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The District of Columbia Circuit's New Found Vigilance over Costly Regulations Affecting the Petroleum Industry: United States Environmental Protection Agency v. the American Petroleum Institute

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THE DISTRICT OF COLUMBIA CIRCUIT'S NEW FOUND VIGILANCE OVER COSTLY REGULATIONS AFFECTING THE PETROLEUM REFINING INDUSTRY: UNITED STATES ENVIRONMENTAL PROTECTION AGENCY v. THE AMERICAN PETROLEUM INSTITUTE

I. INTRODUCTION

The struggle between supporters of environmental preservation and those who purportedly harm the environment through ongoing business practices has been mediated by the Environmental Protection Agency (hereinafter "EPA") and its interpretation of numerous government statutes for years. EPA faces the admittedly onerous task of regulating business that, in the course of legitimate, environmentally sensitive attempts to recycle or reuse discarded materials, continue to harm the environment. Meanwhile, a critical median between capitalism and environmental preservation lies in the balance.

EPA, empowered by the Resource Conservation and Recovery Act of 1976 (hereinafter "RCRA"), is in charge of interpreting the meaning of the term "solid waste" under RCRA. EPA promulgated rules explaining the term "solid waste" under RCRA for the express purpose of hazardous waste regulation. More specifically, the focus of this Note and its corresponding case, American Petroleum Institute (API) v. EPA (hereinafter "API II"), outlines the method of determining the circumstances that deem a solid waste "discarded" and thereby subject to EPA regulation under RCRA. Both the petroleum refining industry and the petrochemical manufacturing industry attempted to urge EPA to exempt certain byproducts of their on-going process of oil production, which may contain valuable in-


3. See id. at 65 (focusing on discard in relation to recycled oil-bearing wastewaters from petroleum refining industry).
ingredients such as reusable oil, from the Agency’s regulations. This particular debate between advocates of the petroleum refining industry and EPA will surely continue in the future. As the price of this precious commodity increases under protest around the globe, so will the scrutiny of its industry and its production processes.

Section II of this Note encompasses the facts of API II and sets forth the following: (1) the processes by which usable oil is extracted from oil-bearing wastewaters and petrochemical manufactured oil; (2) the attendant controversy between the petroleum refining industry and the government over the proper characterization of the terms “solid waste” and “discarded” for purposes of RCRA and its regulations during the recovery process; and (3) the corresponding statutory interpretation problem hampering the petrochemical refining industry.

Section III details other case law and legal materials germane to the definition and circumstances surrounding the terms “discarded material” and “solid waste.” Section IV provides a description of the API II court’s reasoning, particularly regarding the definitions of “solid waste” and “discarded materials” under RCRA. Section V contains a Critical Analysis of the API II decision. The analysis suggests that EPA is given too much deference, and it illustrates this point through a careful scrutiny of arguments presented by each of the parties. Finally, Section VI chronicles the impact of the API II decision and its future repercussions on the petroleum refining industry, and the nation as a whole.

II. FACTS

In the petroleum refining industry, refineries attempt to “remove impurities” and isolate hydrocarbon fractions from crude oil feedstock. These refineries use massive amounts of water; the wastewaters generated thereafter contain a “small” percentage of

4. See id. at 55. EPA’s initial stance in 1988 excluded oil-bearing wastewaters from the purview of RCRA. See id. (citing Identification and Listing of Hazardous Waste: Amendments to Definition of Solid Waste, 53 Fed. Reg. 519, 525-26 (1988)). In 1994, however, EPA changed its mind and held that even before the oil-bearing wastewater undergoes “primary treatment,” or the process by which salvageable oil is recovered from the wastewaters, this byproduct (wastewater) is deemed solid waste and subject to RCRA regulations. See API II, 216 F.3d at 55 (citing 59 Fed.Reg. 38,540/1). For an in depth discussion about the process of “primary treatment” see infra, notes 7-8 and accompanying text.

5. See API II, 216 F.3d at 55 (quoting Final Rule, 63 Fed. Reg. at 42,113/3-42,115/1,42,121/2).
residual oil. Petroleum refineries ultimately discharge the oil-bearing wastewater, but only after they implement a three-step process. The most notable step in this three-step process is called "primary treatment," which removes certain materials, especially potentially reusable oil. This procedure has two beneficiary consequences: "(1) it meets a Clean Water Act requirement that refineries remove oil from their wastewater, and (2) it allows refineries to recover a not insignificant quantity of oil . . . ."

In sharp contrast to petroleum refineries, petrochemical manufacturers do not refine crude oil. Rather, these manufacturers use refined petroleum products and other feedstocks "to produce pe-

6. See API II, 216 F.3d at 55. This by-product, known as oil-bearing wastewater, is the substance at issue in this Casenote. At this point in the oil recovery process, the wastewater has not yet been treated to reclaim any usable oil. See id. The controversy between EPA and the petroleum refining industry leaders centers on the fact that EPA earmarked the wastewater as "solid waste" under RCRA, even before any reusable oil could be extracted from the oil-bearing wastewaters. See Solid Waste Disposal Act, §§ 1004(5)(B), 3001(a), as amended, 42 U.S.C. § 6903(27).

In its brief to this case, EPA attempted to put the ratio of water used in the primary treatment process into perspective: "While the oil content of the typical feedstock used in various refining steps is higher than 99% (greater than 990,000 parts per million)... refinery wastewater contains about one hundred-thousandth of the oil." Brief for Petitioner at 23, American Petroleum Inst. v. United States EPA, No. 94-1683 (D.C. Cir. filed Feb. 25, 2000).


8. API II, 216 F.3d at 55. Additionally, the amount of oil that is recovered by primary treatment and recycled back into the "refinery production process" was stated in API II as 1,000 barrels per day across the industry. See id. The sole purpose of primary treatment, according to EPA, is to treat plant wastewater so that it can be discarded pursuant to the Clean Water Act ("CWA"). Brief for Respondent at 10, American Petroleum Inst. v. United States EPA, No. 94-1683 (D.C. Cir. filed Feb. 25, 2000). EPA also stated in its brief that "numerous types of industries treat their wastewaters (including those containing oil) using these treatment stages to comply with the CWA." Id. (citing American Iron and Steel Inst. v. EPA, 568 F.2d 284, 293 (3d Cir. 1977) and NRDC v. EPA, 790 F.2d 289, 293 & n.2 (3d Cir. 1986)).

trochemical products such as organic chemicals."¹⁰ As with primary
treatment, these production processes have a tendency to produce
residual oil, otherwise known as "petrochemical recovered oil."¹¹
This oil, a by-product, can be reintroduced into the petroleum re-
fining process as well.¹²

Initially, EPA proposed to shield oil-bearing wastewaters from
the broad, sweeping definition of solid waste contemplated by
RCRA.¹³ However, in 1994 and 1998, EPA investigated various pro-
duction processes in the petroleum refining industry and reviewed
the feasibility of excluding from the definition of solid waste "two
secondary materials: oil-bearing wastewaters generated by the petro-
leum refining industry and recovered oil produced by the pe-
etrochemical refining industry."¹⁴ Moreover, another statutory
interpretation by EPA seemed impending.

