that stores or treats the hazardous secondary material shall maintain at the facility a copy of the procedure used to determine that containers with capacity of 0.46 m^3 or greater, which do not meet applicable DOT regulations as specified in paragraph (f) of this section, are not managing hazardous secondary material in light material service.

(d) *Container Level 2 standards.* (1) A container using Container Level 2 controls is one of the following:

(i) A container that meets the applicable U.S. Department of Transportation (DOT) regulations on packaging hazardous materials for transportation as specified in paragraph (f) of this section.

(ii) A container that operates with no detectable organic emissions as defined in § 261.1081 and determined in accordance with the procedure specified in paragraph (g) of this section.

(iii) A container that has been demonstrated within the preceding 12 months to be vapor-tight by using 40 CFR part 60, appendix A, Method 27 in accordance with the procedure specified in paragraph (h) of this section.

(2) Transfer of hazardous secondary material in or out of a container using Container Level 2 controls shall be conducted in such a manner as to minimize exposure of the hazardous secondary material to the atmosphere, to the extent practical, considering the physical properties of the hazardous secondary material and good engineering and safety practices for handling flammable, ignitable, explosive, reactive, or other hazardous materials. Examples of container loading procedures that the EPA considers to meet the requirements of this paragraph include using any one of the following: a submerged-fill pipe or other submerged-fill method to load liquids into the container; a vapor-balancing system or a vapor-recovery system to collect and control the vapors displaced from the container during filling operations; or a fitted opening in the top of a container through which the hazardous secondary material is filled and subsequently purging the transfer line before removing it from the container opening.

(3) Whenever a hazardous secondary material is in a container using Container Level 2 controls, the remanufacturer or other person that stores or treats the hazardous secondary material shall install all covers and closure devices for the container, and secure and maintain each closure device in the closed position except as follows:

(i) Opening of a closure device or cover is allowed for the purpose of adding hazardous secondary material or other material to the container as follows:

(A) In the case when the container is filled to the intended final level in one continuous operation, the remanufacture or other person that stores or treats the hazardous secondary material shall promptly secure the closure devices in the closed position and install the covers, as applicable to the container, upon conclusion of the filling operation.

(B) In the case when discrete quantities or batches of material intermittently are added to the container over a period of time, the remanufacturer or other person that stores or treats the hazardous secondary material shall promptly secure the closure devices in the closed position and install covers, as applicable to the container, upon either the container being filled to the intended final level; the completion of a batch loading after which no additional material will be added to the container within 15 minutes; the person performing the loading operation leaving the immediate vicinity of the container; or the shutdown of the process generating the material being added to the container, whichever condition occurs first.

(ii) Opening of a closure device or cover is allowed for the purpose of removing hazardous secondary material from the container as follows:

(A) For the purpose of meeting the requirements of this section, an empty hazardous secondary material container may be open to the atmosphere at any time (*i.e.,* covers and closure devices are not required to be secured in the closed position on an empty container).

(B) In the case when discrete quantities or batches of material are removed from the container, but the container is not an empty hazardous secondary materials container, the remanufacturer or other person that stores or treats the hazardous secondary material shall promptly secure the closure devices in the closed position and install covers, as applicable to the container, upon the completion of a batch removal after which no additional material will be removed from the container within 15 minutes or the person performing the unloading operation leaves the immediate vicinity of the container, whichever condition occurs first.

(iii) Opening of a closure device or cover is allowed when access inside the container is needed to perform routine activities other than transfer of hazardous secondary material. Examples of such activities include those times when a worker needs to open a port to measure the depth of or sample the material in the container, or when a worker needs to open a manhole hatch to access equipment inside the container. Following completion of the activity, the remanufacturer or other person that stores or treats the hazardous secondary material shall promptly secure the closure device in the closed position or reinstall the cover, as applicable to the container.

(iv) Opening of a spring-loaded, pressure-vacuum relief valve, conservation vent, or similar type of pressure relief device which vents to the atmosphere is allowed during normal operations for the purpose of maintaining the internal pressure of the container in accordance with the container design specifications. The device shall be designed to operate with no detectable organic emission when the device is secured in the closed position. The settings at which the device opens shall be established such that the device remains in the closed

position whenever the internal pressure of the container is within the internal pressure operating range determined by the remanufacturer or other person that stores or treats the hazardous secondary material based on container manufacturer recommendations, applicable regulations, fire protection and prevention codes, standard engineering codes and practices, or other requirements for the safe handling of flammable, ignitable, explosive, reactive, or hazardous materials. Examples of normal operating conditions that may require these devices to open are during those times when the internal pressure of the container exceeds the internal pressure operating range for the container as a result of loading operations or diurnal ambient temperature fluctuations.

(v) Opening of a safety device, as defined in § 261.1081, is allowed at any time conditions require doing so to avoid an unsafe condition.

(4) The remanufacture or other person that stores or treats the hazardous secondary material using containers with Container Level 2 controls shall inspect the containers and their covers and closure devices as follows:

(i) In the case when a hazardous secondary material already is in the container at the time the remanufacturer or other person that stores or treats the hazardous secondary material first accepts possession of the container at the facility and the container is not emptied within 24 hours after the container is accepted at the facility (*i.e.,* is not an empty hazardous secondary material container), the remanufacturer or other person that stores or treats the hazardous secondary material shall visually inspect the container and its cover and closure devices to check for visible cracks, holes, gaps, or other open spaces into the interior of the container when the cover and closure devices are secured in the closed position. The container visual inspection shall be conducted on or before the date that the container is accepted at the facility (*i.e.,* the date the container becomes subject to the subpart CC container standards).

(ii) In the case when a container used for managing hazardous secondary material remains at the facility for a period of 1 year or more, the remanufacturer or other person that stores or treats the hazardous secondary material shall visually inspect the container and its cover and closure devices initially and thereafter, at least once every 12 months, to check for visible cracks, holes, gaps, or other open spaces into the interior of the container when the cover and closure devices are secured in the closed position. If a defect is detected, the remanufacturer or other person that stores or treats the hazardous secondary material shall repair the defect in accordance with the requirements of paragraph (d)(4)(iii) of this section.

(iii) When a defect is detected for the container, cover, or closure devices, the remanufacturer or other person that stores or treats the hazardous secondary material shall make first efforts at repair of the defect no later than 24 hours after detection, and repair shall be completed as soon as possible but no later than 5 calendar days after detection. If repair of a defect cannot be completed within 5 calendar days, then the hazardous secondary material shall be removed from the container and the container shall not be used to manage hazardous secondary material until the defect is repaired.

(e) *Container Level 3 standards.* (1) A container using Container Level 3 controls is one of the following:

(i) A container that is vented directly through a closed-vent system to a control device in accordance with the requirements of paragraph (e)(2)(ii) of this section.

(ii) A container that is vented inside an enclosure which is exhausted through a closed-vent system to a control device in accordance with the requirements of paragraphs (e)(2)(i) and (ii) of this section.

(2) The remanufacturer or other person that stores or treats the hazardous secondary material shall meet the following requirements, as applicable to the type of air emission control equipment selected by the remanufacturer or other person that stores or treats the hazardous secondary material:

(i) The container enclosure shall be designed and operated in accordance with the criteria for a permanent total enclosure as specified in "Procedure T—Criteria for and Verification of a Permanent or Temporary Total Enclosure" under 40 CFR 52.741, appendix B. The enclosure may have permanent or temporary openings to allow worker access; passage of containers through the enclosure by conveyor or other mechanical means; entry of permanent mechanical or electrical equipment; or direct airflow into the enclosure. The remanufacturer or other person that stores or treats the hazardous secondary material shall perform the verification procedure for the enclosure as specified in Section 5.0 to "Procedure T—Criteria for and Verification of a Permanent or Temporary Total Enclosure" initially when the enclosure is first installed and, thereafter, annually.

(ii) The closed-vent system and control device shall be designed and operated in accordance with the requirements of § 261.1087 of this subpart.

(3) Safety devices, as defined in § 261.1081, may be installed and operated as necessary on any container, enclosure, closed-vent system, or control device used to comply with the requirements of paragraph (e)(1) of this section.

(4) Remanufacturers or other persons that store or treat the hazardous secondary material using Container Level 3 controls in accordance with the provisions of this subpart shall inspect and monitor the closed-vent systems and control devices as specified in § 261.1087 of this subpart.

(5) Remanufacturers or other persons that store or treat the hazardous secondary material that use Container Level 3 controls in accordance with the provisions of this subpart shall prepare and maintain the records specified in § 261.1089(d) of this subpart.

(6) Transfer of hazardous secondary material in or out of a container using Container Level 3 controls shall be conducted in such a manner as to minimize exposure of the hazardous secondary material to the atmosphere, to the extent practical, considering the physical properties of the hazardous secondary material and good engineering and safety practices for handling flammable, ignitable, explosive, reactive, or other hazardous materials. Examples of container loading procedures that the EPA considers to meet the requirements of this paragraph include using any one of the following: a submerged-fill pipe or other submerged-fill method to load liquids into the container; a vapor-balancing system or a vapor-recovery system to collect and control the vapors displaced from the container during filling operations; or a fitted opening in the top of a container through which the hazardous secondary material is filled and subsequently purging the transfer line before removing it from the container opening.

(f) For the purpose of compliance with paragraph (c)(1)(i) or (d)(1)(i) of this section, containers shall be used that meet the applicable U.S. Department of Transportation (DOT) regulations on packaging hazardous materials for transportation as follows:

(1) The container meets the applicable requirements specified in 49 CFR part 178 or part 179.

(2) Hazardous secondary material is managed in the container in accordance with the applicable requirements

specified in 49 CFR part 107, subpart B and 49 CFR parts 172, 173, and 180.

(3) For the purpose of complying with this subpart, no exceptions to the 49 CFR part 178 or part 179 regulations are allowed.

(g) To determine compliance with the no detectable organic emissions requirement of paragraph (d)(1)(ii) of this section, the procedure specified in § 261.1083(d) of this subpart shall be used.

(1) Each potential leak interface (*i.e.,* a location where organic vapor leakage could occur) on the container, its cover, and associated closure devices, as applicable to the container, shall be checked. Potential leak interfaces that are associated with containers include, but are not limited to: the interface of the cover rim and the container wall; the periphery of any opening on the container or container cover and its associated closure device; and the sealing seat interface on a spring-loaded pressure-relief valve.

(2) The test shall be performed when the container is filled with a material having a volatile organic concentration representative of the range of volatile organic concentrations for the hazardous secondary materials expected to be managed in this type of container. During the test, the container cover and closure devices shall be secured in the closed position.

(h) Procedure for determining a container to be vapor-tight using Method 27 of 40 CFR part 60, appendix A for the purpose of complying with paragraph (d)(1)(iii) of this section.

(1) The test shall be performed in accordance with Method 27 of 40 CFR part 60, appendix A of this chapter.

(2) A pressure measurement device shall be used that has a precision of ±2.5 mm water and that is capable of measuring above the pressure at which the container is to be tested for vapor tightness.

(3) If the test results determined by Method 27 indicate that the container sustains a pressure change less than or equal to 750 Pascals within 5 minutes after it is pressurized to a minimum of 4,500 Pascals, then the container is determined to be vapor-tight.

§ 261.1087 Standards: Closed-vent systems and control devices.

(a) This section applies to each closed-vent system and control device installed and operated by the remanufacturer or other person who stores or treats the hazardous secondary material to control air emissions in accordance with standards of this subpart.

(b) The closed-vent system shall meet the following requirements:

(1) The closed-vent system shall route the gases, vapors, and fumes emitted from the hazardous secondary material in the hazardous secondary material management unit to a control device that meets the requirements specified in paragraph (c) of this section.

(2) The closed-vent system shall be designed and operated in accordance with the requirements specified in § 261.1033(k) of this part.

(3) In the case when the closed-vent system includes bypass devices that could be used to divert the gas or vapor stream to the atmosphere before entering the control device, each bypass device shall be equipped with either a flow indicator as specified in paragraph (b)(3)(i) of this section or a seal or locking device as specified in paragraph (b)(3)(ii) of this section. For the purpose of complying with this paragraph, low leg drains, high point bleeds, analyzer vents, open-ended valves or lines, spring loaded pressure relief valves, and other fittings used for safety purposes are not considered to be bypass devices.

(i) If a flow indicator is used to comply with paragraph (b)(3) of this section, the indicator shall be installed at the inlet to the bypass line used to divert gases and vapors from the closed-vent system to the atmosphere at a point upstream of the control device inlet. For this paragraph, a flow indicator means a device which indicates the presence of either gas or vapor flow in the bypass line.

(ii) If a seal or locking device is used to comply with paragraph (b)(3) of this section, the device shall be placed on the mechanism by which the bypass device position is controlled (*e.g.,* valve handle, damper lever) when the bypass device is in the closed position such that the bypass device cannot be opened without breaking the seal or removing the lock. Examples of such devices include, but are not limited to, a car-seal or a lock-and-key configuration valve. The remanufacturer or other person that stores or treats the hazardous secondary material shall visually inspect the seal or closure mechanism at least once every month to verify that the bypass mechanism is maintained in the closed position.

(4) The closed-vent system shall be inspected and monitored by the remanufacturer or other person that stores or treats the hazardous secondary material in accordance with the procedure specified in § 261.1033(l).

(c) The control device shall meet the following requirements:

(1) The control device shall be one of the following devices:

(i) A control device designed and operated to reduce the total organic content of the inlet vapor stream vented to the control device by at least 95 percent by weight;

(ii) An enclosed combustion device designed and operated in accordance with the requirements of § 261.1033(c) of this part; or

(iii) A flare designed and operated in accordance with the requirements of § 261.1033(d) of this part.

(2) The remanufacturer or other person that stores or treats the hazardous secondary material who elects to use a closed-vent system and control device to comply with the requirements of this section shall comply with the requirements specified in paragraphs (c)(2)(i) through (vi) of this section.

(i) Periods of planned routine maintenance of the control device, during which the control device does not meet the specifications of paragraph (c)(1)(i), (ii), or (iii) of this section, as applicable, shall not exceed 240 hours per year.

(ii) The specifications and requirements in paragraphs (c)(1)(i) through (iii) of this section for control devices do not apply during periods of planned routine maintenance.

(iii) The specifications and requirements in paragraphs (c)(1)(i) through (iii) of this section for control devices do not apply during a control device system malfunction.

(iv) The remanufacturer or other person that stores or treats the hazardous secondary material shall demonstrate compliance with the requirements of paragraph (c)(2)(i) of this section (*i.e.,* planned routine maintenance of a control device, during which the control device does not meet the specifications of paragraph (c)(1)(i), (ii), or (iii) of this section, as applicable, shall not exceed 240 hours per year) by recording the information specified in § 261.1089(e)(1)(v) of this subpart.

(v) The remanufacturer or other person that stores or treats the hazardous secondary material shall correct control device system malfunctions as soon as practicable after their occurrence in order to minimize excess emissions of air pollutants.

(vi) The remanufacturer or other person that stores or treats the hazardous secondary material shall operate the closed-vent system such that gases, vapors, or fumes are not actively vented to the control device during periods of planned maintenance or control device system malfunction (*i.e.,* periods when the control device is not operating or not operating normally) except in cases when it is necessary to

vent the gases, vapors, and/or fumes to avoid an unsafe condition or to implement malfunction corrective actions or planned maintenance actions.

(3) The remanufacturer or other person that stores or treats the hazardous secondary material using a carbon adsorption system to comply with paragraph (c)(1) of this section shall operate and maintain the control device in accordance with the following requirements:

(i) Following the initial startup of the control device, all activated carbon in the control device shall be replaced with fresh carbon on a regular basis in accordance with the requirements of § 261.1033(g) or (h) of this part.

(ii) All carbon that is hazardous waste and that is removed from the control device shall be managed in accordance with the requirements of § 261.1033(n), regardless of the average volatile organic concentration of the carbon.

(4) A remanufacturer or other person that stores or treats the hazardous secondary material using a control device other than a thermal vapor incinerator, flare, boiler, process heater, condenser, or carbon adsorption system to comply with paragraph (c)(1) of this section shall operate and maintain the control device in accordance with the requirements of § 261.1033(j) of this part.

(5) The remanufacturer or other person that stores or treats the hazardous secondary material shall demonstrate that a control device achieves the performance requirements of paragraph (c)(1) of this section as follows:

(i) A remanufacturer or other person that stores or treats the hazardous secondary material shall demonstrate using either a performance test as specified in paragraph (c)(5)(iii) of this section or a design analysis as specified in paragraph (c)(5)(iv) of this section the performance of each control device except for the following:

(A) A flare;

(B) A boiler or process heater with a design heat input capacity of 44 megawatts or greater;

(C) A boiler or process heater into which the vent stream is introduced with the primary fuel;

(ii) A remanufacturer or other person that stores or treats the hazardous secondary material shall demonstrate the performance of each flare in accordance with the requirements specified in § 261.1033(e).

(iii) For a performance test conducted to meet the requirements of paragraph (c)(5)(i) of this section, the remanufacturer or other person that stores or treats the hazardous secondary material shall use the test methods and procedures specified in § 261.1034(c)(1) through (4).

(iv) For a design analysis conducted to meet the requirements of paragraph (c)(5)(i) of this section, the design analysis shall meet the requirements specified in § 261.1035(b)(4)(iii).

(v) The remanufacturer or other person that stores or treats the hazardous secondary material shall demonstrate that a carbon adsorption system achieves the performance requirements of paragraph (c)(1) of this section based on the total quantity of organics vented to the atmosphere from all carbon adsorption system equipment that is used for organic adsorption, organic desorption or carbon regeneration, organic recovery, and carbon disposal.

(6) If the remanufacturer or other person that stores or treats the hazardous secondary material and the Regional Administrator do not agree on a demonstration of control device performance using a design analysis then the disagreement shall be resolved using the results of a performance test performed by the remanufacturer or other person that stores or treats the hazardous secondary material in accordance with the requirements of paragraph (c)(5)(iii) of this section. The Regional Administrator may choose to have an authorized representative observe the performance test.

(7) The closed-vent system and control device shall be inspected and monitored by the remanufacture or other person that stores or treats the hazardous secondary material in accordance with the procedures specified in § 261.1033(f)(2) and (l). The readings from each monitoring device required by § 261.1033(f)(2) shall be inspected at least once each operating day to check control device operation. Any necessary corrective measures shall be immediately implemented to ensure the control device is operated in compliance with the requirements of this section.

§ 261.1088 Inspection and monitoring requirements.

(a) The remanufacturer or other person that stores or treats the hazardous secondary material shall inspect and monitor air emission control equipment used to comply with this subpart in accordance with the applicable requirements specified in §§ 261.1084 through 261.1087 of this subpart.

(b) The remanufacture or other person that stores or treats the hazardous secondary material shall develop and implement a written plan and schedule to perform the inspections and monitoring required by paragraph (a) of this section. The remanufacturer or other person that stores or treats the hazardous secondary material shall keep the plan and schedule at the facility.

§ 261.1089 Recordkeeping requirements.

(a) Each remanufacturer or other person that stores or treats the hazardous secondary material subject to requirements of this subpart shall record and maintain the information specified in paragraphs (b) through (j) of this section, as applicable to the facility. Except for air emission control equipment design documentation and information required by paragraphs (i) and (j) of this section, records required by this section shall be maintained at the facility for a minimum of 3 years. Air emission control equipment design documentation shall be maintained at the facility until the air emission control equipment is replaced or otherwise no longer in service. Information required by paragraphs (i) and (j) of this section shall be maintained at the facility for as long as the hazardous secondary material management unit is not using air emission controls specified in §§ 261.1084 through 261.1087 of this subpart in accordance with the conditions specified in § 261.1080(b)(7) or (d) of this subpart, respectively.

(b) The remanufacturer or other person that stores or treats the hazardous secondary material using a tank with air emission controls in accordance with the requirements of § 261.1084 of this subpart shall prepare and maintain records for the tank that include the following information:

(1) For each tank using air emission controls in accordance with the requirements of § 261.1084 of this subpart, the remanufacturer or other person that stores or treats the hazardous secondary material shall record:

(i) A tank identification number (or other unique identification description as selected by the remanufacturer or other person that stores or treats the hazardous secondary material).

(ii) A record for each inspection required by § 261.1084 of this subpart that includes the following information:

(A) Date inspection was conducted.

(B) For each defect detected during the inspection: The location of the defect, a description of the defect, the date of detection, and corrective action taken to repair the defect. In the event that repair of the defect is delayed in accordance with the requirements of § 261.1084 of this subpart, the remanufacturer or other person that stores or treats the hazardous secondary

material shall also record the reason for the delay and the date that completion of repair of the defect is expected.

(2) In addition to the information required by paragraph (b)(1) of this section, the remanufacturer or other person that stores or treats the hazardous secondary material shall record the following information, as applicable to the tank:

(i) The remanufacturer or other person that stores or treats the hazardous secondary material using a fixed roof to comply with the Tank Level 1 control requirements specified in § 261.1084(c) of this subpart shall prepare and maintain records for each determination for the maximum organic vapor pressure of the hazardous secondary material in the tank performed in accordance with the requirements of § 261.1084(c) of this subpart. The records shall include the date and time the samples were collected, the analysis method used, and the analysis results.

(ii) The remanufacturer or other person that stores or treats the hazardous secondary material using an internal floating roof to comply with the Tank Level 2 control requirements specified in § 261.1084(e) of this subpart shall prepare and maintain documentation describing the floating roof design.

(iii) Remanufacturer or other persons that store or treat the hazardous secondary material using an external floating roof to comply with the Tank Level 2 control requirements specified in § 261.1084(f) of this subpart shall prepare and maintain the following records:

(A) Documentation describing the floating roof design and the dimensions of the tank.

(B) Records for each seal gap inspection required by § 261.1084(f)(3) of this subpart describing the results of the seal gap measurements. The records shall include the date that the measurements were performed, the raw data obtained for the measurements, and the calculations of the total gap surface area. In the event that the seal gap measurements do not conform to the specifications in § 261.1084(f)(1) of this subpart, the records shall include a description of the repairs that were made, the date the repairs were made, and the date the tank was emptied, if necessary.

(iv) Each remanufacturer or other person that stores or treats the hazardous secondary material using an enclosure to comply with the Tank Level 2 control requirements specified in § 261.1084(i) of this subpart shall prepare and maintain the following records:

(A) Records for the most recent set of calculations and measurements performed by the remanufacturer or other person that stores or treats the hazardous secondary material to verify that the enclosure meets the criteria of a permanent total enclosure as specified in "Procedure T—Criteria for and Verification of a Permanent or Temporary Total Enclosure" under 40 CFR 52.741, appendix B.

(B) Records required for the closed-vent system and control device in accordance with the requirements of paragraph (e) of this section.

(c) [Reserved]

(d) The remanufacturer or other person that stores or treats the hazardous secondary material using containers with Container Level 3 air emission controls in accordance with the requirements of § 261.1086 of this subpart shall prepare and maintain records that include the following information:

(1) Records for the most recent set of calculations and measurements performed by the remanufacturer or other person that stores or treats the hazardous secondary material to verify that the enclosure meets the criteria of a permanent total enclosure as specified in "Procedure T—Criteria for and Verification of a Permanent or Temporary Total Enclosure" under 40 CFR 52.741, appendix B.

(2) Records required for the closed-vent system and control device in accordance with the requirements of paragraph (e) of this section.

(e) The remanufacturer or other person that stores or treats the hazardous secondary material using a closed-vent system and control device in accordance with the requirements of § 261.1087 of this subpart shall prepare and maintain records that include the following information:

(1) Documentation for the closed-vent system and control device that includes:

(i) Certification that is signed and dated by the remanufacturer or other person that stores or treats the hazardous secondary material stating that the control device is designed to operate at the performance level documented by a design analysis as specified in paragraph (e)(1)(ii) of this section or by performance tests as specified in paragraph (e)(1)(iii) of this section when the tank or container is or would be operating at capacity or the highest level reasonably expected to occur.

(ii) If a design analysis is used, then design documentation as specified in § 261.1035(b)(4). The documentation shall include information prepared by the remanufacturer or other person that stores or treats the hazardous secondary material or provided by the control device manufacturer or vendor that describes the control device design in accordance with § 261.1035(b)(4)(iii) and certification by the remanufacturer or other person that stores or treats the hazardous secondary material that the control equipment meets the applicable specifications.

(iii) If performance tests are used, then a performance test plan as specified in § 261.1035(b)(3) and all test results.

(iv) Information as required by §§ 261.1035(c)(1) and 261.1035(c)(2), as applicable.

(v) A remanufacturer or other person that stores or treats the hazardous secondary material shall record, on a semiannual basis, the information specified in paragraphs (e)(1)(v)(A) and (B) of this section for those planned routine maintenance operations that would require the control device not to meet the requirements of § 261.1087(c)(1)(i), (ii), or (iii) of this subpart, as applicable.

(A) A description of the planned routine maintenance that is anticipated to be performed for the control device during the next 6-month period. This description shall include the type of maintenance necessary, planned frequency of maintenance, and lengths of maintenance periods.

(B) A description of the planned routine maintenance that was performed for the control device during the previous 6-month period. This description shall include the type of maintenance performed and the total number of hours during those 6 months that the control device did not meet the requirements of § 261.1087(c)(1)(i), (ii), or (iii) of this subpart, as applicable, due to planned routine maintenance.

(vi) A remanufacturer or other person that stores or treats the hazardous secondary material shall record the information specified in paragraphs (e)(1)(vi)(A) through (C) of this section for those unexpected control device system malfunctions that would require the control device not to meet the requirements of § 261.1087(c)(1)(i), (ii), or (iii) of this subpart, as applicable.

(A) The occurrence and duration of each malfunction of the control device system.

(B) The duration of each period during a malfunction when gases, vapors, or fumes are vented from the hazardous secondary material management unit through the closed-vent system to the control device while the control device is not properly functioning.

(C) Actions taken during periods of malfunction to restore a malfunctioning control device to its normal or usual manner of operation.

(vii) Records of the management of carbon removed from a carbon adsorption system conducted in accordance with § 261.1087(c)(3)(ii) of this subpart.

(f) The remanufacturer or other person that stores or treats the hazardous secondary material using a tank or container exempted under the hazardous secondary material organic concentration conditions specified in § 261.1082(c)(1) or (c)(2)(i) through (vi) of this subpart, shall prepare and maintain at the facility records documenting the information used for each material determination (*e.g.,* test results, measurements, calculations, and other documentation). If analysis results for material samples are used for the material determination, then the remanufacturer or other person that stores or treats the hazardous secondary material shall record the date, time, and location that each material sample is collected in accordance with applicable requirements of § 261.1083 of this subpart.

(2) [Reserved]

(g) A remanufacturer or other person that stores or treats the hazardous secondary material designating a cover as ''unsafe to inspect and monitor'' pursuant to § 261.1084(l) or § 261.1085(g) of this subpart shall record and keep at facility the following information: The identification numbers for hazardous secondary material management units with covers that are designated as ''unsafe to inspect and monitor,'' the explanation for each cover stating why the cover is unsafe to inspect and monitor, and the plan and schedule for inspecting and monitoring each cover.

(h) The remanufacturer or other person that stores or treats the hazardous secondary material that is subject to this subpart and to the control device standards in 40 CFR part 60, subpart VV, or 40 CFR part 61, subpart V, may elect to demonstrate compliance with the applicable sections of this subpart by documentation either pursuant to this subpart, or pursuant to the provisions of 40 CFR part 60, subpart VV or 40 CFR part 61, subpart V, to the extent that the documentation required by 40 CFR parts 60 or 61 duplicates the documentation required by this section.

§ 261.1090 [Reserved]

[FR Doc. 2014–30382 Filed 1–12–15; 8:45 am]

BILLING CODE 6560–50–P

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1038 **September Term, 2016**

EPA-73FR64668
EPA-80FR1694

Filed On: March 21, 2017

American Petroleum Institute,

Petitioner

v.

Environmental Protection Agency,

Respondent

American Chemistry Council, et al.,
Intervenors

Consolidated with 15-1083, 15-1085, 15-1088, 15-1089, 15-1094

BEFORE: Tatel and Kavanaugh, Circuit Judges; Williams, Senior Circuit Judge

ORDER

It is **ORDERED**, on the court's own motion, that the parties file supplemental briefs, not to exceed 10 pages, addressing whether industry petitioners have standing to challenge the replacement of the "reasonable efforts" option in 40 C.F.R. § 261.4(a)(24)(v)(B) (2014) with the "variance" option in the current version of that rule. While not otherwise limited, the parties are directed to address in their supplemental briefs how standing may be affected by the EPA's finding in the rulemaking record that no entity ever used the "reasonable efforts" option while it was available. See *Definition of Solid Waste*, 80 Fed. Reg. 1694, 1709/1 (Jan. 13, 2015).

The supplemental briefs are due by 4:00 p.m. on March 30, 2017. In addition to electronic filing, paper copies are to be delivered to the court by the time and date due.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

Message

From: Schmidt, Lorie [Schmidt.Lorie@epa.gov]
Sent: 4/28/2017 9:55:31 PM
To: Dunham, Sarah [Dunham.Sarah@epa.gov]; Gunasekara, Mandy [Gunasekara.Mandy@epa.gov]; Dravis, Samantha [dravis.samantha@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Bolen, Brittany [bolen.brittany@epa.gov]; Zenick, Elliott [Zenick.Elliott@epa.gov]; McGartland, Al [McGartland.Al@epa.gov]; Rees, Sarah [rees.sarah@epa.gov]
CC: Page, Steve [Page.Steve@epa.gov]; Tsirigotis, Peter [Tsirigotis.Peter@epa.gov]; Harvey, Reid [Harvey.Reid@epa.gov]; Lewis, Josh [Lewis.Josh@epa.gov]; Koerber, Mike [Koerber.Mike@epa.gov]
Subject: RE: CPP NPR and cost memo

Thanks, Sarah.

OGC will review these docs.

What timing are we looking at?

Thanks

Lorie

Lorie Schmidt
Associate General Counsel, Air and Radiation
Office of General Counsel
US Environmental Protection Agency
(202)564-1681

From: Dunham, Sarah
Sent: Friday, April 28, 2017 5:28 PM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Dravis, Samantha <dravis.samantha@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Bolen, Brittany <bolen.brittany@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; McGartland, Al <McGartland.Al@epa.gov>; Rees, Sarah <rees.sarah@epa.gov>
Cc: Page, Steve <Page.Steve@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Harvey, Reid <Harvey.Reid@epa.gov>; Lewis, Josh <Lewis.Josh@epa.gov>; Koerber, Mike <Koerber.Mike@epa.gov>
Subject: CPP NPR and cost memo

Attorney Client / Deliberative Ex. 5

Attorney Client / Deliberative Ex. 5

Attorney Client / Deliberative Ex. 5

Comments, further direction on timing, and specific direction on any of the items mentioned above (or not mentioned above) are very welcome.

Message

From: Neugeboren, Steven [Neugeboren.Steven@epa.gov]
Sent: 3/27/2017 4:29:02 PM
To: Greenwalt, Sarah [greenwalt.sarah@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]
CC: Kupchan, Simma [Kupchan.Simma@epa.gov]; Wehling, Carrie [Wehling.Carrie@epa.gov]; Wendelowski, Karyn [wendelowski.karyn@epa.gov]; Shapiro, Mike [Shapiro.Mike@epa.gov]; Minoli, Kevin [Minoli.Kevin@epa.gov]
Subject: paper for Administrator on WOTUS withdrawal
Attachments: WOTUS2 withdrawal options legal assessment 3-27 Final1.docx

Attached is a paper for the Administrator on this issue. Kevin has reviewed.

Feel free to call to discuss.

Steven Neugeboren
Associate General Counsel
Water Law Office
Environmental Protection Agency
202-564-5488

Message

From: Graham, Cheryl [Graham.Cheryl@epa.gov]
Sent: 4/17/2017 5:24:29 PM
To: OGC Immediate Office Personal Email / Ex. 6
CC: Jones, Gail-R [Jones.Gail-R@epa.gov]
Subject: 4/17/17 ARLO reg review agenda
Attachments: 17-04-17 agenda.docx

Cheryl R. Graham
OGC/ARLO
(202) 564-5473

Message

From: Fotouhi, David [fotouhi.david@epa.gov]
Sent: 4/20/2017 10:45:28 PM
To: Schwab, Justin [schwab.justin@epa.gov]
Subject: RE: draft litigation report for DPP ACP / Ex. 5

Please see a revised draft below. Deliberative Process / Attorney-Client / Ex. 5

Deliberative Process / Attorney-Client / Ex. 5

David Fotouhi

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

From: Schwab, Justin
Sent: Thursday, April 20, 2017 12:30 PM
To: Fotouhi, David <fotouhi.david@epa.gov>
Subject: draft litigation report for DPP ACP / Ex. 5

Please add anything I'm recused from and pass on to him copying me (unless we need to discuss further). Please use your judgment on whether this is all appropriate for circulation outside this building at this stage.

His prompt:

Deliberative Process / Attorney-Client / Ex. 5

My input (culled from Kevin's weekly reports/informed by my own knowledge):

Energy Sector/Air

Deliberative Process / Attorney-Client / Ex. 5

Deliberative Process / Attorney-Client / Ex. 5

Water

Deliberative Process / Attorney-Client / Ex. 5

Chemicals

Deliberative Process / Attorney-Client / Ex. 5

Message

From: Minoli, Kevin [Minoli.Kevin@epa.gov]
Sent: 2/13/2017 11:29:41 PM
To: Schnare, David [schnare.david@epa.gov]
CC: Schwab, Justin [schwab.justin@epa.gov]
Subject: Litigation Deadlines in OGC Cases
Attachments: Litigation Deadlines 2-13-2017 (2-17 on) - OneDocket.pdf

David- Attached per your request is a chart listing litigation deadlines or hearings in OGC's cases from February 17, 2017, through April 30, 2017. Note that the list includes all cases without regard to individual recusal or conflict issues, but it simply identifies the deadline or type of hearing and does not reveal any internal information about the cases. In addition, the list does not include enforcement cases where OECA is the lead. Please let me know if you have any questions.

Thanks, Kevin

Kevin S. Minoli
Acting General Counsel
Office of General Counsel
US Environmental Protection Agency
Main Office Line: 202-564-8040

Message

From: Neugeboren, Steven [Neugeboren.Steven@epa.gov]
Sent: 4/28/2017 2:37:25 AM
To: Wehling, Carrie [Wehling.Carrie@epa.gov]; Eisenberg, Mindy [Eisenberg.Mindy@epa.gov]; Shapiro, Mike [Shapiro.Mike@epa.gov]; Best-Wong, Benita [Best-Wong.Benita@epa.gov]; Goodin, John [Goodin.John@epa.gov]; Kupchan, Simma [Kupchan.Simma@epa.gov]; Moyer, Jennifer A CIV USARMY CEHQ (US) [Jennifer.A.Moyer@usace.army.mil]; Cindy Barger [cindy.s.barger.civ@mail.mil]; Jensen, Stacey M CIV USARMY HQDA (US) [Stacey.M.Jensen@usace.army.mil]; Minoli, Kevin [Minoli.Kevin@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Fotouhi, David [fotouhi.david@epa.gov]
CC: Downing, Donna [Downing.Donna@epa.gov]
Subject: RE: draft desk statement for submission to OMB
Attachments: Step 1 initiating OMB review desk statement_DRAFT.cw.docx

Attorney Client / Deliberative Ex. 5

Copying OGC front office folks so they are aware (David – speaking of desk statements . . .).

Steven Neugeboren
Associate General Counsel
Water Law Office
Environmental Protection Agency
202-564-5488

From: Wehling, Carrie
Sent: Thursday, April 27, 2017 4:22 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Shapiro, Mike <Shapiro.Mike@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Moyer, Jennifer A CIV USARMY CEHQ (US) <Jennifer.A.Moyer@usace.army.mil>; Cindy Barger <cindy.s.barger.civ@mail.mil>; Jensen, Stacey M CIV USARMY HQDA (US) <Stacey.M.Jensen@usace.army.mil>
Cc: Downing, Donna <Downing.Donna@epa.gov>
Subject: RE: draft desk statement for submission to OMB

Attorney Client / Deliberative Ex. 5

Carrie

Caroline (Carrie) Wehling
Assistant General Counsel
Water Law Office
U.S. Environmental Protection Agency
Washington DC 20004
202-564-5492
wehling.carrie@epa.gov

From: Eisenberg, Mindy
Sent: Thursday, April 27, 2017 3:37 PM
To: Shapiro, Mike <Shapiro.Mike@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie

<Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Moyer, Jennifer A CIV USARMY CEHQ (US) <Jennifer.A.Moyer@usace.army.mil>; Cindy Barger <cindy.s.barger.civ@mail.mil>; Jensen, Stacey M CIV USARMY HQDA (US) <Stacey.M.Jensen@usace.army.mil>
Cc: Downing, Donna <Downing.Donna@epa.gov>
Subject: draft desk statement for submission to OMB

Hi All,
Here is a draft desk statement in anticipation of OMB submittal. Please send any edits by COB if possible so we can forward to OPA.

Thanks!

Mindy Eisenberg
Acting Director, Wetlands Division
Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, mailcode 4502T
Washington, DC 20460
(202) 566-1290
eisenberg.mindy@epa.gov

Message

From: Logan, Paul [Logan.Paul@epa.gov]
Sent: 4/7/2017 4:30:32 PM
To: Schwab, Justin [schwab.justin@epa.gov]
CC: Schefski, Kenneth [Schefski.Kenneth@epa.gov]
Subject: WY ozone interstate transport - petition for reconsideration, and petition for review in 10th Circuit
Attachments: FW: State of Wyoming's Petition for Reconsideration of EPA's Final Rule - Interstate Transport for WY; Wyoming's petition for review of the 2/3/17 interstate transport action

Flag: Flag for follow up

Justin,

Thanks again for our phone call today. Attorney Client / Deliberative Ex. 5

Attorney Client / Deliberative Ex. 5

Also, attached are emails containing Wyoming's petition for reconsideration (including new information in support of the petition), as well as the petition for review in the 10th Circuit.

Paul Logan
Deputy Regional Counsel | EPA Region 8
303.312.6854 | logan.paul@epa.gov

Message

From: Daly, Carl [Daly.Carl@epa.gov]
Sent: 4/3/2017 10:43:15 PM
To: Hestmark, Martin [Hestmark.Martin@epa.gov]; Morales, Monica [Morales.Monica@epa.gov]; Clark, Adam [Clark.Adam@epa.gov]; Logan, Paul [Logan.Paul@epa.gov]
CC: Bohan, Suzanne [bohan.suzanne@epa.gov]; Koerber, Mike [Koerber.Mike@epa.gov]
Subject: FW: State of Wyoming's Petition for Reconsideration of EPA's Final Rule - Interstate Transport for WY
Attachments: StateofWyomingPetitionforReconsideration-InterstateTransport (4-3-17).pdf; AttachmentsWYPetitionforReconsideration-InterstateTransport (4-3-17).pdf

FYI – Deb was also cc'ed.

Carl Daly, Deputy Assistant Regional Administrator
Office of Partnerships and Regulatory Assistance
EPA, Region 8
303-312-6416

From: Robert Leteff [mailto:robert.leteff@wyo.gov]
Sent: Monday, April 3, 2017 3:50 PM
To: Pruitt, Scott <Pruitt.Scott@epa.gov>
Cc: Todd Parfitt <todd.parfitt@wyo.gov>; Colin McKee <colin.mckee@wyo.gov>; Thomas, Deb <thomas.debrah@epa.gov>; Daly, Carl <Daly.Carl@epa.gov>; Nancy Vehr <nancy.vehr1@wyo.gov>; Darla Potter <darla.potter@wyo.gov>; amber.potts@wyo.gov; Elizabeth Morrisseau <elizabeth.morrisseau@wyo.gov>
Subject: State of Wyoming's Petition for Reconsideration of EPA's Final Rule - Interstate Transport for WY

Administrator Pruitt,

Please find attached to this email the State of Wyoming's Petition for Reconsideration of EPA's Final Rule on the Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Interstate Transport for Wyoming. The original petition letter and a copy of the attachments were sent to the William Jefferson Clinton Building via FedEx overnight mail for delivery tomorrow (April 4, 2017). A copy of the letter and the attachments were also sent via FedEx overnight to EPA's Region 8 office in Denver.

Please do not hesitate to contact Wyoming Air Quality Division Administrator Nancy Vehr with any questions, or to direct any legal questions to our council, Elizabeth Morrisseau, at the Wyoming Attorney General's Office.

Sincerely,

Rob Leteff
Wyoming Department of Environmental Quality - Air Quality Division
State Implementation Planning and Rule Development
(307) 777-7740
robert.leteff@wyo.gov

E-Mail to and from me, in connection with the transaction
of public business, is subject to the Wyoming Public Records
Act and may be disclosed to third parties.

Attachment A

HYSPLIT Analyses of Parcel Trajectory for High Ozone Days in 2011 at the Douglas County, CO Monitoring Station

Wyoming Department of Environmental Quality
Air Quality Division
March 7, 2017

I. Introduction

On February 3, 2017, the Environmental Protection Agency (EPA) published a final rule, "Approval and Disapproval of Air Quality Implementation Plans; Interstate Transport for Wyoming," in the Federal Register (FR Vol. 82, No. 22). In this rule, among other actions, the EPA disapproved the portion of the State of Wyoming's State Implementation Plan (SIP) addressing prong 2 of the interstate transport requirements for the 2008 ozone National Ambient Air Quality Standards (NAAQS). This disapproval hinged on a finding in an EPA modeled ozone transport assessment which found that Wyoming is projected to contribute 1.18 ppb of ozone to a maintenance receptor in the Denver, Colorado area in 2017.

This analysis serves as a supplement to the State of Wyoming's SIP submittal, providing additional evidence to support Wyoming's original claim that Wyoming is not expected to significantly contribute to Colorado's attainment of the 2008 NAAQS. The analysis includes additional information to support Wyoming's stance, including HYSPLIT and smoke analyses, as well as referencing modeling results which contradict the EPA's findings.

The maintenance monitor identified by the EPA as being influenced by emissions from Wyoming in 2017 is identified in Table 1, below.

Site Name	Douglas County
AQS Site ID	08-035-0004
Monitor Type	SLAMS
PQAO	CDPHE
Latitude	39.534488
Longitude	-105.070358
Attainment Status	Nonattainment

Table 1. Site Details

The EPA's modeling analysis projected the maintenance status of monitors based on the 10 days with the highest maximum 8-hour average ozone values in the base year of 2011. The top 10 days for the Douglas County monitor and the associated maximum 8-hour average ozone value are identified in Table 2, below.

Date	Starting Hour	Max 8-Hour Ozone Value (ppm)
June 24, 2011	12:00	0.099
June 7, 2011	10:00	0.084*
August 13, 2011	12:00	0.084
August 12, 2011	10:00	0.082
August 20, 2011	11:00	0.081
August 27, 2011	10:00	0.08
July 18, 2011	13:00	0.079
July 30, 2011	10:00	0.078
June 22, 2011	11:00	0.076
July 9, 2011	09:00	0.075

Table 2. Top 10 2011 Max 8-hr Ozone Days
*This value was flagged in AQS by the agency.

In analyzing these days it was noted that the June 7, 2011 value was identified as being associated with an exceptional event by the monitoring agency, the Colorado Department of Public Health and Environment (CDPHE). The comment provided in AQS about the June 7, 2011 event (from the hours of 07:00-21:00) is as follows:

"The passage of a strong low pressure system created a fold in the tropopause. Associated stratospheric air in the troposphere and deep mixing resulted in stratospheric ozone being pulled down to ground level along the Colorado Front Range and mountain regions. The affected hourly concentrations are those flagged as "ro" in the AQS database. This meteorological Condition is not controllable."

II. HYSPLIT and Smoke Impact Analysis

HYSPLIT (Hybrid Single Particle Lagrangian Integrated Trajectory) Model Analyses generate wind trajectories up to forty-eight (48) hours prior to (backwards trajectory) or after (forwards trajectory) a chosen start date of interest. A backwards trajectory is a valuable indicator of what could affect a stationary location such as a city or monitoring station. A forwards trajectory is beneficial to view possible dispersion from an emission source.

In order to assess the potential impacts of Wyoming emissions on the Douglas County monitor, backward trajectories were run for each of the 10 highest ozone days in 2011. Trajectory data in this analysis were sourced from the National Oceanic and Atmospheric Administration's (NOAA) Air Resource Laboratory (ARL) website, here: http://www.arl.noaa.gov/HYSPLIT_info.php[1]. The National Centers for Environmental Protection's (NCEP) Global Data Assimilation System (GDAS) meteorological data set

[1] Stein, A.F., Draxler, R.R, Rolph, G.D., Stunder, B.J.B., Cohen, M.D., and Ngan, F., (2015). NOAA's HYSPLIT atmospheric transport and dispersion modeling system, Bull. Amer. Meteor. Soc., **96**, 2059-2077, http://dx.doi.org/10.1175/BAMS-D-14-00110.1

using a 0.5 degree resolution was used for these analyses. The model vertical velocity option was selected for vertical motion. These modeled trajectories are displayed in Figures 1-10, below.

Fire and smoke impacts were also assessed for the 10 highest ozone days in 2011. Fire and smoke data were obtained from NOAA's ARL website, here: http://www.ready.noaa.gov/smoke_verifyhms.php[2]. Where smoke impacts were present in the map domain on a given day, those layers were included in Figures 1-10. Fire and smoke data displayed are for the high ozone day, rather than the day before.

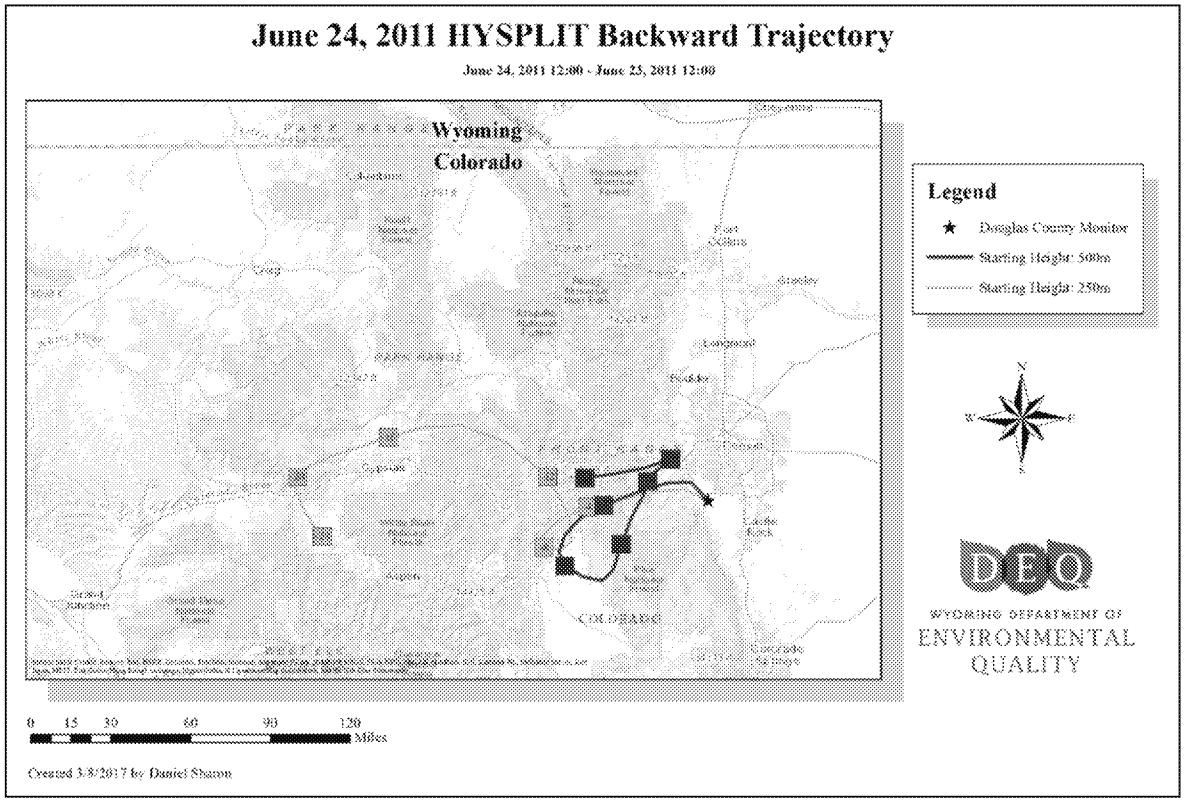


Figure 1. HYSPLIT Run for June 24, 2011

[2] NOAA. 2017. Meteorological archive data spanning June 2011 to August 2011. Downloaded from ARL website, http://www.arl.noaa.gov/index.php. Accessed March 2017.

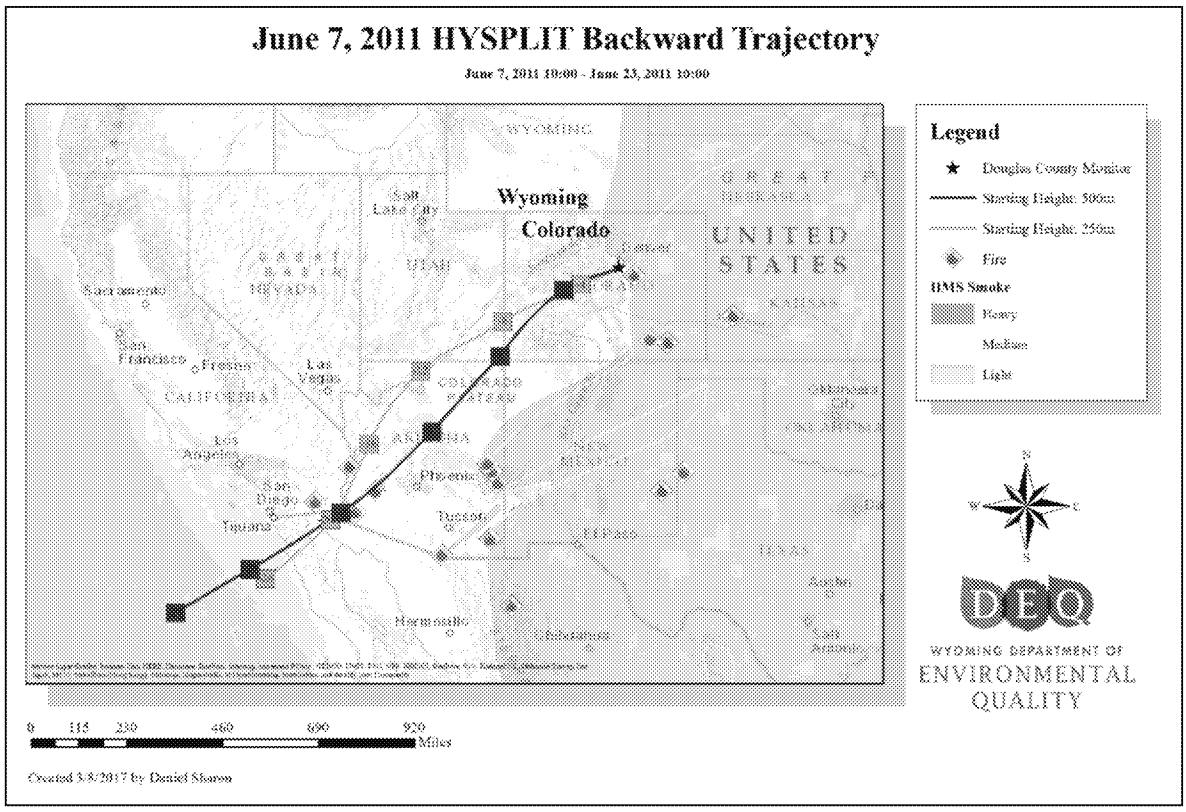


Figure 2. HYSPLIT Run for June 7, 2011

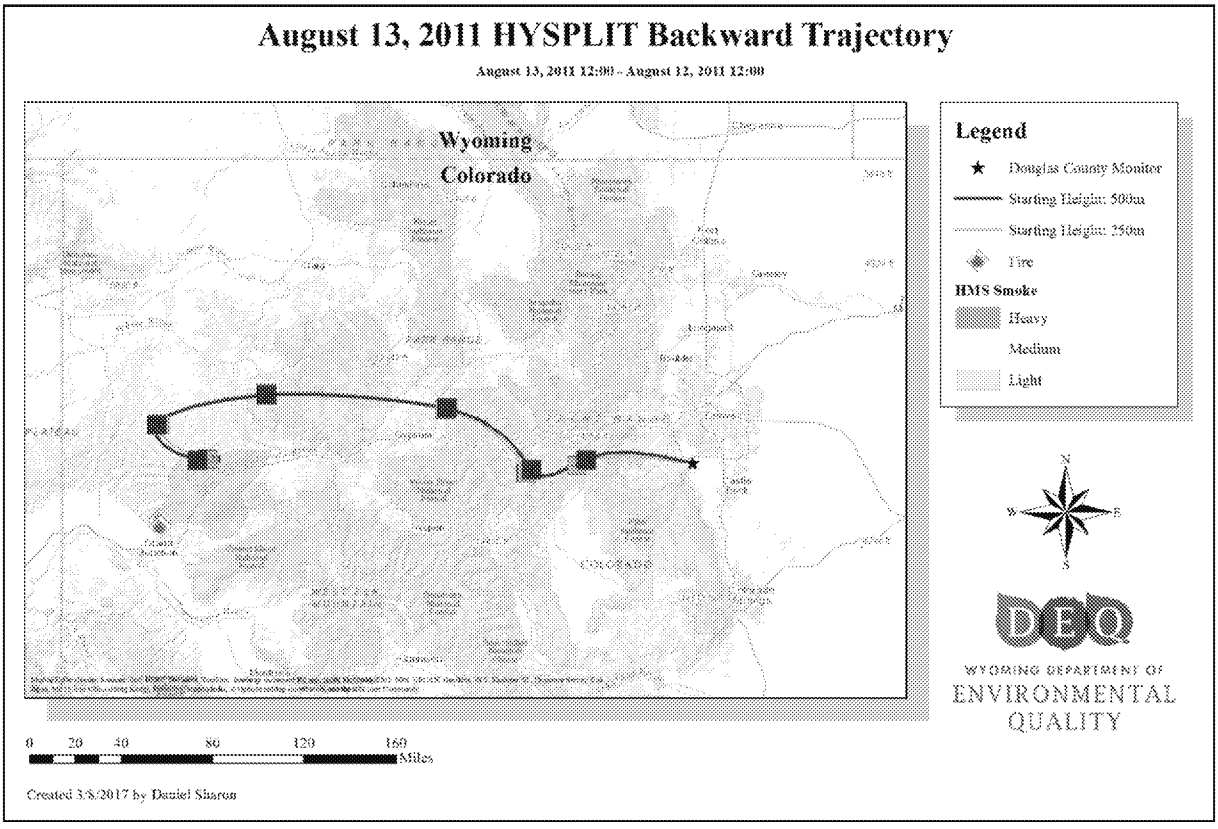


Figure 3. HYSPLIT Run for August 13, 2011

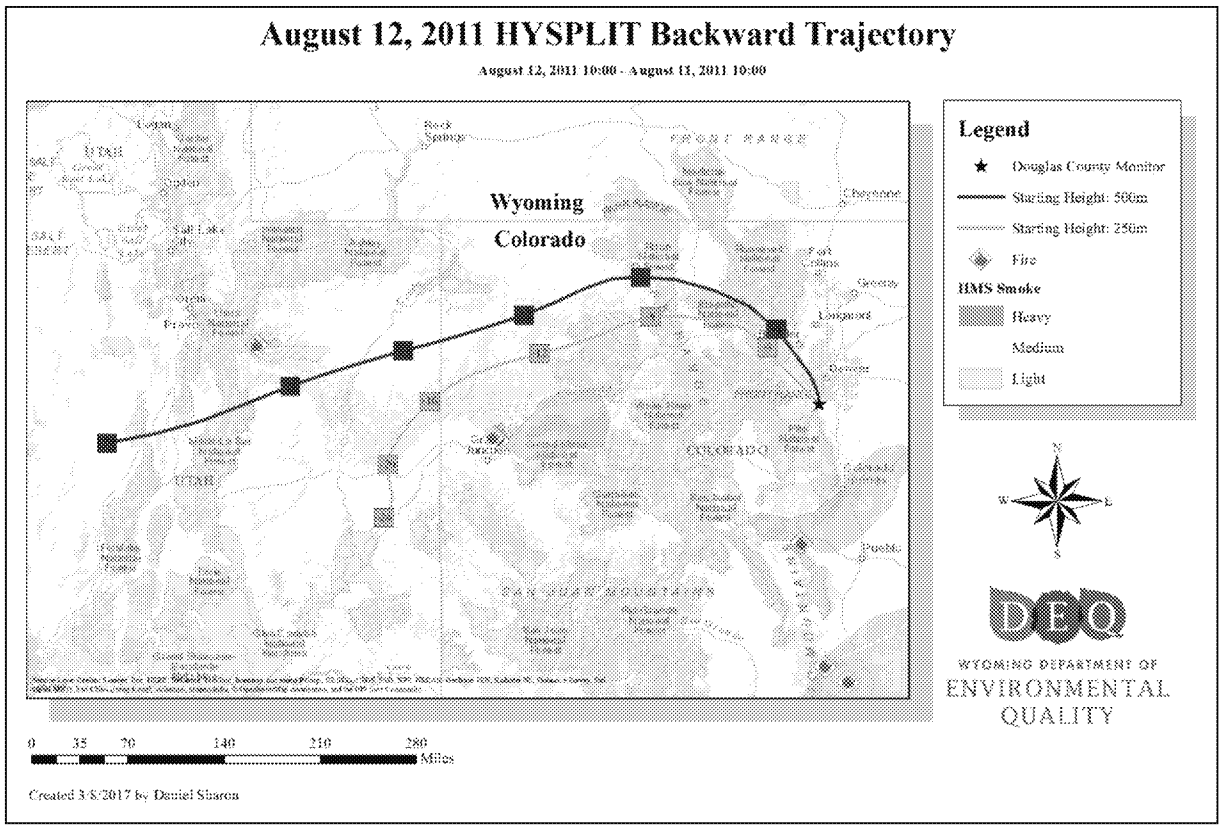


Figure 4. HYSPLIT Run for August 12, 2011

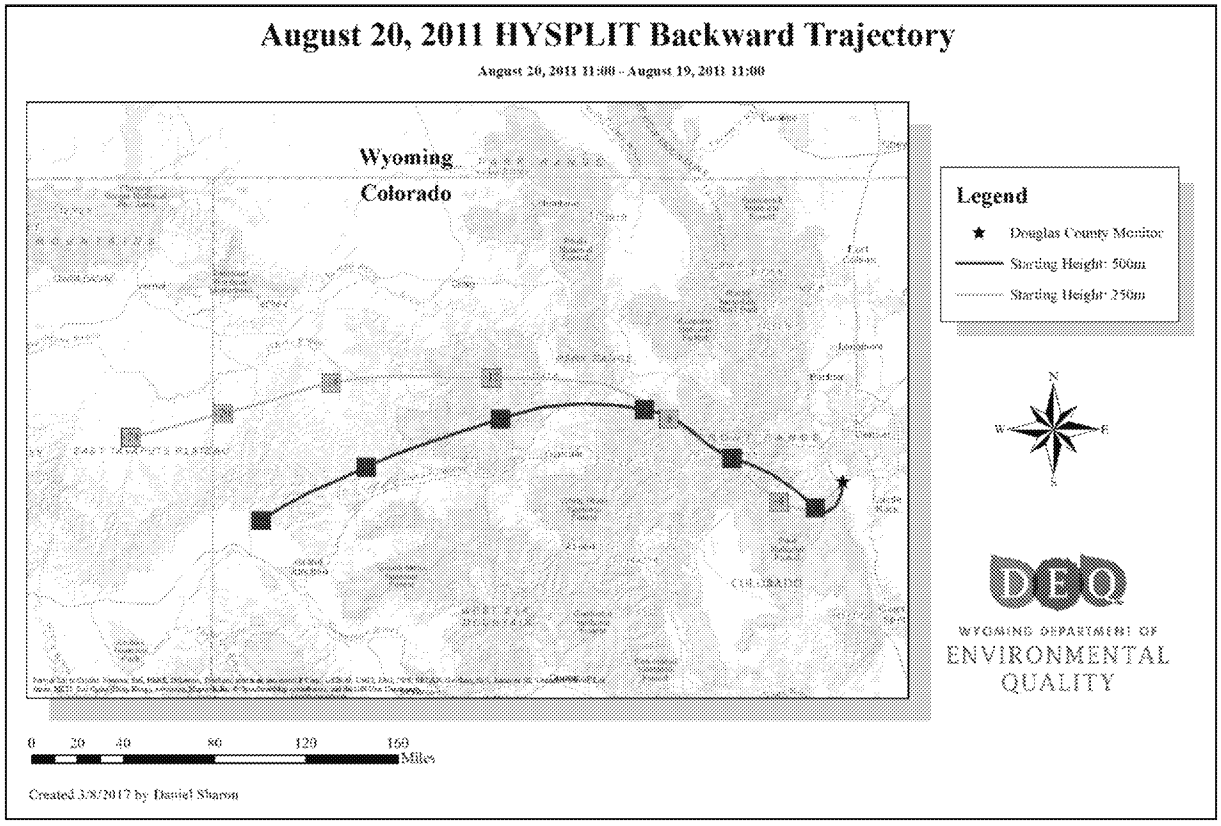


Figure 5. HYSPLIT Run for August 20, 2011

ED_002401_00000757-00005

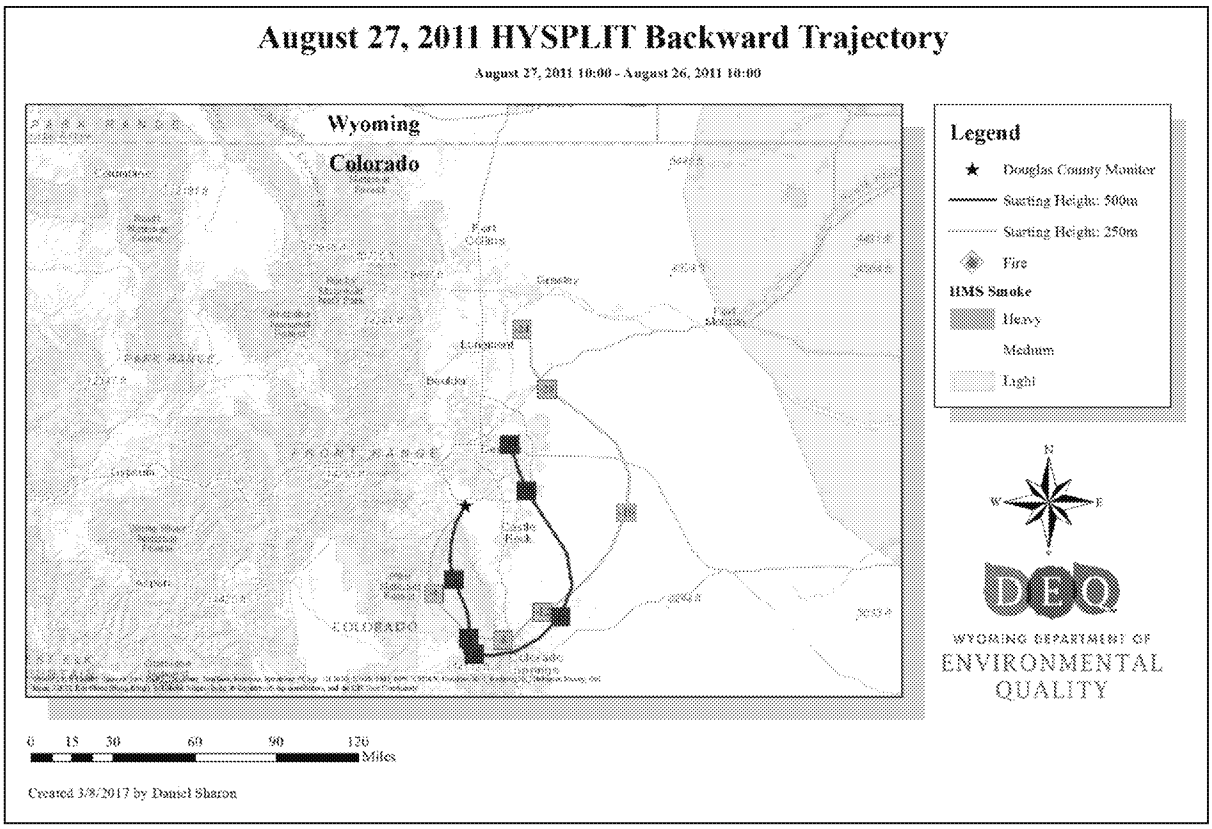


Figure 6. HYSPLIT Run for August 27, 2011

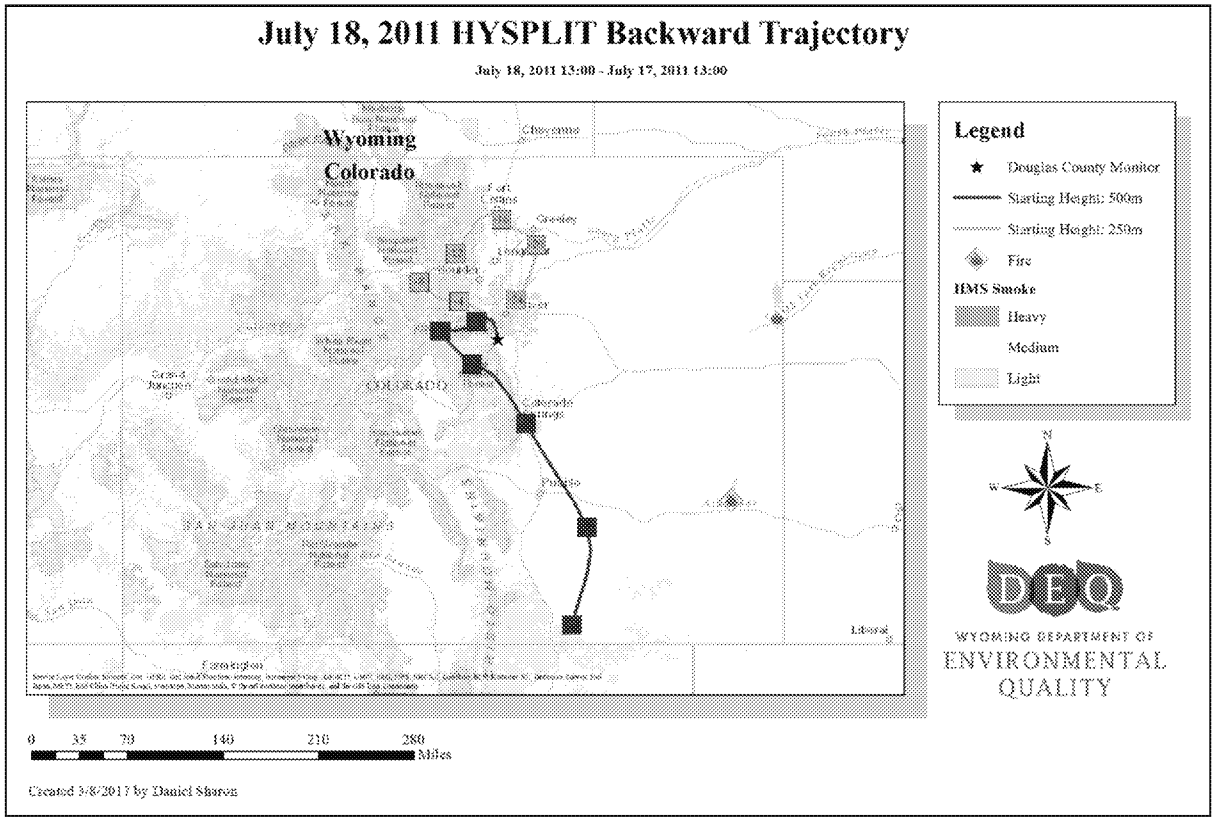


Figure 7. HYSPLIT Run for July 18, 2011

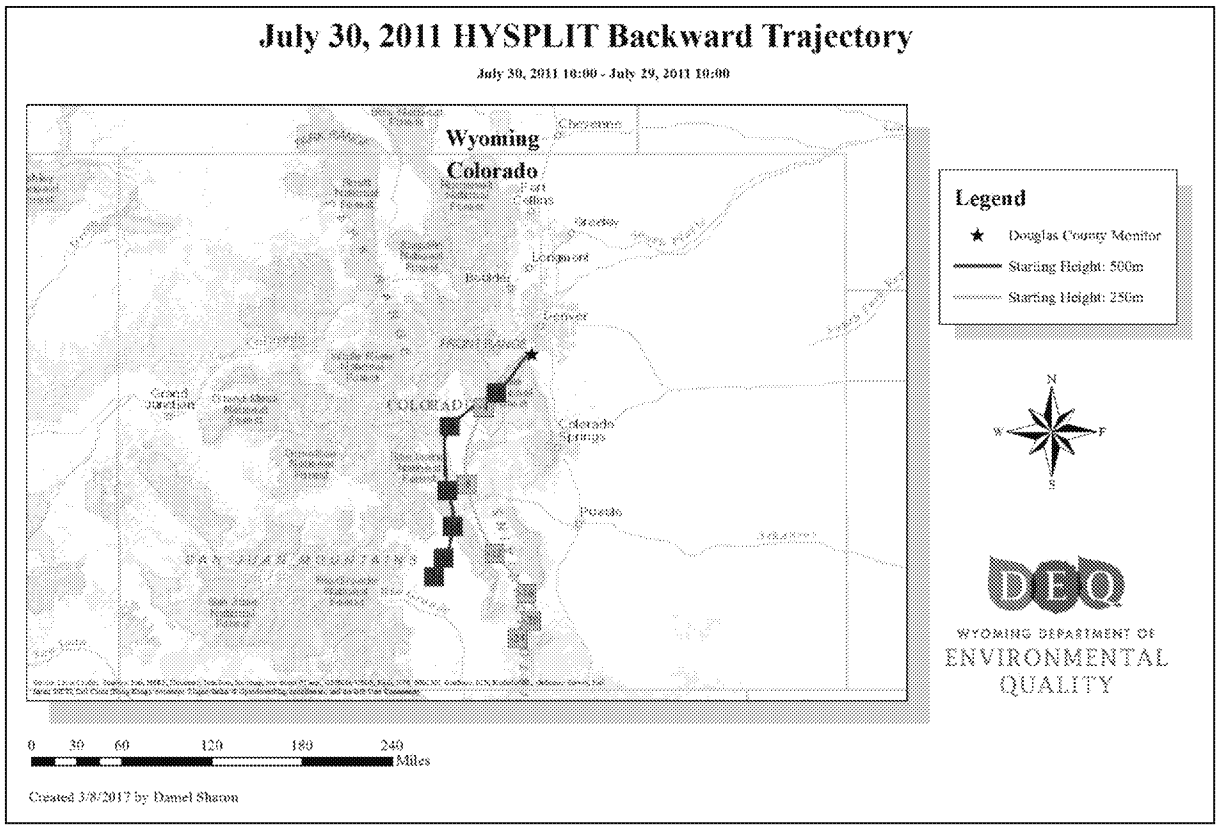


Figure 8. HYSPLIT Run for July 30, 2011

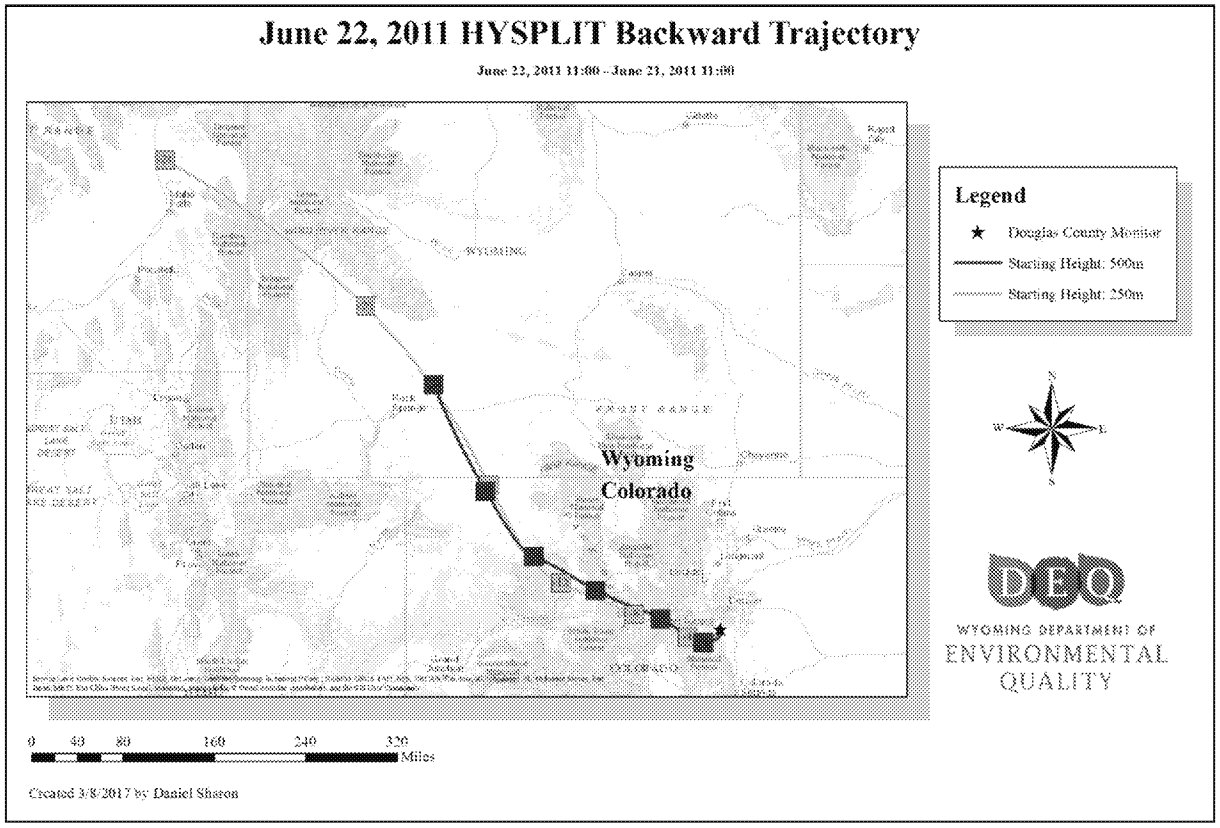


Figure 9. HYSPLIT Run for June 22, 2011

ED_002401_00000757-00007

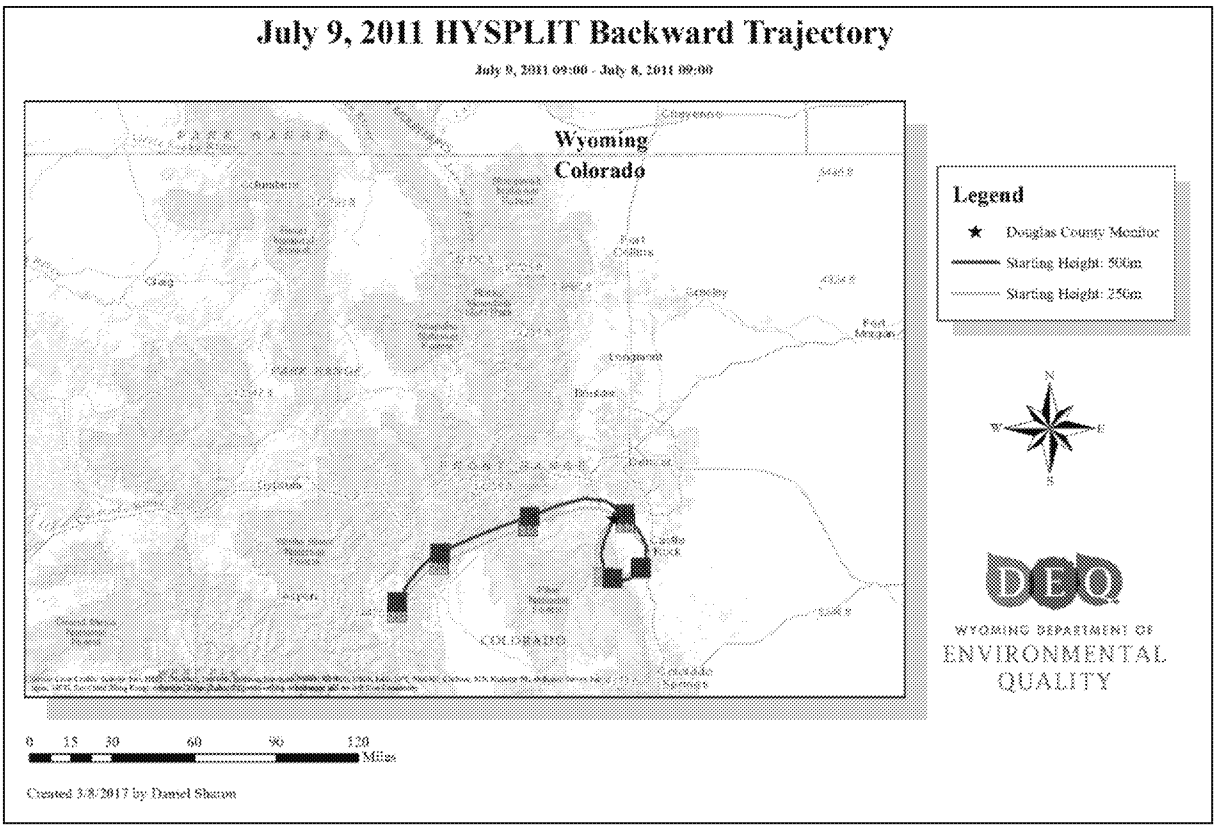


Figure 10. HYSPLIT Run for July 9, 2011

ED_002401_00000757-00008

Attachment A Supplement 1

Supplement to HYSPLIT Analysis of Parcel Trajectory for High Ozone Days in 2011 at the Douglas County, CO Monitoring Station

Wyoming Department of Environmental Quality
Air Quality Division
March 30, 2017

In addition to the HYSPLIT analyses performed to characterize parcel movement on monitored high ozone days in 2011 at the Douglas County, Colorado monitor, the Air Quality Division (AQD) performed additional HYSPLIT runs for the modeled high days that were used in the Environmental Protection Agency's (EPA) determination of Wyoming's contributions in 2017. Four (4) of the days included in the AQD's March 7, 2017 analysis were among the eight (8) days used by the EPA to calculate ozone contribution from Wyoming to the Douglas County receptor. These four days are August 20, August 13, August 12, and June 22.

The additional four (4) days included in the EPA calculations are July 4, July 5, June 9, and August 10. HYSPLIT analyses for these days in 2011 are presented in Figures 1-4, below. As with the AQD's March 7, 2017 analysis, trajectory data were sourced from the National Oceanic and Atmospheric Administration's (NOAA) Air Resource Laboratory (ARL) website, here: http://www.arl.noaa.gov/HYSPLIT_info.php[1]. The National Centers for Environmental Protection's (NCEP) Global Data Assimilation System (GDAS) meteorological data set using a 0.5 degree resolution was used for these analyses. The model vertical velocity option was selected for vertical motion.

Fire and smoke impacts were also assessed for the additional four modeled high ozone days. Fire and smoke data were obtained from NOAA's ARL website, here: http://www.ready.noaa.gov/smoke_verifyhms.php[2]. Where smoke impacts were present in the map domain on a given day, those layers were included in Figures 1-4. Fire and smoke data displayed are for the high modeled ozone day, rather than the day before.

Because no start hour data were provided by the EPA for their modeled MDA8 concentrations on the high modeled ozone days, all trajectories were run backwards from 11:00 AM on the day in question. 11:00 is the average of the start times for the high MDA8 concentrations on the top 10 high monitored ozone days in 2011.

---

[1] Stein, A.F., Draxler, R.R, Rolph, G.D., Stunder, B.J.B., Cohen, M.D., and Ngan, F., (2015). NOAA's HYSPLIT atmospheric transport and dispersion modeling system, Bull. Amer. Meteor. Soc., **96**, 2059-2077, http://dx.doi.org/10.1175/BAMS-D-14-00110.1

[2] NOAA. 2017. Meteorological archive data spanning June 2011 to August 2011. Downloaded from ARL website, http://www.arl.noaa.gov/index.php. Accessed March 2017.

