U.S. ENVIRONMENTAL PROTECTION AGENCY'S PROPOSED REGULATORY REVISIONS TO THE RCRA SUBTITLE C DEFINITION OF SOLID WASTE

Key Issues For The Mining & Mineral Processing Industry

The U.S. Environmental Protection Agency's (EPA) upcoming proposed rule to revise the Resource Conservation and Recovery Act (RCRA) Subtitle C regulatory definition of solid waste is of direct interest to the mining and mineral processing industry, which has labored under a series of EPA regulatory definitions that improperly characterized as wastes certain valuable in-process secondary materials used in the industry's production operations. These unlawful regulatory definitions were successfully challenged by the National Mining Association (NMA) and its predecessor in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), most recently in *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000) (*ABR*), which served as the impetus for the 2008 final rule now under reconsideration.

Background

EPA filed a joint motion on Sept. 10, 2010, with the Sierra Club in the D.C. Circuit notifying the court that they negotiated a settlement agreement regarding the issues presented by the Sierra Club in proceedings on the final rule. According to the terms of the settlement agreement, EPA agreed to "prepare a notice of proposed rulemaking which will address, at a minimum, issues raised in Sierra Club's petition including the four issues listed in the May 27, 2009, Federal Register Notice, 74 Fed. Reg. 25,200." In that notice, EPA announced a public meeting on June 30, 2009, and requested comments on: (1) the definition of "contained"; (2) the notification requirements; (3) the definition of legitimacy; and (4) the transfer-based exclusion. NMA provided an oral statement at the public meeting and filed written comments, which focused on the definition of "contained" and the definition of legitimacy.

Issue # 1 – EPA Should Not Pursue a Different Approach for Determining Legitimate Recycling

- ***The TARs Factor***

In the 2008 final rule, EPA established two so-called "legitimacy factors" that had to be addressed before certain recycling practices could be exempted from RCRA Subtitle C regulation, and two other factors that have to be considered, including the "toxics along for the ride" (TARs) factor. For the mining and mineral processing industry, EPA's recognition in the 2008 final rule that the TARs factor would have to be considered, but that there are situations "in which this factor is not met but the recycling would still be considered legitimate," including in the mining and mineral processing industry, was an extremely important and rational decision.

Specifically, EPA stated in the 2008 final rule that:

> "In many mineral processing operations, the very nature of an operation results in hazardous constituents concentrating in the product as it proceeds through the various steps of the process. In many cases, there is not an analogous product to compare the products of these processes so this factor may not be relevant because of the nature of the operations. As with the above example, if a facility considers a factor and decides that it is not applicable to its process, the Agency suggests that the facility evaluate the presence of hazardous constituents in its

product and be prepared to demonstrate both that it considered this factor and the reasons it believes the factor is not relevant." 73 Fed. Reg. at 64,705.

By rightfully acknowledging this fundamental problem with applying the TARs factor to the mining and mineral processing industry, the agency avoided halting legitimate recycling practices within the industry.

If EPA were to reconsider this approach and make all four criteria, including the TARs factor, mandatory, it could mean that the necessary flexibility inherent in the 2008 approach would be eliminated, and that failure to meet the TARs factor would automatically label a recycling practice as sham recycling. Such a result would fly in the face of the record before EPA and would be particularly problematic for the mining and mineral processing industry, given the problems inherent in applying any TARs analysis in the industry.

As an initial matter, it is unclear how a TARs mandatory factor could be applied in a meaningful way within the industry, because as a practical reality there are no products made without the use of in-process materials. The recycling of in-process materials is intrinsic to primary metals and minerals production, as the industry seeks to maximize the recovery of the target metal(s) and mineral(s) present in the virgin ore. Therefore, unless the industry completely reconfigures its operations, it would be impossible to make the comparison required under the test, *i.e.*, the comparison between the "toxics" in products made solely from virgin feedstocks and the "toxics" in products made from both virgin and in-process materials.

Moreover, even if it were somehow possible to make the required comparison, any increased levels of metallic impurities in a product that might result from use of in-process materials should not lead to a mandatory conclusion that sham recycling is occurring. As the concentrations of the "target" metal(s) increase, so do the concentrations of other metals (especially those with similar physical or chemical properties as the target metal(s)). The result is that in-process materials almost invariably have higher concentrations of both target metals and non-target metals than the original ores. When these materials are reinserted into the mining and mineral processing industry production process, the product could conceivably have higher concentrations of non-target metals than would otherwise be the case. However, this result would in no sense mean that sham recycling was occurring.

In addition, the TARs approach in the 2008 final rule focuses on whether the non-target constituents are "significantly elevated" when compared with the levels in analogous products made from primary feedstocks. EPA should not consider a revision of this approach to a test which evaluates whether the levels of the non-target constituents in the products: (1) made partially from recycled materials, and (2) made only from primary feedstocks are "comparable". Contrary to statements made by EPA, and particularly in the mining and mineral processing industry, if levels of non-target constituents are found in products made partially from recycled materials at levels higher than, not comparable to, the products made only from primary feedstocks it does not indicate that discard of the non-target constituents or sham recycling is occurring. This result is particularly true if the industry product meets product specifications for the non-target constituents.

- ***Management as a Valuable Commodity***

EPA's 2008 final rule adopted the "management as a valuable" commodity factor as the other legitimacy factor to be considered. For reasons similar to those discussed above, EPA should not transform this "factor to be considered" into a mandatory criterion. In addition, this factor provides that if there are no analogous raw materials, the secondary material to be recycled

should be "contained," meaning that it must be "placed in a unit that controls the movement of that material out of the unit." 73 Fed. Reg. at 64,703.

NMA is concerned, however, that the agency may be pursuing modifications to the definition of "contained" in the proposed rule that would violate the jurisdictional limitations placed on the agency under RCRA. As a matter of law, EPA is barred from regulating the storage of in-process materials in the mining and mineral processing industry. As the D.C. Circuit recognized in 1987 and reaffirmed in 2000: "[C]ongress clearly and unambiguously expressed its intent that 'solid waste' (and therefore EPA's regulatory authority) be limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away." *ABR*, 208 F.3d at 1051 (quoting *American Mining Congress v. EPA*, 824 F.2d 1177, 1190 (D.C. Cir. 1987)). Thus, if EPA chooses to codify specific performance or storage standards, the agency will once again be squarely in violation of the D.C. Circuit's opinion in *ABR*, which struck down EPA's attempts in the mining and mineral processing industry to require specific storage conditions for materials not discarded.

Issue # 2 – EPA Cannot Legally Regulate Land Based Production Units in the Mining and Mineral Processing Industry

EPA correctly recognized in the final rule that the conditional provisions on "land-based units" in the "generator control" and "transfer-based" exclusions do not apply to the mining and mineral processing industry's land-based production units. In response to NMA's comments, EPA stated in the preamble to final rule that ". . . EPA agrees that the Agency does not regulate the production process. (*See* 63 FR 28580). Accordingly, EPA has clarified the definition of 'land-based unit' to clarify that production units are not included in that definition." 73 Fed. Reg. at 64,729. This was a critical clarification for the mining and mineral processing industry, and it should not be revised by EPA.