In API II, EPA ruled that oil-bearing wastewaters, before the
primary treatment process has begun, constitute "solid waste" for
the purposes of RCRA regulation.¹⁵ Additionally, EPA ruled that
recovered oil from petrochemical facilities escapes the broad net of
the "solid waste" definition if certain specified conditions are met.¹⁶
The District of Columbia remanded the portion of the API II deci-

¹⁰ API II, 216 F.3d at 58 (contrasting petroleum refining industry with pet-
rochemical refining industry).
¹¹ See id. (citing Final Rule, 63 Fed.Reg. at 42,114 n.2).
¹² See id. (comparing petrochemical manufacturing to petroleum refining).
¹³ See API II, 216 F.3d at 55 (explaining EPA's rationale for scrutinizing
primary treatment of oil-bearing wastewater); for a further discussion of API II see
supra note 4. EPA continually emphasized that only a small percentage of oil is
recovered from primary treatment. See id. However, EPA provided no empirical
evidence in support of this assertion. See id.
¹⁴ Id., at 54. The API II court stated that the reason EPA decided to re-exam-
ine the production process of the petroleum refining industry was "in pursuit of
its RCRA obligations." Id.
¹⁵ See API II, 216 F.3d at 55 (failing to distinguish between downstream
and upstream oil recovery units central to Industry Petitioner's rebuttal regarding sali-
cy of primary treatment). In its Final Joint Brief to the District of Columbia
Circuit Court of Appeals, API maintained that "only . . . in-process, oil-bearing wast-
ewaters that are part of a continuous, ongoing oil recovery upstream of oil recover-
y units should be excluded. API has never contested that wastewaters
downstream of oil-recovery and being treated for discharge are solid wastes." Final
Joint Brief of Petitioners, supra note 7, at 8.
¹⁶ See API II, 216 F.3d at 55 (citing Final Rule, 63 Fed. Reg. at 42, 128-30 &
C.F.R. § 261.4(a)(12),(18)). CMA contended that the petrochemical recovered oil
is not discarded at all, and therefore it challenged "EPA's decisions in 1985 to
regulate, and 1994 and 1998 to continue regulating, petrochemical recovered oil as
solid waste simply because it is used to produce fuels." Final Brief for Petitioners,
supra notes 7 at 2. CMA alleged that petrochemical recovered oil is carefully moni-
tored because "99% of its feedstock consists of hydrocarbons that serve a useful
function in the manufacturing of fuels." Id.
tion that dealt with the oil-bearing wastewaters because EPA neglected to provide a complete explanation of its decision not to exclude the wastewaters from RCRA.17 As a principal of the petrochemical manufacturing industry, the Chemical Manufacturers Association (hereinafter “CMA”) filed a petition in API II arguing that EPA “has no authority to regulate any petrochemical recovered oil under any circumstances because such materials are not ‘discarded.’”18 The API II court denied CMA’s petition as to petrochemical recovered oil.19 The American Petroleum Institute (“API”), CMA and Texaco, Inc. (collectively, “Industry Petitioners”) appealed both of these decisions.20

III. BACKGROUND

A. General Overview of Strict RCRA Regulation

Some commentators lament the undervaluation of used oil in the marketplace, both in its dollars and cents value and in its value to the sensitive environment.21 Various Congressional members also adhere to this position.22 California Congressman Esteban E. Torres detailed the numerous costs to society and the environment for improperly disposed used oil.23 For example, im-

17. See API II, 216 F.3d at 58. It has been held that an agency must fully articulate an explanation for its actions which include a "rational connection between the facts found and the choice made." Id. at 56 (citing Motor Vehicles Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

18. Id. at 59 (outlining CMA’s argument against EPA regulation based on plain meaning of “discarded”).

19. See API II, 216 F.3d at 59 (rejecting CMA’s argument outright).

20. See id. at 55. On the issue of the oil-bearing wastewaters, the API II court remanded that portion of the case in order to give EPA the opportunity to proffer a reasonable explanation for its rule-making. See id. at 58. API II did not suggest a particular result on remand. See id.


22. See id. In 1992, the Honorable Esteban E. Torres, a representative from California, stated before the Committee on Energy and Natural Resources, that “the market value of collected used oil does not reflect social or external cost to society of failing to recycle that oil.” Id.

23. See id. Representative Torres focused on lubricating oil, and he failed to address the petroleum refining industry specifically. See id. However, due to the poignant perspectives that Representative Torres offered, and due to the absence of any industry-specific limitation placed on his remarks, they have been included as part of this Casenote to provide context. See generally, id. at 12-15.
properly disposed oil "often finds its way into our lakes and streams and even into our drinking water supplies."24

Additionally, if used oil is disposed of improperly, it contributes to mounting clean-up costs at landfill sites and to the amount of airborne lead pollution that fills the skies every year.25 The primary treatment process attempts to alleviate some of these dangers by recapturing some of the used oil before the wastewater is "ultimately discharged."26 Proponents of EPA and its regulatory effects, promulgated through RCRA, attempted to present an equally persuasive argument: the oil-bearing wastewaters, even before primary treatment, are "solid wastes," which could be further categorized as hazardous waste that pose substantial risks not only toward the natural environment through contamination, but also toward the health of human beings.27 The resulting contention by EPA was, and continues to be, that strict regulation of this used oil by-product is justified from an environmentally conscious point of view.

Compliance with environmental regulations has dramatically increased business costs in the petroleum refining industry over the last decade.28 In 1996 alone, the environmental expenditures of the petroleum industry allocated 8.2 billion dollars, which

24. Id. Two million gallons of drinking water can be contaminated by one quart of used oil discarded improperly. See Used Oil Energy Production Act: Hearing on S. 2631 Before the Senate Comm. on Energy and Natural Res., 102d Cong. 15 (1992).

25. See id. at 14. In fact, as of 1992, fifty-three Superfund sites have been identified as sources of used oil contamination. See id. Lead emitted from improperly disposed used oil accounts for 600,000 pounds of airborne pollution every year. See id.

26. See API II, 216 F.3d at 55 (discussing goals of primary treatment process).

27. See id. at 59. Section 3001(e)(2) of RCRA requires EPA to decide whether petroleum refining wastes, in this case oil-bearing wastewaters, should be listed as hazardous wastes. See Final Brief for Respondent at 15, American Petroleum Inst. v. United States EPA, No. 94-1683 (D.C. Cir. filed Feb. 25, 2000) (citing 42 U.S.C. § 6921(e)(2)). The statutory standard to classify a waste as hazardous, embodied by EPA, is whether that particular waste presents "substantial present or potential hazard for human health or the environment." Id. at 3. On the other hand, proponents of the petroleum refining industry argue hazardous waste classification is a formality; "[r]egulations and administration of regulations should focus on true environmental protection, reducing actual risk to actual people . . . rather than record keeping and reporting that add cost without providing real benefits." Issues Affecting the Refining Sector of the Petroleum Industry: Hearing Before the Senate Comm. on Energy and Natural Res., 102d Cong. 161 (1999) (statements of J.C. Klasing, General Manager, Environmental Affairs and Safety, AMOCO Oil Company).

amounted to approximately one-fourth of the net income of the top 200 oil and natural gas companies. This amounts to eighty-three dollars per U.S. household. Since the 1970s, the federal government has enacted ten laws "that impact the petroleum refining industry." This figure does not consider: (1) the numerous regulations attached to these laws; and (2) the laws and regulations passed by the individual states. Petroleum industry leaders maintain that the laws and regulations should take into account "the cost of compliance and the benefits derived from society."

B. Interpretation and Application of RCRA Statutes and Definitions

In 1994, EPA contemplated regulating wastewaters under RCRA because "even before the oil is recovered in primary treatment," the wastewaters are discarded materials and hence "solid wastes" subject to regulation. When a byproduct, such as oil-bearing wastewaters or petrochemical recovered oil, is discarded, EPA considers it "solid waste" under RCRA. However, this is a heated debate between the Industry Petitioners and EPA.