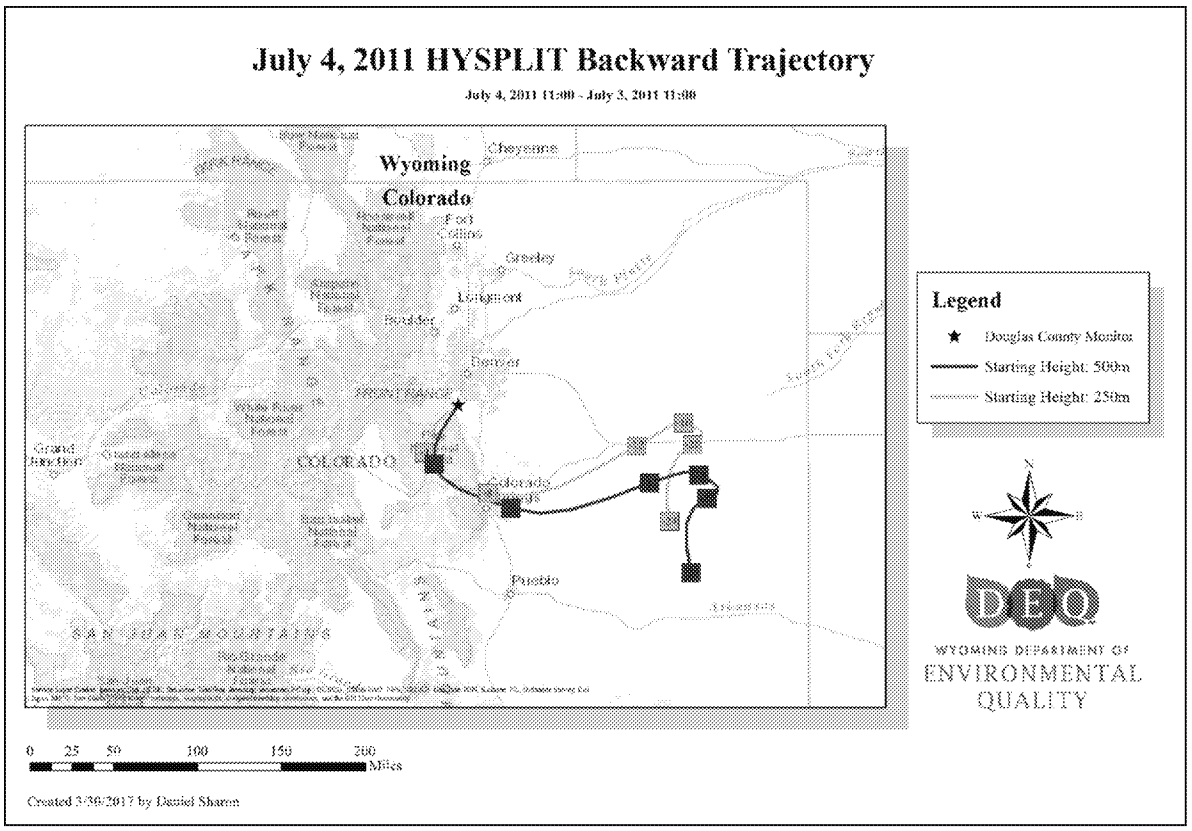


Figure 1. HYSPLIT Run for July 4, 2011

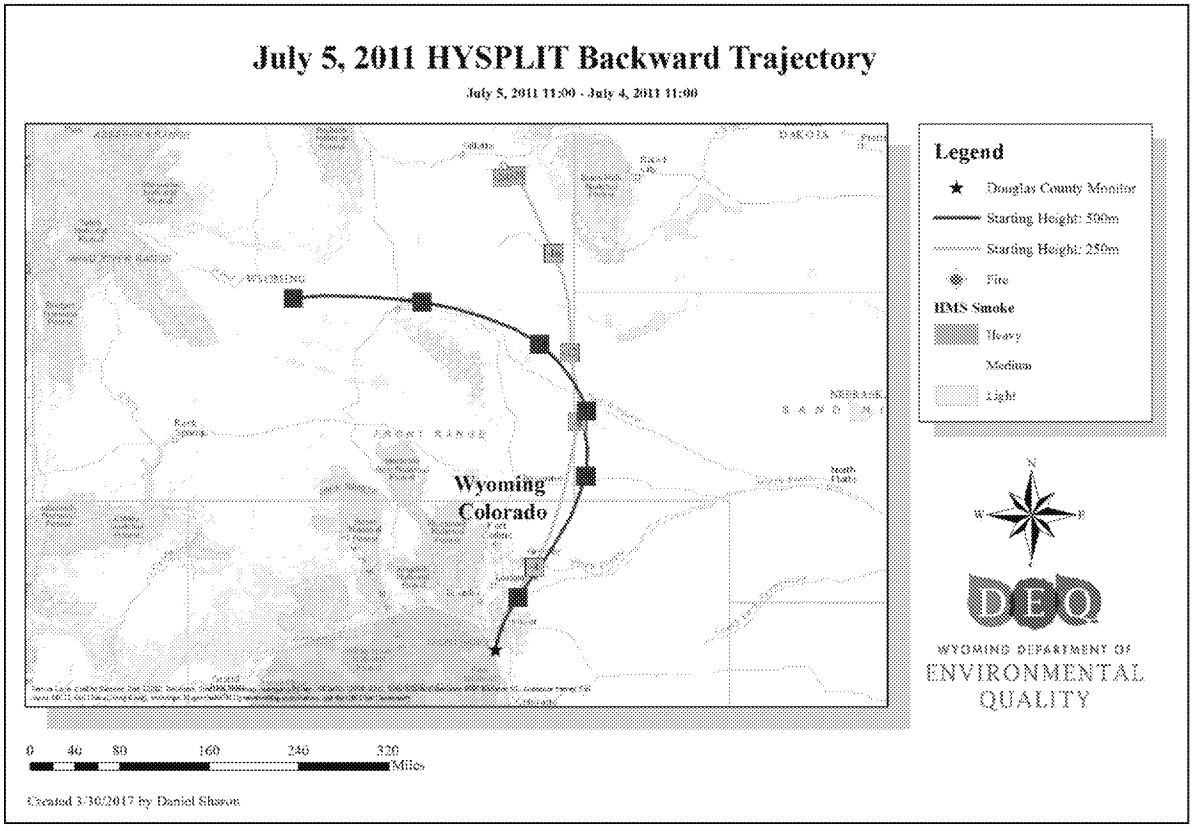


Figure 2. HYSPLIT Run for July 5, 2011

ED_002401_00000757-00010

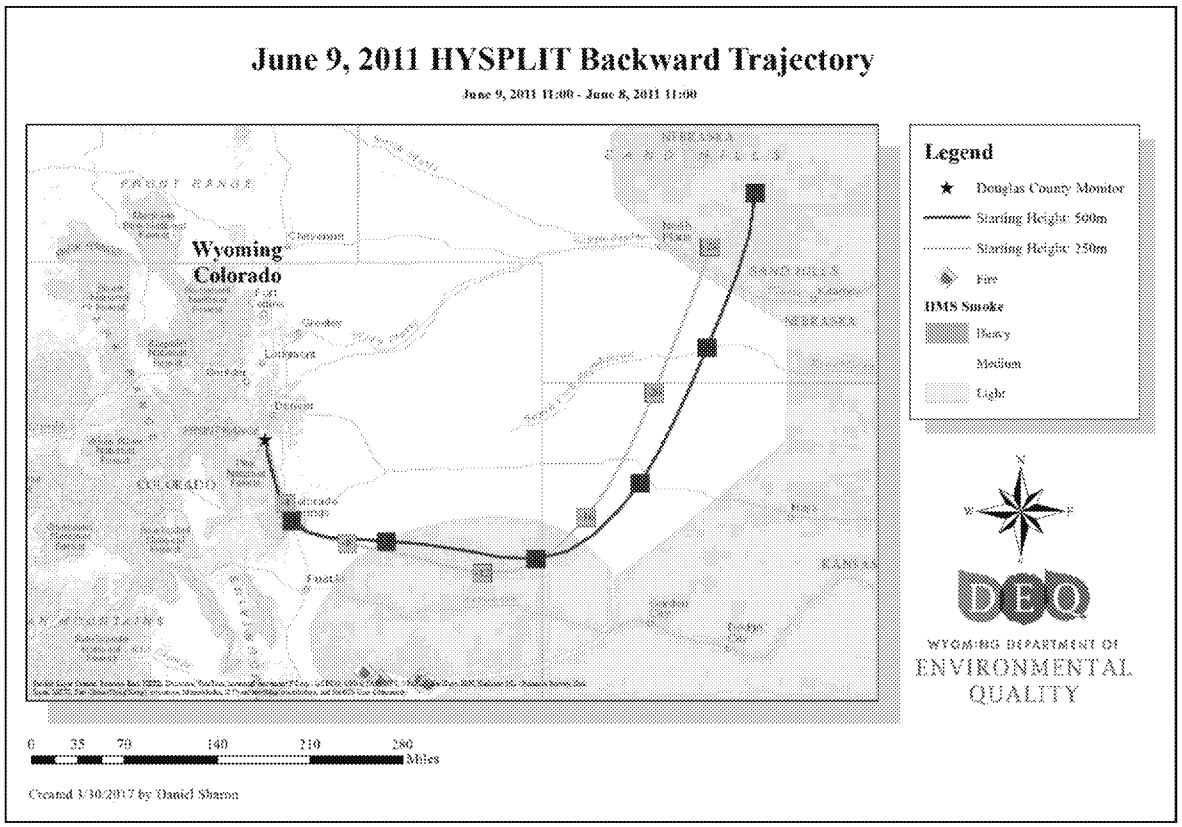


Figure 3. HYSPLIT Run for June 9, 2011

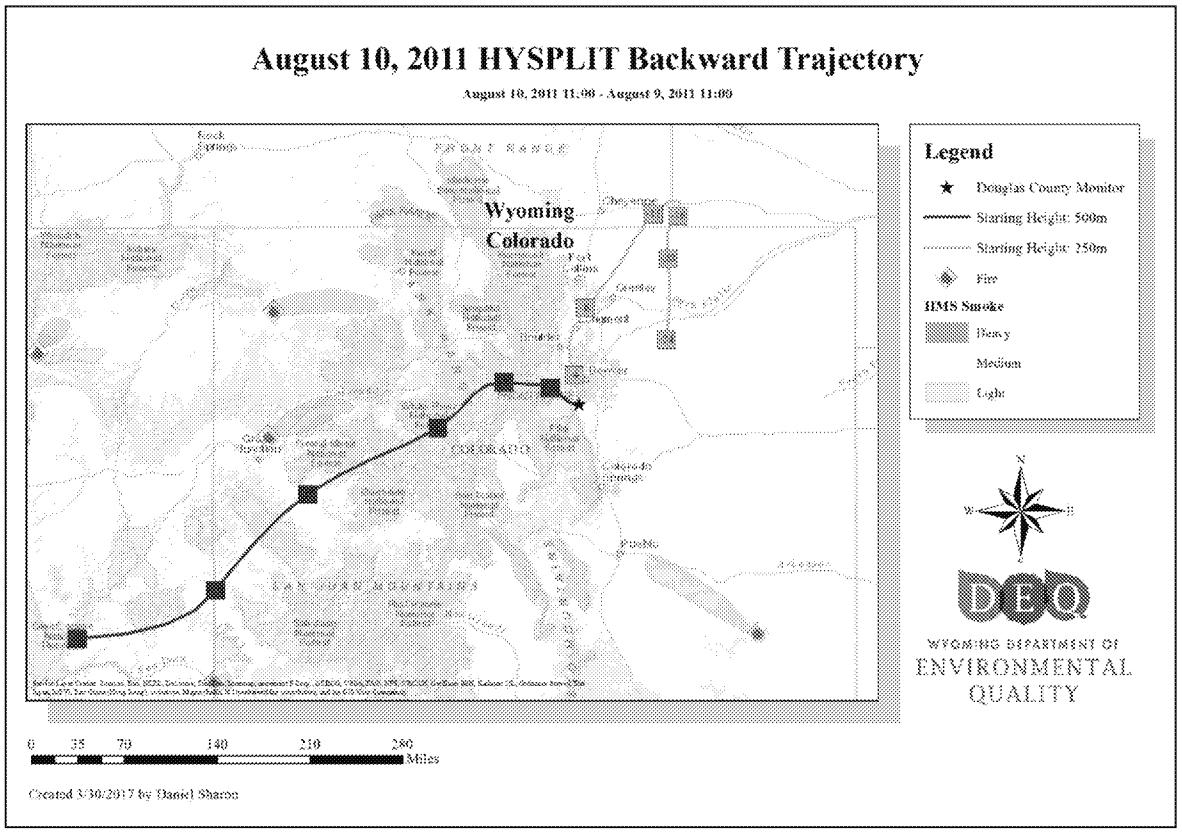


Figure 4. HYSPLIT Run for August 10, 2011

ED_002401_00000757-00011

As can be seen in Figures 1-4 above, the only high modeled ozone days where trajectories passed through Wyoming were July 5, 2011 and August 10, 2011. Figure 2, showing the July 5, 2011 trajectory, also shows significant smoke impacts directly adjacent to the Douglas County monitor which would be expected to have a greater impact on the ozone value at this site than emissions from Wyoming and likely had a confounding effect on model performance. Figure 4 shows that on August 10, 2011 only the 250 meter trajectory passed through a small section of southeast Wyoming.

ED_002401_00000757-00012

Attachment A Supplement 2

Calculation of 2017 Contribution from Wyoming to Denver

EPA performed nationwide air quality modeling to support the CSAPR Update which was finalized on September 7, 2016. As described in the Air Quality Modeling Technical Support Document (AQMTSD) for this rule, air quality modeling was used to identify monitoring sites that are projected to be nonattainment and/or maintenance receptors for the 2008 NAAQS in 2017. The modeling was also used, in part, to quantify the contributions from projected 2017 anthropogenic emissions in each state, individually, to 2017 average design values at each receptor site. The modeling-based daily 8-hour contributions were used to calculate an average contribution metric, as documented in the AQMTSD. The results of this modeling identified that projected 2017 anthropogenic emissions in Wyoming contribute 1.18 ppb to the 2017 average design value at a maintenance receptor site in Douglas County, Colorado.

The AQMTSD, Table 4-1 provides an example of the calculation of the average contribution metric. Below we provide a table containing the data used to calculate this metric for Wyoming's contribution to the Douglas County receptor. The table includes (1) the 2017 model-predicted maximum daily average 8-hour (MDA8) ozone concentrations for this site on those days with modeled ozone exceedances in 2017 (i.e., MDA8 values $\geq$ 76 ppb), (2) the daily 8-hour average contributions from Wyoming corresponding to the time of the MDA8 concentration, and (3) the "pseudo" concentration which is the difference between modeled MDA8 concentration and the contribution from Wyoming. The data in the table are rank-ordered based on the MDA8 ozone concentrations on these days. The 2017 average design value for the Douglas County site is 75.5 ppb. Using the data in table below, the Relative Contribution Factor (RCF) for Wyoming to this site is:

(79.700 – 78.446) / 79.700 = 0.01573

The contribution metric value for Wyoming is calculated as:

75.5 x 0.01573 = 1.1876 which is truncated to 1.18 ppb

ED_002401_00000757-00013

Data for Calculating Ozone Contribution from Wyoming to the Douglas County Receptor (units are ppb).

Month	Day	2017 Predicted MDA8 O3 (ppb)	Contributions from WY (ppb)	"Pseudo" 8-Hr O3 for WY (ppb)
8	20	83.729	0.695	83.034
8	13	82.590	1.732	80.858
7	4	80.980	0.651	80.329
7	5	79.785	3.949	75.836
6	9	78.356	0.136	78.220
8	10	78.015	0.242	77.773
8	12	77.522	1.065	76.457
6	22	76.630	1.565	75.065
Multi-Day Average =>		79.700	-	78.446
2017 Average Design Value is 75.5 ppb		RCF =>	0.01573	-
		Contribution =>	1.1876	-
		Truncated Contribution =>	1.18	-

Attachment B

Denver Metro/North Front Range 2017 Ozone Source Apportionment Modeling

Abstract

The Denver Metro/North Front Range Moderate Area Ozone State Implementation Plan (SIP) included 2017 ozone attainment demonstration modeling for the 2008 0.075 ppm ozone NAAQS. The attainment demonstration modeling used a 2011 CAMx modeling platform that was based on the Western Air Quality Study (WAQS) CAMx 2011b database available through the Intermountain West Data Warehouse (IWDW (http://views.cira.colostate.edu/tsdw/)). Additional modeling was performed to look ahead to the new 2015 0.070 ppm ozone NAAQS. Two types of 2017 ozone source apportionment modeling were conducted: (1) Local Source Analysis that analyzed ozone contributions from different source sectors within Colorado; and (2) Transport Analysis that analyzed ozone contributions due to emissions from western states. The ozone source apportionment (SA) modeling results can be visualized using a web-based SA Vis Tool that is discussed in this wiki. The Denver ozone SIP modeling was conducted by Ramboll Environ (http://www.ramboll-environ.com/) and Alpine Geophysics (http://www.alpinegeophysics.com/) under contract to the Denver Regional Air Quality Council (RAQC (http://raqc.org/)) along with the Colorado Department of Public Health and Environment (CDPHE) Air Pollution Control Division (APCD (https://www.colorado.gov/pacific/cdphe/apcd)).

Local Source Analysis SA Vis Tool (http://vibe.cira.colostate.edu/WAQS_SA_CO)

Transport Analysis SA Vis Tool (http://vibe.cira.colostate.edu/WAQS_SA_DENVER)

Overview

The Denver 2017 ozone source apportionment (SA) modeling was conducted using the Comprehensive Air-quality Model with extensions (CAMx (http://www.camx.com/)) photochemical grid model (PGM) Anthropogenic Precursor Culpability Assessment (APCA) version of the Ozone Source Apportionment Technology (OSAT). Two types of Denver 2017 ozone SA modeling were conducted following the procedures in the March 21, 2016 SA Modeling Plan (/wiki/Attachments/Source Apportionment/Denver/Denver_SA_Plan_2016-03-21.pdf): (1) Local Source Analysis; and (2) Transport Analysis. As described in more detail below, the Local Source Analysis ozone SA modeling calculated the 2017 ozone contributions resulting from different source sectors in Colorado. The Transport Analysis calculated ozone contributions due to anthropogenic emissions from western states as well as eastern U.S., Mexico, Canada, offshore and Boundary Conditions (BCs) around the CONUS modeling domain (i.e., contributions due to international transport and stratospheric ozone). The Denver ozone modeling used three domains as shown in Figure 1: (i) a Continental U.S. (CONUS) domain at 36 km grid resolution; (ii) a western U.S. (WESTUS) domain at 12 km grid resolution; and (iii) a Colorado domain at 4 km grid resolution. The Local Source Analysis ozone SA modeling was run on just the Colorado 4 km domain using boundary conditions (BCs) extracted from the 2017 CAMx 36/12 km CONS/WESTUS domain simulation. The Transport Analysis ozone SA run was run on the 36/12 km CONUS/WESTUS domains using BCs for the CONUS domain from the MOZART (https://www2.acom.ucar.edu/gcm/mozart) Global Chemistry Model (GCM). A description of the CAMx OSAT/APCA ozone source apportionment tool is provided in Chapter 7 of the CAMx User's Guide (http://www.camx.com/files/camxusersguide_v6-30.pdf) .

The Denver 2011 CAMx modeling platform was based on the CAMx 2011b 36/12/4 km modeling platform developed by the Western Air Quality Study (WAQS) and available on the Intermountain West Data Warehouse (IWDW (http://views.cira.colostate.edu/tsdw/)). Details on the development of the WAQS CAMx 2011b modeling platform, including meteorological modeling and model performance evaluation (MPE), emissions modeling and the CAMx base case modeling, are available in reports (http://views.cira.colostate.edu/tsdw/Documents/?file=WAQS_Base11b_MPE_Draft_21Jan2016.doc) on the IWDW. The Denver ozone modeling adopted the WAQS 36 km CONUS and 12 km WESTUS domains, but redefined the 4 km domain to focus on Colorado (Figures 1 and 2). The meteorological inputs for the Denver CAMx database used the same WAQS WRF 2011 36/12/4 km simulation output, but they were re-processed using the latest WRFCAMx processor (WRFCAMx v4.4 released April 2016). For the Denver CAMx 36/12 km domains, emissions from version 2 of the 2011 National Emissions Inventory (NEI (https://www.epa.gov/air-emissions-inventories/2011-national-emissions-inventory-nei-data)) were used. For the 4 km Colorado domain, emissions were provided by the CDPHE/APCD. On-road mobile source emissions were based on the MOVES2014 on-road mobile source emissions model. For the Denver ozone Nonattainment Area (NAA), detailed link-based activity data were used based on Traffic Demand Model (TDM) output. More details on the Denver ozone SIP modeling database are provided in the Modeling Protocol (/wiki/Attachments/Source Apportionment/Denver/Model_Protocol_Denver_RAQC_2017SIPv4.pdf), 2011 base case and model performance evaluation report (/wiki/Attachments/Source Apportionment/Denver/Denver_2017SIP_MPE_Finalv1.pdf) and 2017 ozone projection modeling report (/wiki/Attachments/Source Apportionment/Denver/Denver_2017SIP_2017AttainDemo_Finalv1.pdf).

Figure 1. Denver 36 km CONUS, 12 km WESTUS and 4 km Colorado CAMx modeling domains.

Denver 2017 Local Source Analysis Ozone Source Apportionment Modeling

The Local Source Analysis ozone source apportionment modeling was conducted using the Denver 2017c CAMx modeling database for the Colorado 4 km domain and the May-August 2011 modeling period. Boundary Conditions (BCs) for the Colorado 4 km domain were based on the CAMx 2017c 36/12 km CONUS/WESTUS simulation. The Colorado 4 km modeling domain is shown in Figure 2. The Anthropogenic Precursor Culpability Assessment (APCA[1]) version of the CAMx Ozone Source Apportionment Technology (OSAT) was used. CAMx version v6.3 (released April 2016) was used in the Denver ozone SA modeling that has several updates to CAMx v6.1 (released April 2014) used in the WAQS modeling. One important update of CAMx v6.3 is the new OSAT/APCA source apportionment algorithms that track reactive nitrogen and odd oxygen through the chemical species; more details on the differences on the OSAT/APCA formulations are given in Section 7.1 of the CAMx v6.3 user's guide (http://www.camx.com/files/camxusersguide_v6-30.pdf) .

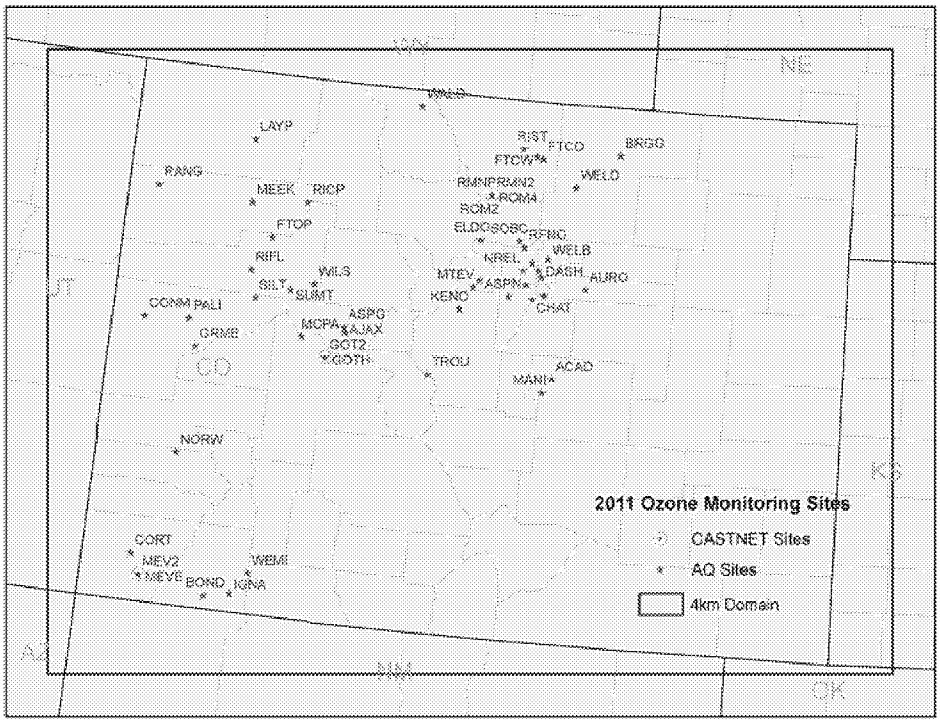


Figure 2. Denver 4 km Colorado modeling domain with ozone monitors that were operating during some portion of 2011.

Local Source Analysis Source Apportionment Groups

The Denver 2017 Local Source Analysis source apportionment modeling was configured to obtain ozone contributions from 4 Source Regions and 7 Source Categories. Separate ozone contributions were obtained for each Source Group that were defined as the intersection between the Source Regions and Source Categories. The Denver 2017 Local Source Analysis ozone source apportionment modeling used the following 4 Source Regions and 7 Source Categories;

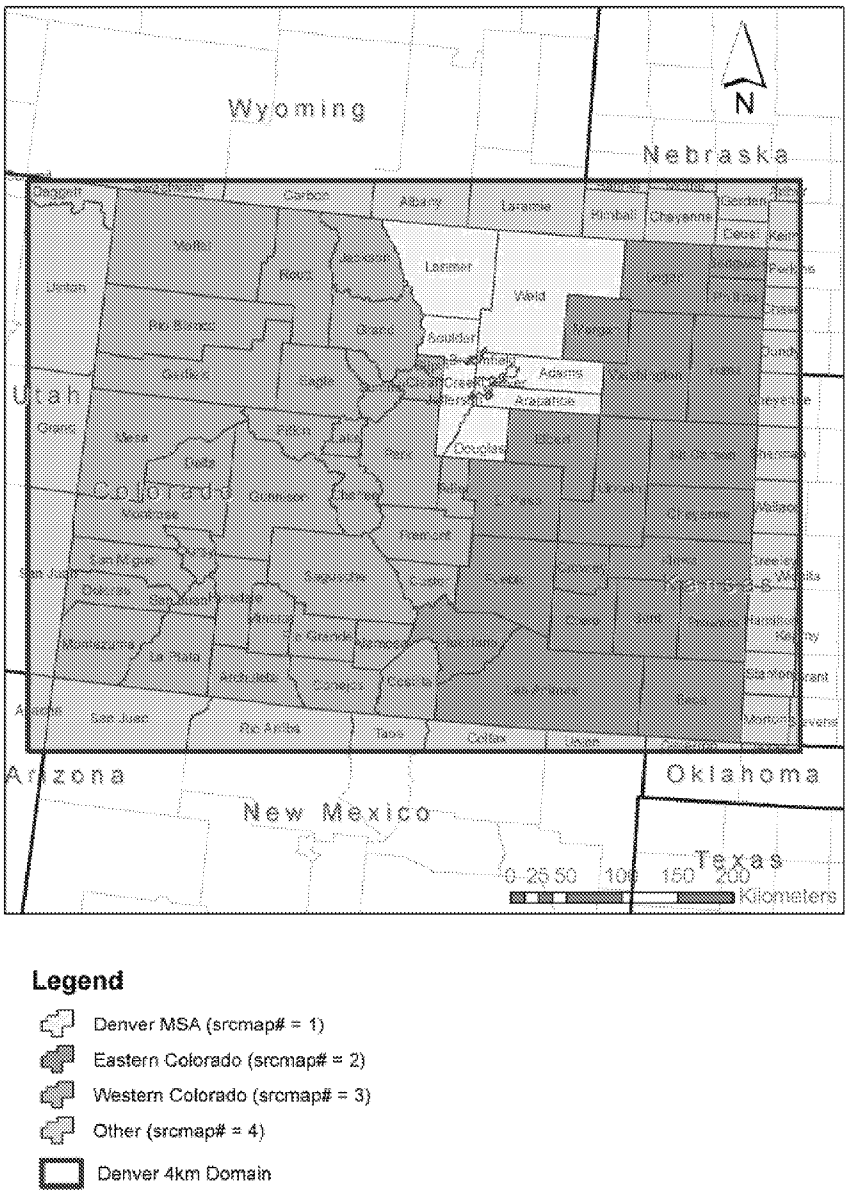
Source Regions (Figure 3) (4)

- 9 counties that are included in the DMA/NFR NAA (see Figure 4)[2];
- Western Colorado;
- Eastern Colorado; and
- Slivers of Surrounding States

Source Categories (7)

- Natural Emissions (Biogenic, All Fires and Lightning NOX)
- Oil and Gas Emissions;
- On-Road Mobile;
- Non-Road Mobile;
- EGU Point;
- Non-EGU Point; and
- Remainder Anthropogenic.

With 4 Source Regions and 7 Source Categories, and the need to always include initial concentrations (IC) and Boundary Conditions (BCs) as their own separate Source Groups, that results in a total of 30 Source Groups for which separate ozone source contributions were obtained. The Western and Eastern Colorado Source Regions were defined as west and east of the Denver Metro/NFR NAA as shown in Figure 3. The use of separate Western and Eastern Colorado Source Regions will allow a better identification of the contributing sources. For example, the analysis separates the contributions from oil and gas emissions from the Denver-Julesburg Basin (east) versus the Piceance Basin (west). The CAMx 2017c 4 km Local Analysis Source Apportionment was conducted for May 1 through August 31 period using the 2011c 4 km WRF meteorology and 2017c base year emission inventory. Figure 4 displays the Denver Metro/NFR ozone NAA with locations of ozone monitoring sites where the results were analyzed.



Legend

- Denver MSA (srcmap# = 1)
- Eastern Colorado (srcmap# = 2)
- Western Colorado (srcmap# = 3)
- Other (srcmap# = 4)
- Denver 4km Domain

Figure 3. Denver Local Source Analysis Source Regions.

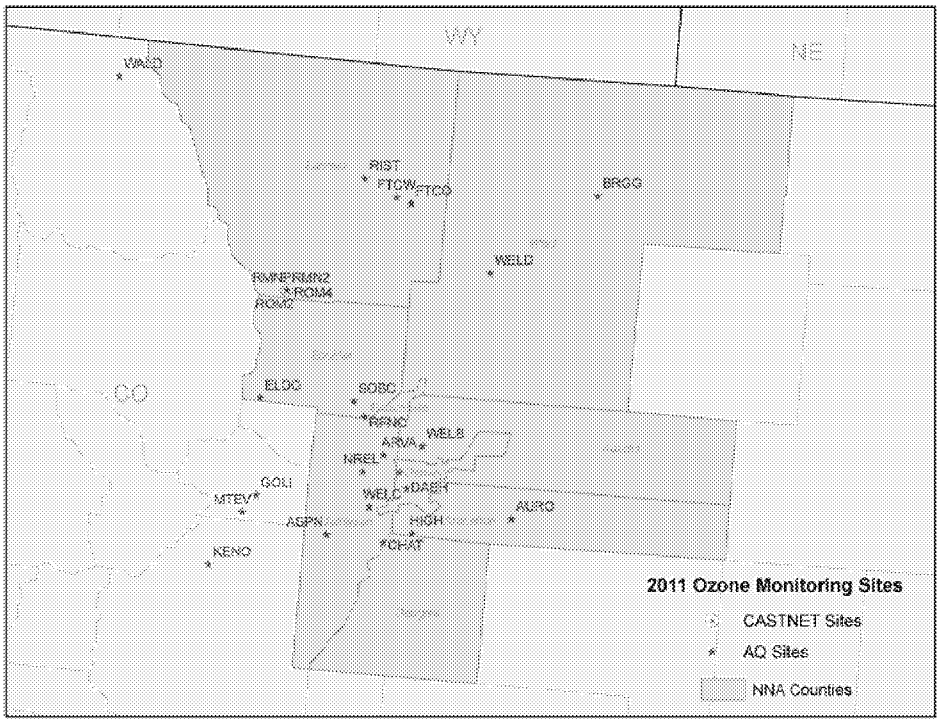


Figure 4. Nine county Denver Metro/NFR ozone NAA and locations of ozone monitoring sites operating in 2011 (whole counties depicted, actual NAA excludes the northern portions of Larimer and Weld Counties).

Local Source Analysis Ozone Source Apportionment Modeling Results

The CAMx 2017c 4 km Local Source Analysis ozone source apportionment modeling results were summarized in a PowerPoint Presentation (PPT (/wiki/pages/new?title=enter%20url%20or%20page%20name)). The ozone contributions of each Source Group to the maximum daily 8-hour average (MDA8) ozone concentrations at each monitoring site within the Denver Metro/NFR NAA and vicinity for each day of the modeling period were extracted and loaded into a web-based source apportionment visualization tool (SA Vis Tool) that can be accessed here: Local Source Analysis SA Vis Tool (http://vibe.cira.colostate.edu/WAQS_SA_CO)

The SA Vis Tool generates pie charts of 2017 ozone contributions by Source Region, Source Category or both (i.e., Source Groups) for monitoring sites within the Colorado 4 km modeling domain. The use of the SA Vis Tool involves the following:

- Selection of whether ozone SA visualization is for monitors from the AQS or CASTNet monitoring networks.
- Selection of the monitor where data is requested. This request can be made by selecting the monitor from drop down menus for State, County and Site or by using the map and selecting the monitor location.
- Select the day where results are desired. The day can be selected from a top five ozone day list for that monitor, from a drop down menu of ranked ozone days from high to low during the May-Sep modeling period or from a calendar. Note that multiple days can also be selected and the SA Tool will visualize the average contribution across those days.
- The SA Vis Tool will then visualize the modeled 2017 MDA8 ozone value for the selected monitoring site and day:
  - The top bar in the plot will list the modeled 2017 MDA8 ozone for the selected site/day(s), the amount the ozone is due to BCs around the 4 km Colorado domain (BC-4km) and the amount of the rest of the ozone (Non-BC); o Initially, the upper pie chart will be the Non-BC ozone contributions by Source Regions;
  - Initially, the lower pie chart will be the Non-BC ozone contributions by Source Categories;
  - Next to the lower pie chart will be a 10-day time series centered on the day in question that shows total MDA8 ozone and ozone due to BC-4km;
  - The monitoring site or day can be changed using drop down menus in the top left. The day can also be changed by clicking on the MDA8 ozone for a new day in the time series chart.
  - The Region/Category pie charts can be switched.
  - Clicking on one of the pie slices in the top pie chart provides more information in the bottom pie chart about that slice.

Figure 5 displays an example from the Local Source Analysis SA Vis Tool for the Chatfield monitoring site in Douglas County, Colorado based on August 26, 2011 meteorology. The total modeled 2017 MDA8 ozone is 74.2 of which 56.2 ppb (76%) is due to the BC-4km and the remaining 18.0 ppb (24%) non-BC portion is due to emissions in the Colorado 4 km domain. The pie charts show the contributions from the non-BC portion of the ozone with the percent numbers with the pie slices displaying the percent of total ozone (i.e., with the BC-4km contribution). For Figure 5, ozone from the Denver Metro/NFR NAA contributes 20.3% of the total ozone so since the non-BC portion of the ozone is 24% the NAA pie slice takes up 84% of the non-BC pie chart. In the lower Source Category pie chart the slice size is the fraction of the non-BC portion while the percent contributions are the contribution to the total ozone. The key to the definitions of the Local Source ozone SA modeling Source Contributions are as follows:

- NAT = Natural Emissions (Biogenic, Lightning NOx and Fires)
- OG = Oil and Gas Emissions
- OR = On-Road Mobile Source Emissions

- NR = Non-Road Mobile Source Emissions
- EGU = Electrical Generating Units Point Source Emissions
- nEGU = Non-EGU Point Source Emissions
- REM = Remainder Anthropogenic Emissions (Area Sources)

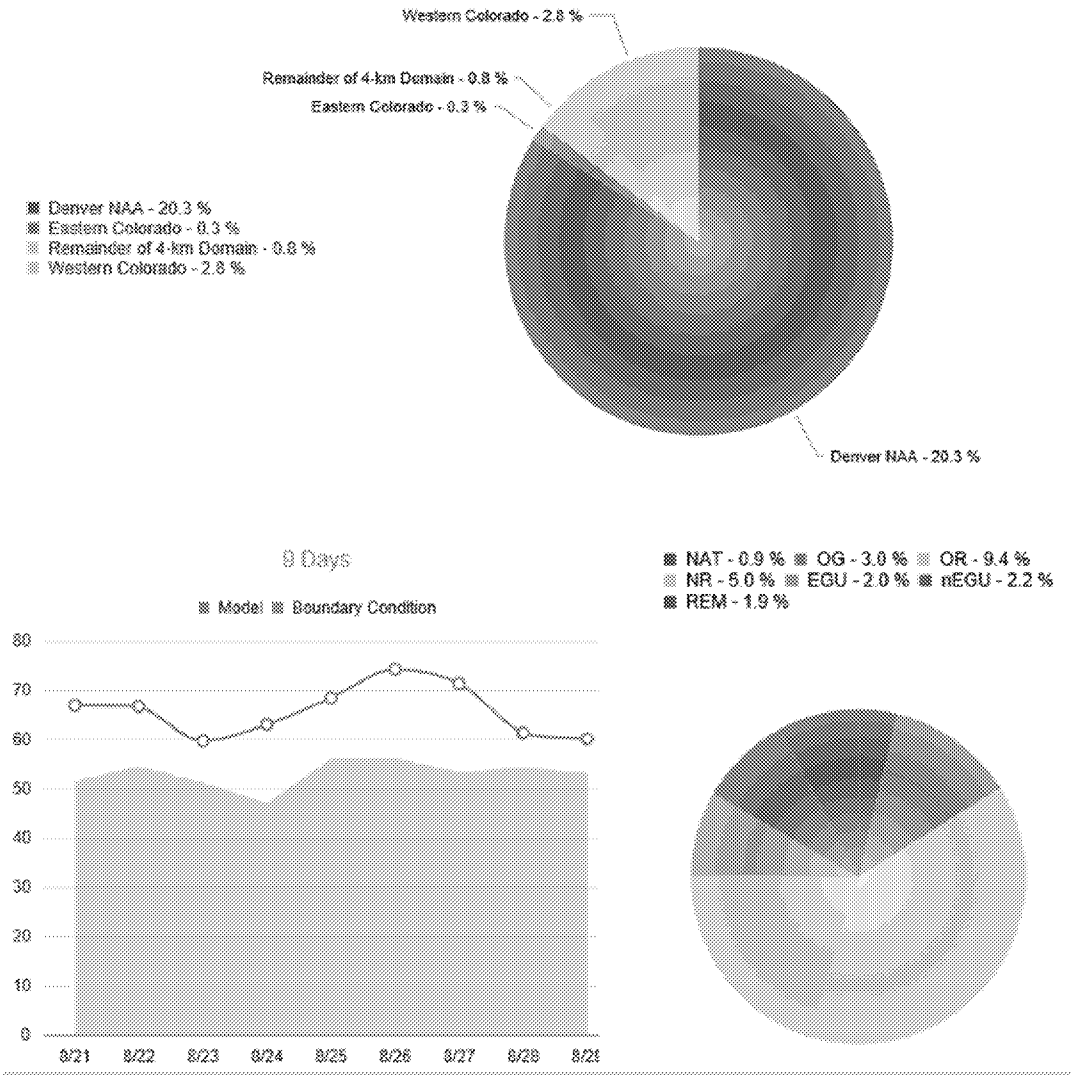


Figure 5. Example Local Source SA Vis Tool display for Chatfield (Douglas County, Colorado) on August 26, 2016 that has total modeled 2017 MDA8 ozone of 74.2 with 58.2 ppb due to BC-4km and 18.0 ppb due to non-BC (Colorado sources), pie chart slice sizes are contributions to non-BC ozone and percentages are contributions to total MDA8 ozone.

Transport Analysis Ozone Source Apportionment Modeling

The Denver 2017 ozone source apportionment Transport Analysis ran the CAMx v6.3 APCA ozone source apportionment tool using a fully linked two-way nested 36/12 km 2017c modeling platform (see Figure 1). The ozone Transport Analysis was used to obtain the contributions of anthropogenic emissions from each western state and the portions of Mexico and Canada within the 36 km CONUS domain (Figure 1) to ozone concentrations in the Denver Metro/NFR NAA and other locations in the western U.S. The ozone Transport Analysis also obtained the ozone contributions due to natural emissions within the CONUS domain as well as the Boundary Conditions (BCs) around the 36 km CONUS domain (from the MOZART GCM); the BC contributions include ozone influences from international sources, global natural sources and stratospheric ozone. Transport Analysis Source Apportionment Groups The ozone Transport Analysis used the following Source Region and Category definitions:

Source Regions (21)

- 17 Western States (see Figure 6);
- Eastern US;
- Mexico (Mex);
- Canada (Can); and
- Offshore Shipping (OSS) that also included offshore O&G development.

Source Categories (2)

- Natural Emissions (Biogenic, All Fires and Lighting NOX); and
- Anthropogenic Emissions.

ICBC (6)

- IC;
- East BC;
- West BC;
- North BC;
- South BC; and
- Top BC.

With 21 Source Regions, times 2 Source Categories, plus 6 stratifications of ICBC, that results in separate ozone source apportionment contributions for 48 Source Groups.

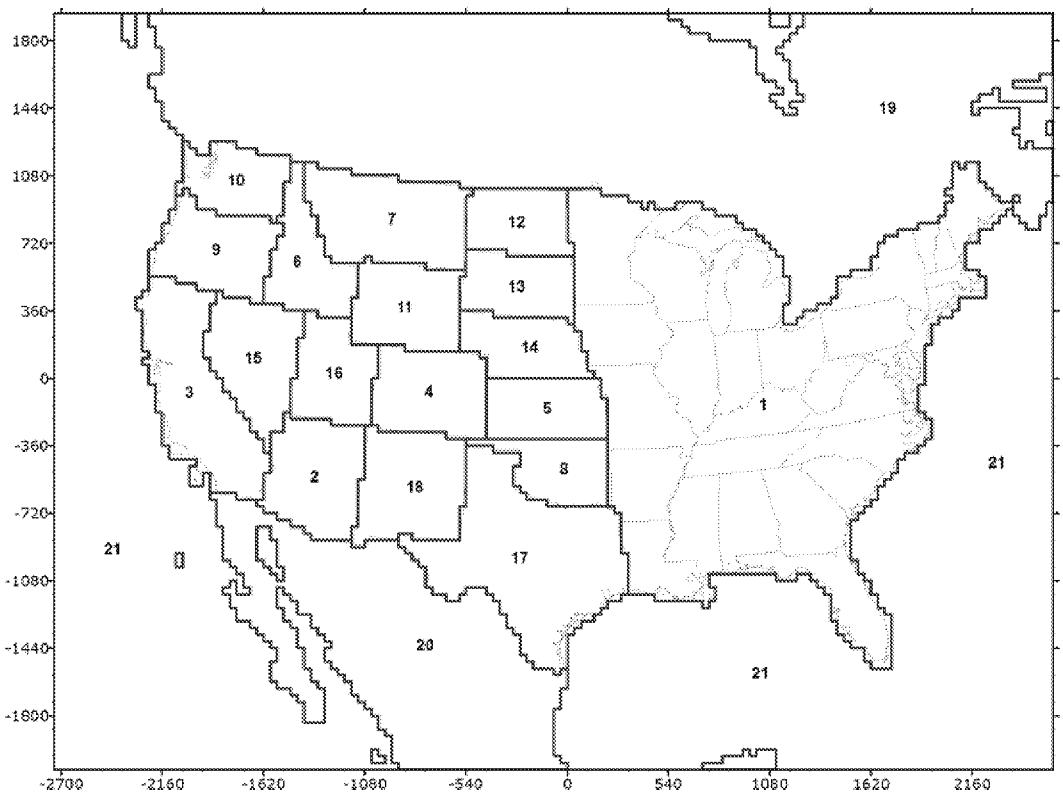


Figure 6. Source Regions used in the ozone Transport Analysus CAMx 2017 ozone source apportionment simulation with separate contributions due to anthropogenic emissions from 17 western states, EUSA, Canada, Mexico and OSS.

Transport Analysis Ozone Source Apportionment Results

The CAMx 2017c 36/12 km Transport Analysis ozone source apportionment modeling results were summarized in a PowerPoint Presentation (PPT (/wiki/pages/new?title=enter%20url%20or%20page%20name)). The results from the Transport Analysis SA simulation were post-processed to obtain the contributions of states anthropogenic emissions as well as other regions and natural emissions to 2017 MDA8 ozone concentrations at western U.S. monitoring sites. These contributions were loaded into the ozone SA Vis Tool for display as discussed above for the Local Source Analysis.

Transport Analysis SA Vis Tool (http://vibe.cira.colostate.edu/WAQS_SA_DENVER)

Figure 7 displays example results from the Transport Analysis Vis SA Tool for the 2017 MDA8 ozone at the same site (Chatfield) and day (August 26, 2011) used in the Figure 5 example display from the Local Source Analysis SA Vis Tool. The total 2017 MDA8 ozone at Chatfield on August 26, 2016 from the Transport Analysis is 68.4 ppb, which is lower than seen in the Local Source Analysis (74.2 ppb), which is likely because of the higher resolution grid (4 km) used in the Local Source Analysis SA modeling than used in the Transport Analysis (12 km) SA modeling. Of the 68.4 ppb total 2017 MDA8 ozone, 39.6 ppb (58%) is from the CONUS BCs and 28.9 ppb (42%) is from the non-BC contributions (i.e., anthropogenic and natural emissions within the CONUS modeling domain). The upper pie chart slices correspond to the total contributions from all emissions (anthropogenic and natural) in each Source Region, with Colorado being the largest contributor on this day at Chatfield, followed by Mexico, New Mexico and Arizona suggesting regional transport from the south-southwest on this day. The Source Region labels using state names are descriptive, where Off-Shore Shipping refers emissions in the Pacific and Atlantic Oceans and the Gulf of Mexico also includes offshore O&G emissions. The two Source Categories are Natural (NAT) and Anthropogenic (ANT) emissions whose contributions are identified in the lower pie chart.

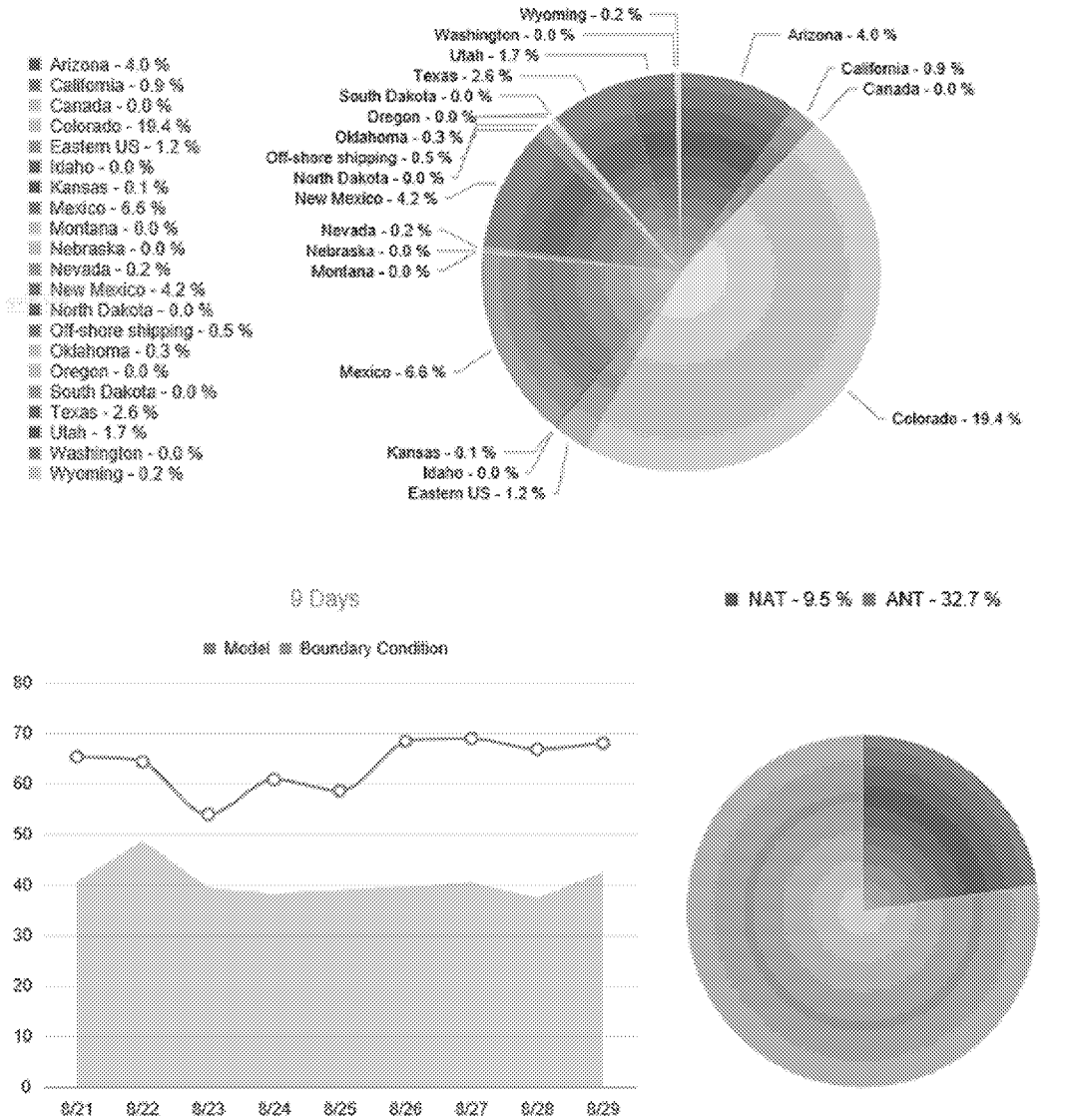


Figure 7. Example Transport Analysis SA Vis Tool display for Chatfield (Douglas County, Colorado) on August 26, 2016 that has total modeled 2017 MDA8 ozone of 68.4 with 39.6 ppb (58%) due to BC-CONUS and 28.9 ppb (42%) due to non-BC (CONUS sources), pie chart slice sizes are contributions to non-BC ozone and percentages are contributions to total MDA8 ozone.

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[1] APCA differs from the OSAT ozone source apportionment tool in that ozone is only allocated to Natural emissions when it is formed due to Natural NOx emissions interacting with Natural VOC emissions. For example, when ozone is formed due to the interaction of biogenic VOC with anthropogenic NOX emissions under VOC-limited ozone conditions, a condition where OSAT will assign the ozone formed to the biogenic VOC source category, APCA recognizes that biogenic VOC cannot be controlled so redirects the ozone formed to the anthropogenic NOX emissions category.

[2] The northern portions of Larimer and Weld Counties are not part of the Nonattainment Area, but segregating those areas the Source Region would have minimal impact on the Source Apportionment.

This page was last modified 27 days ago.

Attachment C

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Submitted via email and www.regulations.gov

December 19, 2016

The Honorable Gina McCarthy
Administrator, U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Mail Code 1101A
Washington, DC 20460

Comments of the Utility Air Regulatory Group on the Proposed Rule, "Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Interstate Transport for Wyoming," 81 Fed. Reg. 81712 (Nov. 18, 2016), EPA-R08-OAR-2016-0521

Dear Administrator McCarthy:

On November 18, 2016, the United States Environmental Protection Agency ("EPA") published a proposed rule entitled "Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Interstate Transport for Wyoming." 81 Fed. Reg. 81712. EPA proposes partial approval and partial disapproval of a Wyoming state implementation plan ("SIP") submittal addressing Clean Air Act ("CAA") infrastructure SIP requirements with respect to interstate transport for the 2008 ozone national ambient air quality standard ("NAAQS") of 75 parts per billion.[1] The following comments on EPA's proposed rule are

[1] These comments specifically address EPA's proposed actions with respect to Wyoming's SIP submittal for interstate transport requirements for the 2008 ozone NAAQS under "prong 1" and "prong 2" of section 110(a)(2)(D)(i) of the CAA (*i.e.*, the "significant contribution" and "interference with maintenance" clauses of that provision). EPA's proposed rule also proposes approval of certain other Wyoming infrastructure SIP submittals and disapproval of certain other such submittals. The fact that these comments do not specifically address proposed actions to disapprove other SIP submittals, including EPA's proposed disapproval of visibility-related interstate transport SIP submittals under "prong 4" of section 110(a)(2)(D)(i), should not in any way be construed as expressing or implying support for those proposed actions.

respectfully submitted on behalf of the Utility Air Regulatory Group ("UARG").[2]

With respect to prongs 1 and 2, the proposed rule is based—apparently entirely—on information from modeling analyses that EPA conducted for its Cross-State Air Pollution Rule (CSAPR) Update rulemaking, 81 Fed. Reg. 74504 (Oct. 26, 2016). *See* 81 Fed. Reg. at 81714-16. In the proposed rule, EPA notes that in the CSAPR Update rulemaking, EPA concluded that

> [a]s to western states, . . . there may be geographically specific factors to consider in evaluating interstate transport, and given the near-term 2017 implementation timeframe, the EPA focused the final CSAPR Update on eastern states. *See* CSAPR Update at 81 FR 74523. Consistent with our statements in the CSAPR Update, the EPA intends to address western states, like Wyoming, on a case-by-case basis.

Id. at 81715. Based on its CSAPR Update rulemaking information, EPA proposes to approve the Wyoming prong 1 SIP submittal for the 2008 ozone NAAQS. EPA says that its "modeling indicates that Wyoming does not contribute above the one percent threshold to any nonattainment receptors." *Id.* Although UARG does not believe EPA's one-percent-of-NAAQS contribution threshold should be determinative in this matter—*i.e.*, UARG believes it is *not* the case that a state may properly be subjected to interstate-transport emission reduction obligations on the basis that the state contributes more than one percent of the NAAQS to air quality at a downwind location—UARG agrees that EPA should find that Wyoming does not contribute significantly to nonattainment of the NAAQS in any other state and therefore should approve this element of Wyoming's SIP submittal.

EPA proposes, however, to conclude that Wyoming's emissions contribute, in an amount above the one percent threshold, to ozone concentrations at one "maintenance-only" monitor, *i.e.*, Douglas County, Colorado, monitor ID number 80350004, in the Denver area. *Id.* On this basis, EPA concludes that "the State's emissions require further evaluation, taking into account both air quality and cost considerations, to determine what, if any, emissions reductions might be necessary to address the State's emission reduction obligation pursuant to 110(a)(2)(D)(i)(I)" prong 2. *Id.*

In its proposed rule, EPA properly refrains from "determining that one percent of the NAAQS is always an appropriate threshold for identifying interstate transport linkages for all

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[2] UARG is a voluntary group of electric generating companies and national trade associations. The vast majority of electric energy in the United States is generated by individual members of UARG or other members of UARG's trade association members. UARG participates on behalf of its members in CAA proceedings that affect the interests of electric generators.

states in the West." *Id.* Indeed, for reasons UARG explained in its comments on the proposed version of the CSAPR Update rule, EPA should not use the one-percent level as a contribution threshold in its section 110(a)(2)(D)(i)(I) analyses—and certainly should not use it (or any other specific threshold) as a bright-line test that results in subjecting states to interstate-transport emission reduction obligations. *See* UARG Comments on Proposed CSAPR Update Rule at 22-26 (Feb. 1, 2016), EPA-HQ-OAR-2015-0500-0253. EPA also should not establish such obligations for states based on a mistaken interpretation of the CAA's provisions with respect to what EPA here calls a downwind "maintenance" receptor. *See id.* at 33-37.

Although it purports not to apply mechanically a one-percent-of-NAAQS threshold in this proceeding, EPA nonetheless faults Wyoming because, according to EPA, the state's "SIP submittal neither identified nor included any ozone or ozone precursor emission reduction measures that the EPA could evaluate to determine whether the state has fully addressed . . . transport impacts." 81 Fed. Reg. at 81715. On this basis, EPA states that it "cannot conclude that Wyoming's SIP contains sufficient provisions to prohibit emissions that will interfere with maintenance of the 2008 ozone NAAQS in the Denver, Colorado area." *Id.*

It appears, however, that EPA is unreasonably refusing to allow Wyoming an adequate opportunity to address these matters. In the present rulemaking, the Air Quality Division of the Wyoming Department of Environmental Quality submitted a letter to EPA requesting an extension of the December 19, 2016 deadline for submission of comments because the existing comment period "is insufficient given the technical analysis required to formulate an adequate response to the Proposed Rule." EPA-R08-OAR-2016-0521-0012 at 1 (Nov. 23, 2016) ("Wyoming Letter"). The letter noted that "[t]he Division will need to devote significant time and energy reviewing EPA's basis for the approval and disapproval" of the SIP submittals and that EPA's proposed disapproval of the prong 2 SIP submittal for the 2008 ozone NAAQS "will require significantly more analysis than other parts of the Proposed Rule." Noting that the SIP submittal at issue was received by EPA on February 6, 2014, *see* 81 Fed. Reg. at 81713—and that EPA therefore had had more than two years and nine months to review, analyze, and act on the SIP, Wyoming said it "believes it is reasonable to allow at least an additional ninety (90) days to review EPA's Proposed Rule involving multiple Wyoming State Plans" and to have "the opportunity to provide additional information in support" of its ozone transport SIP submittal. Wyoming Letter at 1. Wyoming emphasized that it "remains committed to working with EPA, but is concerned that *EPA has not yet worked with western states or western regional planning organizations on region-appropriate analysis* for interstate transport." *Id.* (emphasis added).

UARG shares the concern expressed by Wyoming and believes the state's request is eminently reasonable and should be granted. EPA, however, denied Wyoming's request in a letter dated December 6, 2016. Without in any way disputing Wyoming's statement that the

state needs additional time to develop and provide relevant information—and without disputing that, as Wyoming's letter explained, it would be reasonable to provide that additional time—EPA asserted that it was forced to deny any extension of the public comment period on the grounds that attorneys for Sierra Club "will not agree" to an extension. EPA-R08-OAR-2016-0521-0013. Indeed, Sierra Club's refusal to allow more time was the *only* reason EPA cited for denying the state's reasonable request.

In describing Sierra Club's veto of any extension of the public comment period, EPA stated:

> A federal court currently has pending before it a motion to enter a partial consent decree addressing deadlines for numerous SIP submissions nationwide, including this one. *Opposing counsel in that case* [*i.e.*, Sierra Club's counsel] has already granted EPA an extension of the negotiated deadline for this SIP submission until January 17, 2017, but *will not agree to the further extension* sought by Wyoming. Accordingly, *we cannot grant your request to extend the comment period.*

Id. (emphases added). It appears that the case EPA referred to is *Sierra Club v. McCarthy*, Case No. 3:15-cv-04328-JD (N.D. Cal.), in which Sierra Club and EPA jointly submitted a motion on October 15, 2016, asking the U.S. District Court for the Northern District of California in San Francisco to enter a proposed consent decree, negotiated between Sierra Club and EPA, that would set a deadline of January 17, 2017, for EPA to sign a notice of final rulemaking to approve or disapprove the Wyoming SIP submittals. *Sierra Club v. McCarthy*, Joint Motion To Enter Partial Consent Decree (Oct. 15, 2015) (Document 57); *Sierra Club v. McCarthy*, [Proposed] Partial Consent Decree at ¶ 1.a. (Oct. 15, 2015) (Document 57-1) ("Proposed Consent Decree").

It is improper for EPA to rely on this proposed consent decree to refuse to allow the public and stakeholders, including the Department of Environmental Quality of the directly affected state, any additional time to provide information to EPA in this rulemaking. First, the district court's docket in this case confirms that the proposed consent decree is only that—a *proposed* decree, which the court has not entered. Equally important, EPA fails to explain why—despite the fact that it has not disputed the need for additional time for Wyoming to develop and submit relevant information—EPA will not either (i) take action to modify the proposed consent decree or, in the absence of a modification of the proposed consent decree, (ii) file a motion with the district court to modify the (still-not-binding) January 17, 2017 deadline for good cause, as the proposed consent decree expressly authorizes EPA to do, *see* Proposed Consent Decree at ¶ 5. In all events, it is improper for EPA to deny an affected state's opportunity to submit meaningful comments and to prepare relevant technical and other information for EPA's consideration—information that EPA itself characterizes as

appropriate for assessment of the issues at stake in the rulemaking, *see* 81 Fed. Reg. at 81715—on the sole basis that a single private group does "not agree."

Particularly under these circumstances, EPA should not make final its proposed disapproval of Wyoming's prong 2 SIP submittal for the 2008 ozone NAAQS. Instead, EPA should make final its proposed approval of SIP submittals, including the prong 1 submittal for the 2008 ozone NAAQS, and reopen the public comment period on the proposed SIP disapprovals for at least 90 days to allow Wyoming and other commenters time to provide any analyses and other information to EPA regarding the prong 2 SIP submittal and any proposed SIP disapproval actions. Furthermore, UARG urges EPA to respond favorably to Wyoming's request that EPA work collaboratively with the affected western states in this important matter. Moreover, in addressing this matter, EPA must take into account the numerous and important factors that affect consideration of any interstate transport issues in western states.[3]

UARG appreciates the opportunity to provide these comments. Please contact me if you would like to discuss UARG's comments.

Sincerely,

Norman W. Fichthorn
Counsel to the Utility Air Regulatory Group

[3] *See, e.g.*, Comments of the Western Energy Supply and Transmission Associates on the Proposed Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, at 2-4, EPA Docket No. EPA-HQ-OAR-2015-0500-0360 (Feb. 1, 2016).

WESTERN ENERGY
ALLIANCE

December 19, 2016

Adam Clark
Air Program
Environmental Protection Agency Region 8
Mail Code 8P-AR
1595 Wynkoop St.
Denver, CO 80202

RE: Air Quality State Implementation Plans; Approvals and Promulgations; Wyoming; Interstate Transport, Docket ID No. EPA-R08-OAR-2016-0521-0001

Dear Mr. Clark:

Western Energy Alliance is writing to express concern with EPA's proposed action on the State of Wyoming's State Implementation Plan (SIP) for ozone interstate transport. EPA's proposed action does not align with the weight of evidence and inappropriately relies on flawed modeling and methodologies. In addition to the comments submitted here, we fully support and endorse the State of Wyoming's comments on this proposed action.

Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members are independents, the majority of which are small businesses with an average of fifteen employees.

We believe EPA's proposed decision to disapprove the Wyoming Department of Environmental Quality's (WDEQ) SIP runs contrary to long-standing agency practice of accepting a "weight of evidence" approach to evaluating whether an area has a meaningful impact on National Ambient Air Quality Standards (NAAQS) maintenance in downwind states. Instead of accepting WDEQ's well-reasoned approach, EPA relies on faulty modeling results stemming from the Cross-State Air Pollution Rule (CSAPR) Update for the 2008 ozone NAAQS. WDEQ raised concerns with the suitability of CSAPR modeling in its original comments, which EPA later dismissed based on insufficient supporting evidence from WDEQ. Since WDEQ's ozone transport SIP was developed in 2014 before the updated CSAPR modeling guidance was developed, it is inappropriate for EPA to hold WDEQ analysis to standards that did not exist when the SIP was developed.

EPA has inappropriately put the onus on Wyoming to provide evidence to support or deny EPA's decisions on the suitability of CSAPR modeling. Moreover, it is unreasonable for EPA to expect an exhaustive technical analysis of the CSAPR modeling within a 30-day

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comment window. The burden should rest on EPA to explain its justification for reversing long-standing policy about the CSAPR modeling deficiencies for the West.

The modeling results EPA points to in the disapproval decision are flawed because the CSAPR model has not been adapted to the unique concerns of western states. Primarily developed as a tool for eastern states in the ozone transport region, the CSAPR model fails to account for the topography, altitude, and climate of the western United States. Climate factors characteristic of the West include stratospheric intrusions, a long and severe wildfire season, abundant sunshine, and lack of summertime precipitation, all of which the CSAPR model fails to adequately consider. In the decision, EPA has provided no explanation or evidence for why it has determined modeling results need not account for these considerations. Additionally, EPA has failed to provide sufficient evidence that it reviewed and considered state exceptional events packages that may provide mitigating circumstances for NAAQS violations based on events such as wildfires or stratospheric intrusions of ozone. It is also unclear whether EPA has accounted for background ozone in CSAPR modeling and technical analysis. Background ozone in the western United State can contribute as much as 60 parts per billion (ppb) or more, which is critically important for NAAQS attainment and maintenance.[1]

Instead, EPA points to supposed shortcomings in WDEQ's analysis, including failure to contemplate contributions from other nonattainment areas in Utah and Colorado. As EPA is likely aware, the designated nonattainment area along Utah's Wasatch Front is 46 miles southwest of the westernmost corner of Wyoming, and is separated by the prominent Wasatch mountain range, which rise nearly 8,000 feet above the valley floor. The prevailing wind direction in Salt Lake City year-round is south or southeast, meaning it is highly unlikely that Wyoming is meaningfully contributing to impaired air quality in the Wasatch Front nonattainment area. Furthermore, Utah's impaired air quality is often associated with atmospheric inversions within the Salt Lake valley that coincide with calm winds that trap pollutants within the valley. WDEQ has made an entirely justifiable assumption that the weight of evidence does not warrant any further evaluation of its contributions to Wasatch Front PM 2.5 or ozone exceedances. If EPA doubts the validity of WDEQ assessment on impacts in Utah, it should provide a well-reasoned explanation, which it has not done in this proposed action.

EPA's decision appears to point to other out-of-state regions that have recorded NAAQS violations but may not have been formally designated yet. One such area is likely Utah's Uinta Basin, which is undergoing the nonattainment designation process. However, ozone exceedances in the Uinta Basin, as has been documented through extensive scientific study, are associated with light winds, atmospheric inversions, and local snow cover.[2] The Uinta Mountains to the north provide a physical barrier that helps form the inversion

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[1] *Estimating North American Background Ozone in U.S. Surface Air With Two Independent Global Models: Variability, Uncertainties, and Recommendations*. Fiore et al. December 26, 2013.
[2] *Final Report, 2014 Uinta Basin Ozone Study*. Till Stoeckenius et al. February 2015.

conditions that produce ozone. As scientists have thoroughly demonstrated, the ozone exceedances are concentrated below 6,000 feet in elevation. After three years of study, scientists did not find ozone transport from Wyoming playing an influencing factor in the Uinta Basin. It appears that EPA may be expecting WDEQ to prove a negative by studying its impact on neighboring states.

Similarly, Colorado's ozone nonattainment challenges are affected by the northern Front Range's climate, geography, and local emissions sources. Wyoming's assessment that the year-round westerly prevailing wind direction makes it reasonable to infer that Cheyenne, a city located 100 miles north-northeast of Denver, is unlikely to be a driving factor behind ozone levels in the Denver Metro/North Front Range Ozone Nonattainment Area. By calling for further study based on its own flawed and incomplete modeling and analysis, EPA is putting an unreasonable burden on WDEQ. Prior to imposing any such burden, EPA should support that its own justifications based on CSAPR modeling and subsequent analysis meet the same high analytical standard it is requiring of the states.

We encourage EPA to accept the State of Wyoming's ozone transport SIP as proposed, which is based on a well-reasoned approach that relies on the weight of evidence. We are available to discuss this matter further with EPA.

Sincerely,

Kathleen M. Sgamma
President

BASIN ELECTRIC POWER COOPERATIVE
A Touchstone Energy® Cooperative

December 19, 2016

Submitted electronically via: http://www.regulations.gov

Docket ID: EPA–R08–OAR–2016–0521

Administrator Gina McCarthy
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Comment Submittal on the U.S. Environmental Protection Agency's "Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Interstate Transport for Wyoming" (November 18, 2016)

Dear Administrator McCarthy:

Basin Electric Power Cooperative (**Basin Electric**) appreciates this opportunity to submit comments on U.S. Environmental Protection Agency's (**EPA**) proposed *Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Interstate Transport for Wyoming* published in the November 18, 2016 Federal Register.

Basin Electric is a regional, consumer-owned, generation and transmission cooperative formed in 1961 to supply supplemental power to a consortium of rural electric distribution cooperatives. Basin Electric supplies 137 rural electric member cooperative systems with wholesale electric power who in turn serve approximately 2.9 million consumers in a nine-state area. Basin Electric's core business is generating and delivering electricity to wholesale customers, primarily our member systems. At the end-of-year 2015, Basin Electric's generation portfolio consisted of 5,594 megawatts (**MW**) of wholesale electric generating capacity, located in four western states. Four coal-fired electric generating stations comprise the largest proportion (56.4%) of Basin Electric's generation portfolio. The remainder of Basin Electric's generation fleet consists of natural gas (18.4%), wind (14.5%), hydroelectric (5.6%), oil (3.2%) nuclear (1.1%) and recovered energy (0.8%) generation facilities. Basin Electric has additional natural gas generation projects that will be commercially available by the end of 2016 that will bring an additional 202 MW of generation capacity.

Basin Electric submits these comments electronically to docket ID EPA–R08–OAR–2016–0521 as noticed in the federal register at 81 Fed. Reg. 81712 (November 18, 2016), per the instructions in EPA's proposed action.

EPA's proposed action involves portions of six submissions from the State of Wyoming that are intended to demonstrate that Wyoming's State Implementation Plan (**SIP**) meets certain interstate transport requirements of the Clean Air Act (Act or CAA). Basin Electric's comments are limited to only to the "certification of Wyoming's infrastructure SIP for the 2008 ozone NAAQS" that Wyoming DEQ submitted to EPA on February 6, 2014, and EPA's proposed

decision to "disapprove the prong 2 portion of the February 6, 2014, 2008 ozone NAAQS infrastructure submittal."[1]

EPA's disapproval of the prong 2 portion of the February 6, 2014, 2008 ozone NAAQS infrastructure submittal is premature and inappropriate for the reasons discussed in the comments below.

Instead of "disapprov[ing] the prong 2 portion of [Wyoming's] February 6, 2014, 2008 ozone NAAQS infrastructure submittal,"[2] EPA and Wyoming should agree to allow Wyoming to re-submit the prong 2 portion of Wyoming's February 6, 2014, 2008 ozone NAAQS infrastructure submittal after the following have occurred:

- The resolution of the litigation involving the appeal of EPA's federal implementation plan (**FIP**) for Wyoming for Regional Haze involving nitrogen oxide (**NOx**) emissions from BART-eligible sources[3] and "reasonable progress" sources;[4]
- Wyoming is given a reasonable opportunity to evaluate the factors and analysis set forth at 81 Fed. Reg. at 81713-14, much of which was either unavailable or legally unclear at the time Wyoming submitted its "certification of Wyoming's infrastructure SIP for the 2008 ozone NAAQS" to EPA on February 6, 2014;
- Wyoming is given an opportunity to evaluate the appropriateness of using the CSAPR model as a screening tool to determine the impacts of interstate transport of NOx and whether those emissions "significantly contribute to nonattainment of the NAAQS" ozone levels in Colorado and other neighboring States.

1.0 Statement of Basin Electric's interest in this action by EPA.

Basin Electric is a not-for-profit wholesale electric power supply cooperative that generates power from a diverse mix of fuel sources, including coal, natural gas, oil, and wind. Basin Electric is one of a group of six regional, consumer-owned public power energy organizations, known as the Missouri Basin Power Project. The Missouri Basin Power Project built and owns the Laramie River Station (**LRS**) located near Wheatland, Wyoming. Basin Electric has a 42.27 percent ownership interest in LRS, which consists of three 570 MW net coal-fired electricity units. LRS began "early action" compliance with Wyoming's SIP for Regional Haze by installing over-fire air to reduce NOx emissions from LRS Unit 1 in 2009, LRS Unit 2 in 2010, and LRS Unit 3 in 2011, and by installing new state-of-the-art low-NOx burners on LRS Unit 1 in 2012, LRS Unit 2 in 2013, and LRS Unit 3 in 2014.[5]

On January 30, 2014, EPA disapproved the NOx portion of the Regional Haze SIP that Wyoming had submitted to EPA on January 12, 2011, and substituted its own FIP requiring additional BART controls for NOx on all three LRS Units beyond what Wyoming's BART NOx

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[1] 81 Fed. Reg. at 81716.
[2] 81 Fed. Reg. at 81716.
[3] "BART" refers to "best available retrofit technology" as defined by the factors listed in CAA § 169A(g)(2), 42 U.S.C. § 7491(g)(2), and BART-eligible sources are the sources that are required to install BART at CAA § 169A(b)(2)(A), 42 U.S.C. § 7491(b)(2)(A).
[4] The term "reasonable progress" is defined by the factors listed in CAA § 169A(g)(1), 42 U.S.C. § 7491(g)(1).
[5] LRS had previously installed an earlier version of low-NOx burners well over a decade before the Regional Haze requirements applied, which also resulted in a significant reduction of NOx emissions at that time.

SIP had required.[6] Similar additional NOx controls were required under the FIP for many other Wyoming sources. The FIP was appealed by LRS and other Wyoming utilities to the 10th Circuit Court of Appeals shortly thereafter. During the appeal, LRS and EPA continue to negotiate in good faith a "better-than-BART" alternative that is more cost effective than EPA's NOx FIP of LRS. That process has involved additional modeling and other issues that are still in the process of being resolved.

On February 6, 2014, six days after EPA issued the NOx FIP at 79 Fed. Reg. 5032 (January 30, 2014), Wyoming submitted the "certification of Wyoming's infrastructure SIP for the 2008 ozone NAAQS" that is the subject of this proposed action by EPA.

2.0 Reasons in Support of why EPA and Wyoming should agree to allow Wyoming to re-submit the prong 2 portion of Wyoming's February 6, 2014, 2008 ozone NAAQS infrastructure submittal before proceeding with this action.

2.1 NOx reductions for the Regional Haze Program in Wyoming are still being negotiated.

EPA states at 81 Fed. Reg. at 81714 that "WDEQ's submission does not provide any technical analysis demonstrating that the SIP contains adequate provisions prohibiting emissions that will interfere with maintenance of the 2008 ozone NAAQS in any other state (prong 2)." This is unfair after-the-fact reasoning.

At the time of Wyoming's 2008 ozone NAAQS infrastructure submittal on February 6, 2014, EPA's FIP had just been released 6 days before. The relevant NOx reductions were still in the process of being implemented under the early-action installation of NOx controls that LRS and other utilities had agreed to as part of Wyoming's Regional Haze NOx SIP. Those additional NOx FIP reductions are still under appeal before the 10th Circuit Court of Appeals, some of which are subject to confidential settlement negotiations between LRS and EPA.

Therefore, from February 2014 to now, doing a "technical analysis demonstrating that the SIP contains adequate provisions prohibiting emissions that will interfere with maintenance of the 2008 ozone NAAQS in any other state (prong 2)" makes no sense until the NOx emissions are more certain based on the outcome of the anticipated potential settlement for LRS and the resolution of the other parts of the appeal to the 10th Circuit Court of Appeals.

Thus, Basin Electric suggests that EPA and Wyoming enter into an agreement to allow Wyoming to re-examine and re-submit the prong 2 portion of Wyoming's February 6, 2014, 2008 ozone NAAQS infrastructure submittal after the resolution of the appeal of EPA's FIP, including any settlements.[7]

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[6] "Approval, Disapproval and Promulgation of Implementation Plans; State of Wyoming; Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze," 79 Fed. Reg. 5032 (January 30, 2014).
[7] The term "reasonable progress" is defined by the factors listed in CAA § 169A(g)(1), 42 U.S.C. § 7491(g)(1).

2.2 Wyoming should be given a fair opportunity to evaluate EPA's CSAPR Update Modeling.

Wyoming should be given an opportunity to review the recently-finalized CSAPR Update modeling EPA uses to project more than a 1% impact at receptors in Douglas County, Colorado to determine whether it is an accurate and appropriate tool to use in Wyoming or the west.

On February 1, 2016, West Associates submitted public comment in the CSAPR Update for the 2008 Ozone NAAQS providing several concerns about the use of the CSAPR modeling for Western states. Basin Electric supports these concerns and has attached a copy of the West Associates letter for your review.

EPA's proposed disapproval of Wyoming's prong 2 provisions for ozone is based on the CSAPR update modeling that was released as a final rule on October 26, 2016. Wyoming has had little to no opportunity to assess the factors of this analysis, or understand their application in Wyoming. *See* "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS," 81 Fed. Reg. 74504 (October 26, 2016). As EPA appropriately notes in this proposed rulemaking[8] and in the CSAPR Update rule,[9] the CSAPR modeling is conducted specifically for Eastern, not Western States. Also, in this proposed action, EPA notes that there are different factors affecting modeling and modeling results that should be considered in the Western States, some of which are "geographically specific,"[10] such as broad expanses of public land, high altitude settings, international transport and elevated background ozone concentrations that can comprise a significant portion of ambient concentrations, especially on high ozone days in the Western United States.

It is unreasonable to disapprove the prong 2 provisions for the Wyoming interstate transport ozone SIP submitted nearly three years ago based on a recently finalized modeling analysis, without considering the circumstances or providing Wyoming an opportunity analyze the information and supplement the administrative record.

2.3 Wyoming should be given an opportunity to evaluate the appropriateness of using the CSAPR model as a screening tool to determine the impacts of interstate transport of NOx and whether those emissions "significantly contribute to nonattainment of the NAAQS" ozone levels in Colorado and other neighboring States before the disapproval is issued.

EPA recognizes in this proposed action that differences exist between Eastern and Western States where it says at 81 Fed. Reg. at 81715:

> As to western states, the EPA noted in the CSAPR Update that there may be geographically specific factors to consider in evaluating interstate transport, and given the near-term 2017 implementation timeframe, the EPA focused the final CSAPR Update on eastern states. *See* CSAPR Update at 81 FR 74523. Consistent with our statements in the CSAPR Update, the EPA intends to address western states, like Wyoming, on a case-by-case basis.

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[8] 81 Fed. Reg. at 81715.
[9] 81 Fed. Reg. at 74523.
[10] 81 Fed. Reg. at 81715.

> The EPA's air quality modeling as updated for the final CSAPR Update projects that for the Western U.S. (outside of California), there are no nonattainment receptors and only three maintenance receptors located in the Denver, Colorado area. Wyoming emissions are projected to contribute above one percent of the NAAQS at one of these receptors (the "Douglas County maintenance receptor"; see Table 1, below). The modeling also shows that multiple upwind states would collectively contribute to the projected Douglas County maintenance receptor in Colorado. The EPA found that the contribution to ozone concentrations from all states upwind of the Douglas County maintenance receptor in Colorado is about 9.7 percent. [Footnote 8] Thus, the collective contribution of emissions from upwind states represents a large portion of the ozone concentrations at the projected Douglas County maintenance receptor in Colorado.

According to the CSAPR Update modeling, in addition to Colorado, 18 other "upwind" States contribute to the ozone levels at the Douglas County ambient air maintenance monitor. And by far (approximately half) of the ozone measured at the monitor is from the "Initial & Boundary" – also referred to as "background" – ozone levels. The contribution in parts per billion (ppb), from largest to smallest, from each identified contributor according to the modeling is: Initial & Boundary a/k/a background – 36.59; Colorado – 26.10; Biological – 4.35; Utah – 1.63; California – 1.18; Wyoming – 1.18; Fires - .56; Nebraska - .53; Iowa - .51; Nevada - .50; Arizona - .39; Canada & Mexico - .33; Texas - .32; Idaho - .24; Tribal - .23; Oklahoma - .14; New Mexico - .13; Oregon - .12; Offshore - .07; South Dakota - .05; North Dakota - .05; Washington - .04; Montana - .03; Missouri - .01; and Louisiana - .01.

EPA recently proposed to approve Nevada's SIP based on facts nearly identical facts to this proposed action. *See* 81 Fed. Reg. 87857, 87859 (December 6, 2016).

Either the Wyoming ozone transport SIP should be approved as it is proposed to be for Nevada, or EPA should allow Wyoming to re-examine and re-submit the prong 2 portion of Wyoming's February 6, 2014, 2008 ozone NAAQS infrastructure submittal before moving forward with this proposed action.

Thank you for your consideration of our comments. If you have any questions or require additional information, please contact Mark Foss or Mike Paul at (701) 223-0441.

Sincerely,

Mark D. Foss
Senior Vice President & General Counsel

mdf/ds
enclosure

WEST ASSOCIATES

February 1, 2016

Submitted to Federal eRulemaking Portal - http://www.regulations.gov **Docket ID No. EPA-HQ-OAR-2015-0500**

U.S. Environmental Protection Agency
EPA Docket Center
Mail Code 28221T
Attention: Docket ID No. EPA-HQ-OAR-2015-0500,
1200 Pennsylvania Avenue, NW.
Washington, DC 20460

Re: Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS

To Whom It Concerns:

Western Energy Supply and Transmission Associates (WEST) appreciates this opportunity to comment on the United States Environmental Protection Agency's (EPA) proposed Cross-State Air Pollution Rule (CSAPR) Update for the 2008 Ozone NAAQS. WEST is a coalition of 11 cooperative, public and investor-owned electric utilities[1] operating 40% of the fossil fueled generating capacity and producing 30% of the electricity in 11 western states, serving over 214,000 GWHs to almost 8.6 million customers.

The proposed rule requires 23 states in the eastern U.S. to reduce interstate emission transport that significantly contributes to nonattainment, or interferes with maintenance, of the 2008 ozone NAAQS by reducing their ozone season electric generating unit (EGU) NOX emissions in 2017 and future years. The EPA is proposing to update CSAPR to address interstate emission transport with respect to the 2008 ozone NAAQS of certain states' ozone-season nitrogen oxide (NOx) emissions budgets established by CSAPR. This proposal also updates the status of certain states' outstanding interstate ozone transport obligations with respect to the 1997 ozone NAAQS, for which CSAPR provided a partial remedy.[2]

This proposal does not apply to 11 contiguous states in the western U.S. However, EPA requests comment on whether it should. In framing the issue, EPA states the following:

[1] WEST members include Arizona Electric Power Cooperative, Arizona Public Service, Basin Electric Power

[2] 80 Fed. Reg. 75706 (December 3, 2015)

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"CSAPR and previous federal transport rules, such as the NOX SIP Call and the Clean Air Interstate Rule (CAIR) ... addressed collective contributions of ozone pollution from states in the eastern U.S. These rules did not address contributions in the 11 western contiguous United States. There may be additional criteria to evaluate regarding collective contribution of transported air pollution in the West, such as those raised in EPA-state meetings to discuss approaches for determining how emissions in upwind states impact air quality in downwind states. Given that the near-term 2017 implementation timeframe constrains the opportunity to conduct evaluations of additional criteria, the EPA proposes to focus this rulemaking on eastern states. This focus would not relieve western states of obligations to address interstate transport under the Act. The EPA and western states, working together, would continue to evaluate interstate transport on a case-by-case basis. While the EPA proposes to focus this rulemaking on eastern states, we seek comment on whether to include western states in this rule."[3]

EPA expands on this later in the proposal stating, "The EPA would also continue to engage with western states on air quality modeling analyses and the implications of those analyses for interstate transport."[4]

WEST agrees with EPA that the western states should <u>not</u> be included in this rule, but that EPA and western states should continue working together to evaluate the complex nature of interstate transport in the West and to address concerns on a case-by-case basis where they exist. There are several reasons for our position:

First, notwithstanding EPA's assertion that its air quality modeling supporting this proposed rule includes data for the western states that indicate a relationship between upwind sources and downwind receptors, WEST believes this data is incomplete and otherwise insufficient for purposes of supporting the inclusion of western states in this rulemaking.

Second, historically, ozone nonattainment strategies have been focused on solving urban ozone exceedances that can be influenced by several local factors and transported air pollution from EGUs in neighboring states. Some western states have been addressing these kinds of challenge for several years. Yet, overall, ozone in western states does not present the persistent regional challenge with exceedances as it does in the east, and ozone presents different technical challenges. The Western States Air Resources Council (WESTAR) has commented on the challenges facing western states:

"There are significant uncertainties about the origin, magnitude, frequency, duration and geographic distribution of ozone in the west. Transported background ozone or the precursor pollutants that cause ozone may originate in another state, in Mexico, Canada, or Asia. It may be transported down from the stratosphere. It may be the

[3] Ibid. at 75708 - 75709
[4] Ibid. at 75715 - 75716

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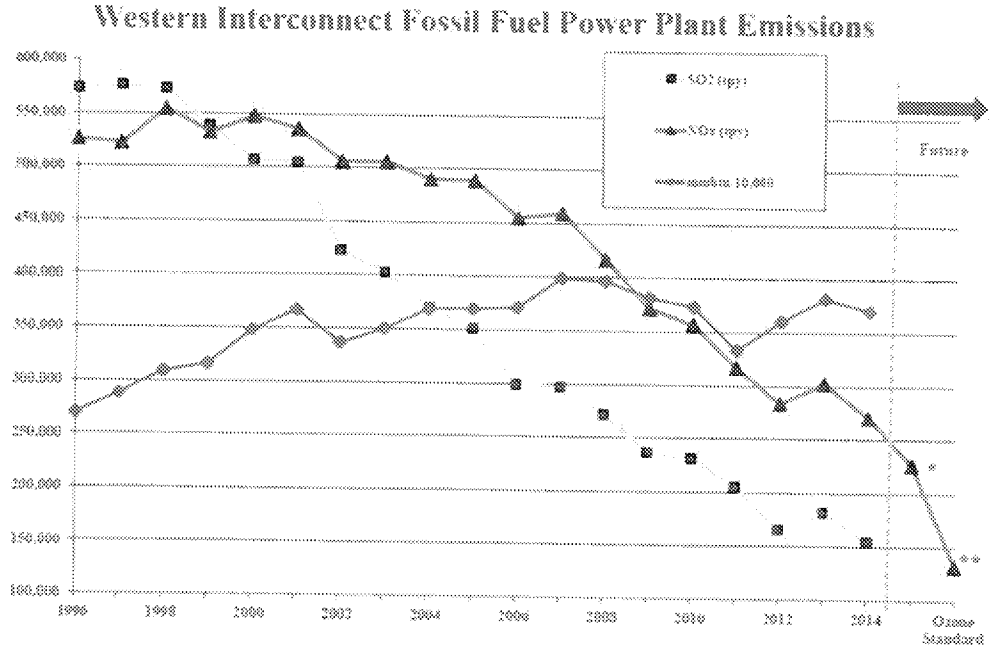
product of wildfires. Characterizing multiple natural events (wildfire, stratospheric intrusions), occurring with varying intensities, and sometimes overlapping over space and time will require resources beyond the states' limited means. Implementing a more stringent ozone standard in the west will require a much better understanding of the role of background and transported ozone ... "[5].

Therefore, WEST agrees with EPA that western transport is complicated by a number of factors and that "there may be additional criteria to evaluate regarding transported air pollution in the West."

Third, an approach that relies on a collective, regional contribution from EGUs will not address the varied and complex circumstances affecting western ozone exceedances. Furthermore, as illustrated in Figure 1 below, NOx emissions from power plant sources in the Western Interconnect have declined continuously and significantly since 2000, and are likely to further decline as regional haze and Clean Power Plan strategies are implemented.

Figure 1. [6]



As WESTAR has observed,

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[5] Letter from Western States Air Resources (WESTAR) Council to EPA (Docket ID No. OAR-HQ-OAR-2008-0699), March 16, 2015, at p. 4

[6] Presentation by Tom Moore, "Western Regional Technical Analysis for Ozone Standard Planning, WESTAR," San Francisco (April 9, 2015) at slide 4.

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"Making the right choices about how to improve air quality in ozone nonattainment areas will depend on how well we understand the science, and our understanding of the science needs to improve. Given the absence of industrial development in numerous areas of the intermountain west, nonattainment area controls simply will not work to achieve attainment. Neither will interstate contribution reductions be sufficient in many areas to reduce ozone to levels below the proposed standard.[7]

Finally, western regulators have identified several needs for improvements in modeling and analysis that will be required to address the varied and complex challenges facing western states with respect to urban and rural ozone exceedances, including but not limited to [8]:

- Ozone NAAQS planning–requires photochemical modeling for State Implementation Plan (SIP) attainment demonstrations for nonattainment areas.
- Ozone transport SIPs –photochemical source apportionment modeling can be used to quantify U.S. Ozone transport between states and jurisdictions.
- Identification of Ozone exceptional events caused by stratospheric intrusion and wildfires –requires observations & data analysis, supplemented with global/regional scale photochemical models and regression models.
- Identification of international transport of Ozone for §179B demonstrations: requires nested global and regional scale photochemical modeling to evaluate international transport of Ozone.
- Identification of §182 Rural Transport Areas –combination of data analysis and photochemical modeling.

Regional modeling of U.S. sources for air quality planning, to identify sources and assess controls for contributing sources, will be needed within the West.

WEST appreciates the fact that states remain obligated under the Clean Air Act to address interstate transport in their SIPs. However, WEST does not believe imposing a new regulatory framework in the west that was developed to address realities prevalent in the east is appropriate. Recent evidence strongly suggests that diverse on- and offshore contributors cause interstate transport in the west. If strategies are genuinely needed to address maintenance and limited nonattainment concerns due to interstate transport in the western states, these will need to be based on improved modeling and analysis.

Therefore, we urge EPA to defer inclusion of western states in this proposal, and to continue working with western states in developing improved analytical tools so that appropriate strategies can be developed for our unique circumstances.

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[7] WESTAR Letter to EPA at p. 2

[8] Moore Presentation at Slide 19

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Thank you for your consideration of WEST's comments on this matter. If you have any questions, please contact me at 701-557-5652 or by email at LWitham@bepc.com.

Sincerely,

/s

Lyle Witham
President of the Board
WEST Associates

Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

DEQ

Matthew H. Mead, Governor

Todd Parfitt, Director

April 4, 2017

Scott Pruitt
Administrator
U.S. Environmental Protection Agency
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N. W.
Washington, DC 20460

Submitted via overnight mail and electronic mail

Re: Petition for Reconsideration of Final Rule on the Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Interstate Transport for Wyoming; Docket No. EPA-R08-OAR-2016-0521

Dear Administrator Pruitt:

The Wyoming Department of Environmental Quality, Air Quality Division (WDEQ) hereby petitions the United States Environmental Protection Agency (EPA) to reconsider the Final Rule on the Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Interstate Transport for Wyoming. 82 Fed. Reg. 9142 (Feb. 3, 2017) (Final Rule). Pursuant to Clean Air Act (CAA) Section 307(d)(7)(B), WDEQ requests that EPA convene a proceeding for reconsideration of the Disapproval. That would enable the EPA to hear testimony and receive new information from WDEQ and other parties who submitted comments to the above-referenced docket.

While WDEQ is hopeful that the EPA will grant this request, in consideration of the importance of the Disapproval to the State of Wyoming, WDEQ has contemporaneously filed a petition for review of the Disapproval in the United States Court of Appeals for the Tenth Circuit. Should EPA wish to engage in settlement negotiations, WDEQ is willing to jointly move the Tenth Circuit to stay that litigation for the duration of settlement discussions.

1. Basis for Petition and Procedural Background

In the above-referenced Disapproval, the EPA disapproved several portions of State Implementation Plan (State Plan or SIP) revisions submitted by the State of Wyoming to satisfy the State's CAA 110(a)(2)(D)(i) interstate transport requirements. As part of the requirements, State Plans must contain adequate provisions preventing any emissions activity in one state from emitting pollutants in amounts that will contribute significantly to nonattainment, or interfere with maintenance, of the National Ambient Air Quality Standards (NAAQS) in another state. Wyoming's SIP revisions included an infrastructure SIP for the 2008 ozone NAAQS, submitted

on February 6, 2014. The EPA did not propose any action on Wyoming's 2008 ozone NAAQS State Plan until November 18, 2016, at which point it proposed a number of actions, including the disapproval of SIP prong 2 of CAA subsection 110(a)(2)(D)(i)(I), which addresses interference with maintenance of the NAAQS in another state.

EPA stated many times that it would not use the Cross-State Air Pollution Rule (CSAPR) in the West as it has done in the Final Rule. In the interim period between submission and disapproval, EPA issued a memorandum intended to provide guidance to states when addressing the CAA's interstate transport "Good Neighbor" provision in their State Plans. In the memo, EPA stated, "CSAPR and its predecessor transport rules, the NO_x SIP Call and CAIR, were designed to address the collective contributions from the 37 states in the Eastern U.S. and were not formally evaluated for applicability to the 11 states in the Western U.S."[1] After EPA issued the guidance, but before taking action on Wyoming's plans, EPA issued a notice of data availability (NODA) to support the upcoming CSAPR update for the 2008 ozone NAAQS. The NODA for the CSAPR update was published for comment on August 4, 2015, well after the Division submitted the 2008 Ozone Infrastructure SIP. Wyoming commented on the NODA[2] with the understanding that the rule applied only to eastern states and that Wyoming would provide additional comments when the EPA proposed additional SIP requirements for western states.[3] When the EPA proposed the CSAPR update on December 3, 2015, the WDEQ commented to that effect once again, because the proposed and final rules both stated that, "the EPA is not addressing interstate emission transport in this action for the 11 western contiguous United States." 81 Fed. Reg. 74523.