29. See State of the Petroleum Industry: Hearing Before the Senate Comm. on Energy and Natural Res., 106th Cong. 117 (1999) (citing Petroleum Industry Environmental Performance Sixth Annual Report by the American Petroleum Institute (citation omitted)) (providing costs of EPA regulation on petroleum refining industry). The $8.2 billion figure was more than EPA's entire budget for that year. See id.
30. See id. (calling for common sense environmental laws and regulations).
31. Id. at 117.
32. See id. (outlining problems with numerous EPA regulations).
33. State of the Petroleum Industry: Hearing Before the Senate Committee on Energy and Natural Resources, 106th Cong. 117 (1999) (containing various excerpts of congressional testimony from both political officials and members of private businesses).
34. API II, 216 F.3d at 54-55 (D.C. Cir. 2000) (per curiam) (discussing EPA's consideration in adopting "1994 Rule which determined that oil-bearing wastewaters are solid waste for purposes of RCRA"). See id. at 55.
35. See id. at 54. Industry Petitioners were careful to point out that the term "wastewater" does mean that oil-bearing wastewaters are RCRA "solid wastes." See Joint Final Brief of Petitioners at 3, n.1, American Petroleum Inst. v. United States EPA, No. 94-1683 (D.C. Cir. filed Feb. 25, 2000). A key House Committee Report cited by Industry Petitioners stated that "[w]aste itself is a misleading word in the context of the committee's activities. Much industrial and agricultural waste is reclaimed or put to new use and is therefore not part of the discarded materials problem that the committee addresses." Id. (citing H.R. REP. No. 1491 at 2 (1976)).
1. Statutory Layout

a. Oil-bearing wastewaters

RCRA delegated to EPA the statutory power to regulate hazardous wastes and solid wastes.36 The definition of solid waste is set forth in Subtitle D of RCRA, which bestows less restrictive management constraints and standards upon material conforming to this broad definition.37 In the context of RCRA, Congress defined solid waste as:

"[A]ny garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities. . . ."38

Additionally, EPA defined solid waste for the "purposes of its hazardous waste regulations" as "any discarded material."39 Taken a step further, "discarded material," in the context of RCRA, means

36. See Connecticut Coastal Fisherman’s Ass’n v. Remington Arms Co., 989 F.2d 1305, 1314 (2nd Cir. 1993) (holding lead shot and clay targets deposited on land and in water incident to normal operation of gun club were solid waste under RCRA and its regulations).

37. See API II, 216 F.3d at 54 (showing materials classified under Subtitle C, such as "hazardous wastes" are under more demanding management schedules than materials classified under Subtitle D).

38. See Connecticut Coastal, 989 F.2d at 1314. The EPA has created "a dichotomy of the definition of solid waste." Id. Regulations encompassing the identification and listing of hazardous wastes “include[s] a definition of solid waste that applies only to wastes that are also hazardous for purposes [of subtitle C of RCRA].” Military Toxics Project v. EPA, 146 F.3d 948, 951 (D.C. Cir. 1998) (providing “intended use” defense against enforcement of RCRA by EPA). “Solid waste is by statute defined broadly as any discarded material; by regulation, however, solid waste for the purposes of Subtitle C includes only discarded material that has been abandoned in certain ways. . . .” Id. at 951. This analysis is illustrative of the complexity of the statutory interpretation at issue.

39. API II, 216 F.3d at 54 (citing 42 U.S.C.§ 6903(27)). RCRA provides for a "cradle to grave" regulatory structure for the "treatment, storage and disposal of solid and hazardous wastes." Connecticut Coastal, 989 F.2d at 1313. But see Gaba, Solid waste and Recycled Materials under RCRA: Separating Chaff from Wheat, 16 Ecology L.Q. 623, 651 (1989) (calling RCRA "deathbed to grave" statute because of difficulty in ascertaining when material is dead for purposes of RCRA). The analysis begins with a determination that a substance is a solid waste because under RCRA, hazardous wastes are a "subset" of solid wastes. Id. As a result, in order for a waste to be classified as hazardous, it must first qualify as a solid waste for the purposes of RCRA. See id. (citing United Techs. Corp. v. EPA, 821 F.2d 714, 716 n.1 (D.C. Cir. 1987)).
any material "which is abandoned, recycled, or considered inherently waste-like."40

b. Petrochemical recovered oil

Concerned that a broad exclusion for petrochemical recovered oil under the ambit of RCRA would encourage "sham recycling," EPA enacted a regulation that excluded petrochemical oil from the definition of solid waste only if certain conditions are met.41 "Sham recycling" is the prohibited disposal of waste through "adulteration."42 For these situations, EPA crafted a rule that excluded from its solid waste definition "petrochemical recovered oil . . . to be inserted into the petroleum refining process . . . along with normal refinery process streams, provided [that] [t]he oil is hazardous only because it exhibits the characteristic of ignitability. . . ."43 Petrochemical recovered oil that is inherently hazardous, due to the presence of other hazardous materials in its composition, is not excluded from the definition of solid waste.44 Furthermore, as a tenet of EPA's goal of curbing "sham recycling," petrochemical oil that is "speculatively accumulated before being recycled into the petro-

40. API II, 216 F.3d at 58. A further refining of solid waste yields the definition of hazardous waste under RCRA: "Hazardous waste is . . . solid waste that: (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness; or (B) pose substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." Final Brief for Respondent at 4, American Petroleum Inst. v. United States EPA, No. 94-1683 (D.C. Cir. filed Feb. 25, 2000).

41. See API II, 216 F.3d at 58. In other words, these "conditions" prevent the exclusion of oil that contains "non-refinable hazardous materials." Id; see also, Cathy Landry, Rehearing Sought on Refinery Waste Case, PLATT'S OILGRAM NEWS, Sept.14, 2000, at 2.

42. See API II, 216 F.3d at 58; see also United States v. Marine Shale Processors, 81 F.3d 1361, 1365 (5th Cir. 1996)(examining whether shale processing company engaged in sham recycling of contaminated soil or used soil as legitimate ingredient in production of product).

43. Id. (citing Final Rule, 63 Fed. Reg. 42,185 (codified at 40 C.F.R. § 261.4(a)(18)(i))). Ignitability and benzene toxicity characteristics are normal to basic petroleum feedstocks; therefore EPA allowed materials to still be excluded if they possessed only these properties. See Fed. Reg. at 42,130/1.

44. See API II, 216 F.3d at 58-59. Industry Petitioners stated, "[i]ssues pertaining to environmental harm may be central to deciding which solid wastes warrant regulation as hazardous wastes, but they have no bearing at all on whether the material in question has been discarded." Joint Brief of Petitioners at 24, American Petroleum Inst. v. United States EPA, No. 94-1683 (D.C. Cir. filed Feb. 25, 2000). A consultation to RCRA supports Petitioners' proposition: "RCRA defines a hazardous waste as a solid waste which . . . may (B) pose a substantial present or potential hazard to human health or the environment." Id. at 24, n.84 (citing 42 U.S.C. § 6903(5)).
leum refining process" is not excluded from the definition of solid waste.45

C. Case Law Illustrations and *Chevron* Statutory Analysis

1. Multiple Interpretations of "Discarded"

The Industry Petitioners’ case revolved around the varied interpretations of the term “discarded” in the language and structure of RCRA.46 Starting in 1987, EPA’s definition of “solid waste” and “discarded” were dissected in three major cases brought before the United States Circuit Court of Appeals for the District of Columbia.47 These three cases and their progeny unfortunately failed to clarify (1) the RCRA definition of “solid waste,” and (2) when a recyclable material “becomes a solid waste under the RCRA.”48 This controversy and its ambiguity continues today.

   a. "Discarded" conforms to its plain meaning

The seminal case regarding the definition of “solid waste” is *American Mining Congress v. United States Environmental Protection Agency* (hereinafter “AMC I”).49 Interpretation of congressional in-

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45. *API II*, 216 F.3d at 59. CMA argued *API II* held EPA has no authority to regulate the petrochemical recovered oil under any circumstances because the materials at issue in the case were not discarded. See id. For a further discussion of this issue, see supra note 18 and accompanying text.

46. See *API II*, 216 F.3d at 59 (illustrating complexity of interpretations of discarded). Compare Sweeney, supra note 1, at 21 (stating “The wild goose chase through the labyrinthine maze of jurisdictional triggers and carveouts under the definition of solid waste regulations has had an impact beyond the regulated community.”), with Sierra Club v. United States Dep’t of Energy, 734 F. Supp. 946, 947-952 (D. Colo. 1990) (critiquing Department of Energy attempts to recover plutonium which ultimately was regulated by EPA).

*Sierra Club* held that neither “the hazardous waste nor the plutonium mixed with it is destined for immediate reuse and neither passes in a continuous stream or flow from one production process to another.” Id. at 950. This mixed waste was finally “stored for incineration that allows the ultimate recovery of plutonium.” Id. (citing American Mining Congress v. EPA, 824 F.2d 1177, 1190 (D.C. Cir. 1987)); see also, *API II*, 216 F.3d at 50. For a further discussion of this issue see supra note 45 and accompanying text (discussing CMA’s assertion that materials were not discarded).

47. See Sweeney, supra note 1, at 21. The Court of Appeals for the District of Columbia Circuit “has expressed its astonishment, displeasure, and sheer befuddlement at interpreting . . . solid waste . . . under RCRA regulations.” Id. at 21.

48. See id. at 28 (describing reasons why ambiguity surrounding RCRA terms continues).

49. See American Mining Cong. v. United States EPA, 824 F.2d 1177, 1186 (D.C. Cir. 1987) (drawing legal boundary between when spent materials generated from petroleum refining were discarded and thus solid wastes, and when they were recycled) (hereinafter “AMC I”); see also, Ass’n of Battery Recyclers v. EPA, 208 F.3d 1047, 1056 (D.C. Cir. 2000) (affirming AMC I by holding some mineral processing secondary materials destined for reuse as part of continuous industrial process is
tent played a significant role in the AMC I decision. This is evidenced by the D.C. Circuit’s repeated references to the legislative history and Congress’ reasoning behind the term “discarded material,” as well as “adherence to the statutory interpretation principles enunciated by the Supreme Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. (hereinafter “Chevron”).”

In AMC I, the challenge to EPA’s authority lied in the contention that in-process secondary materials are outside the boundaries of the Agency’s regulations. The materials were not solid waste subject to RCRA scrutiny because these particular materials were not discarded. The District of Columbia Circuit expressly limited EPA’s authority to regulate those materials that are “discarded,” or “disposed of, thrown away, or abandoned” — a definition which parallels the ordinary, plain-English meaning of “discarded.” Secondary materials that are “recycled and reused in an on-going manufacturing process or industrial process within the generating industry itself need not be regulated as ‘solid waste.’” As a result,

50. AMC I, 824 F.2d at 1182. The court in AMC I observed that a concrete definition of “discarded” did not exist. See id. Therefore, the court turned to a case that revealed the general framework for analyzing agency interpretations of statutes. See id. (citing Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)). Chevron embodied a two-step process: (1) “If the intent of Congress is clear, that is the end of the matter . . . [and] the court . . . must give effect to the unambiguously expressed intent of Congress”; or (2) where Congress’s intent is not elucidated, the question for the presiding court is whether the agency’s answer is based on a permissible construction of the statute . . . [and] a court may not substitute its own construction . . . for a reasonable interpretation.” Chevron, 467 U.S. at 837, 842-44 (1984) (discussing how Agency could define statutory source for purposes of Clean Air Act).

51. See AMC I, 824 F.2d at 1183. The processes referred to in AMC I are petroleum refining and extractive metallurgy operations. See Sweeney, supra note 1, at 22.

52. See AMC I, 824 F.2d at 1183. The AMC I court recognized a distinct difference between “discarding and ultimate recycling . . . and a continuous or on-going manufacturing process with one-site recycling.” Id. at 1180.

53. Id. at 1184 (advocating everyday use of term “discarded”). AMC I also discussed congressional intent as well as the plain meaning of the word “discarded.” Id. at 1185. The congressional intent that the AMC I court attempted to unravel was whether Congress meant for the open-ended definition of “discarded” to encompass readily recyclable materials through immediate reuse in an industry’s on-going production process. See id.

54. Sweeney, supra note 1, at 21 (emphasis added); see also, AMC I, 824 F.2d at 1185. Regulating these materials would directly controvert the goals of both the states and Congress by restricting alternative disposal methods of solid waste. See id. at 1186. The court in AMC I, however, has drawn criticism from commentators
AMC I ruled that these materials were not truly discarded, hence they are "not part of the waste disposal problem." 55

b. "Indisputably discarded": expansion of RCRA's regulatory reach

In 1990, the decision in American Petroleum Institute v. United States Environmental Protection Agency (hereinafter "API I") represented an expansion of the breadth of RCRA regulation. 56 At issue in API I was "the use of land treatment as a method of pre-treatment for KO61 slag [a by-product of production] generated from primary steel production prior to recycling or reuse in the smelting process." 57 This process is distinguishable from the process described in AMC I in that the KO61 slag present in API I was: (1) placed on land; (2) pre-treated in preparation of recycling; and (3) transported to a distinct reclamation facility. 58 The AMC I court held that the KO61 slag was "undisputedly discarded since placing it on the land prior to recovery operations presented a serious threat of land contamination and ... contributed to the waste disposal problem." 59 The KO61 slag was "indisputably discarded" because it "never indicated that it understood EPA's rationale for regulating recyclable materials as solid waste." Gaba supra note 39, at 651.

55. Sweeney, supra note 1, at 21. In contrast, the dissent of AMC I argued that RCRA's functional approach towards the term "disposal" suggested that RCRA was intended to be read more open-ended than the plain-meaning, narrower explanation of "discarded," espoused by the majority, and ultimately accepted by the AMC I court. See AMC I, 824 F.2d at 1196 (Mikva, J., dissenting).


57. Sweeney, supra note 1, at 23. The slag was originally generated in electric arc furnaces; it was neither reclaimed nor recycled "in an ongoing process within the generating industry itself." Id. "Slag," as used here, is the residue produced from smelting metal-laden wastes. See id. at n. 154.

58. See id at 23. The fact that the slag was land treated troubled EPA, and it held a heavy hand in the court's reasoning. See id. In the 1984 amendments to RCRA, Congress switched the focus of hazardous waste management away from land disposal and towards other treatment alternatives because "[c]ertain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk ... reliance on land disposal should be minimized or eliminated. ..." API I, 906 F.2d at 733.