WDEQ submitted Wyoming's 2008 ozone NAAQS SIP on February 6, 2014 and EPA had until August 5, 2015 to act on the submission. Throughout the entire process, WDEQ received no indication or communication from EPA's Region 8 office that any deficiencies were present in any of the interstate transport portions of Wyoming's State Plan submissions, and it was not until November 18, 2016, that WDEQ received any official communication that EPA planned to disapprove prong 2 of Wyoming's 2008 ozone SIP. WDEQ requested, and was subsequently denied, an extension so that it could provide EPA with additional information.[4] WDEQ provided what information it could in a comment letter to the docket by the December 19, 2016, comment period deadline. In this petition, the Division provides new technical information to support its original SIP submission. That new information is central to this rulemaking, and because the EPA did not consider this information when the agency first disapproved Wyoming's SIP submission, the EPA should now convene a proceeding to formally receive and consider this information.

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[1] *See* Information on the Interstate Transport "Good Neighbor" Provision for the 2008 Ozone National Ambient Air Quality Standards (NAAQS) under Clean Air Act (CAA) Section 110(a)(2)(D)(i). January 22, 2015, p. 4

[2] *See* Docket No. EPA–HQ–OAR–2015–0500

[3] WDEQ was also not able to comment at this time on the contribution threshold. The NODA stated, "In CSAPR, the EPA used a contribution screening threshold of 1 percent of the NAAQS to identify upwind states in the eastern U.S. that may significantly contribute to downwind nonattainment and/or maintenance problems and which warrant further analysis. The EPA will take comment on the appropriate threshold to be applied for purposes of the 2008 ozone NAAQS in the upcoming rulemaking proposal to address interstate ozone transport for that standard. The EPA is not proposing or taking comment on this threshold as part of this NODA." 80 Fed. Reg. 46277.

[4] *See* Docket ID No. EPA-R08-OAR-2016-0521

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2. Overview of New Information

In the Final Rule, EPA disapproved prong 2 of Wyoming's plan for the 2008 ozone NAAQS because EPA "linked" Wyoming emissions to projected high ozone levels at a Douglas County, Colorado receptor. EPA applied the "one percent" threshold used in the CSAPR update, which was determined using CAM_x modeling. The model used "Ozone Source Apportionment Technology" (OSAT), "Particulate Source Apportionment Technology" (PSAT) and the "Anthropogenic Precursor Culpability Analysis" (APCA), to determine the contributions from upwind states to predicted ozone levels. The EPA relies on the ability of OSAT/APCA to "tag" ozone precursor emissions from Wyoming and to distinguish precisely how much of the predicted ozone at downwind receptors is attributable to Wyoming.

In recent conversations with the EPA staff that conducted the CSAPR transport modeling, WDEQ inquired about the reliability of the predicted contributions, and if the predicted contributions could be verified. EPA confirmed that the certainty of the source apportionment tools cannot be tested, and that back-trajectories are used to determine if the modeled contributions from an upwind state are plausible. This is very concerning for Wyoming, because while transport patterns can reveal if wind flows would even allow precursor emissions from a particular area to reach a given receptor, it does not prove that OSAT/APCA can predict ozone contributions with any degree of accuracy. Moreover, one of the source apportionment tools in CAM_x, PSAT, was recently found to produce inconsistent results within the model, which called into question previous modeling results that were used for $PM_{2.5}$ and regional haze SIPs, as well as the CSAPR. According to the model developer, this inconsistency with PSAT has been corrected within the model, but it demonstrates the unproven nature of the source apportionment tools. Wyoming has serious concerns that EPA is using an inaccurate assessment tool to predict very small levels of ozone that in turn "link" Wyoming emissions to receptors in other states.

Knowing that the primary source of certainty testing for the source apportionment tools is through back-trajectory analysis, Wyoming conducted its own analysis of back-trajectories for the 10 days with the highest monitored ozone values at the Douglas County, Colorado monitor (referred to in the disapproval as a receptor) to which Wyoming emissions were "linked" in the base 2011 CSAPR modeling. Wyoming's objective was to compare the transport patterns on those 10 days to the model-predicted "contributions" from Wyoming to determine if the model results were reasonable. Only one of the 10 back-trajectories showed that flows for the previous 24 hours originated from the direction of Wyoming (see Attachment A). For the other nine back-trajectories, flows originated from southern Colorado, western Colorado/eastern Utah, states southwest of Colorado, and the Denver Front Range. WDEQ received additional data from EPA's Region 8 office on March 27, 2017 and conducted back-trajectory analyses on the four additional days for which it did not already conduct analyses (See Attachment A Supplements 1 and 2). In all, WDEQ's back-trajectory analyses show flows from only three of the eight modeled days (6/22, 7/5, and 8/10) and only one of the highest monitored days in 2011 (6/22).

WDEQ recently became aware of source apportionment modeling conducted by Ramboll Environ and Alpine Geophysics on behalf of the Denver Regional Air Quality Council (RAQC) and the Colorado Department of Public Health and Environment (CDPHE) Air Pollution Control

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Division (APCD) (Attachment B).[5] The modeling was conducted using the same CAM_x software used in EPA's CSAPR modeling with data from the Intermountain West Data Warehouse. The analysis showed that for the same site, on the same day, total 2017 MDA8 O_3 (highest daily maximum 8 hour average for ozone) was different between the types of analyses (Local Source Analysis versus Transport Analysis) likely due to the differences in grid resolution. This discrepancy alone is reason enough for EPA to reconsider Wyoming's 2008 ozone SIP submission.

Additional information has become available since the CSAPR Update and the disapproval of Wyoming's ozone SIP for which the CAM_x modeling does not account. The peer-reviewed journal *Atmospheric Chemistry and Physics* published an article dated March 1, 2017, which observed that ozone concentrations at some sites in the western U.S. are increasing despite stringent emissions controls.[6] The article concludes that an increase of Asian anthropogenic emissions has increased by 1–2 ppb yr^{-1} since 1990 and is a major driver of both spring and summer background ozone in the western U.S., contributing up to 65% of springtime background ozone. The article specifically references the Denver metropolitan area and notes that "the 4th highest MDA8 O_3 in the Denver metropolitan area shows little change over the past decades, despite significant reductions in NO_x…and CO emissions."[7]

EPA has also taken action on a petition, dated December 9, 2013, since its disapproval of prong 2 of Wyoming's 2008 ozone SIP. In the action, EPA stated that, "[o]zone levels across the nation are expected to further decline over the next several years due to emissions controls already in place. The EPA's emissions projections in support of the 2015 ozone NAAQS modeling show declining emissions of NO_X and VOCs between 2017 and 2025." 82 Fed. Reg. 6520. In light of this information, it seems premature for the EPA to disapprove prong 2 of Wyoming's State Plan for ozone.

WDEQ also submitted numerous exceptional event packages to EPA between 2011 and 2014, and EPA responded in a letter received by WDEQ on April 28, 2016 that:

> A preliminary review of the demonstrations submitted indicates that the flagged PM and ozone data may have been influenced by exceptional events; however, at this time the EPA will not take action on WDEQ's request for concurrence on the referenced data flags. The data are not anticipated to be involved in any pending regulatory decision by the EPA, therefore, the EPA is not making a concurrence decision on the demonstrations submitted. *If at some point in the future the flagged data would be included in an attainment demonstration or involved in other regulatory decisions, the EPA would then undertake a full review of the submitted demonstrations to allow a concurrence decision at that time.*" (emphasis added).

Yet all of those flagged data were used in the EPA's regulatory decision to disapprove Wyoming's ozone transport State Plan submission. 82 Fed. Reg. 9151. WDEQ asks that EPA

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[5] Denver Metro/North Front Range 2017 Ozone Source Apportionment Modeling. Retrieved from http://vibe.cira.colostate.edu/wiki/wiki/9132/. February 21, 2017 and March 16, 2017.
[6] M. Lin et al. "US surface ozone trends and extremes from 1980 to 2014" *Atmospheric Chemistry and Physics*. March 1, 2017. p. 2964
[7] Ibid. p. 2960

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concur on Wyoming's decisions to flag the data as influenced by exceptional events, remove the flagged data, and then use the new data set to reconsider the Final Rule. WDEQ also requests that EPA review Colorado receptor data for any possible concurrent exceptional events, such as wildfires, on certain dates and WDEQ would also like an opportunity to review that data. Even though a state chooses not to submit an exceptional event package it does not mean data was not impacted by an exceptional event or events. Any day impacted by an exceptional event should be flagged as such whether or not that event was included in an official submission.

3. Docket Comments Supported Allowing Wyoming to Submit More Information

WDEQ's request for additional time to submit more information was not unreasonable. Every other comment to the docket supporting Wyoming's underlying State Plan submission requested that the EPA grant WDEQ additional time to submit additional information. (See Attachment C). The EPA chose not to give WDEQ more time based on a then-unsigned consent decree with the Sierra Club. That decision flies in the face of cooperative federalism because, in essence, the EPA determined that a citizen group's convenience during litigation was more important than a sovereign state's right to fully participate in its own State Plan development process.

I appreciate the time that you have taken to consider WDEQ's request. Although WDEQ is hopeful that the EPA will convene a proceeding for reconsideration, WDEQ will also be filing a petition for review in the 10th Circuit Court of Appeals today. Please feel free to contact me with any questions at (307) 777-3746. Please direct questions that are legal in nature to my counsel at the Wyoming Attorney General's Office, Elizabeth Morrisseau, at (307) 777-6199.

Sincerely,

Nancy E. Vehr
Air Quality Division Administrator

CC: Todd Parfitt, Wyoming Department of Environmental Quality, Director
Colin McKee, Wyoming Governor's Office, Policy Advisor
Deb Thomas, EPA Region 8, Acting Administrator
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Message

From: Odendahl, Steve [Odendahl.Steve@epa.gov]
Sent: 4/5/2017 3:42:37 PM
To: Logan, Paul [Logan.Paul@epa.gov]; Schefski, Kenneth [Schefski.Kenneth@epa.gov]; Clark, Adam [Clark.Adam@epa.gov]; Morales, Monica [Morales.Monica@epa.gov]; Daly, Carl [Daly.Carl@epa.gov]; Hestmark, Martin [Hestmark.Martin@epa.gov]
CC: Hogan, Stephanie [Hogan.Stephanie@epa.gov]; Vijayan, Abi [Vijayan.Abi@epa.gov]
Subject: Wyoming's petition for review of the 2/3/17 interstate transport action
Attachments: DENVER-#572491-v1-Wyo_Ozone_Transport_Petition_for_Review.pdf

DOJ has provided a copy of the petition, attached here. **Attorney Client / Deliberative Ex. 5**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; SCOTT PRUITT, in his official capacity as Administrator of the U.S. Environmental Protection Agency; and DEBORAH THOMAS, in her official capacity as Acting Region 8 Administrator of the U.S. Environmental Protection Agency, Respondents.	)	Case No. _____

STATE OF WYOMING'S PETITION FOR REVIEW

On February 3, 2017, the United States Environmental Protection Agency (EPA) disapproved the interstate ozone transport portion of Wyoming's February 6, 2014, State Implementation Plan revision submittal. 82 Fed. Reg. 9142 (Feb. 3, 2017) (the Rule). The State of Wyoming hereby petitions the Court for review of the EPA's decision under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), and Federal Rule of Appellate Procedure 15(a). Wyoming will ask this Court to vacate and remand that portion of the Rule to EPA for further proceedings. A copy of the Rule (Exhibit 1) and Wyoming's petition for reconsideration to the agency (Exhibit 2) are attached to this Petition.

Petitions for judicial review of the Rule must be filed in the United States Court of Appeals for the appropriate circuit by April 4, 2017. 82 Fed. Reg. at 9154 (citing Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1)). Because this rule applies to the State of Wyoming, venue is appropriate in this Court. *See id.*

Respectfully submitted this 4th day of April, 2017.

s/ Elizabeth A. Morrisseau
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Attorneys for Petitioner

CERTIFICATE OF DIGITAL SUBMISSION, VIRUS SCANNING, AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **STATE OF WYOMING'S PETITION FOR REVIEW**, as submitted in Digital Form via the Court's ECF system, is an exact copy of the documents filed with the Clerk and has been scanned for viruses with Malwarebytes Anti-Malware, version 2.2.1.1043, Virus Definition File Dated: April 4, 2017 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

s/ Erik E. Petersen
Senior Assistant Attorney General

CERTIFICATE OF SERVICE

Consistent with Local Rule 15.3, I hereby provide a list of the respondents requiring service of the Petition by the clerk.

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Office of General Counsel (2311)
U.S. Environmental Protection

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Consistent with Federal Rule of Appellate Procedure 15(c), I hereby certify that Wyoming will serve a copy of this filing upon the following participants to the underlying agency proceeding.

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EXHIBIT 1

Rule No.	Rule title	State effective date	Final rule citation, date	Comments
*	*	*	*	*
R307–403 Permits: New and Modified Sources in Nonattainment Areas and Maintenance Areas				
R307–403	Permits: New and Modified Sources in Nonattainment Areas and Maintenance Areas.	9/15/1998	71 FR 7679, 2/14/06	Except for R307–403–1, R307–403–2, R307–403–10, R307–403–11.
R307–403–1	Purpose and Definitions	7/1/2013	[insert **Federal Register** citation], 2/3/2017.	Conditionally approved through 2/5/2018.
R307–403–2	Applicability	7/1/2013	[insert **Federal Register** citation], 2/3/2017.	Conditionally approved through 2/5/2018.
R307–403–10	Analysis of Alternatives	7/1/2013	[insert **Federal Register** citation], 2/3/2017.	Conditionally approved through 2/5/2018.
R307–403–11	Actuals PALS	7/1/2013	[insert **Federal Register** citation], 2/3/2017.	Conditionally approved through 2/5/2018.
*	*	*	*	*

* * * * *

[FR Doc. 2017–02189 Filed 2–2–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2016–0521; FRL–9959–15–Region 8]

Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Interstate Transport for Wyoming

AGENCY: The Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action on portions of six submissions from the state of Wyoming that are intended to demonstrate that the State Implementation Plan (SIP) meets certain interstate transport requirements of the Clean Air Act (Act or CAA). These submissions address the 2006 and 2012 fine particulate matter ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS), 2008 ozone NAAQS, 2008 lead (Pb) NAAQS, 2010 sulfur dioxide (SO_2) NAAQS and 2010 nitrogen dioxide (NO_2) NAAQS. The interstate transport requirements under the CAA consist of four elements (or prongs): Significant contribution to nonattainment (prong 1) and interference with maintenance (prong 2) of the NAAQS in other states; and interference with measures required to be included in the plan for other states to prevent significant deterioration of air quality (prong 3) or to protect visibility (prong 4). Specifically, the EPA is approving Wyoming's submissions for interstate transport prongs 1 and 2 for the 2008 Pb and 2010 NO_2 NAAQS, and approving prong 1 and disapproving prong 2 for the 2008 ozone NAAQS. The EPA is also approving interstate transport prong 4 for the 2008 Pb and 2010 SO_2 NAAQS, and disapproving prong 4 for the 2006 $PM_{2.5}$, 2008 ozone, 2010 NO_2 and 2012 $PM_{2.5}$ NAAQS.

DATES: This final rule is effective on March 6, 2017.

ADDRESSES: The EPA has established a docket for this action under Docket Identification Number EPA–R08–OAR–2016–0521. All documents in the docket are listed on the *http://www.regulations.gov* index. Although listed in the index, some information may not be publicly available, *e.g.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air Program, Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. The EPA requests that you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Adam Clark, Air Program, U.S. Environmental Protection Agency, Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–7104, *clark.adam@epa.gov.*

I. Background

On November 18, 2016, the EPA proposed action on six submittals from Wyoming intended to address the interstate transport requirements of CAA section 110(a)(2)(D)(i) for the 2008 Pb, 2008 ozone, 2010 NO_2, 2010 SO_2, and 2006 and 2012 $PM_{2.5}$ NAAQS. 81 FR 81712. In that action, the EPA proposed to approve CAA section 110(a)(2)(D)(i)(I) prongs 1, 2 and 4 for the 2008 Pb NAAQS, prong 1 for the 2008 ozone NAAQS, prongs 1 and 2 for NO_2, and prong 4 for the 2010 SO_2 NAAQS, and proposed to disapprove prong 4 for the 2006 $PM_{2.5}$, 2008 ozone, 2010 NO_2 and 2012 $PM_{2.5}$ NAAQS, and prong 2 for the 2008 ozone NAAQS. An explanation of the CAA requirements, a detailed analysis of the State's submittals, and the EPA's rationale for all proposed actions were provided in the notice of proposed rulemaking, and will not generally be restated here.

The public comment period for this proposed rule ended on December 19, 2016. The EPA received seven comments on the proposal, which will be addressed in the "Response to Comments" section, below. All of the comments relate to the EPA's proposed action with respect to prongs 1 and 2 of CAA section 110(a)(2)(D)(i)(I) for the 2008 ozone NAAQS. We had proposed to approve the portion of the Wyoming SIP submittal pertaining to the CAA requirement that the State prohibit any emissions activity within the State from emitting air pollutants which will significantly contribute to nonattainment (prong 1) of the 2008 ozone NAAQS in other states and proposed to disapprove the portion of the Wyoming SIP submittal pertaining to the requirement that the state prohibit any emissions activity within the state interfering with maintenance (prong 2) of the 2008 ozone NAAQS in other states. In proposing to take this action, we noted two deficiencies in Wyoming's submittal: (1) Wyoming limited its

technical analysis to a discussion on general wind patterns relative to areas designated nonattainment in certain states that are geographically closest to Wyoming, and did not consider whether emission activity in the State specifically contributed to such areas on days with measured exceedances of the NAAQS or in other areas not designated nonattainment; and (2) Wyoming did not give the "interfere with maintenance" clause of CAA section 110(a)(2)(D)(i)(I) independent significance because its analysis did not attempt to evaluate the potential impact of Wyoming's emissions on ozone in areas that may have issues maintaining air quality.

In addition, the EPA cited at proposal certain technical information and a related analysis the agency conducted in order to facilitate efforts to address interstate transport requirements for the 2008 ozone NAAQS, which was also used to support the recently finalized Cross-State Air Pollution Rule Update for the 2008 ozone NAAQS (CSAPR Update).[1] In particular, the EPA cited to air quality modeling which (1) identified locations in the U.S. where the EPA anticipates nonattainment or maintenance issues in 2017 for the 2008 ozone NAAQS (these are identified as nonattainment and maintenance receptors), and (2) quantified the projected contributions from emissions from upwind states to downwind ozone concentrations at the nonattainment and maintenance receptors in 2017. The notice also proposed to apply an air quality threshold of one percent of the NAAQS, equivalent to 0.75 ppb with respect to the 2008 ozone NAAQS, to determine whether a state was "linked" to an identified downwind air quality problem in another state such that the upwind state may significantly contribute to nonattainment or interfere with maintenance of the NAAQS in the downwind state.

The modeling data showed that emissions from Wyoming contribute above the one percent threshold to one identified maintenance receptor in the Denver, Colorado area. Accordingly, as the Wyoming Department of Environmental Quality (WDEQ) did not provide technical analysis sufficient to support the State's conclusion that emissions originating in Wyoming do not interfere with maintenance of the 2008 ozone NAAQS in any other state, the EPA proposed to disapprove the Wyoming SIP as to prong 2 of CAA section 110(a)(2)(D)(i)(I). The proposal also noted that, despite the deficiencies in Wyoming's SIP submission as to prong 1, the modeling data confirmed the State's conclusion that it does not significantly contribute to nonattainment of the 2008 ozone NAAQS in any other state. Accordingly, the EPA proposed to approve Wyoming's SIP as meeting the prong 1 requirements of CAA section 110(a)(2)(D)(i)(I) for the 2008 ozone NAAQS.

II. Response to Comments

Comment: Several commenters asserted that the State should be given more time to review the CSAPR Update modeling analysis before the EPA takes final action on Wyoming's SIP submittal addressing the prong 1 and 2 requirements as to the 2008 ozone NAAQS. WDEQ submitted a comment letter on November 23, 2016, requesting a 90-day extension to the 30-day comment period that the State asserted was necessary "to devote significant time and energy reviewing the EPA's basis for the approval and disapproval of the State Plans named in the Proposed Rule." The State noted that the EPA had taken over two years and nine months to review Wyoming's February 6, 2014 submittal, and that it was therefore reasonable to allow 120 days for the State to review the EPA's proposed action and to provide additional information in support of its original SIP submission. The EPA responded to WDEQ with a December 6, 2016 letter informing the State that we would not be extending the comment period for the proposed rule.[2]

Commenter Utility Air Regulatory Group (UARG) asserted that the EPA's refusal to extend the comment period is unreasonable. UARG stated that the EPA did not dispute that the State needed additional time, but rather denied the extension request on grounds that opposing counsel in a proposed consent decree negotiated between the EPA and the Sierra Club had refused to extend the negotiated deadline. *See Sierra Club v. McCarthy*, Case No. 3:15–cv–04328–JD, (N.D. Cal), Joint Motion to Enter Partial Consent Decree (Oct. 15, 2015) (Document 57). UARG asserted that, because the consent decree was still proposed and therefore had not been entered by the court, the EPA could have taken action to modify the proposed consent decree or filed a motion with the district court to modify the deadline. The commenter asserted that the EPA should have either taken one of these actions, or disputed WDEQ's statement that it needed additional time.

Several commenters asserted that Wyoming should be given an opportunity to review the recently-finalized CSAPR Update modeling to determine whether it is accurate or appropriate for Wyoming or the West overall. Commenter WEST Associates requested that the EPA allow Wyoming to re-examine and resubmit the prong 2 portion of the State's February 6, 2014 submittal before moving forward with a final action.

Response: The EPA disagrees with the commenters that the State has not had sufficient time to review the modeling analysis associated with the CSAPR Update Rulemaking. The EPA has provided several opportunities for states to review its modeling information relative to the 2008 ozone NAAQS. The EPA first issued a memo to all states on January 22, 2015, which included the preliminary modeling results assessing interstate transport with respect to the 2008 ozone NAAQS.[3] This preliminary modeling showed that in 2018 Wyoming would contribute to a maintenance receptor above the one percent screening threshold used in the original CSAPR rulemaking. The EPA subsequently issued updated modeling in an August 4, 2015 Notice of Data Availability (NODA), which included a docket with substantial technical information on how the modeling was conducted, notably an Air Quality Modeling Technical Support Document.[4] The updated air quality modeling also identified linkages between Wyoming and nonattainment and maintenance receptors in the Denver, Colorado area, and Wyoming submitted comments on the docket for the NODA. The modeling released in the NODA was used to support the proposed CSAPR Update, and the EPA provided additional, robust explanation and technical support for the modeling in that proposal (80 FR 75706, December 23, 2015) and again in the final rule (81 FR 74504, October 26, 2016), which once more demonstrated a linkage between Wyoming and a maintenance receptor in the Denver, Colorado area, as described in the EPA's

[1] "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS." 81 FR 74504, October 26, 2016.

[2] EPA's December 6, 2016 letter is available in the docket for this action.

[3] "Information on the Interstate Transport "Good Neighbor" Provision for the 2008 Ozone National Ambient Air Quality Standards (NAAQS) under Clean Air Act (CAA) Section 110(a)(2)(D)(i)(I)." January 22, 2015. This document, and the associated January 2015 "Air Quality Modeling Technical Support Document for the 2008 Ozone NAAQS Transport Assessment," are available in the docket for this action.

[4] "Updated Air Quality Modeling Technical Support Document for the 2008 Ozone NAAQS Transport Assessment," August 2015.

proposed action on Wyoming's SIP submission.[5]

Moreover, the EPA proposed a similar action with respect to Utah's SIP submission addressing interstate transport with respect to the 2008 ozone NAAQS based on several deficiencies in that state's SIP and citing to the air quality modeling conducted to support the CSAPR Update, which demonstrated that Utah was also linked to nonattainment and maintenance receptors in Denver. May 10, 2016, 81 FR 28807. WDEQ reviewed and commented on the EPA's proposed disapproval action on Utah's interstate transport SIP submission in a June 9, 2016 comment letter submitted to the EPA.[6] In that letter, WDEQ discussed the impact that the EPA's application of the one percent screening threshold to states linked to the Denver receptors would have on the state of Wyoming. Accordingly, Wyoming had several opportunities (including time since January 2015) to review and comment on the EPA's modeling conducted over the last two years and, as necessary, to supplement its submission with additional technical analysis addressing the linkages repeatedly identified in the EPA's analysis.

Finally, although the commenters focus on concerns relative to an opportunity to review the applicability of the EPA's air quality modeling, they do not address the clear deficiency in Wyoming's SIP identified in the EPA's proposed disapproval as to the prong 2 requirements. As explained at proposal, in remanding the Clean Air Interstate Rule (CAIR) to the EPA in *North Carolina* v. *EPA*, the D.C. Circuit explained that the regulating authority must give the "interfere with maintenance" clause of section 110(a)(2)(D)(i)(I) "independent significance" by evaluating the impact of upwind state emissions on downwind areas that are at risk of future nonattainment, considering historic variability, even if they currently measure clean data.[7] Wyoming's SIP submission did not give the "interfere with maintenance" clause of section 110(a)(2)(D)(i)(I) independent significance because its analysis did not evaluate the potential impact of Wyoming emissions on areas that may have issues maintaining that air quality, even if they are currently measuring clean data. Thus, even absent the EPA's modeling, the SIP submission was deficient as to addressing the requirements of prong 2 with respect to the 2008 ozone NAAQS. Finally, the EPA notes that finalization of this action in no way precludes the state of Wyoming from subsequently submitting a SIP or SIP revision to address the deficiencies identified here.

Comment: Commenters WEST Associates and Basin Electric Power Cooperative (BEPC) stated that the EPA should wait for the litigation on the EPA's Federal Implementation Plan (FIP) for NO_X-related portions of the Wyoming Regional Haze SIP/FIP to be resolved before taking final action on prong 2 of Wyoming's February 6, 2014 submittal. The commenters asserted that it is counterproductive to engage in a prong 2 analysis for ozone while the EPA's Regional Haze NO_X FIP is still under appeal before the United States Court of Appeals for the 10th Circuit. Commenter BEPC noted that the representatives for the Laramie River Station are currently participating in good faith negotiations with the EPA aimed at reaching an agreement on the Regional Haze NO_X controls for the source.

Response: The EPA disagrees that it would be appropriate to wait until resolution of the legal challenges to the EPA's January 30, 2014 partial approval and partial disapproval of Wyoming's Regional Haze SIP and the EPA's concurrent promulgation of a FIP (79 FR 5032) before acting on Wyoming's prong 2 SIP submission. The Regional Haze and interstate transport planning requirements address different air quality concerns and are addressed under different statutory provisions and timeframes. The Regional Haze requirements concern visibility in Class I areas, whereas the interstate transport requirements are concerned with attainment and maintenance of the NAAQS, which are designed to address public health and welfare. Thus, while actions taken to address one set of requirements may assist with meeting the other set of requirements, neither Wyoming nor the commenters have explained how implementation of either the disputed SIP or FIP requirements for Regional Haze would necessarily address the 110(a)(2)(D)(i)(I) interstate transport requirements.

Moreover, Wyoming's prong 2 SIP was submitted on February 6, 2014 and was deemed complete by operation of law on August 7, 2014. Accordingly, CAA section 110(k)(2) requires the EPA to have taken final action to approve or disapprove a state's SIP within one year thereafter. As the EPA's action on this submission is already belated, the EPA does not find it appropriate to further delay action on the State's interstate transport SIP until there is resolution of litigation for an unrelated SIP requirement. Delaying action on the State's interstate transport SIP would only further delay potential emission reductions that may be necessary to address maintenance of the NAAQS in Denver, and thereby further delay the public health benefits that would accrue from such emission reductions. To the extent Wyoming believes that the NO_X emission reductions that would be achieved through the State's implementation of the Regional Haze requirements will assist in meeting the State's interstate transport requirements, once the ongoing dispute is resolved, Wyoming may submit a revised SIP submission making an appropriate demonstration at that time.

Comment: Commenter WDEQ disagrees with the EPA's basis for disapproving the State's SIP submission as to the prong 2 requirements for the 2008 ozone NAAQS, and believes its February 6, 2014 submittal contains the necessary information to meet these requirements. WDEQ asserted that it had relied upon the EPA's most recent guidance at the time that directly addressed the prong 1 and 2 requirements. WDEQ noted that the EPA's September 2013 infrastructure SIP guidance did not address the prongs 1 and 2 requirements, and therefore relied on prior guidance documents issued in 2006 and 2007 regarding reliance on the EPA's prior interstate transport rulemaking, CAIR, for purposes of developing interstate transport SIPs.[8] WDEQ noted that these guidance documents state that a negative declaration from states not covered by CAIR certifying that the state meets prongs 1 and 2 is adequate to satisfy the requirements of CAA section 110(a)(2)(D)(i). WDEQ added that the guidance documents made no indication that the EPA expected states to consider contributions on days where downwind states measured an exceedance, neither in nonattainment nor maintenance areas. WDEQ contends that the EPA's proposed finding that WDEQ's analyses for prongs 1 and 2 are deficient because "transported

[5] The Air Quality Modeling Technical Support Document (AQM TSD) for each of these actions in the docket for this rulemaking.

[6] WDEQ's comment letter on the EPA's May 10, 2016 proposed action on the Utah submittal can be found on *www.regulations.gov* in the docket for that action, EPA–R08–OAR–2016–0107.

[7] 531 F.3d 896, 910–11 (D.C. Cir. 2008) (holding that the EPA must give "independent significance" to each prong of CAA section 110(a)(2)(D)(i)(I)).

[8] "Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ NAAQS," August 15, 2006, and "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards," October 2, 2007.

emissions may cause an area to measure exceedances of the standard even if that area is not formally designated nonattainment by the EPA" is unreasonable because such a showing was not stated as a requirement for approval. WDEQ also noted that the EPA previously approved Wyoming's ozone infrastructure plan which used the same methodology and approach used by the State in its February 6, 2014 submittal.

WDEQ asserted that the EPA's proposed prong 2 disapproval indicates a radical change from its prior approach for determining adequacy of such plans. WDEQ asserted that the EPA has made statements indicating that the Agency has not evaluated the applicability of a transport rule in the western states, and that the EPA does not have an understanding of the nature of interstate ozone transport in the West. WDEQ suggested that the EPA should conduct interstate transport modeling and analysis specific to western states and then use the outcome of such analysis in the development and evaluation of future plans, but not plans previously submitted.

Commenter Western Energy Alliance stated that the EPA's proposed action runs contrary to long-standing agency practice of accepting a "weight of evidence" approach to evaluating interstate transport in downwind states, and contends that is inappropriate for the EPA to hold the WDEQ analysis to standards that did not exist when the SIP was developed.

Response: For the reasons described at proposal and in this final action, the EPA disagrees that Wyoming's SIP submission contains adequate provisions to address the prong 2 requirements with respect to the 2008 ozone NAAQS. In particular, the State did not give the "interfere with maintenance" clause of CAA section 110(a)(2)(D)(i)(I) independent significance, because its analysis did not attempt to evaluate the potential impact of Wyoming emissions on areas that may have issues maintaining that air quality, even if they currently measure clean data. As we noted at proposal, the EPA's most recent technical information demonstrates that emissions from Wyoming will impact air quality in other states relative to the 2008 ozone NAAQS.

The EPA disagrees that it needed to issue guidance for states to be aware of the requirement to evaluate areas that might be at risk of violating the standard, regardless of whether those areas are or have been designated nonattainment. The court in *North Carolina* was specifically concerned with areas not designated nonattainment when it rejected the view that "a state can never 'interfere with maintenance' unless the EPA determines that at one point it 'contribute[d] significantly to nonattainment.'" 531 F.3d at 910. The court pointed out that areas barely attaining the standard due in part to emissions from upwind sources would have "no recourse" pursuant to such an interpretation. *Id.* Accordingly, and as described in the proposal, the court explained that the regulatory authority must give "independent significance" to the maintenance prong of CAA section 110(a)(2)(D)(i)(I) by separately identifying such downwind areas for purposes of defining states' obligations pursuant to the good neighbor provision. Thus, the court's decision in *North Carolina* gave Wyoming sufficient notice, without further guidance from the EPA, that it needed to consider the potential impact of its emissions on areas that may have issues maintaining the standard. In addition, as noted at proposal, the EPA has stated in many actions before Wyoming made their submission that the obligation to address impacts on downwind air quality is independent of formal designations because exceedances can happen in any area.[9] Wyoming's SIP submission did not attempt to evaluate such areas and was thus deficient as to the prong 2 requirements. In so finding, the EPA is not engaged in a "radical departure" from its prior approach to evaluating SIPs, but merely measuring Wyoming's SIP against the statutory requirements, as interpreted by the court in *North Carolina*.[10]

While EPA appreciates the helpful role guidance can provide to states, whether the EPA chooses to issue guidance or not does not relieve either states of the obligation to submit SIPs that address CAA section 110(a)(2)(D)(i)(I) by the statutory deadline or the EPA of the obligation to review SIPs consistent with those statutory requirements. States bear the primary responsibility to demonstrate that their plans contain adequate provisions to address the statutory interstate transport provisions, specifically to demonstrate that the plan properly prohibits emissions that will significantly contribute to nonattainment or interfere with maintenance of the NAAQS in downwind states. Furthermore, in *EPA* v. *EME Homer City Generation, L.P.*, the Supreme Court clearly held that "nothing in the statute places the EPA under an obligation to provide specific metrics to States before they undertake to fulfill their good neighbor obligations." 134 S. Ct. 1584, 1601 (2014).[11] While the EPA has taken a different approach in some prior rulemakings by providing states with an opportunity to submit a SIP after we quantified the states' emission reduction obligations (*e.g.*, the NO_X SIP Call and CAIR[12]), the CAA does not require such an approach. As discussed earlier, the EPA did provide information to assist states with developing or supplementing their SIP submittals for the 2008 ozone NAAQS, including the January 22, 2015 memorandum providing preliminary modeling information regarding potential downwind air quality problems and levels of upwind state contributions and the August 4, 2015 NODA providing

[9] The EPA notes that, in approving the state's SIP to address the requirements of section 110(a)(2)(D)(i)(I) with respect to the 1997 ozone NAAQS, the EPA supplemented the State's technical analysis in order to ensure that that independent analysis was given to the prong 2 requirements. See 73 FR 26023, May 8, 2008.

[10] *See, e.g.*, Clean Air Interstate Rule, 70 FR 25162, 25265 (May 12, 2005) ("As to impacts, CAA section 110(a)(2)(D) refers only to prevention of 'nonattainment' in other States, not to prevention of nonattainment in designated nonattainment areas or any similar formulation requiring that designations for downwind nonattainment areas must first have occurred."); Cross-State Air Pollution Rule, 76 FR 48208, 48211 (Aug. 8, 2011) (evaluating nonattainment and maintenance concerns based on modeled projections); Brief for Respondents U.S. Environmental Protection Agency at 23–24, *EME Homer City Generation, L.P.* v. *EPA*, Case No. 11–1302 (D.C. Cir. Jan. 16, 2015), ECF No. 1532516 (defending the EPA's identification of air quality problems in CSAPR independent of area designations). Cf. Final Response to Petition from New Jersey Regarding SO_2 Emissions From the Portland Generating Station, 76 FR 69052 (Nov. 7, 2011) (finding facility in violation of the prohibitions of CAA section 110(a)(2)(D)(i)(I) with respect to the 2010 SO_2 NAAQS prior to issuance of designations for that standard). Thus, it was unnecessary for the EPA to issue formal guidance to alert states to its interpretation of CAA section 110(a)(2)(D)(i)(I) requirements.

[11] "Nothing in the Act differentiates the Good Neighbor Provision from the several other matters a State must address in its SIP. Rather, the statute speaks without reservation: Once a NAAQS has been issued, a State 'shall' propose a SIP within three years, § 7410(a)(1), and that SIP 'shall' include, among other components, provisions adequate to satisfy the Good Neighbor Provision, § 7410(a)(2)." *EPA* v. *EME Homer City Generation, L.P.*, 134 S. Ct. at 1600; *see also Nat'l Ass'n of Mfrs.* v. *EPA*, 750 F.3d 921, (D.C. Cir. 2014) ("Finally, petitioners argue that EPA should not have issued, or at least should not require compliance with, the 2013 NAAQS without first providing States and regulated parties certain implementation guidance. We disagree. The NAAQS sets a clear numerical target specifying the maximum levels of emissions in the States. Under the law, States will devise implementation plans to meet that target. Nothing in the law dictates additional guidance from EPA at this point.").

[12] For information on the NO_X SIP call see 63 FR 57356 (October 27, 1998). For information on CAIR (the Clean Air Interstate Rule) see 70 FR 25162 (May 12, 2005).

updated modeling. All of these documents consistently indicated that the EPA's technical analysis showed that Wyoming emissions contribute to downwind air quality problems with respect to the 2008 ozone NAAQS; yet Wyoming did not revise or supplement its SIP submittal with additional data showing the State had satisfied its statutory obligation.[13]

Moreover, it is inappropriate to rely on older EPA guidance to demonstrate compliance with the prong 2 requirements for the 2008 ozone NAAQS as those guidance documents do not address this specific NAAQS. Both the 2006 and 2007 guidance documents WDEQ claims to have relied on are inapplicable to the State's obligation to address the prong 2 requirements for the 2008 ozone NAAQS. First, WDEQ concedes that both guidance documents were aimed at the addressing the prongs 1 and 2 requirements for the 1997 ozone and fine particulate matter ($PM_{2.5}$) NAAQS, not the 2008 ozone NAAQS at issue here. To the extent the guidance documents recommended relying on the analysis conducted to support the CAIR rulemaking, that rulemaking also only addressed the 1997 standards, and not the more stringent 2008 ozone NAAQS. The guidance documents in no way suggested that states could rely on the analysis from CAIR to address the prong 1 and 2 requirements for any other NAAQS. Moreover, even were the CAIR analysis in some way relevant to the consideration of the 2008 ozone NAAQS, the EPA did not evaluate the impact of emissions from western states, including Wyoming, on air quality in the course of that rulemaking.[14] Accordingly, there would be no basis on which either Wyoming or the EPA could conclude that the CAIR analysis supports a conclusion that Wyoming does not contribute significantly to nonattainment or interfere with maintenance either for the NAAQS explicitly addressed by CAIR or for any other NAAQS.[15]

More importantly, in *North Carolina* v. *EPA*, the D.C. Circuit held that CAIR was "fundamentally flawed," 531 F.3d 896, 929 (D.C. Cir. 2008), in part because CAIR did not satisfy the statutory requirement to "achieve something measurable towards the goal of prohibiting sources 'within the State' from contributing to nonattainment or interfering with maintenance in 'any other State.'" *Id.* at 908. The D.C. Circuit held in *EME Homer City Generation, L.P.* v. *EPA*, "when our decision in North Carolina deemed CAIR to be an invalid effort to implement the requirements of the good neighbor provision, that ruling meant that the initial approval of the CAIR SIPs was in error at the time it was done." 795 F.3d 118, 133 (2015). States therefore did not need formal guidance to understand that it was no longer appropriate to rely on CAIR for purposes of satisfying the state's interstate transport obligations with respect to the 2008 ozone NAAQS, particularly when Wyoming submitted its SIP revision, six years after the *North Carolina* decision issued. Nonetheless, in a subsequent guidance document issued addressing the prong 1 and 2 requirements for the 2006 $PM_{2.5}$ NAAQS, the EPA explicitly stated that states should no longer rely on CAIR as a means of addressing the interstate transport requirements because the rule had been remanded by the court in *North Carolina*.[16]

Although WDEQ questions how it could have developed an approvable SIP without explicit guidance from the EPA and before the EPA had conducted air quality modeling evaluating downwind air quality and contributions, as explained earlier, states bear the primary responsibility for demonstrating that their plans contain adequate provisions to address the statutory interstate transport provisions whether or not the EPA issues such guidance or conducts such modeling. The commenters are correct to note that, in separate interstate transport actions, the EPA has reviewed and finalized action on interstate transport SIPs in states where air quality modeling was not available or where the total weight of evidence for finalizing action on the state's SIP was not solely based on air quality modeling.[17] As evidenced by these actions, consideration of monitoring data and wind patterns, properly used, can be relevant to evaluating potential interstate transport impacts, but such consideration does not absolve a state from evaluating its downwind impact regardless of formal area designations and considering the requirements of both prongs of the good neighbor provision. A state can and should submit all of the technical information it considers relevant to evaluate its contribution to downwind air quality, including anticipated changes in the emissions from sources within the state and any additional factors specific to the state that influence its emissions and air pollution which may transport to other states. As we noted above and as found by the Supreme Court in *EME Homer City Generation, L.P.*, the lack of guidance does not relieve either the states of the obligation to submit SIPs that address CAA section 110(a)(2)(D)(i)(I) nor the EPA of the obligation to review such SIPs consistent with the statutory requirements of the good neighbor provision. Though Wyoming submitted

[13] The EPA does not agree that its statements explaining the EPA's intent to work with western states are an indication that the EPA does not have an understanding of interstate transport in the West. The EPA's statement that the EPA and the states should have a "common understanding of interstate ozone transport in each part of the country" was intended to indicate the Agency's desire to work with the states to develop appropriate solutions to interstate transport problems, not an indication that the EPA lacks an understanding of interstate transport in the West. As explained further below, the EPA believes the modeling provides a reliable projection of the nature of interstate transport in western states.

[14] See AQM TSD for CAIR final rule, at 3. WDEQ's citation to CSAPR is also unavailing. CSAPR also addressed only the 1997 ozone NAAQS, not the more stringent 2008 ozone NAAQS, and did not evaluate interstate transport as to any of these standards in western states, including Wyoming. 76 FR 48229 (describing modeling of states in the central and eastern U.S.). Accordingly, it would also be inappropriate for Wyoming to conclude that, because the state was not included in CSAPR, it does not significantly contribute to nonattainment or interfere with maintenance of the 2008 ozone NAAQS.

[15] Additionally, the 2006 guidance to which WDEQ points explicitly noted that any negative declaration indicating a state was not covered by CAIR should also be supported by a technical demonstration. *See* 2006 iSIP Guidance, p. 5.

[16] Memo from William T. Harnett to Regional Air Division Directors, Regions I–X, "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)" (Sept. 25, 2009), p. 3. Notably, this guidance document explicitly stated as to the prong 2 requirements, "This provision requires evaluation of impacts on areas of other states that are meeting the 2006 24-hour $PM_{2.5}$ NAAQS, not merely areas formerly designated nonattainment that are subject to a maintenance SIP. Therefore, the state's submission must explain whether or not emissions from the state have this impact and, if so, address the impact." *Id.* p. 3–4. The EPA continued by providing specific factors a state could consider: "A state's submission for this requirement should provide the technical information which the state deems appropriate to support its conclusions. Suitable information might include, but is not limited to, information concerning emissions in the state, meteorological conditions in the state and the potentially impacted states, monitored ambient concentrations in the state and the potentially impacted states, and air quality modeling." *Id.* p. 4.

[17] See, *e.g.*, Air Quality State Implementation Plans; Approvals and Promulgations: Utah; Interstate Transport of Pollution for the 2006 $PM_{2.5}$ NAAQS May 20, 2013 (78 FR 29314); Final Rule, 78 FR 48615 (August 9, 2013); Approval and Promulgation of Implementation Plans; State of California; Interstate Transport of Pollution; Significant Contribution to Nonattainment and Interference With Maintenance Requirements, Proposed Rule, 76 FR 146516, 14616–14626 (March 17, 2011); Final Rule, 76 FR 34872 (June 15, 2011); Approval and Promulgation of State Implementation Plans; State of Colorado; Interstate Transport of Pollution for the 2006 24-Hour $PM_{2.5}$ NAAQS, Proposed Rule, 80 FR 27121, 27124–27125 (May 12, 2015); Final Rule, 80 FR 47862 (August 10, 2015).

a technical analysis that considers certain factors which align with the EPA's actions on prior SIP submissions, the EPA could not conclude based on this analysis that the State is not interfering with maintenance of the NAAQS in other states, particularly in light of air quality modeling demonstrating that emissions from Wyoming impact air quality in Denver, Colorado. The basis for this conclusion was explained in the proposal for this final action.

Comment: Commenter WDEQ stated that the EPA is applying new criteria retroactively. WDEQ asserted that the EPA had not established any technical requirements for demonstrating impacts on nearby states at the time of Wyoming's February 6, 2014 submission, but then retroactively applied "a technical analysis developed almost three years after Wyoming's submittal to evaluate Wyoming's plan." The State submitted a timeline to argue that the EPA's proposed action is out of sequence with appropriate rulemakings. Commenter WDEQ noted that it had commented on the EPA's August 4, 2015 NODA, "stating that it understood that the rule applied only to eastern states and would provide additional comments when the EPA proposed additional SIP requirements for western states." Wyoming asserted that the EPA did not provide a response to this comment. Finally, WDEQ stated that the EPA failed to indicate that a revision to submitted plans might be required, as it had done in its October 2, 2007 guidance document.

Response: As discussed previously, the EPA's primary basis for disapproving Wyoming's prong 2 SIP submission as to the 2008 ozone NAAQS is based on the State not giving the "interfere with maintenance" clause of CAA section 110(a)(2)(D)(i)(I) independent significance as required by *North Carolina*, a decision which was issued six years before Wyoming submitted the SIP at issue here. The EPA also has technical information demonstrating that emissions from Wyoming impact a downwind maintenance receptor in Denver, Colorado, but even absent this information, the State did not provide an adequate technical analysis meeting the basic statutory requirements outlined by the D.C. Circuit and supporting its conclusion.

Wyoming is correct to note that the EPA stated the CSAPR Update does not apply to Wyoming, and the final CSAPR Update does not impose any implementation obligations on the state of Wyoming or sources within the State. 81 FR 74523, October 26, 2016. However, in the context of that rulemaking, the EPA developed technical information relevant to western states, including Wyoming, while in this final action on the Wyoming SIP the EPA is adopting an approach to analyzing that data as it applies to Wyoming. While the modeling cited in this action was conducted after Wyoming submitted its SIP addressing the requirements of CAA section 110(a)(2)(D)(i)(I) for the 2008 ozone NAAQS, it would not be appropriate for the EPA to ignore modeling data indicating that the emissions from the State would impact air quality in other states. Rather, the EPA must evaluate each SIP submission based on the information available and consistent with the Act as we and courts interpret it at the time of our action, not at the time of the state's submittal. Wyoming was aware that the EPA had data indicating a potential impact as early as January 2015, but did not submit additional information to supplement or revise its SIP submission addressing CAA section 110(a)(2)(D)(i)(I) requirements for the 2008 ozone NAAQS.[18] Wyoming also had an opportunity to review the modeling information in the context of the EPA's proposed action on the SIP submission, and could comment on the appropriateness of using the modeling for this purpose, and how the EPA should interpret the modeling results as they apply to Wyoming, which both Wyoming and a number of other commenters have done. The EPA addresses those specific comments regarding the EPA's technical analysis below.

Comment: Commenter WDEQ stated that the EPA's use of CSAPR Update modeling as a screening tool is not appropriate for interstate transport in the West, citing its June 9, 2016 comment letter opposing the EPA's proposed action for Utah. Commenters UARG, WEST Associates, and BEPC also referenced or attached comment letters submitted on the CSAPR Update proposal.[19]

Response: Commenters should identify with reasonable specificity any objections or issues with the proposed action rather than only referring or citing to comments made in other contexts. It is not appropriate to cite to or attach comments made on separate rulemaking actions without identifying which portions of such comments are relevant to the present proposed action. Accordingly, the EPA is not here responding to comments made on separate rulemaking actions.

Comment: Commenter Western Energy Alliance stated that the CSAPR Update modeling results are flawed because the model has not been adapted to the unique concerns of western states. The commenter stated that "the CSAPR model fails to account for the topography, altitude, and climate of the western United States. Climate factors characteristic of the West include stratospheric intrusions, a long and severe wildfire season, abundant sunshine, and lack of summertime precipitation, all of which the CSAPR model fails to adequately consider." The commenter asserted that the EPA did not provide evidence explaining why the modeling results need not consider these factors. Finally, the commenter stated that the EPA inappropriately put the onus on the State to provide evidence to support or deny the EPA's decisions on the appropriateness of the CSAPR modeling, while the burden should rest on the EPA to justify the reversal of its long-standing policy about the CSAPR modeling deficiencies in the West.

Commenter WEST Associates stated that the EPA had noted in the CSAPR Update proposal that the modeling for that rule was conducted specifically for Eastern states. The commenter also referenced language from the CSAPR Update and the Wyoming proposal in which the EPA stated that there may be geographically specific factors to consider in evaluating ozone transport in the West affecting modeling and modeling results. Citing 81 FR 81715, November 18, 2016. The commenter suggested that these factors could include broad expanses of public land, high altitude settings, international transport and elevated background ozone concentrations that can comprise a significant portion of ambient concentrations, especially on high ozone days in the Western United States.

Response: The commenters do not provide evidence or technical bases for their claims about the inadequacies of the modeling for projecting air quality and contributions in the West. As described in the CSAPR Update Final Air Quality Modeling Technical

[18] The EPA explained in issuing the January 2015 memo that its "goal is to provide information and to initiate discussions that inform state development and EPA review of 'Good Neighbor' SIPs, and, where appropriate, to facilitate state efforts to supplement or resubmit their 'Good Neighbor' SIPs," at 1. With respect to western states, the EPA indicated it would evaluate potential linkages on a case-by-case basis and recommended that states consult with the EPA regional offices. *Id.* at 4.

[19] These comment letters can be found in the docket for the CSAPR Update, EPA–HQ–OAR–2015–0500.

Support Document (2016 AQM TSD),[20] the CSAPR modeling was performed for a nationwide domain that accounted for the differences in emissions (including actual wild fires), meteorology, and topography in various regions across the U.S. The precipitation and other meteorological factors used in the EPA's modeling were found to correspond closely to measured data.[21] The 2016 AQM TSD includes an evaluation of 2011 base year model performance for 8-hour daily maximum concentrations on a regional and statewide basis as well as for individual monitoring sites. For example, the performance evaluation results for Wyoming indicate that the model tends to under predict measured 8-hour daily maximum ozone concentrations by 10.3 percent, on average, during the period May through September, which is the season the EPA used for analyzing 2017 model-predicted interstate contributions. For the Douglas County maintenance receptor in Colorado, the 2011 modeling under predicts measured 8-hour daily maximum ozone concentrations by 7.5 percent, on average for the May through September time period. As described more fully in the 2016 AQM TSD, the EPA's use of the Comprehensive Air Quality Model with Extensions (CAMx) source apportionment modeling for the CSAPR Update is appropriate and the Agency finds its use sufficient for the purposes of assessing and identifying downwind air quality problems and contributions from upwind states in both the eastern and the western U.S.[22] The emissions modeling TSD for the CSAPR Update final rule "Preparation of Emission Inventories for the version 6.3, 2011 Emissions Modeling Platform" describes how fire emissions were developed and modeled using a consistent approach for the contiguous United States. As described earlier, the most updated modeling continues to indicate that emissions from Wyoming will interfere with maintenance of the 2008 ozone NAAQS at one receptor in the Denver, Colorado area (*i.e.*, Douglas County).

The EPA does not find the information provided by the commenters to indicate flaws in the modeling conducted by the EPA. Rather, the commenters point to factors which the CSAPR Update modeling specifically took into account.[23] As described in the CAMx model User's Guide, "CAMx is an Eulerian photochemical dispersion model that allows for integrated "one-atmosphere" assessments of tropospheric air pollution (ozone, particulates, air toxics, and mercury) over spatial scales ranging from neighborhoods to continents. It is designed to unify all of the technical features required of "state-of-the-science" air quality models into a single open-source system that is computationally efficient, flexible, and publicly available."[24] For these reasons, the EPA disagrees with these comments and finds the use of the CSAPR Update modeling to evaluate Wyoming's contributions to interstate transport is reasonable and supported.

The EPA did acknowledge in the CSAPR Update final rule that "for western states, there may be geographically specific factors to consider in evaluating interstate ozone pollution transport," and that "given the near-term 2017 analysis and implementation of the CSAPR Update FIPs, the EPA focused this rulemaking on eastern states where the CSAPR method for assessing collective contribution has proven effective." 81 FR 74523, October 26, 2016. However, these statements were not an indication that the EPA believed the modeling of air quality in the West was flawed. Rather, the EPA was suggesting that additional factors may be relevant in determining whether an upwind state that was projected to impact air quality in a downwind state should be determined to significantly contribute to nonattainment or interfere with maintenance of the NAAQS in that state. The EPA's recent action approving Arizona's interstate transport SIP, discussed in more detail at proposal, demonstrates some of the geographically specific factors that the EPA was referring to with these statements. *See* Proposed Rule, 81 FR 15202, March 22, 2016; Final Rule, 81 FR 31513, May 19, 2016.[25]

Comment: Commenter Western Energy Alliance stated that it is unclear whether the CSAPR Update modeling accounted for background ozone, which can contribute up to 60 ppb in the western U.S. Commenters West Associates and BEPC also note that approximately half of the ozone measured at the Denver monitor is from background ozone. These commenters suggest that this presents "nearly identical" facts to the grounds used to propose approval of Nevada's interstate transport SIP for the 2008 ozone NAAQS. 81 FR 87859, December 6, 2016.

Response: The commenters do not explain how the EPA's modeling has allegedly failed to account for background ozone. This modeling includes emissions from biogenic sources which are a major component of natural background ozone that is particularly relevant to summertime high ozone concentrations. The modeling also includes emissions from large portions of Canada and Mexico that are adjacent to the U.S. within the modeling domain. Background ozone due to transport from more distant international sources was accounted for by the use of global air quality modeling to provide ozone and precursor concentrations along the boundary of the modeling domain. The commenters

[20] "Air Quality Modeling Technical Support Document for the Final Cross State Air Pollution Rule Update." August 2016. This document was included in the docket for the proposed action.

[21] "Meteorological Model Performance for Annual 2011 Simulation WRF v3.4" in the docket for the CSAPR Update Rulemaking, at EPA–HQ–OAR–2015–0500–0076.

[22] "The EPA used CAMx photochemical source apportionment modeling to quantify the impact of emissions in specific upwind states on downwind nonattainment and maintenance receptors for 8-hour ozone. CAMx employs enhanced source apportionment techniques that track the formation and transport of ozone from specific emissions sources and calculates the contribution of sources and precursors to ozone for individual receptor locations. The strength of the photochemical model source apportionment technique is that all modeled ozone at a given receptor location in the modeling domain is tracked back to specific sources of emissions and boundary conditions to fully characterize culpable sources." 80 FR 75726, December 3, 2015.

[23] Stratospheric intrusions are short-term events that have a relatively local impact on ground-level ozone concentrations and are unrelated to the impacts of interstate transport on downwind ozone formed from anthropogenic sources in upwind states. The modeling performed by the EPA did not explicitly account for these events within the modeling domain. However, the global modeling EPA used to provide boundary concentrations that reflect international transport into the domain did simulate processes that can result in stratospheric intrusions.

[24] User's Guide Comprehensive Air Quality Model with Extensions version 6.2. Environ International Corporation, Novato, CA, March, 2015.

[25] *See also* Notice of Availability of the Environmental Protection Agency's Preliminary Interstate Ozone Transport Modeling Data for the 2015 Ozone National Ambient Air Quality Standard (NAAQS), 82 FR 1740 (January 6, 2017): "While the 1 percent screening threshold has been traditionally applied to evaluate upwind state linkages in eastern states where such collective contribution was identified, the EPA noted in the CSAPR Update that, as to western states, there may be geographically specific factors to consider in determining whether the 1 percent screening threshold is appropriate. For certain receptors, where the collective contribution of emissions from one or more upwind states may not be a considerable portion of the ozone concentration at the downwind receptor, the EPA and states have considered, and could continue to consider, other factors to evaluate those states' planning obligation pursuant to the Good Neighbor provision. However, where the collective contribution of emissions from one or more upwind states is responsible for a considerable portion of the downwind air quality problem, the CSAPR framework treats a contribution from an individual state at or above 1 percent of the NAAQS as significant, and this reasoning applies regardless of where the receptor is geographically located."

have not explained how they believe the EPA must consider background ozone levels in evaluating interstate transport in the West, nor cited any specific provision of the statute that specifically requires such consideration. While the EPA does not view the obligation under the good neighbor provision as a requirement for upwind states to bear all of the burden for resolving downwind air quality problems, the CAA requires that upwind states (as well as the downwind states themselves) take reasonable steps to control emissions impacting downwind air quality even in areas affected by high levels of background concentrations of ozone. Were the EPA to absolve upwind states of the responsibility to make such reasonable reductions simply because of such background ozone concentrations, the area's citizens would suffer the health and environmental consequences of such inaction.

Moreover, the EPA does not agree that, because background ozone contributes to the projected design values at the Denver monitor, the factual circumstances are "nearly identical" to the circumstances supporting the proposed approval of the Nevada SIP. In fact, the circumstances here are substantially different than the facts considered in the Nevada SIP approval. The EPA proposed to approve Nevada's SIP submission because, among other factors, it determined that the cumulative contribution from upwind states to the downwind receptors to which Nevada was linked (all of which were located in California) was low relative to the cumulative contribution to air quality problems similarly identified elsewhere in the country and because Nevada was the only state contributing above the one percent threshold to those receptors. 81 FR 87860, Dec. 6, 2016. Because the EPA determined that emissions that result in transported ozone from upwind states have limited impacts on the projected air quality problems at the California receptors, the EPA proposed to determine that the sites should not be treated as receptors for purposes of determining interstate transport obligations. *Id.* This is in contrast to the air quality problem identified at the Denver receptor wherein the EPA determined that a significant portion of the ozone concentration was attributable to the collective contribution from anthropogenic emissions in multiple states, three of which contribute at or above the one percent screening threshold. 81 FR 81714 through 81715, December 6, 2016. The Denver receptor is comparable to receptors the EPA has addressed in the East in rulemakings such as the CSAPR Update wherein the EPA determined that downwind air quality problems resulted in part from the contributions of multiple upwind states that, although individually relatively small, collectively contribute a large portion of the ozone concentration at downwind receptors. *See* 81 FR 74518–19.[26]

Moreover, consistent with the EPA's approach to background concentrations in this action, the EPA disagreed with Nevada's contention that background concentrations should necessarily excuse an upwind state from reducing emissions where such emissions reductions may nonetheless improve downwind air quality. 81 FR 87860. The EPA noted that even areas with high background ozone may still have a relatively large amount of ozone from the collective contribution of upwind U.S. emissions. *Id.* Therefore, regardless of the level of background ozone, emissions reductions from upwind states may be an important component of solving the local nonattainment problem.

Comment: Commenter WDEQ stated that the EPA's decisions on interstate transport SIPs do not follow a consistent approach, and that the EPA is applying a piecemeal decision-making approach rather than a systematic analysis. WDEQ also asserted that the EPA is making arbitrary decisions as to what constitutes "significant" or "insignificant" contribution levels. WDEQ asserted that the EPA is not applying the one percent threshold as a screening threshold, as stated in the proposal. Referring to the EPA's October 19, 2016 final action on the Utah interstate transport SIP (81 FR 71991), WDEQ argued that the EPA gave no consideration to information submitted by Utah in its analysis beyond the one percent contribution. WDEQ further stated that the EPA approved the Colorado interstate transport submittal which otherwise "did not provide a detailed analysis supporting its conclusion, including any quantification of the distance to other nonattainment areas or the amount of ozone emission reductions within the state and over what timeframe," solely because it was modeled below the one percent contribution threshold. 80 FR 72939, November 23, 2015. WDEQ also asserted that the Colorado approval is counter to the EPA actions disapproving plans from western states on the basis that they did not provide enough technical analysis.

WDEQ further asserted that the approval of the Arizona interstate transport SIP for 2008 ozone was inconsistent with the proposed action on Wyoming, because the EPA based its Arizona action on a weight of evidence analysis and a determination that Arizona's contribution was "negligible" although it was over the one percent threshold. The State also asked the EPA to explain why it determined the cumulative contribution percentages for Arizona were negligible, and at what percentage such contributions became negligible.

Response: The EPA disagrees that it has taken an inconsistent approach to reviewing states' interstate transport SIPs with respect to the 2008 ozone NAAQS. Where the EPA has determined that a state's SIP has not addressed all of the statutory requirements or provided a technical analysis to justify its conclusion regarding the state's impact on downwind air quality problems, the EPA has identified those deficiencies in acting upon the state's SIP submission. Where the EPA had analysis available that nonetheless supported the state's conclusion despite these deficiencies in the state's SIP submission, the EPA has proposed to approve the state's SIP submission, as it did with Colorado. However, where the EPA does not have its own analysis to support a state's conclusion, it does not have a basis to nonetheless approve the state's otherwise deficient SIP submission, as in Utah for prong 2. Accordingly, the EPA is in this rule finalizing approval as to Wyoming's otherwise deficient prong 1 demonstration because the EPA has an independent analysis that supports the conclusion that the state does not significantly contribute to nonattainment downwind. However, the EPA cannot approve Wyoming's deficient prong 2 demonstration because it has no independent basis on which it can conclude that the state does not interfere with maintenance of the 2008 ozone NAAQS downwind.

The EPA furthermore disagrees that it is not using the one percent contribution threshold as a screening threshold. States are not determined to significantly contribute to nonattainment or interfere with maintenance downwind merely because impacts from the state exceed the one percent threshold. As noted in the proposal for this final action, the one

[26] The EPA's analysis showed, for example, that upwind states collectively contributed in the range of 9.7% to 12.6% to the total ozone concentrations for receptors in Denton County, Harris County, and Tarrant County, Texas. This range is similar to the collective contribution at the Douglas County receptor in Colorado. See document EPA–R08–OAR–2016–0521–0002, "Final CSAPR Update_Ozone Design Values & Contributions_All Sites," in the docket for this action.

percent threshold identifies a state as "linked," prompting further inquiry into whether the contributions are significant and whether there are cost-effective controls that can be employed to reduce emissions. In the case of Colorado, as it was determined that state was not linked to any downwind nonattainment or maintenance receptors, further inquiry was unnecessary in spite of deficiencies identified with the Colorado transport analysis. In the case of states like Wyoming and Utah, the linkage to Denver area receptors indicated that each state's emissions require further evaluation, taking into account both air quality and cost considerations, to determine what, if any, emissions reductions might be necessary to address the states' emission reduction obligation pursuant to 110(a)(2)(D)(i)(I). As Wyoming's SIP submission does not adequately evaluate whether additional emissions reductions are necessary or achievable, the EPA could not conclude that the State's SIP submission had demonstrated that the state prohibits emissions that interfere with maintenance of the NAAQS downwind.

With regard to the EPA's action on the Arizona submittal, the EPA found that the maximum total contribution from anthropogenic emissions in all states to either of the two California receptors to which Arizona contributed above the one percent threshold was 4.4 percent of the total ozone concentration at that receptor, and that only one state contributed above the one percent threshold. 81 FR 15203, March 22, 2016. Thus, the EPA determined that, unlike receptors identified in prior rulemakings, the air quality problems at the California receptors could not be attributed to the collective contribution of numerous upwind states. Given this information, the EPA determined that interstate transport to the California receptors is negligible overall, meaning that all states together (including Arizona) do not contribute significantly to the ozone problems at these receptors. Because the EPA determined that emissions that result in transported ozone from upwind states have limited impacts on the projected air quality problems at the California receptors, the EPA determined that the sites should not be treated as receptors for purposes of determining interstate transport obligations. *Id.* As stated in the proposal for this final action, EPA found that the contribution to ozone concentrations from all states upwind of the Douglas County, Colorado maintenance receptor is about 9.7 percent, and that three upwind states made contributions greater than one percent to the receptor. 81 FR 81715, November 18, 2016. The EPA has not defined a specific level which delineates between "negligible" and "significant" collective contribution, but has rather looked at each of these cases individually and reached conclusions based on our review of the information specific to each case. In the case of the Douglas County, Colorado receptor, the contributions from upwind states are comparable to receptors the EPA has addressed in the East in rulemakings such as the CSAPR Update wherein the EPA determined that downwind air quality problems resulted in part from the relatively small individual contributions of upwind states that collectively contribute a large portion of the ozone concentration at downwind receptors. *See* 81 FR 74518 through 74519.[27] Thus, the EPA has identified no basis on which it can distinguish the Douglas County, Colorado receptor from those receptors addressed in the East—nor have the commenters presented any such basis for the EPA to make a distinction when upwind states contribute more than twice as much to downwind nonattainment than was present at the California receptors addressed in the Arizona action.

Comment: Commenter WDEQ stated that the EPA's analysis does not consider new emissions information or reductions since the most recent modeling. The State asserted that because the EPA conducted the CSAPR Update modeling using an emissions inventory from a 2011 base year, the analysis fails to account for any emissions reductions in Wyoming between 2011 and when the updated modeling was conducted. WDEQ specifically pointed to the following ozone emissions reduction measures in the State: Participation in the EPA's Ozone Advance Program; emissions reductions in the Upper Green River Basin (UGRB), a marginal nonattainment area which was determined by the EPA to have timely attained the 2008 Ozone NAAQS on May 4, 2016 (81 FR 26697); reductions in NO_X emissions from 2011 and 2014 of 34 percent for Title V facilities and 76 percent for non-Title V facilities that are not oil and gas reductions facilities. The State "believes a more accurate assessment of Wyoming's contribution to the receptor in Colorado could be made using more recent emission inventory data available from the Division," and asked that the EPA use more recent data to conduct modeling for Wyoming.

The State asserted that it had made several attempts to provide the EPA with additional information, citing its November 23, 2016 letter requesting an extension to the comment period as an example, and claimed that the EPA has told Wyoming it will not consider any additional information beyond the February 6, 2014 submission.

Response: The EPA disagrees that the CSAPR Update modeling failed to account for any emissions reductions in Wyoming between 2011 and 2016, despite the use of a 2011 base year. As shown in the supporting documentation for the CSAPR Update Rule, significant emissions reductions for multiple pollutants, including NO_X, were accounted for in the modeling analysis.[28] At the EPA's request, on September 13, 2016 and September 14, 2016, the State submitted to the EPA an emissions inventory and an inventory summary that compared 2011 to 2014 Wyoming NO_X and VOC emissions.[29] The State also included two graphs describing Wyoming NO_X and VOC emission reductions in certain sectors in its December 19, 2016 comment letter on the proposal for this final action. EPA staff compared this information to the emissions reductions anticipated from base case year 2011 to projected future year 2017 in the CSAPR Update Modeling, and found that NO_X and VOC emissions reductions included in the CSAPR Update modeling were greater than the NO_X and VOC reductions in Wyoming emissions from 2011 to 2014, per the State's inventory.[30] The EPA does not dispute that NO_X emission reductions have taken place in Wyoming between 2011 and 2014, as the inventory and the December 19, 2016 comment letter graphs indicate substantial reductions have occurred in certain sectors. However, the inventory

[27] The EPA's analysis showed, for example, that upwind states collectively contributed in the range of 9.7% to 12.6% to the total ozone concentrations for receptors in Denton County, Harris County, and Tarrant County, Texas. This range is similar to the collective contribution at the Douglas County receptor in Colorado. See document EPA–R08–OAR–2016–0521–0002, "Final CSAPR Update_Ozone Design Values & Contributions_All Sites," in the docket for this action.

[28] "Final Rule Emissions Modeling TSD: Preparation of Emissions Inventories for the Version 6.3, 2011 Emissions Modeling Platform" in the docket for the CSAPR Update Rulemaking, at EPA–HQ–OAR–2015–0500–0523.

[29] See September 12–14, 2016 email exchanges between Adam Clark, EPA Region 8, and Amber Potts and Tyler Ward, WDEQ, as well as attached emissions inventory documents submitted by the State, in the docket for this action.

[30] See document "2011ek_2017ek_state_full_SCC_summary" in the docket for this action. This document is also available in the docket for the CSAPR Update Rulemaking at EPA–HQ–OAR–2015–0500–0498.

taken on its own did not lead the EPA to the conclusion that the NO_X reductions during this time were sufficient to show that Wyoming does not interfere with maintenance of the 2008 ozone NAAQS. In other words, the information was inconclusive, and so did not alter the EPA's decision to propose disapproval for prong 2. The EPA has reached the same conclusion regarding the comment letter graphs, and is therefore finalizing disapproval as to the prong 2 requirements.

The EPA also disagrees that the State made several attempts to provide EPA with additional information. The State submitted the aforementioned September 13, 2016 inventory, which the EPA reviewed. The State also submitted the June 9, 2016 comment letter on the Utah proposal as discussed previously, and the November 23, 2016 letter requesting an extension to the comment period. The EPA has reviewed and addressed all of these documents. Finally, the EPA is unaware that any staff told Wyoming that we will not consider any additional information beyond the February 6, 2014 submission. The EPA has continuously encouraged the State to submit additional technical information that might better inform our analysis, as discussed in detail earlier.

Comment: Commenter WDEQ asked whether the EPA's CSAPR Update modeling considered the impact ozone sources in the Colorado portion of the Front Range Urban Corridor, which extends from Pueblo, Colorado to Cheyenne, Wyoming, may have on attainment in Wyoming. The State then asserted that, because 98 percent of the population in this corridor resides in Colorado, and because the population in the Colorado portion of the corridor is much larger and denser than the population of the state of Wyoming, the mobile source and urban emissions emanating from Colorado are far more likely to contribute to Wyoming than the other way around.

Commenter Western Energy Alliance stated that Colorado's ozone nonattainment is affected by the northern Front Range's climate, geography, and local emissions sources, and not by Wyoming emissions. The commenter supported Wyoming's assessment that the year-round westerly prevailing wind direction makes it reasonable to infer that Cheyenne is not a driving cause of ozone nonattainment in Colorado's Front Range.

Commenter Western Energy Alliance also asserted that Wyoming is not contributing to ozone nonattainment in the Uintah Basin or in the Salt Lake Valley in Utah.

Response: In the CSAPR Update modeling, the EPA modeled contributions from all 48 contiguous states, including Colorado, to receptors in Wyoming. As the EPA did not project any nonattainment or maintenance receptors in the state of Wyoming for 2017, the EPA has determined that no state contributes significantly to nonattainment or interferes with maintenance of the 2008 ozone NAAQS in Wyoming. The EPA approved prongs 1 and 2 of Colorado's 2008 ozone interstate transport SIP on February 16, 2016. 81 FR 7706. The EPA did not receive any comments requesting that either portion of the Colorado SIP submission be disapproved.

The EPA agrees that Colorado emissions contribute more to ozone pollution in the Denver area than emissions from any other state. Indeed, the CSAPR Update modeling projected that Colorado would contribute 34.6% percent of the ozone at the Douglas County, Colorado maintenance receptor in 2017, compared to 9.7 percent of the emissions from all other states and tribes combined, with Wyoming projected to contribute 1.5 percent of the ozone. Although there are intrastate contributions to maintenance receptors in Denver, Colorado, those contributions do not relieve upwind states, like Wyoming, from controlling their within state emissions that significantly contribute to a downwind state's nonattainment or interfere with maintenance of the NAAQS in other states.

Thus, while CAA section 110(a)(2)(D)(i)(I) does not hold upwind areas solely responsible for attainment and maintenance of the NAAQS in downwind states, the statute requires upwind states to address their fair share of downwind air quality problems. As noted, the EPA finds that Wyoming contributions to the Douglas County, Colorado maintenance receptor are such that the State's emissions require further evaluation of potential emission reduction obligations pursuant to 110(a)(2)(D)(i)(I).

Regarding Wyoming's contribution to ozone issues in Utah, the EPA has not found that Wyoming emissions contribute significantly to nonattainment or interfere with maintenance of the 2008 ozone NAAQS in Utah.

Comment: Commenter WDEQ asserted that "EPA has not yet worked with western states or western regional planning organizations on region-appropriate analysis for interstate transport." The State listed examples in which the EPA committed to working with western states to address interstate transport.

Commenter WDEQ requested that the EPA honor the commitment made in the Utah Final Rulemaking to "assisting the states in conducting or reviewing air quality modeling and other relevant technical information for the purposes of determining compliance with CAA section 110(a)(2)(D)(i)(I)." 81 FR 71996, October 19, 2016. Specifically, the State requested that the EPA commit to work with WDEQ to conduct the necessary modeling and analysis for developing a SIP revision in the event that the EPA finalizes the proposed disapproval.

Response: Prior to the State's February 2014 SIP submission, the EPA held a meeting in Denver, Colorado on April 17, 2013 (and held a conference call) with western states to discuss next steps to address transport of air pollution across state boundaries. Subsequent to the release of the January 2015 memo and the August 2015 NODA with air quality modeling results, the EPA notes that it also held a webinar, a workshop and conference calls with states. Moreover, while we appreciate the importance of working with states in the SIP development process, states have the primary responsibility for developing SIPs to address the requirements of CAA section 110(a)(2)(D)(i)(I). As noted earlier, in *EPA* v. *EME Homer City Generation, L.P.*, the Supreme Court clearly held that "nothing in the statute places the EPA under an obligation to provide specific metrics to States before they undertake to fulfill their good neighbor obligations." 134 S. Ct. at 1601. However, EPA remains committed to working with the State on reviewing technical information for the purposes of determining compliance with the requirements of 110(a)(2)(D)(i)(I).

Comment: Commenter Western Energy Alliance stated that "EPA has failed to provide sufficient evidence that it reviewed and considered state exceptional events packages that may provide mitigating circumstances for NAAQS violations based on events such as wildfires or stratospheric intrusions of ozone."

Response: In order for emissions to be excluded on the basis of an exceptional event per CAA 319(b), all exceptional event criteria applicable to the activity must be met. No exceptional event demonstrations relevant to the Douglas County, Colorado monitor were submitted to the EPA for evaluation, so no evidence was available with regard to the impact of exceptional event emissions on the violating monitor in the design value period considered. To the extent that the EPA approves an

exceptional events demonstration for this area in the future, the EPA can consider the impacts that action or other new information would have on the modeling results either in reviewing a subsequent SIP submission from Wyoming, which the State may submit at any time, or in evaluating whether any emissions reductions are necessary to address downwind air quality in addressing the Agency's FIP obligation triggered by this disapproval.

Comment: Commenter Sierra Club stated that the EPA should disapprove Wyoming's prong 1 submission for the 2008 ozone NAAQS. The commenter asserted that the Douglas County, Colorado maintenance receptor (to which Wyoming was modeled to contribute above one percent)[31] should instead be a nonattainment receptor, but it is not because the modeling under-predicts the receptor's 2017 ozone design value. The commenter based this assertion on a weight of evidence approach using ambient air monitoring data collected at the receptor. The commenter stated that such a weight of evidence approach was appropriate to determine this receptor should be nonattainment, and noted that the EPA had used a weight of evidence approach in its action on Arizona's transport SIP. The CSAPR Update modeling projected that the Douglas County, Colorado receptor would have a 2017 average design value of 75.5 ppb, with a maximum design value of 77.6 ppb.[32] The commenter first asserted that the 75.5 ppb level should indicate nonattainment rather than maintenance because the design value exceeds the 75.0 level of the NAAQS, referring to EPA's basis for a maintenance categorization as "bad math." The commenter then stated that the Douglas County, Colorado receptor will indeed be nonattainment for the 2015–2017 period. The commenter included the 4th highest daily maximum values, on which the 2008 ozone NAAQS is based, for the years 2010 through 2016, which the EPA has replicated (with edits) in Table 1, below.

TABLE 1—4TH HIGHEST DAILY MAX AT DOUGLAS COUNTY, COLORADO RECEPTOR

Year	4th Max (ppb)
2016	78
2015	81
2014	74
2013	83
2012	79
2011	81
2010	78

The commenter stated that the 2015–2017 monitored design value at the Douglas County, Colorado receptor could only attain the NAAQS if the receptor recorded a 4th daily maximum value of 66 ppb in 2017, a value well below the smallest value since 2010. The commenter asserted that the previous 7 years of monitoring data provide a weight of evidence analysis demonstrating that this receptor will be nonattainment for the 2015–2017 design value period. The commenter also asserted that it is unsurprising that the CSAPR Update modeling analysis under-predicts the 2017 design values because it included 2009 monitoring data which was impacted by the Great Recession, during which time ozone levels decreased. The commenter therefore recommended that the EPA disapprove Wyoming's February 6, 2014 prong 1 submittal for the 2008 ozone NAAQS.

Response: First, the EPA does not agree that because the receptor is projected to have an average design value of 75.5, that the EPA should label this receptor a nonattainment receptor. As explained in the 2016 AQM TSD, "In determining compliance with the NAAQS, ozone design values are truncated to integer values. For example, a design value of 75.9 ppb is truncated to 75 ppb which is attainment. In this manner, design values at or above 76.0 ppb are considered to be violations of the NAAQS."[33] This method is consistent with the method to compliance with the 2008 ozone NAAQS.[34] Therefore a design value of 75.5 is not considered a violation of the standard.

The EPA agrees that recent monitoring data at the Douglas County, Colorado monitor suggest that the site faces a risk of not attaining the NAAQS in 2017. However, that risk is uncertain as the future monitored 2017 design value is unknown at this time. In light of this uncertainty and the statute's silence on how nonattainment and maintenance should be identified under the good neighbor provision, the EPA has developed a reasonable approach to identify downwind nonattainment and maintenance receptors. When evaluating air quality modeling for purposes of interstate transport, the EPA has routinely identified nonattainment receptors as those with monitors that are both projected to be unable to attain in an appropriate future year and that are measuring nonattainment based on current data—*i.e.*, if the projected average design value in the future year does not exceed the standard, the EPA does not identify that receptor as a nonattainment receptor, but rather as a maintenance receptor. *See* 81 FR 74517 (CSAPR Update); 80 FR 75723 through 75724 (Proposed CSAPR Update); 76 FR 48227 through 48228 (CSAPR); 70 FR 25243–33 (CAIR); *see also North Carolina*, 531 F.3d at 913–914 (affirming as reasonable EPA's approach to defining nonattainment in CAIR). Given the EPA's modeling does not project that the Douglas County, Colorado receptor will be in nonattainment in 2017, even though it may currently be measuring nonattainment, it would be inconsistent with the EPA's past practice to identify that receptor as a nonattainment receptor.

Moreover, the EPA does not agree that it should identify a nonattainment receptor based on the formula proposed by the commenter because the data cited by the commenter does not conclusively prove that this monitor will be in nonattainment based on 2017 data.[35] First, the commenter notes that it would be possible for the 2017 design value to be sufficiently low such that the 3-year average is attaining the NAAQS. Second, the CAA provides that should 2017 data yield a fourth highest 8-hour concentration of 75.9 ppb or below, the state can petition EPA for additional time to demonstrate attainment of the NAAQS. *See* CAA section 181(a)(5).

That said, the EPA agrees that the receptor may have problems maintaining the standard in 2017 and has therefore identified this site as a maintenance receptor. As a result of this finding, the EPA and the State of Wyoming will need to evaluate what

[31] For details about the Douglas County, Colorado receptor, see the proposal for this final rulemaking at 81 FR 81715.

[32] See document EPA–R08–OAR–2016–0521–0002, "Final CSAPR Update_Ozone Design Values & Contributions_All Sites," in the docket for this action.

[33] See 2016 AQM TSD at pg. 11.

[34] See 40 CFR part 50, Appendix P—Interpretation of the Primary and Secondary National Ambient Air Quality Standards for Ozone; Section 2.1: "*Computing 8-hour averages.* Hourly average concentrations shall be reported in parts per million (ppm) to the third decimal place, with additional digits to the right of the third decimal place truncated."

[35] Although the commenter is correct that the EPA evaluated the weight of the evidence in the Arizona SIP submission, the EPA did not use the approach proposed by the commenter to average projections and monitored data in identifying potential receptors.

further emissions reductions may be required to ensure that the State's impact on downwind air quality is mitigated such that the State will not interfere with maintenance of the standard at that receptor.

The weight of evidence analysis in our action on the Arizona SIP determined the nature of the projected receptor's interstate transport problem as to the magnitude of ozone attributable to interstate transport from all upwind states collectively contributing to the air quality problem, not to the identification of that receptor. In the EPA action on the Arizona SIP, Arizona was the only state that contributed greater than the 1 percent threshold to the projected 2017 levels of the 2008 ozone NAAQS at the El Centro receptor. The EPA's assessment concluded that emissions reductions from Arizona are not necessary to address interstate transport because the total collective upwind state ozone contribution to these receptors is relatively low compared to the air quality problems typically addressed by the good neighbor provision. As discussed previously, the EPA similarly evaluated collective contribution to the Douglas County, Colorado monitor and finds the collective contribution of transported pollution to be substantial. Furthermore, in our action on the Arizona SIP we did not deviate from our past practice in identifying nonattainment and maintenance receptors in the way that commenter suggests we should do here.

The EPA does not agree that its projections are unreliable because the 2009 data are affected by the "Great Recession." In determining our 2009–2013 base period average design values, the data from 2009 are only weighted once, whereas, data in 2011 which has higher ozone is weighted 3 times in the calculations. In addition, our emissions data are projected from 2011 to 2017 and, thus, the effects of the recession on 2009 emissions have very little influence our 2017 projected emissions. In this respect, the air quality and emissions in 2009 have only a very limited influence on the projected design values. As described in EPA's air quality modeling guidance for ozone attainment demonstrations, the use of 5-year weighted average design values, as applied here, is intended to focus the base period air quality on the year of base case emissions, 2011 for this analysis, and to smooth out, to some extent, the effects of inter-annual variability in ozone concentrations.[36] Thus, EPA continues to believe that including ambient data from 2009 is appropriate for projecting future year ozone concentrations as part of the final rule.

Comment: Commenter Sierra Club asserted that the EPA's analysis of Wyoming's February 6, 2014 submittal ignores wintertime ozone levels. The commenter asserted that the EPA relies on the CSAPR Update analysis for its Wyoming ozone transport analysis, and that the CSAPR Update analysis throws out wintertime ozone data.[37] The commenter stated that it is inappropriate for the EPA to exclude the wintertime ozone data because the EPA has elsewhere acknowledged that wintertime ozone is an important issue in Wyoming and neighboring states. To support this point, the commenter cited the EPA's revision to the 2008 ozone NAAQS, which states that "Elevated levels of winter-time O3 have also been measured in some western states where precursor emissions can interact with sunlight off the snow cover under very shallow, stable boundary layer conditions." 80 FR 65416, October 26, 2015. The commenter also cited the ozone NAAQS revision to show that the ozone seasons for both Colorado and Utah are year-round, and that the EPA must therefore include an evaluation of wintertime ozone before it can approve any ozone transport provisions for Wyoming. 80 FR 65419 through 65420, October 26, 2015.

Response: As stated in the CSAPR Update Final, "Ozone levels are generally higher during the summer months." 81 FR 74513, October 26, 2016. The 2016 AQM TSD states that "High winter ozone concentrations that have been observed in certain parts of the Western U.S. are believed to result from the combination of strong wintertime inversions, large NO_X and VOC emissions from nearby oil and gas operations, increased UV intensity due to reflection off of snow surfaces and potentially still uncharacterized sources of free radicals." 2016 AQM TSD at 14. Thus, high winter-time ozone episodes are due to a build-up of local emissions combined with local stagnation meteorological conditions rather than interstate transport. The EPA therefore disagrees that it must evaluate wintertime ozone before approving Wyoming's SIP as to the prong 1 requirements of section 110(a)(2)(D)(i)(I).

III. Final Action

The EPA is approving CAA section 110(a)(2)(D)(i)(I) prongs 1, 2 and 4 for the 2008 Pb NAAQS, prong 1 for the 2008 ozone NAAQS, prongs 1 and 2 for the 2010 NO_2 NAAQS, and prong 4 for the 2010 SO_2 NAAQS, as shown in Table 2, below. The EPA is disapproving prong 4 for the 2006 $PM_{2.5}$, 2008 ozone, 2010 NO_2 and 2012 $PM_{2.5}$ NAAQS, and prong 2 for the 2008 ozone NAAQS, as shown in Table 3. Disapproval of prong 2 for the 2008 ozone NAAQS will establish a 2-year deadline, under CAA section 110(c), for the EPA to promulgate a FIP, unless the EPA approves a SIP that meets these requirements. As stated at proposal, the prong 4 disapprovals do not have additional practical consequences for the State or the EPA because the FIP already in place will satisfy the prong 4 requirements for these NAAQS. The EPA will work with Wyoming to provide assistance as necessary to help Wyoming develop an approvable SIP submittal and the EPA is committed to taking prompt action on a SIP submitted by the State. Disapproval does not start a mandatory sanctions clock for Wyoming pursuant to CAA section 179 because this action does not pertain to a part D plan for nonattainment areas required under CAA section 110(a)(2)(I) or a SIP call pursuant to CAA section 110(k)(5).

TABLE 2—LIST OF WYOMING INTERSTATE TRANSPORT PRONGS THAT THE EPA IS APPROVING

Approval
February 6, 2014 submittal—2008 Ozone NAAQS: (D)(i)(I) prong 1.
October 12, 2011 submittal—2008 Pb NAAQS: (D)(i)(I) prongs 1 and 2, (D)(i)(II) prong 4.
January 24, 2014 submittal—2010 NO_2 NAAQS: (D)(i)(I) prongs 1 and 2.
March 6, 2015 submittal—2010 SO_2 NAAQS: (D)(i)(II) prong 4.

TABLE 3—LIST OF WYOMING INTERSTATE TRANSPORT PRONGS THAT THE EPA IS DISAPPROVING

Disapproval
August 19, 2011 submittal—2006 $PM_{2.5}$ NAAQS: (D)(i)(II) prong 4.
February 6, 2014 submittal—2008 Ozone NAAQS: (D)(i)(I) prong 2, (D)(i)(II) prong 4.

[36] Modeling Guidance for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze available in the docket and at: *http://www.epa.gov/ttn/scram/guidance/guide/Draft_O3-PM-RH_Modeling_Guidance-2014.pdf.*

[37] *Id.* The commenter specifically cited the following language from the document: "In addition, there are 7 sites in 3 counties in the West that were excluded from this file because the ambient design values at these sites were dominated by wintertime ozone episodes and not summer season conditions that are the focus of this transport assessment." *Citing* EPA–R08–OAR–2016–0521–0002 at "Readme" tab.

TABLE 3—LIST OF WYOMING INTERSTATE TRANSPORT PRONGS THAT THE EPA IS DISAPPROVING—Continued

Disapproval
January 24, 2014 submittal—2010 NO_2 NAAQS: (D)(i)(II) prong 4.
June 24, 2016 submittal—2012 $PM_{2.5}$ NAAQS: (D)(i)(II) prong 4.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state actions, provided that they meet the criteria of the CAA. Accordingly, this action merely approves some state law provisions as meeting federal requirements and disapproves other state law because it does not meet federal requirements; this action does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP does not apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 4, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See CAA section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: January 17, 2017.

Debra H. Thomas,

Acting Regional Administrator, Region 8.

40 CFR part 52 is amended to read as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart ZZ—Wyoming

■ 2. In § 52.2620, the table in paragraph (e) is amended by adding the entry "(27) XXVII" at the end of the table to read as follows:

§ 52.2620 Identification of plan.

* * * * *

(e) * * *

Rule No.	Rule title	State effective date	EPA effective date	Final rule citation/ date	Comments
*	*	*	*	*	*
(27) XXVII	Interstate transport SIP for Section 110(a)(2)(D)(i) prong 1–2008 Ozone NAAQS; prongs 1, 2 and 4–2008 Pb NAAQS; prong 1 and 2–2010 NO_2 NAAQS; prong 4–2010 SO_2 NAAQS.	2/6/2014; 10/12/2011; 1/24/2014; 3/6/2015.	3/6/2017	[Insert **Federal Register** citation] 2/3/2017.	

[FR Doc. 2017–02197 Filed 2–2–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2016–0588; FRL–9959–18–Region 8]

Approval and Promulgation of State Implementation Plans; Interstate Transport for Utah

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action on a portion of a January 31, 2013 submission and a December 22, 2015 supplemental submission from the State of Utah that are intended to demonstrate that the Utah State Implementation Plan (SIP) meets certain interstate transport requirements of the Clean Air Act (Act or CAA) for the 2008 ozone National Ambient Air Quality Standards (NAAQS). The interstate transport requirements under the CAA consist of four elements: Significant contribution to nonattainment (prong 1) and interference with maintenance (prong 2) of the NAAQS in other states; and interference with measures required to be included in the plan for other states to prevent significant deterioration of air quality (prong 3) or to protect visibility (prong 4). Specifically, the EPA is approving interstate transport prong 1 for the 2008 ozone NAAQS.

DATES: This final rule is effective on March 6, 2017.

ADDRESSES: The EPA has established a docket for this action under Docket Identification Number EPA–R08–OAR–2016–0588. All documents in the docket are listed on the *http://www.regulations.gov* index. Although listed in the index, some information may not be publicly available, *e.g.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado, 80202–1129. The EPA requests that you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Adam Clark, Air Program, U.S. Environmental Protection Agency, Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–7104, *clark.adam@epa.gov.*

I. Background

On December 20, 2016, the EPA proposed to approve portions of Utah's January 31, 2013 submission and December 22, 2015 supplemental submission as meeting the prong 1 requirements of CAA section 110(a)(2)(D)(i) for the 2008 ozone NAAQS. 81 FR 92755, December 20, 2016. An explanation of the CAA requirements, a detailed analysis of the State's submittals, and the EPA's rationale for this proposed action were provided in the notice of proposed rulemaking, and will not be restated here. The public comment period for this proposed rule ended on January 10, 2017. The EPA received four comments on the proposal, which will be addressed in the "Response to Comments" section, below.

II. Response to Comments

Comment: Commenter Sierra Club stated that the EPA should disapprove Utah's prong 1 submission for the 2008 ozone NAAQS. The commenter asserted that all three of the Denver area maintenance receptors to which Utah's projected contribution exceeded one percent of the NAAQS [1] should instead be nonattainment receptors, but are not because the CSAPR Update modeling under-predicts the receptors' 2017 ozone design values. The commenter based this assertion on a weight of evidence approach using ambient air monitoring data collected at these receptors. The commenter stated that such a weight of evidence approach was appropriate to determine this receptor should be nonattainment, and noted that the EPA had used a weight of evidence approach in its action on Arizona's transport SIP. The CSAPR Update modeling projected that the Douglas County, Colorado receptor (monitor site ID 80350004) would have a 2017 average design value of 75.5 ppb, with a maximum design value of 77.6 ppb, and that one Jefferson County, Colorado receptor (monitor site ID 80590006) would have a 2017 average design value of 75.7 ppb, with a maximum design value of 78.2 ppb.[2] The commenter first asserted that both average design values should indicate nonattainment rather than maintenance, referring to the EPA's basis for the maintenance categorizations as "bad math." The commenter then stated that all three maintenance receptors will indeed be nonattainment for the 2015–2017 period. The commenter included the 4th highest daily maximum values, on which the 2008 ozone NAAQS is

[1] For details about these receptors, see EPA's final rulemaking disapproving prong 2 of Utah's 2008 ozone submittals, at 81 FR 71992, October 19, 2016.

[2] See document EPA–R08–OAR–2016–0588–0002, "Final CSAPR Update_Ozone Design Values & Contributions_All Sites," in the docket for this action.

EXHIBIT 2

Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

DEQ

Matthew H. Mead, Governor

Todd Parfitt, Director

April 4, 2017

Scott Pruitt
Administrator
U.S. Environmental Protection Agency
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N. W.
Washington, DC 20460

Submitted via overnight mail and electronic mail

Re: Petition for Reconsideration of Final Rule on the Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Interstate Transport for Wyoming; Docket No. EPA-R08-OAR-2016-0521

Dear Administrator Pruitt:

The Wyoming Department of Environmental Quality, Air Quality Division (WDEQ) hereby petitions the United States Environmental Protection Agency (EPA) to reconsider the Final Rule on the Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Interstate Transport for Wyoming. 82 Fed. Reg. 9142 (Feb. 3, 2017) (Final Rule). Pursuant to Clean Air Act (CAA) Section 307(d)(7)(B), WDEQ requests that EPA convene a proceeding for reconsideration of the Disapproval. That would enable the EPA to hear testimony and receive new information from WDEQ and other parties who submitted comments to the above-referenced docket.

While WDEQ is hopeful that the EPA will grant this request, in consideration of the importance of the Disapproval to the State of Wyoming, WDEQ has contemporaneously filed a petition for review of the Disapproval in the United States Court of Appeals for the Tenth Circuit. Should EPA wish to engage in settlement negotiations, WDEQ is willing to jointly move the Tenth Circuit to stay that litigation for the duration of settlement discussions.

1. Basis for Petition and Procedural Background

In the above-referenced Disapproval, the EPA disapproved several portions of State Implementation Plan (State Plan or SIP) revisions submitted by the State of Wyoming to satisfy the State's CAA 110(a)(2)(D)(i) interstate transport requirements. As part of the requirements, State Plans must contain adequate provisions preventing any emissions activity in one state from emitting pollutants in amounts that will contribute significantly to nonattainment, or interfere with maintenance, of the National Ambient Air Quality Standards (NAAQS) in another state. Wyoming's SIP revisions included an infrastructure SIP for the 2008 ozone NAAQS, submitted

on February 6, 2014. The EPA did not propose any action on Wyoming's 2008 ozone NAAQS State Plan until November 18, 2016, at which point it proposed a number of actions, including the disapproval of SIP prong 2 of CAA subsection 110(a)(2)(D)(i)(I), which addresses interference with maintenance of the NAAQS in another state.

EPA stated many times that it would not use the Cross-State Air Pollution Rule (CSAPR) in the West as it has done in the Final Rule. In the interim period between submission and disapproval, EPA issued a memorandum intended to provide guidance to states when addressing the CAA's interstate transport "Good Neighbor" provision in their State Plans. In the memo, EPA stated, "CSAPR and its predecessor transport rules, the NO_x SIP Call and CAIR, were designed to address the collective contributions from the 37 states in the Eastern U.S. and were not formally evaluated for applicability to the 11 states in the Western U.S."[1] After EPA issued the guidance, but before taking action on Wyoming's plans, EPA issued a notice of data availability (NODA) to support the upcoming CSAPR update for the 2008 ozone NAAQS. The NODA for the CSAPR update was published for comment on August 4, 2015, well after the Division submitted the 2008 Ozone Infrastructure SIP. Wyoming commented on the NODA[2] with the understanding that the rule applied only to eastern states and that Wyoming would provide additional comments when the EPA proposed additional SIP requirements for western states.[3] When the EPA proposed the CSAPR update on December 3, 2015, the WDEQ commented to that effect once again, because the proposed and final rules both stated that, "the EPA is not addressing interstate emission transport in this action for the 11 western contiguous United States." 81 Fed. Reg. 74523.

WDEQ submitted Wyoming's 2008 ozone NAAQS SIP on February 6, 2014 and EPA had until August 5, 2015 to act on the submission. Throughout the entire process, WDEQ received no indication or communication from EPA's Region 8 office that any deficiencies were present in any of the interstate transport portions of Wyoming's State Plan submissions, and it was not until November 18, 2016, that WDEQ received any official communication that EPA planned to disapprove prong 2 of Wyoming's 2008 ozone SIP. WDEQ requested, and was subsequently denied, an extension so that it could provide EPA with additional information.[4] WDEQ provided what information it could in a comment letter to the docket by the December 19, 2016, comment period deadline. In this petition, the Division provides new technical information to support its original SIP submission. That new information is central to this rulemaking, and because the EPA did not consider this information when the agency first disapproved Wyoming's SIP submission, the EPA should now convene a proceeding to formally receive and consider this information.

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[1] *See* Information on the Interstate Transport "Good Neighbor" Provision for the 2008 Ozone National Ambient Air Quality Standards (NAAQS) under Clean Air Act (CAA) Section 110(a)(2)(D)(i). January 22, 2015, p. 4

[2] *See* Docket No. EPA–HQ–OAR–2015–0500

[3] WDEQ was also not able to comment at this time on the contribution threshold. The NODA stated, "In CSAPR, the EPA used a contribution screening threshold of 1 percent of the NAAQS to identify upwind states in the eastern U.S. that may significantly contribute to downwind nonattainment and/or maintenance problems and which warrant further analysis. The EPA will take comment on the appropriate threshold to be applied for purposes of the 2008 ozone NAAQS in the upcoming rulemaking proposal to address interstate ozone transport for that standard. The EPA is not proposing or taking comment on this threshold as part of this NODA." 80 Fed. Reg. 46277.

[4] *See* Docket ID No. EPA-R08-OAR-2016-0521

2. Overview of New Information

In the Final Rule, EPA disapproved prong 2 of Wyoming's plan for the 2008 ozone NAAQS because EPA "linked" Wyoming emissions to projected high ozone levels at a Douglas County, Colorado receptor. EPA applied the "one percent" threshold used in the CSAPR update, which was determined using CAM_x modeling. The model used "Ozone Source Apportionment Technology" (OSAT), "Particulate Source Apportionment Technology" (PSAT) and the "Anthropogenic Precursor Culpability Analysis" (APCA), to determine the contributions from upwind states to predicted ozone levels. The EPA relies on the ability of OSAT/APCA to "tag" ozone precursor emissions from Wyoming and to distinguish precisely how much of the predicted ozone at downwind receptors is attributable to Wyoming.

In recent conversations with the EPA staff that conducted the CSAPR transport modeling, WDEQ inquired about the reliability of the predicted contributions, and if the predicted contributions could be verified. EPA confirmed that the certainty of the source apportionment tools cannot be tested, and that back-trajectories are used to determine if the modeled contributions from an upwind state are plausible. This is very concerning for Wyoming, because while transport patterns can reveal if wind flows would even allow precursor emissions from a particular area to reach a given receptor, it does not prove that OSAT/APCA can predict ozone contributions with any degree of accuracy. Moreover, one of the source apportionment tools in CAM_x, PSAT, was recently found to produce inconsistent results within the model, which called into question previous modeling results that were used for $PM_{2.5}$ and regional haze SIPs, as well as the CSAPR. According to the model developer, this inconsistency with PSAT has been corrected within the model, but it demonstrates the unproven nature of the source apportionment tools. Wyoming has serious concerns that EPA is using an inaccurate assessment tool to predict very small levels of ozone that in turn "link" Wyoming emissions to receptors in other states.

Knowing that the primary source of certainty testing for the source apportionment tools is through back-trajectory analysis, Wyoming conducted its own analysis of back-trajectories for the 10 days with the highest monitored ozone values at the Douglas County, Colorado monitor (referred to in the disapproval as a receptor) to which Wyoming emissions were "linked" in the base 2011 CSAPR modeling. Wyoming's objective was to compare the transport patterns on those 10 days to the model-predicted "contributions" from Wyoming to determine if the model results were reasonable. Only one of the 10 back-trajectories showed that flows for the previous 24 hours originated from the direction of Wyoming (see Attachment A). For the other nine back-trajectories, flows originated from southern Colorado, western Colorado/eastern Utah, states southwest of Colorado, and the Denver Front Range. WDEQ received additional data from EPA's Region 8 office on March 27, 2017 and conducted back-trajectory analyses on the four additional days for which it did not already conduct analyses (See Attachment A Supplements 1 and 2). In all, WDEQ's back-trajectory analyses show flows from only three of the eight modeled days (6/22, 7/5, and 8/10) and only one of the highest monitored days in 2011 (6/22).

WDEQ recently became aware of source apportionment modeling conducted by Ramboll Environ and Alpine Geophysics on behalf of the Denver Regional Air Quality Council (RAQC) and the Colorado Department of Public Health and Environment (CDPHE) Air Pollution Control

Division (APCD) (Attachment B).[5] The modeling was conducted using the same CAM_x software used in EPA's CSAPR modeling with data from the Intermountain West Data Warehouse. The analysis showed that for the same site, on the same day, total 2017 MDA8 O_3 (highest daily maximum 8 hour average for ozone) was different between the types of analyses (Local Source Analysis versus Transport Analysis) likely due to the differences in grid resolution. This discrepancy alone is reason enough for EPA to reconsider Wyoming's 2008 ozone SIP submission.

Additional information has become available since the CSAPR Update and the disapproval of Wyoming's ozone SIP for which the CAM_x modeling does not account. The peer-reviewed journal *Atmospheric Chemistry and Physics* published an article dated March 1, 2017, which observed that ozone concentrations at some sites in the western U.S. are increasing despite stringent emissions controls.[6] The article concludes that an increase of Asian anthropogenic emissions has increased by 1–2 ppb yr^{-1} since 1990 and is a major driver of both spring and summer background ozone in the western U.S., contributing up to 65% of springtime background ozone. The article specifically references the Denver metropolitan area and notes that "the 4th highest MDA8 O_3 in the Denver metropolitan area shows little change over the past decades, despite significant reductions in NO_x…and CO emissions."[7]

EPA has also taken action on a petition, dated December 9, 2013, since its disapproval of prong 2 of Wyoming's 2008 ozone SIP. In the action, EPA stated that, "[o]zone levels across the nation are expected to further decline over the next several years due to emissions controls already in place. The EPA's emissions projections in support of the 2015 ozone NAAQS modeling show declining emissions of NO_X and VOCs between 2017 and 2025." 82 Fed. Reg. 6520. In light of this information, it seems premature for the EPA to disapprove prong 2 of Wyoming's State Plan for ozone.

WDEQ also submitted numerous exceptional event packages to EPA between 2011 and 2014, and EPA responded in a letter received by WDEQ on April 28, 2016 that:

> A preliminary review of the demonstrations submitted indicates that the flagged PM and ozone data may have been influenced by exceptional events; however, at this time the EPA will not take action on WDEQ's request for concurrence on the referenced data flags. The data are not anticipated to be involved in any pending regulatory decision by the EPA, therefore, the EPA is not making a concurrence decision on the demonstrations submitted. *If at some point in the future the flagged data would be included in an attainment demonstration or involved in other regulatory decisions, the EPA would then undertake a full review of the submitted demonstrations to allow a concurrence decision at that time.*" (emphasis added).

Yet all of those flagged data were used in the EPA's regulatory decision to disapprove Wyoming's ozone transport State Plan submission. 82 Fed. Reg. 9151. WDEQ asks that EPA

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[5] Denver Metro/North Front Range 2017 Ozone Source Apportionment Modeling. Retrieved from http://vibe.cira.colostate.edu/wiki/wiki/9132/. February 21, 2017 and March 16, 2017.
[6] M. Lin et al. "US surface ozone trends and extremes from 1980 to 2014" *Atmospheric Chemistry and Physics*. March 1, 2017. p. 2964
[7] Ibid. p. 2960

concur on Wyoming's decisions to flag the data as influenced by exceptional events, remove the flagged data, and then use the new data set to reconsider the Final Rule. WDEQ also requests that EPA review Colorado receptor data for any possible concurrent exceptional events, such as wildfires, on certain dates and WDEQ would also like an opportunity to review that data. Even though a state chooses not to submit an exceptional event package it does not mean data was not impacted by an exceptional event or events. Any day impacted by an exceptional event should be flagged as such whether or not that event was included in an official submission.

3. Docket Comments Supported Allowing Wyoming to Submit More Information

WDEQ's request for additional time to submit more information was not unreasonable. Every other comment to the docket supporting Wyoming's underlying State Plan submission requested that the EPA grant WDEQ additional time to submit additional information. (See Attachment C). The EPA chose not to give WDEQ more time based on a then-unsigned consent decree with the Sierra Club. That decision flies in the face of cooperative federalism because, in essence, the EPA determined that a citizen group's convenience during litigation was more important than a sovereign state's right to fully participate in its own State Plan development process.

I appreciate the time that you have taken to consider WDEQ's request. Although WDEQ is hopeful that the EPA will convene a proceeding for reconsideration, WDEQ will also be filing a petition for review in the 10th Circuit Court of Appeals today. Please feel free to contact me with any questions at (307) 777-3746. Please direct questions that are legal in nature to my counsel at the Wyoming Attorney General's Office, Elizabeth Morrisseau, at (307) 777-6199.

Sincerely,

Nancy E. Vehr
Air Quality Division Administrator

CC: Todd Parfitt, Wyoming Department of Environmental Quality, Director
Colin McKee, Wyoming Governor's Office, Policy Advisor
Deb Thomas, EPA Region 8, Acting Administrator
Carl Daly, EPA Region 8, Air Program Director

Attachment A

HYSPLIT Analyses of Parcel Trajectory for High Ozone Days in 2011 at the Douglas County, CO Monitoring Station

Wyoming Department of Environmental Quality
Air Quality Division
March 7, 2017

I. Introduction

On February 3, 2017, the Environmental Protection Agency (EPA) published a final rule, "Approval and Disapproval of Air Quality Implementation Plans; Interstate Transport for Wyoming," in the Federal Register (FR Vol. 82, No. 22). In this rule, among other actions, the EPA disapproved the portion of the State of Wyoming's State Implementation Plan (SIP) addressing prong 2 of the interstate transport requirements for the 2008 ozone National Ambient Air Quality Standards (NAAQS). This disapproval hinged on a finding in an EPA modeled ozone transport assessment which found that Wyoming is projected to contribute 1.18 ppb of ozone to a maintenance receptor in the Denver, Colorado area in 2017.

This analysis serves as a supplement to the State of Wyoming's SIP submittal, providing additional evidence to support Wyoming's original claim that Wyoming is not expected to significantly contribute to Colorado's attainment of the 2008 NAAQS. The analysis includes additional information to support Wyoming's stance, including HYSPLIT and smoke analyses, as well as referencing modeling results which contradict the EPA's findings.

The maintenance monitor identified by the EPA as being influenced by emissions from Wyoming in 2017 is identified in Table 1, below.

Site Name	Douglas County
AQS Site ID	08-035-0004
Monitor Type	SLAMS
PQAO	CDPHE
Latitude	39.534488
Longitude	-105.070358
Attainment Status	Nonattainment

Table 1. Site Details

The EPA's modeling analysis projected the maintenance status of monitors based on the 10 days with the highest maximum 8-hour average ozone values in the base year of 2011. The top 10 days for the Douglas County monitor and the associated maximum 8-hour average ozone value are identified in Table 2, below.

Date	Starting Hour	Max 8-Hour Ozone Value (ppm)
June 24, 2011	12:00	0.099
June 7, 2011	10:00	0.084*
August 13, 2011	12:00	0.084
August 12, 2011	10:00	0.082
August 20, 2011	11:00	0.081
August 27, 2011	10:00	0.08
July 18, 2011	13:00	0.079
July 30, 2011	10:00	0.078
June 22, 2011	11:00	0.076
July 9, 2011	09:00	0.075

Table 2. Top 10 2011 Max 8-hr Ozone Days
*This value was flagged in AQS by the agency.

In analyzing these days it was noted that the June 7, 2011 value was identified as being associated with an exceptional event by the monitoring agency, the Colorado Department of Public Health and Environment (CDPHE). The comment provided in AQS about the June 7, 2011 event (from the hours of 07:00-21:00) is as follows:

"The passage of a strong low pressure system created a fold in the tropopause. Associated stratospheric air in the troposphere and deep mixing resulted in stratospheric ozone being pulled down to ground level along the Colorado Front Range and mountain regions. The affected hourly concentrations are those flagged as "ro" in the AQS database. This meteorological Condition is not controllable."

II. HYSPLIT and Smoke Impact Analysis

HYSPLIT (Hybrid Single Particle Lagrangian Integrated Trajectory) Model Analyses generate wind trajectories up to forty-eight (48) hours prior to (backwards trajectory) or after (forwards trajectory) a chosen start date of interest. A backwards trajectory is a valuable indicator of what could affect a stationary location such as a city or monitoring station. A forwards trajectory is beneficial to view possible dispersion from an emission source.

In order to assess the potential impacts of Wyoming emissions on the Douglas County monitor, backward trajectories were run for each of the 10 highest ozone days in 2011. Trajectory data in this analysis were sourced from the National Oceanic and Atmospheric Administration's (NOAA) Air Resource Laboratory (ARL) website, here: http://www.arl.noaa.gov/HYSPLIT_info.php[1]. The National Centers for Environmental Protection's (NCEP) Global Data Assimilation System (GDAS) meteorological data set

[1] Stein, A.F., Draxler, R.R, Rolph, G.D., Stunder, B.J.B., Cohen, M.D., and Ngan, F., (2015). NOAA's HYSPLIT atmospheric transport and dispersion modeling system, Bull. Amer. Meteor. Soc., **96**, 2059-2077, http://dx.doi.org/10.1175/BAMS-D-14-00110.1

using a 0.5 degree resolution was used for these analyses. The model vertical velocity option was selected for vertical motion. These modeled trajectories are displayed in Figures 1-10, below.

Fire and smoke impacts were also assessed for the 10 highest ozone days in 2011. Fire and smoke data were obtained from NOAA's ARL website, here: http://www.ready.noaa.gov/smoke_verifyhms.php[2]. Where smoke impacts were present in the map domain on a given day, those layers were included in Figures 1-10. Fire and smoke data displayed are for the high ozone day, rather than the day before.

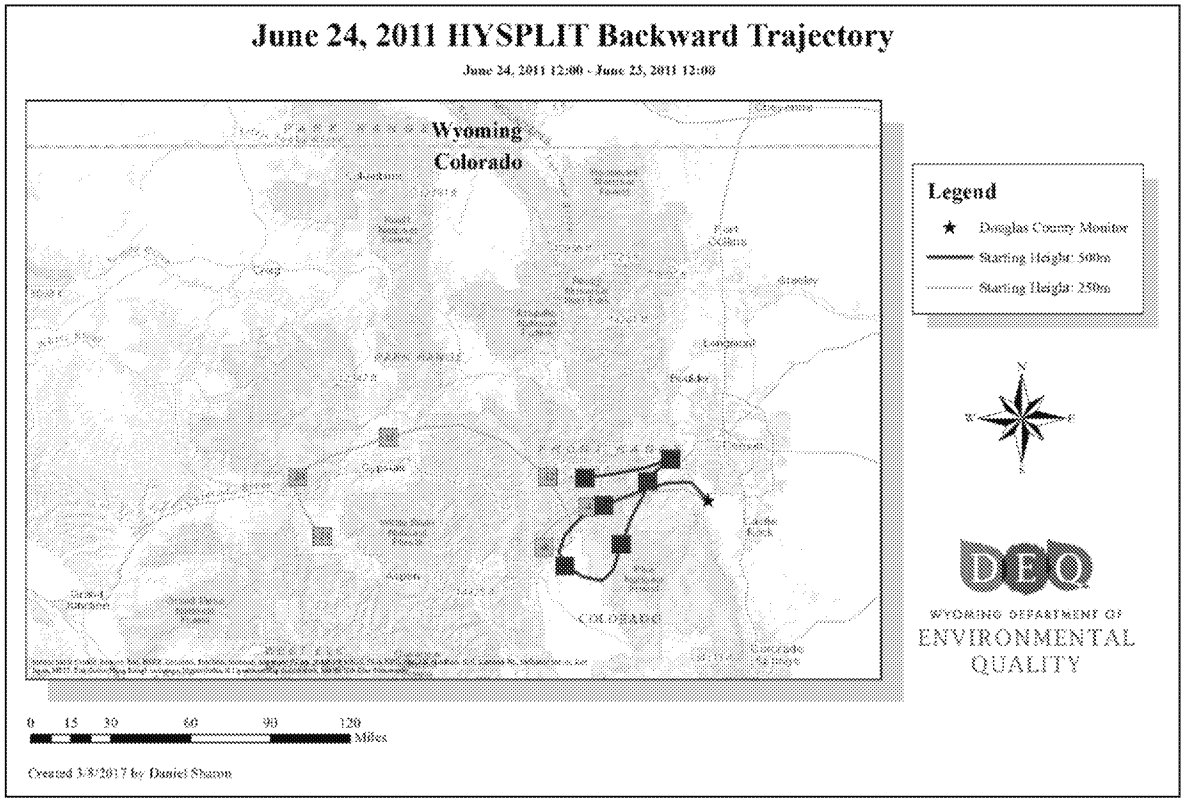

Figure 1. HYSPLIT Run for June 24, 2011

[2] NOAA. 2017. Meteorological archive data spanning June 2011 to August 2011. Downloaded from ARL website, http://www.arl.noaa.gov/index.php. Accessed March 2017.

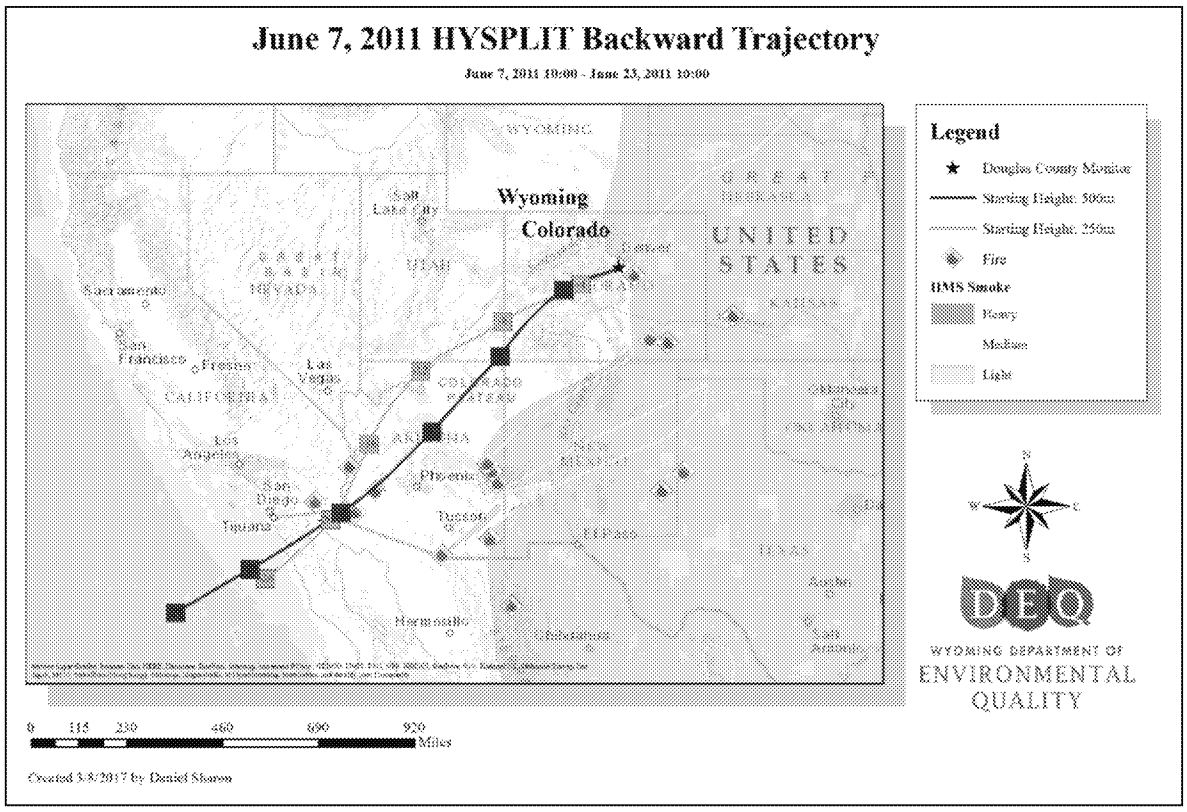

Figure 2. HYSPLIT Run for June 7, 2011

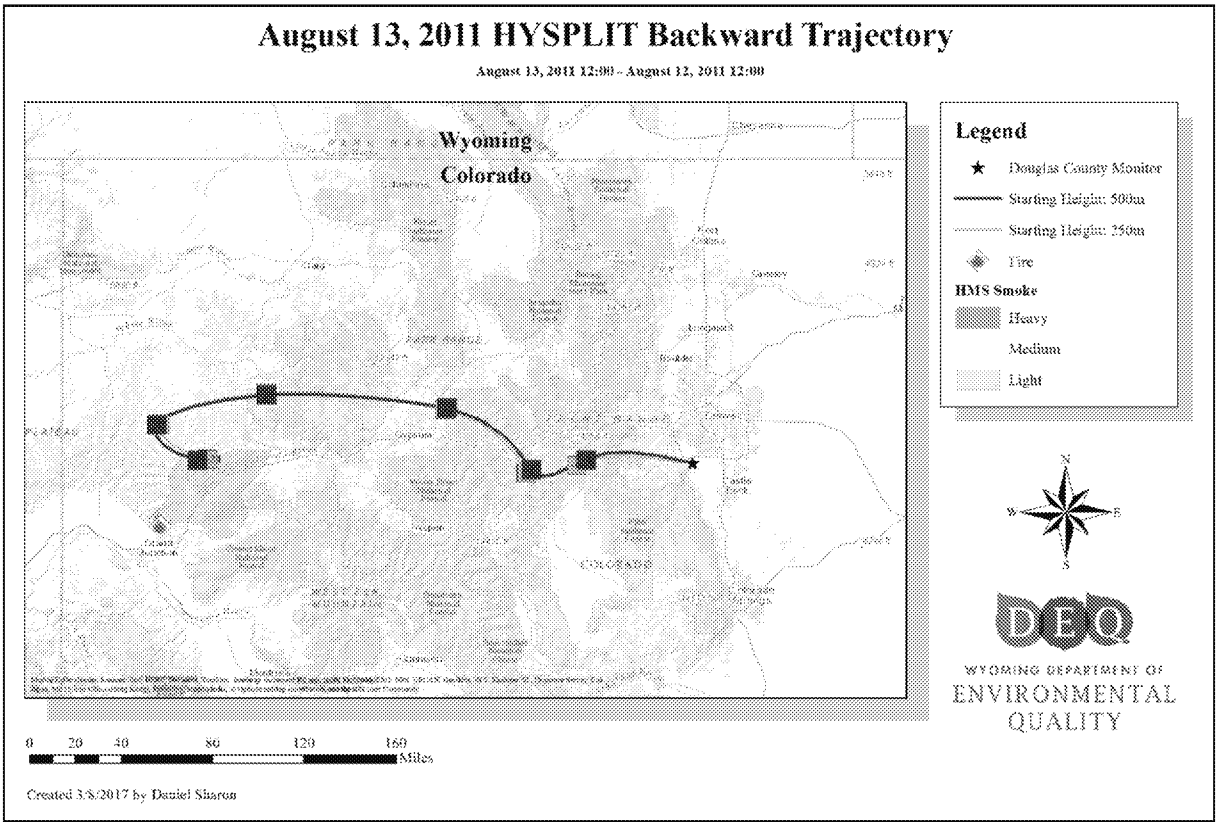

Figure 3. HYSPLIT Run for August 13, 2011

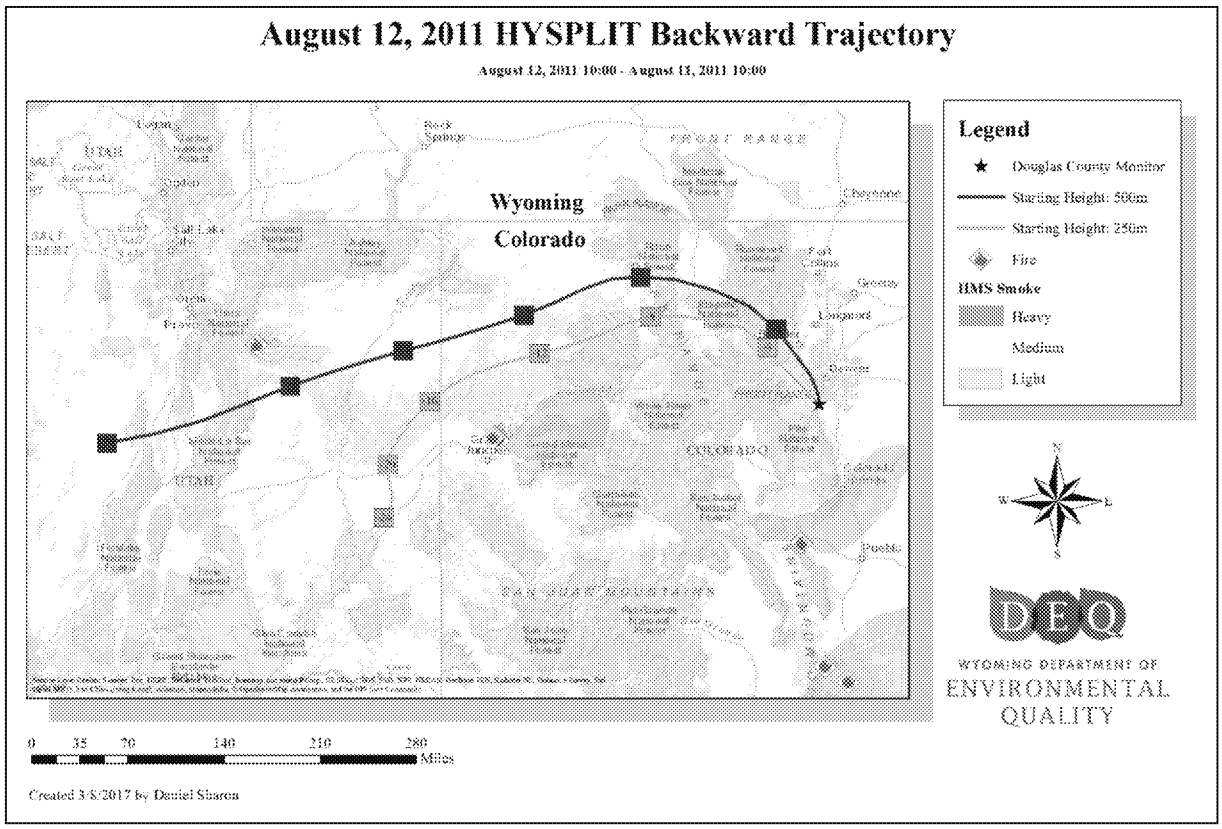

Figure 4. HYSPLIT Run for August 12, 2011

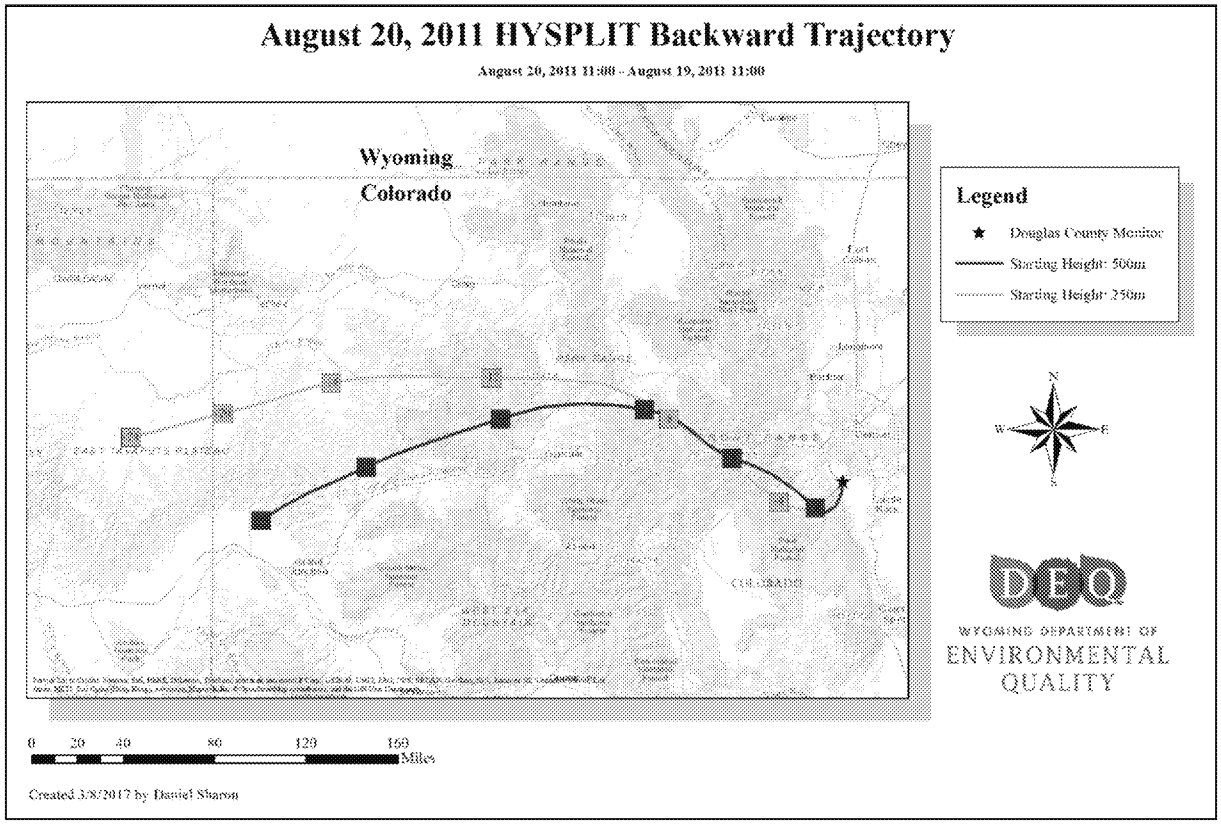

Figure 5. HYSPLIT Run for August 20, 2011

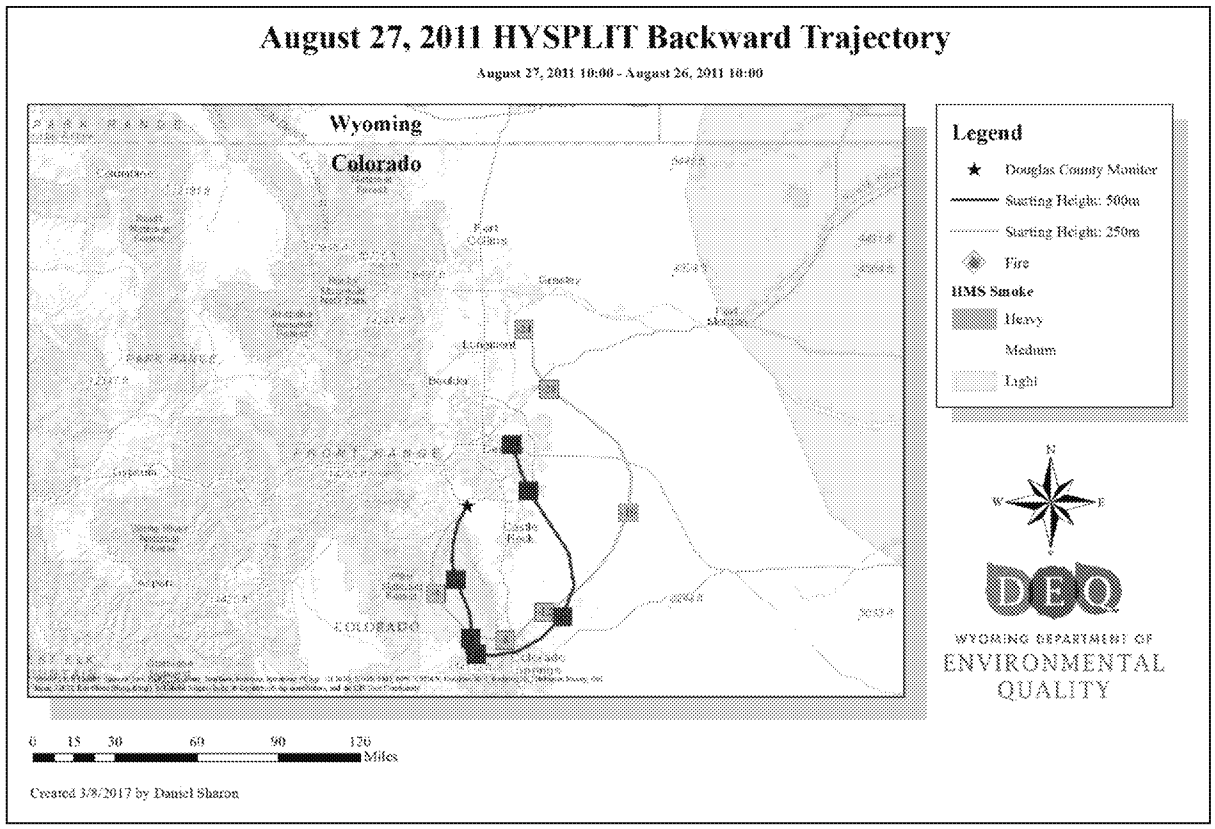

Figure 6. HYSPLIT Run for August 27, 2011

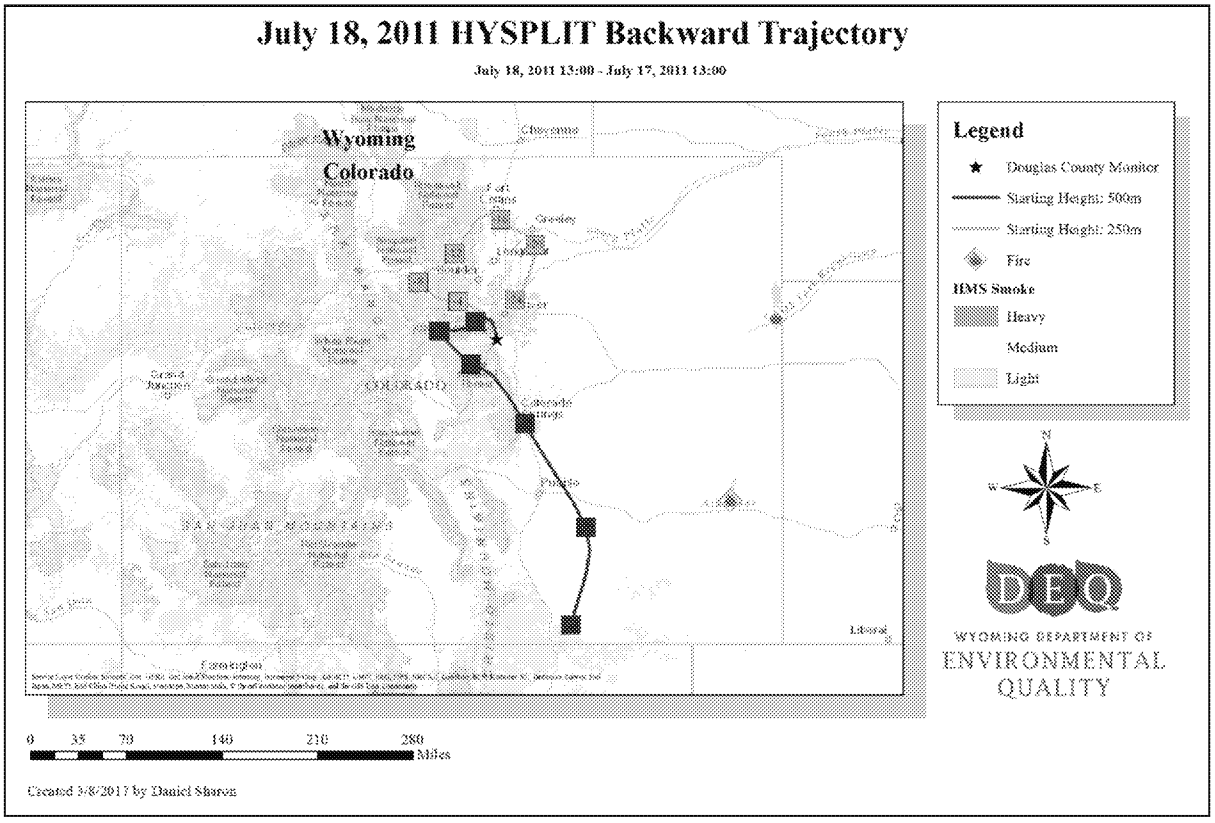

Figure 7. HYSPLIT Run for July 18, 2011

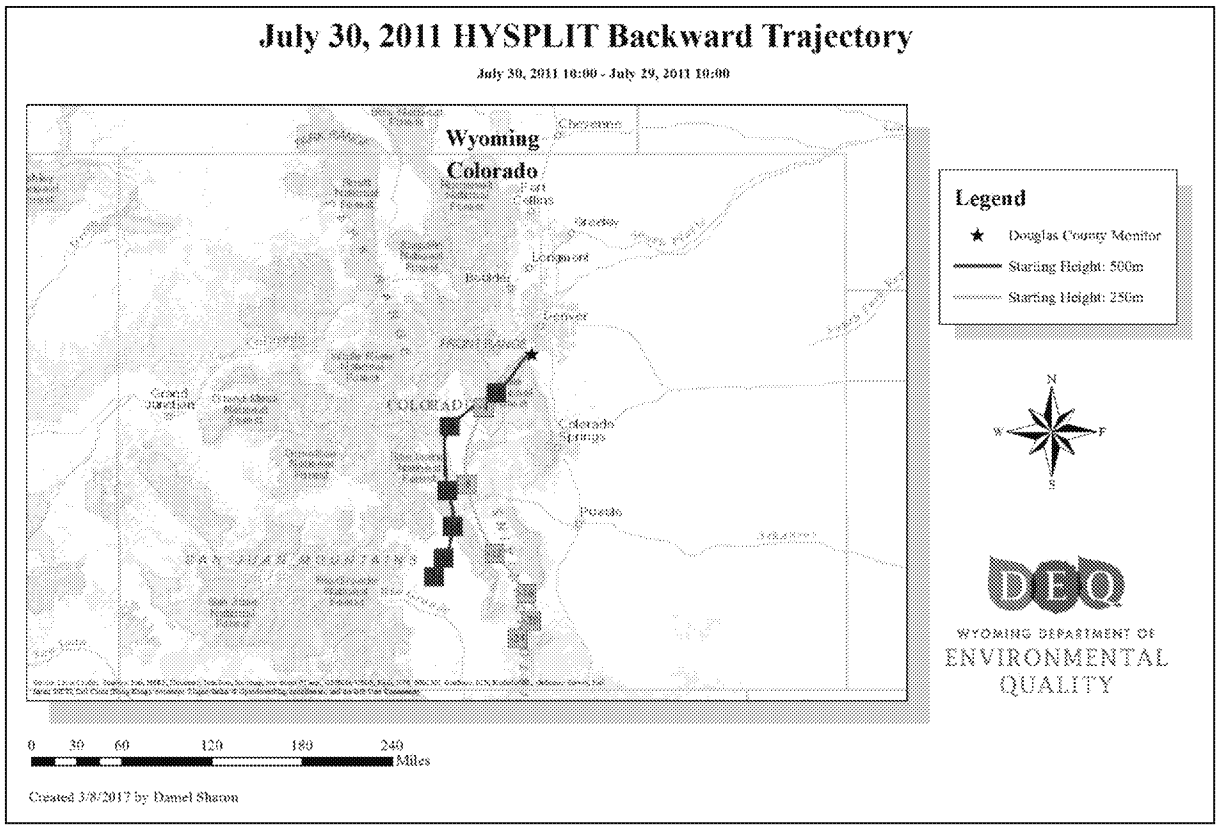

Figure 8. HYSPLIT Run for July 30, 2011

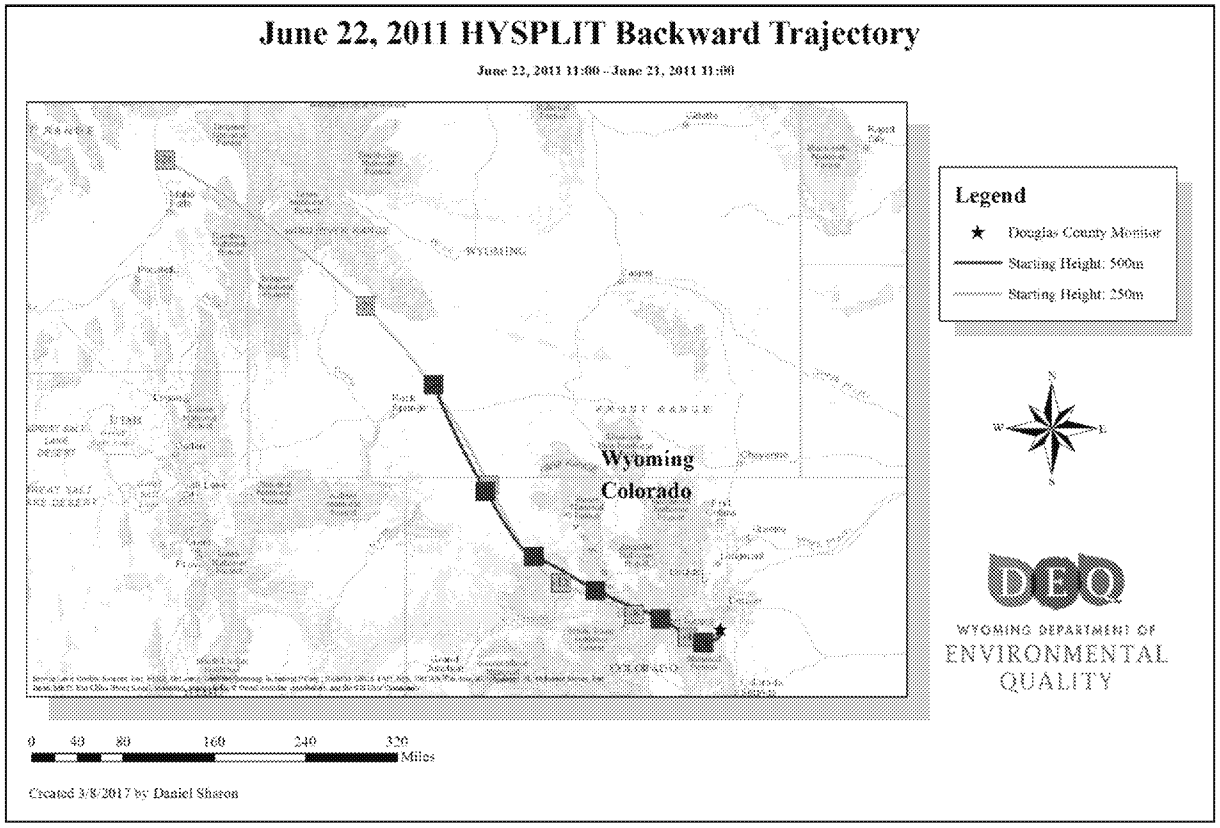

Figure 9. HYSPLIT Run for June 22, 2011

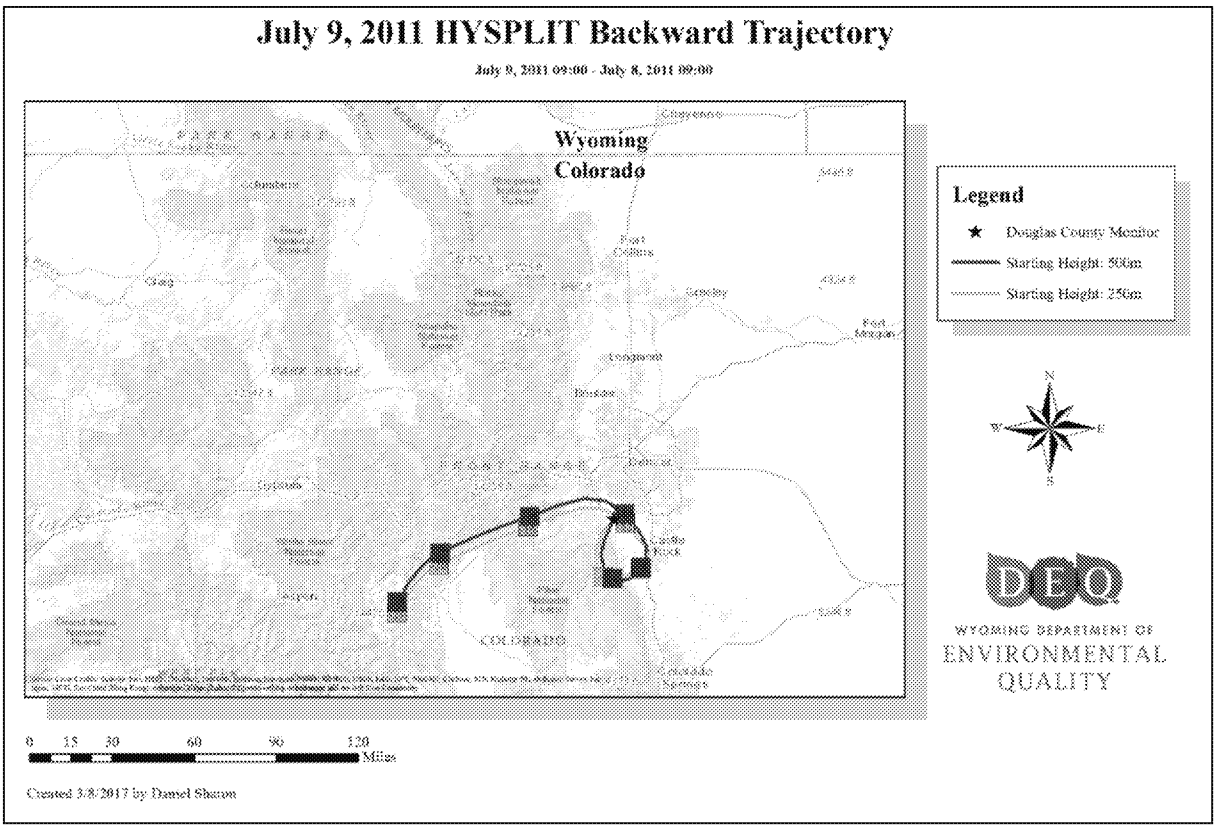

Figure 10. HYSPLIT Run for July 9, 2011

Attachment A Supplement 1

Supplement to HYSPLIT Analysis of Parcel Trajectory for High Ozone Days in 2011 at the Douglas County, CO Monitoring Station

Wyoming Department of Environmental Quality
Air Quality Division
March 30, 2017

In addition to the HYSPLIT analyses performed to characterize parcel movement on monitored high ozone days in 2011 at the Douglas County, Colorado monitor, the Air Quality Division (AQD) performed additional HYSPLIT runs for the modeled high days that were used in the Environmental Protection Agency's (EPA) determination of Wyoming's contributions in 2017. Four (4) of the days included in the AQD's March 7, 2017 analysis were among the eight (8) days used by the EPA to calculate ozone contribution from Wyoming to the Douglas County receptor. These four days are August 20, August 13, August 12, and June 22.

The additional four (4) days included in the EPA calculations are July 4, July 5, June 9, and August 10. HYSPLIT analyses for these days in 2011 are presented in Figures 1-4, below. As with the AQD's March 7, 2017 analysis, trajectory data were sourced from the National Oceanic and Atmospheric Administration's (NOAA) Air Resource Laboratory (ARL) website, here: http://www.arl.noaa.gov/HYSPLIT_info.php[1]. The National Centers for Environmental Protection's (NCEP) Global Data Assimilation System (GDAS) meteorological data set using a 0.5 degree resolution was used for these analyses. The model vertical velocity option was selected for vertical motion.

Fire and smoke impacts were also assessed for the additional four modeled high ozone days. Fire and smoke data were obtained from NOAA's ARL website, here: http://www.ready.noaa.gov/smoke_verifvhms.php[2]. Where smoke impacts were present in the map domain on a given day, those layers were included in Figures 1-4. Fire and smoke data displayed are for the high modeled ozone day, rather than the day before.

Because no start hour data were provided by the EPA for their modeled MDA8 concentrations on the high modeled ozone days, all trajectories were run backwards from 11:00 AM on the day in question. 11:00 is the average of the start times for the high MDA8 concentrations on the top 10 high monitored ozone days in 2011.

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[1] Stein, A.F., Draxler, R.R, Rolph, G.D., Stunder, B.J.B., Cohen, M.D., and Ngan, F., (2015). NOAA's HYSPLIT atmospheric transport and dispersion modeling system, Bull. Amer. Meteor. Soc., **96**, 2059-2077, http://dx.doi.org/10.1175/BAMS-D-14-00110.1

[2] NOAA. 2017. Meteorological archive data spanning June 2011 to August 2011. Downloaded from ARL website, http://www.arl.noaa.gov/index.php. Accessed March 2017.

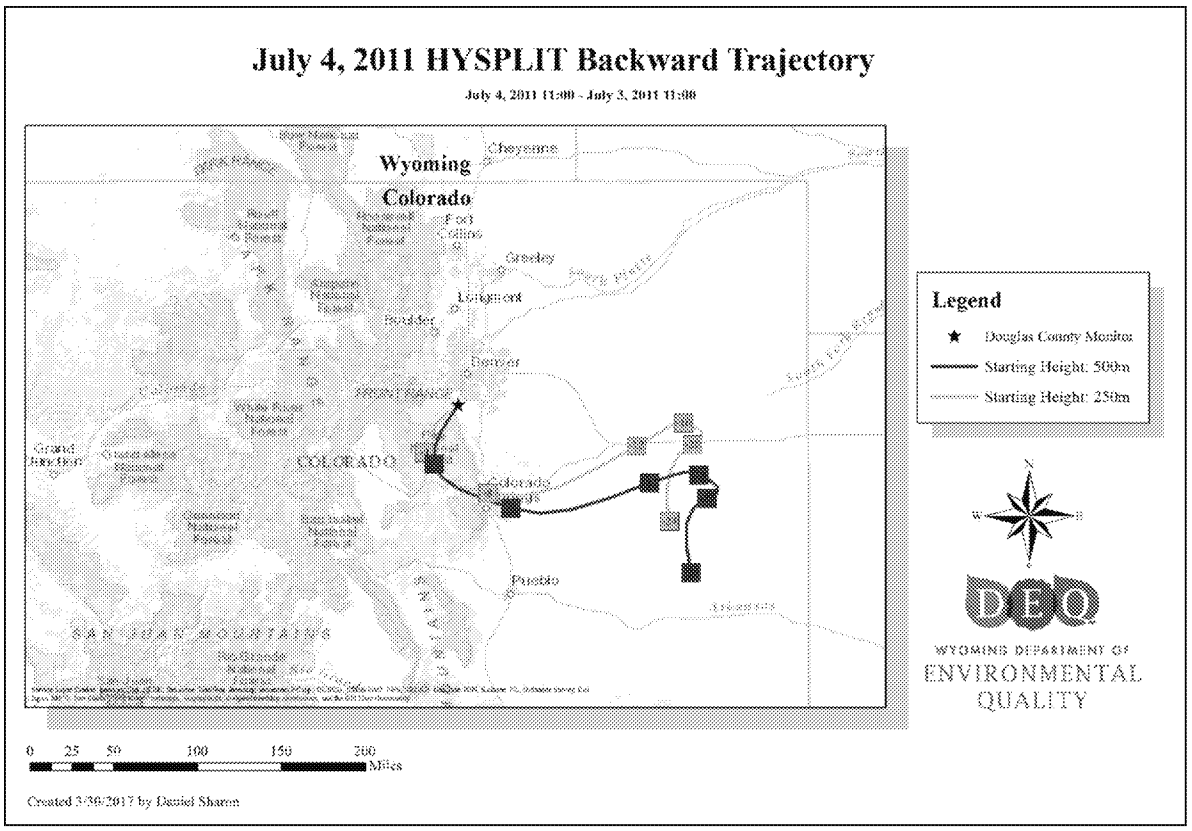


Figure 1. HYSPLIT Run for July 4, 2011

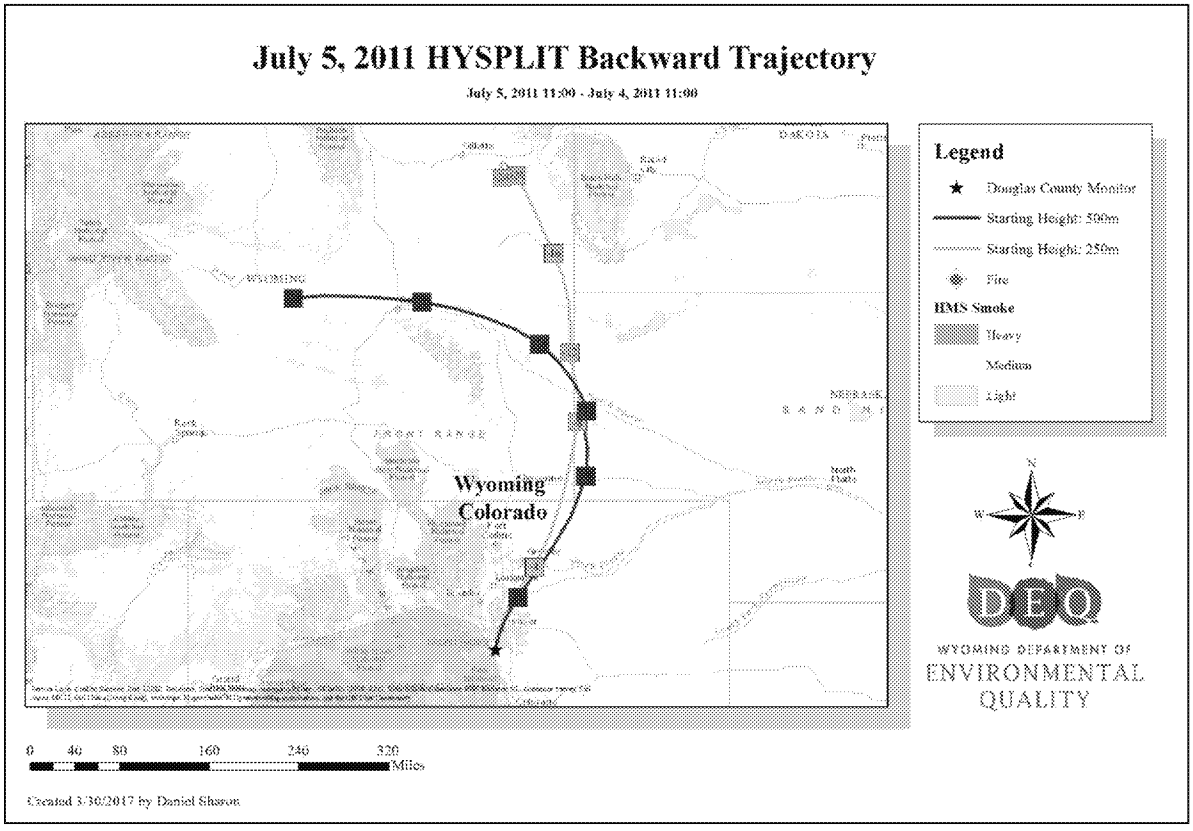


Figure 2. HYSPLIT Run for July 5, 2011

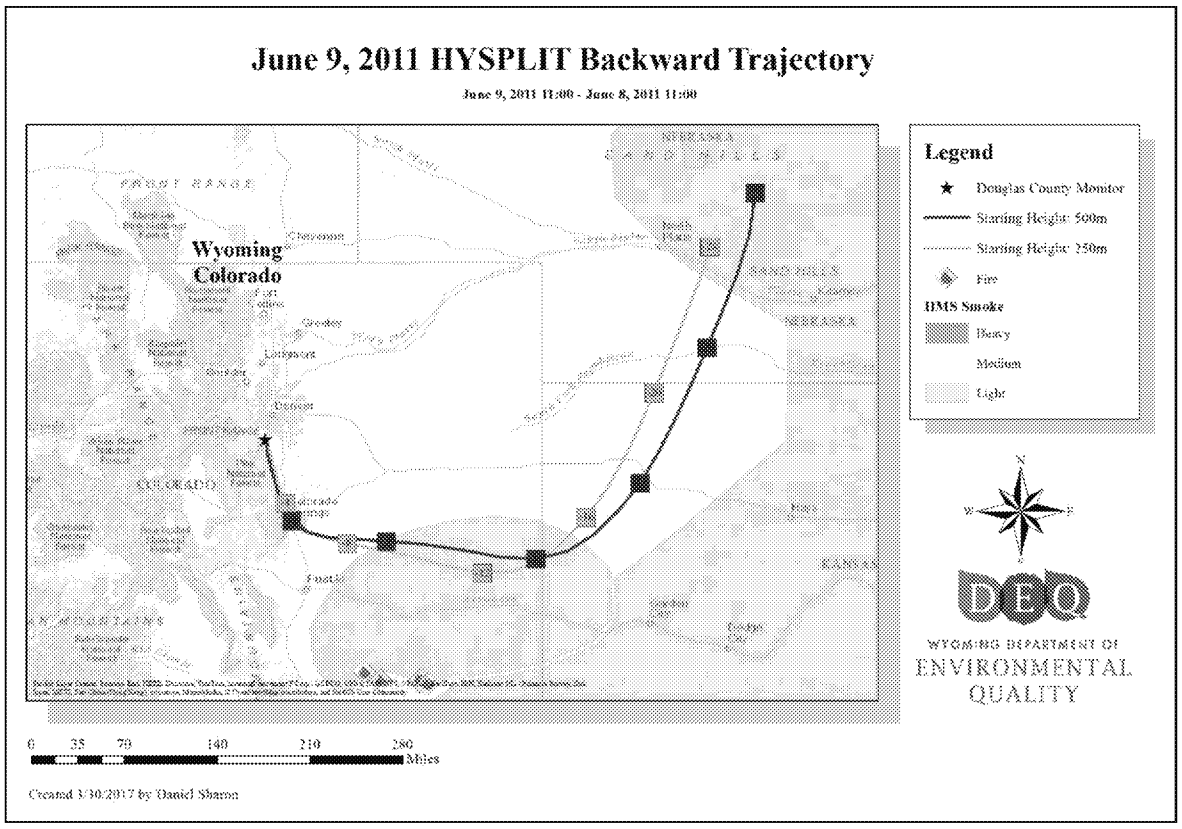


Figure 3. HYSPLIT Run for June 9, 2011

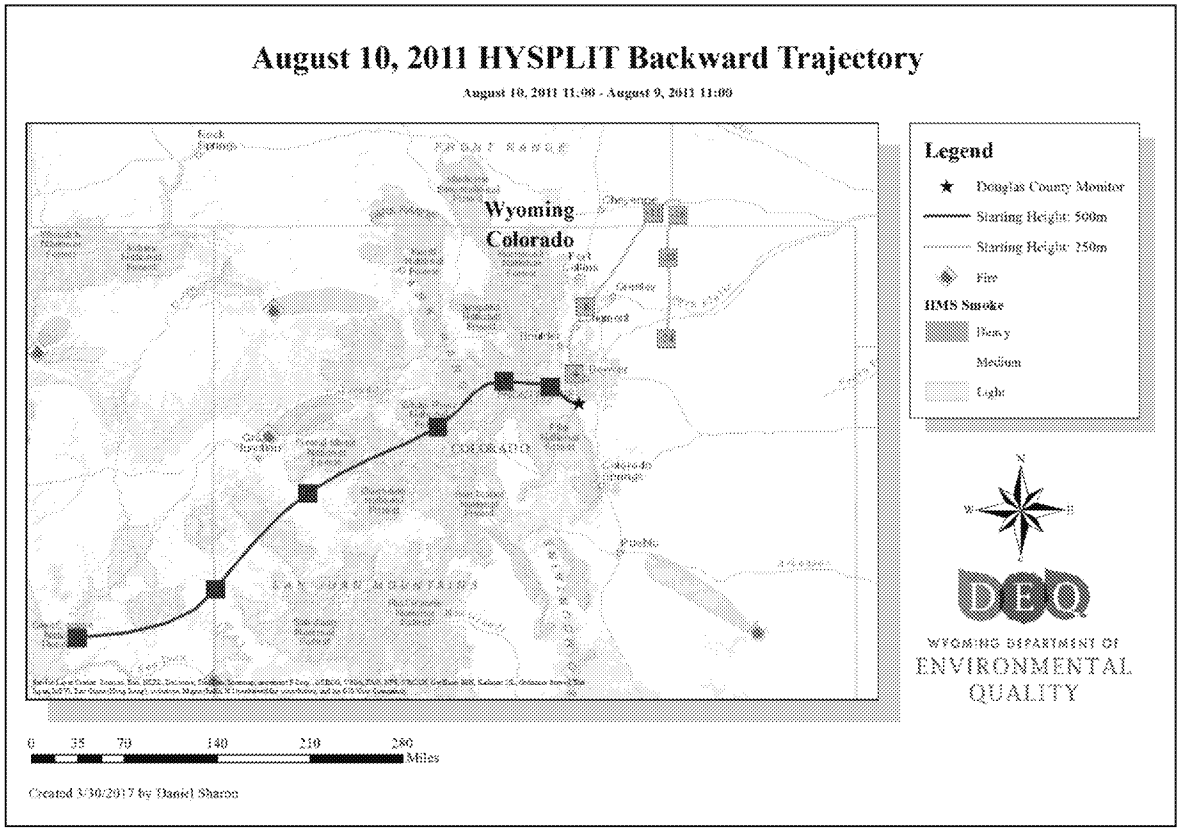


Figure 4. HYSPLIT Run for August 10, 2011

As can be seen in Figures 1-4 above, the only high modeled ozone days where trajectories passed through Wyoming were July 5, 2011 and August 10, 2011. Figure 2, showing the July 5, 2011 trajectory, also shows significant smoke impacts directly adjacent to the Douglas County monitor which would be expected to have a greater impact on the ozone value at this site than emissions from Wyoming and likely had a confounding effect on model performance. Figure 4 shows that on August 10, 2011 only the 250 meter trajectory passed through a small section of southeast Wyoming.

Attachment A Supplement 2

Calculation of 2017 Contribution from Wyoming to Denver

EPA performed nationwide air quality modeling to support the CSAPR Update which was finalized on September 7, 2016. As described in the Air Quality Modeling Technical Support Document (AQMTSD) for this rule, air quality modeling was used to identify monitoring sites that are projected to be nonattainment and/or maintenance receptors for the 2008 NAAQS in 2017. The modeling was also used, in part, to quantify the contributions from projected 2017 anthropogenic emissions in each state, individually, to 2017 average design values at each receptor site. The modeling-based daily 8-hour contributions were used to calculate an average contribution metric, as documented in the AQMTSD. The results of this modeling identified that projected 2017 anthropogenic emissions in Wyoming contribute 1.18 ppb to the 2017 average design value at a maintenance receptor site in Douglas County, Colorado.

The AQMTSD, Table 4-1 provides an example of the calculation of the average contribution metric. Below we provide a table containing the data used to calculate this metric for Wyoming's contribution to the Douglas County receptor. The table includes (1) the 2017 model-predicted maximum daily average 8-hour (MDA8) ozone concentrations for this site on those days with modeled ozone exceedances in 2017 (i.e., MDA8 values $\geq$ 76 ppb), (2) the daily 8-hour average contributions from Wyoming corresponding to the time of the MDA8 concentration, and (3) the "pseudo" concentration which is the difference between modeled MDA8 concentration and the contribution from Wyoming. The data in the table are rank-ordered based on the MDA8 ozone concentrations on these days. The 2017 average design value for the Douglas County site is 75.5 ppb. Using the data in table below, the Relative Contribution Factor (RCF) for Wyoming to this site is:

(79.700 – 78.446) / 79.700 = 0.01573

The contribution metric value for Wyoming is calculated as:

75.5 x 0.01573 = 1.1876 which is truncated to 1.18 ppb

Data for Calculating Ozone Contribution from Wyoming to the Douglas County Receptor (units are ppb).

Month	Day	2017 Predicted MDA8 O3 (ppb)	Contributions from WY (ppb)	"Pseudo" 8-Hr O3 for WY (ppb)
8	20	83.729	0.695	83.034
8	13	82.590	1.732	80.858
7	4	80.980	0.651	80.329
7	5	79.785	3.949	75.836
6	9	78.356	0.136	78.220
8	10	78.015	0.242	77.773
8	12	77.522	1.065	76.457
6	22	76.630	1.565	75.065
Multi-Day Average =>		79.700	-	78.446
2017 Average Design Value is 75.5 ppb		RCF =>	0.01573	-
		Contribution =>	1.1876	-
		Truncated Contribution =>	1.18	-

Attachment B

Denver Metro/North Front Range 2017 Ozone Source Apportionment Modeling

Abstract

The Denver Metro/North Front Range Moderate Area Ozone State Implementation Plan (SIP) included 2017 ozone attainment demonstration modeling for the 2008 0.075 ppm ozone NAAQS. The attainment demonstration modeling used a 2011 CAMx modeling platform that was based on the Western Air Quality Study (WAQS) CAMx 2011b database available through the Intermountain West Data Warehouse (IWDW (http://views.cira.colostate.edu/tsdw/)). Additional modeling was performed to look ahead to the new 2015 0.070 ppm ozone NAAQS. Two types of 2017 ozone source apportionment modeling were conducted: (1) Local Source Analysis that analyzed ozone contributions from different source sectors within Colorado; and (2) Transport Analysis that analyzed ozone contributions due to emissions from western states. The ozone source apportionment (SA) modeling results can be visualized using a web-based SA Vis Tool that is discussed in this wiki. The Denver ozone SIP modeling was conducted by Ramboll Environ (http://www.ramboll-environ.com/) and Alpine Geophysics (http://www.alpinegeophysics.com/) under contract to the Denver Regional Air Quality Council (RAQC (http://raqc.org/)) along with the Colorado Department of Public Health and Environment (CDPHE) Air Pollution Control Division (APCD (https://www.colorado.gov/pacific/cdphe/apcd)).

Local Source Analysis SA Vis Tool (http://vibe.cira.colostate.edu/WAQS_SA_CO)

Transport Analysis SA Vis Tool (http://vibe.cira.colostate.edu/WAQS_SA_DENVER)

Overview

The Denver 2017 ozone source apportionment (SA) modeling was conducted using the Comprehensive Air-quality Model with extensions (CAMx (http://www.camx.com/)) photochemical grid model (PGM) Anthropogenic Precursor Culpability Assessment (APCA) version of the Ozone Source Apportionment Technology (OSAT). Two types of Denver 2017 ozone SA modeling were conducted following the procedures in the March 21, 2016 SA Modeling Plan (/wiki/Attachments/Source Apportionment/Denver/Denver_SA_Plan_2016-03-21.pdf): (1) Local Source Analysis; and (2) Transport Analysis. As described in more detail below, the Local Source Analysis ozone SA modeling calculated the 2017 ozone contributions resulting from different source sectors in Colorado. The Transport Analysis calculated ozone contributions due to anthropogenic emissions from western states as well as eastern U.S., Mexico, Canada, offshore and Boundary Conditions (BCs) around the CONUS modeling domain (i.e., contributions due to international transport and stratospheric ozone). The Denver ozone modeling used three domains as shown in Figure 1: (i) a Continental U.S. (CONUS) domain at 36 km grid resolution; (ii) a western U.S. (WESTUS) domain at 12 km grid resolution; and (iii) a Colorado domain at 4 km grid resolution. The Local Source Analysis ozone SA modeling was run on just the Colorado 4 km domain using boundary conditions (BCs) extracted from the 2017 CAMx 36/12 km CONS/WESTUS domain simulation. The Transport Analysis ozone SA run was run on the 36/12 km CONUS/WESTUS domains using BCs for the CONUS domain from the MOZART (https://www2.acom.ucar.edu/gcm/mozart) Global Chemistry Model (GCM). A description of the CAMx OSAT/APCA ozone source apportionment tool is provided in Chapter 7 of the CAMx User's Guide (http://www.camx.com/files/camxusersguide_v6-30.pdf) .

The Denver 2011 CAMx modeling platform was based on the CAMx 2011b 36/12/4 km modeling platform developed by the Western Air Quality Study (WAQS) and available on the Intermountain West Data Warehouse (IWDW (http://views.cira.colostate.edu/tsdw/)). Details on the development of the WAQS CAMx 2011b modeling platform, including meteorological modeling and model performance evaluation (MPE), emissions modeling and the CAMx base case modeling, are available in reports (http://views.cira.colostate.edu/tsdw/Documents/?file=WAQS_Base11b_MPE_Draft_21Jan2016.doc) on the IWDW. The Denver ozone modeling adopted the WAQS 36 km CONUS and 12 km WESTUS domains, but redefined the 4 km domain to focus on Colorado (Figures 1 and 2). The meteorological inputs for the Denver CAMx database used the same WAQS WRF 2011 36/12/4 km simulation output, but they were re-processed using the latest WRFCAMx processor (WRFCAMx v4.4 released April 2016). For the Denver CAMx 36/12 km domains, emissions from version 2 of the 2011 National Emissions Inventory (NEI (https://www.epa.gov/air-emissions-inventories/2011-national-emissions-inventory-nei-data)) were used. For the 4 km Colorado domain, emissions were provided by the CDPHE/APCD. On-road mobile source emissions were based on the MOVES2014 on-road mobile source emissions model. For the Denver ozone Nonattainment Area (NAA), detailed link-based activity data were used based on Traffic Demand Model (TDM) output. More details on the Denver ozone SIP modeling database are provided in the Modeling Protocol (/wiki/Attachments/Source Apportionment/Denver/Model_Protocol_Denver_RAQC_2017SIPv4.pdf), 2011 base case and model performance evaluation report (/wiki/Attachments/Source Apportionment/Denver/Denver_2017SIP_MPE_Finalv1.pdf) and 2017 ozone projection modeling report (/wiki/Attachments/Source Apportionment/Denver/Denver_2017SIP_2017AttainDemo_Finalv1.pdf).

Figure 1. Denver 36 km CONUS, 12 km WESTUS and 4 km Colorado CAMx modeling domains.

Denver 2017 Local Source Analysis Ozone Source Apportionment Modeling

The Local Source Analysis ozone source apportionment modeling was conducted using the Denver 2017c CAMx modeling database for the Colorado 4 km domain and the May-August 2011 modeling period. Boundary Conditions (BCs) for the Colorado 4 km domain were based on the CAMx 2017c 36/12 km CONUS/WESTUS simulation. The Colorado 4 km modeling domain is shown in Figure 2. The Anthropogenic Precursor Culpability Assessment (APCA[1]) version of the CAMx Ozone Source Apportionment Technology (OSAT) was used. CAMx version v6.3 (released April 2016) was used in the Denver ozone SA modeling that has several updates to CAMx v6.1 (released April 2014) used in the WAQS modeling. One important update of CAMx v6.3 is the new OSAT/APCA source apportionment algorithms that track reactive nitrogen and odd oxygen through the chemical species; more details on the differences on the OSAT/APCA formulations are given in Section 7.1 of the CAMx v6.3 user's guide (http://www.camx.com/files/camxusersguide_v6-30.pdf) .

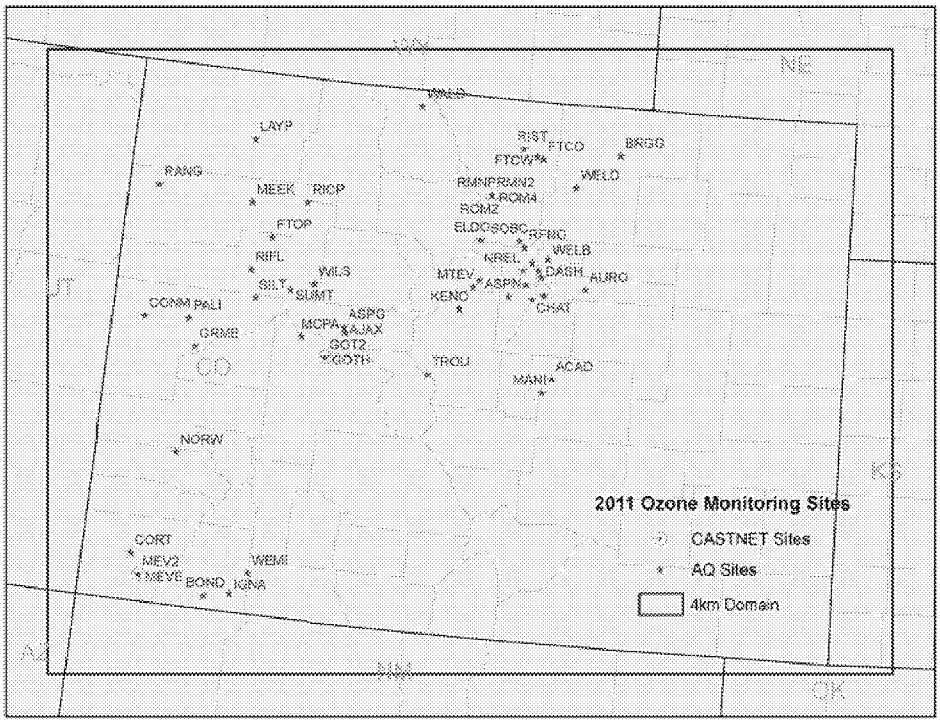


Figure 2. Denver 4 km Colorado modeling domain with ozone monitors that were operating during some portion of 2011.

Local Source Analysis Source Apportionment Groups

The Denver 2017 Local Source Analysis source apportionment modeling was configured to obtain ozone contributions from 4 Source Regions and 7 Source Categories. Separate ozone contributions were obtained for each Source Group that were defined as the intersection between the Source Regions and Source Categories. The Denver 2017 Local Source Analysis ozone source apportionment modeling used the following 4 Source Regions and 7 Source Categories;

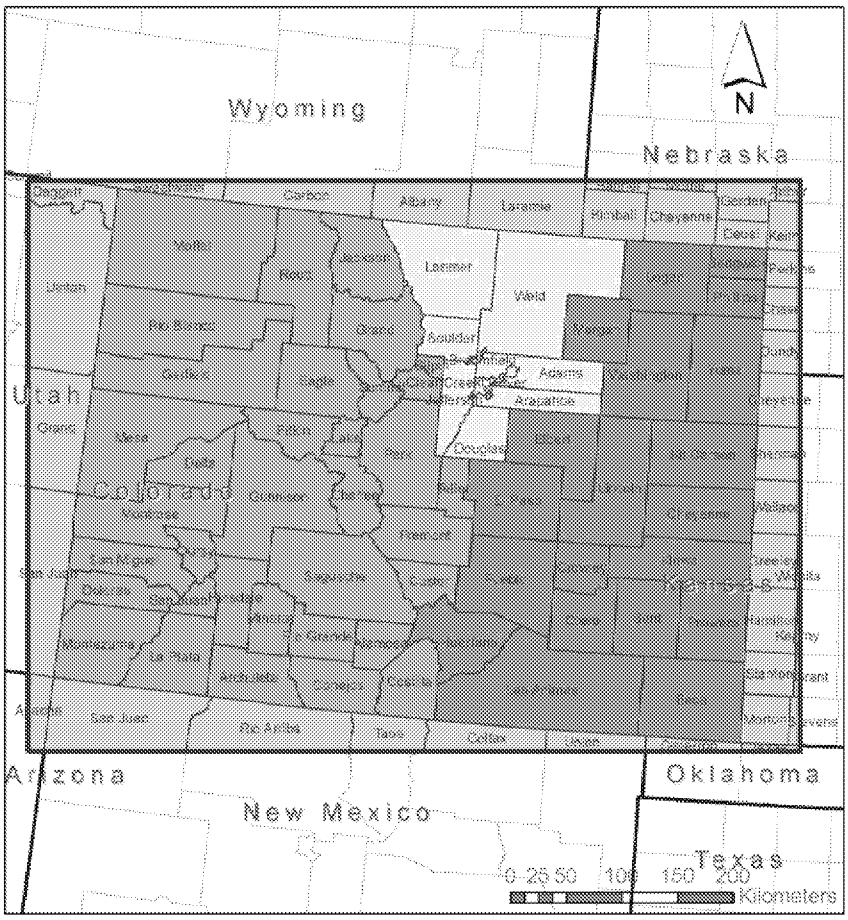
Source Regions (Figure 3) (4)

- 9 counties that are included in the DMA/NFR NAA (see Figure 4)[2];
- Western Colorado;
- Eastern Colorado; and
- Slivers of Surrounding States

Source Categories (7)

- Natural Emissions (Biogenic, All Fires and Lightning NOX)
- Oil and Gas Emissions;
- On-Road Mobile;
- Non-Road Mobile;
- EGU Point;
- Non-EGU Point; and
- Remainder Anthropogenic.

With 4 Source Regions and 7 Source Categories, and the need to always include initial concentrations (IC) and Boundary Conditions (BCs) as their own separate Source Groups, that results in a total of 30 Source Groups for which separate ozone source contributions were obtained. The Western and Eastern Colorado Source Regions were defined as west and east of the Denver Metro/NFR NAA as shown in Figure 3. The use of separate Western and Eastern Colorado Source Regions will allow a better identification of the contributing sources. For example, the analysis separates the contributions from oil and gas emissions from the Denver-Julesburg Basin (east) versus the Piceance Basin (west). The CAMx 2017c 4 km Local Analysis Source Apportionment was conducted for May 1 through August 31 period using the 2011c 4 km WRF meteorology and 2017c base year emission inventory. Figure 4 displays the Denver Metro/NFR ozone NAA with locations of ozone monitoring sites where the results were analyzed.