59. API I, 906 F.2d at 741 (D.C. Cir. 1990). The term "expansion" referred to in the subtitle of this section of the Note is symbolic of the fact that after API I in 1990, "RCRA jurisdiction ... included all discarded materials, except those subject to reclamation in an on-going manufacturing process within the generating industry itself." Sweeney, supra note 1, at 23; cf. Connecticut Coastal, 989 F.2d at 1316 (explaining used clay targets from firing range were discarded). Connecticut Coastal presented an interesting divergence and is noted for its use of the "normal use of product" rationale. Id. at 1313. Remington, a gun club, contended that RCRA did not apply because the disposal of the clay targets on the range was "merely incidental to the use of a product." Id. However, after almost seventy years of use, as
before the metal reclamation process because the metal was left to lay on the land for a period of time.\textsuperscript{60} In contrast, the materials profiled in \textit{AMC I} were destined for beneficial use and did not contribute to the waste disposal problem because these materials were reused in a continuous process by the generating industry itself.\textsuperscript{61}

The District of Columbia Circuit also distinguished \textit{API I} from \textit{AMC I} by highlighting the fact that when the KO61 slag was delivered to the reclamation facility, it was not part of an "ongoing manufacturing or industrial process within the generating industry," but was "part of a mandatory waste treatment plan proscribed by the EPA."\textsuperscript{62} The metal slag retained its solid waste status within the confines of the reclamation facility.\textsuperscript{63} As a result, the metal slag remained within EPA's regulatory reach because it was "solid waste" considered "sludge from a waste treatment plant."\textsuperscript{64}

c. Further regulation of discarded materials based on the \textit{AMC I} ruling: land disposal units of wastewater treatment plants no longer immune from RCRA

In \textit{American Mining Congress v. United States Environmental Protection Agency} (hereinafter "\textit{AMC II}") the D.C. Circuit further refined its holding in \textit{AMC I} to include secondary materials managed in

much as 2,400 tons of lead from discharges (or five million pounds) and eleven million pounds of clay target pieces were scattered on the property around the Club and in the nearby waters of Long Island Sound. \textit{See id.} The \textit{Connecticut Coastal} court concluded that the lead shot and clay targets piled up long enough to be considered solid waste under the statutory definition. \textit{See Connecticut Coastal, 989 F.2d at 1315; see also, Catellus Dev. Corp. v. General Auto., 34 F.3d 748, 752 (9th Cir. 1994)} (aligning with Eleventh Circuit in \textit{Ilco} in holding that lead components from spent batteries are solid waste because they retained their character as waste throughout); \textit{cf. United States v. Wedzeb Enter., Inc., 844 F. Supp. 1328, 1335 (S.D. Ind. 1994)} (holding "[i]t is the worthlessness of an object that makes it refuse or garbage").\textsuperscript{60}

60. \textit{See API I, 906 F.2d at 741; see generally, Sweeney, supra note 1, at 23. Subtitle C of RCRA has established a requisite that one of two preconditions to a hazardous waste being disposed of on land must be met; "(1) the Administrator of the EPA determines, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal units . . . or (2) the waste is treated to meet standards established by EPA . . . ." \textit{API I, 906 F.2d at 729 (citing 42 U.S.C. § 6924(d), (e), (g) & (m)).}}

61. \textit{See API I, 906 F.2d at 741. The court also dismissed as "immaterial" the Industry Petitioners' notion in \textit{AMC I} that the method of waste treatment extracted something of value, and therefore, should be immune from regulation as hazardous waste. \textit{See id.} at 741, n.16.}

62. \textit{Id.} (stating KO61 slag was not part of on-going manufacturing process, distinguishing \textit{API I} from \textit{AMC I}).

63. \textit{See id.} (listing alternative reasoning for EPA regulation of slag).

64. \textit{API I, 906 F.2d at 741 (giving EPA's reasons for regulation of metal slag).}
land disposal units as "discarded." Petitioners' main contention in AMC II was that the sludges from primary smelting operations were stored in surface impoundments that evaded RCRA regulation due to the possibility of reclamation "some time in the future. . . ." In an attempt to bolster its claim, the petitioners in AMC II invoked the D.C. Circuit's decision in AMC I, in that materials destined for reuse could not be regulated by RCRA. EPA argued, however, that its jurisdiction is not innocuous because "the wastes at issue in this case, which are managed in land disposal units that are part of the wastewater treatment systems, which have become 'part of the waste disposal problem and which are not part of [an] ongoing industrial process'" supported EPA's position. Thus, AMC II subjected materials to EPA regulation due to the amount of time the waste was left on land, regardless of the materials' inherent ability to be reused someday in the industry.

As a result of these cases, one thing is clear: materials destined for "immediate reuse in another phase of the industry's ongoing production process are not RCRA solid wastes." The main controversy, still in existence today, is the ambiguous definition of "solid waste" and the attendant determination of when a solid waste is discarded. Although AMC I laid "broad strokes that illustrate the circumstances under which recycled secondary materials are by def-

65. See American Mining Cong. v. United States EPA, 907 F.2d 1179, 1186 (D.C. Cir. 1990) (hereinafter "AMC II") (holding specific time period did not prevent sludge from being discarded even though possibility of reuse).

66. Id. Smelting operations use surface impoundments "to collect, treat and dispose" of wastewater; and as an indirect side effect, they "continuously produce sludges, which precipitate from the wastewater." Id. The three wastes at issue in this case are K064, K065 and K066, which petitioners claim are not "solid waste." Id.; see also, Owen Elec. Steel Co. of S.C. v. Browner, 37 F.3d 146 (4th Cir. 1994) (concluding slag that lays dormant for six-months before reuse in another capacity is discarded).

67. AMC II, 907 F.2d at 1186; see also, United States v. Ilco, Inc., 996 F.2d 1126 (11th Cir. 1993) (declining to exempt from RCRA regulation lead parts which had been reclaimed from spent car and truck batteries for recycling purposes). In 1986, the number of vehicle batteries which become useless was approximately 70,000,000. See United States v. Ilco, Inc., 996 F.2d at 1128. The Ilco court added to the interpretation of congressional intent behind RCRA by stating that "[i]t is perfectly reasonable for EPA to assume Congress meant 'discarded once.'" Id. at 1132.

68. Sweeney, supra note 1, at 25 (stating development of regulatory system for recycling of industrial, commercial and municipal solid wastes currently among most significant issues in environmental policy arena); see also, Ilco v. EPA, 996 F.2d 1126 (11th Cir. 1993) (holding discarded automobile batteries do not lose characteristic as discarded even though reclamer has found value in its components); cf. RSR Corp. v. Avanti Dev., Inc., No. 95-1359-C-M/S, 1999 U.S. Dist. LEXIS 20424, at *12 (S.D. Ind. Jan. 20, 1999) (addressing useful product defense).
inition solid wastes,” *API I* and *AMC II* place some restrictive caveats to the broad foundation laid by *AMC I*.69

**IV. NARRATIVE ANALYSIS**

**A. Foundation Laid by *API II* Court**

The D.C. Circuit in *API II* faced the crucial determination of whether an industrial byproduct may be characterized as either “discarded” or “in-process” material, and thus may be regulated under RCRA as solid waste.70 More specifically, EPA considered whether to exclude from the revisited description of solid waste two secondary materials: (1) oil-bearing wastewaters generated by the petroleum refining industry; and (2) recovered oil produced by the petrochemical manufacturing industry.71 After setting forth the relevant statutory provisions pertaining to this issue, the *API II* court dealt with each of the byproducts in kind.72

**B. Oil-Bearing Wastewaters**

The *API II* court began by providing a comprehensive analysis of the process by which oil-bearing wastewaters were generated, called primary treatment.73 Although reusable oil is recaptured from wastewater that would otherwise be discarded, the District of Columbia Circuit presented both the Industry Petitioners’ arguments and EPA’s arguments regarding the possible regulation of the oil-bearing wastewater.74 The main disagreement between the two sides, as cited by the *API II* court was the point at which these wastewaters “become discarded for purposes of the solid waste definition.”75 The query was whether discarding of the wastewater happened “before the primary treatment process, allowing regulation of wastewater as solid waste at that point,” or at the end of the primary treatment process, when the oil from the wastewaters was already recovered for further use.76

69. Sweeney, *supra* note 1, at 25 (describing restrictive covenants placed upon reading of *AMC I*).

70. *See API II*, 216 F.3d at 50 (dealing with central issue of Note).