Legend

- Denver MSA (srcmap# = 1)
- Eastern Colorado (srcmap# = 2)
- Western Colorado (srcmap# = 3)
- Other (srcmap# = 4)
- Denver 4km Domain

Figure 3. Denver Local Source Analysis Source Regions.

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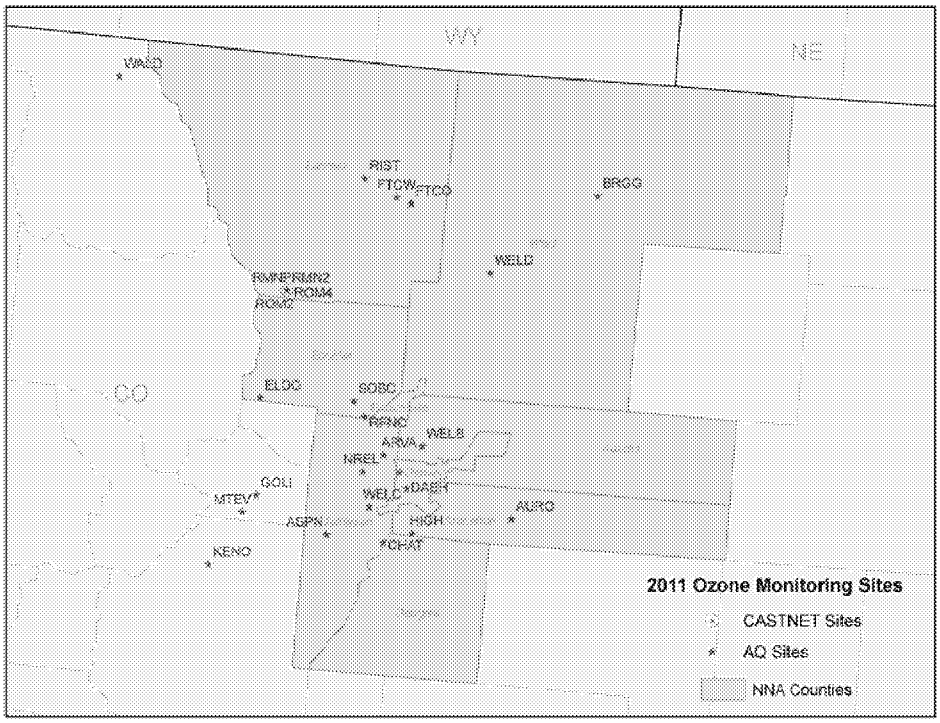

Figure 4. Nine county Denver Metro/NFR ozone NAA and locations of ozone monitoring sites operating in 2011 (whole counties depicted, actual NAA excludes the northern portions of Larimer and Weld Counties).

Local Source Analysis Ozone Source Apportionment Modeling Results

The CAMx 2017c 4 km Local Source Analysis ozone source apportionment modeling results were summarized in a PowerPoint Presentation (PPT (/wiki/pages/new?title=enter%20url%20or%20page%20name)). The ozone contributions of each Source Group to the maximum daily 8-hour average (MDA8) ozone concentrations at each monitoring site within the Denver Metro/NFR NAA and vicinity for each day of the modeling period were extracted and loaded into a web-based source apportionment visualization tool (SA Vis Tool) that can be accessed here: Local Source Analysis SA Vis Tool (http://vibe.cira.colostate.edu/WAQS_SA_CO)

The SA Vis Tool generates pie charts of 2017 ozone contributions by Source Region, Source Category or both (i.e., Source Groups) for monitoring sites within the Colorado 4 km modeling domain. The use of the SA Vis Tool involves the following:

- Selection of whether ozone SA visualization is for monitors from the AQS or CASTNet monitoring networks.
- Selection of the monitor where data is requested. This request can be made by selecting the monitor from drop down menus for State, County and Site or by using the map and selecting the monitor location.
- Select the day where results are desired. The day can be selected from a top five ozone day list for that monitor, from a drop down menu of ranked ozone days from high to low during the May-Sep modeling period or from a calendar. Note that multiple days can also be selected and the SA Tool will visualize the average contribution across those days.
- The SA Vis Tool will then visualize the modeled 2017 MDA8 ozone value for the selected monitoring site and day:
  - The top bar in the plot will list the modeled 2017 MDA8 ozone for the selected site/day(s), the amount the ozone is due to BCs around the 4 km Colorado domain (BC-4km) and the amount of the rest of the ozone (Non-BC); o Initially, the upper pie chart will be the Non-BC ozone contributions by Source Regions;
  - Initially, the lower pie chart will be the Non-BC ozone contributions by Source Categories;
  - Next to the lower pie chart will be a 10-day time series centered on the day in question that shows total MDA8 ozone and ozone due to BC-4km;
  - The monitoring site or day can be changed using drop down menus in the top left. The day can also be changed by clicking on the MDA8 ozone for a new day in the time series chart.
  - The Region/Category pie charts can be switched.
  - Clicking on one of the pie slices in the top pie chart provides more information in the bottom pie chart about that slice.

Figure 5 displays an example from the Local Source Analysis SA Vis Tool for the Chatfield monitoring site in Douglas County, Colorado based on August 26, 2011 meteorology. The total modeled 2017 MDA8 ozone is 74.2 of which 56.2 ppb (76%) is due to the BC-4km and the remaining 18.0 ppb (24%) non-BC portion is due to emissions in the Colorado 4 km domain. The pie charts show the contributions from the non-BC portion of the ozone with the percent numbers with the pie slices displaying the percent of total ozone (i.e., with the BC-4km contribution). For Figure 5, ozone from the Denver Metro/NFR NAA contributes 20.3% of the total ozone so since the non-BC portion of the ozone is 24% the NAA pie slice takes up 84% of the non-BC pie chart. In the lower Source Category pie chart the slice size is the fraction of the non-BC portion while the percent contributions are the contribution to the total ozone. The key to the definitions of the Local Source ozone SA modeling Source Contributions are as follows:

- NAT = Natural Emissions (Biogenic, Lightning NOx and Fires)
- OG = Oil and Gas Emissions
- OR = On-Road Mobile Source Emissions

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- NR = Non-Road Mobile Source Emissions
- EGU = Electrical Generating Units Point Source Emissions
- nEGU = Non-EGU Point Source Emissions
- REM = Remainder Anthropogenic Emissions (Area Sources)

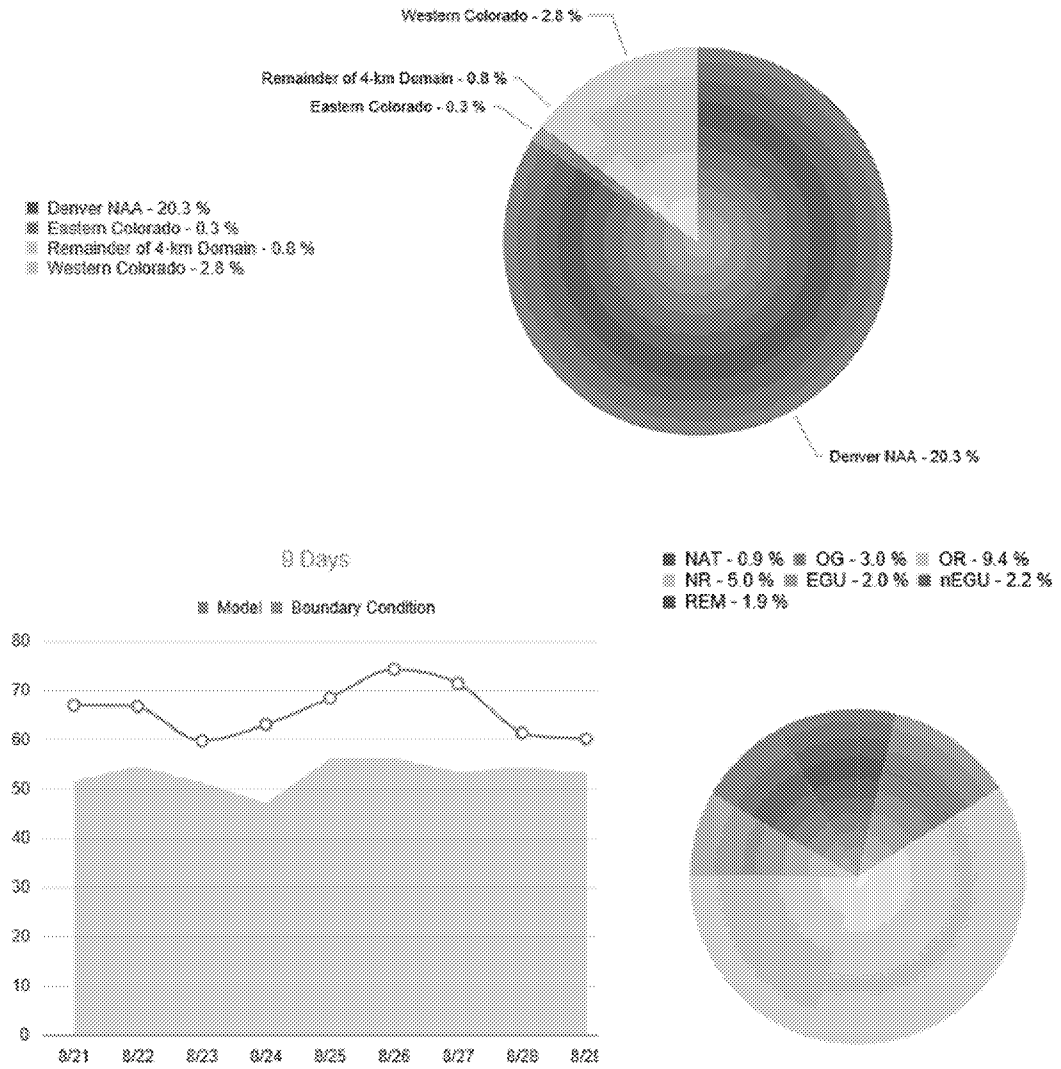

Figure 5. Example Local Source SA Vis Tool display for Chatfield (Douglas County, Colorado) on August 26, 2016 that has total modeled 2017 MDA8 ozone of 74.2 with 58.2 ppb due to BC-4km and 18.0 ppb due to non-BC (Colorado sources), pie chart slice sizes are contributions to non-BC ozone and percentages are contributions to total MDA8 ozone.

Transport Analysis Ozone Source Apportionment Modeling

The Denver 2017 ozone source apportionment Transport Analysis ran the CAMx v6.3 APCA ozone source apportionment tool using a fully linked two-way nested 36/12 km 2017c modeling platform (see Figure 1). The ozone Transport Analysis was used to obtain the contributions of anthropogenic emissions from each western state and the portions of Mexico and Canada within the 36 km CONUS domain (Figure 1) to ozone concentrations in the Denver Metro/NFR NAA and other locations in the western U.S. The ozone Transport Analysis also obtained the ozone contributions due to natural emissions within the CONUS domain as well as the Boundary Conditions (BCs) around the 36 km CONUS domain (from the MOZART GCM); the BC contributions include ozone influences from international sources, global natural sources and stratospheric ozone. Transport Analysis Source Apportionment Groups The ozone Transport Analysis used the following Source Region and Category definitions:

Source Regions (21)

- 17 Western States (see Figure 6);
- Eastern US;
- Mexico (Mex);
- Canada (Can); and
- Offshore Shipping (OSS) that also included offshore O&G development.

Source Categories (2)

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- Natural Emissions (Biogenic, All Fires and Lighting NOX); and
- Anthropogenic Emissions.

ICBC (6)

- IC;
- East BC;
- West BC;
- North BC;
- South BC; and
- Top BC.

With 21 Source Regions, times 2 Source Categories, plus 6 stratifications of ICBC, that results in separate ozone source apportionment contributions for 48 Source Groups.

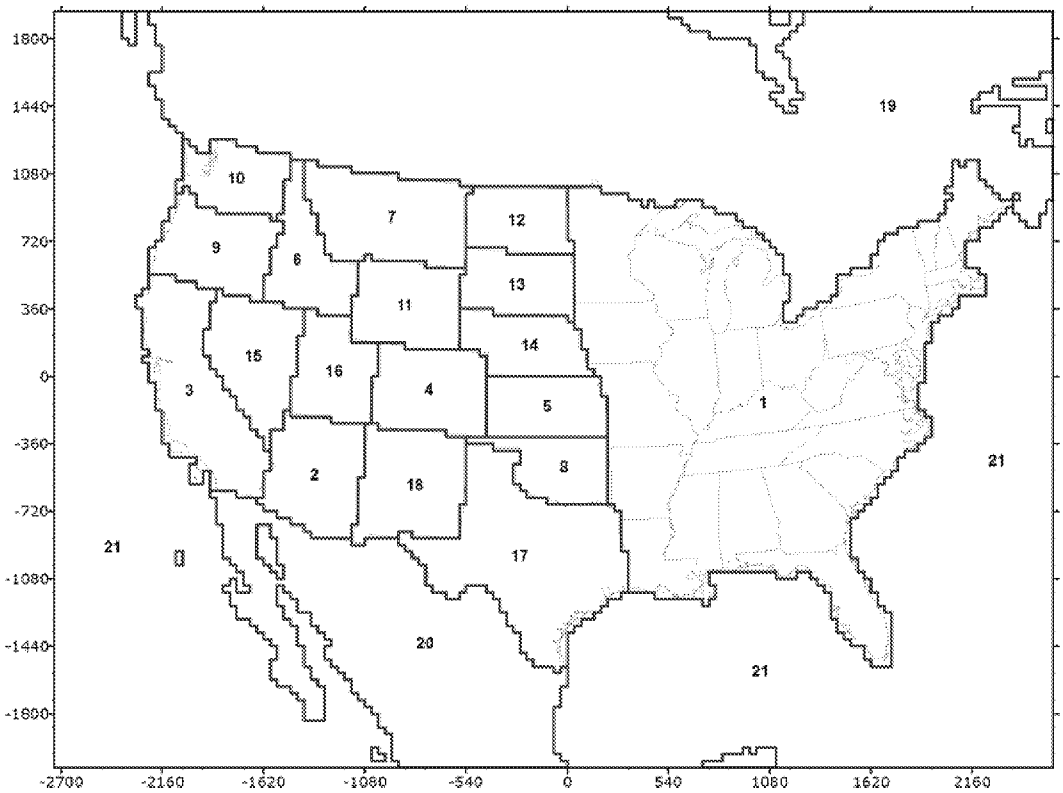

Figure 6. Source Regions used in the ozone Transport Analysus CAMx 2017 ozone source apportionment simulation with separate contributions due to anthropogenic emissions from 17 western states, EUSA, Canada, Mexico and OSS.

Transport Analysis Ozone Source Apportionment Results

The CAMx 2017c 36/12 km Transport Analysis ozone source apportionment modeling results were summarized in a PowerPoint Presentation (PPT (/wiki/pages/new?title=enter%20url%20or%20page%20name)). The results from the Transport Analysis SA simulation were post-processed to obtain the contributions of states anthropogenic emissions as well as other regions and natural emissions to 2017 MDA8 ozone concentrations at western U.S. monitoring sites. These contributions were loaded into the ozone SA Vis Tool for display as discussed above for the Local Source Analysis.

Transport Analysis SA Vis Tool (http://vibe.cira.colostate.edu/WAQS_SA_DENVER)

Figure 7 displays example results from the Transport Analysis Vis SA Tool for the 2017 MDA8 ozone at the same site (Chatfield) and day (August 26, 2011) used in the Figure 5 example display from the Local Source Analysis SA Vis Tool. The total 2017 MDA8 ozone at Chatfield on August 26, 2016 from the Transport Analysis is 68.4 ppb, which is lower than seen in the Local Source Analysis (74.2 ppb), which is likely because of the higher resolution grid (4 km) used in the Local Source Analysis SA modeling than used in the Transport Analysis (12 km) SA modeling. Of the 68.4 ppb total 2017 MDA8 ozone, 39.6 ppb (58%) is from the CONUS BCs and 28.9 ppb (42%) is from the non-BC contributions (i.e., anthropogenic and natural emissions within the CONUS modeling domain). The upper pie chart slices correspond to the total contributions from all emissions (anthropogenic and natural) in each Source Region, with Colorado being the largest contributor on this day at Chatfield, followed by Mexico, New Mexico and Arizona suggesting regional transport from the south-southwest on this day. The Source Region labels using state names are descriptive, where Off-Shore Shipping refers emissions in the Pacific and Atlantic Oceans and the Gulf of Mexico also includes offshore O&G emissions. The two Source Categories are Natural (NAT) and Anthropogenic (ANT) emissions whose contributions are identified in the lower pie chart.

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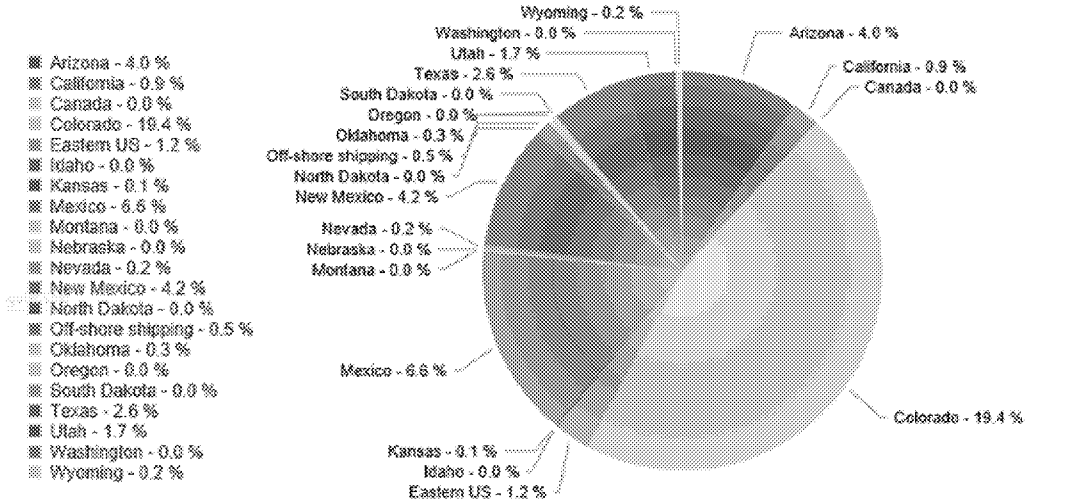

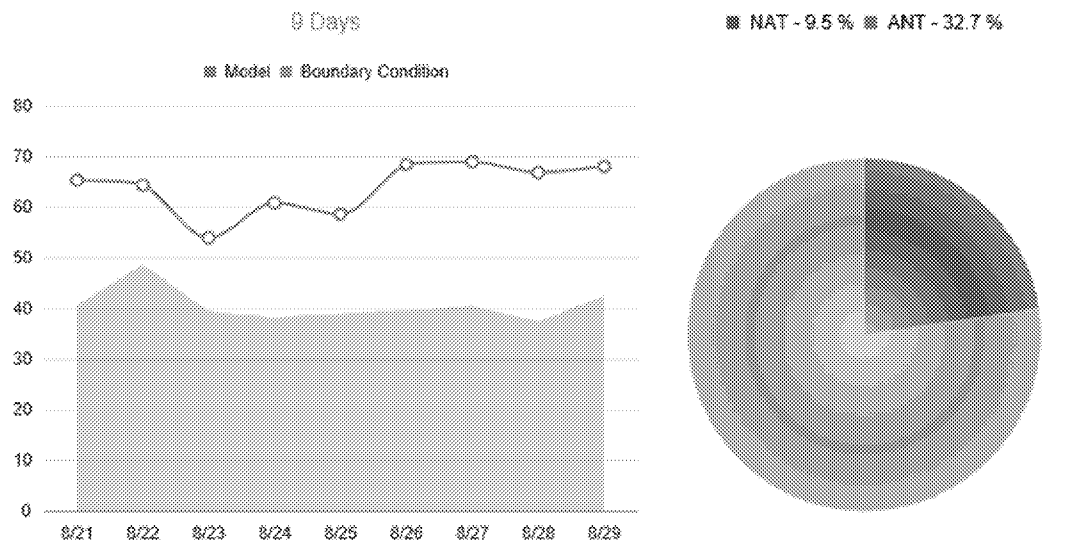

Figure 7. Example Transport Analysis SA Vis Tool display for Chatfield (Douglas County, Colorado) on August 26, 2016 that has total modeled 2017 MDA8 ozone of 68.4 with 39.6 ppb (58%) due to BC-CONUS and 28.9 ppb (42%) due to non-BC (CONUS sources), pie chart slice sizes are contributions to non-BC ozone and percentages are contributions to total MDA8 ozone.

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[1] APCA differs from the OSAT ozone source apportionment tool in that ozone is only allocated to Natural emissions when it is formed due to Natural NOx emissions interacting with Natural VOC emissions. For example, when ozone is formed due to the interaction of biogenic VOC with anthropogenic NOX emissions under VOC-limited ozone conditions, a condition where OSAT will assign the ozone formed to the biogenic VOC source category, APCA recognizes that biogenic VOC cannot be controlled so redirects the ozone formed to the anthropogenic NOX emissions category.

[2] The northern portions of Larimer and Weld Counties are not part of the Nonattainment Area, but segregating those areas the Source Region would have minimal impact on the Source Apportionment.

This page was last modified 27 days ago.

Attachment C

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Submitted via email and www.regulations.gov

December 19, 2016

The Honorable Gina McCarthy
Administrator, U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Mail Code 1101A
Washington, DC 20460

Comments of the Utility Air Regulatory Group on the Proposed Rule, "Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Interstate Transport for Wyoming," 81 Fed. Reg. 81712 (Nov. 18, 2016), EPA-R08-OAR-2016-0521

Dear Administrator McCarthy:

On November 18, 2016, the United States Environmental Protection Agency ("EPA") published a proposed rule entitled "Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Interstate Transport for Wyoming." 81 Fed. Reg. 81712. EPA proposes partial approval and partial disapproval of a Wyoming state implementation plan ("SIP") submittal addressing Clean Air Act ("CAA") infrastructure SIP requirements with respect to interstate transport for the 2008 ozone national ambient air quality standard ("NAAQS") of 75 parts per billion.[1] The following comments on EPA's proposed rule are

[1] These comments specifically address EPA's proposed actions with respect to Wyoming's SIP submittal for interstate transport requirements for the 2008 ozone NAAQS under "prong 1" and "prong 2" of section 110(a)(2)(D)(i) of the CAA (*i.e.*, the "significant contribution" and "interference with maintenance" clauses of that provision). EPA's proposed rule also proposes approval of certain other Wyoming infrastructure SIP submittals and disapproval of certain other such submittals. The fact that these comments do not specifically address proposed actions to disapprove other SIP submittals, including EPA's proposed disapproval of visibility-related interstate transport SIP submittals under "prong 4" of section 110(a)(2)(D)(i), should not in any way be construed as expressing or implying support for those proposed actions.

respectfully submitted on behalf of the Utility Air Regulatory Group ("UARG").[2]

With respect to prongs 1 and 2, the proposed rule is based—apparently entirely—on information from modeling analyses that EPA conducted for its Cross-State Air Pollution Rule (CSAPR) Update rulemaking, 81 Fed. Reg. 74504 (Oct. 26, 2016). *See* 81 Fed. Reg. at 81714-16. In the proposed rule, EPA notes that in the CSAPR Update rulemaking, EPA concluded that

> [a]s to western states, . . . there may be geographically specific factors to consider in evaluating interstate transport, and given the near-term 2017 implementation timeframe, the EPA focused the final CSAPR Update on eastern states. *See* CSAPR Update at 81 FR 74523. Consistent with our statements in the CSAPR Update, the EPA intends to address western states, like Wyoming, on a case-by-case basis.

Id. at 81715. Based on its CSAPR Update rulemaking information, EPA proposes to approve the Wyoming prong 1 SIP submittal for the 2008 ozone NAAQS. EPA says that its "modeling indicates that Wyoming does not contribute above the one percent threshold to any nonattainment receptors." *Id.* Although UARG does not believe EPA's one-percent-of-NAAQS contribution threshold should be determinative in this matter—*i.e.*, UARG believes it is *not* the case that a state may properly be subjected to interstate-transport emission reduction obligations on the basis that the state contributes more than one percent of the NAAQS to air quality at a downwind location—UARG agrees that EPA should find that Wyoming does not contribute significantly to nonattainment of the NAAQS in any other state and therefore should approve this element of Wyoming's SIP submittal.

EPA proposes, however, to conclude that Wyoming's emissions contribute, in an amount above the one percent threshold, to ozone concentrations at one "maintenance-only" monitor, *i.e.*, Douglas County, Colorado, monitor ID number 80350004, in the Denver area. *Id.* On this basis, EPA concludes that "the State's emissions require further evaluation, taking into account both air quality and cost considerations, to determine what, if any, emissions reductions might be necessary to address the State's emission reduction obligation pursuant to 110(a)(2)(D)(i)(I)" prong 2. *Id.*

In its proposed rule, EPA properly refrains from "determining that one percent of the NAAQS is always an appropriate threshold for identifying interstate transport linkages for all

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[2] UARG is a voluntary group of electric generating companies and national trade associations. The vast majority of electric energy in the United States is generated by individual members of UARG or other members of UARG's trade association members. UARG participates on behalf of its members in CAA proceedings that affect the interests of electric generators.

states in the West." *Id.* Indeed, for reasons UARG explained in its comments on the proposed version of the CSAPR Update rule, EPA should not use the one-percent level as a contribution threshold in its section 110(a)(2)(D)(i)(I) analyses—and certainly should not use it (or any other specific threshold) as a bright-line test that results in subjecting states to interstate-transport emission reduction obligations. *See* UARG Comments on Proposed CSAPR Update Rule at 22-26 (Feb. 1, 2016), EPA-HQ-OAR-2015-0500-0253. EPA also should not establish such obligations for states based on a mistaken interpretation of the CAA's provisions with respect to what EPA here calls a downwind "maintenance" receptor. *See id.* at 33-37.

Although it purports not to apply mechanically a one-percent-of-NAAQS threshold in this proceeding, EPA nonetheless faults Wyoming because, according to EPA, the state's "SIP submittal neither identified nor included any ozone or ozone precursor emission reduction measures that the EPA could evaluate to determine whether the state has fully addressed . . . transport impacts." 81 Fed. Reg. at 81715. On this basis, EPA states that it "cannot conclude that Wyoming's SIP contains sufficient provisions to prohibit emissions that will interfere with maintenance of the 2008 ozone NAAQS in the Denver, Colorado area." *Id.*

It appears, however, that EPA is unreasonably refusing to allow Wyoming an adequate opportunity to address these matters. In the present rulemaking, the Air Quality Division of the Wyoming Department of Environmental Quality submitted a letter to EPA requesting an extension of the December 19, 2016 deadline for submission of comments because the existing comment period "is insufficient given the technical analysis required to formulate an adequate response to the Proposed Rule." EPA-R08-OAR-2016-0521-0012 at 1 (Nov. 23, 2016) ("Wyoming Letter"). The letter noted that "[t]he Division will need to devote significant time and energy reviewing EPA's basis for the approval and disapproval" of the SIP submittals and that EPA's proposed disapproval of the prong 2 SIP submittal for the 2008 ozone NAAQS "will require significantly more analysis than other parts of the Proposed Rule." Noting that the SIP submittal at issue was received by EPA on February 6, 2014, *see* 81 Fed. Reg. at 81713—and that EPA therefore had had more than two years and nine months to review, analyze, and act on the SIP, Wyoming said it "believes it is reasonable to allow at least an additional ninety (90) days to review EPA's Proposed Rule involving multiple Wyoming State Plans" and to have "the opportunity to provide additional information in support" of its ozone transport SIP submittal. Wyoming Letter at 1. Wyoming emphasized that it "remains committed to working with EPA, but is concerned that *EPA has not yet worked with western states or western regional planning organizations on region-appropriate analysis* for interstate transport." *Id.* (emphasis added).

UARG shares the concern expressed by Wyoming and believes the state's request is eminently reasonable and should be granted. EPA, however, denied Wyoming's request in a letter dated December 6, 2016. Without in any way disputing Wyoming's statement that the

state needs additional time to develop and provide relevant information—and without disputing that, as Wyoming's letter explained, it would be reasonable to provide that additional time—EPA asserted that it was forced to deny any extension of the public comment period on the grounds that attorneys for Sierra Club "will not agree" to an extension. EPA-R08-OAR-2016-0521-0013. Indeed, Sierra Club's refusal to allow more time was the *only* reason EPA cited for denying the state's reasonable request.

In describing Sierra Club's veto of any extension of the public comment period, EPA stated:

> A federal court currently has pending before it a motion to enter a partial consent decree addressing deadlines for numerous SIP submissions nationwide, including this one. *Opposing counsel in that case* [*i.e.*, Sierra Club's counsel] has already granted EPA an extension of the negotiated deadline for this SIP submission until January 17, 2017, but *will not agree to the further extension* sought by Wyoming. Accordingly, *we cannot grant your request to extend the comment period.*

Id. (emphases added). It appears that the case EPA referred to is *Sierra Club v. McCarthy*, Case No. 3:15-cv-04328-JD (N.D. Cal.), in which Sierra Club and EPA jointly submitted a motion on October 15, 2016, asking the U.S. District Court for the Northern District of California in San Francisco to enter a proposed consent decree, negotiated between Sierra Club and EPA, that would set a deadline of January 17, 2017, for EPA to sign a notice of final rulemaking to approve or disapprove the Wyoming SIP submittals. *Sierra Club v. McCarthy*, Joint Motion To Enter Partial Consent Decree (Oct. 15, 2015) (Document 57); *Sierra Club v. McCarthy*, [Proposed] Partial Consent Decree at ¶ 1.a. (Oct. 15, 2015) (Document 57-1) ("Proposed Consent Decree").

It is improper for EPA to rely on this proposed consent decree to refuse to allow the public and stakeholders, including the Department of Environmental Quality of the directly affected state, any additional time to provide information to EPA in this rulemaking. First, the district court's docket in this case confirms that the proposed consent decree is only that—a *proposed* decree, which the court has not entered. Equally important, EPA fails to explain why—despite the fact that it has not disputed the need for additional time for Wyoming to develop and submit relevant information—EPA will not either (i) take action to modify the proposed consent decree or, in the absence of a modification of the proposed consent decree, (ii) file a motion with the district court to modify the (still-not-binding) January 17, 2017 deadline for good cause, as the proposed consent decree expressly authorizes EPA to do, *see* Proposed Consent Decree at ¶ 5. In all events, it is improper for EPA to deny an affected state's opportunity to submit meaningful comments and to prepare relevant technical and other information for EPA's consideration—information that EPA itself characterizes as

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appropriate for assessment of the issues at stake in the rulemaking, *see* 81 Fed. Reg. at 81715—on the sole basis that a single private group does "not agree."

Particularly under these circumstances, EPA should not make final its proposed disapproval of Wyoming's prong 2 SIP submittal for the 2008 ozone NAAQS. Instead, EPA should make final its proposed approval of SIP submittals, including the prong 1 submittal for the 2008 ozone NAAQS, and reopen the public comment period on the proposed SIP disapprovals for at least 90 days to allow Wyoming and other commenters time to provide any analyses and other information to EPA regarding the prong 2 SIP submittal and any proposed SIP disapproval actions. Furthermore, UARG urges EPA to respond favorably to Wyoming's request that EPA work collaboratively with the affected western states in this important matter. Moreover, in addressing this matter, EPA must take into account the numerous and important factors that affect consideration of any interstate transport issues in western states.[3]

UARG appreciates the opportunity to provide these comments. Please contact me if you would like to discuss UARG's comments.

Sincerely,

Norman W. Fichthorn
Counsel to the Utility Air Regulatory Group

[3] *See, e.g.*, Comments of the Western Energy Supply and Transmission Associates on the Proposed Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, at 2-4, EPA Docket No. EPA-HQ-OAR-2015-0500-0360 (Feb. 1, 2016).

WESTERN ENERGY
ALLIANCE

December 19, 2016

Adam Clark
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Environmental Protection Agency Region 8
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RE: Air Quality State Implementation Plans; Approvals and Promulgations; Wyoming; Interstate Transport, Docket ID No. EPA-R08-OAR-2016-0521-0001

Dear Mr. Clark:

Western Energy Alliance is writing to express concern with EPA's proposed action on the State of Wyoming's State Implementation Plan (SIP) for ozone interstate transport. EPA's proposed action does not align with the weight of evidence and inappropriately relies on flawed modeling and methodologies. In addition to the comments submitted here, we fully support and endorse the State of Wyoming's comments on this proposed action.

Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members are independents, the majority of which are small businesses with an average of fifteen employees.

We believe EPA's proposed decision to disapprove the Wyoming Department of Environmental Quality's (WDEQ) SIP runs contrary to long-standing agency practice of accepting a "weight of evidence" approach to evaluating whether an area has a meaningful impact on National Ambient Air Quality Standards (NAAQS) maintenance in downwind states. Instead of accepting WDEQ's well-reasoned approach, EPA relies on faulty modeling results stemming from the Cross-State Air Pollution Rule (CSAPR) Update for the 2008 ozone NAAQS. WDEQ raised concerns with the suitability of CSAPR modeling in its original comments, which EPA later dismissed based on insufficient supporting evidence from WDEQ. Since WDEQ's ozone transport SIP was developed in 2014 before the updated CSAPR modeling guidance was developed, it is inappropriate for EPA to hold WDEQ analysis to standards that did not exist when the SIP was developed.

EPA has inappropriately put the onus on Wyoming to provide evidence to support or deny EPA's decisions on the suitability of CSAPR modeling. Moreover, it is unreasonable for EPA to expect an exhaustive technical analysis of the CSAPR modeling within a 30-day

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comment window. The burden should rest on EPA to explain its justification for reversing long-standing policy about the CSAPR modeling deficiencies for the West.

The modeling results EPA points to in the disapproval decision are flawed because the CSAPR model has not been adapted to the unique concerns of western states. Primarily developed as a tool for eastern states in the ozone transport region, the CSAPR model fails to account for the topography, altitude, and climate of the western United States. Climate factors characteristic of the West include stratospheric intrusions, a long and severe wildfire season, abundant sunshine, and lack of summertime precipitation, all of which the CSAPR model fails to adequately consider. In the decision, EPA has provided no explanation or evidence for why it has determined modeling results need not account for these considerations. Additionally, EPA has failed to provide sufficient evidence that it reviewed and considered state exceptional events packages that may provide mitigating circumstances for NAAQS violations based on events such as wildfires or stratospheric intrusions of ozone. It is also unclear whether EPA has accounted for background ozone in CSAPR modeling and technical analysis. Background ozone in the western United State can contribute as much as 60 parts per billion (ppb) or more, which is critically important for NAAQS attainment and maintenance.[1]

Instead, EPA points to supposed shortcomings in WDEQ's analysis, including failure to contemplate contributions from other nonattainment areas in Utah and Colorado. As EPA is likely aware, the designated nonattainment area along Utah's Wasatch Front is 46 miles southwest of the westernmost corner of Wyoming, and is separated by the prominent Wasatch mountain range, which rise nearly 8,000 feet above the valley floor. The prevailing wind direction in Salt Lake City year-round is south or southeast, meaning it is highly unlikely that Wyoming is meaningfully contributing to impaired air quality in the Wasatch Front nonattainment area. Furthermore, Utah's impaired air quality is often associated with atmospheric inversions within the Salt Lake valley that coincide with calm winds that trap pollutants within the valley. WDEQ has made an entirely justifiable assumption that the weight of evidence does not warrant any further evaluation of its contributions to Wasatch Front PM 2.5 or ozone exceedances. If EPA doubts the validity of WDEQ assessment on impacts in Utah, it should provide a well-reasoned explanation, which it has not done in this proposed action.

EPA's decision appears to point to other out-of-state regions that have recorded NAAQS violations but may not have been formally designated yet. One such area is likely Utah's Uinta Basin, which is undergoing the nonattainment designation process. However, ozone exceedances in the Uinta Basin, as has been documented through extensive scientific study, are associated with light winds, atmospheric inversions, and local snow cover.[2] The Uinta Mountains to the north provide a physical barrier that helps form the inversion

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[1] *Estimating North American Background Ozone in U.S. Surface Air With Two Independent Global Models: Variability, Uncertainties, and Recommendations*. Fiore et al. December 26, 2013.
[2] *Final Report, 2014 Uinta Basin Ozone Study*. Till Stoeckenius et al. February 2015.

conditions that produce ozone. As scientists have thoroughly demonstrated, the ozone exceedances are concentrated below 6,000 feet in elevation. After three years of study, scientists did not find ozone transport from Wyoming playing an influencing factor in the Uinta Basin. It appears that EPA may be expecting WDEQ to prove a negative by studying its impact on neighboring states.

Similarly, Colorado's ozone nonattainment challenges are affected by the northern Front Range's climate, geography, and local emissions sources. Wyoming's assessment that the year-round westerly prevailing wind direction makes it reasonable to infer that Cheyenne, a city located 100 miles north-northeast of Denver, is unlikely to be a driving factor behind ozone levels in the Denver Metro/North Front Range Ozone Nonattainment Area. By calling for further study based on its own flawed and incomplete modeling and analysis, EPA is putting an unreasonable burden on WDEQ. Prior to imposing any such burden, EPA should support that its own justifications based on CSAPR modeling and subsequent analysis meet the same high analytical standard it is requiring of the states.

We encourage EPA to accept the State of Wyoming's ozone transport SIP as proposed, which is based on a well-reasoned approach that relies on the weight of evidence. We are available to discuss this matter further with EPA.

Sincerely,

Kathleen M. Sgamma
President

BASIN ELECTRIC POWER COOPERATIVE
A Touchstone Energy® Cooperative

December 19, 2016

Submitted electronically via: http://www.regulations.gov

Docket ID: EPA–R08–OAR–2016–0521

Administrator Gina McCarthy
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Comment Submittal on the U.S. Environmental Protection Agency's "Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Interstate Transport for Wyoming" (November 18, 2016)

Dear Administrator McCarthy:

Basin Electric Power Cooperative (**Basin Electric**) appreciates this opportunity to submit comments on U.S. Environmental Protection Agency's (**EPA**) proposed *Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Interstate Transport for Wyoming* published in the November 18, 2016 Federal Register.

Basin Electric is a regional, consumer-owned, generation and transmission cooperative formed in 1961 to supply supplemental power to a consortium of rural electric distribution cooperatives. Basin Electric supplies 137 rural electric member cooperative systems with wholesale electric power who in turn serve approximately 2.9 million consumers in a nine-state area. Basin Electric's core business is generating and delivering electricity to wholesale customers, primarily our member systems. At the end-of-year 2015, Basin Electric's generation portfolio consisted of 5,594 megawatts (**MW**) of wholesale electric generating capacity, located in four western states. Four coal-fired electric generating stations comprise the largest proportion (56.4%) of Basin Electric's generation portfolio. The remainder of Basin Electric's generation fleet consists of natural gas (18.4%), wind (14.5%), hydroelectric (5.6%), oil (3.2%) nuclear (1.1%) and recovered energy (0.8%) generation facilities. Basin Electric has additional natural gas generation projects that will be commercially available by the end of 2016 that will bring an additional 202 MW of generation capacity.

Basin Electric submits these comments electronically to docket ID EPA–R08–OAR–2016–0521 as noticed in the federal register at 81 Fed. Reg. 81712 (November 18, 2016), per the instructions in EPA's proposed action.

EPA's proposed action involves portions of six submissions from the State of Wyoming that are intended to demonstrate that Wyoming's State Implementation Plan (**SIP**) meets certain interstate transport requirements of the Clean Air Act (Act or CAA). Basin Electric's comments are limited to only to the "certification of Wyoming's infrastructure SIP for the 2008 ozone NAAQS" that Wyoming DEQ submitted to EPA on February 6, 2014, and EPA's proposed

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decision to "disapprove the prong 2 portion of the February 6, 2014, 2008 ozone NAAQS infrastructure submittal."[1]

EPA's disapproval of the prong 2 portion of the February 6, 2014, 2008 ozone NAAQS infrastructure submittal is premature and inappropriate for the reasons discussed in the comments below.

Instead of "disapprov[ing] the prong 2 portion of [Wyoming's] February 6, 2014, 2008 ozone NAAQS infrastructure submittal,"[2] EPA and Wyoming should agree to allow Wyoming to re-submit the prong 2 portion of Wyoming's February 6, 2014, 2008 ozone NAAQS infrastructure submittal after the following have occurred:

- The resolution of the litigation involving the appeal of EPA's federal implementation plan (**FIP**) for Wyoming for Regional Haze involving nitrogen oxide (**NOx**) emissions from BART-eligible sources[3] and "reasonable progress" sources;[4]
- Wyoming is given a reasonable opportunity to evaluate the factors and analysis set forth at 81 Fed. Reg. at 81713-14, much of which was either unavailable or legally unclear at the time Wyoming submitted its "certification of Wyoming's infrastructure SIP for the 2008 ozone NAAQS" to EPA on February 6, 2014;
- Wyoming is given an opportunity to evaluate the appropriateness of using the CSAPR model as a screening tool to determine the impacts of interstate transport of NOx and whether those emissions "significantly contribute to nonattainment of the NAAQS" ozone levels in Colorado and other neighboring States.

1.0 Statement of Basin Electric's interest in this action by EPA.

Basin Electric is a not-for-profit wholesale electric power supply cooperative that generates power from a diverse mix of fuel sources, including coal, natural gas, oil, and wind. Basin Electric is one of a group of six regional, consumer-owned public power energy organizations, known as the Missouri Basin Power Project. The Missouri Basin Power Project built and owns the Laramie River Station (**LRS**) located near Wheatland, Wyoming. Basin Electric has a 42.27 percent ownership interest in LRS, which consists of three 570 MW net coal-fired electricity units. LRS began "early action" compliance with Wyoming's SIP for Regional Haze by installing over-fire air to reduce NOx emissions from LRS Unit 1 in 2009, LRS Unit 2 in 2010, and LRS Unit 3 in 2011, and by installing new state-of-the-art low-NOx burners on LRS Unit 1 in 2012, LRS Unit 2 in 2013, and LRS Unit 3 in 2014.[5]

On January 30, 2014, EPA disapproved the NOx portion of the Regional Haze SIP that Wyoming had submitted to EPA on January 12, 2011, and substituted its own FIP requiring additional BART controls for NOx on all three LRS Units beyond what Wyoming's BART NOx

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[1] 81 Fed. Reg. at 81716.
[2] 81 Fed. Reg. at 81716.
[3] "BART" refers to "best available retrofit technology" as defined by the factors listed in CAA § 169A(g)(2), 42 U.S.C. § 7491(g)(2), and BART-eligible sources are the sources that are required to install BART at CAA § 169A(b)(2)(A), 42 U.S.C. § 7491(b)(2)(A).
[4] The term "reasonable progress" is defined by the factors listed in CAA § 169A(g)(1), 42 U.S.C. § 7491(g)(1).
[5] LRS had previously installed an earlier version of low-NOx burners well over a decade before the Regional Haze requirements applied, which also resulted in a significant reduction of NOx emissions at that time.

SIP had required.[6] Similar additional NOx controls were required under the FIP for many other Wyoming sources. The FIP was appealed by LRS and other Wyoming utilities to the 10th Circuit Court of Appeals shortly thereafter. During the appeal, LRS and EPA continue to negotiate in good faith a "better-than-BART" alternative that is more cost effective than EPA's NOx FIP of LRS. That process has involved additional modeling and other issues that are still in the process of being resolved.

On February 6, 2014, six days after EPA issued the NOx FIP at 79 Fed. Reg. 5032 (January 30, 2014), Wyoming submitted the "certification of Wyoming's infrastructure SIP for the 2008 ozone NAAQS" that is the subject of this proposed action by EPA.

2.0 Reasons in Support of why EPA and Wyoming should agree to allow Wyoming to re-submit the prong 2 portion of Wyoming's February 6, 2014, 2008 ozone NAAQS infrastructure submittal before proceeding with this action.

2.1 NOx reductions for the Regional Haze Program in Wyoming are still being negotiated.

EPA states at 81 Fed. Reg. at 81714 that "WDEQ's submission does not provide any technical analysis demonstrating that the SIP contains adequate provisions prohibiting emissions that will interfere with maintenance of the 2008 ozone NAAQS in any other state (prong 2)." This is unfair after-the-fact reasoning.

At the time of Wyoming's 2008 ozone NAAQS infrastructure submittal on February 6, 2014, EPA's FIP had just been released 6 days before. The relevant NOx reductions were still in the process of being implemented under the early-action installation of NOx controls that LRS and other utilities had agreed to as part of Wyoming's Regional Haze NOx SIP. Those additional NOx FIP reductions are still under appeal before the 10th Circuit Court of Appeals, some of which are subject to confidential settlement negotiations between LRS and EPA.

Therefore, from February 2014 to now, doing a "technical analysis demonstrating that the SIP contains adequate provisions prohibiting emissions that will interfere with maintenance of the 2008 ozone NAAQS in any other state (prong 2)" makes no sense until the NOx emissions are more certain based on the outcome of the anticipated potential settlement for LRS and the resolution of the other parts of the appeal to the 10th Circuit Court of Appeals.

Thus, Basin Electric suggests that EPA and Wyoming enter into an agreement to allow Wyoming to re-examine and re-submit the prong 2 portion of Wyoming's February 6, 2014, 2008 ozone NAAQS infrastructure submittal after the resolution of the appeal of EPA's FIP, including any settlements.[7]

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[6] "Approval, Disapproval and Promulgation of Implementation Plans; State of Wyoming; Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze," 79 Fed. Reg. 5032 (January 30, 2014).
[7] The term "reasonable progress" is defined by the factors listed in CAA § 169A(g)(1), 42 U.S.C. § 7491(g)(1).

2.2 Wyoming should be given a fair opportunity to evaluate EPA's CSAPR Update Modeling.

Wyoming should be given an opportunity to review the recently-finalized CSAPR Update modeling EPA uses to project more than a 1% impact at receptors in Douglas County, Colorado to determine whether it is an accurate and appropriate tool to use in Wyoming or the west.

On February 1, 2016, West Associates submitted public comment in the CSAPR Update for the 2008 Ozone NAAQS providing several concerns about the use of the CSAPR modeling for Western states. Basin Electric supports these concerns and has attached a copy of the West Associates letter for your review.

EPA's proposed disapproval of Wyoming's prong 2 provisions for ozone is based on the CSAPR update modeling that was released as a final rule on October 26, 2016. Wyoming has had little to no opportunity to assess the factors of this analysis, or understand their application in Wyoming. *See* "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS," 81 Fed. Reg. 74504 (October 26, 2016). As EPA appropriately notes in this proposed rulemaking[8] and in the CSAPR Update rule,[9] the CSAPR modeling is conducted specifically for Eastern, not Western States. Also, in this proposed action, EPA notes that there are different factors affecting modeling and modeling results that should be considered in the Western States, some of which are "geographically specific,"[10] such as broad expanses of public land, high altitude settings, international transport and elevated background ozone concentrations that can comprise a significant portion of ambient concentrations, especially on high ozone days in the Western United States.

It is unreasonable to disapprove the prong 2 provisions for the Wyoming interstate transport ozone SIP submitted nearly three years ago based on a recently finalized modeling analysis, without considering the circumstances or providing Wyoming an opportunity analyze the information and supplement the administrative record.

2.3 Wyoming should be given an opportunity to evaluate the appropriateness of using the CSAPR model as a screening tool to determine the impacts of interstate transport of NOx and whether those emissions "significantly contribute to nonattainment of the NAAQS" ozone levels in Colorado and other neighboring States before the disapproval is issued.

EPA recognizes in this proposed action that differences exist between Eastern and Western States where it says at 81 Fed. Reg. at 81715:

> As to western states, the EPA noted in the CSAPR Update that there may be geographically specific factors to consider in evaluating interstate transport, and given the near-term 2017 implementation timeframe, the EPA focused the final CSAPR Update on eastern states. *See* CSAPR Update at 81 FR 74523. Consistent with our statements in the CSAPR Update, the EPA intends to address western states, like Wyoming, on a case-by-case basis.

[8] 81 Fed. Reg. at 81715.
[9] 81 Fed. Reg. at 74523.
[10] 81 Fed. Reg. at 81715.

> The EPA's air quality modeling as updated for the final CSAPR Update projects that for the Western U.S. (outside of California), there are no nonattainment receptors and only three maintenance receptors located in the Denver, Colorado area. Wyoming emissions are projected to contribute above one percent of the NAAQS at one of these receptors (the "Douglas County maintenance receptor"; see Table 1, below). The modeling also shows that multiple upwind states would collectively contribute to the projected Douglas County maintenance receptor in Colorado. The EPA found that the contribution to ozone concentrations from all states upwind of the Douglas County maintenance receptor in Colorado is about 9.7 percent. [Footnote 8] Thus, the collective contribution of emissions from upwind states represents a large portion of the ozone concentrations at the projected Douglas County maintenance receptor in Colorado.

According to the CSAPR Update modeling, in addition to Colorado, 18 other "upwind" States contribute to the ozone levels at the Douglas County ambient air maintenance monitor. And by far (approximately half) of the ozone measured at the monitor is from the "Initial & Boundary" – also referred to as "background" – ozone levels. The contribution in parts per billion (ppb), from largest to smallest, from each identified contributor according to the modeling is: Initial & Boundary a/k/a background – 36.59; Colorado – 26.10; Biological – 4.35; Utah – 1.63; California – 1.18; Wyoming – 1.18; Fires - .56; Nebraska - .53; Iowa - .51; Nevada - .50; Arizona - .39; Canada & Mexico - .33; Texas - .32; Idaho - .24; Tribal - .23; Oklahoma - .14; New Mexico - .13; Oregon - .12; Offshore - .07; South Dakota - .05; North Dakota - .05; Washington - .04; Montana - .03; Missouri - .01; and Louisiana - .01.

EPA recently proposed to approve Nevada's SIP based on facts nearly identical facts to this proposed action. *See* 81 Fed. Reg. 87857, 87859 (December 6, 2016).

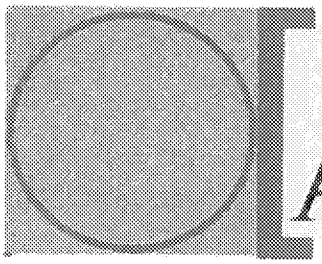
Either the Wyoming ozone transport SIP should be approved as it is proposed to be for Nevada, or EPA should allow Wyoming to re-examine and re-submit the prong 2 portion of Wyoming's February 6, 2014, 2008 ozone NAAQS infrastructure submittal before moving forward with this proposed action.

Thank you for your consideration of our comments. If you have any questions or require additional information, please contact Mark Foss or Mike Paul at (701) 223-0441.

Sincerely,

Mark D. Foss
Senior Vice President & General Counsel

mdf/ds
enclosure



WE
ASSO ES

February 1, 2016

Submitted to Federal eRulemakin Po ta tp://www.regulations.gov Docket
ID No. EPA-HQ-OAR-20 5-0500

U.S. Environmental Protection Ag ncy
EPA Docket Center
Mail Code 28221T
Attention: Docket ID No. EPA-HQ OAR-201 - 500
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Cross-State Air Poll tion Rule Update fo the 2008 Ozone NAAQS

To Whom It Concerns:

Western Energy Supply and Transmission Associates (WEST) appreciates this opportunity to comment on the United States Env onmental Protection Agency's (EPA) proposed Cross-State Air Pollution Rule (CSAPR) Update for the 2008 Ozone NAAQS. WEST is a coalition of 11 cooperative public and investor owned electric utilities[1] operating 40% of the fossil fueled generat ng capacity and producing 30% of the electricity in 11 western states, serving over 21 000 GWHs to almost 8.6 million customers.

The proposed rule requires 23 states in the eastern U S. to reduce interstate emission transport that significantly contributes to nonattainment, or interferes with maintenance, of the 2008 ozone NAAQS by reducing their ozone season electric generating unit (EGU) NOX emissions in 2017 and uture years. The EPA is proposing to update CSAPR to address interstate emission transport with respect to the 2008 ozone NAAQS of certain states' ozone-season nitrogen oxide (NOx) emissions budgets established by CSAPR. This proposal also updates the status o certain states' outstanding interstate ozone transport obligations with respect to he 1997 ozone NAAQS, for which CSAPR provided a partial remedy.

This proposal does not apply to 11 contiguous states in he western U.S. However, EPA requests comment on whether it should. In f aming the ssue EPA states the fo ow g:

[1] WEST members include Arizona Electric Powe Cooper tive, Arizona Public Servi Basin E ectr c Power
[2] 80 Fed. Reg. 75706 (December 3, 2015)

> *"CSAPR and previous federal transport rules, such as the NOX SIP Call and the Clean Air Interstate Rule (CAIR) ... addressed collective contributions of ozone pollution from states in the eastern U.S. These rules did not address contributions in the 11 western contiguous United States. There may be additional criteria to evaluate regarding collective contribution of transported air pollution in the West, such as those raised in EPA-state meetings to discuss approaches for determining how emissions in upwind states impact air quality in downwind states. Given that the near-term 2017 implementation timeframe constrains the opportunity to conduct evaluations of additional criteria, the EPA proposes to focus this rulemaking on eastern states. This focus would not relieve western states of obligations to address interstate transport under the Act. The EPA and western states, working together, would continue to evaluate interstate transport on a case-by-case basis. While the EPA proposes to focus this rulemaking on eastern states, we seek comment on whether to include western states in this rule."*[3]

EPA expands on this later in the proposal stating, "The EPA would also continue to engage with western states on air quality modeling analyses and the implications of those analyses for interstate transport."[4]

WEST agrees with EPA that the western states should <u>not</u> be included in this rule, but that EPA and western states should continue working together to evaluate the complex nature of interstate transport in the West and to address concerns on a case-by-case basis where they exist. There are several reasons for our position:

First, notwithstanding EPA's assertion that its air quality modeling supporting this proposed rule includes data for the western states that indicate a relationship between upwind sources and downwind receptors, WEST believes this data is incomplete and otherwise insufficient for purposes of supporting the inclusion of western states in this rulemaking.

Second, historically, ozone nonattainment strategies have been focused on solving urban ozone exceedances that can be influenced by several local factors and transported air pollution from EGUs in neighboring states. Some western states have been addressing these kinds of challenge for several years. Yet, overall, ozone in western states does not present the persistent regional challenge with exceedances as it does in the east, and ozone presents different technical challenges. The Western States Air Resources Council (WESTAR) has commented on the challenges facing western states:

> *"There are significant uncertainties about the origin, magnitude, frequency, duration and geographic distribution of ozone in the west. Transported background ozone or the precursor pollutants that cause ozone may originate in another state, in Mexico, Canada, or Asia. It may be transported down from the stratosphere. It may be the*

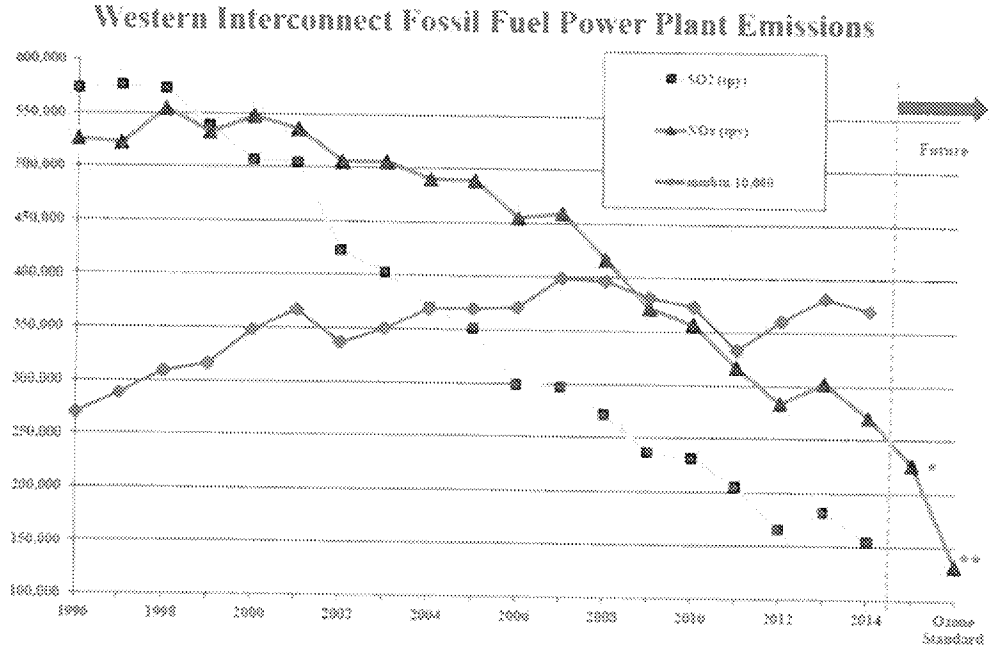
[3] Ibid. at 75708 - 75709
[4] Ibid. at 75715 - 75716

> *product of wildfires. Characterizing multiple natural events (wildfire, stratospheric intrusions), occurring with varying intensities, and sometimes overlapping over space and time will require resources beyond the states' limited means. Implementing a more stringent ozone standard in the west will require a much better understanding of the role of background and transported ozone ... "*[5].

Therefore, WEST agrees with EPA that western transport is complicated by a number of factors and that "there may be additional criteria to evaluate regarding transported air pollution in the West."

Third, an approach that relies on a collective, regional contribution from EGUs will not address the varied and complex circumstances affecting western ozone exceedances. Furthermore, as illustrated in Figure 1 below, NOx emissions from power plant sources in the Western Interconnect have declined continuously and significantly since 2000, and are likely to further decline as regional haze and Clean Power Plan strategies are implemented.

Figure 1. [6]



1996 through 2014 data from EPA data for fossil fuel-fired electrical generating units in the 11-state Western Interconnect
* Additional NOx reductions estimate - BART controls from Regional Haze baseline planning
** Further NOx reductions estimate from applying maximum post-combustion controls to all remaining units

As WESTAR has observed,

---

[5] Letter from Western States Air Resources (WESTAR) Council to EPA (Docket ID No. OAR-HQ-OAR-2008-0699), March 16, 2015, at p. 4

[6] Presentation by Tom Moore, "Western Regional Technical Analysis for Ozone Standard Planning, WESTAR," San Francisco (April 9, 2015) at slide 4.

> *"Making the right choices about how to improve air quality in ozone nonattainment areas will depend on how well we understand the science, and our understanding of the science needs to improve. Given the absence of industrial development in numerous areas of the intermountain west, nonattainment area controls simply will not work to achieve attainment. Neither will interstate contribution reductions be sufficient in many areas to reduce ozone to levels below the proposed standard.*[7]

Finally, western regulators have identified several needs for improvements in modeling and analysis that will be required to address the varied and complex challenges facing western states with respect to urban and rural ozone exceedances, including but not limited to [8]:

- Ozone NAAQS planning–requires photochemical modeling for State Implementation Plan (SIP) attainment demonstrations for nonattainment areas.
- Ozone transport SIPs –photochemical source apportionment modeling can be used to quantify U.S. Ozone transport between states and jurisdictions.
- Identification of Ozone exceptional events caused by stratospheric intrusion and wildfires –requires observations & data analysis, supplemented with global/regional scale photochemical models and regression models.
- Identification of international transport of Ozone for §179B demonstrations: requires nested global and regional scale photochemical modeling to evaluate international transport of Ozone.
- Identification of §182 Rural Transport Areas –combination of data analysis and photochemical modeling.

Regional modeling of U.S. sources for air quality planning, to identify sources and assess controls for contributing sources, will be needed within the West.

WEST appreciates the fact that states remain obligated under the Clean Air Act to address interstate transport in their SIPs. However, WEST does not believe imposing a new regulatory framework in the west that was developed to address realities prevalent in the east is appropriate. Recent evidence strongly suggests that diverse on- and offshore contributors cause interstate transport in the west. If strategies are genuinely needed to address maintenance and limited nonattainment concerns due to interstate transport in the western states, these will need to be based on improved modeling and analysis.

Therefore, we urge EPA to defer inclusion of western states in this proposal, and to continue working with western states in developing improved analytical tools so that appropriate strategies can be developed for our unique circumstances.

---

[7] WESTAR Letter to EPA at p. 2

[8] Moore Presentation at Slide 19

Thank you for your consideration of WEST's comments on this matter. If you have any questions, please contact me at 701-557-5652 or by email at LWitham@bepc.com.

Sincerely,

/s

Lyle Witham
President of the Board
WEST Associates

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

Chris Wolpert
Chief Deputy Clerk

April 04, 2017

Mrs. Elizabeth Morrisseau
Mr. Erik Petersen
Office of the Attorney General for the State of Wyoming
2320 State Capitol
Cheyenne, WY 82002

RE: 17-9514, State of Wyoming v. EPA, et al
Dist/Ag docket: EPA-R08-OAR-2016-0521

Dear Counsel:

The court has received and docketed your petition for review. Please note your case number above. Copies of the Tenth Circuit Rules, effective January 1, 2017, and the Federal Rules of Appellate Procedure, effective December 1, 2016, may be obtained by contacting this office or visiting our website at http://www.ca10.uscourts.gov. In addition, please note all counsel are required to file pleadings via the court's Electronic Case Filing (ECF) system. You will find information regarding registering for and using ECF on the court's website. We invite you to contact us with any questions you may have about our operating procedures. Please note that all court forms are now available on the court's web site.

Please note effective December 1, 2016 multiple important changes to the Federal Rules of Appellate Procedure took effect. The changes include new word length requirements for briefs and amendment of the "three-day service" rule. Please visit our website at http://www.ca10.uscourts.gov to familiarize yourself with these changes.

We have served the petition for review on the respondent agency via electronic notice using the court's ECF system. Petitioner must serve a copy of the petition for review on all parties, other than the respondent, who participated in the proceedings before the agency.

Attorneys must complete and file an entry of appearance form within 14 days of the date of this letter. *See* 10th Cir. R. 46.1(A). Pro se parties must complete and file the form within thirty days of the date of this letter. An attorney who fails to enter an appearance within that time frame will be removed from the service list for this case, and there may

be other ramifications under the rules. If a respondent does not wish to participate in the appeal, a notice of non-participation should be filed via ECF as soon as possible. The notice should also indicate whether counsel wishes to continue receiving notice or service of orders issued in the case.

In addition, petitioner must complete and file a docketing statement within 14 days of the date of this letter. *See* 10th Cir. R. 15.1.

The respondent agency shall file the record, or a certified list in lieu of the record, within 40 days after service of the petition for review. *See* Fed. R. App. P. 17. If a certified list is filed, the entire record, or the parts the parties may designate, must be filed on or before the deadline set for filing the respondent's brief. *See* 10th Cir. R. 17.1.

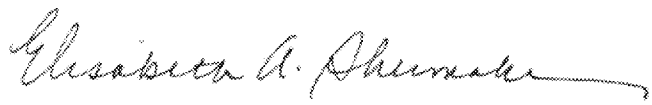
Petitioner's opening brief must be filed within 40 days of the date on which the certified list or record is filed. *See* 10th Cir. R. 31.1(B). Subsequent briefs must be filed as required by Fed. R. App. P. 31(a). Motions for extension of time to file briefs must comply with 10th Cir. R. 27.1 and 27.5. These motions are not favored.

Briefs must satisfy all requirements of the Federal Rules of Appellate Procedure and Tenth Circuit Rules with respect to form and content. *See* specifically Fed. R. App. P. 28 and 32 and 10th Cir. R. 28.1, 28.2 and 32, as well as 31.3 when applicable. Seven hard copies of briefs must be provided to the court within two days of filing via the court's Electronic Case Filing system. See 10th Cir. R. 31.5 and the court's CM/ECF User's Manual. Counsel are encouraged to utilize the court's Briefing & Appendix checklist when compiling their briefs.

This matter will be heard on a record that the agency provides. *See* Fed. R. App. P. 17(a) and 10th Cir. R. 17.3. As a result, the parties need not file an appendix. If, however, any party wishes to file a separate appendix it should file a motion seeking that relief.

Please contact this office if you have questions.

Sincerely,



Elisabeth A. Shumaker
Clerk of the Court

cc: David Aiken Carson
Correspondence Control Unit
Scott Pruitt

EAS/na

Message

From: Best-Wong, Benita [Best-Wong.Benita@epa.gov]
Sent: 4/4/2017 12:48:27 PM
To: Shapiro, Mike [Shapiro.Mike@epa.gov]; Greenwalt, Sarah [greenwalt.sarah@epa.gov]
CC: Dravis, Samantha [dravis.samantha@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Minoli, Kevin [Minoli.Kevin@epa.gov]; Fotouhi, David [fotouhi.david@epa.gov]; Goodin, John [Goodin.John@epa.gov]; Peck, Gregory [Peck.Gregory@epa.gov]; Campbell, Ann [Campbell.Ann@epa.gov]
Subject: RE: Draft WOTUS Rule Text
Attachments: Attorney Client / Ex. 5

Rule text is attached.

Regards,
Benita

Benita Best-Wong
Acting Deputy Assistant Administrator
Office of Water
US EPA
1200 Pennsylvania Avenue, NW
Washington, DC 20460
202-566-1159

From: Shapiro, Mike
Sent: Monday, April 03, 2017 9:49 PM
To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Cc: Dravis, Samantha <dravis.samantha@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>
Subject: Draft WOTUS Rule Text

Sarah,

Attorney Client / Attorney Work Product / Deliberative Ex. 5

Attorney Client / Attorney Work Product / Deliberative Ex. 5

Again, please contact us if you have any questions or concerns.

Thank you,

Mike

Michael Shapiro
Acting Assistant Administrator
US EPA, Office of Water

Message

From: Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]
Sent: 2/24/2017 4:55:36 PM
To: Schwab, Justin [schwab.justin@epa.gov]
Subject:
Attachments:

Attorney Client / Ex. 5

Justin- Attorney Client / Ex. 5

Attorney Client / Ex. 5

++++++++++++
202-564-5647 (o)
Personal Phone / Ex. 6 (c)

Message

From: Neugeboren, Steven [Neugeboren.Steven@epa.gov]
Sent: 4/28/2017 1:55:45 AM
To: Minoli, Kevin [Minoli.Kevin@epa.gov]
CC: Fotouhi, David [fotouhi.david@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Prabhu, Aditi [Prabhu.Aditi@epa.gov]; Packard, Elise [Packard.Elise@epa.gov]; Kupchan, Simma [Kupchan.Simma@epa.gov]; Wehling, Carrie [Wehling.Carrie@epa.gov]; Wendelowski, Karyn [wendelowski.karyn@epa.gov]
Subject: Attorney Client / Ex. 5

Thanks Kevin. Very pleased that we were able to move forward on this important issue. This has been a truly a team effort – Attorney Client / Ex. 5

Steven Neugeboren
Associate General Counsel
Water Law Office
Environmental Protection Agency
202-564-5488

From: Minoli, Kevin
Sent: Thursday, April 27, 2017 4:46 PM
To: Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Cc: Fotouhi, David <fotouhi.david@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Prabhu, Aditi <Prabhu.Aditi@epa.gov>; Packard, Elise <Packard.Elise@epa.gov>
Subject: Attorney Client / Ex. 5

Excellent work, Steve. Attorney Client / Ex. 5

Attorney Client / Ex. 5

Thanks, Kevin

Kevin S. Minoli
Acting General Counsel
Office of General Counsel
US Environmental Protection Agency
Main Office Line: 202-564-8040

From: Neugeboren, Steven
Sent: Thursday, April 27, 2017 3:48 PM
To: Shapiro, Mike <Shapiro.Mike@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Loop, Travis <Loop.Travis@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Klasen, Matthew <Klasen.Matthew@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Kaiser, Sven-Erik <Kaiser.Sven-Erik@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Bangerter, Layne <bangerter.layne@epa.gov>; Frithsen, Jeff <Frithsen.Jeff@epa.gov>; Nickerson, William <Nickerson.William@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>; Dravis, Samantha <dravis.samantha@epa.gov>; Keating, Jim <Keating.Jim@epa.gov>; Bowles, Jack <Bowles.Jack@epa.gov>; Damico, Brian <Damico.Brian@epa.gov>; Breen, Barry <Breen.Barry@epa.gov>; Cheatham, Reggie <cheatham.reggie@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>; Stokely, Peter <Stokely.Peter@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; jennifer.a.moyer@usace.army.mil; Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Donald.e.jackson@usace.army.mil; Brown, Byron <brown.byron@epa.gov>; Bowman, Liz

<Bowman.Liz@epa.gov>
Cc: FertikEdgerton, Rachel <FertikEdgerton.Rachel@epa.gov>; Borum, Denis <Borum.Denis@epa.gov>; Orvin, Chris <Orvin.Chris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Pollins, Mark <Pollins.Mark@epa.gov>; Washington, Valerie <Washington.Valerie@epa.gov>; Howard, MarkW <Howard.MarkW@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Cherry, Andrew <Cherry.Andrew@epa.gov>; Lousberg, Macara <Lousberg.Macara@epa.gov>; Theis, Joseph <Theis.Joseph@epa.gov>; Bahk, Benjamin <Bahk.Benjamin@epa.gov>; Evalenko, Sandy <Evalenko.Sandy@epa.gov>; Cindy Barger <cindy.s.barger.civ@mail.mil>; McGartland, Al <McGartland.Al@epa.gov>; Penman, Crystal <Penman.Crystal@epa.gov>; Clark, Becki <Clark.Becki@epa.gov>; Indermark, Michele <Indermark.Michele@epa.gov>; Hanson, Andrew <Hanson.Andrew@epa.gov>; Principe, Vanessa <Principe.Vanessa@epa.gov>; Swackhammer, J-Troy <Swackhammer.J-Troy@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Skinner-Thompson, Jonathan <Skinner-Thompson.Jonathan@epa.gov>
Subject: Attorney Client / Ex. 5

Samantha has approved the language I circulated earlier today (pasted below for convenience).

Attorney Client / Ex. 5

Steven Neugeboren
Associate General Counsel
Water Law Office
Environmental Protection Agency
202-564-5488

From: Neugeboren, Steven

Message

From: Benton, Donald [benton.donald@epa.gov]
Sent: 2/28/2017 6:55:30 PM
To: Bangerter, Layne [bangerter.layne@epa.gov]; Benton, Donald [benton.donald@epa.gov]; Davis, Patrick [davis.patrick@epa.gov]; Ericksen, Doug [ericksen.doug@epa.gov]; Greaves, Holly [greaves.holly@epa.gov]; Kreutzer, David [kreutzer.david@epa.gov]; Munoz, Charles [munoz.charles@epa.gov]; Schnare, David [schnare.david@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Sugiyama, George [sugiyama.george@epa.gov]
Subject: WOTUS

Importance: High

POTUS to sign EO on WOTUS any minute, watching it on tv in my office. You are welcome to join right now.

Don
Senator Don Benton
Senior White House Advisor
Office of the Administrator
202.564.4711

Message

From: Dunham, Sarah [Dunham.Sarah@epa.gov]
Sent: 4/28/2017 9:27:44 PM
To: Gunasekara, Mandy [Gunasekara.Mandy@epa.gov]; Dravis, Samantha [dravis.samantha@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Bolen, Brittany [bolen.brittany@epa.gov]; Schmidt, Lorie [Schmidt.Lorie@epa.gov]; Zenick, Elliott [Zenick.Elliott@epa.gov]; McGartland, Al [McGartland.Al@epa.gov]; Rees, Sarah [rees.sarah@epa.gov]
CC: Page, Steve [Page.Steve@epa.gov]; Tsirigotis, Peter [Tsirigotis.Peter@epa.gov]; Harvey, Reid [Harvey.Reid@epa.gov]; Lewis, Josh [Lewis.Josh@epa.gov]; Koerber, Mike [Koerber.Mike@epa.gov]
Subject: CPP NPR and cost memo
Attachments: Attorney Client / Ex. 5

Attorney Client / Attorney Work Product / Deliberative Ex. 5

Message

From: Wehling, Carrie [Wehling.Carrie@epa.gov]
Sent: 4/25/2017 2:17:43 PM
To: Minoli, Kevin [Minoli.Kevin@epa.gov]; Neugeboren, Steven [Neugeboren.Steven@epa.gov]; Kupchan, Simma [Kupchan.Simma@epa.gov]; Wendelowski, Karyn [wendelowski.karyn@epa.gov]
CC: Schwab, Justin [schwab.justin@epa.gov]; Fotouhi, David [fotouhi.david@epa.gov]; Prabhu, Aditi [Prabhu.Aditi@epa.gov]
Subject: **Attorney Client / Ex. 5**

Thanks, Kevin.

Ex. 5 - Deliberative Process/Attorney Client

Appreciate any direction you can provide.

Thanks.

Carrie

David Cooper's email from this morning:

Ex. 5 - Deliberative Process/Attorney Client

Ex. 5 - Deliberative Process/Attorney Client

Caroline (Carrie) Wehling
Assistant General Counsel
Water Law Office
U.S. Environmental Protection Agency
Washington DC 20004
202-564-5492
wehling.carrie@epa.gov

From: Minoli, Kevin
Sent: Tuesday, April 25, 2017 10:04 AM
To: Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Cc: Schwab, Justin <schwab.justin@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Prabhu, Aditi <Prabhu.Aditi@epa.gov>
Subject: My comments on WOTUS

Here they are. Let me know if you can't read them or have questions. Thanks!

Kevin S. Minoli
Acting General Counsel
Office of General Counsel
US Environmental Protection Agency
Main Office Line: 202-564-8040

Begin forwarded message:

> **From:** "Veney, Carla" <Veney.Carla@epa.gov>
> **To:** "Minoli, Kevin" <Minoli.Kevin@epa.gov>
> **Subject: pdf**

> **From:** DC-WJCN-4020-M@epa.gov [mailto:DC-WJCN-4020-M@epa.gov]
> **Sent:** Tuesday, April 25, 2017 8:43 AM
> **To:** Veney, Carla <Veney.Carla@epa.gov>
> **Subject:**

Message

From: Schmidt, Lorie [Schmidt.Lorie@epa.gov]
Sent: 3/27/2017 3:30:44 PM
To: Schwab, Justin [schwab.justin@epa.gov]; Gunasekara, Mandy [Gunasekara.Mandy@epa.gov]; Greenwalt, Sarah [greenwalt.sarah@epa.gov]; Minoli, Kevin [Minoli.Kevin@epa.gov]; Dunham, Sarah [Dunham.Sarah@epa.gov]
CC: Page, Steve [Page.Steve@epa.gov]; Tsirigotis, Peter [Tsirigotis.Peter@epa.gov]; Jordan, Scott [Jordan.Scott@epa.gov]; Zenick, Elliott [Zenick.Elliott@epa.gov]
Subject: Attorney Client / Ex. 5
Attachments:

Flag: Flag for follow up

Justin, Mandy and Sarah G – we need final OK from you on the text of the notices.

Ex. 5 - Deliberative Process/Attorney Client

Sarah D – Ex. 5 - Deliberative Process/Attorney Client

Ex. 5 - Deliberative Process/Attorney Client

If there's anything we need to talk about, please call me at Personal Phone / Ex. 6

Thanks,

Lorie

Lorie Schmidt
Associate General Counsel, Air and Radiation
Office of General Counsel
US Environmental Protection Agency
(202)564-1681

Message

From: Prabhu, Aditi [Prabhu.Aditi@epa.gov]
Sent: 4/17/2017 2:38:15 PM
To: Schwab, Justin [schwab.justin@epa.gov]; Fotouhi, David [fotouhi.david@epa.gov]
Subject: One Docket report - litigation deadlines
Attachments: One Docket report - 4-12-17.pdf

Flag: Flag for follow up

Justin/David - Here's the chart of litigation deadlines through the end of June.

Aditi Prabhu
Special Assistant, Office of General Counsel
U.S. Environmental Protection Agency
(202)564-2473

Message

From: Albores, Richard [Albores.Richard@epa.gov]
Sent: 4/20/2017 10:08:20 PM
To: Minoli, Kevin [Minoli.Kevin@epa.gov]
CC: OGC Immediate Office Support [OGCFrontOfficeSupportStaff@epa.gov]; Packard, Elise [Packard.Elise@epa.gov]; Fotouhi, David [fotouhi.david@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]
Subject: ATTACHED FOR YOUR REVIEW: Draft OGC Weekly Report 4.20.17
Attachments: OGC Weekly Report 4.20.17-draft.docx

Kevin – as promised, this should make your work on tonight's submission easier.

Attorney Client / Ex. 5

Good night.

R

~~~~~

RICHARD L. ALBORES
Associate Deputy General Counsel * Office of General Counsel * U.S. EPA * 1200 Pennsylvania Avenue, NW * MC2310A * Washington, DC 20460 * email: albores.richard@epa.gov * phone: 202.564.7102 * mobile: Personal Phone / Ex. 6
~~~~~

Message

From: silver.wendy@epa.gov [silver.wendy@epa.gov]
Sent: 3/13/2017 5:42:05 PM
To: Schwab, Justin [schwab.justin@epa.gov]
Subject: ***Action Required***Request for Review of Custodians - R8_CityofColoradoSprings_7-9-2015_CWA litigation hold

Attorney Work Product / Ex. 5

Please access the Custodian Portal to answer the questionnaire.

NOTE: You must be logged into the EPA Network to access this link.

The legal team recognizes that your time is valuable and appreciates your cooperation and continued support.

Failure to promptly respond to the questions found at the end of the notice will result in automatic reminders to your email account until you respond.

This email is intended for the sole use of the intended recipient(s) and contains material that is privileged attorney-client communication and/or subject to the attorney work product doctrine. Any review, reliance, distribution, or forwarding without express permission by the sender is strictly prohibited. If you are not the intended recipient, please contact the sender and delete all copies.

Message

From: Schmidt, Lorie [Schmidt.Lorie@epa.gov]
Sent: 3/24/2017 2:54:35 AM
To: Schwab, Justin [schwab.justin@epa.gov]; Minoli, Kevin [Minoli.Kevin@epa.gov]; Dunham, Sarah [Dunham.Sarah@epa.gov]
CC: Jordan, Scott [Jordan.Scott@epa.gov]; Zenick, Elliott [Zenick.Elliott@epa.gov]; Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]
Subject: Attorney Client DP / Ex. 5
Attachments:

All –

ACP Deliberative Process / Ex. 5

Please note that there are some bubble comments you should read during your review.

Thanks

Lorie

Message

From: Starfield, Lawrence [Starfield.Lawrence@epa.gov]
Sent: 2/1/2017 4:01:58 PM
To: Schwab, Justin [schwab.justin@epa.gov]
CC: Cozad, David [Cozad.David@epa.gov]; Shinkman, Susan [Shinkman.Susan@epa.gov]; Kelley, Rosemarie [Kelley.Rosemarie@epa.gov]; Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: Pruitt hearing
Attachments: spw-011817.pd.pdf

Justin,

Here's a copy of the transcript of Attorney General Pruitt's hearing. Attorney Client / Ex. 5

Attorney Client / Ex. 5

Larry

HEARING ON NOMINATION OF ATTORNEY GENERAL SCOTT PRUITT TO BE ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Wednesday, January 18, 2017

United States Senate

Committee on Environment and Public Works

Washington, D.C.

The committee met, pursuant to notice, at 10:00 a.m. in room 406, Dirksen Senate Office Building, the Honorable John Barrasso [chairman of the committee] presiding.

Present: Senators Barrasso, Carper, Inhofe, Capito, Boozman, Wicker, Fischer, Moran, Rounds, Ernst, Sullivan, Cardin, Sanders, Whitehouse, Merkley, Gillibrand, Booker, Markey, Duckworth, and Harris.

Also Present: Senator Lankford.

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STATEMENT OF THE HONORABLE JOHN BARRASSO, A UNITED STATES SENATOR FROM THE STATE OF WYOMING

Senator Barrasso. Good morning. I call this hearing to order.

We have quite a full house today. I welcome the audience. This is a formal Senate hearing, and in order to allow the Committee to conduct its business, we will maintain decorum. That means if there are disorders, demonstrations by a member of the audience, the person causing the disruption will be escorted from the room by the Capitol Police.

Since this is our first hearing of this session, I would like to welcome our new members, Senators Jerry Moran, Joni Ernst, Tammy Duckworth and Kamala Harris. Thank you very much and congratulations in joining the Committee.

I would also like to welcome Senator Tom Carper in his new role as the Ranking Member of the Committee. You are here, even if you have a scratchy throat, 40 years from when you were Treasurer of Delaware, member of Congress, governor, member of the U.S. Senate. Have not missed a day. You are Cal Ripken, Jr. and the iron man. So thanks for being here. Thank you. I look forward to working with you.

He deserves applause.

With regard to procedure, we will follow the early bird rule in terms of the order of member questions. Members who were here at the start, as you all are, will be placed in the line based on your seniority on the Committee. Members who arrive after the hearing has started will be added to the line in the order they arrive.

With respect to today's hearing, we will abide by the Committee's five-minute rule. The five minutes includes not just the questions, but also the nominee's answers, so I ask our members to please leave enough time for the nominee to answer your question. Today we will have many rounds of questions as are necessary so that members' questions are answered.

Today's hearing is to consider the nomination of Attorney General of Oklahoma, Scott Pruitt, to be the Administrator of the Environmental Protection Agency. Attorney General Pruitt has been a distinguished public servant as well, and we will hear the same from his fellow Oklahomans today. He served eight years in the Oklahoma State Senate before being elected Attorney General of Oklahoma in November of 2010, where he still serves.

There are numerous statements from his peers and the people that he has helped over the years that stand as a testament to his strong qualifications to run the Environmental Protection Agency.

Twenty-four State attorneys general wrote to both Ranking Member Carper and to me stating that "As attorneys general, we understand the need to work collaboratively to address threats to our environment that cross State lines, as well as the importance of a Federal counterpart in the EPA Administrator who possesses the knowledge, experience, and principles to work with our States to address issues affecting our environment. We believe that no one exemplifies these qualities more than Scott Pruitt."

Now, Attorney General Pruitt has taken on polluters, including the oil industry, when there was cause. Randy Ellis, an award-winning

investigative reporter with the Oklahoman newspaper, praised Pruitt for his ability to take on industry. The paper highlighted the work of Attorney General Pruitt to hold a large oil company accountable. This is what Ellis stated. He said, "Mr. Pruitt demonstrated that he will take on industry when they overstep when he sued oil companies such as BP who knowingly double-dipped by collecting reimbursements for corrective action environmental costs for sites that they polluted."

This is why I believe President-elect Trump nominated Attorney General Pruitt to serve as the Administrator of the Environmental Protection Agency. The EPA, under the leadership of a qualified and responsible administrator, is a vital tool that must be used to protect the air we breathe, the water we drink, and the communities where our families live. It is truly a sacred trust.

Colleagues on both sides of the aisle say that Attorney General Pruitt has the right experience for the position. Attorney General Pruitt understands the need to both protect the environment, while allowing our Nation's economy to grow. The agency needs a leader who will follow the laws created by this Committee.

During the last eight years, EPA administrators created broad and legally questionable new regulations which have undermined the American people's faith in the Agency. These regulations have done great damage to the livelihoods of our Nation's hardest working citizens. The regulatory zeal of the last eight years has violated a fundamental principle of environmental stewardship, which is do no harm. This failed environmental leadership has contributed to two of

the worst Government-created environmental disasters in decades: the Gold King Mine spill and Flint, Michigan's water crisis. Those disasters hurt people, many from low-income and minority communities who can least afford it.

As I have discussed with Attorney General Pruitt, my home State of Wyoming is a leading energy producing State. We have abundant supplies of coal, natural gas, crude oil, and uranium. These industries provide thousands of good paying jobs for Wyoming communities. We are also, in my opinion, one of the most beautiful States in the Nation. We are home to Yellowstone and Grand Teton National Parks and numerous national forests and pristine lakes and waterways. Our wildlife population is diverse and abundant. We have thriving populations of grizzly bears, wolves, elk, and bison. People travel from around the world to come to Wyoming because our State's natural resources are spectacular.

Wyoming has managed to strike that balance between our environment and our economy, and it shows. For eight years, Wyoming has suffered under an EPA that didn't believe in striking a balance. As EPA regulations crushed energy jobs in my State, State revenue fell that pays for State programs. This includes paying for our vital environmental programs. Clearly, a wholesale change is needed. Any new Administrator of the Environmental Protection Agency needs to protect the environment in a responsible way that doesn't ignore the good work that States do to protect their air, land, and water, as well as their economies.

At this time I would like to ask Ranking Member Senator Carper for an opening statement.

[The prepared statement of Senator Barrasso follows:]

STATEMENT OF THE HONORABLE THOMAS R. CARPER, A UNITED STATES SENATOR FROM THE STATE OF DELAWARE

Senator Carper. Mr. Chairman, thank you for bringing us here today. Thank you for your kind words, as well.

Let me begin by welcoming our nominee, his wife Marlyn, and his children, Cade and McKenna, to what is a very important hearing.

Mr. Pruitt, this past Sunday morning I rose at dawn. I went for a long run, took me through a beautiful State park in the northern part of Delaware. I reached the park at sunrise, just as the sun was coming up and the sky was turning a brilliant blue. The winter air was crisp and clear. Wildlife was all around. In a word, it was perfect.

As I ran, I said a prayer of thanksgiving for the gift of this moment. Later that morning, my wife and I went to church. There we joined our congregation in singing a hymn that began with these words: "For the beauty of the earth, for the glory of the skies, for the love which from our birth over and around us lies, Lord of all, to these we raise this our hymn of grateful praise."

Those words filled my heart with emotion then and they do so again this morning.

In little more than 48 hours, Donald Trump will place his hand on a Bible. He will take an oath to defend our Country and Constitution. That Bible reminds us repeatedly to love our neighbors as ourselves and it answers the question who is my neighbor. Also found in those pages are scores of admonitions about another obligation that those of us who live on this Earth are expected to meet. Simply put, we are to

serve as stewards of this planet. I believe that we have a moral obligation to do so.

A great many of my colleagues in the Senate agree, and so do most Americans. We need to be convinced that you embrace it as well; not just with your words, but with your deeds. Much of your record suggests otherwise. And today, and in the days that follow, we need to find out where the truth lies.

Leading the Environmental Protection Agency is hard work. That Agency, created by President Richard Nixon and a bipartisan Congress 46 years ago, is tasked with implementing our Nation's most important clean air, clean water, and safe chemical laws. The EPA is required to use sound science to protect both our environment and our public health. By and large, the EPA has done this successfully for decades while our economy has continued to grow.