71. *See id.* at 54 (noting issues EPA considered for exclusion from final regulation).

72. *See id.* at 55-56 (expounding upon issues EPA considered during exclusion process).

73. *See id.* at 55 (noting process generating oil-bearing wastewaters).

74. *See API II*, 216 F.3d at 55 (granting EPA deference rule-making process).

75. *Id.* (illustrating absence of bright-line point of when byproduct is discarded).

76. *Id.* The court stated that “no one disputes that the discard . . .” of the oil-bearing wastewater “has certainly occurred” toward the later portions of treatment.
The *API II* court was guided by a number of different factors in its holding regarding the oil-bearing wastewaters.\(^77\) Chief among these factors were the three previous cases that discussed this same topic, namely *AMC I*.\(^78\) The Industry Petitioners grounded their argument in the fact that oil-bearing wastewaters were not solid waste because *AMC I* already declared that "in-process secondary materials are not discarded" and accordingly, may not regulate them.\(^79\) However, the D.C. court also elucidated its prior holding in *AMC I*, by proscribing a more narrow reading of that opinion.\(^80\) According to the D.C. Circuit, *AMC I* did not address the discard status of any of the specific materials contained in the briefs; rather, it held only that the wastewaters, taken as a whole, were part of an on-going production process and therefore immune from RCRA regulation.\(^81\)

Using the *Chevron* standard enunciated in *AMC II* to analyze whether EPA may regulate an industrial by-product as solid waste, the *API II* court initially gave EPA's decision deference.\(^82\) However, the *API II* court also recognized EPA's rule-making power did not come automatically.\(^83\) The D.C. Circuit in *API II* cited EPA's inability to "balance the costs and benefits of primary treatment," which forced the D.C. Circuit to recognize that "because the agency has failed to provide a rational explanation for its decision... the decision [was] arbitrary and capricious."\(^84\) Consequently, the *API II* court vacated that portion of EPA's decision and declined to ex-

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\(^{77}\) See *API II*, 216 F.3d at 56-57 (accepting EPA view that scant amount of oil is recovered in primary treatment).

\(^{78}\) See id. (citing chiefly three cases, namely *AMC I*, *AMC II*, and *API I*).

\(^{79}\) Id. at 56 (citing ruling of *AMC I* with authority).

\(^{80}\) See id. at 56 (distinguishing oil-bearing wastewaters from materials described in *AMC I*).

\(^{81}\) See *API II*, 216 F.3d at 50, 56 (clarifying on-going production process).

\(^{82}\) See id. (citing American Mining Cong. v. United States EPA, 907 F.2d 1179, 1186-87 (D.C. Cir. 1990)). The court in *API II* also admitted that prior cases attempting to decide when "discard" occurred have been unable to draw a clear line, although *AMC II* may have been the closest case to doing so. See id. For a more complete discussion of the circumstances and holding of *AMC II*, see supra notes 65-67 and accompanying text.

\(^{83}\) See *API II*, 216 F.3d at 57 (citing importance of agency interpretation guidelines regarding statutes provided by *Chevron*).

\(^{84}\) Id. More specifically, the court in *API* needed obvious proof, contained in the record, that "EPA engaged in reasoned decision-making to decide which characterization is appropriate. The record...[was] deficient in that regard." Id.
clude oil-bearing wastewaters from the statutory definition of solid waste; and they remanded for further proceedings.\textsuperscript{85}

C. Petrochemical Recovered Oil

EPA promulgated a regulation excluding petrochemical recovered oil from the definition of solid waste, "provided that certain conditions are met."\textsuperscript{86} The D.C. Circuit, in \textit{API II}, catalogued the concerns of EPA regarding "sham recycling," as well as how some extra materials, which could be hazardous, are added to the petrochemical recovered oil.\textsuperscript{87} If these extra materials provide no benefit to the "industrial process, EPA found this to be an act of discard under the guise of recycling."\textsuperscript{88} The Industry Petitioner, Chemical Manufacturers’ Association (hereinafter “CMA”), argued that EPA could not regulate any of the petrochemical recovered oil because these materials have not been “discarded.”\textsuperscript{89} In presenting this argument, CMA failed to attack the reasonableness of EPA’s conditions for exclusion.\textsuperscript{90} The \textit{API II} court, in turn, rejected CMA’s plain meaning argument under part one of the \textit{Chevron} analysis by holding EPA was "correct that abandoning a material is discarding even if labeled recycling."\textsuperscript{91}

Hypothetically, a refiner or manufacturer in a specific case could go to great lengths to demonstrate that additional chemicals in oil, for example, are not the product of “sham recycling” or adul-

\textsuperscript{85} See id. (noting \textit{API I} holding).

\textsuperscript{86} \textit{API II}, 216 F.3d at 58. Petrochemical recovered oil that is rendered hazardous due to the presence of other hazardous materials, such as benzene, is excluded from the definition of solid waste. See id. EPA also wanted to decrease the amount of sham recycling that occurred in the petroleum refining industry, such as when “petrochemical recovered oil is 'speculatively accumulated before being recycled into the petroleum refining process.'” \textit{Id}.

\textsuperscript{87} See id. (stating ways in which process of shaming recycling is consummated).

\textsuperscript{88} \textit{API II}, 216 F.3d at 58. EPA’s concerns about sham recycling are not baseless. See id. According to the court in \textit{API II}, EPA did not determine whether "sham recycling" actually occurred in the petrochemical manufacturing industry. See id. However, in \textit{API II} EPA mentioned some samples of petrochemical recovered oil were tested and showed contamination levels of namely “chlorinated or other halogenated materials that were unexpected . . . .” \textit{Id}.

\textsuperscript{89} See id. at 59 (stating CMA’s argument that materials have not yet been discarded).

\textsuperscript{90} See id., at 57 (stating reasonableness of EPA regulation not presented to court).

\textsuperscript{91} \textit{Id}. at 59 (citing part one of \textit{Chevron} analysis).
eration, therefore, are not discarded. The D.C. Circuit in *API II* did not consider such a scenario and dismissed CMA's claim.

V. Critical Analysis

EPA, in its capacity as a decision-making agency, is held to a high standard for analyzing statutes and implementing costly regulations. In extending a similar high bar to EPA's rationale for strict regulations of oil-bearing wastewater and petrochemical recovered oil, questions regarding their necessity have arisen. Considering the cost and burden of EPA regulations in the petroleum refining industry, such a discussion is warranted.

A. District of Columbia Circuit's Inconsistencies Highlighted by Industry Petitioners

The District of Columbia Circuit dealt with the different interpretations of when a material is discarded for the purposes of the solid waste under RCRA, as well as with maintaining congruency in its ruling as the litigation progressed, especially with regard to *AMC II*. The troubling outcome of the uncertain interpretation is far reaching, resulting in costly EPA regulation of the petroleum refining industry. A fair reading of *AMC II* revealed that wastewater treatment systems "are not part of ongoing industrial process," which is solid in its conception. Taken in the context of *API II*, however, *AMC II* is arguably outdated and inapplicable to EPA's

92. See id. (providing rebuttal to CMA's objections to samples relied upon by EPA).

93. See Telephone Interview with Ralph J. Colletti, Jr., Senior Attorney, American Petroleum Institute (Sept. 7, 2000) (notes of interview available with author). In a recent turn of events, however, the Court of Appeals for the District of Columbia Circuit is considering a rehearing on this particular matter. See id.

94. See *API II*, 216 F.3d at 54; for a corresponding discussion of *API II* in this regard, see *supra* note 7, at 8,9 (documenting reasons *AMC I* controlled issues in *API II*).