Many in this room today may not remember a time before the EPA, a time when States had to work individually to protect citizens and the community in which they live, a time before the Clean Water Act and Clean Air Act were signed into law, a time when businesses operating throughout the U.S. were faced with a myriad of conflicting State and local laws affecting our health and our environment. The choking smog and soot of a half century ago seem unfathomable now. Rivers on fire and deadly toxic plumes sound like something from another world, impossible in our United States of America.

Today we have the luxury of largely forgetting these frightening circumstances thanks to the efforts of the Environmental Protection Agency, its employees, partnership with State and local agencies and

with companies across America. In fact, the EPA and its many partners throughout this Country have been so successful that it is easy for some of us to forget just why this Agency is so critical. For some it is also easy to presume that there is not much more for the Agency to do, and that just could not be further from the truth.

The environmental threats that we face today are real, and they don't respect State boundaries. As we consider a nominee to run our Nation's foremost environmental agency, it is worth reminding everyone here why the mission of the EPA is so critical and just what is at stake.

Over time, my State of Delaware has made great strides in cleaning up our own air pollution, but our work only goes so far. Delaware, like many States on the East Coast, sits at the end of what is known as America's tailpipe. Ninety percent of the air pollution in Delaware comes from outside of the First State, from power plants hundreds of miles away in places like Kentucky, Ohio, Indiana, and across the Midwest.

As governor of Delaware, if I had eliminated every source of air pollution with my State, stopped every combustion source and ordered every motor vehicle off the roads, Delaware would still have faced deadly doses of air pollution. Should children and others in Delaware really be forced to live with the consequences of decisions made by polluters hundreds or even thousands of miles away who gain economically from our disadvantage? I don't think so.

Fortunately, the EPA has recently implemented something called the Good Neighbor Rule to make sure that all States do their fair

share to clean up the air. Every citizen in this Country has the right to breathe clean air, regardless of whether they are in a downwind or upwind State. That is why we have the EPA.

I remember fishing as a boy with my dad along the Dan River, near my hometown of Danville, Virginia. We brought home the fish that we caught to eat, and my mom and sister ate them as well. Today that quintessential American pastime comes with a warning label. That river, along with countless other polluted streams, rivers, and lakes in all 50 States are subject to public health advisories cautioning citizens against eating the mercury-laden fish found in them.

We have known for decades that most of the mercury in our fish come from air pollution that is emitted from the dirtiest coal plants and then settles in our waterways. We also know that mercury is a powerful neurotoxin that accumulates in the human body over time, threatening the health of this environment and this generation, and for generations to come.

The EPA recently issued public health protections to clean up the toxic air pollution from our dirtiest coal plants, allowing families in Delaware and thousands of other communities to once again eat the fish from our rivers, our lakes, our streams without concern of mercury poisoning. That is why we have the EPA.

Too often, when State and local communities are pinched for cash, they try to save money by short-changing clean air and clean water protections, and improvements to water infrastructure are oftentimes ignored. Corners are cut; solutions are adopted that may save dollars now, but inflict costly and unnecessary damage later. As we have seen

most recently in the city of Flint, Michigan, these cuts can have a terrible, even a tragic, impact on the health of the most vulnerable in our society, especially the youngest among us.

Today, the citizens of Flint still lack clean drinking water, and the new generation there which has been exposed to high levels of lead faces an uncertain future. That is why we have the EPA.

You may not know it, Mr. Pruitt, but Delaware is the lowest lying State in our Nation. The highest point in Delaware is a bridge. Back home, the reality that our climate is changing is not up for grabs or up for debate. Families and business owners face the stark reality of climate change every single day, and tackling that challenge is not just the right thing to do, what is best for Delaware's economy; it is a matter of survival.

Take a ride with me sometime some 30 miles south of Dover Air Force Base, heading east toward the Delaware Bay, on Prime Hook Road, and you will see what I mean. There was a time not long ago where, just before you reached the Delaware Bay, you came to a parking lot. Today that parking lot is under water. Stand there with me, looking to the east, and you will see part of a concrete bunker slipping out of the water about 1:00. Recently, someone showed me a photo taken of that bunker in 1947, the year I was born. It was on dry land, 500 feet west of the water's edge. Five hundred feet west.

But our little State alone cannot stem the flow of greenhouse gases into our atmosphere that is largely causing our climate to change, our seas to rise, and our coastline to retreat. Every State

must do its fair share to safeguard our climate and their neighbors. That is why we have the EPA.

Examples of air and water pollution produced by one State and fouling the air and water of others can still be found in too many parts of America, like the runoff from Pennsylvania that degrades the waters of the Chesapeake Bay or the haze exported from other States that oftentimes shrouds the Smokey Mountains and degrades visibility at the Grand Canyon. That is why we have the EPA.

Some of my colleagues describe me as recovering governor. For the most part, I believe that governors and presidents deserve deference in picking the members of their leadership teams and, as a result, I have given presidents of both parties that deference in most instances. Since coming to the Senate in 2001, I have opposed only one of the nominees for EPA administrator; supporting two Republicans, two Democrats nominees. Subsequently, every EPA administrator that I have supported demonstrated clearly that they were committed to furthering the overall mission of the EPA, protecting human health and our environment.

I am also committed to a full and fair confirmation process with respect to our nominations that this President-elect has offered, too.

Having said that, though, I have shared with Mr. Pruitt, and I will share with my colleagues today, that too much of what I have seen of his record of the environment and his views about the role of EPA are troubling, and in some cases deeply troubling. Even former Republican EPA Administrator Christine Whitman, with whom I served for seven years as governor of neighboring States, recently said that she

"can't recall ever having seen an appointment of someone who is so disdainful of the agency and the science behind what the agency does."

Let me conclude with this. It is hard to imagine a more damning statement, and from one who served not long ago in that position of trust, Mr. Pruitt, to which you have been nominated. Today is your opportunity to show us that she has gotten it wrong. To be honest with you, coming to this hearing today, I fear that she has gotten it right.

Thank you.

[The prepared statement of Senator Carper follows:]

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Senator Barrasso. Thank you very much, Senator Carper.

In a few moments I would like to turn to Senator Inhofe and Lankford from their home State of Oklahoma regarding the nominee's distinguished career. Before I do that, though, I want to say a few words about Senator Inhofe and his distinguished career as chairman of the Senate Environment and Public Works Committee.

First, I want to thank my friend, Jim Inhofe, for his leadership of this Committee. His dedication to protecting the environment, rebuilding our Nation's infrastructure, strengthening the Country's economy, were clearly evident throughout his time as chairman. He worked across party lines to get things done. During the 114th Congress, under Jim Inhofe's leadership, this Committee held 67 hearings. Of those, 8 were field hearings. Thirty-two bills passed out of the Committee that were signed into law.

Chairman Inhofe oversaw the first long-term highway bill in a decade. This law will improve the Nation's roads, bridges, transit systems, and rail transportation networks. He also worked on a bipartisan basis with former Ranking Member Barbara Boxer to pass badly needed Water Resources Development Act legislation. This new law prioritizes dam, waterway, and port construction projects, and it supports flood control projects that protect millions of people.

For the first time in 40 years, the Toxic Substances Control Act was modernized under Chairman Inhofe's tenure. This law enacts a new uniform regulatory program that will improve public confidence in the safety of chemicals, promote innovation, and provide manufacturers with certainty regarding regulation.

Chairman Inhofe also worked to keep the Administration accountable. Chairman Inhofe worked to ensure that there was oversight of overreaching administration regulations concerning the Clean Power Plan, Waters of the U.S., the Stream Buffer Rule, coal ash regulations, and many more.

So I am very glad that Senator Inhofe will remain on the Committee. I look forward to working closely with him to protect our environment and bolster our Nation's economy.

Senator Inhofe, thank you for your hard work, your dedication, and your leadership. Senator Inhofe, you are now recognized to introduce and talk about Attorney General Pruitt. Thank you.

STATEMENT OF THE HONORABLE JAMES M. INHOFE, A UNITED STATES SENATOR FROM THE STATE OF OKLAHOMA

Senator Inhofe. Senator Barrasso, thank you very much, and I am looking forward to working in a very senior position on your Committee. This is the Committee that gets things done, as Scott Pruitt is fully aware.

I thank you, Chairman Barrasso, and also you, Senator Carper, for letting me join you for this, and I am honored to join my fellow Senator, Senator Lankford, in introducing not just the Attorney General Scott Pruitt, but my good friend, and to offer my support for his nomination to be the next Administrator of the Environmental Protection Agency.

Though neither of us were born in Oklahoma, we got here as quick as we could, and both ended up in Tulsa, so he is also a neighbor. Attorney General Pruitt, you will be glad to know this, he was born in Kentucky. He showed what he was made out of and ended up a great baseball player that was able to get a scholarship and go through the university there. Then he came to Oklahoma, went through law school at the University of Tulsa, and did all kinds of things, specialized at that time in constitutional law.

In 1998, General Pruitt ran and was elected to the Oklahoma State Senate, where he served six years and he quickly became a leader. Indeed, success has followed him throughout his law practice to the State Senate, to become the co-owner and manager, managing general partner of Oklahoma City's AAA minor league baseball team -- see, we

have something in addition to the Thunder that we are all fully aware of -- and is currently Oklahoma's Attorney General.

Through the course of his career, Attorney General Pruitt has stood out as a champion of State and individual rights, and has fought against Federal overreach. He has earned a reputation as a defender of the rule of law and has worked to keep the role of the Federal Government in check. As head of the Environmental Protection Agency, Attorney General Pruitt will ensure that the Agency fulfills the role delegated to it by the laws passed by Congress, nothing more and nothing less.

Oklahoma is an energy and agricultural State, but we are also a State that knows what it means to protect the environment while balancing competing interests. As attorney general, Scott was instrumental -- oh, this is a big deal. We actually have had an ongoing litigation for 100 years; it was the State of Oklahoma, the City of Oklahoma City, the Choctaw Nation, the Chickasaw Nation. It was over water rights. We weren't able to resolve that problem. This guy comes trotting along and resolves it overnight, after 100 years of failures of trying to get this done.

He has also worked with Oklahoma Department of Environmental Quality and the Oklahoma Water Resources Board to protect the scenic rivers. He is kind of a hero of the scenic rivers place. People don't know, Scott, that we in Oklahoma actually have more miles of freshwater shoreline --

[Interruption from audience.]

Senator Barrasso. I would ask the Senator to please suspend his remarks for a few seconds.

[Interruption from audience.]

Senator Barrasso. Thank you, Senator Inhofe.

Senator Inhofe. They obviously don't like scenic rivers, but we do in Oklahoma.

Anyway, additionally, in 2012, Oklahoma partnered with four other States, New Mexico, Colorado, Kansas, and Texas, to bring together State official conservation groups, energy and ag industries, and other private landowners to address the challenges facing one of the problems that we have there having to do with what might become an endangered species. It was an effort that saw success in its first year. Now, this is working with four different States. Despite endorsing the plan, the Fish and Wildlife Service moved forward with listing the species as threatened, endangering the cooperation reached between these varying interests.

So Attorney General Pruitt sued the Fish and Wildlife Department for ignoring the unique cooperative agreement and he won. He wins. He wins these things.

Yes, as Attorney General, Scott Pruitt has fought the EPA, the Fish and Wildlife Service, the oil companies, and the outgoing administration on many fronts. But all of these suits were brought to protect State and local interests from overzealous and activist executive agencies.

Over the last eight years, the Obama Administration has advanced a radical environmental agenda, has exhibited a deep distrust of State

governments and private landowners, and has worked to obstruct the fossil fuel industry and agriculture producers, the most ardent protectors of the environment. These are industries and interests that Oklahoma relies on, and, far from being an enemy of the environment, Scott has proven himself to be an expert at balancing economic growth with environmental stewardship.

So it is my belief that Attorney General Pruitt will return the Environmental Protection Agency to its proper role as a steward for the environment, acting within the bounds prescribed by Congress and the Constitution.

Thank you, Mr. Chairman.

[The prepared statement of Senator Inhofe follows:]

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Senator Barrasso. Thank you, Senator Inhofe.

Senator Lankford.

STATEMENT OF THE HONORABLE JAMES LANKFORD, A UNITED STATES SENATOR FROM THE STATE OF OKLAHOMA

Senator Inhofe. Chairman Barrasso, thank you. Ranking Member Carper, members of the Committee, thank you for allowing me to be able to be here today, introduce my fellow Oklahoman, and for Senator Inhofe and I to both be able to stand with him and to be able to introduce who we believe will be a tremendous nominee as Administrator for the Environmental Protection Agency.

It is an honor to speak in support of Attorney General Pruitt today. Over the past six years, Scott has been a leader in the State of Oklahoma, strongly committed to enforcing the law and adhering to the Constitution. He is a statesman. He is a dedicated public servant. As Administrator of the EPA, I would fully expect Scott to lead the Agency to follow every environmental law and to partner with States, local authorities, and Tribes to do what is best for our present and for our future.

As Attorney General of Oklahoma, he stood shoulder to shoulder with more than half of the States to ensure the Federal Government operates within the bounds of the statute and the Constitution. He has argued consistently that many regulations that the EPA promulgates are in fact the responsibilities of State governments first.

In an environment where Chevron deference is precedent, it is critical that the leader of an agency that has such wide latitude to extract costs from the economy also respects the importance of our federalist foundation and the pocketbooks of hardworking families.

In previous congressional testimony, Scott has emphasized the importance of laws like the Clean Air Act, stressing that the intention was for States and the EPA to work together under a model of cooperative federalism that protects the environment, while considering economic costs.

As Attorney General, Scott has been an ardent defender of the rule of law for Oklahomans. In 2012, he sued British Petroleum, arguing that they knowingly double-dipped through the collection of funds through a cleanup fund despite having insurance coverage for environmental cleanup. He did not hesitate to stand up for his constituents and for his State.

Mike Turpen is the former Attorney General of the State of Oklahoma and the former Chairman of the Oklahoma Democratic Party. He spoke out in mid-December, when Scott was first announced. Let me just read a short portion of his very long statement in support of Scott Pruitt.

Former Attorney General Mike Turpen and our former Democratic Party Chairman said, "Oklahoma Attorney Scott Pruitt is a good choice to head up the Environmental Protection Agency. I am convinced Scott Pruitt will work to protect our natural habitats, reserves, and resources. His vision for a proper relationship between protection and prosperity makes him superbly qualified to serve as our next EPA Administrator."

Scott is an active member and a deacon at his church, First Baptist Church Broken Arrow, a congregation of almost 2,000 people. He is incredibly strong in his faith and he strives to walk in

integrity. Scott is a serious baseball fan, as well. If you run out of environmental or legal questions today, which I doubt you will, but if you run out, why don't you ask him a couple questions about baseball strategy and spring training, which starts in just a few weeks.

I have to tell you Scott is a friend. I have prayed with Scott. I have seen Scott struggle with hard decisions that affect our State's future. I have seen Scott listen to people to try to learn all sides of an issue. And I have seen Scott take difficult stands on matters of law. I think he will be an excellent administrator for the EPA and I think he will do very well today in getting a chance to bring you the confidence that he will work hard for our Nation's present and for the future.

Thank you, Mr. Chairman.

[The prepared statement of Senator Lankford follows:]

Senator Barrasso. Well, thank you so very much, Senator Lankford and Senator Inhofe. Senator Lankford, you are welcome to stay, but you can't stay in that seat.

[Laughter.]

Senator Lankford. You got it.

Senator Barrasso. Now I would like to welcome Attorney General Pruitt to the Senate Environment and Public Works Committee. Welcome. I invite you to first introduce your family and then proceed with your statement. Congratulations and welcome.

STATEMENT OF HONORABLE E. SCOTT PRUITT, ATTORNEY GENERAL, STATE OF OKLAHOMA (OKLAHOMA CITY, OK)

Mr. Pruitt. Good morning, Chairman Barrasso, Ranking Member Carper, members of the Committee. It is an honor and a privilege to be before you today to be considered for the position of EPA Administrator.

I first want to say thank you to Senators Inhofe and Lankford for their opening comments. Senator Inhofe has been a mentor and a friend to me many, many years, and he spent a lot of time with me through this process, introducing me to many of you, and I really appreciate his guidance and his help.

Senator Lankford was a friend well before he entered Congress, and he is already serving Oklahoma and this Country with great distinction.

Mr. Chairman, you indicated to introduce my family. I am blessed today to have my family in attendance with me. My wife, Marlyn, of 27 years, is in attendance, along with my children, McKenna and Cade. There is a little change going on in their life as well. McKenna is actually graduating from Oklahoma University this spring and Senator Whitehouse's alma mater of the University of Virginia Law School. And my son is going to be graduating high school and heading to Oklahoma University, following in his sister's footsteps, to be a Boomer Sooner.

So there is lots of change going on in their lives, lots of change going on in my family's life, and lots of change going on in

the Country. And I think the people of this Country are really hungry for some change.

And with change comes an opportunity for growth, an opportunity to assess how we can reprioritize as a Nation. And when I ponder leading the EPA, I get excited about the great work to be done on behalf of our Nation and being a good steward of the natural resources we have as a Nation. What could be more important than protecting our Nation's waters, improving our air, and managing the land that we have been blessed with as a Nation, all the while protecting the health and welfare of our people?

So, if confirmed, I would lead the EPA with the following principles in mind.

First, we must reject as a Nation the false paradigm that if you are pro-energy, you are anti-environment; and if you are pro-environment, you are anti-energy. I utterly reject that narrative. In this Nation, we can grow our economy, harvest the resources God has blessed us with, while also being good stewards of the air, land, and water by which we have been favored. It is not an either-or proposition.

Next, we should celebrate the great progress that we have made as a Nation since the inception of the EPA and the laws that have been passed by this body, but recognize that we have much work to do.

Third, rule of law matters. Process matters. It inspires confidence in those that are regulated. The law is static, not transient. Regulators are supposed to make things regular, to fairly and equitably enforce the rules and not pick winners and losers. A

regulator should not be for or against any sector of our economy. Instead, a regulator ought to follow law in setting up the rules so that those who are regulated can plan, allocate resources to meet the standards, versus operating in a state of uncertainty and duress.

Fourth, federalism matters. It matters because Congress says so. And because we need to achieve good outcomes as a Nation for air and water quality, we need the partnership of the States to achieve that. It is our State regulators who oftentimes best understand the local needs and the uniqueness of our environmental challenges. Plus, our State regulators possess the resources and expertise to enforce our environmental laws.

Fifth, public participation is key. We need to hear all voices as we make decisions on behalf of our Country with respect to environmental laws.

Two final things personally. I seek to be a good listener, to listen and to lead. You can't do one without the other. Listen to those career staff --

[Interruption from audience.]

Mr. Pruitt. Listen to those career staff at the EPA, as I have done as Attorney General of Oklahoma, and listen to you here in Congress with respect to the needs of your respective States, and listen to the voice of all Americans as we seek to carry out our duties under the law.

Lastly, and this is very important, I seek to serve with civility. Oftentimes, as policymakers, you deal with very contentious issues; I have as Attorney General of Oklahoma, as well. We deal with

weighty issues and there is passion on both sides of issues. But we should not succumb to personalizing matters. We should encourage open and civil discourse. One such issue where civil discourse is absent involves climate change. Let me say to you science tells us that the climate is changing, and that human activity in some manner impacts that change. The ability to measure with precision the degree and extent of that impact, and what to do about it, are subject to continuing debate and dialogue, and well it should be.

So with these principles in mind, I seek to answer your questions today, and I am honored to be here today to be considered for the position of EPA Administrator.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Pruitt follows:]

Senator Barrasso. Well, thank you very much. Welcome to your family, and thank you and congratulations again.

Attorney General Pruitt, you have answered the Committee questionnaire. The United States Office of Government Ethics has stated that you are "in compliance with applicable laws and regulations governing conflicts of interest."

Throughout this hearing, and with the questions for the record, our Committee members will have an opportunity to learn more about your commitment to public service and our Nation. I would ask that throughout this hearing you please respond to the questions for the record.

With that said, I have to ask the following questions that we ask of all nominees on behalf of the Committee. Do you agree, if confirmed, to appear before this Committee or designated members of this Committee, and other appropriate committees of the Congress, and provide information subject to appropriate and necessary security protection with respect to your responsibilities?

Mr. Pruitt. Yes, Mr. Chairman.

Senator Barrasso. Do you agree to ensure that testimony, briefings, documents, and electronic and other forms of information are provided to this Committee and its staff, and other appropriate committees, in a timely manner?

Mr. Pruitt. Yes, Mr. Chairman.

Senator Barrasso. Do you know of any matters which you may or may not have disclosed that might place you in any conflict of interest if you are confirmed?

Mr. Pruitt. No, Chairman.

Senator Barrasso. Thank you.

Just a couple quick questions before we go back and forth. I would just ask if you could just please describe your environmental philosophy, what you would do to protect our environment.

Mr. Pruitt. Well, Mr. Chairman, as I indicated in my opening statement, I believe that the role of a regulator, and this may not sound too exciting, but is to make things regular. And I think one of the difficult challenges we see with individuals across the Country is the inability to predict or know what is expected of them as far as their obligations under our environmental laws. And I really believe, Mr. Chairman, that if confirmed as EPA Administrator, this public participation, cooperative federalism, rule of law being the focus of how we do business at the EPA, is center to restoring confidence and certainty in those that are regulated.

Clearly, the mission of the EPA, as I indicated in my opening statement, to protect our natural resources, protecting our water quality, improving our air, helping protect the health and welfare of our citizens, is key to the leadership of the EPA, and, where enforcement is necessary, vigorous enforcement. I have done that as attorney general in Oklahoma. I have taken very constructive steps against those that have violated the law, but we have done so, I think, in a very decisive and meaningful way.

So, Mr. Chairman, with that in mind.

Senator Barrasso. I am going to ask one other question, then I am going to reserve the balance of my time for some interjection and questioning throughout.

There are still a number of environmental problems that I see in the Country and in my State. Cold War legacy pollution is a serious problem, where chemical compounds are left deep in the soil from our military activity decades ago. Often, there are not the tools yet available to adequately address this pollution. If confirmed, would you advocate increasing the EPA's focus on innovative technological solutions to address these and other environmental problems?

Mr. Pruitt. Yes, Mr. Chairman, and this Congress, this past Congress, as you indicated in your statement and as Senator Inhofe recognized, with the changes to the TSCA law, there are priorities this year, new authority actually that has been given to the EPA Administrator to order testing on certain chemicals. As I have spent time with some of the members on this Committee, Senator Gillibrand, as an example, mentioned PFOA as a concern with respect to the Safe Drinking Water Act, along with TSCA. So, yes, Mr. Chairman, I believe that there are priorities that are key to improving our environment, from CERCLA to TSCA, across air quality, with non-attainment to attainment, and would seek to focus and prioritize those efforts.

Senator Barrasso. Thank you.

Senator Carper.

Senator Carper. Mr. Pruitt, we don't often have the kind of disruptions in this room and in this building that we are witnessing here today. This is extraordinary. Not unprecedented, but

extraordinary. And people might ask, well, why are folks so concerned. Well, I will tell you why they are so concerned. And you don't have to go back to March 3rd up in Detroit, Michigan, where President-elect, then Candidate Trump, Donald Trump said these words, "We're going to get rid of EPA in almost every form. We are going to have little tidbits left, but we are going to take a tremendous amount out." That is what he said during the Republican primary.

And what did he say after the election? Well, November 10th, Fox News with Chris Wallace, he said, "Environmental Protection, what they do is a disgrace. Every week they come out with new regulations." Chris Wallace asked him, "Well, who is going to protect the environment?" He responded by saying, "We'll be fine with the environment." We'll be fine with the environment.

Well, we are concerned that we won't be fine with the environment. Sometimes words do matter. And one of the concerns that I have is he is the president, you would be his nominee, you would be his EPA Administrator. All the things that he said in the campaign, do they just go away? In you he has put somebody in place who has actually defunded or led to the defunding of the Environmental Protection Unit within your own agency. And yet you have joined in a dozen or more lawsuits over the last six years, ever since you have been attorney general, going after the EPA. That is why I have the kind of concern that you are witnessing here today; not just on that side of the dais, but on this side as well.

You just took an oath, you raised your hand and took an oath to answer the questions that our Chairman asked of you, and one of them

was a question dealing with your willingness to respond to reasonable questions that are asked of you. One of the things I asked of you, I submitted a letter that I think you received shortly after Christmas, maybe December 28th, close of business, and in it I asked a lot of questions. I asked you to try to respond by January 9th. You didn't respond to one of them by January 9th, not even one. Today's hearing, I just asked my staff have you responded to any of those questions in writing that I asked almost three weeks ago and, to my knowledge, no response has yet been received. That is why we have a concern. That is why we have a concern.

Mercury.

Mr. Pruitt. I am sorry?

Senator Carper. I am going to start off by talking about mercury. In 2011, the EPA required dirty coal power plants to clean up mercury and air toxic emissions by issuing the Mercury and Air Toxic Standards Rule. This rule will reduce the mercury, a neurotoxin that contaminates our streams and our oceans, pollutes our fish, and harms our children's health.

As attorney general, I believe you have been part of at least 14 legal cases against the EPA, and at least three of these cases against the EPA's rules, to reduce mercury emissions from power plants. Is that correct? Just yes or no.

Mr. Pruitt. Senator, we have been involved in litigation around the MATS Rule.

Senator Carper. Is that correct, yes or no?

Mr. Pruitt. As I indicated, yes, we have been a part of litigation involving the MATS Rule.

Senator Carper. Thank you. It is my understanding that at least one of these cases against the mercury rule is still pending. Is that correct? Just yes or no.

Mr. Pruitt. I believe so, Senator, yes.

Senator Carper. Thank you. In the cases against the mercury rule, you questioned the EPA's determination that mercury emissions from power plants are harmful to health and should be regulated. To be clear, have you ever supported a case against the EPA that claims, and this is a quote, "human exposure to methylmercury resulting from coal-fired power plants is exceedingly small," yes or no?

Mr. Pruitt. Senator, that is not a yes or no question, if I may.

Senator Carper. Fair enough. This position seems to question an EPA decision in 2000 in which the Agency determined, after almost a decade of study, and this is a quote from them, "mercury emissions from power plants pose significant hazards to public health and must be reduced." Would you say the legal cases you have supported in the past directly challenge this Agency finding, yes or no?

Mr. Pruitt. Senator, the challenges we have had as a State --

Senator Carper. Yes or no?

Mr. Pruitt. -- along with the other States --

Senator Carper. Yes or no?

Mr. Pruitt. If I may, Senator. If I may.

Senator Carper. Just hold your fire. Just hold your fire.

Mr. Pruitt. Okay.

Senator Carper. The legal position you have taken on mercury also seems to call in question the 2003 testimony from then EPA Assistant Administrator of Air and Radiation, Jeff Holmstead, under George W. Bush, who sat right where you are sitting today, and this is what he said, "EPA is required to regulate mercury because EPA determined that mercury emissions from power plants pose an otherwise unaddressed significant risk to health and the environment, and because controls options to reduce this risk are available."

This Bush EPA statement on mercury risk seems contrary to the legal arguments you have supported in the past. Is that correct, yes or no?

Mr. Pruitt. I agree with Mr. Holmstead's position that mercury is something that is very dangerous to the environment and should be regulated under section 112.

Senator Carper. Thank you very much. Are you aware that the last three administrators have publicly stated that the EPA is required to regulate mercury from power plants because of the health risk, yes or no?

Mr. Pruitt. I believe that mercury should be regulated under Section 112.

Senator Carper. Thank you very much. My time is about to expire. I will just hold it there. Thank you very much, Mr. Chairman.

Senator Barrasso. Thank you, Senator Carper.

Senator Inhofe.

Senator Inhofe. Thank you, Mr. Chairman.

Well, I don't think you had adequate time to answer some of the questions that were asked. Is there anything you would like to add, to elaborate on?

Mr. Pruitt. Yes, Senator, thank you. I do want to say to Senator Carper's concern with respect to the President-elect's statements throughout the campaign, I believe there is a very important role for the Environmental Protection Agency. In fact, you and I talked about that in your office. I believe that there are air quality issues and water quality issues that cross State line; that the jurisdiction of the EPA, its involvement in protecting our air quality and improving our Nation's waters is extremely important.

And the EPA has served a very valuable role, historically. After all, it was Republicans who created the EPA under executive order in 1970, and this body has passed many pieces of legislation since the 1970s to focus upon improving our air and improving our water quality, and we have much to celebrate. Actually, there are six criteria pollutants under the NAAQS program since 1980 that are down 63 percent. We have made progress as a Country, but we have work to do, and the EPA has a very valuable role, in partner with the States, to carry out those steps to ensure improving our air quality and protecting our Nation's waters.

So, Senator Carper, I am hopeful that, in response to your concern about the role of the EPA, I believe it is a very valuable role, and it is something that we should focus on in partnering with our States.

With respect to mercury, the litigation that you referred to, there was no argument that we made from a State perspective that mercury is not a hazardous air pollutant under Section 112. Our argument focused upon the cost-benefit analysis that the EPA failed to do, and in the Michigan v. EPA case, the Supreme Court actually agreed. So it was more about the process, again, that the EPA was supposed to go through in regulating mercury to provide certainty to those in the marketplace, not a statement with respect to whether mercury should be regulated or not under Section 112.

Thank you, Senator Inhofe.

Senator Inhofe. Thank you, General. I am glad you brought up this thing about the Clean Air Act. The amendments from 1990, I was one of the co-sponsors, it has been incredibly successful. You mentioned that we have reduced those pollutants by 63 percent, but what you didn't add was that is in spite of the fact that we had 153 percent increase in our economic activity. That is a major thing.

In my introduction I mentioned this thing that you did that no one can figure out how you did it, involved a 100-year dispute between not just the State of Oklahoma and the City of Oklahoma City and the Choctaws and the Chickasaws. Do you want to share with us how you did that? You know, they tried for 100 years, and you came in and did it in less than 100 days.

Mr. Pruitt. Less than eight months into my administration as attorney general, we were sued as a State by the Choctaw and Chickasaw Nation with respect to water in 17 counties in Southeast Oklahoma. Many of you, if you know anything about water litigation, it generally

takes decades to resolve water litigation. We were able to go from August of 2011 until 2016 and negotiate an historic water rights agreement with those two Nations to provide certainty to those that are regulated, to provide a voice to the Tribes with respect to water allocation and water quality; and the State has maintained its position as arbiter of how those permits are allocated, as well.

So it was a partnership. It was the way things ought to work when litigation occurs. Sitting across the table from individuals and working together to try to solve the problem. And, Senator, we were able to achieve that in record time, and I am very proud of what we did as a State and as the Chickasaw and Choctaw Nation together.

Senator Inhofe. Yes, that is good. I think, also, you got them all in one room, didn't you?

Mr. Pruitt. Yes, sir.

Senator Inhofe. That works.

You have been criticized by some of the people talking about some of your environmental record. I would like to be sure that people are aware of a number of people, I have some here that I will submit for the record, but a guy named Ed Fite is the vice president of scenic rivers and water quality of the GRDA. This is a person who has really been at the forefront of our scenic rivers program; he praises you, saying, "I found that General Pruitt has always done right by our scenic rivers. He has done everything constructive that he told me that he would do."

The same thing comes from the North Carolina Department of Environmental Quality, Donald van der Vaart. He wrote, "Pruitt is

committed to clean air and clean water, and to restoring the EPA to its original mission of enforcing the environmental laws written by Congress."

J.D. Strong, head of the Water Resources Board, said, "Attorney General Pruitt" and he goes on and praises you.

I would like to know why it is you have become such a hero of the scenic river people.

Mr. Pruitt. Well, Senator, as you know, Oklahoma has endured many decades of dispute with respect to phosphorous levels in the scenic Illinois River. In fact, there has been litigation that has been a part of that dispute for some time. There was actually a memorandum of understanding that Arkansas and Oklahoma entered into around 2002, 2003, and that memorandum expired during my time as attorney general. There were many in government at the time that said we should just wait on the EPA to come in and address the issue, and I chose a different path. I actually reached out to my Democratic colleague, Dustin McDaniel, the attorney general of the State of Arkansas, and we were able to negotiate an agreement that had phosphorous levels set at .037 scientifically driven and enforced on both sides of the border for the first time in history.

So I think Mr. Fite is actually the head of the Scenic Illinois Rivers Commission. He has been center on this issue for a number of years, and I think his good word relates to the work that we did in my office, working with Dustin McDaniel, to achieve that good outcome.

Senator Inhofe. I know my time has expired, but, Mr. Chairman, I would like to enter into the record at this point in the record the statement by the DEQ that I referred to.

Senator Barrasso. Without objection, hearing none.

[The referenced information follows:]

Senator Barrasso. Senator Whitehouse.

Senator Whitehouse. Thank you, Chairman.

Welcome to the Committee, Mr. Pruitt. As we discussed when you and I met, the oceans off of our ocean State are warming due to fossil fuel-driven climate change. It is crashing our fisheries like lobster and winter flounder, and making earning a living harder for our fishermen. I see nothing in your career to give those fishermen any confidence that you will care one bit for their well-being, and not just the well-being of the fossil fuel industry.

In a process that you could replicate in an Oklahoma high school science lab, excess carbon dioxide from fossil fuel emissions is turning our seas more acid. Rhode Island shell fishermen and shell fish growers are concerned. In my colleague, Senator Merkley's State, they have already had oysters spat wiped out for businesses by acidified waters. I see nothing in your career that you would care at all about our Rhode Island shell fishermen.

In Rhode Island, we have bad air days, and because of EPA's work there are fewer and fewer. A bad air day is a day when people driving into work hear on the radio that ozone from out-of-State smoke stacks has made the air in Rhode Island dangerous and that infants and the elderly and people with breathing difficulties should stay home on an otherwise beautiful day. Because those smoke stacks are out-of-State, we need EPA to protect us, and I see nothing in your record that would give a mom taking her child to the hospital for an asthma attack any comfort that you would take the slightest interest in her.

And your passion for devolving power down to States doesn't help us, because our State regulators can't do anything about any of those problems; they all come from out-of-State sources. In this respect we are very like Delaware.

One of the things I would like to ask you about here is the connection between you and some of these fossil fuel companies. These are some of the companies that have supported you. These are some of the political organizations that you have raised money for. You have raised money for them for Pruitt for Attorney General, correct?

Mr. Pruitt. Yes, sir. I had a campaign committee for that, yes.

Senator Whitehouse. And Devon Energy, Koch Industries, Exxon-Mobil have all maxed out to that account.

Mr. Pruitt. I am not aware if they maxed out or not, Senator, but I am sure they have given to that committee.

Senator Whitehouse. Oklahoma Strong PAC is your leadership pack?

Mr. Pruitt. It was, yes.

Senator Whitehouse. It was? And, similarly, they gave money, they maxed out to that organization as well, which you controlled?

Mr. Pruitt. I am unsure about that, Senator.

Senator Whitehouse. Okay. But they contributed to it.

Mr. Pruitt. I am even unsure about that as well. I haven't looked at that.

Senator Whitehouse. You closed your super PAC, Liberty 2.0, but that took fossil fuel contributions as well, correct?

Mr. Pruitt. That particular entity has been closed, yes.

Senator Whitehouse. Now, you helped to raise money for the Republican Attorney Generals Association. While you were a member of its executive committee, they received $530,000 from Koch Industries, $350,000 from Murray Energy, $160,000 from Exxon-Mobil, and $125,000 from Devon Energy, the company whose letter you transposed onto your letterhead and sent as an Oklahoma attorney general document.

Did you solicit, in your role at the Republican Attorney Generals Association, any of that funding?

Mr. Pruitt. I am unable to confirm if they gave those numbers, Senator, those amounts. There were several --

Senator Whitehouse. Did you solicit funding from them in your role at the Republican Attorney Generals Association?

Mr. Pruitt. I attended fundraising events as an attorney general, along with other attorneys general with respect to the RAGA.

Senator Whitehouse. And did you solicit? Did you ask them for money for RAGA?

Mr. Pruitt. As I indicated, I attended fundraising events with respect to this.

Senator Whitehouse. But that is different. Attending fundraising is one thing. Asking them is my question. Did you ask them for money?

Mr. Pruitt. Specifically, you would have to ask about certain entities. I don't know. You have an entire list.

Senator Whitehouse. Those are the entities: Koch Industries, Murray Energy, Exxon-Mobil, Devon Energy.

Mr. Pruitt. I did not ask of Koch or -- what were the other ones?

Senator Whitehouse. Murray Energy, Exxon-Mobil, Devon Energy.

Mr. Pruitt. I have not asked them for money on behalf of RAGA.

Senator Whitehouse. You said to the Chairman that there is nothing that might place you in a conflict of interest that you have not disclosed. Yet, you founded the Rule of Law Defense Fund, which is a dark money operation that supports the Republican Attorney Generals Association, and you have not disclosed any of your solicitations for that entity, nor have you disclosed what money was raised pursuant to those solicitations. This is an organization that appears to have a million dollar a year budget, so very substantial funds have been solicited. I believe you were its chairman. Will you disclose your role in soliciting money and in receiving money for the Rule of Law Defense Fund pursuant to your solicitations?

Mr. Pruitt. Senator, a point of clarification. I actually did not start nor initiate the Rule of Law Defense Fund. That is something I did not do.

Senator Whitehouse. You led it?

Mr. Pruitt. I have been an officer of that organization for 2016.

Senator Whitehouse. Okay, an officer of it.

Mr. Pruitt. There is an executive staff, fundraisers that actually carry out the functions of that organization. There are many attorneys general that serve on that board. It is not a decision of

one; it is a decision of those that are empowered to make those decisions.

Senator Whitehouse. But you haven't told us anything about that. You haven't told us --

Mr. Pruitt. I have no access --

Senator Whitehouse. -- who you asked money from, --

Mr. Pruitt. That is a file that --

Senator Whitehouse. -- you haven't told us what they gave, if you asked them. It is a complete black hole into which at least a million dollars goes, and, based on your record of fundraising, it appears that a great deal of your fundraising comes from these organizations who are in the energy sector and devoted to fighting climate change.

Mr. Pruitt. Some of whom I have actually sued, as well, Senator. But with respect to the Rule of Law --

Senator Whitehouse. Name one you have sued up there.

Mr. Pruitt. Exxon-Mobil.

Senator Whitehouse. Really?

Mr. Pruitt. Yes.

Senator Whitehouse. My time has expired. We will pursue this in further questions.

Mr. Pruitt. We are involved in, as I indicated, I think, in your office, we are involved in, and Senator Inhofe mentioned it in his comments, a situation in Oklahoma where multiple oil and gas companies, ConocoPhillips and others, have defrauded the State in cleanup with respect to spills that have occurred, and Exxon-Mobil --

Senator Whitehouse. That is a qui tam fraud case; it has nothing to do with the environment.

Mr. Pruitt. Senator, --

Senator Barrasso. I thought you were going to resolve that for the second round.

Senator Whitehouse. I am sorry, he was coming back to me, so I was responding.

Senator Barrasso. Thank you.

Before heading to Senator Capito, there are two articles I will be introducing into the record. One from The Wall Street Journal in September, headlined "Hillary Clinton Raises More Than Donald Trump from Oil Industry." The second article that I will be introducing for the record is from Politico from December 27th, by Elana Schor, who quotes America Rising Executive Director Brian Rogers: "This is a partisan fishing expedition by six liberal Democrats who, combined, have taken more than $1.2 million from far left environmentalist groups dead set against any reforms to an out-of-control EPA."

[The referenced information follows:]

Senator Barrasso. Senator Capito.

Senator Capito. Thank you, Mr. Chairman.

And thank you, Attorney General Pruitt, for being here, for your willingness to throw your hat in the ring to serve. I would like to quote the Ranking Member when he says it is hard work, because it is. The EPA is hard work.

But one of the things you said really struck me, and I believe that the rule of law does matter, and I am heartened by your passion for that.

The regulatory overreach of the EPA has contributed to economic devastation in my State of West Virginia and my region. Data from the Mine Safety and Health Administration shows that 60,000 coal jobs have been lost between 2011 and 2016. Thousands of these were in West Virginia. We are in a desperate situation in our State right now because of this.

We had a field hearing in Beckley, West Virginia, where our WVU economist, John Deskins, said that the coal industry downturn had resulted in six of our southern West Virginia counties being in a great depression.

For the past eight years, the EPA has given no indication at all that it cares about the economic impact of its policies, even though Congress has said very clearly in the Clean Air Act and other environmental statutes that we expect jobs and economic factors to be taken into account. That is part of the law. In October, a federal court held that the EPA had failed to evaluate the job impacts of the

EPA Clean Air Act as required by 321(a) of that Act, and ordered the EPA to submit a schedule for conducting the required jobs analysis.

Incredibly, the EPA told the court it would take two years -- this was just in the last several weeks -- it would take two years just to come up with a plan on how to do the analysis, which, in my view, if that is part of the law that EPA is supposed to be following, they should already have the protocols set up to do an effective and accurate job analysis.

So the court responded like this: "This response is wholly inefficient, unacceptable, and unnecessary. It evidences the continued hostility on the part of the EPA to the acceptance of the mission established by Congress."

So I would like to ask you to commit to me to ensure that the EPA will follow the law it is charged with implementing and do those ongoing evaluation of job losses and economic shifts due to the requirements of the Act as required by the law.

Mr. Pruitt. Senator, as you indicated, I really believe that it is important that rule of law is adhered to because it inspires confidence in those that are regulated. I think oftentimes those that are regulated don't know what is expected of them. They look at a statute, they see the requirements of the statute, and then those that are regulating act in a way that is not consistent with that framework, so they don't know what is expected of them; and that causes uncertainty and, I think, paralysis to a certain degree. So rule of law is something that we should take seriously. It has been at the heart of the litigation that we have initiated as a State.

A lot of times these cases, as we were talking earlier with Senator Carper, there is a policy or a political kind of attention that is drawn to it, but really is about process and rule of law, and making sure that the framework that this body, Congress, has established is respected and enforced. So I appreciate your comments.

Senator Capito. Well, in looking for the balance, we need to have at least a correct analysis of what the economic implications are of regulations.

It is so important, critically important that we enforce our environmental laws, and to keep our air clean and get it cleaner and protect our waters.

In January of 2014, a storage tank in Charleston, West Virginia was corrupted and went into the river. It was right by the water flow of the major water source in my community. Three hundred thousand people had to do without water for several weeks. It caused a lot of angst economically to small businesses. Imagine a restaurant not being able to use water or you can't wash your clothes. You couldn't do anything with the water.

But also, and I share this concern, concern about the health and the long-range implications of what has happened. Several people, multiple individuals and Freedom Industries have pled guilty to environmental crimes in federal court, which I am very pleased about.

So let's talk about TSCA, because in TSCA I was able to support a provision that would say that if you are storing in close proximity to drinking water, you have to take that into consideration when you are reviewing potentially hazardous chemicals.

Can we count on you to work with this Committee to make sure that this bipartisan TSCA reform bill is fully implemented, and efficiently and fully?

Mr. Pruitt. Absolutely, Senator. In fact, I would commend the work of this Committee, with Senator Inhofe's leadership, in passing that update to the TSCA legislation. For the first time in history, as you know, the EPA has the ability to order testing to address chemicals that are going to be entered into the stream of commerce, and that is a very big substantive change that exists. There are many deadlines --

Senator Capito. And I would also add that in TSCA -- excuse me just a minute because I am running out of time. In TSCA we actually expanded the EPA's reach. So when you are asked if you are wanting to get rid of the EPA or it doesn't have a value, I voted to expand that reach of EPA to make sure that I have clean water and that if a spill happens in a community around this Country, what has happened in Flint, Michigan, doesn't have the far-reaching implications that it does.

Thank you very much.

Mr. Pruitt. Thank you, Senator.

Senator Barrasso. Senator Cardin.

Senator Cardin. Thank you, Mr. Chairman.

Mr. Pruitt, welcome to the Committee. Thank you for your willingness to serve our Country.

I want to talk about the Chesapeake Bay Program. We talked about that in my office. I explained to you, and I will do it very quickly,

that this is a program that was developed at the State level with the States that are in the watershed, including Delaware, with my colleague, Senator Carper. It is a State that the locals have determined how it is best to reach their pollution targets in order to help preserve the Chesapeake Bay. It is the largest estuary in the northern hemisphere. It is critically important; it is complicated. It doesn't flush itself, as many bodies of water do; it has a reduction of oyster crops. There are so many problems. All the stakeholders have gotten together; they worked out a plan. The Federal Government is part of that plan. It is enforced through the TMDL program and it has been agreed to by the local governments.

It was challenged, the TMDLs, including you joined that lawsuit. The Supreme Court refused to overturn the Court of Appeals supporting the use of the TMDLs.

If you are confirmed, will you support the Federal role in the Chesapeake Bay Program as envisioned by the partners and stakeholders, enforcing the TMDLs, if necessary?

Mr. Pruitt. Yes, Senator. And as I indicated in your office, the time that we had together, I really commend the six States that joined together to address the Chesapeake Bay and to try to set levels for both point source and non-point source type of discharge into the Chesapeake Bay. There were some concerns about the precedent, the role that EPA was playing initially, but through that litigation the EPA has acknowledged that their role is more informational. And there was concern in Oklahoma about the Mississippi River Basin and the

precedent that was set in that matter, and that is what spawned our litigation.

But I really want to emphasize to you that process represents what should occur, for States to join together and enter into an agreement to address water quality issues and then involve the EPA to serve the role it is supposed to serve is something that should be commended and celebrated. And as it relates to enforcing that TMDL, I can commit to you that in fact I will do so.

Senator Cardin. Part of the Federal Government's partnership is to provide resources. There are several programs that fund initiatives within the Chesapeake Bay Watershed; probably the largest is the State Revolving Funds dealing with wastewater. Will you support the Federal Government's partnership through funding these programs that are critically important to make the advancements in the Chesapeake Bay Watershed?

Mr. Pruitt. Yes, Senator. I believe that the grant-making role of the EPA, as we talked about in your office, is very important to States across this Country, whether it is the revolving funds or the WIFIA portions of our statutes. But grant-making, in general, is very important, and I will commit to you in that regard that I would do so with respect to the Chesapeake Bay.

Senator Cardin. I want to continue on clean water for one moment. We have had significant problems with safe drinking water and clean water. Let me ask you a preliminary question. Do you believe there is any safe level of lead that can be taken into the human body, particularly a young person?

Mr. Pruitt. Senator, that is something I have not reviewed, nor know about. I would be very concerned about any level of lead going into the drinking water or, obviously, human consumption, but I have not looked at the scientific research on that.

Senator Cardin. The Clean Water Act provides for Federal guidance as to acceptable clean water. It is enforced by the States. So my question to you in regards to clean water is what steps will you take to make sure that our children are safe. We saw in Flint, Michigan a tragedy occur. Where do you think the Federal Government needs to strengthen its regulatory roles to make sure that our children are safe from lead?

Mr. Pruitt. Well, I think with Flint, Michigan it is an example of delay in response by the EPA. There should have been more done on corrosion control programs with the Flint, Michigan system. As you know, under the Clean Water Act and the Safe Drinking Water Act, if there is an emergency situation, the EPA can enter an emergency order to address those kinds of concerns. I think there should have been a more fast response, a more rapid response to Flint, Michigan.

I think with respect to water quality it is infrastructure. Water infrastructure is important. And, as you indicated, the States play a very vital role in that process, and there needs to be more cooperation between the EPA and the States to ensure water quality is protected.

Senator Cardin. Just so I understand, you have participated in several lawsuits against the EPA's involvement, saying that the locals should have the responsibility. If you are confirmed, will you

support Federal enforcement, particularly in multi-State issues, where the only way we can get enforcement is at the Federal level?

Mr. Pruitt. I believe that is a vital role of the EPA. As I indicated in your office, with air quality, water quality, issues that cross State line, there is an enforcement mechanism that is important, and would seek to do so if confirmed as EPA Administrator.

Senator Cardin. Thank you.

Senator Barrasso. Thank you, Senator Cardin.

Senator Fischer.

Senator Fischer. Thank you, Mr. Chairman.

And thank you, Mr. Pruitt, for being here today, but also for accepting the nomination. It is a service and a sacrifice not just for you, but for your family, as well, to step forward to serve this Country. So thank you, sir, for being willing to do that.

Mr. Pruitt. Thank you, Senator.

Senator Fischer. For your testimony, I do thank you, and I would like to, first of all, let you know that Nebraskans have been really affected by the EPA in many instances, and I will give you some examples of that.

Nebraska's public power utilities are grappling with how they could ever comply with the EPA's carbon emission reduction mandates. The City of Omaha is struggling with the Agency's expensive CSO mandate and drinking water affordability. Nebraska farmers are waiting on new crop technology products that are stuck in a broken regulatory process. Our biofuel investors and producers are desperate for certainty under the RFS. Homebuilders, transportation

stakeholders, and local county officials are concerned about the jurisdictional expansion to control our State's water resources. Communities and small business owners fear that the EPA's ozone mandate will stunt potential economic development and growth in our State. As a result of the activist role the EPA has played for the past eight years, families are concerned about the futures of their livelihood.

We all want clean air and we all want clean water. That is one point that I know each and every person here agrees on. But with the EPA's tremendous impact on Americans' lives each and every day, it is important that the Agency be open, transparent, and answerable for its actions. Given these concerns, along with the many others that have been and will continue to be discussed today, what steps will you take as the EPA Administrator to provide relief for American families that are faced truly with an onslaught of EPA rules?

Mr. Pruitt. Senator, you mentioned open, transparent rulemaking. There are concerns that have been expressed recently with respect to regulation through litigation, where groups initiate litigation against the EPA and the United States Government, and set environmental policy through something called a sue and settle process. I think this body, as well as the U.S. House, has looked at those kinds of issues. And when we talk about open transparency, there is a reason why the Administrative Procedures Act exists. It is intended to provide notice to those that are going to be impacted with rules to give them the opportunity to offer comment and to inform the regulators on the impact of those rules. And then it is the

obligation of the regulator to take those things into consideration in finalizing rules; otherwise, they act in an arbitrary and capricious way.

So it is very important that that process be adhered to, to give voice to all Americans in balancing the environmental objectives we have, but also the economic harm that results. And the Supreme Court has spoken about that rather consistently of late, and I would seek to lead the EPA in such a way to ensure that openness and transparency.

Senator Fischer. You know, a couple weeks ago I held a very good conversation about our shared vision for the EPA, to bring common sense and accountability back to that Agency, and I think that is going to go a long way in restoring confidence in the Agency by the American people.

One issue we did discuss was the Renewable Fuel Standard and its importance to my home State of Nebraska. We are the largest ethanol producer west of the Missouri River. Our neighbors to the east, Senator Ernst's home State, they do lead the Nation in ethanol production. So honoring the congressionally-mandated timelines and the volume requirements that are critical from an investment point of view and also from a planning perspective, I think that this is especially relevant, and especially during the current farm crisis that we are seeing and the negative impact on people in agriculture all across this Nation.

In our meeting you did express your commitment to me to honor the law and you echoed President-elect Trump's support for the statute

itself and a strong RVO. For the record, can you please once again express your commitment to uphold the congressional intent of the RFS?

Mr. Pruitt. Yes, Senator, and you said it well, to honor the intent, and the expression of the Renewable Fuel Standard statute is very, very important. It is not the job of the Administrator of the EPA to do anything other than administer the program according to the intent of Congress, and I commit to you to do so.

Senator Fischer. And you also --

Mr. Pruitt. And I would say this. The waivers that routinely are offered by the Administrator, recently another waiver was offered, it should be used judiciously. There is a reason why Congress put in that statute those statutory objectives. The market has changed since 2005, and the waiver authority that has been provided by this body is important, but that waiver authority should be used judiciously, and the act should be complied with and enforced consistent with the will of Congress.

Senator Fischer. Thank you, sir. And I would ask that you also tell us publicly what you told us, that you will honor the timelines on the volume levels that are mandated by Congress.

Mr. Pruitt. Yes, Senator.

Senator Fischer. Thank you very much.

Senator Barrasso. Thank you, Senator Fischer.

Senator Merkley.

Senator Merkley. Thank you, Mr. Chairman.

Over a number of years, information started pouring into EPA that the estimate of the amount of fugitive methane escaping in gas and oil

drilling had been deeply underestimated. In 2011, the EPA put out its best estimates based on the information that was being presented. And this is relevant because methane is a global warming gas, more potent than CO2.

Gas companies didn't like this because, well, it presented a vision of natural gas being more damaging environmentally than folks had previously understood. Devon Energy is one of the groups that sought to cast doubt on this scientific information, and they came to you to be their spokesperson; and they asked will you be our mouthpiece in casting doubt and send a letter we have drafted to the EPA, and you sent that letter.

And I just want to ask, first, are you aware that methane is approximately 30 times more potent than carbon dioxide as a global warming gas?

Mr. Pruitt. I am, Senator.

Senator Merkley. Thank you.

Mr. Pruitt. I think the impact on human --

Senator Merkley. That is the answer. Yes. Thank you. It is a yes or no question.

And on a 1 to 10 scale, how concerned are you about the impacts of fugitive methane in driving global warming?

Mr. Pruitt. Methane, as you indicated --

Senator Merkley. One to 10 scale. Highly, 10, very concerned, or 1, not so concerned?

Mr. Pruitt. The quantities of methane in the atmosphere compared to CO2 is less, but it is far more potent, and it is --

Senator Merkley. Are you concerned? I am asking about your level of concern.

Mr. Pruitt. Yes. Yes.

Senator Merkley. Highly concerned?

Mr. Pruitt. I am concerned.

Senator Merkley. Thank you. Do you acknowledge sending this letter to the EPA in October 2011?

Mr. Pruitt. Senator, if that is a letter that is on my letterhead that was sent to the EPA, yes, with respect to the issue.

Senator Merkley. Do you acknowledge that 97 percent of the words in that letter came directly from Devon Energy?

Mr. Pruitt. I have not looked at the percentage, Senator.

Senator Merkley. The statement that has been analyzed many times is that all of the 1,016 words, except for 37 words, were written directly by Devon Energy.

Mr. Pruitt. Senator, that was a step that was taken as attorney general representing the interest of our State. Over 25 percent of --

Senator Merkley. I didn't ask that question. I was just asking if you copied the letter virtually word for word. You have acknowledged that, yes, it is in the record. People can count it. It is correct.

All right, so a public office is about serving the public. There is a public concern over the impact of methane on global warming. There is scientific research showing that it is far more devastating than anticipated and far more is leaking. But you used your office as a direct extension of an oil company, rather than a direct extension

of the interests of the public health of the people of Oklahoma. Do you acknowledge that you presented a private oil company's position rather than a position developed by the people of Oklahoma?

Mr. Pruitt. Senator, with respect, I disagree. The efforts that I took as attorney general were representing the interests of the State of Oklahoma.

Senator Merkley. Earlier you said you --

Mr. Pruitt. And there was a concern about --

Senator Merkley. No, no, excuse me. I am asking the questions. You said earlier you listen to everyone. In drafting this letter, you took an oil company's position and then, without consulting people who had diverse views about the impact, you sent it off. How can you present that as representing the people of Oklahoma when you simply only consulted an oil company to push its own point of view for its private profit?

Mr. Pruitt. Senator, there is an obligation the EPA has to follow processes as established by this body. The cost-benefit analysis under Section 112 is something that they have to engage in. There was a concern about the overestimated percentages that the EPA put in the record; it was a record-based challenge. That was the expression of the letter to the EPA, and it was representing the interests of an industry in the State of Oklahoma; not a company, an industry.

Senator Merkley. Thank you. But my question was what other groups, environmental groups or other groups, did you consult so that

you had that full perspective before representing simply a for-profit oil company using your official office and your official letterhead?

Mr. Pruitt. I consulted with other environmental officials in Oklahoma that regulate that industry and learned from them with respect to the concerns about the estimates that were provided by the EPA.

Senator Merkley. Can you provide this Committee with information showing who you consulted in representing this letter specifically for Devon Energy? Because the information that is in the public realm only shows that they simply sent you a letter, asked you to send it, and you sent it without questions.

Mr. Pruitt. We have seven or so individuals in our office that are involved in these kinds of issues, and we will collect the information they have and provide it to this body pursuant to the Chairman's direction.

Senator Merkley. Your staff expanded substantially while you were in charge, to 251 staff members. Why do you need an outside oil company to draft a letter when you have 250 people working for you?

Mr. Pruitt. Senator, as I have indicated, that was an effort that was protecting the State's interest in making sure that we made the voices of all Oklahomans heard on a very important industry to our State.

Senator Merkley. You said all heard, but you only sent it on behalf of a single voice, the oil company. Thank you.

Senator Barrasso. I still have some time remaining from my questioning. Is there anything you would like to add that you haven't

felt you have had a chance in terms of answering fully some of the areas of the questioning?

Mr. Pruitt. I think, Senator, the clarification that the letter that was sent to the EPA was not sent on behalf of any one company. This was not particular to Devon Energy, not particular to Chesapeake, not particular to other companies in our State; it was particular to an industry. The State of Oklahoma has an oil and gas industry that is vibrant to our State, as you might imagine, just like many of you have industry in your State. There was concern expressed by that industry, many folks in that industry, about the overestimating that occurred with that methane rule. That was the communication to the EPA. It was a position of the State, not the position of any one company.

Senator Barrasso. Thank you.

Senator Moran.

Senator Moran. Chairman, thank you very much.

General Pruitt, welcome to the Committee. Thank you for your public service. I am going to see if I can get through three areas in the five minutes that I have.

First of all, WOTUS, Waters of the United States. Despite there being an injunction against the enforcement of the WOTUS rule, I am told that EPA Region 7, the region in which Kansas is part, those regional inspectors have increased their inspection of smaller animal feeding operations. Unlike many States, Kansas has a well-established State permit system for small facilities, as well as the delegated authority under the Clean Water Act. The EPA, rather than cooperating

with the State agency, the EPA is engaged in its own inspections and its own enforcement on these small facilities, often conflicting with State permitting and the enforcement process.

In these actions, the EPA has claimed jurisdiction over features like grass waterways, culverts under county roads unconnected to the feeding operation and not situated in or near any body of water.

General Pruitt, what would your direction be to the EPA staff, to Region 7 and others, in regard to their actions enforcing WOTUS while an injunction is in place?

Mr. Pruitt. Well, Senator, as you indicated, and I do want to acknowledge the same concerns have been expressed by those individuals in Oklahoma in different groups with respect to the WOTUS definition that has been offered by the EPA that is subject to a 31-State challenge that was consolidated there before the 6th Circuit, and, as you indicated, there has been a stay of enforcement against that particular rule. The Supreme Court actually, last Friday, took up a matter of jurisdiction on that case, so that adds some complexity to this.

But I think the role of the EPA, prospectively, is to seek to provide clarity on what the true definition, what the best definition is with respect to Waters of the United States. As you know, there is much flexibility and discretion there given to the EPA in a series of cases that lead up to the Rapanos decision that haven't provided a tremendous amount of clarity. The best thing the EPA can do going forward is to reestablish that clarity so that States and individuals know what is expected of them in compliance.

Senator Moran. General, thank you. I don't think I need to remind you, in particular, about the role that States play in clean water. But I would take a moment to highlight something that is often, I think, forgotten in the regulatory world of water, water quality, is the Department of Agriculture, the Natural Resource Conservation Service, in which landowners are assisted through the Department of Agriculture in improving water quality and water quantity in a very partnership-oriented local effort that is significantly different than the tremendous reach from the EPA in Washington, D.C. as compared to the local efforts by landowners themselves to work with USDA to solve problems.

Let me move to my second question. It revolves the Flint Hills. That is a Native grassland in our State. The owners of those grasslands, these are thousands of acres of grass, they burn the prairie in the early spring for purposes of regeneration of that grass. It is learned from the Indians that lightning used to be the method by which that grassland burned. Less so now with the settlement that have occurred of our Country. And as a result of that annual burning, that is ecologically desirable, there is times in which a city, even one of our own, Wichita, for example, is in non-attainment under the Clean Air Act. And I raise this issue to you in asking that you work, if you are confirmed, with the State of Kansas in our local efforts to manage the burning of the national grasslands in a way that is advantageous to wildlife habitat, at the same time done in a timely fashion, at appropriate times, in appropriate

amounts, that preserves the air quality; but, again, not a heavy-handed approach that one-size solution or a ban fits the circumstance.

Mr. Pruitt. If confirmed, Senator, I look forward to working with you on that issue.

Senator Moran. I thank you for that.

Finally, I want to highlight a small town in Kansas named Pretty Prairie, a typical name or a perfect name for a town in our State. Pretty Prairie, Kansas, has a population of about 700 people. For several decades, because of the high nitrates in the city's water levels -- I didn't say that very well. Because of high levels of nitrate in the city water system, the city has provided free bottled water to its citizens. And my question to you is now the EPA is disallowing that practice and requiring the city to spend approximately $2.4 million and raise the rates of our residents of that community by $80 a month while the community seemingly is satisfied with the solution of the city providing an alternative to the expense of a new water treatment plant.

I ask this question, again, as an example of where a rigid decision, as compared to a community-based decision, seems to prevail at the EPA, and would give you an opportunity to confirm to me what I hope you would say is that you will work with communities. You, as an Oklahoman, and, me as a Kansan, and many of the members of this Committee represent lots of communities in which the population is insufficient to be able to pay for the costs of water or sewer treatment. We need financial resources to accomplish that, but we also need common sense solutions to the problem.

Mr. Pruitt. Senator, I look forward to working with you on that issue as well as the other. There was a saying in the environmental space: national standards, neighborhood solutions. And I think it is important for the EPA Administrator, those in Washington, as I said in my opening statement, to listen and learn from those, from you with respect to the needs of your community and your State, and collaborate with you and the local officials to achieve good outcomes.

Senator Moran. I look forward to educating you on behalf of Kansans.

Senator Barrasso. Thank you, Senator Moran.

Senator Booker.

Senator Booker. Good morning, Mr. Pruitt.

Mr. Pruitt. Good morning, Senator Booker.

Senator Booker. I have a letter that I read that you sent to the Committee last year, and you said that the Oklahoma Attorney General, you said, "I am responsible for protecting the welfare of Oklahoma citizens." I assume that is still correct and you believe that.

Mr. Pruitt. Yes, Senator.

Senator Booker. And during the past six years in pursuit of that, if you look at the record of the lawsuits you filed against the EPA, you have joined or filed 14 lawsuits against the EPA challenging clean air and clean water rules, yes?

Mr. Pruitt. We have been involved in multiple pieces of litigation, Senator.

Senator Booker. Yes, but I am looking at specifically 14, and, Mr. Chairman, I would like to put those 14 lawsuits into the record,

of where you specifically challenged the EPA on air quality. And let me just go through some of those.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Booker. Thank you, sir.

To reflect your recollection, you filed two lawsuits challenging the EPA Mercury and Air Toxics Standard; you filed a lawsuit challenging the EPA's 2015 National Ambient Air Quality Standards for ozone; you filed four lawsuits challenging the EPA's Clean Power Plan; you have sued to challenge the EPA's 111(b) standards for carbon dioxide emissions from new power plants; and you also sued to challenge the EPA's Federal implementation plan for Oklahoma under the Regional Haze Rule.

You are familiar with those, I imagine?

Mr. Pruitt. Yes, Senator.

Senator Booker. And you filed a lawsuit challenging the EPA Cross-State Air Pollution Rule, something in New Jersey we are very concerned with. Are you aware that that rule, which you lost in that suit, scientists estimate that that alone prevents 400,000 asthma attacks nationally each year? Are you aware of those estimations?

Mr. Pruitt. Yes, Your Honor. Yes, Senator. May I offer --

Senator Booker. I appreciate your promotion to judge.

[Laughter.]

Senator Booker. Let me continue, Mr. Pruitt. I don't have much time.

Mr. Pruitt. Okay.

Senator Booker. So each of these lawsuits that I just went through and that we analyzed, all of them challenge attempts by the EPA to reduce air pollution. In all of them except one you filed those lawsuits joining with polluting companies that were also suing

the EPA. And, so, in addition to filing those lawsuits with some of the polluting companies, or at least one that has now been specifically mentioned by two of my colleagues, you used substantial portions of the letters from those companies, put them on your official attorney general letterhead; and what was sort of surprising to me is that when you have been asked about this in the public, you basically represented that that is actually called representative government in my view of the world. Your testimony here says that you were representing industry; you were representing the polluters.

So with all of these lawsuits you filed, and with all of these letters like this one, written to the EPA on behalf of the industries that are causing the pollution, it seems clear to me that obviously the fact pattern on representing polluters is clear, that you worked very hard on behalf of these industries that have their profits externalized, negative externalities are their pollution.

So I just have a question for you specifically about the children of Oklahoma. Do you know how many kids in Oklahoma, roughly, have asthma?

Mr. Pruitt. I do not, Senator.

Senator Booker. Well, according to data published by the very non-partisan group, the American Lung Association, more than 111,000 children in Oklahoma, which is more than 10 percent, more than 1 in 10 of all the kids in Oklahoma, have asthma. That is one of the highest asthma rates in the entire United States of America.

Now, this is a crisis, similar data, for where I was mayor, and I can tell you firsthand the devastating impacts that asthma has on

children and families; affecting their economic well-being, parents who have to watch their children struggle to breathe, people that have to miss work, rushing their kids to the hospital. One in 10 kids having a disease, missing school, is a significant problem.

So if you have been writing letters on behalf of polluting industries, I want to ask you how many letters did you write to the EPA about this health crisis? If this is representative government, did you represent those children? I want to know what actions you have taken in the past six years in your capacity as protector of the welfare of Oklahoma citizens to protect the welfare of those 111,000 children. Did you ever let any of them write letters on your letterhead to the EPA, and did you even file one lawsuit, one lawsuit on behalf of those kids to reduce the air pollution in your State and help them to have a healthy life?

Mr. Pruitt. Senator, I have actually provided a list of cases to the Chairman with respect to enforcement steps we have taken in multiple pieces of environmental litigation. But let me say to you, with respect to cross-State pollution and some of the cases you referred to, the State has to have an interest before it can bring those cases, as you know. You can't just bring a lawsuit if you don't have standing, if there has not been some injury to the State of Oklahoma. In each of those cases --

Senator Booker. My time has expired, but if I could just say injury, clearly asthma is triggered and caused by air pollutants. Clearly there is an air pollution problem. And the fact that you have not brought suits in any of the levels which you have represented the

industries that are causing the pollution is really problematic when you are going to sit in a position that is nationally supposed to be affecting this reality. And asthma, in our Country, is the number one reason why children in America, health reason why children in America miss school.

Mr. Chairman, thank you.

Senator Barrasso. Thank you very much.

I submit for the record first an article from the Tulsa World from Scott Thompson. The headline is "EPA will be in good hands with Scott Pruitt." Scott Thompson is the Executive Director of the Oklahoma Department of Environmental Quality. Talks about the excellent work done and ends with a quote: "EPA will be in good hands with Scott Pruitt."

I would point out that between 2004 and 2008, and we will submit this for the record, the most recent employers of Obama Administration senior EPA officials sue the EPA with 12 lawsuits, at least, in the time when George W. Bush was in his second term, including Lisa Jackson, Assistant Administrator Cynthia Giles, Gina McCarthy, and Stephen Owens. They were petitioners and plaintiffs filing suits against the EPA.

And, finally, I will submit an editorial from the Tulsa World. "Over the past six years, Pruitt's legal team has consistently shown deference to the legal expertise and professionals at DEQ," the Department of Environmental Quality. This was written by the executive director. More importantly, he said, "I cannot recall an

instance where they did not allow us to pursue legal action when deemed necessary."

And then, finally, from Mike Turpen, who is the former Chairman of the Oklahoma Democratic Party, says, "The job of the EPA is the essential mission of guarantying clean air and clean water. Pruitt has never compromised those critical components of a healthy population with any actions he has taken."

[The referenced information follows:]

Senator Barrasso. Senator Rounds.

Senator Rounds. Thank you, Mr. Chairman.

Welcome, Attorney General Pruitt.

Mr. Pruitt. Thank you, Senator Rounds.

Senator Rounds. I notice that you didn't have the opportunity in the time allotted for Senator Booker's question. Would you care to finish your response with regard to the role that the States have in their ability to either participate in a suit and whether or not they have standing? Would you like to finish your thoughts on that?

Mr. Pruitt. Thank you, Senator.

Senator, as I indicated in your office, when we spent time together, the enforcement role in the State of Oklahoma is different than other States. With respect to the Department of Environmental Quality, the Oklahoma Water Resources Board, we had multiple agencies, Department of Agriculture, that have frontline enforcement authority with respect to our environmental laws.

The role that we play in my office largely is a general counsel role. We provide guidance and direction to those agencies. There were many cases we have initiated in conjunction with them, but mainly those agencies enforce actions at their level. Many of those agencies have dozens of attorneys on their staff and a general counsel in their own right bringing those enforcement actions.

You mentioned several of the cases. From MATS to Cross-State Air Pollution and the rest. I believe the Cross-State Air Pollution Rule is a very important statute that EPA should enforce. I believe that if there are downwind States that are contributing to non-attainment -

- I am sorry, upwind States that are contributing to non-attainment in downwind States, that there should be responsibility for those States. We had that issue with Texas at times.

So the lawsuit was not questioning the authority of the EPA to regulate under the Cross-State Air Pollution Rule; it was more that they were trying to assess damages against certain States that were in excess of their allocated share.

So each of those cases I would ask you to remember I am an advocate in behalf of the State of Oklahoma. There is a State's interest that Senator Rounds indicated that has to be in play. To say that any of those cases is about any one company is just simply not right. There is no parens patriae standing that I have as attorney general to bring a case on behalf of a private citizen or a company; there has to be a standing, an injury to the State's interest to bring those cases.

So I would ask you to consider that as we go through those cases you mentioned earlier.

Thank you, Senator Rounds.

Senator Rounds. Thank you.

And thank you, sir, for your response, your complete response. Also, as the chairman of the Subcommittee on Oversight of the Environmental Protection Agency, I have had the opportunity to look at their basis or the way that they make their decisions known, and the logic they use in getting to those decisions. We had a chance to talk about it in my office the other day, and one of the items that I brought up was the fact that we actually had received comments from

the Small Business Administration Office of Advocacy, a copy of which I got.

Mr. Chairman, I would like to have put into the record.

Senator Barrasso. Without objection.

Senator Rounds. Thank you.

[The referenced information follows:]

Senator Rounds. And with this, this was a letter that was sent to the EPA in October of 2014 requesting that the EPA withdraw the proposed Waters of the U.S. Rule, the WOTUS Rule, and reevaluate the impacts the rule would have on American small business. Now, this is a Federal agency requesting the EPA take a second look at a proposed rule.

The EPA refused this request and issued the final rule that we have today.

What are your thoughts on this? And would you, if you are approved and become the next Administrator of the EPA, would you take a second look at whether or not they had a valid reason for having the Waters of the U.S. Rule considered again?

Mr. Pruitt. I think, Senator, the response of the 6th Circuit and where we are presently with litigation, there is definitely a need to address that on a prospective basis. Historically, as you know, under the Clean Water Act, and even before the Clean Water was passed, waters of the United States equaled navigable waters, navigable in fact waters. We know from a couple of cases that led up to the most recent case, Rapanos, that the Clean Water Act is something more than navigable in fact. But what that more is has to be determined and assessed.

So, as I indicated earlier to another Senator's question, the most important thing is to provide certainty, to make sure that the Clean Water Act helps those at the State level know where the boundaries are, where they have jurisdiction and where they don't, so

that we can have regulations that are fair and equitable, and uncertainty is not created.

Senator Rounds. In the lawsuits that you brought against the Environmental Protection Agency on behalf of the State of Oklahoma, would it be fair to say that a number of those are based upon the Environmental Protection Agency failing to follow its own rules and the promulgation of those rules?

Mr. Pruitt. Yes, Senator. I think whether it is the MATS case or the Clean Power Plan case or the WOTUS case, or a multitude of cases, the courts have agreed that the EPA has exceeded its authority; that the EPA has not acted within the framework that Congress has established in performing the role that it is supposed to perform. That is the reason I mentioned in my opening statement that process matters; rule of law matters; federalism matters. Those issues matter because Congress has said so. It is Congress who gives authority to the EPA. The EPA is an administrative agency, it is not a legislative body. So it is important for that agency to act within the framework, within the substantive authority that Congress has provided it in doing its job.

In leading the EPA, if confirmed, I think if I do that effectively, it will provide confidence, certainty to those that are regulated to know what is expected to them, and improve our air and improve our water because of that.

Senator Rounds. Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Rounds.

Senator Markey.

Senator Markey. Thank you, Mr. Chairman.

This morning, NOAA, NASA has declared 2016 the hottest year in the 137-year-old record that has been kept. Donald Trump has called global warming a hoax caused by the Chinese. Do you agree that global warming is a hoax?

Mr. Pruitt. I do not, Senator.

Senator Markey. So Donald Trump is wrong?

Mr. Pruitt. I do not believe that climate change is a hoax.

Senator Markey. Okay. That is important for the president to hear.

Mr. Pruitt, you have made a career working on behalf of the fossil fuel industry to eviscerate regulations designed to protect public health and the environment. You have sued the EPA 19 times to stop clean air and water protections. Eight of those cases are still ongoing, including your litigation that challenges critical rules that reduce levels of hazardous smog, mercury, and carbon pollution.

As EPA Administrator, you would be in a position to serve as plaintiff, defendant, judge, and jury on these ongoing eight lawsuits, and that would be wrong. In your ethics agreement you have said that you would not participate in any matter that is ongoing litigation within one year. But, Mr. Pruitt, isn't it correct that these lawsuits may very well continue for much longer than one year?

Mr. Pruitt. Well, Senator, I have the letter from the ethics counsel at the EPA, and the one-year time period is intended to address covered entities, entities that I served in a chairmanship or an officer capacity. The Southern Theological Seminary, the Windows

Ministry, those entities are covered entities. So if there is a matter that arises before the EPA within a one-year period, a particular matter, a specific case that involves those entities, then the recusal would be in order. But that is really the focus of the one-year timeline.

Senator Markey. So will you agree to recuse yourself from those lawsuits which you brought as the attorney general of Oklahoma against the EPA, not just for one year, but for the entirety of the time that you are the Administrator of the EPA? Will you commit to doing that?

Mr. Pruitt. Senator, for clarity, I think that it is important to note that the one-year time period, again, is for those covered entities that were highlighted in the EPA letter.

With respect to pending litigation, the EPA ethics counsel has indicated, with respect to particular matters and specific parties, there will be an opportunity to get counsel from the EPA at that point to determine what steps could be taken to avoid appearances of impropriety.

Senator Markey. Are you saying that you will not recuse yourself from the actual matters which you are suing the EPA on right now as Attorney General of Oklahoma for the time that you are the head of the EPA?

Mr. Pruitt. I am not saying that at all, Senator.

Senator Markey. You are saying that. Will you recuse yourself?

Mr. Pruitt. I am saying that the EPA ethics counsel has indicated those cases will require a review by the EPA ethics counsel, and if it involves a particular matter with a specific party, then

recusal would potentially be in order and I would follow the guidance and counsel of EPA ethics.

Senator Markey. This is a clear line for the American public, given your record from Oklahoma in suing the EPA on all of these matters, that if you don't agree to recuse yourself, then, again, you become plaintiff, defendant, judge, and jury on the cases that you are bringing right now as Attorney General of Oklahoma against the EPA; and the EPA is for all of the people of the United States, not just the fossil fuel industry of Oklahoma. So you are not committing, and I think that is a big mistake, Mr. Pruitt, to recuse yourself from those cases. It is critical.

Moreover, you also are in a position to initiate regulations that could overturn smog protections, carbon pollution protections that are right now on the books that you are suing as Attorney General of Oklahoma to overturn. Would you commit to not regulating, promulgating new regulations in any of the areas where you right now are suing the EPA? Would you make a commitment that you would recuse yourself from doing that?

Mr. Pruitt. Let me be clear, Senator, because we talked about this in your office, and I very much enjoyed the conversation that we had there in this area that we talked about. I have every willingness and desire to recuse, as directed by EPA ethics counsel; and if directed to do so I will in fact do so, to recuse from those cases. There is a difference, as you know, between pending litigation in a particular matter with specific parties and prospective rulemaking. Rulemaking goes through a process.

Senator Markey. What the American people are expecting here is the EPA doesn't turn into every polluter's ally. The only way to ensure that is for you to recuse yourself from the cases that you have brought, because most of them are to overturn the clean air, clean water, smog regulations. So to create an appearance of independence, it is critical that you recuse yourself; otherwise --

Mr. Pruitt. And I will --

Senator Markey. -- otherwise, honestly, people are going to think that it is not just the fox guarding the hen house, it is the fox destroying the hen house, because you haven't distanced yourself from the actual litigation that you have initiated on most of the key issues that you are now going to have responsibility for protecting in terms of the public health of the entire Country.

Mr. Pruitt. And, Senator, I can say to you unequivocally I will recuse, as directed by EPA ethics counsel.

Senator Markey. And I am saying to you that you should just start out saying I am going to recuse myself from anything that relates to any litigation that I have initiated as the Attorney General of Oklahoma that questions the clean air, clean water, climate change, smog, or mercury protections which are right now on the books that the EPA is honored to protect. And if you don't do that, then we are going to have a fundamental conflict of interest that is presented by your presence as the Administrator of the EPA. It just gets down to being a matter as simple as that.

Senator Barrasso. The Senator's time has expired. Thank you, Senator Markey.

For clarification, will you fully follow the advice of the EPA ethics counsel?

Mr. Pruitt. Yes, Mr. Chairman.

Senator Barrasso. Thank you.

Just for additional clarification, regarding conflicts of interest, I note the letter to this Committee on January 4th that I am submitting to the record. "We," this is the Office of Government Ethics, "believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest."

And then there was a letter yesterday from Walter Shaub, Director, Office of Government Ethics, responding to a letter from Senator Carper and other EPW Democrats regarding Attorney General Pruitt and potential conflicts of interest, and they say, "If the Office of Government Ethics has transmitted a certified financial disclosure report and an ethics agreement to the Senate," which they have, "it means the Office of Government Ethics is satisfied that all financial conflicts of interest have been identified and resolved."

Senator Ernst.

Senator Ernst. Thank you, Mr. Chair.

Thank you, Attorney General Pruitt, for appearing in front of us today. I enjoyed our conversation, both one-on-one and then in a group setting as well, and I would like to go back and revisit our discussion on the RFS. As you know, Iowa is home to 43 ethanol refineries. We are the largest producer of ethanol west or east of the Missouri River.

President-elect Trump reiterated his support for biofuels while he was campaigning cross Iowa and all across the Midwest, and those areas of the Country overwhelmingly supported his candidacy and led to his victory. And thank you for stating once again that you would honor his commitment to biofuels by carrying out the RFS as intended by Congress.

Policy certainty is key for economic growth, and this is something that we discussed in my office. Unfortunately, as a result of uncertainty surrounding the EPA's renewable fuel volume targets in 2014, 2015, and 2016, second generation biofuel investment decreased and proposed projects moved overseas. Fortunately, the EPA has recently changed its course and released updated volume targets for the RFS that meet the levels prescribed by Congress.

If confirmed as Administrator, what will you do to continue to provide certainty so that investment can continue to happen right here at home in the United States?

Mr. Pruitt. You know, Senator, as you indicated in our meeting, the importance of the infrastructure, the investment that has occurred in reliance upon the law was passed in 2005 and updated in 2007, and as I indicated earlier to Senator Fischer's question, the latitude discretion that has been given to the EPA Administrator with respect to waiving those statutory targets should be judiciously used. It shouldn't be automatic; it should be something that the EPA Administrator seeks to comply with and adhere to because of the will of this body.

So I think those waivers obviously are in order, but with respect to market conditions, we have less consumption today, more fuel-efficient vehicles. Market conditions have changed since 2005, but, despite that, the EPA Administrator should not use that to undermine or to somehow put into question the commitments made by this body in the Renewable Fuel Standards statute.

Senator Ernst. Thank you for your commitment to the RFS and the intention of Congress.

I also want to touch on an issue you mentioned in your testimony, which is the level of fear and distrust many folks have of the EPA. When I am home in Iowa, I host town halls all across the State, and just want to hear what is going on in their communities, and what I hear, without fail, at these town halls is that folks are frustrated with the EPA and the gotcha mentality that has stemmed from the Agency. My constituents tell me the EPA is out to get them rather than work with them, and there is a huge lack of trust between many of my constituents and the EPA. And if we take a look specifically at the WOTUS rule, Iowans truly feel that the EPA ignored their comments and concerns, threw them under the rug and then just moved forward.

We know now that the EPA relied on gimmicky mass emails and social media events to prop up their message, and then they used those tactics to insinuate that anyone who had reasonable concerns about the WOTUS rule are somehow in favor of dirty water, which is absolutely ridiculous. And this type of culture that was created under the Obama Administration has no place, has no place here.

So, Mr. Pruitt, what do you plan to do in your first days as the Administrator to improve the relationships EPA has with the hardworking folks across the Country?

Mr. Pruitt. Well, Senator, as I indicated in my opening statement, this paradigm that we live within today, that if you are pro-energy, you are anti-environment, if you are pro-environment, you are anti-energy, is something that I think is just a false narrative. We can do better than that. In fact, this Country has shown for decades that we can grow our economy and be a good steward of our air, land, and water, and we need to get back to that.

Cooperative federalism is at the heart of many of the environmental statutes that have been passed by this body, and the reason for that is it is the States, many times, that have the resources, the expertise, and understanding what the unique challenges are for the environment and improving our water and our air. It is not that they don't care about it. Senator Whitehouse indicated a devolution of authority to the States would create a problem. That is not what I am advocating. And I think we hear in the marketplace we need a partnership, a true partnership between the EPA in performing its role along with the States in performing theirs. And if we had that partnership, as opposed to punishment, as opposed to uncertainty and duress that we currently see in the marketplace, I think we will have better air, better water quality as a result.

Senator Ernst. Thank you. I look forward to that partnership and transparency.

Thank you, Mr. Chair.

Senator Barrasso. Thank you, Senator.

Senator Duckworth.

Senator Duckworth. Thank you.

Mr. Pruitt, I want to clarify your response to Senator Ernst on this whole congressional intent when it comes to the RFS. What I want to know, and what the people of Illinois, we are also a great producer of ethanol, what we need to know is where exactly you stand on the RFS. Are you the attorney general who only three years ago sided with big oil to slam the RFS? You said that RFS was "unworkable" and also that it was a "flawed program."

So I am a little confused by what you are saying today. Are you that Mr. Pruitt, or are you the Scott Pruitt today who is saying all the right things in this confirmation hearing and in these meetings to try to reassure pro-RFS States by repeating nice sounding, but ultimately vague and hollow mantra that, if confirmed, you would enforce the RFS law as written by Congress?

As you and I are quite well aware of, such a statement essentially dodges the critical issue for biofuels producers and workers, because under the law the EPA has considerable discretion to adjust the renewable volume obligation in a manner that you would argue is contrary to congressional intent, yet may be compliant with the explicit letter of the statute. So, as EPA Administrator, you could still technically be in compliance with Congress, with the law, but actually be working against it; and your answers today have not clarified that.

So my question to you, Mr. Pruitt, is this: Which specific actions has EPA taken since 2007 while administering the RFS that you, in your view, are not consistent with congressional intent? Can you name any?

Mr. Pruitt. Thank you, Senator. The Administrator and the EPA routinely misses the statutory targets in publishing those each year, creating great uncertainty in the marketplace. In fact, in some years they have missed the timeline, as far as submitting those targets, by over a year; in some cases over two years.

Senator Duckworth. Okay, so let me ask you this, then. Yes or no, do you believe that Congress intended for the RFS to increase the amount of renewable fuel blended in our Nation's liquid transportation fuel supply, yes or no?

Mr. Pruitt. Without question.

Senator Duckworth. Without question.

Mr. Pruitt. Yes.

Senator Duckworth. All right. My second question, then, is, yes or no, do you believe Congress intended for the RFS to be a stable policy that drives private investment in the renewable energy industry?

Mr. Pruitt. Yes.

Senator Duckworth. And, finally, if confirmed, will you commit to opposing any and all proposals to move the point of obligation under the RFS program from refiners to blenders?

Mr. Pruitt. Senator, as you know, the EPA is actually involved in a comment period on that very issue, and to prejudge the outcome of

that I think would be -- I would not be able to do that. There are many aspects of the program, from the trading program, the monitoring of fraud in the system, that need to be better administrated by the EPA. These have been administration issues. The EPA has created uncertainty. We talked about, a minute ago, with the Senator, about the amount of investment that has gone into the infrastructure because of the 2005 law. Those individuals need to have certainty and confidence that the RFS is going to be enforced and administered pursuant to the desires of Congress.

Senator Duckworth. Right. But if you were to do that, then you would actually have to answer yes, because to move the RFS program from refiners to blenders is actually one of those ways that you can actually undermine the RFS standards as intended by Congress, which you yourself just now said was intended to increase the amount of biofuels blended into the fuel supply of the United States.

This is my problem. On the one hand, your entire track record shows you to be someone who opposes the RFS and yet here, in front of Congress and in meetings with Senators, you are giving these vague answers that sound right when it comes to the RFS, but really opens all sorts of back doors for you to oppose the Renewable Fuel Standard; and that is very troublesome because all across the Midwest -- you know, for those of us who have fought to strengthen national security by lessening our Country's dangerous dependence on foreign oil, I am really incredibly concerned about the future of the RFS on American-produced biofuels under a Scott Pruitt-led EPA. And I am also

incredibly concerned about what you are going to do in terms of protecting the environment.

In your answer to one of my colleagues about what the role of the EPA is, what is the job of the EPA, one of the first questions you got, you spent five minutes talking before you actually said protect the environment. You talked all about reducing EPA's influence over States for a good five minutes before you actually got to the environment. And then for my farmers, my corn and soybean producers for my biofuel industry, the RFS is critical in order to continue that. And I would rather burn American-made American-grown corn and soybean in my gas tank then I would oil from the Middle East. I have already been to a war fought over oil in the Middle East, and I don't intend to allow us to continue to do that; which is why the RFS is so critical not just for the jobs in Illinois, not just to support Illinois agriculture, but for our national security when it comes to where we are going to get our energy supply.

I am out of time. Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Duckworth.

Mr. Pruitt. If I may, Senator, let me say to you the role of the Administrator of the EPA is to enforce and administer the RFS program to carry out the objectives of that statute. Those targets that have been put in that statute by this body need to be respected. The discretion authority, the waiver authority of the Administrator needs to be judiciously used to address those concerns that we talked about.

So I don't want you to have any concern about the intent, objective, or will, if confirmed, of carrying out the RFS mandate or the statute in its whole.

Senator Duckworth. That very answer concerns me because you have not actually said that you are going to stick with it.

Senator Barrasso. I would like to submit for the record two. One, a letter from the American Farm Bureau Federation which strongly supports the nomination of Scott Pruitt as Administrator of the U.S. Environmental Protection Agency and urges a vote in favor of his confirmation. The second is a letter from the Democrat Attorney General of the State of Arkansas, former Democrat Attorney General, Dustin McDaniel, who has this to say about Attorney General Scott Pruitt's work on the stem phosphorous levels in the Illinois River watershed. He said, "Recent press accounts regarding these efforts unfairly mischaracterize the work that was done by General Pruitt and his team. He was a staunch defender of sound science and good policy as appropriate tools to protect the environment of his State. I saw firsthand how General Pruitt was able to bridge political divides and manage multiple agency agendas to reach an outcome that was heralded by most credible observers as both positive and historic."

[The referenced information follows:]

Senator Barrasso. Senator Boozman.

Senator Boozman. Thank you, Mr. Chairman.

And thank you, Attorney General Pruitt, for your willingness to serve, and your family. I think everybody at the dais here realizes these really are family affairs that truly affect everyone.

In recent years, EPA has made it increasingly difficult for Arkansas to manage its delegated national pollutant discharge elimination system. Too often, the permits, rulemakings, or other actions sent to EPA for review are returned with demands far more restrictive, additional expensive data collection is required, and other costly onerous requirements. New leadership at EPA has an opportunity to correct this coercive federalism and, instead, restore cooperative federalism as intended. The States have the expertise and local knowledge necessary to administer environmental programs.

Mr. Pruitt, EPA has the opportunity to play a significant role in supporting a move back to cooperative federalism. Can you please explain how you plan to change the EPA's State dynamic?

My experience with EPA, and being on transportation in the House, being ranking member on water there, ranking member of the Senate is the EPA, their attitude is we are with you unless you come out with a finding that is contrary, and then we are going to do it our way. So can you address that?

Mr. Pruitt. I think two things, Senator. One, as we indicated earlier, rule of law and making sure that the authority granted to the States under State implementation plans, delegation under certain clean water provisions, that that is respected. But also I think the

EPA needs to provide more assistance to the States and work in partnership and be proactive. Those regional administrators that we have across the Country need to be seen as partners, and not adversaries.

So I think restoring that confidence, restoring that relationship and seeking to do so is very, very important in carrying out this partnership that we know exists under the various environmental statutes.

Senator Boozman. Very good.

For the past eight years, EPA has acted as a political arm of the Obama Administration time and time again. We have seen rules developed not based on sound science, but on political ideology. When rules have been released, States and private sector, and even Congress, have had trouble getting EPA to show the science that helped develop these rules.

Under your leadership, can we expect EPA to be more transparent, in other words, how the rules are being developed, the science behind them? And you have continued to allude to this and I think it is so important, as Administrator of the EPA, can we count on you to base all of your decisions on the rule of law, not on the Administrator's or even your own political ideology?

Mr. Pruitt. Absolutely, Senator, in response to the latter point of your question. Public participation is important. There is a reason why, in rulemaking, that you take comment. There is a reason, as I indicated earlier to Senator Ernst, that you involve those that are impacted by rulemaking, because you want to understand the impact,

both economically and otherwise, in the benefit of the environment, as well as making sure that you craft rules and regulations that take all those things into consideration. So hearing the voices of all Americans in that rulemaking process, responding to those comments in the record before rules are finalized, transparency, objectivity, a commitment to process is very important, in my view, of restoring the confidence of the American people in the rulemaking processes that occur here in Washington, D.C.

Senator Boozman. So, again, releasing the scientific data behind that would be something that you would very much support?

Mr. Pruitt. Yes, Senator.

Senator Boozman. A problem with the EPA the EPW Committee has faced with the current Administration is a lack of communication. Time and time again EPA either did not respond to questions from Committee members or, at the very least, took months to respond. Under your leadership, can we expect EPA to get Committee members answers in a timely fashion?

Mr. Pruitt. Yes, Senator. As I indicated in my opening statement, listening is an important role of leadership, and listening to the voices of folks here in Congress. As I went through and met with many of you through this process, there were issues particular to your State that you made me aware of, and I, if confirmed as EPA Administrator, seek to be very active in listening to the needs with respect to your various States and respond to this body with respect to questions.

Senator Boozman. Let me just comment on the Arkansas-Oklahoma issue. I was the Congressman in that district, so I inherited that in 2001. I have been working on this for 15 years. And I appreciate you and Attorney General McDaniel doing a very good job of getting things done. On the other hand, the idea that somehow you were soft, in fact, I would argue that the agreement that was reached was way too restrictive and is probably one of the most restrictive watersheds as far as phosphorous requirements of anyplace in the United States.

Mr. Pruitt. Well, as you know, Senator, in that process we actually selected a biologist from Baylor University to engage in a scientific study on what the phosphorous levels should be, the numeric quality of the water, and it was determined at the end of that process that .037 was the right standard and is now enforceable on both sides of the border for the first time in history. So it is a very important outcome.

Senator Boozman. No, I understand, and I commend you on the process. You know, the implication here is somehow, you know, you came up with a deal that was too soft, and, if anything, I would argue that it was perhaps a little bit too harsh. But I do appreciate the process. I know that you and our former attorney general were able to do something that had been going on for decades.

Mr. Pruitt. Thank you, Senator.

Senator Barrasso. You have been at it now for about two hours. If you can stay with us 'til we finish the first round of questioning; we have about five or six additional questions coming.

Senator Harris is next and then we will break at about 12:30, if that is all right.

Senator Carper. Can I make a unanimous consent request, Mr. Chairman?

Senator Barrasso. Yes, sir.

Senator Carper. I would like to ask unanimous to submit for the record the legal brief against the Mercury and Air Toxics rule which Mr. Pruitt supported. Stated in that brief, I will just quote it, it says "Human exposure to methylmercury resulting from coal-fired electric-generating utilities is exceedingly small." That is the quote.

Also ask unanimous consent to submit for the record a recent article that quotes, I think from the New York Times, it quotes a 40-year career employee of the Oklahoma Department of Environmental Quality that has him saying these words: "Mr. Pruitt has advocated and stood up for the profits of businesses, be it poultry companies or the energy industry and other polluters, at the expense of people who have to drink the water or breathe the air."

Other statements have been introduced for the record saying quite a different thing about Mr. Pruitt. I think it is only fair to go to someone who has worked there for 40 years that has quite a different view than the one than the witness has expressed. Thank you.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Barrasso. Senator Harris.

Senator Harris. Thank you, Chairman.

Mr. Pruitt, as an attorney general, I know as former attorney general of California, that we, as attorneys general, have several duties, which include representing our clients, State agencies, and also the discretion and power to initiate lawsuits in our independent capacity as attorneys general. Would you agree with that?

Mr. Pruitt. Some States provide more latitude than others.

Senator Harris. Does your State?

Mr. Pruitt. Our State has not provided constitutionally as much authority as other States --

Senator Harris. Have you never exercised your independent capacity as attorney general to bring a legal action?

Mr. Pruitt. Senator, I would have to know more specifics about what you are referring to. But in response to your question, it does --

Senator Harris. Have you ever exercised your independent capacity as the attorney general of your State to initiate a legal action, yes or no?

Mr. Pruitt. The litigations that we have engaged in largely have been in consultation with agencies that --

Senator Harris. Largely. So you have also exercised your independent capacity as the attorney general of your State, is that correct or not?

Mr. Pruitt. I may have, Senator. I don't know.

Senator Harris. You don't know if you have or not? You have been attorney general for your State for almost seven years, is that correct?

Mr. Pruitt. Approaching that, yes. Six years, actually.

Senator Harris. And I have read that you have initiated, and it has been mentioned before, 14 lawsuits in your independent capacity as the attorney general of Oklahoma, and apparently seven of those cases have been resolved, six of which you have lost. My question is I hear that you are a lover of baseball. What would your batting average then be?

Mr. Pruitt. It was generally about 300, which is pretty good for a second baseman.

Senator Harris. My calculation is it is 142.

Moving on, would you agree that as attorneys who have the responsibility for doing the work of justice, and particularly as an attorney general, that we make decisions based on propriety and impropriety; we make decisions based on what is not only an actual conflict, but what is an appearance of conflict? Would you agree that is important?

Mr. Pruitt. I believe that is important, Senator.

Senator Harris. Okay. And so on this issue of whether or not you would be recused if you are nominated and actually voted in as the Administrator of the EPA, you have said that you will recuse yourself from the cases your office has been involved with if directed to do that. Do you agree that you also have the discretion to recuse yourself from those cases?

Mr. Pruitt. I believe, Senator, the rules of professional conduct, in addition to the review that OGE --

Senator Harris. Do you believe that you have the discretion to recuse yourself from the cases that you were involved with as attorney general?

Mr. Pruitt. I think it is actually stronger than that, Senator. I actually have an obligation in those instances, as directed by ethics counsel, and that is the reason I indicated earlier that I will recuse.

Senator Harris. Independent of any direction from ethics counsel, do you agree you have the discretion to recuse yourself from those cases?

Mr. Pruitt. I believe that it is important to maintain --

Senator Harris. I am asking about whether or not you actually have the discretion, the power, to recuse yourself. Do you disagree or agree with that?

Mr. Pruitt. Clearly, there is a discretion to recuse.

Senator Harris. Clearly.

You are familiar with the Clean Air Act, yes?

Mr. Pruitt. I am sorry, Senator?

Senator Harris. You are familiar with the Clean Air Act?

Mr. Pruitt. I am.

Senator Harris. And as you may know, Section 209, subdivision (b) of the Clean Air Act, recognizes California's authority to issue air pollution standards for new motor vehicles that go above and beyond Federal standards. The EPA has historically recognized

California's authority to issue new motor vehicle pollution standards that go above and beyond Federal standards.

In your opening statement you write, "It is not EPA's mission to be against sectors of industry in general or against particular States." Will you commit, then, to upholding that same standard and recognizing California's authority to issue its own new motor vehicle air pollution standards?

Mr. Pruitt. You know, Senator, as you indicated, California was actually regulating those standards before the EPA was actually created, which is why the California waiver exists under statute.

Senator Harris. Do you agree to uphold that same standard that has been held by your previous administrators?

Mr. Pruitt. I agree to review that as each administrator before me has. It has been granted at times and denied at times.

Senator Harris. Do you agree to uphold it? Reviewing and upholding are two different points.

Mr. Pruitt. Senator, as you know, administrators in the past have not granted the waiver and in fact have granted the waiver. That is a review process that will be conducted if confirmed.

Senator Harris. What is your intention, sir?

Mr. Pruitt. I don't know without going through the process to determine that, Senator, and one would not want to presume the outcome.

Senator Harris. In the 14 cases that have been previously mentioned, in each of those cases regulated companies were also a party to your suits, is that correct?

Mr. Pruitt. In some instances, yes.

Senator Harris. In most of them. Can you name a few instances in which you have filed a lawsuit in your independent capacity as attorney general against a corporate entity for violating State or Federal pollution laws?

Mr. Pruitt. Senator, I have a list here that has been provided.

Senator Harris. Can you name them, please?

Mr. Pruitt. Sure. There is a list that has been --

Senator Harris. Can you name one?

Mr. Pruitt. Yes. The first is the Mahard Egg Farm involving a CAFO situation and cleanup of a large hen operation that affected water quality. Coco Manufacturing --

Senator Harris. Did you file a lawsuit in that case, sir?

Mr. Pruitt. I did, Senator.

Senator Harris. Okay. And what was the outcome of that case?

Mr. Pruitt. We received a good outcome against them.

Senator Harris. And the name of that entity was what?

Mr. Pruitt. Mahard Egg Farm.

Senator Harris. And can you name any other cases where you have actually filed a lawsuit against a corporate entity for violating Federal pollution laws?

Mr. Pruitt. In fact, that case was brought in conjunction with the EPA. And I want to address something, Senator. Earlier, when you say independent capacity, those cases that you referred to, the list of cases, were as an extension of the DEQ in the State of Oklahoma, an

extension of agencies at the State level that had authority granted to them by this body that we were --

Senator Harris. And I understand that role, as a former attorney general, but that is you representing your client. I am asking about your independent capacity as the attorney general of your State.

Let's move on.

On the issue of mercury --

Senator Barrasso. I would suggest that the Senator's time has expired.

Senator Harris. Thank you.

Senator Barrasso. Thank you.

I would like to introduce for the record a letter by J.D. Strong, who is the Director of the Oklahoma Department of Wildlife Conservation, who, in reference to the submission recently by the Ranking Member, makes reference to that former employee who is retired from the State of Oklahoma and is currently serving as Vice Chairman of the Oklahoma chapter of the Sierra Club. So the references are from now someone who is no longer a State employee, but the Vice Chairman of the Oklahoma chapter of the Sierra Club.

But this letter from Mr. Strong goes to talk about the efforts by Attorney General Pruitt, who says, "For the past six years General Pruitt has been instrumental in many of our successes and has never asked me to compromise regulatory efforts to benefit industry." He says, "On the contrary. All of our projects and cases that involved his office were given staff support at the highest level and, more often than not, resulted in more stringent environmental protection.

He has been a strong ally in defending our ability to continue the great progress that we made in protecting Oklahoma's environment."

Senator Carper. Mr. Chairman, in response, let me just ask for unanimous consent to put in the record, and this is on behalf of Senator Whitehouse, rebuttal articles for Mr. Pruitt's claim on litigation against fossil companies. Some of the topline points from these articles are, one, that they are fraud cases first and foremost; second, some were brought by his predecessor, Drew Edmondson; third point, the case against BP was filed and left dormant at least for any publication; and also that Mr. Pruitt fought against the participation of State whistleblowers in the litigation, and that was a reference to qui tam action.

Thank you.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Barrasso. Senator Sullivan.

Senator Sullivan. Thank you, Mr. Chairman.

General Pruitt, it is good to see you again. Thank you for your willingness to serve. And to your family, as you know, it is a team effort, so I want to thank them as well.

I appreciated your opening statement, particularly your written statement, and I want to emphasize we all want clean air. We all want clean water. My State of Alaska has some of the cleanest air, cleanest water, pristine environment literally in the world. But your emphasis on the ability to do both, to grow an economy, to develop our resources responsibly, and protect the environment I think is very, very important, and I appreciate that focus.

I believe the EPA needs a serious course correction. As Senator Ernst talked about, there is a lot of anger, even fear of this Agency throughout many parts of the Country, and I believe you are the right person to provide that course correction and do something that is very important, which is regain the trust of the American people that I think has been lost in a lot of places in America because of the overreach, because of the lack of focusing on the law.

So there has been a lot of discussion this morning about cooperative federalism. Can you explain it in a little more detail? Is that your term or is that a term that -- did you come up with that or is that something that was actually directed by Congress?

Mr. Pruitt. Directed by Congress, Senator.

Senator Sullivan. And so in the Clean Air Act and the Clean Water Act who was given, what entity in our Republican form of

Government was given the primary responsibility over clean air and clean water in the United States?

Mr. Pruitt. Well, as you know, Senator, under the Clean Air Act there is something called State implementation plans that the EPA and the States review together, but the States have that responsibility of adopting the plan --

Senator Sullivan. So isn't it correct actually in the law it says --

Mr. Pruitt. It is.

Senator Sullivan. -- the primary responsibility under the Clean Air Act and Clean Water -- and who directed that?

Mr. Pruitt. Congress.

Senator Sullivan. Okay. So when you are talking about cooperative federalism, that is not some Scott Pruitt invented; you are focusing on the intent of the Congress.

Mr. Pruitt. Probably more so than any statutes that have been adopted by Congress historically, the environmental statutes that we know, from clean water to clean air to Safe Drinking Water Act, many pieces of legislation, Congress has been very explicit and very specific in saying that cooperative federalism, the role of the States is important, should be respected, and should be emphasized.

Senator Sullivan. So let me show you a chart here. This is the Waters of the U.S. in the States and entities that sued to stop that rule. Thirty-two. Democrats and Republicans and Independents. Do you think this is an example of cooperative federalism? And if not, if you are confirmed, what are you going to do to get back to what is

not a Scott Pruitt idea, it is the direct direction of the Congress of the United States?

Mr. Pruitt. Senator, when you think about the relationship between the EPA and the States, the States are not mere vessels of federal will; they don't exist simply to carry out federal dictates from Washington, D.C. There are substantive requirements, obligations, authority, jurisdiction granted to the States under our environmental statutes. That needs to be respected. When it is not respected, that is what spawned most of this litigation that has been referenced here today. And why does it spawn it? Because it matters. It matters that the States participate in the way that Congress has directed, and they have been unable to do so for a number of years.

Senator Sullivan. So, again, cooperative federalism, you are carrying out the will of Congress when you are focused on that issue.

Mr. Pruitt. That is exactly right. The expertise, the resources, the knowledge, the awareness of how to fix environmental issues at the local level is something that is important for the entire Country to know.

Senator Sullivan. So I am a former attorney general myself who has sued the EPA, and some of my colleagues on the other side of the aisle, Judge Booker's comments, I think he tried to equate a little bit suing the EPA, not caring for Oklahoma's children. Do you care about Oklahoma's children?

Mr. Pruitt. Without question. I have a couple sitting behind me.

Senator Sullivan. Fourteen lawsuits. And again, Senator Boozman mentioned this, what has been the primary focus of those lawsuits? It is not that you don't care about the environment, is it?

Mr. Pruitt. Absolutely not. I care very much about the environment. It is to restore the relationship and ensure the relationship that Congress has directed, the role of the States in improving our environment. There is an idea in Washington that the States, those in Oklahoma or in Alaska or other parts of the Country, don't care about the water we drink or the air we breathe. The farmers and ranchers, those in industry in the State of Oklahoma, most of them are very committed to that. When they have not been, we have taken enforcement action against them.

Senator Sullivan. And just one final question. A lot of my colleagues on the other side of the aisle spent a lot of time, and I think Senator Sanders is up next, vilifying the oil and gas industry, somehow bad actors, polluters. According to the American Petroleum Institute, 364,000 Oklahomans work in the oil and gas industry or related service sectors. Are these people bad actors? Are they polluters? Can you describe? You talk about the good people in your written statement. Who are these people, and are you representing them when you are bringing these kind of actions? Are they evil people?

Mr. Pruitt. No, Senator. They want to comply with the law. They want to know what is expected of them. They care about the air they breathe and the water they drink, and they want to make sure that

the EPA is partnering with State agencies and industry to ensure that that outcome occurs.

Senator Sullivan. And aren't these hundreds of thousands of people part of that industry?

Mr. Pruitt. Absolutely. In fact, 25 percent of our entire State budget in Oklahoma is from that industry. This is a State concern. And more than that, we have significant regulation over this industry. Our Corporation Commission has oversight over many of these issues. So we have regulatory bodies, from DEQ to the Corporation Commission to others, that are involved in making sure that the air we breathe and the water we drink is clear in the State of Oklahoma.

Senator Barrasso. Thank you.

Senator Sullivan. Thank you, Mr. Chairman.

Senator Barrasso. Senator Gillibrand.

Senator Gillibrand. Thank you, Mr. Chairman.

Thank you, Mr. Pruitt, for being willing to serve this Administration, for your interest in public service, and your past public service.

Mr. Pruitt. Thank you, Senator.

Senator Gillibrand. I want to talk to you about some of the constituents in my State and the challenges, the very real challenges we face. First, we had millions of people's lives upended with Superstorm Sandy. I mean, millions of people. We had parents who lost their children who drowned because of surges of water coming through their homes, through the streets. The devastation was literally unparalleled in my State; it was just something we had never

seen before. And we are going to be looking to you to protect these families and protect these communities, because we know, with global climate change, the incidents of super storms and violent weather impacts is changed, it is very, very different. And you have already told folks that you do believe that global climate change is real, it has been caused by human activity.

Do you believe also that sea levels are rising?

Mr. Pruitt. Senator, I believe that the EPA, addressing this issue because of the MATS v. EPA case and the endangerment finding has obligations to address the CO2 issue. In doing so, they need to follow the processes as set up by Congress. So I think it is very important to do both.

Senator Gillibrand. But you have studied this issue of sea levels. You do realize they are rising. And it is one of the reasons why these storm surges were so high and devastating communities all across New York City. So I need you to be vigilant because lives are at stake, and I think you have the purview to do that. Will you be vigilant?

Mr. Pruitt. Senator, we will obviously address those issues that we talked about in your office, and I appreciate your passion on this issue.

Senator Gillibrand. One of the other issues that we talked about that I think is equally as concerning is issues of mercury that have been raised, about asthma rates that have been raised, about groundwater polluted. I have looked at your record. Most of the lawsuits you filed as attorney general were related to businesses,

specifically what was important for your State in terms of employers and businesses. And the few lawsuits you did file about human safety were few and far between.

But this role as head of the EPA, you are going to have a much more important role to play, and I want to talk specifically about mercury. If you believe that mercury is a threat to public health, but oppose the remedy of reducing mercury air pollution from power plants because it is too costly, what, then, do you think you should do or what should be done to address the mercury pollution?

Mr. Pruitt. Let me say, Senator, mercury is something, it is a hazardous air pollutant under Section 112. It is something that the EPA has authority to regulate and should regulate. It should do so, though, within the framework established by this body, and the Supreme Court said that the EPA did not follow the cost-benefit obligations. It is not that the benefits outweigh the costs, it is just that they simply didn't engage in a proper record-based support for their rule. So that goes back to earlier questions with other Senators about the process mattering, being committed to the rule of law and the rulemaking authority that Congress has given the EPA in making sure that as rules are passed, that they can be upheld in court.

Senator Gillibrand. But I need you also to be worried about human health. I understand there is a cost, but when you are talking about lives, when you are talking about children who can't breathe, I have been to the emergency room at 2 in the morning with a child who can't breathe; it is a horrible thing. We have had children die in New York City because none of their teachers, no administrators in the

schools knew what to do when a child has an asthma attack. It is a huge problem. So I need you to care about human health and really believe that the cost, when human health is at risk, when people are dying, is far higher than it is the cost to that polluter to clean up the air and change their processes. I need you to feel it as if your children sitting behind you are the ones in the emergency room. I need you to know it.

Mr. Pruitt. And, Senator, I would say to you there are certain instances where costs can't even be considered, as you know. Those criteria pollutants under our NAAQS program, cost is not even a factor because human health is the focus.

Senator Gillibrand. So let's talk about that. So you and I previewed this in my office. We have a horrible problem in New York State with Superfund sites and with groundwater that is polluted. We have PFOA in our water. We have the largest PCB Superfund site in the United States in the Hudson River. When families who don't have money fish in the Hudson River, they eat those fish, they get ill. It is horrible. The contaminants are real, they are pervasive, and they are destroying lives. They are also destroying the economy, because when you have contaminants all over the place you can't sell your house, you can't put in industries that are relying on tourism. It is a huge problem.

So PFOA is an example of a chemical that needs to be tested. I need you to put it number one on your list, to test it, and if it is the carcinogen that many scientists have said it is, it needs to be banned.

Mr. Pruitt. The TSCA authority that has been granted by this body, you and I talked about that in your office, PFOA needs to be addressed quickly, even under the Safe Drinking Water Act as well.

Senator Gillibrand. Will you commit to doing that work?

Mr. Pruitt. Yes, Senator.

Senator Gillibrand. Thank you.

Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator.

Senator Carper. Mr. Chairman, I have a unanimous consent request. I would like to submit for the record, and this is sort of in response to a question raised by Senator Harris. Mr. Pruitt, in his response to her question on whether he had ever filed a lawsuit against a corporate entity for violating State or Federal pollution, apparently was not correct. I want to just submit for the record a list of cases that have been active under Mr. Pruitt's leadership. It notes which ones were started by his predecessor and it shows that the case in which he mentioned in his exchange with Senator Harris I think it was the egg case. That case actually was initiated not by Mr. Pruitt, but by this predecessor.

Thank you.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Barrasso. And I would like to submit to the record, as well, having heard that some of my Democratic colleagues have expressed their concerns that Attorney General Pruitt is not open to the finding of science, especially as it relates to climate change, this is not so. I would like to call the Committee's attention to a letter by the Cornwall Alliance for the Stewardship of Creation. The letter is signed by 130 scientists, economists, legal scholars, policy experts, religious leaders, and over 230 other citizens urging Attorney General Pruitt's confirmation. The group includes David Legates, who is a Ph.D. in climatology, Professor of Climatology and Geography at the University of Delaware. The author praises Pruitt, stating, "Mr. Pruitt has also demonstrated understanding of and open-mindedness toward scientific insights crucial to the formulation and implementation of environmental regulation."

The organization's founder and national spokesman, Calvin Beisner, is quoted in the press release announcing the letter as saying the following, "Some environmental activists are determined to prevent Mr. Pruitt's confirmation, painting him as a science denier or a climate change denier." Mr. Beisner continues, "He is neither. He is a solid, common-sense attorney general who will bring much needed reform to the EPA."

Without objection, the letter will be submitted for the record.

[The referenced information follows:]

Senator Barrasso. Senator Wicker.

Senator Wicker. Thank you, Mr. Chairman and Mr. Ranking Member. I think it has been a good hearing so far. I think we have a lot of information that will be reassuring to the American people.

One thing I do object to, though, is something that has happened for years since I have been a member of this Committee, and that is somehow to list political contributions and suggest that somehow they make an individual suspect or not qualified. My dear friend from Rhode Island showed a poster and showed some contributions and suggested that based on those contributions from companies like Southern Company, for example, who has contributed to my campaign, that his appropriateness for the job should be challenged.

So I am glad that the Chairman had added to the record this article from September 6 from the Washington Street Journal, September 6 of last year, pointing out the Democratic presidential candidate, Hillary Clinton, raised significantly more money than Donald Trump from the oil and gas industry. Individuals who worked for oil and gas companies donated $149,000 to Mr. Trump's GOP campaign as of the date of July 30, compared with $525,000 to Mrs. Clinton.

Mr. Chairman, I am glad you put this in the record, and presumably, based on that argument, Hillary Clinton would be suspect, were she to have been nominated for the position of heading the EPA.

Now, Mr. Attorney General, let's talk about States as partners. And I enjoyed your exchange with Senator Cardin about the Chesapeake Bay program. As I understand, you actually applaud the Chesapeake Bay

program, and particularly the way the EPA worked with States as partners, is that correct? And could you enlarge on that?

Mr. Pruitt. Senator, I absolutely applaud the effort by the States to join together in a six-State coalition to address the quality of the Chesapeake Bay's water quality. That is what we did in Arkansas, Oklahoma and Arkansas did with the scenic Illinois River that has already been talked about with Senator Boozman and others. So I think the effort that they engaged in was something that other States ought to model, and the EPA came alongside and took that TMDL and is providing assistance to those six States with respect to that agreement.

Senator Wicker. Now, with regard to the Clean Power Plan and the Waters of the United States rules, where did those regulations go wrong in this respect?

Mr. Pruitt. Well, with respect to the Clean Power Plan, in the cases, the Supreme Court has actually said -- it was an unprecedented step that the Supreme Court took. Never in history had the Supreme Court issued a stay against a rule like the Clean Power Plan, and they did so because of the likelihood of success on the merits, in the sense that the Clean Power Plan did not reflect the authority of Congress given to the EPA to regulate CO2. As an example, with respect to power generation, there has to be a significant finding that poses risk to public health and welfare. They did not do that. They did not go through the proper processes of inside the fence and regulations of facilities, power generation facilities.

So those matters, Senator, are about rule of law. And the same is true with the Waters of the United States rule.

Senator Wicker. And I have not delved into this as an attorney, as you have, but I can tell you that the Department of Environmental Quality in my State told me very emphatically that the Clean Power Plan would put us out of business because we would not have had an alternative to the coal that we use. So I hope we can continue to make progress on this issue.

Let me ask you about wood products. The Federal Government buys a lot of lumber, uses a lot of wood in construction and procures a lot of wood. There are standards certifying that the forests are appropriate. One is the American Tree Farm System; another is the Sustainable Forestry Initiative.

EPA seems to like a certification program called the FSC, the Forest Stewardship Council. Problem is, with this certification program, it excludes 90 percent of the lumber grown in the United States of America.

We have had a lot of activity on both sides of the aisle in challenging this, and I object also to a so-called interim recommendation made by EPA in this regard. As far as I am concerned, it is discrimination against domestic wood, and now they have come back and told us that this interim recommendation is under review.

Could you comment about both of these, the idea of an interim recommendation being imposed on an entire industry and also give us any thoughts you have about using the Forest Stewardship Council

certification model as opposed to these other perfectly good Sustainable Forestry Initiative and American Tree Farm System?

Senator Barrasso. And if I could ask you to do it briefly, as the Senator's time has expired?

Mr. Pruitt. Senator, as you and I discussed in our meeting, I am very concerned about the latter issue, and making sure that all voices, all options are considered is something the EPA Administrator should do and I would seek to do, if confirmed.

With respect to the interim step, I think that there is a concern that many have offered throughout the last several years, that regulators in Washington, not just the EPA, are seeking to use guidance or other steps to avoid what would be called formal rulemaking; that Congress has obligated those agencies to reform to ensure exactly what you just described, that all voices are heard. And that is unfortunate when agencies do that, because that is an abuse of the process.

Senator Wicker. Thank you, sir.

Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Wicker.

Senator Sanders.

Senator Sanders. Thank you, Mr. Chairman. And I apologize for being late, but we were at a hearing with Congressman Price, who is the nominee for HHS. Perhaps not a great idea to have important nominating hearings at exactly the same time. So I apologize for not being here earlier.

My office has received a great deal of comments from people in the State of Vermont, which takes environmental protection very seriously, as well as from all over the Country, and the fear is that the nomination of Mr. Pruitt is a nomination designed to protect the fossil fuel industry, and not the environment.

I would like to ask Mr. Pruitt a question. As I understand it, earlier in this hearing you said that Mr. Trump was wrong in suggesting, in stating over and over again that climate change was a "hoax." Is that in fact the case?

Mr. Pruitt. That is correct, Senator.

Senator Sanders. Okay. Let me ask you this. As you may know, some 97 percent of scientists who have written articles for peer-reviewed journals have concluded that climate change is real, it is caused by human activity, and it is already causing devastating problems in our Country and around the world. Do you believe that climate change is caused by the emission, by carbon emissions by human activity?

Mr. Pruitt. Senator, as I indicated, you weren't here during my opening statement, but as I indicated in my opening statement, the climate is changing and human activity contributes to that in some manner.

Senator Sanders. In some manner.

Mr. Pruitt. Yes, sir.

Senator Sanders. Ninety-seven percent of the scientists who wrote articles in peer-reviewed journals believe that human activity

is the fundamental reason we are seeing climate change. You disagree with that?

Mr. Pruitt. I believe the ability to measure with precision the degree of human activity's impact on the climate is subject to more debate on whether the climate is changing or the human activity contributes to it.

Senator Sanders. While you are not certain, the vast majority of scientists are telling us that if we do not get our act together and transform our energy system away from fossil fuel, there is a real question as to the quality of the planet that we are going to be leaving our children and our grandchildren. So you are applying for a job as Administrator for the EPA to protect our environment. Overwhelming majority of scientists say we have got to act boldly, and you are telling me that there needs to be more debate on this issue and that we should not be acting boldly.

Mr. Pruitt. No, Senator. As I have indicated, the climate is changing and human activity impacts that.

Senator Sanders. But you haven't told me why you think the climate is changing.

Mr. Pruitt. Well, Senator, the job of the Administrator is to carry out the statutes as passed by this body and to --

Senator Sanders. Why is the climate changing?

Mr. Pruitt. Senator, in response to the CO2 issue, the EPA Administrator is constrained by statutes --

Senator Sanders. I am asking you a personal opinion.

Mr. Pruitt. My personal opinion is immaterial --

Senator Sanders. Really?

Mr. Pruitt. -- to the job of carrying out --

Senator Sanders. You are going to be the head of the agency to protect the environment, and your personal feelings about whether climate change is caused by human activity and carbon emissions is immaterial?

Mr. Pruitt. Senator, I have acknowledged to you that the human activity impacts the climate.

Senator Sanders. Impacts.

Mr. Pruitt. Yes.

Senator Sanders. Scientific community doesn't tell us it impacts; they say it is the cause of climate change and we have to transform our energy system. Do you believe we have to transform our energy system in order to protect the planet for future generations?

Mr. Pruitt. I believe the EPA has a very important role at regulating the emissions of CO2.

Senator Sanders. You didn't answer my question. Do you believe we have to transform our energy system away from fossil fuel, to do what the scientific community is telling us, in order to make sure that this planet is healthy for our children and grandchildren?

Mr. Pruitt. Senator, I believe that the Administrator has a very important role to perform in regulating CO2.

Senator Sanders. Can you tell me, as I think all of us know, Oklahoma has been subjected to a record-breaking number of earthquakes. Scientists say that Oklahoma is almost certain to have more earthquakes with heightened risk of a large quake probable to

endure for a decade and that the cause of this is fracking. Picking up on Senator Harris's discussion with you, can you point me to any opinion that you wrote, any enforcement actions you took against the companies that were injecting waste fracking water?

Mr. Pruitt. Senator, let me say I am very concerned about the connection between activity in Oklahoma and --

Senator Sanders. And, therefore, you must have taken action, I guess. Can you tell me who you fined for doing this, if you are very concerned?

Mr. Pruitt. The Corporation Commission in Oklahoma is vested with the jurisdiction and they have actually acted on that.

Senator Sanders. And you have made public statements expressing your deep concern about this.

Mr. Pruitt. We have worked with, through our --

Senator Sanders. You have made public statements. You are in a State which is seeing a record-breaking number of earthquakes. You are the attorney general. Obviously, you have stood up and said you will do everything you can to stop future earthquakes as a result of fracking.

Mr. Pruitt. Senator, I have acknowledged that I am concerned about --

Senator Sanders. Acknowledged that you are concerned. Your State is having a record number of -- well, if that is the kind of Administrator for the EPA, your State is having a record-breaking number of earthquakes, you acknowledge that you are concerned. If

that is the kind of EPA Administrator you will be, you are not going to get my vote.

Senator Barrasso. Senator Inhofe.

Senator Inhofe. Mr. Chairman, a UC request. I ask at this point in the record that we reprint the Wall Street Journal op-ed piece that was written by two outstanding scientists called "The Myth of the Climate Change Ninety-Seven Percent."

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Barrasso. I have a little bit of time left in my questioning from the first round. I just wanted to talk about some of the concerns I have with overregulation. Do you have the same concerns with the overregulation of U.S. manufacturing over the last eight years? I believe we have exported manufacturing jobs overseas, the jobs that go with them in terms of the manufacturing of those goods to places like China and India that are going to produce those products in a less environmentally friendly way. Do you agree with this notion that this approach harms not just the environment, but also our own U.S. economy?

Mr. Pruitt. I believe, Senator, that it puts us in an economic disadvantage when we don't hear all voices in the rulemaking process with respect to these issues, absolutely.

Senator Barrasso. I would also like to submit for the record an op-ed on CNN by Jeb Bush, saying, "Scott Pruitt is ready to turn around the EPA. I cannot think of a person more suited to lead the Environmental Protection Agency than Oklahoma Attorney General Scott Pruitt. He has acknowledged human impact on the climate and supports a robust discussion about its affects and what the Government should and shouldn't do to address it."

And then also submitting for the record a report that I did as ranking member of the Subcommittee on Clean Air and Nuclear Safety of this Committee, this was a couple of years ago, called "Red Tape Making Americans Sick." I put this together as a physician where we talk about unemployment, long-term unemployment increases the likelihood of hospital visits, illnesses, premature deaths in

communities due to joblessness; it hurts children's health, hurts family well-being, and quote scientists who point that the unemployment rate is well established as a risk factor for elevated illness and mortality rates in epidemiological studies performed since the 1980s. Additionally, there is influencing on mental disorders, on suicide, alcohol abuse, alcoholism. We also see it with spouse abuse, drug abuse.

So that the regulations that come out of the EPA that do cut into employment of hardworking Americans actually contributes to a deterioration of their health.

I don't know if you have any comments on that or what you may have seen in Oklahoma at times of unemployment.

Mr. Pruitt. Senator, we have seen similar issues in Oklahoma. We have prescription drug abuse that occurs at rates that are unprecedented, as other parts of the Country, so there is a similar concern that we have in Oklahoma.

Senator Barrasso. I appreciate your patience, your honesty, your forthright presentation this morning. We are going to go to a second round. I now have about 12:45. If it is all right with you, Ranking Member Carper, we will come back in an hour. We will take an hour break and come back and resume with a second round of questioning at 1:45.

The Committee is in recess.

Mr. Pruitt. Thank you, Senator.

[Recess.]

Senator Barrasso. Let us resume the confirmation hearing for Scott Pruitt to be EPA Administrator.

Attorney General Pruitt, let me start by saying sometimes you get a chance to sit down over lunch and you say, I have been answering questions for over two-and-a-half hours. I wish I had said something differently about something or other. Is there anything you would like to clarify?

Mr. Pruitt. I have just one point of clarification in response to Senator Whitehouse's questions this morning about different environmental enforcement steps we have taken with respect to the leaky underground storage and double dipping in our State. I have officially initiated three cases there with respect to Valero, BP and Conoco. Exxon and a number of other cases are still in settlement discussions. Those cases have not materialized in actual litigation just yet.

Senator Barrasso. Thank you for that clarification.

I have a couple quick questions. In the City of Cheyenne, Wyoming, it was discovered that trichloroethylene, a chemical that has been used by the military to degrease the engines of rocket motors, was seeping into the city's drinking water supply. The Army Corps of Engineers, which was in charge of a nearby former Atlas nuclear missile site, refused to even admit that the site was the cause of the pollution. I fought the Corps on this to do testing needing to prove what was obvious to everyone who looked at it. The test results showed a large plume coming from the Atlas site directly into the city's wells. The Corps is now addressing the pollution of the city's

water supply. It is now protected through a state-of-the-art water treatment facility that was installed by the Corps.

Can you perhaps give me an example from when you served as Oklahoma's State Attorney General where you went after polluters and held them accountable in that same way?

Mr. Pruitt. Yes, Senator. As I indicated earlier, I think this was indicated earlier in this morning's testimony, I mentioned the case with the hen producing, the CAFO. That was something we actually initiated. I know there was some question that Senator Carper raised in that regard. That was both with respect to Federal and State violations. We actually joined the State of Texas and the EPA in that enforcement action.

I have submitted for the record, as you know, a list of cases where we have worked with the Wildlife Commission in Oklahoma, the DEQ around CERCLA matters and enforcement of our State laws.

Senator Barrasso. What was troubling to many of us in the previous Administration was when officials within the Obama Administration went to extraordinary lengths to avoid disclosing their official written communications under the Freedom of Information Act. This is the law that allows public access to government records. For example, EPA Administrator Lisa Jackson, at the time, used an EPA email account under the name of Richard Windsor, Richard Windsor, as opposed to her own email account.

If confirmed, will you refrain from taking any such action that makes it difficult or impossible for the public to access your official written communications under the Freedom of Information Act?

Mr. Pruitt. Yes, Mr. Chairman. As I indicated in my opening statement, I really believe that public participation and transparency in rulemaking is very important. I think that extends to this matter as well.

Senator Barrasso. Thank you. I will reserve the remainder of my time.

Senator Carper?

Senator Carper. Thanks, Mr. Chairman.

As we discussed before, you are a part, I think, of at least three lawsuits, Mr. Pruitt, I think one is pending on the EPA's efforts to reduce mercury emissions from power plants. We know that 50 percent of our Nation's mercury emissions come from power plants, not nuclear plants, but generally fossil fuel plants, largely coal-fired plants. We know there are more fish consumption advisories in the U.S. for mercury than I think all other contaminants combined, including in your own State of Oklahoma.

If you believe that the EPA should not move forward on the Mercury and Air Toxics rule, how do States clean up mercury? What do you think are the health impacts of mercury emissions?

Mr. Pruitt. Senator, I actually have not stated that I believe the EPA should not move forward on regulating mercury or adopting rulemaking in that regard. Our challenge was with regard to the process that was used in that case and how it was not complicit with the statutes as defined by Congress.

There is not a statement, nor a belief that I have, that mercury is something that should not be regulated under Section 112 as a

hazardous air pollutant, a HAP. As you know, that section directly deals with health concerns of our citizens. That is the reason why there is control technology that is very heightened in that statute, maximum achievable control technology that is required. So I believe that mercury should be dealt with and dealt with in a meaningful way by the EPA but subject to the processes this body has outlined.

Senator Carper. Senators Lamar Alexander and I worked together for a number of years on clear skies legislation. The George Bush Administration had proposed Clear Skies dealing with sulfur dioxide, nitrogen oxide and mercury. Several colleagues of my own, including Senator Alexander, worked on legislation similar. One of the differences between what we proposed and the Bush Administration's proposal was with respect to reducing the emissions of mercury. I do not recall exactly what the Bush proposal called for in terms of emissions reductions from power plants and others from mercury but it was not very aggressive.

I proposed a reduction of 80 percent over a certain number of years. Senator Alexander said he thought folks could do better than 80 percent and he proposed a 90 percent reduction schedule.

We literally had here at this table witnesses from utilities and one witness from a trade association representing technology companies that focused on reducing emissions of harmful substances into our air and into our water. Every utility representative said, we cannot meet an 80 percent reduction in mercury. The witness from the trade association representing the industry which was in business just to try to reduce emissions like mercury said, not only can the industry

meet those reductions over the stipulated period of time, they could exceed them.

As it turns out, they exceeded them. They actually did better than 80 percent, actually did better than 90 percent and did it more quickly than I think was anticipated.

Is that instructive to you in any way on this question? Is there any lesson there for you or for us from that experience?

Mr. Pruitt. As I have indicated, Senator, I really believe that it is important and it is a partnership between the EPA and the States. I made reference to the phrase earlier of national standards and neighborhood solutions. I think that shows the EPA can be involved and should be involved in setting standards and setting objective, science-based standards to improve air quality and protecting the health of our citizens but also to be a meaningful partner with the States in implementing those laws.

Senator Carper. Let me just stop you there, please. I like to say that in adversity lies opportunity. That is not me. That is Albert Einstein. There is economic advantage to be gained from cleaning up pollution. We have seen there are companies that worked on mercury emissions. They make money doing that and starting that technology around the world. Similarly, there has been money made from the Diesel Emission Reduction Act, the American technology reducing emissions from old diesel engines.

Do you ever give any thought to the economic gain, the economic advantage that can flow from developing that technology to reduce

emissions? I actually think sometimes of setting regulations, clear regulations.

I will never forget a conversation I had when we were working on our Clear Skies legislation addressing four pollutants, meeting with a bunch of utility CEOs, and talking about how to go forward on that issue. At the end of the conversation, one of the utility CEOs, I think a curmudgeon-like older fellow. I do not remember where he was from. He said at the end of the day, here is what you need to do, Congress and the EPA. You need to tell us what the rules are going to be; you need to give us some time and flexibility; and you need to get out of the way. That was what he said. Tell us what the rules are going to be; give us some flexibility; and get out of the way.

Do you believe that actually setting standards, whether it happens to be mercury reductions, CAFE standards, fuel efficiency requirements, that we are actually setting those standards, making it clear that we actually provide certainty and actually open a door for economic production?

Mr. Pruitt. I do, Senator, actually.

Senator Carper. Can you give us an example where you actually saw that happen, were helpful in making that happen?

Mr. Pruitt. In Oklahoma, this is not widely known because we are known as an oil and gas State, but in the generation of electricity in our State, 17 percent of our electricity is generated through wind. We have had a heavy emphasis on renewables. That puts us in the top three in the Country.

Our Corporation Commission, I actually have obligations to appear before the Corporation Commission in the setting of rates. As utility companies are looking at modifying their facilities to comply with environmental statutes, there is great discussion about how to do that more economically and to achieve the air quality objectives we have under EPA and State mandates. I have been very involved in that process through that part of my office.

Senator Carper. Thanks, Mr. Chairman.

Senator Barrasso. Thank you, Senator Carper.

Senator Capito.

Senator Capito. Thank you, Mr. Chairman.

Thank you again for being before us. Congratulations on your nomination.

Mr. Pruitt. Thank you, Senator.

Senator Capito. I think, as you can tell from this committee and the Country is divided on a lot of the issues in and around involving what you are endeavoring to headline here at the EPA. I think understanding one another is extremely important. No matter how many times I might say the same thing and somebody else on the other side might say the same thing, it gives me a greater understanding of where they live and how they think best way to pursue environmental issues are.

In the crowd that just joined us here after lunch are several coal miners who traveled all morning, have been waiting in the hall and made some new friends in the audience. I want to thank them for coming because those are the faces of the issues that I try to address

when we are talking about the different facets of the regulatory environment that we see that has been put forth over the last several years. This question is for you all.

In my very first hearing as a United States Senator on this committee, we had the Assistant Administrator, Janet McCabe. She came to testify about the EPA CO2 rules. When I pressed her about why in the public meetings on the existing plant rules, EPA had not bothered to come to West Virginia or, for that matter, any of the other States that most heavily rely on coal for electricity generation, this is what she said: "We tried to. When we were scheduling national level meetings, we wanted to have those in locations where people were comfortable coming."

Mr. Attorney General, I want you to be comfortable coming anywhere in this Country to talk about whether it is Rhode Island, West Virginia, or Alaska. People need to know you are listening, that you care and that you are understanding the ramifications for the decisions that you make.

So this did not sit very well for me. We had a meeting after that in Beckley, West Virginia, which is the birthplace of the Ranking Member. We had Bo Copley there, who was a laid-off coalminer. He talked about all the hardships of his friends and neighbors. We had the county commissioner who talked about the loss of revenue to the county and how it was impacting the school systems, the real estate values and the bankruptcies of all the different coal companies and people who had been out of work.

I would implore you to commit today to visit West Virginia, both sides of West Virginia, and talk to our coal miners and their families to talk about the job and economic impacts and how we can work together with both sides to try to get to the intended goal of cleaner air and cleaner water.

Mr. Pruitt. Senator, I really appreciate you sharing that. That is the reason I mentioned in my opening statement the importance of listening and leading. This process I have been a part of obviously is very new, but I spent time with each of you, many of you, in individual meetings. Senator Gillibrand talked about issues important to her around CERCLA. You cited concerns and issues that are important to you in West Virginia. I think it is very important, if confirmed as Administrator, that I spend time responding, learning and listening to you and your respective States and trying to be helpful with regard to the environmental issues you face.

Senator Capito. Thank you. That means a lot.

I would like to get some clarification on a topic has been coming up about how many times you, as Attorney General, sued the EPA. You began your statement by saying the rule of law is very important to you. Then you talked about several of the cases and probably most of the cases you brought forward as not challenging the regulations so much as the process or whether the rule of law has been overstepped and the boundaries of the EPA has been the intent of Congress by legislating to the EPA, has been overstepped. The courts have agreed, in some cases, that this is the case.

Could you kind of restate that position on the different actions?

Mr. Pruitt. Senator, as I indicated I think in response to Senator Sullivan, probably more so than most statutes that are passed by Congress, this body has recognized the very important and vibrant role the States play in partnership with the EPA in implementing and enforcing our environmental statutes. Many of you talked about that in your offices and how your DEQ works with the Regional Administrator.

So when we talk about rule of law, as you deal with mercury, as you deal with CO2, as you deal with water issues around WOTUS and the definition in those cases, it is important that you do so consistent with the framework that has been established by this body and that it is respected. That gives confidence to the people that are regulating it.

When you have an administrative agency of any type that acts inconsistent or tries to enlarge its authority, it does not inspire confidence in those that are regulated. You are seeing a matter of picking winners and losers and being against certain things as opposed to protecting people. That rule of law is not something that is academic in my view. It is not something that is just legal; I think it is important to ensuring good outcomes as far as improving our air and protecting our waters.

Senator Capito. Thank you.

Senator Barrasso. Senator Whitehouse.

Senator Whitehouse. Thank you, Mr. Chairman.

Mr. Pruitt, when we left off, we were talking about things that, to quote the Chairman, "might place you in a conflict of interest but

have not been disclosed." We were talking about the dark money operation that supports the Republican Attorney Generals Association.

Before we get back into that, let me ask you this as a hypothetical. If you had raised significant amounts of money for the rule of law defense fund from corporations who will be subject to EPA's regulation, before EPA, with matters before EPA, might that place you in a conflict of interest?

Mr. Pruitt. The EPA Ethics Counsel has said, by the way these are career individuals as you know, Senator. Justina Fugh is a career person at EPA Ethics. So as they have reviewed these potential conflicts, I have disclosed all entities I have been affiliated with.

Senator Whitehouse. I understand that but I am asking you if you think it might place you in a conflict of interest because we both understand that the ethics rules that the EPA is enforcing predate Citizens United, predate dark money. They have said in the letter that they are not even looking at that because they do not have the authority to. That does not mean it is not a conflict of interest. It means that the regulatory authority on government ethics has not caught up with this post-Citizens United, dark money world.

My question is, you are a lawyer, you know conflicts of interest. You have been an attorney general. Might it be a conflict of interest within your definition of the term if you had raised significant amounts of money for this Rule of Law Defense Fund and they will have business before EPA with you? Is that a potential conflict of interest?

Mr. Pruitt. I think if you actually did address those entities to the degree that I was never an officer of the super PAC you are referred to earlier, the Liberty 2.0.

Senator Whitehouse. The question was fund raising. That is the question we do not have any answers on, is what you raised.

Mr. Pruitt. They looked at those entities to determine the nature of my relationship and indicated those would have to be evaluated in the future as certain cases arose.

Senator Whitehouse. Right now, the Chairman asked you a question which is, are there matters that might place you in a conflict of interest that you have not disclosed. You answered no.

Might not having raised significant money, let's say $1 million. Let's say you made a call to Devon Energy and said, I did your letter for you. RAGA needs a lot of money. We have this dark money thing where we can launder your identity clean off it and the money will go into RAGA. I need $1 million out of you. Might that not create a conflict of interest for you if that were the facts?

Mr. Pruitt. Ms. Fugh has indicated in her letter to me, again, these are career individuals at EPA Ethics, that if particular matters involving specific parties arise in the future, it will be evaluated at that point.

Senator Whitehouse. How will they know if you are not willing to disclose that you raised a hypothetical $1 million from Devon Energy?

Mr. Pruitt. Those aren't even covered entities under her letter at this point.

Senator Whitehouse. That is my point. That may very well create a conflict of interest, mightn't it?

Mr. Pruitt. Senator, I did not serve in an office or capacity at that entity in any way.

Senator Whitehouse. That also is not the question. The question is a very simple one. Did you raise money for the Rule of Law Defense Fund, front entities that will appear before EPA as potential defendants in subjects of regulation? If so, how much and what did you tell them and what did you ask? It seems to me that is not an unusual or --

Mr. Pruitt. The Rule of Law Defense Fund, according to Ms. Fugh, would need to be a party in the future for that to be an issue. That is what she has indicated in her letter to me. At the time, if it should arise in the future, I will seek the counsel of EPA Ethics and follow the advice of those career folks to make a decision and recuse if necessary. That is something I commit to doing.

Senator Whitehouse. At this point, what I deduce from your statement is that if that set of hypothetical facts were true, if you had raised $1 million from a big energy corporation to go through the Rule of Law Defense Fund to support your efforts at RAGA, that is not something anybody should care about, even if that corporation is before you at EPA and subject to your regulation?

Mr. Pruitt. I think it is something that if presented in the future, Justina Fugh, myself and EPA Ethics would evaluate that and I would take the appropriate steps to recuse if they told me to do so.

Senator Whitehouse. But how would it be presented in the future if you are not willing to present it now? Why does it matter in the future and not now?

Mr. Pruitt. If there is a matter or case that comes before the EPA's authority, that would be something. There is ongoing, as you know, Senator, Ms. Fugh indicated this in her letter, there is ongoing obligations that I will have, if confirmed as Administrator, to bring those kinds of matters to the attention of EPA Ethics.

Senator Whitehouse. For what it is worth, I think the Senate has a role in policing this as well, that the whole purpose of advice and consent and the reason there are these government ethics filings is so we can look at this exact question. The fact they haven't been updated to take into account dark money and all these big political organizations that have been created with dark money doesn't take away our Senate obligation to find out what conflicts of interest you will bring to the position of Administrator. It gives me very little comfort that you are not willing to answer those questions here.

My time has expired. I will continue in another round.

Senator Barrasso. Thank you very much, Senator Whitehouse.

I would like to introduce for the record an article in the Associated Press in the Seattle Times headlined, "Ethics Officials Clear Trump EPA Nominee." It says, "The Office of Government Ethics on Monday released the personal financial disclosure report for Scott Pruitt, currently Oklahoma's Attorney General. The Ethics Office affirmed that Pruitt's disclosures comply with applicable federal laws

and rules. "His finances," it says, "are among the least complicated of Trump's Cabinet nominees."

[The referenced information follows:]

Senator Barrasso. Senator Boozman.

Senator Boozman. Thank you, Mr. Chairman.

I really do find it ironic and hypocritical that we are in a situation that my friends on the other side of the aisle in this committee, using their definition of dark money as elected official, have literally raised millions of dollars of so-called dark money.

I'd like to talk a little bit about some of the over-regulatory burden that the States are facing. Air quality in Arkansas is among some of the cleanest in the Nation. Despite the progress that the State has made in looking forward, trying to do the right thing, the Regional Haze Federal Plan is going to produce a tremendous economic burden on them.

I think it is a prime example of the haphazard regulatory atmosphere that we have had in the past with little input from the States and stakeholders. For years, the regulatory certainty has prevented businesses from hiring new employees and stunting economic growth. In fact, the National Small Business Association that was just released found that more than half of small businesses have held off on hiring because they don't know what the rules are going to be.

You have mentioned it several times. Can you talk a little bit more about the impact that you have seen in regard to regulatory uncertainty in the State of Oklahoma and the experiences you have had?

Mr. Pruitt. Senator, the Visibility Program, we have had similar challenges in Oklahoma. The Regional Haze Program under the Clean Air Act, that section of the Clean Air Act is really quite a bit different

than other provisions of the Clean Air Act. It gives primacy to the States in adopting plans to increase or improve visibility.

That particular section of the law says by the year 2064, we should have natural visibility in some key areas across the Country. Oklahoma several years ago, actually in 2010 under a different Administration, both Governor and Attorney General submitted a State implementation plan that beat that deadline by decades. Despite that, the EPA came in and rejected that State implementation plan and forced a federal implementation plan on the State, costing the consumers quite a bit of money.

One thing I would add that I didn't talk about earlier is we talked about cooperative federalism and the importance of partnership. I have talked about that; you've talked about that. Under this past Administration, the use of federal implementation plans, if you combine President Bush, President Clinton and President George W. Bush, those three Administrations combined issued five federal implementation plans under the Clean Air Act in three Administrations. This Administration has issued 56. So it shows an attitude of indifference, an attitude of trying to be dictatorial in some respects toward the State's role or manipulative of the State's role in a way that is, I think, counterproductive for air quality.

Senator Boozman. When you and fellow Attorney Generals and other stakeholders sue the Federal Government, whether it is regional haze or waters of the U.S. or whatever, your goal is not to do away with the regulation, your goal is to make it such that the EPA follows their regulatory authority, is that correct?

Mr. Pruitt. Yes, Senator. In that example I provided to you where the State implementation plan of Oklahoma that was rejected, we actually satisfied the statutory mandate that was under the regionalized program. We reached natural visibility a couple of decades ahead of schedule. The methodology that was used, the EPA simply disagreed with it. So they used their authority to displace the State plan costing consumers in the State hundreds of millions of dollars in increased utility costs.

Senator Boozman. One of the things I think we have also seen in the last eight years is tremendous mission creep on the part of the EPA where they have gotten into areas where they don't have the expertise. I think expertise would be the best word in regard to coming out with some of the things they have done where they lack jurisdiction and haven't really been in the past.

Can we count on you to work with the other agencies and take their expertise into careful consideration as we come out with the rules and regulations?

Mr. Pruitt. I think interagency cooperation is very, very important. Obviously with rulemaking, that is something that occurs and should occur, I think, in a very collaborative way. So yes, Senator, I believe it is very important as the EPA conducts its business that it works with the Corps and works with other agencies at the federal level to ensure that it is doing all it can to advance and protect water quality and air quality and do so within the framework established by Congress.

Senator Boozman. Does it feel like it is the ultimate decider again when they sometimes do not have the expertise of the other agency?

Mr. Pruitt. Yes, Senator. I agree.

Senator Boozman. Thank you.

Mr. Pruitt. Thank you.

Senator Boozman. Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Boozman.

Senator Merkley.

Senator Merkley. Thank you, Mr. Chairman.

Mr. Pruitt, are you familiar with this piece of medical equipment?

Mr. Pruitt. Yes, an inhaler, it looks like.

Senator Merkley. Yes, an asthma inhaler. Are you familiar with how many Americans have asthma?

Mr. Pruitt. No, Senator, I am not.

Senator Merkley. It's about 1 out of 10 Americans, including over 7 million children. It is a pretty significant health problem across the Country. I know I have been fortunate not to have asthma but some folks I know who have it and have asthma attacks feel like they are suffocating. Sometimes they go into crisis. People go into crisis with asthma. Sometimes they die from it. It is a terrifying condition.

The EPA, in October 2015, strengthened the National Ambient Air Quality Standards for ground level ozone. They strengthened it to 70 ppb, adjusting it from 75 ppb, because they argued that it was an

attainable standard that would save $3 billion to $6 billion and in addition, of course, greatly improve the quality of life by diminishing the amount of asthma attacks and deaths.

You challenged this. You launched a lawsuit against this standard. Was the basis of your lawsuit cost benefit analysis, that they didn't follow their process?

Mr. Pruitt. It was not, Senator. As you know, under the NAAQS Program, the Whitman decision, cause cannot be considered in a criteria pollutant.

Senator Merkley. What was the standard you were challenging?

Mr. Pruitt. It was a records-based challenge that the need to ratchet down from 75 parts per billion to 70 parts per billion. As you know, the 75 parts per billion had only been in operation for two years. I think, Senator, it is important from a priority perspective or the resource perspective of the EPA when 40 percent of the Country is in nonattainment for one of those criteria pollutants, perhaps there should be focus on how to meet the level already in statute or already in rule.

Senator Merkley. So you challenged this based on the attainability standard? I already know that --

Mr. Pruitt. The records-based challenge, yes.

Senator Merkley. Yes, the attainability standard. There were numerous groups that weighed in and said no, this is totally attainable. I will submit a list for the record of that, Mr. Chairman.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Merkley. The key to this is that by implementing that, by the time it is implemented, it would save annually 230,000, an estimate of course, asthma attacks among children, 160,000 missed school days, a tremendous number of missed work days, 630 emergency room visits and 340 cases of acute bronchitis. But it also would save, best estimate, 320 to 660 premature deaths.

Here is something that profoundly affects the health of folks in Oklahoma, folks across the Country, folks in my home State of Oregon, something that expert after expert said is fully attainable, and you challenged it not on a process issue, that is not on whether or not there was a cost benefit analysis because as you rightly pointed out, cost is not allowed to be a factor, but whether it was attainable. Why fight so hard on the side of the oil industry rather than fighting on the side of the health of the people of Oklahoma?

Mr. Pruitt. Senator, let me say to you with respect to the NAAQS Program, when you look at the nonattainment we have in this Country, it is presently around 40 percent, I think increasing the nonattainment percentage as opposed to focusing resources to get nonattainment into attainment is a very important role of the EPA. We should be taking those marginal and moderate areas on our map that are in nonattainment and work with local officials, those counties, through monitoring and assistance to help move from nonattainment to attainment. That is a very important goal of the EPA in each of these criteria.

Senator Merkley. Thank you. You have made your point clear. I just simply disagree with you. None of these standards, when they are

set, are attained. That is the point. It is an objective to be worked at over time. There was a strategy that this might take until 2025 to be fully implemented.

But in the course of laying out that vision and having folks across the Country work towards that vision, you end up saving a tremendous amount of money and a tremendous amount of lives. I, as a Senator from Oregon, fighting for the quality of life of Oregonians, deeply resent folks fighting for oil industry that are trying to damage the health of my constituents and Americans across this Country. It is a question of values and valuing profits of companies over the health of our citizens, it is a character issue and that is what these hearings are all about. We are charged with Hamilton to determine whether or not an individual is of fit character. To me this is a character issue, valuing profits over people's health.

Thank you, Mr. Chair.

Senator Barrasso. Thank you, Senator Merkley.

I am submitting for the record a report by the National Black Chamber of Commerce entitled, Potential Impact of Proposed EPA Regulations on Low Income Groups and Minorities. The report goes from 2015 and goes on to say that EPA regulations, including its regulation on carbon dioxide emissions, would result in the year 2020 in nearly 200,000 black jobs would be lost and more than 300,000 Hispanic jobs would be lost. Additionally, commensurate with this, there would be median household income significant decreases throughout the communities listed in the report.

[The referenced information follows:]

Senator Barrasso. Senator Fischer.

Senator Fischer. Thank you, Mr. Chairman. Here we go again on round two. I am happy that we have an opportunity to continue questioning with you, General Pruitt.

Nebraska, much like Oklahoma, is a rural State. In many cases, the closest town or the neighbor can be located miles and sometimes hours away. In Nebraska one in four jobs is directly tied to production agriculture. Under this Administration, farmers and ranchers felt especially targeted by the EPA. For example, in 2011 and 2012, EPA Region 7 conducted aerial surveillance or flyovers of feed yards in my State. While flying over my State, EPA documented these facilities with photographs.

This was very disconcerting to me given that many livestock producers in Nebraska also live and raise their families on these properties. Not only were these producers not informed beforehand but the EPA has already delegated the authority to carry out the Clean Water Act in Nebraska to the State Department of Environmental Quality.

What will you do to ensure that the EPA sticks to its core mission? Furthermore, how will you work with the regulated community, including agriculture, to build trust among constituencies that have been, I would say, the subject of bullying tactics by this EPA that we have now?

Mr. Pruitt. Senator, I indicated in my opening statement some core themes, if confirmed as Administrator, that I would seek to comply with. One is public participation, full participation to

ensure that all voices are heard as the EPA conducts its activities with respect to rulemaking particularly. I think perhaps what you are referring to is the lack of that voice or opportunity in the last several years. So I would work to build a collaborative relationship with those States. As I have indicated, I think the Departments of Environmental Quality at the State level are valuable partners, that we need to restore their confidence in the partnership with the EPA and then seek to listen to the community concerns in addressing and responding to environmental issues.

Senator Fischer. Thank you.

In one of her exit interviews, EPA Administrator Gina McCarthy has admitted that she has had a bad relationship with agriculture and with the agriculture community. She listed it as one of her regrets. I think a bad relationship is an understatement in this case.

This Administration's EPA philosophy is diametrically opposed to the idea that farmers can be good stewards of our land, our water, our environment. Instead, it seemed that this Administration's EPA wanted to regulate. In some cases, it looked like they wanted to prevent farming. The agriculture community is looking forward to a new leadership at the EPA and working with you.

Mr. Chairman, I have here some statements from agriculture officials and groups I would like inserted into the record.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Fischer. If I may, I would close by quoting a few of those. Jim Reese, the Oklahoma Secretary of Agriculture, says that "Scott Pruitt will continue EPA's efforts to protect our environment but with respect towards landowners, taxpayers, municipalities, businesses and Congress." That is nice to hear, sir.

Troy Stowater, Nebraska Cattlemen president, stated "Simply put, Mr. Pruitt sees clearly that agriculture and environment are not opposing terms but rather, they are complementary. He will work to cultivate the relationships which will lead to the United States leading in food and fiber production while improving the environment in which it is accomplished." Again, I am happy to look forward to that relationship being established again so that all parts of our society here in this Country can participate and receive the recognition that we are good stewards of the land.

If confirmed, what will be your relationship with the agriculture community? Are you going to enforce current laws and will you also respect the limits that we have on those laws?

Mr. Pruitt. Yes, on both counts, Senator, and also the theme I mentioned in my opening statement that I would highlight again, is that we need to reject this paradigm that if you are pro-energy, you are anti-environment or if you are pro-environment; you are anti-energy. I believe that we, as a Country, have demonstrated that and we have made great progress since the 1970s in improving our air quality and protecting our waters. We can grow an economy and also protect and be a good steward of our environment. We need to restore that proper balance and commitment to both as we seek to do our job.

Senator Fischer. Thank you. As I said earlier, every member of this committee believes in clean air and clean water. We want an environment that is respected where we can manage our natural resources in a responsible manner. Thank you, sir.

Senator Barrasso. Thank you, Senator Fischer.

Senator Cardin.

Senator Cardin. Thank you, Mr. Chairman.

Mr. Pruitt, I want to try to get your understanding. I heard you say that you wanted to see the regulations and the laws predictable so that stakeholders know exactly what is required so there is no confusion.

I want to concentrate on the waters of the U.S. because, ever since the Supreme Court decisions, there has been an uncertainty as to what waters are, in fact, subject to regulation by the Federal Government and what waters are not. Do you believe that priority should be set by statute or should it be set by regulations from the EPA?

Mr. Pruitt. Senator, I think that is a great question. If you look at the series of cases going back to Bayview all the way to Rapanos, I think you are exactly right. The definition in the Clean Water Act says that navigable waters are waters of the United States. That doesn't provide a great deal of clarity to those that administer the law. I think the EPA taking steps to provide clarity is important absent Congress responding. I think that perhaps there is a time and place for Article 1 response, congressional response, to what this

body means when it says navigable waters are waters of the United States.

Senator Cardin. Of course, the Congress, for whatever reasons, for a long period of time, has not been able to respond as to what we think the definition of the waters of the U.S. should be. The Administration did come forward with proposed regulations which were resisted by many of the stakeholders that you are aware of.

How would you define the waters of the U.S.? What was wrong in the regulation? I don't want to go through all the details. Tell me, where do you think we should regulate? You already said more than just navigable. How do we define it? How do you do it? What did the Administration do wrong?

Mr. Pruitt. The challenge up until now with respect to the current rule, this involves actually an air case, the UARG case, where Justice Scalia talked about the counterbalance to Massachusetts v. EPA where the steps taken by the EPA to take the endangerment finding in 2009 that dealt with Title II mobile sources and then link that over the PSD Program was something Justice Scalia said transformed the statute and was not lawful or constitutional.

I think the same thing perhaps is going on with the current rule. When you are classifying dry creek beds in southeast Oklahoma that are dry 90 percent of the year as a water of the United States, that clearly is something that is --

Senator Cardin. The Administration, in its regulation, had certain exceptions that tried to deal with that. You obviously didn't think those exceptions were clear enough.

Mr. Pruitt. Actually, the Sixth Circuit said that those clarifications were not sufficient. I would agree with you, Senator Cardin, that I believe the clarity around this definition, the jurisdiction of the EPA, is essential to get right and to address. As I indicated earlier to some questions, the Supreme Court has actually taken up a matter from last Friday, it is more jurisdictional and not merit-based. But the response by Congress, the response to provide clarity, perhaps is a very important step to take.

Senator Cardin. I want to pursue this. I think we have asked questions for the record as to specific provisions you believe should be in that rule that would be different than the proposed rule. I would appreciate a response to that so we can try to see where we are heading in your thought process as to how you define the regulated waters of the U.S. That would be helpful to us.

Mr. Pruitt. I think, Senator, the reason that is difficult, as you know, is because in that process, whatever process that would take place, that would be rulemaking which means there would be comment.

Senator Cardin. I understand that. I am not trying to get every I dotted and every T. I just want to get your philosophy as to where the waters of the U.S. lines would be drawn and where you took exception to the regulatory efforts of the Obama Administration.

Let me get to the second point, if I might, on fracking. Fracking is an interesting area because it is State-regulated principally. There are very few federal regulations. My State has gas deposits that could be subject to fracking. Pennsylvania, our neighboring State, has done that. There have been some problems with

pollution of water. We know about the gas releases that have already been talked about. There is some concern particularly with deep well drilling that when you inject the fluids back into the cavities, that it may cause instability. In your State, I know there were a lot of earthquakes and there has been talk about whether these earthquakes were motivated by the fracking activities or not.

How well have the States regulated fracking? Where do you see the federal role should be in protecting our environment from fracking?

Mr. Pruitt. I am glad you mentioned the State role because we actually have been regulating hydraulic fracturing in Oklahoma since the late 1940s, early 1950s. It is not a new process. Horizontal drilling is, but the hydraulic fracturing process is not. Many States have been very aggressive in regulating it for a number of decades.

With response to the seismicity issue you are talking about, the earthquakes in Oklahoma, the Corporation Commission has actually declared off limits certain drilling activity in hot spots already. They have taken a very aggressive approach. I too share their concern. I have been in conversation with the commissioners at the Corporation Commission, that is who has jurisdiction in this matter. They have taken very meaningful steps to declare off limits certain drilling activity to try to see if it will help reduce the number of earthquakes happening in Oklahoma. It has helped.

Senator Cardin. Thank you. Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Cardin.

Senator Inhofe.

Senator Inhofe. Thank you, Mr. Chairman.

I have two unanimous consent requests, so don't start my clock yet.

One is I really believe, and perhaps am overly sensitive to this, that Mr. Pruitt's integrity has been put into question with the accusations of contributions to his campaign. I would like to keep in mind that the oil industry is a huge industry in my State of Oklahoma. They have things called PACs where the middle income people will say yes, they support me also.

I think we need to have in the record that there are some things that are going on that should not be going on. This affects the Democrats and not the Republicans. There is a guy named Tom Steyer, I want to put this in the record, who actually said he was going to put $100 million into campaigns of individuals talking about global warming and what he expected. In 2014, he didn't do that. He only put in $75 million of his own money. In 2016, he was the largest contributor putting in $86 million of his own money. I am not going to read this because it does reflect the names of people who are at this dais.

I ask unanimous consent that this be entered into the record.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Inhofe. The other thing --

Senator Carper. I'd like to object. I'd like to ask for clarification from my friend from Oklahoma. The monies that you are referring to, were those donations that were disclosed, fully disclosed?

Senator Inhofe. Oh, yes, I believe they were.

Senator Carper. Then that does not sound like dark money to me.

Senator Inhofe. All right.

On the last question that Mr. Pruitt concerning the earthquakes, I'd like to make this a part of the record because it will surprise you guys that the Oklahoma Corporation Commission has really focused in on this thing and talked about it. This is wastewater in disposal wells that we are concerned with. They clamped down on it and you are exactly right in your response to the question except you didn't go far enough. In 2016, they actually reduced the earthquakes by 31 percent.

So we are doing, in the State of Oklahoma, something that we have been complimented about, the fact we are taking these actions. I'd like to make this a part of the record.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Inhofe. The other thing I want to bring out, and I have done this before but I wasn't going to do it until people kept talking about the science is settled, the science is settled, the science is settled. I know people want to believe that.

I remember so well, every year the UN has a big party and they invite everyone to come in. I was going to go to Copenhagen to be the one-man truth squad which I did and went over there. But during that time, right before I left, I asked the Administrator of the EPA, the job I believe you are going to have, Lisa Jackson, I said I have a feeling once I leave town you are going to come up with an endangerment finding and you are going to give your justification for getting involved in this issue. She smiled so I could tell it was true. I said, when you do this, it has to be based on science. Tell me the science that you are going to use for this. She said, well, the IPCC, the Intergovernmental Panel on Climate Change.

Now, as luck would have it, my luck and not theirs, right after that is when ClimateGate came. That's when it was disclosed that the individuals, the scientists in IPCC rigged the numbers and came up with such an outrageous lie in terms of what causes global warming, all of that. I will just read a couple of them. One of the physicists in the IPCC said "ClimateGate was a fraud on a scale I have never seen before." Clive Cooke with the Financial Times said "The closed-mindedness of these supposed men of science is surprising even to me. The stink of intellectual corruption is overpowering." The UK Telegraph, that is one of the largest publications in the UK, said "It's the worse scientific scandal of our generation." Nobody talks

about that but that is the science they are talking about. I really believe it is necessary to have that as a part of this record of this meeting.

General Pruitt, in 2012, the EPA and the National Highway Traffic Safety Administration issued updated fuel economy standards that were result of a compromise. That compromise was between the Obama Administration, the automakers and the State of California. Part of this deal required a review of these regulations in 2018 before -- these are their words and not mine -- any new standards were put in place. After losing the election, however, the Obama Administration broke the deal by prematurely issuing new regulations. This decision was made unexpectedly and well over a year before the EPA said they would make the determination. This shortened the timeframe and process, and this is concerning.

Mr. Chairman, I do ask unanimous consent that the previous EPA timeline for the expected action on the midterm review be included in the record.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Inhofe. Attorney General Pruitt, as Administrator, will you look into this matter to see whether this extreme action was appropriate or a hasty political decision?

Mr. Pruitt. Senator, as you indicated, the obligation was to meet the November 2018 midterm review. I think the study that was completed was finished December 30 and they issued their findings within 14 days. That time period is something I am not sure normally happens as far as the time, the velocity of 14 days, but it merits review. I would review that, yes.

Senator Inhofe. The follow-up question would be, would you commit to sitting down with the Transportation Secretary, Elaine Chao? I have already talked to her about this, incidentally. Both will be confirmed, I am convinced, and you are working to address the impacts of the EPA's decision on automobile manufacturers and consumers. Will you work with her on that issue?

Mr. Pruitt. Absolutely.

Senator Inhofe. Very good. Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Inhofe.

Senator Booker.

Senator Booker. Thank you very much.

Thank you, Mr. Pruitt. I want to jump into one of the areas that you said is a principal part of one of your achievements. In your opening statement, you said that as Attorney General you were confronted with an important water quality issue on the scenic Illinois River, the high phosphorous levels that were causing a range of problems that come from the manure principally from farm animals.

You go on to state that this was a historic agreement to clean up the river. It was in your opening statement and a number of the other documents that you provided.

You also described the agreement with Arkansas as an important agreement to reduce the pollution again that was the result from poultry growers, that was "occurring as a result of pollution from poultry growers." Are you familiar with this?

Mr. Pruitt. Yes, also discharge from municipalities in northwest Arkansas as well.

Senator Booker. I think that is an important point, yes. I would like to ask you some questions about this but I think it is important. I really dug into this and did some research. I want to go through with my colleagues what the fact pattern is that led to this moment where you intervened.

It really starts with a Supreme Court decision way back in 1992, Arkansas v. Oklahoma. I imagine you are familiar with this Supreme Court decision that resolved the lawsuit between these two States that held that basically upriver States, such as Arkansas, must comply with water quality standards adopted by downriver States and then approved by the EPA. You are familiar with that?

Mr. Pruitt. I am familiar with the litigation, yes.

Senator Booker. After that Supreme Court decision effective July 1, 2002, Oklahoma actually did adopt a .037 water quality standard for phosphorous. Importantly, they gave a decade, ten-year phase-in period before full compliance was required. Then in 2003, your predecessor, Drew Edmondson, negotiated an agreement with Arkansas,

which I have read, called the Statement of Joint Principles and Actions. Mr. Chairman, I'd like to enter that into the record.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Booker. In 2003, to give more teeth to this, this goes to what you were saying about municipalities, it created phosphorous limits for municipal discharges. That 2003 agreement that I have also read through also states that Oklahoma will reevaluate the .037 criteria for total phosphorus in Oklahoma's rivers by 2012.

Then, this is the big part, in accordance with the instructions, the mandates of the Supreme Court, the EPA gave its approval to Oklahoma's .037 phosphorous standard. This was critical because under the Supreme Court decision, now Oklahoma had a water quality standard approved by the EPA that was now enforceable against up-States like Arkansas.

Let's fast forward to April 2012. Oklahoma's Water Resources Board reviewed the best scientific information available in 2012. It reevaluated and reaffirmed the .037 phosphorous standard.

Mr. Chairman, I want to put in an executive summary of that review.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Booker. Then on June 30th, 2012, the ten-year phase-in going back to the Supreme Court decision, the actions by Oklahoma, the ten-year phase-in period was completed in full compliance and the .037 became required. It became now what was required by the States.

Just to recap all of this, because it is a lot, 20 years, Oklahoma's EPA approved a .037 phosphorous standard more than two decades in the making. It had just been reaffirmed by the Oklahoma Water Resources Board and then the ten-year compliance period phase-in had expired.

So when you said that you had entered into a second agreement with Arkansas that, in your words was a historic agreement to clean up the river, that would reduce pollution from poultry growers, this is the question that I have, sincerely, I pulled that 2013 agreement and read it and it was stunning to see that it actually didn't take any steps to reduce pollution but actually only proposes another unnecessary study and attempts to suspend compliance that was two decades in the making with the .037 standard. It suspended compliance for yet another three years of pollution.

Isn't it true that is what the agreement did?

Mr. Pruitt. It isn't, Senator. There was actually no enforcement of the .037 standard taking place on Arkansas' side of the border. You referred to the Memorandum of Understanding, and I actually have the second Statement of Principles here before me as well, that expired in the 2012-2013 timeframe. That is what presented my office with the opportunity to go to Arkansas to ensure that the

.037 standard would actually be enforced from a State law perspective on that side of the border. That had never taken place in history.

You mentioned the EPA. There was no enforcement authority that had taken place on that phosphorous level by the EPA. Oklahoma had it, as you have indicated, as a standard but it was not being enforced upstream in Arkansas. That is what the agreement addresses.

Senator Booker. Mr. Pruitt, I don't have the seniority or the stature or the grandchildren of Senator Inhofe so I can't go over my time but I will say this. In my next round, I will go back into this, because the documents don't seem consistent at all with what you are saying. In my next round of questioning, I'd like to go a little bit deeper into this historic settlement.

Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Booker.

I would introduce for the record an article that appeared in the Tulsa World this past January 12th, 2017 going way beyond the 20 years of that panel, but 33 years. It is by Ed Fite who served as the agency Administrator of the Oklahoma Scenic Rivers Commission from September of 1983 until June of 2016, 33 years. His statement in this op ed that he wrote is "I have found that Pruitt has always done right by our scenic rivers. For the first time ever, he has gotten the State of Arkansas, which happens to have parts of the streams we have designated as scenic rivers originating in and flowing through their State, to agree to Oklahoma's scenic rivers phosphorous standard, an incredible environmental accomplishment, the effect of which cannot be understated."

[The referenced information follows:]

Senator Barrasso. Senator Rounds.

Senator Rounds. Thank you, Mr. Chairman.

Attorney General Pruitt, in August 2016, the EPA Inspector General found the EPA had failed to follow through with its commitment to update its 2010 life cycle analysis for corn ethanol and has also failed to perform its legally required comprehensive study on the environmental effects of the RFS, the Renewable Fuel Standard. EPA's information on ethanol's life cycle emissions is inaccurate and it is outdated. Today's best available science shows that blending ethanol into gasoline can significantly reduce greenhouse gases. However, the EPA has failed to update its own science with most recent, best science that is available and continues to rely on outdated, inaccurate science when setting national policy, regulatory biofuels policy.

What are your thoughts on the EPA relying on outdated, inaccurate science to set federal regulatory policy?

Mr. Pruitt. Senator, I think it is the obligation of the EPA in taking steps, rulemaking and otherwise, to ensure that it has the most up to date, objective scientific data possible.

Senator Rounds. Let me follow up a little bit. The current EPA process for considering the scientific information underpinning major regulations, I believe, is flawed and it is unbalanced. For example, the Scientific Advisory Board, or the SAB, is to provide scientific advice to the EPA Administrator and Congress. But there is a significant lack of geographic diversity in State, local and tribal representation on the SAB.

Can you explain to us what your views are on the agency science and what you envision as the role of agency science at the EPA?

Mr. Pruitt. Senator, as you and I talked about in our meeting, I think it is important to have that geographical representation better represented and there are some conflicts of interest application with the Science Advisory Board that need to be addressed as well, and also with the Clean Air Science Advisory Committee, which is a standing committee of the Science Advisory Board.

Senator Rounds. I have got a chart that shows the geographic makeup of the 2015 chartered SAB. Of the 54 members, the majority of them come from East or West Coast States. I also have a chart that shows the number of States that have government representatives on the SAB.

How would you broaden the geographic scope of SAB members to make certain that States and various governmental entities are represented? The one on the left shows the lack of diversity with regard to the actual members on the board. The one on the right actually shows that we have a grand total of two States with representation for State and local units of government on those boards.

Mr. Pruitt. Senator, if confirmed, it is an issue as I have indicated and we talked about in your office, that is important to address to ensure there is confidence that science is driving rulemaking that it is objective and tethered to the rules adopted by the EPA. So this is a very important issue that needs to be evaluated and discussed to ensure the efficacy of the science that occurs at the EPA.

Senator Rounds. Would you commit to us that you would make an effort to see that the Science Advisory Board actually reflects some fairness with regard to geographic diversity as well as recognizing the important role that local and regional governments and State and local governments have in determining or at least participating in these boards and commissions?

Mr. Pruitt. If confirmed, I look forward to working with you on that issue.

Senator Rounds. Thank you.

Let me finish quickly with just one other item. We have listened a lot to whether you are working on behalf of industries, whether you are working on behalf of the folks from Oklahoma, and your role as an administrator with regard to clean air, water and so forth. As the Attorney General, you have represented the interests of your State and both your State's economy and your State's environment. Just because you are pro-economic development and pro-economic development growth does not mean that you have to be anti-environment. Preserving the environment and preserving the economy I don't believe are mutually exclusive. I don't think you have to choose between the two.

How would you balance economic growth with making certain that we have clean air and clean water?

Mr. Pruitt. I think part of it is inherent in the statutes and the process that the EPA is supposed to conduct. I know sometimes rulemaking is seen as something that is not terribly important or something laborious, but the reason rulemaking, the reason Congress has said you offer notice on a proposed rule and you take comment is

it is needed to make sure all voices are heard and that there is an informed decision that regulators are making before they finalize rules, because of the impact it has on the economy and on the environment in this instance.

Rulemaking is something we should take seriously and that we should do so consistent with the framework outlined by Congress so that all those voices are heard that you are referring to, Senator, in the rulemaking process.

Senator Rounds. Thank you.

Thank you, Mr. Chairman.

Senator Barrasso. Thank you very much, Senator Rounds. Senator Markey?

Senator Markey. Thank you, Mr. Chairman.

Mr. Pruitt, earlier today you said the EPA has an important role in regulating carbon dioxide because of the 2007 landmark Supreme Court ruling in Massachusetts v. EPA. The EPA Administrators for both President Bush and President Obama made a decision that carbon pollution poses a danger to America, otherwise known as the Endangerment Finding.

Will you promise to keep on the books the scientific finding that carbon pollution poses a danger to the American public health and welfare?

Mr. Pruitt. Two things, Senator. First, with respect to Massachusetts v. EPA, the Supreme Court said to the EPA that they had to make a decision.

Senator Markey. That's right.

Mr. Pruitt. To determine whether CO2 posed a risk and, as you indicated, in 2009 they did so. That is the law of the land, those two cases. There is an obligation of the EPA Administrator to do his or her job in fulfilling Massachusetts v. EPA and that endangerment finding from 2009.

Senator Markey. So you will keep that scientific finding on the books?

Mr. Pruitt. That the endangerment finding is there and needs to be enforced and respected.

Senator Markey. You will not review that scientific finding?

Mr. Pruitt. There is nothing that I know that would cause a review at this point.

Senator Markey. That's very good.

Massachusetts v. EPA made it possible for States like California and Massachusetts to set higher standards for the fuel economy of vehicles using their authority under the Clean Air Act. This is a powerful tool for States to reduce emissions and address global warming.

As a direct result of the Clean Air Act authority combined with my 2007 fuel economy law, the Obama Administration reached a historic agreement, with the auto industry's support, to increase fuel economy standards to 54.5 miles per gallon by 2025. Those standards are projected to reduce our dependence on foreign oil by more than 2 million barrels a day, prevent 6 billion tons of carbon pollution and save consumers more than $1.7 trillion at the gas pump because their cars will be so much more efficient.

Those standards are also unleashing a TESLA revolution, clean energy vehicles all across the Country. Ten thousand people are going to be employed, for example, in Nevada in this technology area.

You have said you want States to play a larger role in environmental regulation. In your 2015 testimony before the House Science Committee you wrote, "The EPA was never intended to be our Nation's front line environmental regulator. The States were to have regulatory primacy." But earlier today, you wouldn't commit to maintaining California, Massachusetts and other States' ability to have regulatory primacy as the leaders of the effort to protect their own States to do what is best for global warming in their own States.

So I am going to ask you again, will you support the statutory right of States to do more to reduce dependence on foreign oil, reduce global warming, pollution, save money at the gas pumps and create tens of thousands, hundreds of thousands of jobs in the clean car job business?

Mr. Pruitt. I think, Senator, generally, the answer to that would be yes. But in application with the California waiver that was discussed earlier, that is an adjudicatory process that I can't prejudge what would occur there. As you know, previous Administrators have either granted or denied that based upon a record that was made. I do respect and do believe that States have a very important role. We've acknowledged that or I have acknowledged that today with respect to the Chesapeake Bay situation, as an example.

I will look at that issue, like others, to make sure that it is respected but also is consistent with the statutory framework that you have outlined.

Senator Markey. Do you support the law that says California has a right to ask for a waiver?

Mr. Pruitt. It is statutory and it is something the Administrator has an obligation to do. So yes, I do respect it.

Senator Markey. Do you support the current California waiver for greenhouse gas standards?

Mr. Pruitt. Senator, that is what would be evaluated. I think it is very difficult and we shouldn't prejudge the outcome in that regard if confirmed as Administrator.

Senator Markey. So you are questioning the current waiver? You don't think they're entitled to the current waiver?

Mr. Pruitt. The waiver is something that is granted on an annual basis. The Administrator would be responsible for making that decision.

Senator Markey. You say you are going to review it?

Mr. Pruitt. Yes, Senator.

Senator Markey. When you say review, I hear undo the rights of the States. I think to a certain extent that is troublesome. Because obviously, what we have heard all day is how much you support States' rights when it comes to these issues, but now when it comes to the right of California, Massachusetts and other States to be able to reduce carbon pollution, you are saying you are going to review that.

My problem really goes to this double standard that is created that when you sue, from the Oklahoma perspective, from the oil and gas industry perspective and you represent Oklahoma, you say they have a right to do what they want to do in the State of Oklahoma. When it comes to Massachusetts or California, and it comes to the question of those States wanting to increase their protection of the environment, protect their victimization from carbon pollution, you say there you are going to review.