95. See *State of the Petroleum Refining Industry: Hearing Before the Senate Committee on Energy and Natural Resources*, 106th Cong. 116 (1999) (citing *Petroleum Industry Environmental Performance Sixth Annual Report* by the American Petroleum Institute (citation omitted)) (illustrating expenses incurred by petroleum refining industry companies related to compliance with RCRA regulations).

96. *American Mining Cong. v. EPA*, 907 F.2d 1179, 1186 (D.C. Cir. 1990) (hereinafter "*AMC II*"). EPA does not explain its rationale as to why mineral processing wastewater treatment systems and petroleum refinery wastewater systems were no different in the context of *API II*. See Brief for Respondent, *supra* note 7, at 8. In fact, "there was no oil recovery component to the treatment systems at issue in *AMC II*." Id.
analysis. The materials under review in AMC II were not wastewaters, but rather "mineral processing sludges held indefinitely in impoundments and which might someday be reclaimed." In contrasting oil-bearing wastewaters, which are part of an ongoing industry process, the difference in circumstances of these two cases is stark.

Another major factor that EPA addressed in its case in API II was the location of the managed materials. As articulated in AMC II, the fact that the mineral sludges were managed in surface impoundments played a crucial role in EPA’s decision to regulate the material in that case. API II and the corresponding briefs filed by the parties prior to the decision revealed that EPA asserted it was troubled by "primary wastewater treatment" in surface impoundments. Industry Petitioners distinguished EPA’s logic with AMC II by contending that primary treatment "typically occurs in tanks, not surface impoundments."

The fact that EPA refused to acknowledge that legitimate recovery of oil occurs during the primary treatment process and is not solely a pretext for compliance with the Clean Water Act is equally troubling from a reasonableness standard – a standard necessitated and required by a government agency in its regulatory capacity. Industry Petitioners state that "petroleum refineries have been recovering oil from wastewater for economic efficiency reasons since long before . . . federal environmental laws." However, EPA and

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98. Id. (holding out hope that materials may someday be reclaimed).
99. See id. (highlighting how oil-bearing wastewaters are part of continuous, ongoing oil recovery process).
101. See AMC II, 907 F.2d at 1186-89 (discussing ramifications of treating wastewaters generated by primary smelting operations).
102. See Joint Final Reply Brief of Petitioners, supra note 97, at 9 (alleging some of EPA’s concerns in API II were misdirected).
103. Id. at 9 (permitting oil-water separation to be categorized with primary treatment).
104. See API II, 216 F.3d at 58 (approximating 1,000 barrels of oil recovered per day from primary treatment). For a further discussion of the nature of the problem, see supra note 8 and accompanying text. But see Joint Final Reply Brief of Petitioners, supra note 99, at 10, n.8. For a more complete explanation of the standard a governmental agency, such as EPA, is required to follow in its decision making process, see Chevron, 467 U.S. at 837, 842-44. For a further discussion of the standard outlined here, see supra note 50 and accompanying text.
105. Joint Final Reply Brief of Petitioners, supra note 99, at 10 (stating economic reasons why refineries have been recovering wastewater).
Industry Petitioners disagree about the quantity of oil that is actually recovered from primary treatment and estimates from sides range from an insignificant amount to "considerable quantities of oil-bearing materials." Industry Petitioners distinguish API II on the fact that the recycling of mineral process wastes was in response to mandatory waste treatment requirements. However, the petroleum refining industry has recovered oil "for economic efficiency reasons" for quite some time, and therefore EPA's contention appears somewhat flawed.

B. AMC I, Given Its Factual Backdrop, Should Control This Case

API I set forth the following facts in its primary brief submitted to the court in AMC I:

A refinery is purposefully designed to recover as far as possible all materials through a complex retrieval system that collects all refinable hydrocarbons and returns them to an appropriate step in the refining process. For example, many such hydrocarbons are collected through a vast network of entrapment devices, drains and piping. Some of the hydrocarbons collected are also captured from the wastewater treatment system. Hydrocarbons captured from the wastewater system are separated from the wastewater, then returned for processing. The remaining material from the wastewater is discarded in accordance with approved regulatory procedures. Only such discarded material is 'solid waste' under the statutory definition.

When juxtaposing the holding in the AMC I case against the "factual backdrop" provided above, was that "by regulating in-process secondary materials, EPA has acted in contravention of Congress' intent." Materials derived from the primary treatment of oil-bearing wastewaters are an "in-process secondary material" and are not solid wastes. Industry Petitioners argued convincingly that

106. API II, 216 F.3d at 58 (providing debate between Industry Petitioners and EPA regarding amount of oil recovered during primary treatment).
107. See id. (contending economic reasons for recovery of wastewater underrated).
109. Id. at 29-30 (arguing EPA bound to follow law of AMC I). For a more complete discussion of the facts and circumstances surrounding AMC II, see supra notes 66-67 and accompanying text.
neither API I, nor AMC II, trumped the law of AMC I. Therefore, AMC I's law should be the prevailing authority in API II.\textsuperscript{111}

EPA countered with an interpretation of AMC I, notwithstanding Industry Petitioners' argument. AMC I, contended EPA, embraced a narrow scope of materials, namely those that are "destined for immediate reuse in another phase of the industry's ongoing production process. . . ."\textsuperscript{112} EPA further claimed that AMC II stood for the proposition that even though the material at issue was eventually put back in its original industry process for reuse, the fact that "before such time it is placed in wastewater treatment surface impoundments renders it discarded material, and hence solid waste."\textsuperscript{113} More specifically, EPA abruptly concluded that when certain steps of the petroleum refining process are finalized, the production of petroleum is stopped.\textsuperscript{114} Further, EPA contended the enormous amounts of wastewater generated by the petroleum refining process are not mentioned as a part of the petroleum production process, and therefore, this material must be classified as solid waste.\textsuperscript{115}

\textsuperscript{111} See id.; see generally, API I and AMC II (declining to change law crafted in AMC I).

\textsuperscript{112} Final Brief of Respondent at 21-22, American Petroleum Inst. v. United States EPA, No. 94-1683 (D.C. Cir. filed Feb. 25, 2000) (citing AMC II, 907 F.2d at 1186 (emphasis in original; quoting AMC I)).

\textsuperscript{113} Final Brief of Respondent, supra note 112, at 22 (citing AMC II, 907 F.2d at 1187); see also API I, 906 F.2d at 741 (stating KO61 slag has become part of waste disposal process); Owen Elec. Steel Co., 37 F.3d at 150 (ruling metal slag discarded); United States v. lleo, 996 F.2d at 1311 (11th Cir. 1993) (holding lead components from spent batteries may be regulated); Chemical Waste Mgmt. v. EPA, 976 F.2d 2, 14 (D.C. Cir. 1992) (holding hazardous substances must first be discarded before recycling process).

\textsuperscript{114} See Final Brief of Respondent, supra note 112 at 22 (describing EPA's version of production of petroleum without mention of primary treatment). The reason why the petroleum refining industry engages in the primary treatment of oil-bearing wastewaters is because CWA mandates that refineries remove oil from their wastewater, "including specific requirements regarding the amount to be removed." Id. (citing 40 C.F.R. § 419.12(a)). Further, the "certain steps of the petroleum refining process that EPA referred to were as follows: (1) the separation of crude oil into various usable fractions and (2) the subsequent recovery of the fractions through "distillation, fractionation and cracking towers as fuels, kerosene and gasoline." Id. (citing AMC I, 824 F.2d at 1181). After these steps, EPA believes that the production of petroleum is completed, which does not include primary treatment. See id. For a more complete description of the primary treatment process conducted by the petroleum refinery industry, see supra notes 6-7 and accompanying text.