I think the history of the agency in granting reviews that have been necessary for Massachusetts, for California and other States to improve the environment are still valid. The science hasn't changed, the new clean energy technologies have not changed, the danger to the public from environmental exposure to carbon pollution has not changed. So from our perspective, we are fearful of what a review would actually result in. From my perspective, I think it is going to lead to you undoing that right of the States to be able to provide that protection.

Senator Barrasso. The Senator's time has expired. Thank you, Senator Markey.

I am going to introduce for the record a report from the National Energy Assistance Directors Association. These are the State officials who oversee the financial assistance programs for people to heat their homes.

The report says that when energy prices go up, higher energy prices result in 24 percent of the recipients who go without food for at least a day, 37 percent go without medical or dental care, 34

percent didn’t fill a prescription and 19 percent had someone in their home become sick because the house was cold due to increased energy costs.

[The referenced information follows:]

Senator Ernst?

Senator Ernst. Thank you, Mr. Chairman.

Again, Attorney General Pruitt, thank you for being here today.

I would like to go back to something a colleague, Senator Duckworth, mentioned earlier today, and that is the point of obligation. The proposal to change the point of obligation under the RFS is an example of regulatory change that would destabilize the policy environment if adopted. What is interesting with the point of obligation, we have two sides that normally oppose each other that have actually come together. Both biofuel producers and the American Petroleum Institute oppose this change, both groups.

I would like to submit a letter for the record showing the united opposition to moving the point of obligation. Mr. Chair, if we could have that entered into the record?

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Ernst. I'd like to revisit this. If you can, yes or no, as Administrator, will you oppose changes to the point of obligation?

Mr. Pruitt. Senator, as I indicated in my meeting with you, and I think in response to Senator Duckworth earlier, there is a comment period in process now at the EPA about the point of obligation. I think prejudging the outcome of that process at this point is unwise.

I can say to you as I said to you in the office, any steps that I would take as EPA Administrator with respect to any issues as far as the RNS program, the Monitor Net Program, point of obligation, all these various issues that we discussed, the job of the EPA Administrator is to make sure that the statute is upheld and enforced and not undermined. The vitality of the RFS Program has been defined by Congress dating back to 2005. Any steps the EPA Administrator takes need to be done in such a way to further the objectives of Congress in that statute, not undermine the objectives of Congress in that statute.

Senator Ernst. I do appreciate your being objective. I am sure that Senator Duckworth and I will look forward to continuing to educate you on those issues. Thank you very much.

I would like to show a chart of the State of Iowa. I would like to go back to some of Senator Cardin's comments about who should define what the expanded definition of Waters of the U.S. is. This is a chart of the State of Iowa. As you can see, with the expanded definition, as provided by the EPA, 97 percent of the State of Iowa is now considered Waters of the U.S. If you are in area like mine in southwest Iowa here, I live in a Water of the U.S. Most of the State

is covered by the waters of the U.S. I bring that up, because in a moment, I am going to show you another picture of the consequences of the EPA defining what a Water of the U.S. is.

Last Congress, this committee examined the scope of the federal Clean Water Act jurisdiction EPA and the Corps of Engineers claim today, even without the new WOTUS Rule. The committee found that EPA and the Corps are already expanding their jurisdiction using the concepts that they codified in WOTUS. They are just doing it on a case by case basis.

The jurisdictional claims already being made are very troubling. For example, the Obama EPA told the public that they will not regulate puddles. They will not regulate puddles. However, we learned that the Corps is already regulating puddles by claiming that a puddle in a gravel parking lot is "a degraded wetland." A degraded wetland.

The Obama EPA also told farmers not to worry about being regulated because ordinary farming activities have a statutory exemption. We learned that the Corps of Engineers and the Department of Justice have decided that plowing is not an ordinary farming activity. Explain that to my dear deceased grandfather and my father whose activities in farming include plowing.

According to the Obama Administration, any plowing that pushes soil into furrows is not an exempt farming activity because the tops of plowed furrows can dry out. According to a brief filed by the United States "the furrow tops now serve as small mountain ranges." Right there, folks, small mountain ranges. "These furrow tops now provide conditions that are not conducive to growth and development of

wetland plant species. They are mini-uplands." This is a picture of these small mountain ranges from the government's expert report.

Mr. Pruitt, will you commit to me that if confirmed, EPA will work with the Corps and DOJ to make sure that federal agencies stop trying to regulate ordinary farming practices?

Mr. Pruitt. Yes, Senator.

Senator Ernst. Thank you for that very concise answer.

Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Ernst.

Senator Duckworth.

Senator Duckworth. Thank you, Mr. Chairman.

Mr. Pruitt, I want to come back to this question again. Let me just tell you, I played second base as well. This is a hanging curve ball. You can knock this out of the park with a yes.

Will you commit, yes or no, to reversing the EPA's current interpretation that available infrastructure should limit the requirements to blend biofuels into our fuel supply, given that it runs counter to congressional intent?

Mr. Pruitt. I don't want to take any steps to undermine the objectives in the statute of the RFS as Administrator of EPA.

Senator Duckworth. Will you commit to opposing any attempts to move the point of obligation from the farmer, the soybean producers, the corn producers and biofuel manufacturers away from them and towards the blenders? Because that would be counter to congressional intent.

Mr. Pruitt. Senator, that is something, as I have indicated, that there is an open comment period on that very issue. If confirmed, I would be dealing with that issue and need to respond to the comments that have been made as part of the record. It would be unwise to prejudge that outcome. I can say to you that any steps that I would take as Administrator would be in furtherance of the RFS and not to undermine the RFS.

Senator Duckworth. But the comment period has nothing to do with congressional intent. Earlier today, you said you would abide by congressional intent. The congressional intent is to keep that point of obligation with the soybean and corn producers and the biofuel manufacturers and not to move away from it, regardless of what the open comment period says. So you are saying that you are willing, that your answer is no, because you would be open to moving it away from the soybean and corn growers, the farmers, towards the blenders if that is what comes out of the comment period? Is that what you are saying? That would be against congressional intent though.

Mr. Pruitt. Senator, I think with respect to congressional intent and the statute, the intent, as far as the point of obligation, is not addressed in the statute itself. That is a decision and the Administrator has been involved in that process historically. It's been subject to much discussion. In fact, the EPA has dealt with this issue before.

What I am saying to you is, it is the job of the Administrator to enforce the program, to administer the program, to ensure that the intent of Congress as far as the RFS is upheld. I will do that.

To prejudge the outcome of that particular comment period is something that I can't do and shouldn't do at this point. I would need to respond to that only after being confirmed and going through the rest of the process.

Senator Duckworth. You're saying that you would be open to moving the point of obligation away from the corn and soybean producers and the ethanol manufacturers, if that is what the open comment period says? If that is the result, then you would be open to moving it away from the farmers?

Mr. Pruitt. No. I am saying, Senator, that any actions taken as Administrator that would jeopardize and endanger the RFS as intended by Congress, I would not take. That is different from prejudging an outcome in that particular matter.

Senator Duckworth. But the intent of Congress is to keep the point of obligation with the producers.

Mr. Pruitt. That's something I am not aware of, Senator

Senator Duckworth. Okay. Let's move on. I am very concerned and we will follow up with this in the future. Let's go to safe drinking water.

I sat on the Government and Oversight Committee in the House where in a bipartisan manner we explored what happened in Flint, Michigan. I was actually flabbergasted earlier today when in response to my colleague, Senator Cardin, on whether you believe there is any safe level of lead that children can consume, you responded by saying "Senator, that is not something I have reviewed or know about. I

believe there is some concern but I have not looked into the scientific research on that."

You are about to become the EPA Administrator. You are seeking to be the EPA Administrator, and you've not looked into the issue of lead in our drinking water supply? I think that is something, especially in the aftermath of Flint, that is a serious oversight on your part. Have you even studied the Flint water crisis in preparing for this hearing? Do the names Mary Gade and Susan Hedman ring a bell to you?

Mr. Pruitt. In the situation in Flint, as I indicated earlier, the EPA should have acted more expeditiously in responding to Flint and did not. There was indication at the regional level that there were concerns and there was not a response.

I think that the EPA bears responsibility for what happened in Flint and would seek to, in the future, avoid those kinds of situations by being more proactive through the regional administrators, and the States and municipalities in ensuring the quality of our drinking water.

Senator Duckworth. As EPA Administrator, will you commit to appointing a permanent regional administrator to the Midwest region based out of Chicago, but they cover Michigan? We have issues with lead in Galesburg, Illinois, for example. And will you give them the responsibility and the ability to act proactively so that they can step in when they see that the State is not doing its job in protecting the safe water drinking supply for its citizens?

Mr. Pruitt. As you know, Senator, the answer is yes. The EPA has emergency order authority to respond to situations like you describe. I think the EPA should step in, in those situations, in a very meaningful way.

Senator Duckworth. That's good news, because they did not do it in the case of Flint.

Thank you. I am out of time, Mr. Chairman.

Senator Barrasso. Thank you very much.

I would like to introduce for the record an article from The Oklahoman by Rick Green that says J.D. Strong, Director of the State Wildlife Conservation Department, says of Attorney General Pruitt, "Attorney General Pruitt has been a really good partner and ally in making sure we have adequate protections in place for the quality and quantity of water," said Strong, who previously led the Oklahoma Water Resources Board and was State Secretary of the Environment. "I have never seen him put us in a position where we had to compromise anything to protect the waters of Oklahoma."

[The referenced information follows:]

Senator Barrasso. Senator Boozman.

Senator Boozman. Thank you, Mr. Chairman.

Again, I was the Congressman in the district with the Arkansas-Oklahoma Illinois River situation. I was elected in a special election in 2001 and inherited this. This had been going on for about ten years. In 2001, from that time on until recently, we probably worked on this, it seems like every week.

What happened was in 2003, the EPA came out and said the standard was such that by 2013, the river needed to have an attainment of .037 standard of phosphorous. Arkansas worked very, very hard, changed out all of its treatment plants in that area. That is one of the fastest growing areas in the Country. The ratepayers paid for all of that, hauled out chicken litter and all those kinds of things and made a dramatic improvement in the attainment.

The problem was, though, Arkansas, and you mentioned, my good friend, Senator Booker and he is a good friend, mentioned a lot about Oklahoma this and that. Arkansas never agreed to any of that. So they were going forward but they felt they could not attain the .037 standard because the first national river is in Arkansas, the Buffalo River, and it was not at .037, it is pristine.

In good faith in 2005, I believe, the Attorney General in Oklahoma sued Arkansas. You can correct me if I am wrong on some of these things. In 2010, in that case, all of the stuff was put in place but the federal judges never ruled on it so it was open.

Fast forward, 2013 is arriving. Arkansas does still not agree that the .037 standard is the appropriate one, so they were squaring

off getting ready to sue each other again. Attorney General Pruitt and Attorney General McDaniel, a Democrat in my State, got together and said, let's not waste a ton of money with lawyers, let's use science and things like this to figure this out.

They chose a neutral site, Baylor University, which has an excellent water department. They came in and did a study and came back and said .037 is the standard. Right now, the States are living with that. It was a tremendous effort, took a long time and it was a very, very difficult situation. So I applaud you.

I want to put in the record a letter from our former Attorney General McDaniel that again outlines this. It was very, very complimentary of the Attorney General.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Boozman. Thank you.

Let me quote one of the final paragraphs: "Recent press accounts regarding these efforts unfairly mischaracterize the work that was done by General Pruitt and his team. He was a staunch defender of sound science and good policy as appropriate tools to protect the environment of the State. I saw firsthand how General Pruitt was able to bridge political divides and manage multiple agency agendas to reach an outcome that was heralded by most credible observers as both positive and historic."

Again, as someone who was intimately involved in that, more involved than I wanted to be in things, there really was a heroic effort by yourself and the people in Arkansas trying to resolve a difficult situation.

Mr. Pruitt. Thank you, Senator.

Senator Boozman. Thank you. That's really all I have Mr. Chair.

Senator Barrasso. Thank you very much, Senator Boozman.

Senator Sullivan.

Senator Sullivan. Thank you, Mr. Chairman and General Pruitt.

I wanted to focus on, a number of us talked earlier about the frustrations that the American people have with the EPA. We talked about anger, Senator Ernst talked about fear. I believe it extends to a couple reasons underlying that.

One is the agency currently feels that it is empowered to regulate literally every nook and cranny of American life. Related to that, they seem to have very little respect for the rule of law. Let me touch on those.

Senator Ernst talked about the WOTUS rule. Literally, the EPA has claimed the ability to regulate puddles. As a State with, pre-WOTUS by the way, 65 percent of America's wetlands in Alaska, we have very significant concerns about this.

I want to actually address an earlier comment by Senator Whitehouse where he said there is nothing in your record that shows that you have the background to help America's fishing industry. Well, I couldn't disagree more with Senator Whitehouse, who is a friend and colleague. My State has a fishing industry like Rhode Island's. It is a little bigger. Sixty percent of all the seafood that is --

Senator Whitehouse. It's considerably bigger.

Senator Sullivan. Thank you.

[Laughter.]

Mr. Chairman, would you please acknowledge that for the record?

Senator Barrasso. With no objection.

Senator Sullivan. Almost 60 percent of all seafood harvested in the United States comes from the waters of Alaska and it is considered the best, most sustainable, best managed from an environmental standpoint, fishery in the world.

Do you know what the number one issue is, the top issue of the fishermen of Alaska is? It is EPA overreach. Let me give you a specific example.

This is a regulation, 200 pages, on America's fishermen, the ultimate small businessmen and women. This actually requires that

every fisherman in Alaska, commercial fisherman, requires a discharge permit to literally hose off the deck of a ship. Think about that.

If you are gutting fish and fish guts or pieces of a fish fall on the deck of your ship and you hose it down, fish back into the water of the oceans, you need a permit, 200 pages. This is the kind of thing where the trust between Americans and the EPA has eroded so much because of these kinds of issues.

If confirmed, will you work with me and others on this committee to make sure that these kinds of regulations are balancing environmental needs with jobs that are so important? You mentioned it as a cost. Will you work with us on that and would you care to comment on a regulation like this, fish back into the ocean requiring a permit? Congress, by the way, has extended this twice, the implementation of this, so there is bipartisan agreement that we need to do something about this overreach. Would you care to comment on this?

Mr. Pruitt. Senator, I think it is exemplary of a lack of priority. We have many, like I indicated earlier, 40 percent of our country is in nonattainment under the NAAQS Program. We have over 1,300 CERCLA sites in this Country that need attention to move those areas into remediation and restore those areas for environmental related issues. I think in some respects what you cite there is just missed priorities, trying to focus on something like that as opposed to focusing on these other areas that will really improve tangibly the environmental protections for people across the Country.

Senator Sullivan. Let me talk next about the rule of law. I am glad you emphasized it as a priority. I believe it is one of the principal reasons again why, again, there is such a lack of trust between the American people and the EPA. But it is not just a Republican issue. As a matter of fact, there are a number of examples where this is viewed as a bipartisan issue that we need to address. You may have seen with regard to the Clean Power Plan, Laurence Tribe, not known as a strong staunch Republican, Harvard law professor, stated, "The EPA is attempting to exercise lawmaking that belongs to the Congress and judicial power that belongs to the federal courts. EPA is attempting an unconstitutional trifecta usurping the prerogatives of the States, Congress and the federal courts all at once with its Clean Power Plan." Then he stated, "Burning the Constitution should not become part of our national energy policy."

You've been involved in some of these cases, the Clean Power Plan, the Waters of the U.S. In both of these cases, courts have stayed the EPA's rule. Why do you think the courts have done that? Do you think the rule of law that has been ignored by the EPA is something that if confirmed, you will work on to regain the trust between the EPA and the American people?

Mr. Pruitt. As I indicated earlier, Senator, I think at times perhaps there those in law and the courts that look at rule of law as something that is academic and technical. But it is real. It affects people in very real ways. When you have agencies of any type that act inconsistent with the statutory authority given to them by Congress,

it creates the kind of uncertainty that you are talking about. People don't know what is expected of them, and paralysis happens.

And so rule of law is important to economic development, it is important to send messages of certainty, it is important so that people can plan and allocate resources. There are many laws that people look at and say, I don't really like that. So long as they know what is expected of them, they can plan and allocate resources to comply. I think that is what is important about rule of law.

Senator Sullivan. And as one of the lead litigators on the WOTUS rule and the Clean Power Plan and the fact that the Supreme Court and the Sixth Circuit have put stays on those rules, what do you think that indicates the courts' view is of those two rules issued by the EPA at this moment?

Mr. Pruitt. Well, it is unprecedented for the Supreme Court to have done what they did in the Clean Power Plan.

Senator Sullivan. Never happened in the history --

Mr. Pruitt. Never happened in the history of jurisprudence before the U.S. Supreme Court. That says a lot.

Senator Sullivan. Thank you, Mr. Chairman.

Senator Barrasso. Thank you very much. Senator Moran?

Senator Moran. Mr. Chairman, I yield to somebody ahead of me if they would yield back to me for the next question.

Senator Barrasso. That would be fine. I have some time that I haven't gotten to yet in this second round. We will go shortly to a third round.

I wanted to talk a little about the Mercury Rule that the Supreme Court overturned. They overturned the EPA's Mercury Rule, finding that the EPA did not appropriately consider the costs of the rule. Noting that between the time that the rule is issued and the Supreme Court decision, three years passed, the EPA Administrator Gina McCarthy was on a television show a couple days before the Supreme Court made its ruling, and they said, well, what if the Supreme Court says you are wrong? And essentially, she said, well, the majority of the power plants have already decided and invested in a path, because it is been three years, to achieve compliance with the Mercury Air Toxic Standards. In other words, she had already gotten her result, even though what she had done was found by the courts to be illegal.

So I would ask you your thoughts on her statement, and do you believe that her statement shows respect for the rule of law?

Mr. Pruitt. Well, Senator, this is speculation to a certain degree, and one of my favorite philosophers is Yogi Berra, and he said, "Predictions are pretty tough, particularly about the future." So I don't want to be too speculative here. But when you look at the response of the Supreme Court and the Clean Power Plan, I think largely the reason they acted in an unprecedented way is because of what you just addressed, Mr. Chairman, that in response to the Michigan and the EPA case, there were some comments made that they had achieved the outcome, despite the fact that it acted inconsistent with the framework under the law.

So I think rule of law is something, as I indicated to Senator Sullivan, it is not something that is academic. I think it is

meaningful. It inspires confidence in those that are regulated. It gives them assurance that regulators are acting consistent with their authority, and it allows them to plan and allocate resources to meet the standard sand meet the objectives that Congress and regulators established.

Senator Barrasso. Senator Moran?

Senator Moran. Mr. Chairman, thank you very much.

General, you can see by where I sit on the dais that I haven't been in the Senate a terribly long time. But one of my causes, upon my arrival and the discovery of how the Senate works is to try to work with my colleagues to reassert Congressional authority. In my view, there is a number of ways we could do that. One, Congress could quit passing huge pieces of legislation and delegating authorities to agencies and departments. Another one that we could pursue, and I hope we will this year, is an appropriations process, by which we have the opportunity to influence decisions made at the Environmental Protection Agency and every other agency and department.

One of the things, when we do that by developing a relationship with an agency head, knowing that, and I guess part of that is that members of Congress need to have greater levels of expertise on the subject matter of their jurisdiction. One of the subcommittee I chair is in the Commerce Committee. It has jurisdiction over the National Highway Traffic Safety Administration. The Environmental Protection Agency just last week finalized its greenhouse gas standards for light duty cars and trucks for 2022 to 2025.

Now, the law says that it is to coordinate that effort with the National Highway Traffic Safety Administration. And that agency is still developing its own process to determine appropriate fuel standards. I raise this as an example of where, once again, two agencies instructed by Congress to work together to find a solution or the right answer to an issue ignore the law. I assume you would assure me or members of this committee that the Environmental Protection Agency, to the best of your ability, will obey the law.

But I also assume that you are willing to assure me that when directed by the law to cooperate with other agencies, to have the input of an agency that our subcommittee has jurisdiction over, as the person in the Senate responsible for these issues, I go to the agency that I have the most influence over, and they say, well, EPA's already done its thing. I assume we can bring those kinds of practices to an end.

Mr. Pruitt. Absolutely, Senator. I think that interagency discussion, that collaboration to ensure that there is meaningful discussion, review of action, takes place. I want to speak generally to your delegation reference, because I do think that that is a very important issue that you raise. I think a lot of times, what has happened is that Congress has spoken in very general ways, I will not say vague, but approaching vagueness, and giving carte blanche or substantial authority to agencies without providing the kind of framework that is necessary for them to make their decision.

From a separation of powers issue, I think that is very important. I think it is important for Congress, Article 1, to

exercise its authority and to give the direction to these agencies on how they should conduct their business. Senator Cardin, in his comments and questions earlier about the Waters of the United States Rule, I think that is a problem, presently, largely because the definition of Waters of the United States in the statute is so vague and so general, it creates uncertainty.

So I think making sure that Congress performs its role and the Executive Branch performs its role in enforcing laws, and we try to do less delegation and respect separation of powers, is very, very important.

Senator Moran. I appreciate your reassurance of how you would conduct, if confirmed, the agency. It also is a reflection upon the need for Congress to do its job better. Perhaps, I guess you'd have nothing to do with that. But for me and my colleagues, we need to be much more precise and clear in legislation and much more likely to deal in smaller bite-size pieces. Too often I think Congress is interested, and I don't want to be derogatory to any of my colleagues, but too often we look for the headline, we solved a problem, and yet we complain about what an agency's decisions are and we have given them so much authority they have the ability to make what I would consider, some of us may consider a bad decision.

Mr. Pruitt. And there are important steps that have been taken. We've mentioned TSCA this morning, where you've done just that, in his past year. So I think that is a very important item that you raise, Senator

Senator Moran. Thank you. Thank you, Mr. Chairman.

Senator Barrasso. Thank you very much, Senator Moran.

We'll now move to a third round of questions. Attorney General Pruitt, you just mentioned TSCA. You sent a letter to this committee in April of 2015, supporting the Frank Lautenberg Chemical Safety Act. In fact, the timing of your letter was less than a month after the bill was introduced, and you were the first Attorney General of the United States to support the bill.

The bill ultimately received overwhelming bipartisan support in Congress. It would be your job to implement the bipartisan reforms and ensure we have consistent regulation throughout the Country. Would you discuss the plans that you might have to implement this legislation, and will you commit to implementing the legislation in a timely manner?

Mr. Pruitt. Senator, and Mr. Chairman, yes. I think in response to obligations of the EPA, this body has put timelines before the EPA to carry out certain rulemaking, the Prioritization Rule, the Risk Evaluation Rule, fees that need to be established, all those are mid-term in 2017. And I think it is a matter of the EPA Administrator making that a priority at the agency.

I also think that in response to Senator Gillibrand earlier, and others have raised this too, there are certain, like PFOA, that need to be addressed in evaluating that listing under TSCA or perhaps the Safe Drinking Water Act as well. So I think there are specific actions that need to be taken, but also the rulemaking process and the deadlines be adhered to.

Senator Barrasso. You made reference to, and I did in my opening statements as well, to Flint. There was give and take on Flint a little earlier. The other thing I brought up was the Gold Key mine spill in Colorado, an environmental disaster caused by the EPA. Last Friday, the EPA announced that it has denied all claims for the $1.2 billion in lost income, loss of use of property and damage to the businesses and the property suffered by 73 tribes, by land owners, local businesses, local governments as a result of the spill. The EPA's excuse was its legal interpretation of the Federal Tort Claims Act. According to the EPA, if a federal agency hurts someone through a discretionary action, then the Federal Tort Claims Act does not apply. This doesn't sound right to me.

So if confirmed, will you commit that you will review that decision and use whatever authority is available to you under the law to help the people who have been harmed by the EPA's negligence?

Mr. Pruitt. Yes, Mr. Chairman.

Senator Barrasso. Thank you. Senator Carper?

Senator Carper. Thanks very much. A question. Mr. Chairman, I know you did not use, when we started this round of questioning, you did not use like two minutes and 30 seconds of your time. When you comment like you have just commented, are you drawing down on that two minutes and 30 seconds?

Senator Barrasso. I am now in the third round of questioning, yes, sir. And I would reflect that looking back at EPA nomination hearing processes, when Gina McCarthy was nominated, came to this committee, Chairman Barbara Boxer, two rounds, first round five

minutes, second round, two minutes. We are now in a third round of five minutes, so I think that the Chairman has tried to listen to our discussions with other members to make sure that all the Democrats and every member had a chance to have as many questions as possible.

Senator Carper. Thank you. I want to go back to something you said about one of our colleagues with respect to EPA actually visiting States and participating in meetings in those States with respect to the Clean Power Plan. I think it was said that West Virginia, my native State, native State of my friend of my friend from West Virginia, that was not visited. We have heard since then from Joe Goffman, who was counsel to John McCain, EPA Assistant Administrator for Air, as you may know, he said he personally participated in meetings on the Clean Power Plan in West Virginia, also in Kentucky, Texas, Pennsylvania, Nevada, Washington, California, Wyoming, North Dakota, Colorado, Illinois and I think Nebraska.

I wrote a letter to Gina McCarthy on January 11th. You may recall, Mr. Pruitt, I wrote a letter to you on December 28th, and posed a series of questions to you and asked for your responses by January 9th. I have yet to receive those responses. I wrote a letter to her on January 11th, again, to Gina McCarthy and to Assistant Secretary Darcy of the Department of the Army. I wrote because we were getting and hearing on our office a whole list of assertions about the Waters of the U.S. I think this is maybe instructive for all of us. The things that we were hearing, people were calling in, in Delaware. It led us to ask these questions.

One of the questions was, are the EPA and the Corps currently implementing a new Clean Water Rule. The assertion was that indeed, that has been happening. So we asked, is that really the case. And two days later, two days later, we received a response, no, the agencies are not now implementing the new Clean Water Rule. Implementation of the new rule is temporarily stayed by the Sixth Circuit Court of Appeals. September 2015, the agencies immediately directed their field offices to stop using the new rule, and instead resume implementing regulations interpreting the guidance prior to the new rule. That was one of the questions we asked.

We also asked, because we were hearing assertions otherwise, are the EPA and the Corps currently pursuing enforcement actions pursuant to the new Clean Water Rule. And we got on the same date, January 13th, this response, that said no, the agencies are not pursuing any enforcement actions pursuant to the new Clean Water Rule, and will not enforce this rule unless and until the Sixth Circuit Court of Appeals stay is lifted.

The next question we asked, because we were hearing assertions otherwise, does anything in the Clean Water Rule revoke or otherwise modify the Clean Water Act's statutory or regulatory exemptions for farming and ranching? Response, two days later, January 13th, was no, the Clean Water Rule makes absolutely absolutely no changes to normal farming, ranching and forestry exemptions established under the Clean Water Act in implementing regulations.

So question number four, some have claimed that landowners will no longer be able to rely on the Clean Water Act's statutory and

regulatory exemptions for farming and ranching, should the Clean Water Rule go into effect, because while the statute and regulations remain unchanged, the agency has narrowed those exemptions in practice through the actions in the field. Is that true? And the answer is, not surprisingly, the assertion that the agencies have no application in statutory and regulatory exemptions for farming, ranching and forestry is untrue. The agencies have taken no steps intended to reduce the scope of the exemptions. We have not observed changes by field offices in the way they interpret or implement these exemptions. In fact, the Corps has re-emphasized publicly that these exemptions are self-implementing. Farmers, ranchers and foresters are not required to get approval from the agencies prior to using the exemptions.

I raise this because sometimes what people assert to be true, sometimes it is over the internet, sometimes it is on television, sometimes it is on the radio, newspapers. Assertions are made. And in this case, there is a whole long list of assertions that were made, and none of them were true. They are distortions, untruths about what the EPA is doing with respect to a regulation that was stayed.

I would ask to, for the record, Mr. Chairman, to be able to submit for the record the questions that we posed to EPA on January 11th and also the responses that we have received.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Carper. Thank you. I'd like to look at a chart, if you don't mind. This is a report card that lists 17 counties. How many counties do you have in Oklahoma?

Mr. Pruitt. Seven - seventy-seven.

[Laughter.]

Mr. Pruitt. Mr. Chairman, can I refer to Senator Inhofe for these questions?

[Laughter.]

Senator Carper. I was watching, his lips are barely moving as you speak.

Thank you. At the same time you've been suing EPA on its ozone standards, all the counties in Oklahoma for which data is collected earned an F from the American Lung Association for not meeting ozone health standards. You have 60 counties that the American Lung Association does not have data on the progress made or not made with respect to ozone. These are the ones we have information on, 17. Seventeen counties from Adair to Tulsa. You live in Tulsa, I expect? Tulsa County. They all got Fs. This is last year, 2016. My question to you is, what did you do about it? What did you do about it before or since? Sometimes people may not believe what we say, but they will believe what we do. What have you done about this?

Mr. Pruitt. Senator, two things. I really believe there needs to be a tremendous effort made by counties across this Country to move nonattainment into attainment. Over 40 percent of the Country, presently 40 percent of the Country approximately is in nonattainment.

There needs to be great prioritization with EPA and local officials in achieving attainment.

Senator Carper. But that wasn't my question, Mr. Pruitt. What did you do about it? You have 17 counties for which we have data from last year. What did you do about it? Before or since? That's what I am asking you.

Mr. Pruitt. As indicated in our meeting individually, the primary enforcement responsibility in Oklahoma with respect to air quality permits and the rest is the Department of Environmental Quality. And there have been actions taken by DEQ and they continually work with those counties to reach attainment. And we provide general counsel advice to that agency in the performance of their role.

Senator Carper. I am not the attorney general of Delaware, never had any intention to be, but if 17 of our counties in Delaware -- we only have three - if 17 of them or all three of them got Fs, I promise you, I would do something about it. Thank you.

Senator Barrasso. Senator Inhofe.

Senator Inhofe. Thank you, Mr. Chairman.

Congress recently passed a bipartisan bill, many of us up here supported it, I know I did, as part of the Water Infrastructure Bill to allow States to lead implementation and enforcement of EPA's coal ash rule through the State-based permit program. That rule is already in effect, and it is important that the EPA move quickly on this. If you are confirmed, are you going to get right on this thing?

Mr. Pruitt. Yes, Senator Inhofe.

Senator Inhofe. All right. Sue and settle, we all know what that is, we know that groups, maybe some of the environmentalist extremist groups will file lawsuits against the EPA. The EPA, instead of defending against the lawsuits, will enter into a resolution behind closed doors without any public input or participation. These settlements result in new sets of legally binding priorities and duties for the EPA that achieve demands of special interests. Can you share your thoughts on sue and settle?

Mr. Pruitt. Senator, this issue came up earlier. And it is a concern. Because it is regulation through litigation. There is a place for consent decrees in our litigation system, but to use a consent decree to bypass Congress, bypass the regulatory requirements that you've placed upon those agencies, to engage in rulemaking through litigation is something I think should not occur.

Senator Inhofe. And that is the part that did not come up earlier. I appreciate that very much.

Lastly, the cost of regulations. As you know, the Supreme Court overturned EPA's Mercury and Air Toxics Rule in 2015, because the EPA failed to, ignored the fact that the cost was $9.6 billion annually of the rule. Now, in fact, the EPA's regularly-issued rules over the past eight years are very costly for our industries and our job creators. According to the CRS, now, the CRS, when they make an evaluation, are much more conservative. The figure is always a very conservative figure. But they said the Clean Power Plan would be at least $5 billion to $8 billion a year. The figures I have heard on

that are far greater, because it wouldn't be that much different than the old systems they tried to do through legislation.

The methane standards on oil and gas facilities, $315 million a year. The new ozone standards, $1.4 billion. The 2015 coal ash standards, $587 million a year. And the 2011 sulfur dioxide standards, $1.5 billion a year. Now, when you hear this, all this money is being spent on compliance costs by our job creators, people out there that are working for a living and they are hiring people. What are your thoughts and what do you believe should be the role of the costs of EPA's decision-making?

Mr. Pruitt. I think it is very important in the rulemaking process, Senator. And the Supreme Court and courts have recognized that very important factor.

I mentioned earlier the case that we were involved in in Oklahoma involving the regional haze program. That was an example where Oklahoma actually complied and met and satisfied the requirements under the statute and the rule. But the steps that were taken were displaced by the EPA, adding hundreds of millions of dollars of cost to consumers in the generation of electricity. So costs are very important. We need to make sure that they are considered. In certain areas of the statute, as I indicated earlier, they can't be, under the Title I NAAQS program. But in that case that you are referring to, it is an obligation of the EPA to actually engage in a cost benefit analysis, make a record before it made its decision.

Senator Inhofe. Do you think that the laws that are in the books right now adequately handle this situation?

Mr. Pruitt. I do, largely, Senator. I think it is mostly an application issue that the agency and the regulator is doing its job under the statute as provided by Congress.

Senator Inhofe. Thank you very much.

Senator Barrasso. Senator Whitehouse.

Senator Whitehouse. And presumably, Mr. Pruitt, it goes without saying that if the EPA is going to consider cost to the industry of confirming to pollution guidelines, it should also consider benefits to the public from cleaner air, cleaner water and the results of that compliance, right?]

Mr. Pruitt. It should, Senator.

Senator Whitehouse. So we have been talking about fundraising done by you for the rule of law defense fund during the time when you were both a board member and for a full year the chairman of the Rule of Law Defense Fund and the fact that we have exactly zero information in this committee about that fundraising. We also have zero, and let me ask unanimous consent for the page from the filing that discloses that he was in fact a member of the board of directors and chairman of the Rule of Law Defense Fund.

Senator Barrasso. Without objection.

[The reference information follows:]

Senator Whitehouse. We also have a meeting agenda from the Republican Attorney Generals Association during the time that you were executive committee member of the Republican Attorney Generals Association meeting at the Greenbrier, which I will stipulate to my friend from West Virginia is a lovely place to go. The agenda, which I would like to take this page of and put into the record, mentions a private meeting with Murray Energy. It mentions a private meeting with Southern Company. It mentions a private meeting with the American Fuel Petrochemical Manufacturers. If you will show the graphic, these are all the same groups that I have been asking about in terms of your fundraising for the Rule of Law Defense Fund. And there is Murray Energy, and there is Southern Company, and I am sure the American Fuel Petrochemical Manufacturers represent a lot of the others.

As I understand it, we know nothing, no minutes, no statements, no reports about what took place in those meetings that are described as private meetings on a sheet that is stamped confidential. Correct? We know nothing about the content of those meetings?

Mr. Pruitt. Senator, I did not generate the document. I know nothing about how that document got generated or what --

Senator Whitehouse. Are you denying that those private meetings took place?

Mr. Pruitt. No, Senator. I just didn't generate the document and don't know about the content, other than what you have represented.

Senator Whitehouse. Okay, and we don't know. And because you were on the executive committee of RAGA, that is information that we could get, right? I mean, it is available, if there were minutes or reports out of those meetings, notes taken. But we don't have them, correct?

Mr. Pruitt. Senator, that would be a request made to the Republican Attorney Generals Association. I might add, the Republican Attorney Generals Association, there is a Democrat Attorney Generals Association as well.

[Simultaneous conversations.]

Senator Whitehouse. I am not faulting that. I am talking about private meetings at the time that you were on the executive committee with some of the really, really big polluters with whom you have been very closely politically associated.

Mr. Pruitt. There is a Conference, if I may, Senator, of Western Attorneys General. There is a national association. And they talk about water.

Senator Whitehouse. I know.

Mr. Pruitt. And there are meetings that take place at each of those as well.

Senator Whitehouse. The rest of the attorney generals avoid that because we don't want to talk about water.

Let's talk about FOIA. You have had a conversation with the Chairman about FOIA. As I understand it, there is a FOIA request to the Oklahoma Attorney General's office, to your office, for emails between your office and Devon Energy and Koch Industries and Americans

for Prosperity, the Koch front group, and Murray Energy and the American Petroleum Institute. And the information that I have is that that Open Records Act request was filed more than 740 days ago. More than two years ago. That in response to it, your office has conceded that there are 3,000 responsive documents. Three thousand emails and other documents between your office and these companies. And that in 740 days, exactly zero of those documents have been produced.

Is that acceptable turnaround on a FOIA request, and should we not be concerned that your office is not complying with a FOIA request that relates so specifically to so many of these companies that are going to be before you as EPA Administrator if you are confirmed?

Mr. Pruitt. Senator, I actually have a general counsel and an administrator in my office that are dedicated to performing or providing responses to Open Records requests.

Senator Whitehouse. Not very dedicated, if it takes 740 days. That is still zero.

Mr. Pruitt. But I not involved in that process. That is handled independently by the administrator and that general counsel in responding. So I can't speak to the timeline and why it is taking that length of time. But I will tell you that our office works, we actually go across the State of Oklahoma in training with officials locally in compliance with FOIA and Open Records laws.

[Simultaneous conversations.]

Senator Whitehouse. -- your own training, because it doesn't seem to be sticking very well.

Mr. Pruitt. The representation you made about the timeline, I don't know.

Senator Whitehouse. Given how many of these groups have important financial interests before the EPA, do you not think that 3,000 emails back and forth between you and your office and them are relevant to potential conflict of interest as an administrator and should be before us as we consider this?

Mr. Pruitt. Again, I think the EPA ethics counsel has put out a very clear process with respect to covered entities, as we described it earlier, and on particular matters and specific cases, I will follow the advice of that EPA career person, ethics, to make sure that there -

[Simultaneous conversations.]

Senator Whitehouse. You keep saying that.

Senator Barrasso. The Senator's time has expired.

Senator Whitehouse. Will you let me finish my sentence?

Senator Barrasso. Please do.

Senator Whitehouse. The problem with that is that if you haven't disclosed any of this information, then the EPA ethics counsel would have no idea to even look. They would have no idea what the risks are. You can't say, nobody can look at whether I did this, but by the way, they're going to look at it. It just doesn't add up. Sorry about going over my time.

Senator Barrasso. Thank you, Senator. I would like to point out, we had a report cared that was just brought up. And I would like to introduce for the record a letter from each of the five members of

Congress from the State of Oklahoma with their steadfast support for Scott Pruitt, saying, we are proud of his service to our State and are very confident that he will do a superb job serving our Nation and our citizens in this new role. Also as a follow-up for the first round of questions, there was a dispute about a lawsuit against Mahard Egg Firm and who it was filed by. I have here the complaint in the case, and it was filed May 18th, 2011, and if you read it, it says, in the State of Oklahoma, by and through Attorney General Scott Pruitt. So you are the one that filed the suit, along with the attorney general of Texas against Mahard Egg Firm. This will be submitted for the record as well.

[The referenced information follows:]

Senator Barrasso. Senator Capito.

Senator Capito. Thank you, Mr. Chairman.

Since the Ranking Member mentioned that Mr. Joe Goffman had visited, I call to the attention in beseeching you that when you are successfully the Administrator at the EPA that you will listen to everybody and come to States that are most directly affected. He mentioned that the Associate Assistant Administrator had made the long list that he had said.

I would like to point out a clarification. The EPA announced on September 30th, a day I will remember, because that is the birthday of my youngest child, they announced where they were going to be going for their listening sessions. They went to Boston, they went to New York City, they went to Philadelphia, they went to Atlanta, they went to Denver, they went to Lenaxa, Kansas, and I wish our Kansas Senator was here, which I have looked up is a part of the Kansas City metropolitan area. They went to San Francisco. They went to Washington, D.C. They went to Dallas, they went to Seattle, they went to Chicago.

My State, in the last five years, has lost 10,000 jobs, not wholly because of this, but some of this plays a large part. So I will go back to my original request, that the people that are affected by this environmentally and health-wise are just as important as the people who stand to lose their jobs over this, who then are plunged into poverty, who then have hopelessness around and in their communities, who then become addicted to drugs and other opioids. It

is just a cascading issue. Their lives are just as important. So that is my plea on that.

Now, last question from me.

Senator Carper. Mr. Chairman, could I ask a unanimous consent request?

Senator Barrasso. Yes.

Senator Carper. I am sorry for interrupting. But the document with respect to the outreach that the EPA did, in conjunction with the Clean Power Plan, it shows from October, I think October 16th, 2014, something like this, the document records nearly 1,000 meetings, calls, presentations, conferences, consultations, 1,000, and other outreach with stakeholders. The document shows these post-proposal interactions included more than 300 meetings with State and local stakeholders, had 30 discussions with tribes, 450 meetings with industry stakeholders, 150 discussions in environmental justice and scientific stakeholders, dozens more discussions with conveners. And this goes on and on and on.

In total, the agency received almost 4.3 million comments about all aspects of the proposed rule, more than any rule in EPA history, and thousands of people participated in the agency's public hearings, webinars, listening sessions and so forth, all across the Country. The agency made many revisions in the final rule in response to those comments. Thank you.

Senator Barrasso. Thank you. I would ask that once a questioner starts, they be allowed to continue. We could get into a lengthy discussion. The EPA was found guilty of covert propaganda for

soliciting information through a number of environmental groups. It continues to be a blot on the record of the EPA, and the question of this entire Administration and their approach toward abilities toward the rule of law versus an EPA out of control. So we are going to allow the questioner to continue. Back to you, Senator Capito.

Senator Capito. Thank you.

Not to beat a dead horse, but to try -

[Laughter.]

Senator Capito. I will say that the Assistant Administrator McCabe, when she was telling me that they only wanted to go where places were comfortable, she looked at me and Senator, we are going to Pittsburgh. Gee. Thanks a lot. Which is not in West Virginia, I will make that point.

In any event, my question is, you have said a lot about States, and I agree, the States should have the primacy, it is in the law. And that is something that, part of why you have brought suit and part of the reason you have been successful with other attorneys general.

Let me ask you a question. Let's say you have a State where you are the administrator of the EPA, and you deem that that State's Office of Environmental Quality, or DEP, which is what it is in West Virginia, just doesn't measure up. They are not protecting their people's health, they are not enforcing the law. They are in your judgment and folks that you are working with, are not up to the task and are letting their people down.

What avenues of correction would you have at the EPA, and do you have, and what would you exercise in that kind of category, and what kind of judgments would have to be made for those things to occur?

Mr. Pruitt. Senator, I really appreciate the question. I think there are times where States are recalcitrant, that they don't perform the obligations that they have, let's say, under the Clean Air Act, in adopting a State implementation plan, or as they adopt the State implementation plan they don't take into consideration all the factors that Congress had put in the statute and the EPA requires. In those instances, it is very appropriate for the EPA to use its authority like a federal implementation plan to take over that jurisdiction and to ensure that the safety and health of our citizens is protected, and the air quality is maintained and water quality is maintained.

So there is a time and place for that. I think in many instances, however, over the last several years, it has been the first response as opposed to cooperation. And a federal implementation plan is absolutely in order at times.

Senator Capito. Thank you.

Senator Barrasso. Senator Merkley.

Senator Merkley. Mr. Chairman, before you start my clock, I would like to follow up on Senator Inhofe's strategy here of submitting certain facts back for the record. I would ask unanimous consent to submit for the record an article from the Union of Concerned Scientists related to the so-called ClimateGate that the Senator referred to earlier. That notes that the manufactured controversy over emails stolen from the University has generated a lot

of heat but not light. The email content being quoted does not indicate climate data research has been compromised. Most importantly, nothing in the content of the stolen emails has any impact on our overall understanding of human activities, driving dangerous levels of global warming. Media reports and contrarian claims that they do are inaccurate.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Merkley. Thank you.

Senator Inhofe. Mr. Chairman, since my name was invoked, let me respond. Were you listening when I talked about the various publications that have come and talked about how fraudulent it was? These are publications, science publications, they have gone in and made their own evaluations. And for the U.K Telegraph to say it is the worst scientific scandal for our generation, that is very extreme.

Senator Merkley. We could have an entire day dedicated to the review of the scientific literature on this, and it would weigh very heavily on the scales in the direction I have indicated in support of the information presented by the Union of Concerned Scientists. We may just have to agree to disagree. That is why I submitted it for the record, we will let the public decide.

Senator Inhofe. And that is why the statement is repeated over and over again about the science is settled, that is not an accurate statement.

Senator Barrasso. I would invite the Senator to question the witness.

Senator Merkley. The beauty of the Senate is we get to have our own opinions.

Meanwhile, I also wanted to submit for the record in response, when I was speaking about asthma, Mr. Chairman, you submitted a study from the National Black Chamber of Commerce. And it is important to note that that organization has been funded by the American Petroleum Institute, by a Koch Brothers front group and by Exxon, and that there is a series of responses that invoke the opposite side of that, and

the NAACP, which certainly speak for a broad swath of African Americans, takes a very, very different stance. And it had endorsed the Clean Power Plan.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Merkley. Thank you. I would also like to submit for the record two articles or two statements from the National Congress of American Indians and from Latino organizations, a whole group of Latino organizations, that are very concerned about this nomination.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Merkley. Thank you very much, Mr. Chairman.

Then I would like to turn to a question that has puzzled me over time. And it is in the context of how one evaluates, how one views the world. I heard one of my colleagues once present it this way. If you go to a doctor and they say you have cancer, you decide you had better get a second opinion. You go to a hundred doctors and 97 of them say you have cancer and you had better act, most people feel like, 97 doctors said I should act, three said I should go take some health care supplement. Maybe I had better have the operation.

And that is really the place where we are in climate science now, where the overwhelming weight of the scientific community weighs in and says, yes, it is very logical, you can do it in the laboratory, as Senator Whitehouse noted, that carbon dioxide traps heat. You can do it in a laboratory that methane traps heat. You can track the change in the environment of the concentration of those gases. You can see the impacts on the ground now.

In my home State, you have an impact on the oysters, because the Pacific Ocean is 30 percent more acidic than it was before we started burning coal. That is a scary thing, when shellfish have trouble forming shells. It has an economic impact. Our pine beetles are thriving because the winter is not cold enough to kill them and so it is having a huge impact on our forests. That is an economic impact on rural America.

The southern part of my State has had three worst ever droughts in the last 15 years. It is a huge impact on agricultural communities. The streams in Oregon coming from the snow packs have

been declining in size and raising in temperature, very bad for trout, very bad for salmon. That is an impact on our fishing community.

So the global warming that is taking place and being driven by the burning of fossil fuels is having a huge economic impact on the citizens of my State, my rural citizens, my citizens who depend on timber, who depend on fishing, who depend on farming. Should the citizens seek to address this problem? Because we are just on the front end of this happening.

Ten years ago, we were talking about models that led to the conversation Senator Inhofe had about ClimateGate, about assumptions and models. We don't need models now. We have facts on the ground. The moose are dying because the ticks are not being killed by the winter being cold enough. The fish are migrating on the Atlantic coast and Maine is losing its lobsters to Canada.

These facts on the ground are extraordinarily real. They have a huge economic impact. And shouldn't we take a very serious approach to the urgency of this problem, as we see it descending upon us?

Mr. Pruitt. Senator, I think the EPA, and if confirmed as Administrator, there is currently an obligation to deal with the issue. The Massachusetts v. EPA case says that CO2 is a pollutant under the Clean Air Act. And as such, that is what generated the 2009 endangerment finding. So I think there is a legal obligation presently for the EPA Administrator to respond to the CO2 issue through proper regulations.

Senator Merkley. I believe you are acknowledging in that, which I am glad to hear, that it is a serious problem and that the EPA, that

carbon dioxide is a pollutant and we have a legal obligation to take it on.

Mr. Pruitt. I think Massachusetts v. EPA says that. Counterbalance, by the UARG decision, that came out a few years later, that you can't transform a statute, as the EPA sought to do with the PSD program. So I think the court has spoken very emphatically about this issue. And the EPA has a legal obligation to respond.

Senator Merkley. And as you kind of rank the urgency with which you bring to this, do you see it as something that you wake up every day being, like, the next generation will weigh whether or not we acted promptly? Or is it more, I have a legal obligation because of this court decision, so I will have to have some folks pay some attention to it?

Mr. Pruitt. I think the importance, Senator, it is very difficult to prioritize. Senator Gillibrand is not here, but when she talks to me about PFOA and the threat that she is facing in New York, is that any less important than the CO2 issue? It is not. So the EPA deals with very weighty issues, as you know, water and air quality. It is a matter of prioritizing the resources to achieve better outcomes in each. And I think it is very important to do so as Administrator.

Senator Merkley. I do feel like perhaps you don't understand the gravity of the situation, from your response. Because there are feedback mechanisms that are starting to occur with the open bluewater in the Arctic, feedback from methane bubbling up from the permafrost, bubbling up from the peat bogs, bubbling up from what was previously

frozen methane on the bottom of the ocean that has incredibly accelerating impact on global warming.

Our rate of carbon dioxide pollution is not decreasing globally. It has doubled in rate from one part per million per year to two parts per million per year. So we are on an accelerating curve as a human civilization. And if human civilization doesn't get it together very quickly, we are in very deep trouble. I would hope at some point perhaps the urgency of the situation would be something you will grab hold of. Thank you.

Senator Barrasso. Thank you. Senator Rounds?

Senator Rounds. Thank you, Mr. Chairman.

Attorney General Pruitt, last year at an oversight hearing, we heard reports of the EPA regional offices who are sending companies information collection requests, or ICRs, pursuant to Section 114 of the Clean Air Act, regarding their operations, with no explanation as to the reason for the ICRs. These ICRs, which companies are legally obligated to respond to, can cost the companies millions of dollars to collect the information to respond to the request. They often hear no follow-up from the EPA regarding whether their response was adequate or what the information would be used for.

Last year, I requested from the EPA a record of the ICRs that had been sent to U.S. companies throughout the various regions. I was told by the EPA staff that there was no way to get this information, because they didn't have it.

Second, in 2015, I wrote a letter to the EPA Administrator Gina McCarthy requesting the economic information that forms the basis of

the Clean Power Plan and the ozone NOX standards. These are the major regulations that were being quickly imposed on American taxpayers. The response which I received, it took two and a half months to get the response, but I understand that I am one of the few recipients of an actual letter back from the EPA, and I would ask that it be included as part of the record of the meeting today, Mr. Chairman. The letter was basically nothing short of referring me to an internet link that directed me to a web page, the same web page which generated the questions in the first place. Essentially, they just simply suggested that I Google it. Not hardly a response that you would expect back from a federal agency, at least one that was trying to be responsive with regard to major proposed rules.

Working as a United States Senator, I have found it nearly impossible to easily access the information that I am looking for. I can't imagine the difficulty of a small business, a farmer or a rancher, when they are seeking to get information from the Environmental Protection Agency. As the EPA Administrator, the role which you are seeking, do you believe that this is an adequate way to communicate what the public and elected officials, and where are your views on making agency communication and record-keeping more transparent and accessible?

Mr. Pruitt. Senator, this is actually a common theme. As I met with many of you on this committee, both Democrats and Republicans, it was expressed to me that concern about the lack of response by the EPA at all, in response to inquiries, let alone the time of response. So I believe it is very important, as I indicated in my opening

statement, to listen, not only to the voices of the American people, but listen to members of Congress, listen to members of this body with respect to the issues that are of concern to them in their respective States. That is something I take very seriously and would seek to respond very expeditiously to you and to others in this body with responses.

Senator Rounds. The Ranking Member had asked, and was following up with questions in terms of your role as the attorney general with regard to fracking issues in Oklahoma, but also with regard to clean air attainment levels and so forth. It seemed to me that what you were trying to portray at the time, and I would like you to expand on this, because I think this is important, is that you have a different role as an attorney general than you would be if you were responsible as the agency within the State who had the direct statutory authority to respond to those issues. It seems to me that that is one of the roles that the EPA Administrator has which would be different than that of attorney general, which is the execution of the laws that we have passed.

Could you expand a little bit? Because I think this is really important in terms of the way you perceive your duties with regard to executing the laws that this Congress has passed.

Mr. Pruitt. Yes, Senator, and I appreciate the question. The role of Administrator is to perform an executive role, an executive policy-making role and carrying out the functions and the statutes that Congress has passed. That is much different than my current role as attorney general. As I tried to indicate to Senator Carper, in

respect to enforcement actions in the State of Oklahoma, that is vested specifically in the Department of Environmental Quality. They are the ones that bring enforcement actions against companies who do not comply with air permits, et cetera. We provide general counsel to them in that process, but it is not our responsibility. But more, it is not our jurisdiction. And that is important to me, because it goes back to rule of law, it goes back to process.

I think oftentimes what we see in this Country is that folks kind of disregard the authority or jurisdiction that has been given to them by the statute of the Constitution and they act anyway. That is what creates, I think, a lack of confidence in the American people. So I try to respect those boundaries. I try to respect my role as attorney general, stay in my lane, if you will, and provide the counsel and perform the job that we are supposed to perform to that agency, but then allow that agency to enforce as required by law.

Senator Rounds. And then very quickly, that also means that with regard to determining the science behind the laws that we create, as the Administrator, you are not going to make the determination yourself. You expect that sound science and the scientists with that background would be making the recommendations that you would then face a decision on?

Mr. Pruitt. Yes, Senator, objective and transparent in that process.

Senator Rounds. Thank you. Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Rounds. Senator Booker?

Senator Booker. Mr. Chairman, if you would gracefully hold the clock for a second, because I want to respond very succinctly to something that you and Senator Boozman said. First of all, to you, sir, this is my first time going through nomination hearings. You have been very generous with the way you have been conducting these hearings. I think it is important that we note that, and I appreciate the number of rounds that you are doing.

And then to Senator Boozman, I really do appreciate him adding to the line of inquiry I am having, he referred to me as a friend, which means a lot to me. People around here, your colleagues, know that you have a deep respect for the kind of kindness and just decency that you represent, a level to which I aspire but have not attained. Thank you for that. Thank you for indulging me.

Senator Barrasso. Thank you.

Senator Booker. And again, with respect to my colleague, who is a really good man, if this was between Delaware and New Jersey, I am the up-State, I would be very happy with the agreement that it seems that you, you are the down-State. So that is what I don't understand. You said earlier in your testimony in regard to this matter that you have a copy of the 2003 agreement. Do you have that?

Mr. Pruitt. I have the second agreement, Senator.

Senator Booker. Okay, let's just look at the 2000 agreement. I know you claimed in your testimony earlier that the 2003 agreement had expiration on it.

Mr. Pruitt. There was a ten-year period. But that needed to be reevaluated. This is the second statement I have here, Senator.

Senator Booker. I just want to clarify that it is a contradiction. There is no expiration on the 2003 agreement. It had a reevaluation, a period in which it would be reevaluated. And it was reevaluated by your State with involvement of the EPA and the involvement of Arkansas, and they came up with the same .037 standard. And if you look at the provisions of what you do have in front of you, the 2013 agreement, and I have a blow-up of page 4 of that agreement, it states that, starting here, it states that Oklahoma, through the Water Resources Board, will propose a rule amendment that removes the date to achieve full compliance with a numeric phosphorus criterion set forth in Oklahoma administrative code. Then it lists these two codes.

If you look at those two codes, what those two codes do, you know what they are, they said the sections of phosphorus concentration shall not exceed .037 by June 30th. It is removing the June 30th deadline in these two statutes.

So that is what is frustrating to me, is that this is what you are heralding as a great agreement. But you already had, in the year 2013 agreement, it is clear that you are doing, to me, and I don't know any other way of reading the facts, is that you take a binding rule of law and you suspend it for another three years, allowing more pollution to take place.

Mr. Pruitt. Senator, that is not, the issue here was not whether Oklahoma could enforce its .037 standard, it was whether Arkansas was going to adopt that standard on that side of the border. That had

never taken place in history. That was the concern of Oklahomans. That was the concern of Mr. Fite at the Seneca-Illinois River.

Senator Booker. So I am going to stipulate to what you said, because I am running out of time, sir. I agree with you, whether Arkansas was going to be able to live up to that standard. But you are the Oklahoma attorney general. And this is what I want to say. As soon as you did this so-called historic agreement that set it back, you basically turned to the EPA with a rule, with the power of law of the Supreme Court and said, okay, back off my corporations.

Why do I say that so confidently? Because I pulled a letter from Tyson Foods that literally six days after your so-called historic agreement of suspending this rule for three years, they are delighted. They write to the EPA and say, hey, you may have not only heard of the February 20th agreement by Oklahoma and Arkansas officials to jointly conduct a comprehensive study of concentrations and impacts in the Illinois Rivershed. They are excited. They literally say, compliance, however, with the now .037 has been suspend. So lay off us, EPA, under this agreement, until the study process is completed. In conclusion, the bi-State agreement has suspended implementation date of .037 during the term of the agreement.

Industry is really happy about this, and believes, and of course this letter, you are saying Tyson is wrong, they believe that what you did is give them, the EPA, with the power of the Supreme Court and 20 years of work that predecessors of yours had done, the power to suspend that power over them to comply with the law.

So that is really what I am struggling with. On one hand, you say that you filed lawsuits against 14 people, against the EPA. It is this idea of federalism, of Oklahoma sovereignty, Oklahoma States' rights, you are fiercely fighting for Oklahoma. And on the side of the polluters. You say the EPA is attempting to do things.

But then on the other hand, in this case that you are talking about, you switch suddenly to say, well, Oklahoma's water quality standard for phosphorus, that has been worked on for 25 years, armed with an EPA approval, armed with a Supreme Court decision, on point saying that up-river States are bound, industries believe that they are bound, but suddenly you are no longer fighting for Oklahoma. You are fighting to protect industry, on the side of industry again.

Mr. Pruitt. I can assure you, Senator, that industry didn't think they were bound.

Senator Booker. Why did Tyson write the letter, sir?

Mr. Pruitt. I don't know why they sent that. Because as Senator Boozman indicated earlier, the phosphorus level at .037 was unenforceable on the Arkansas side of the border. That was the concern. Until this agreement that we have here was negotiated and signed by Arkansas, that had never occurred in the history of Oklahoma.

Senator Booker. But sir, Arkansas was party to the 2012 scientific investigation. They are bound by the Supreme Court case which I pointed out to you already, and I can read you the binding paragraphs, bloodened by the EPA and obviously understood by industry that they were bound by that standard. Your agreement didn't stop it.

It extended the period in which people could pollute. I don't understand how that could be historic.

Mr. Pruitt. Senator, I think as you look at what was achieved between Arkansas and Oklahoma, you had the Arkansas attorney general, Ed Fite, who had been involved in these issues, as indicated earlier, since 1983, trying to enforce and obtain water quality that improved the Seneca-Illinois River, he cited the historic results in this matter.

So I am unaware of the letter that you are referring to, but I can assure that industry was not, not at all excited about .037 being enforced on the Arkansas side of the border.

Senator Booker. And I will conclude just by saying, sir, it is clear that industry was excited about the three-year delay that you bought them to continue to pollute. It is written there in a letter. It seems to me the theme in your work is not federalism and States' rights, but deregulation in siding with polluters against the environment and public health standards. It is unfortunate to me that that, unless you can show me something different in the way that this actually helped to clean up the river quicker, but I just don't see that at all in the evidence and the facts that I have before me.

Senator Barrasso. Thank you very much, Senator Booker. Our next questioner is actually Senator Boozman. Since we have Oklahoma and Arkansas both here, I don't know if you have a question, Senator Boozman, or if you just want to make a comment about this agreement, since both of the States are here. You represent the Congressional district directly adjacent.

Senator Boozman. I want to make a quick comment and then after that, I think all of my questions have been answered. I would yield back if we can have agreement.

I think the thing, Senator Booker, to understand is that first of all, the water was not being polluted at that point. Arkansas had made tremendous improvement over the years, and had just, our discharge in Springdale, Fayetteville, Rogers, Bentonville, the major communities there that have grown tremendously during that time frame, their discharges were down to very admirable levels. So all of that was being done.

The question was, was .037 fair versus .04 or .05. As I mentioned earlier, our most pristine river in Arkansas was not at .037. So we didn't feel like we could do that. So Oklahoma was happy with all this stuff. Arkansas is not. And because of that, in 2013, as the agreement ran out, they were prepared to go back to court again. This thing had been litigated since the Supreme Court finding back in the 1990s all along the line.

To be honest, I am not happy with the .037. I think it is too stringent. I would challenge to find a river in New Jersey that meets that standard, and you can't do it. It is a very, very stringent standard.

So it wasn't continuing to pollute and things like that. Tremendous progress made on the Arkansas side. Everyone agrees with that. It was, where do you draw the limit.

So often with the EPA, and this is so important, we have had on the committee, we have had the gentleman that represents the water

district for this huge area. They spent a billion dollars doing a great job of cleaning things up, raising everybody's rates. EPA has come back and wants them to spend another billion dollars for a tiny fraction that everybody agrees would not have any impact on the water quality in the river. These are the kinds of things that you get into.

So again, I am really not happy at all about the .037. I think that Tyson and the industry were happy in the sense that you would have a situation where you would have some finality, you would have some resolution so that everybody could go forward.

Senator Barrasso. Senator Ernst, any final comments or thoughts or questions?

Senator Ernst. Thank you, Mr. Chairman. I don't have any further questions. Whatever additional questions I have, I will submit for the record.

But I do have some closing comments. I do want to push back a little bit on the Ranking Member's comments earlier. I had gone through a series of examples of overreach by the government with the expanded definition of Waters of the U.S. And the Ranking Member had stated that he had a letter that he had received from Administrator Gina McCarthy. And I have no doubt that she was answering those questions honestly, because she wasn't the one making the statements. The statements that I presented came from the Corps of Engineers and the Department of Justice.

Now, I know this to be true: these are not as implied from some obscure website off of the internet done by some blogger in a basement

somewhere. The comments actually came from this committee, case studies from this committee, September of 2016. These are examples of case studies from all across the United States. I will cite just one that I opened up to.

A landowner in California received an investigation letter from the Corps, informing him that disking performed by a tenant farmer on his land may have resulted in an unauthorized discharged into WOTUS, and that regulators had opened a case against the landowner. They are being implemented, case by case. This letter came as a surprise to the landowner, who had been disking this particular site periodically over the last 15 years to sustain grazing conditions for his cattle, a practice he believed was normal, until he received this notice.

The court told the landowner's consultant that all disking for any purpose and at any depth with any potential WOTUS is a discharge into WOTUS and in the absence of a permit, represents an unauthorized discharge in violation of the Clean Water Act. This is an actual letter from the Corps that was submitted to this committee, the EPW committee, last year.

So this is not made up. This is a very real impact to all Americans. So I appreciate your stance, Attorney General Pruitt, that if you are confirmed, you will work with those that wish to continue farming and normal practices. But this is not made up, folks. We just need everyone to understand that the Corps, the DOJ and the EPA have gone beyond what we consider to be reasonable application of the law. Thank you very much.

Senator Carper. Mr. Chairman, if I could just respond very briefly. The letter that I sent on January 11th was not just to the EPA. It was to the head of the EPA and also the Assistant Secretary at the Army, Department of the Army, who is in charge of the Army Corps of Engineers. So it was really to both, both EPA and the Army Corps of Engineers. I gave them a half dozen or more questions and said, these assertions that we are hearing, what is the truth? And they responded jointly.

Senator Ernst. And if I can respond to that, I apologize, because I was going to use Senator Rounds' letter as a prop. I had not seen a letter from the EPA. I had written Administrator Gina McCarthy nearly two years ago on some issues that I was wanting addressed for Iowa. And I invited her to come to Iowa and visit. She never, ever responded to me or my staff.

Thank you, Mr. Chairman.

Senator Barrasso. Senator Markey.

Senator Markey. Thank you, Mr. Chairman.

Mr. Pruitt, you have criticized the Obama Administration on a number of occasions for allegedly "colluding with environmental groups to engage in sue and settle tactics." You just reiterated your concern to Senator Inhofe.

But in December, many of your co-plaintiff attorneys general, who are suing the EPA over the Clean Power Plan, sent a letter to President-Elect Trump, urging him to settle their lawsuits related to the Clean Power Plan. That sure sounds like an invitation to engage in sue and settle to me.

To avoid the appearance of entering into sweetheart settlements on the Clean Power Plan cases, will you commit to recusing yourself form all ongoing litigation that you are involved in?

Mr. Pruitt. Senator, I would say to you that the sue and settle practice, whether by this Administration or future administrations, is a practice that should not be followed. I believe that regulation through litigation is wrong. I believe that the rulemaking process that Congress has established should be respected by agencies, not only the EPA, but across the board.

I would mention one case to you.

Senator Markey. It looks a lot like that is what the attorneys general are doing, who are suing. And you are a co-plaintiff in this case on the Clean Power Plan. Will you recuse yourself from any role in the settling of these cases, in the negotiation on a settling of these cases?

Mr. Pruitt. The sue and settle practice should not be used by any administration to regulate. We have experienced in Oklahoma a case involving the Fish and Wildlife and Endangered Species Act in the relisting of the Lesser Prairie Chicken that impacted our State. So sue and settle is wrong.

Senator Markey. Are you giving me a yes, that you will not settle with these attorneys general?

Mr. Pruitt. I will not engage in a sue and settle practice, if confirmed as EPA Administrator, at any time.

Senator Markey. Will you negotiate with them to reach a settlement, such as has been recommended by the attorneys general who are the plaintiffs in this case against the Clean Power Plan?

Mr. Pruitt. Senator, it is a belief of mine that the use of sue and settle is a practice that should not be done by any agency of the U.S. Government.

Senator Markey. Right. So will you recuse yourself from any involvement in this litigation as it is being decided?

Mr. Pruitt. As I have indicated to you, Senator, the EPA ethics counsel, career staff at the EPA, has said that a particular matter, a specific case that those will be evaluated at the time. I will seek their counsel and comply with their counsel.

Senator Markey. Honestly, Mr. Pruitt, there is no bigger case than the Clean Power Plan. It goes to the promise that the United States is making to the world that we are going to reduce significantly our greenhouse gases. So this just goes to you as an individual saying that since you brought the case, with these other attorneys general, that you will now recuse yourself. Since you are in fact the plaintiff and defendant in this case if you are confirmed as the EPA Administrator.

Mr. Pruitt. Senator, as I indicated to you earlier, and I am sorry to interrupt you, but as I indicated to you earlier, I will recuse if directed by the EPA ethics counsel, career staff at EPA ethics. You know these individuals. They have been there, and I will follow their counsel and guidance.

Senator Markey. All right. I know I am not going to get you to recuse yourself from any of these cases, but I am just telling you, it is going to wind up being a huge conflict of interest if these attorneys general get to settle on their terms with the Trump Administration and you are sitting there in the middle of the room as that occurs.

Now, let me go to another subject, and that is this bottle of Trump water. Trump water, natural spring water. On the label it says, "pure, fresh and free from contaminants. This is water the way it was meant to be." Trump hotel guests have the luxury of drinking this water if they don't trust what comes out of the tap. Low-income communities across our Country do not have the same luxury. Do you agree that the EPA plays a critical role in ensuring that all Americans, regardless of racial, ethnic or economic backgrounds, have a right to clean water, free from contaminants?

Mr. Pruitt. Absolutely. In fact, Senator Booker and I talked about environmental justice in our meeting.

Senator Markey. That is great. As the widespread lead contamination in Flint, Michigan's water supply tragically reminds us, low-income and minority communities often bear far greater environmental burdens. Yet you told Senator Cardin earlier today that you didn't know if there is any safe level of lead. But scientific experts, including the CDC and World Health Organization, have concluded that there is no safe level of lead exposure.

Will you commit to making environmental justice for poor and minority communities an immediate priority of the EPA, if you are confirmed as Administrator?

Mr. Pruitt. I believe it is a very important role of the EPA Administrator.

Senator Markey. Well, minority communities often don't have the money -

Senator Barrasso. The Senator's time has expired in the third round. Thank you.

Senator Sullivan.

Senator Sullivan. General Pruitt, I just have one final question. We talked about some of the challenges that we have, this committee has been working on infrastructure issues. There were a lot of discussions last year about Flint, Michigan and aging infrastructure, which I think is a concern at the State and local and federal levels.

There is also a challenge in certain parts of the Country on no infrastructure. None. No clean water and sewer. My State has over 30 communities that don't have any clean water and sewer. In terms of the diseases and the living conditions in communities like that, as you can imagine, it can be very difficult. So in a bipartisan way, this committee acted last year, established a new program for disadvantaged communities, small communities, to work on those kinds of issues for different communities, whether Alaska or other parts of the Country, that literally live in third world conditions in some communities. So that would be administered by the EPA, this new

program. I just want to get your commitment to work with us to fully fund that new program to work on those kinds of issues.

Mr. Pruitt. As we talked about in our meeting, Senator, I believe sometimes when infrastructure is referenced, we think roads and bridges and we don't think water infrastructure. I think all those are important, and I would make that a priority interfacing with Congress if confirmed as EPA Administrator.

Senator Sullivan. Great. Thank you.

Senator Barrasso. Thank you, Senator Sullivan. I want to thank all the members for the respectful way in which the business was conducted today. Members may also submit follow-up written questions, but it seems that everyone had plenty of opportunity to ask oral questions. Schedule for the close, the recording for the close of business Thursday, January 19th - Senator Carper?

Senator Carper. I thought we were going to do one more.

Senator Barrasso. I thought three rounds was the longest in the history of this. The last, the only other time there were three rounds was Christie Todd Whitman in 2001. Those were three rounds of five minutes each. And the reason that she as a Republican nominee was given three rounds is that the Chairman of the committee was Harry Reid. So three rounds, the witness has been here since 10:00. It is now 4:30, so he has been six and a half hours, and three rounds. By any criteria that one would use, each of five minutes, when Gina McCarthy was nominated, and I had significant numbers of questions, Barbara Boxer limited me to one five-minute round and one two-minute

round. We have more than doubled today that amount of time for questioning.

Senator Whitehouse. Mr. Chairman?

Senator Barrasso. Senator Whitehouse.

Senator Whitehouse. I am certainly not saying that you've been unfair with us, but until this very minute, I don't think it has been clear to anyone that there was a three round limit. I believe you opened the hearing by saying that we would go on until people's questions were answered.

So this is a bit of a novelty. But again, please don't take it as a criticism of your fairness. I think that you have been fair. This is just news. And I do have a bunch of questions right here that I'd hoped to ask as what I expected to be a final fourth round.

Senator Barrasso. Then I would invite you to please submit those follow-up written questions by tomorrow close of business.

Senator Carper. Mr. Chairman, could I be recognized?

Senator Barrasso. Yes, sir. Senator Carper, and then Senator Booker.

Senator Carper. I appreciate the way you've conduced this hearing today. I appreciate all the members coming and coming back again and again. When we were talking a week or two ago about the hearing, whether to have one day of hearings or two days of hearings, our side was interested in having two days of hearings. We were interested in having an outside panel, and it was explained to us that that is not really the tradition of the committee, to have an outside panel.

But you, Senator, preferred to have it in one day, and we'll stay as long as people have questions, I think those were almost exactly your words. And that is hard to argue with, to stay as long as people have questions. Some of the folks have some more questions. I know I do. And we are not running out the clock on those questions. I would just ask that you think back on our earlier conversation and you see your way clear to have one more round and we'll call it a day.

Senator Barrasso. Yes, well, I would say a couple of things. One is, I offered to start the committee meeting earlier today, because there are many of us who have commitments into the evening, people from our home States who are here for the inauguration activities. We have commitments for our home States. And the idea of starting at 9:00 was rejected. And we wanted to go along, right before the third round, I said, now, if there is going to be ongoing, maybe we should take a break, give the witness an opportunity to take a break, you said, no, let's plow on.

The witness has been sitting there now for just about three hours. And depending on wishes of the committee, my preference is to say, we have done more than ever done in the last 16 years or 17 years for nominees. If people have one or two questions, I would want to give the witness an opportunity to stretch his legs. I will be happy to stay. And we can come back with a three-minute round.

But I just think - people have obligations and commitments. And we thought we would be completed by now. It does seem by many of the end, and for people who are here now, they could go. So we have three members, if you want to go two to three minutes or one or two

questions, I think we would be able to accommodate. But to bring back the entire committee and go into the night -

Senator Carper. I am not suggesting we bring back the entire committee. Let me just suggest that if we can, we can agree here. Those that are here today, right this moment, if they have questions, give them five minutes. And then when they're done, we are done.

Senator Barrasso. Any objection from our side? Senator Inhofe.

Senator Inhofe. Though we would be able to yield back any time that we had, if we didn't want to use it.

Senator Barrasso. Sure.

Senator Carper. Or you could yield to us.

[Laughter.]

Senator Inhofe. I can only say that I have chaired this committee for quite a number of years. I have been through this once before and there is always an effort by those who are perhaps not really satisfied, as some of the others might be, to try to make it continue on and on and on.

I would prefer to go ahead. I think we have all had adequate time, and be prepared to vote.

Senator Barrasso. Well, we don't have a vote scheduled for today on this. We don't have an agreement on that. So it wouldn't be a vote. I would say, if we --

Senator Inhofe. Well, if that is the case, then we can confine it for the record, any questions that they have.

Senator Barrasso. Any other suggestions?

Senator Mr. Pruitt. Mr. Chairman, I think you've been exceedingly fair, particularly relative to the confirmation of Gina McCarthy. And I think it is purely within your call to have additional questions be submitted for the record. The opportunity for the witness to answer all the questions, he'll still have to do it before his confirmation. But relative to any other EPA Administrator hearing, you've been very generous, very fair, and I think that, in retrospective, I think that is a very fair outcome, to still ask the questions, just submit the questions for the record.

Senator Carper. Can I respond to our colleague from Alaska? I don't know if you remember a year or two ago, there was a joint session of the House and Senate committees, environment committees. And the witness was Gina McCarthy. And I arrived four hours into the hearing. And after a while, I was recognized to ask a question. And my first question of Gina McCarthy was, you've been here for four hours, haven't you? She said yes. And I said, is there any question you haven't been asked that you wish you had been asked? And she said yes. I said, what is it? She said, I wish I'd been asked if I needed a bathroom break.

[Laughter.]

Senator Carper. I don't know if the witness could use a bathroom break. But if you need one for a couple minutes, we could arrange that.

Here's what we are asking for. Five minutes, Cory Booker, Sheldon Whitehouse, Tom Carper. We ask our questions and we are done.

That's it. Can you handle that? Why don't you say yes? We're wasting a lot of time here.

Senator Barrasso. As you said, you have a couple of questions. Let's go three minutes each and we'll call it good. You're up.

Senator Booker. Mr. Chairman?

Senator Barrasso. Senator Booker.

Senator Booker. I'd asked to be recognized earlier. I do want to -

Senator Barrasso. I apologize. Yes, sir.

Senator Booker. I just want to repeat, I do think what Senator Sullivan said, you have been very, very generous, it is true. I appreciate what seems like an accord right now of a few minutes now. I'd appreciate that.

One thing you didn't mark, which I think should be really important, is I have no sympathy for the nominee and his endurance. I do have for his family, behind him, who has sat through this. I just want to mark for the record that they are true champs. I think that is important to know. I thank them for their indulgence. Not the nominee, but them.

Senator Mr. Pruitt. I would just say that is more evidence that he cares for the children of Oklahoma.

[Laughter.]

Senator Barrasso. I would just say, more people vote for me because of my wife than vote for me, and I would suggest for you as well, in the case of this nominee.

Senator Carper. Let me yield to Senator Whitehouse.

Senator Whitehouse. I just want to touch on two things, and then we'll wrap up. The first is that on your questionnaire you listed an email address with a me.com domain as your business email. You also have an OAG.ok.gov address. Are there other email addresses that you have and are the other email addresses that you use for business other than your me.com and your OAG.ok.gov email addresses?

Mr. Pruitt. I am sorry, Senator. The "me" address is not a business email address. I am not sure why it was designated as such.

Senator Whitehouse. Well, maybe we can just correct the filing on that.

Mr. Pruitt. There are no other email addresses, if that is your question, Senator.

Senator Whitehouse. We have gone through the cases that you list as your environmental cases. When we take out the cases that were started by your predecessor, Drew Edmonson, and when you take out the cases that are fish kill cases, which I understand is a formulaic matter that is resolved by letter at the staff level, you count the fish, you pay the fee, and when you take out the qui tam cases, which are, for those who aren't lawyers, a private individual who brings an action and then the attorney general can step in and take the action over if they want, but it is brought in the first instance by a private individual. And then if you take out the cases in which you sued EPA, there is virtually nothing left.

And in addition to that, we have that you closed the environmental protection unit in Oklahoma as a free-standing unit. You told me when we met that you had rolled it into your federalism

unit. But I was just on the federalism unit is website, and the word "environmental" doesn't even appear on that. It appears to be run by the Solicitor General. It says over and over again that it is involved in appellate litigation. And of course, if you are bringing an action, you are not starting at the appellate level.

Mr. Pruitt. Senator, if I may, the Deputy Solicitor General, Clayton Eubanks, was actually employed by the previous attorney general. He has been designated the Deputy Solicitor General and is responsible for environmental related advice and consent to those agencies.

Senator Whitehouse. Yes. That's a different function, though. That's a different f unction than to bring an action. I have been an attorney general, too. I know the difference. The attorney general has an obligation to provide lawyers, to give advice to agencies. But you also have the authority to bring criminal actions, if you wish. And you have the authority to bring civil actions, if you wish. And it is those authorities that I believe have not gotten much attention.

And the last piece of that, because you will have a chance to respond, but I am on a short clock, is that there was in Oklahoma an environmental crimes task force that your predecessor led. It describes, and I would ask to have these documents put into the record, from 1997 to 2010 the OECTF, the Environmental Crimes Task Force or the Environmental Protection Unit, in conjunction with EPA and other entities, conducted 142 criminal investigations, resulting in 56 prosecutions. Criminal cases resulted in individual convictions on 110 felonies, 21 misdemeanor counts, corporate convictions, 10

felony and 3 misdemeanor counts, $8 million in fines, 28 years of jail time. We can put it in the record.

Do you even participate in the Oklahoma Environmental Crimes Task Force still?

Senator Barrasso. Without objection.

[The referenced information follows:]

Mr. Pruitt. Senator, as I have indicated, we work each day with our Department of Environmental Quality on enforcement along with other agencies. I guess it is a matter of "who takes the credit" for that type of enforcement. But those individuals have offered statements to this body. They are a matter of the record. You've heard statements that the Chairman has referred to that we have worked diligently with those agencies to enforce appropriately. And I would refer to their statements in response.

Senator Barrasso. Thank you, Senator. Senator Booker?

Senator Booker. Thank you very much. First of all, I appreciate your talking about environmental justice and mentioning that. We did talk about that, and I felt good about your personal commitment, at least to me, that you would pursue that.

I just want to go through this last point. I want to put together a fact pattern here to let you have at it and dispute it. I know there is at least one point in here you dispute, and I really want to get to what I draw from the facts. And you can, again, have the last word.

So what I am seeing, that I put together all the facts, just a pattern. There's a litigation from your predecessor that you declined to conclude when you got in against polluting poultry producers who were dumping hundreds of thousands of tons of chicken waste into the Illinois River watershed. You shut down the environmental enforcement unit in your office. This is the one I know you do not agree with me on. But I see it as that you also attempted to suspend Oklahoma's water quality standard for three years.

But the last fact, and again, you have the last word here, sir, is that you also supported a constitutional amendment, State Question 777, the so-called Right to Farm amendment, that would have made it more difficult for the Oklahoma State Legislature, again, you talk about federalism, now trying to take the teeth out of the Oklahoma State Legislature and local governments to enact their own environmental laws in the future,

And this kind of support, and I looked all throughout the magazines, you are going in support of this, it is clear. Here you are in the pro and con about supporting 777. Here is, most of the editorial boards were against you on this in your State. Here's one from Tulsa World Endorsement that said the measure would prevent future State and local regulation on farming and livestock activities unless the State has a compelling State interest, a very high legal standard, as I know, not the lawyer that you are, sir, but I know that is a very hard one, standard, to meet.

So this is the challenge, this idea that you are supporting federalism versus, it seems to me, a pattern of you being on the side of the polluters, and even trying to take the teeth out of the State Legislature's ability to regulate these harmful environmental toxins. I am happy that this ballot initiative was overwhelmingly defeated by Oklahoma voters. But as I see you ascending potentially to this very important position, sir, I just worry about whose side you are going to be on, given the fact pattern that I have about big industry, about big pollution, especially as I know the billions of animals that we have in CAFOs that are poisoning rivers all over this Country.

I really just want you to respond to that, sir. And I will say, because this will be my last word, you will have it. I want to thank you for your indulgence. And I want to thank your family as well.

Mr. Pruitt. Thank you, Senator. And let me respond. There's been some confusion about the litigation. You made reference to several things there, and if I may respond to a couple. The litigation to which you refer, Senator Boozman actually to it as well, my predecessor did bring an action, approximately 2007 timeframe, against the poultry industry and many other defendants in the Northern District of Oklahoma. That case had been fully litigated, submitted to the court for decision before I ever came into office. It was an example of potentially regulation through litigation. And I have talked about that earlier, in response to questions.

I had every authority to dismiss that case when I came into office. I did not. That case is still pending today, awaiting a federal judge's decision. I have taken no action to undermine that case. I have done nothing but file briefs in support of the court making a decision. So that is a point of clarity on the litigation.

With respect to our office, I submitted this in response to Senator Whitehouse's request. We met last week and he asked about FTEs and budget. I have submitted response to him. We have almost a $700,000 budget that the Administrator of our office has attributed to environmental-related activities and seven FTEs that are associated with that as well. So I want to make sure that those two items were shared with you in response to your comments.

Senator Booker. You have nothing to respond to on the State Question 777?

Mr. Pruitt. The State Question 777, we are actually involved in the ballot drafting of those things. So though you represented that I was actively involved in an endorsement, I really was not as far as the actual vote. Now, there was some op ed, and some decisions. But I have tried to make sure that I didn't get involved in that because of our other obligations in the office.

Senator Barrasso. Senator Carper?

Senator Booker. And I can submit this for the record, sir?

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Booker. Thank you, sir.

Senator Carper. Mr. Pruitt, earlier today I mentioned that had submitted a list of about 50 questions to you shortly after Christmas, asked for a response by January 9th and got none. I asked my staff this morning if we had gotten written responses to those questions as of today. And I understand that we have not.

You're going to receive a number of questions for the record from us, Democrats and Republicans. And I am anxious to see what your responses are to those questions. We need your answers, and we need good answers. And the idea of waiting two or three weeks and not providing anything is just unacceptable. So just to put that out there.

And I would like to ask you a question.

Mr. Pruitt. If I may offer this, I tried to, and I talked to the Chairman about this, with respect to your questions I submitted, I was respecting the protocol of the Chair in responding to those questions, and committed that those questions would be answered for the record post the hearing. And that is what I was directed to do by the Chairman.

Senator Carper. All right. Second, based on your other statements, I just want to clarify something. If confirmed, can we have your assurances that the EPA will continue to regulate mercury emissions from power plants under Section 112 of the Clean Air Act, and you will not defer to the States?

Mr. Pruitt. Mercury, under the Section 112, is something that EPA should deal with and regulate.

Senator Carper. Thank you. I came across a quote from you that said, I think you stated the following about an EPA rule involving cross-state smog pollution. And the EPA rule, I think you were quoted as saying, "Threatened the competitive edge Oklahoma has enjoyed for years with low-cost and reliable electric generation. This low-cost energy not only benefits Oklahoma manufacturers but gives our State a considerable edge in recruiting new jobs." And the question I would ask, at the peril of those of us who live in States that are downwind from where Oklahoma might be, as you lower your energy costs to benefit Oklahomans, I just want to ask you, in the spirit of the Golden Rule, keep in mind what that means for us. Keep in mind what that means for us.

Because in my State, I said earlier on, I can shut down my State's economy and we still would be out of compliance on any number of Clean Air requirements. And that was not because of anything we put up in the air, but because of what folks out to the west put up in the air. It eventually came down to the end of America's tailpipe. I would just ask that you do that.

And last, we have a chart, you see this chart. It's an interesting chart. This is what we call a busy chart. It's a busy chart. It looks at the issue of cross-border pollution, as you can see, with this chart, smog, pollution in our Country moves all over the place. I mean, all over the place. As I mentioned, as Delaware's governor, we shut down my State in order to come in compliance with Clean Air challenges. Under your vision for EPA, it sounds like States will be left on their own to deal with this very complex

problem that we see demonstrated right here. I would just ask, how do States address this kind of pollution you see demonstrated here without the assistance of the EPA?

Mr. Pruitt. Well, Senator, as I indicated earlier today, I believe that as an example, the Cross-State Air Pollution Rule, to which you just referred, is a very important authority that the EPA needs to exercise. It needs to do so within the processes that have been provided by the statute. But it is something that is very important for the EPA to perform and execute.

Senator Carper. All right. Mr. Chairman, I have a unanimous consent request to submit for the record, Mr. Chairman, a number of letters with concerns about and many letters in opposition to, some cases for, other cases opposition to Mr. Pruitt's nomination. There are 14 in all.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Carper. Thank you so much. And again, to Mr. Pruitt, to your family, thank you all for joining us today. I see Cage, your son, right behind you, I could barely see Cage's lips moving when you spoke. So I suspect he has a future in law, I am not sure.

[Laughter.]

Mr. Pruitt. We'll see. Thank you, Senator.

Senator Barrasso. Attorney General Pruitt, I do want to follow up, as you said, you were instructed by the committee. I have a copy for the record of a January 9th letter which is the day that you were asked to submit the 52 answers to the questions. It's a letter from

me to the Ranking Member saying, please note the EPW committee does not require nominees to respond to questions in advance of a hearing. And I know you'll be responding to the written questions that will be submitted by tomorrow night.

Senator Carper. Mr. Chairman, could I just add a short thing? That's a conversation between you and the Chairman, I understand that. But again, I would just reiterate, you have received a lot of questions, including some that have been unanswered that I had submitted two or three weeks ago. We need your responses. We need your responses. And I hope the Chairman will give you a reasonable amount of time to respond to those questions, because there will be quite a few of them. They are not going to be like multiple choice answers. They won't be true and false. They will be more complete.

Thank you.

Senator Barrasso. Additionally, I am going to introduce for the record an article from The Economist about mercury and the Mercury Rule. And it is interesting that it says rulemaking is being made to look more beneficial under Barack Obama, but it goes to say, "A casual listener would have assumed that all these benefits came from reduced mercury. In fact, reduced mercury explained none of the purported future reduction in deaths, heart attacks and asthma, and less than 0.01 percent of the monetary benefits. Instead, almost all the benefits came from concomitant reductions in a pollutant that was not the principal target of the Mercury Rule, namely, fine particles."

And I will submit that for the record as we look at the issues going into the future.

[The referenced information follows:]

Senator Barrasso. I want to thank all the members of the committee for your patience. I certainly want to thank the nominee for his time and his testimony today. The hearing is adjourned.

[Whereupon, at 4:55 p.m., the hearing was adjourned.]