\textsuperscript{115} See id. (focusing on sheer volume of wastewater).
C. "Sham Recycling" Is a Front for EPA Regulation of Petrochemical Recovered Oil

In API II, CMA confronted EPA about the Agency's decision to regulate petrochemical recovered oil, by challenging EPA's assertion that this recovered oil was solid waste.\textsuperscript{116} CMA illustrated that petrochemical recovered oil is not discarded or otherwise "disposed, abandoned, or thrown away," as held in AMC I.\textsuperscript{117} Conversely, instead of relying on the precedent, EPA maintained its jurisdiction over the petrochemical recovered oil by invoking the concept of sham recycling, which obviated the "discarded" material analysis formulated by the AMC I court.\textsuperscript{118} The goal of preventing sham recycling can be achieved only through the regulation of non-discarded materials.\textsuperscript{119} AMC I held that "EPA possesses authority only over oils that are discarded before recycling."\textsuperscript{120} The bottom line argument is that petrochemical recovered oil is not discarded, therefore, EPA's jurisdiction in this arena is innocuous.

EPA attempted to build upon the shaky foundation of its sham recycling justification by contending that some petrochemical recovered oil is adulterated with listed hazardous wastes.\textsuperscript{121} Among the chemicals cited by the EPA were high levels of halogens in samples of petrochemical recovered oil.\textsuperscript{122} As with EPA's previous argument, the Industry Petitioners refuted EPA allegations with direct evidence.\textsuperscript{123} First, they asserted that no evidence exists in the record that "any petrochemical recovered oil is actually mixed with

\textsuperscript{116} See Joint Final Reply Brief of Petitioners at 3, American Petroleum Inst. v. United States EPA, No. 94-1683 (D.C. Cir. filed Feb. 25, 2000) (retorting that petrochemical recovered oil serves useful functions and should not be deemed solid waste).

\textsuperscript{117} Id. (citing American Mining Cong. v. United States EPA, 824 F.2d 1177, 1193 (D.C. Cir. 1987)) (showing how petrochemically recovered oil is not discarded).

\textsuperscript{118} See Joint Final Reply Brief of Petitioners at 3, supra note 116 (stressing ramifications of EPA's shield of sham recycling to "sidestep" AMC I results in EPA regulation of materials not discarded). More specifically, EPA claimed jurisdiction to regulate non-discarded materials in order to "prevent disposal through [adulteration]." Id.

\textsuperscript{119} See supra note 116, at 3 (stating "EPA is wrong") (emphasis in original).

\textsuperscript{120} Id. at 3-4 (emphasis in original) (attempting to establish parameters of scope of EPA regulation).

\textsuperscript{121} See id. at 5. Further, EPA claimed that "sham recycling may occur if petrochemical recovered oil is adulterated with [listed] hazardous waste, or hazardous constituents" Id. (citing 62 Fed. Reg. 42,110, 42,129-30 (1998)).


\textsuperscript{123} See id., at 5-7 (stating EPA concerns over high levels of halogens are unfounded).
any listed hazardous wastes. EPA points to no such evidence because none exists." \(^{124}\) Second, some of the halogen concerns that EPA cited are inherent products in the petroleum refinery as a structure, not chemical manufacturing.\(^{125}\) Many refineries use crude oil, salt water and treated fresh water, "which may all contain chloride – a halogen. . . ." \(^{126}\) Third, of the petrochemical samples cited by EPA, some contained higher levels of halogens, while others contained much lower levels, thus revealing inconsistencies in EPA testing.\(^{127}\)

D. EPA Rulings in Regard to Oil-Bearing Wastewaters Remain Arbitrary and Capricious

Along with the sham recycling front created by EPA, Industry Petitioners point out that EPA once declared that oil-bearing wastewaters "simply have been discarded from the refining process," while at the same time the Agency "admits that considerable quantities of oil-bearing residuals may be recovered." \(^{128}\) The United States Supreme Court in Chevron clearly enunciated an analysis that must apply to agency decision making.\(^{129}\) Finally, the record in API II is void of a "rational or reasonable basis" for regulating in-process oil-bearing wastewaters.\(^{130}\) Industry Petitioners characterize EPA's behavior as "irrational, self-serving *ipse dixit* [sic] . . . the essence of arbitrary and capricious decision making." \(^{131}\)

VI. IMPACT

The possible implications of this decision are monumental. The District of Columbia Circuit was correct in vacating the oil-

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124. Id. (citing EPA's lack of evidence).
125. See id. (describing how halogens are inherent in petroleum refinery itself). Those materials mentioned in the text that are utilized by the petroleum refineries, namely crude oil, salt water, and treated fresh water may contain chloride in "the form of dissolved sodium chloride (table salt)." Id. at 6.
127. See id. (cataloging EPA inconsistencies in administration of tests regarding levels of halogens).
129. See *Chevron*, 467 U.S. 837 (laying out two step process for analyzing agency interpretations of statutes).
131. Id. (characterizing EPA's regulation of wastewater).
bearing wastewater portion of the API II opinion.\textsuperscript{132} Under Chevron, EPA failed to provide a reasonable explanation for its regulation of oil-bearing wastewater under RCRA that Chevron requires.\textsuperscript{133} This case represents an exposure of unwarranted EPA regulation on the petroleum refining industry. It is not appropriate to continue saddling the petroleum refining industry with unexplainable regulations — the cost of which literally drives refineries out of business.\textsuperscript{134}

The impact of strict regulation of oil-bearing wastewaters by EPA, without a rational explanation, is broad in scope. It is projected that the domestic production of oil will decline 1.1 percent per year, totalling from 6.5 million barrels per day to 5.0 million barrels per day in 2020.\textsuperscript{135} In fact, dependence on oil imports may one day reach as high as sixty-five percent in 2020.\textsuperscript{136} This figure approximately doubles the percentage of oil imported during the energy crisis of the 1970s.\textsuperscript{137} In the past 15 years, there has been no new U.S. refineries built.\textsuperscript{138} In addition, under this current regulatory climate, that trend will continue.\textsuperscript{139} Furthermore, our coun-

\textsuperscript{132} See API II, 261 F.3d at 58. For a further discussion of the necessary explanations of Agency actions, see supra note 17 and accompanying text (providing rationale of court's remand in oil-bearing wastewater portion of opinion).

\textsuperscript{133} For a discussion of the general framework for analyzing agency interpretations of statutes see supra note 50 and accompanying text.

\textsuperscript{134} See Issues Affecting the Refining Sector of the Petroleum Industry: Hearing Before the Senate Comm. on Energy and Natural Res., 102d Cong. 127(1999)(statements of J.C. Klasing, General Manager, Environmental Affairs and Safety, AMOCO Oil Company)(providing alarming impact statement of increased environmental regulation on petroleum refining industry). This report cites costly compliance with environmental regulation standards as a catalyst for petroleum refinery closures, especially smaller refineries. See id. In fact, the amount of refineries in the United States decreased from 319 to 194 facilities between 1980 and 1990. See id. Additionally, operational capacities of U.S. refineries decreased from 18.0 million barrels to 15.6 million barrels a day between 1980 and 1990. See id.


\textsuperscript{136} See id. (stating possible impact of strict regulation of oil-bearing wastewaters by EPA)

\textsuperscript{137} See id. (contrasting data from energy depleted era of 1970s).

\textsuperscript{138} See Issues Affecting the Refining Sector of the Petroleum Industry: Hearing Before the Senate Comm. on Energy and Natural Res., supra note 134, at 127 (suggesting U.S. refineries and jobs are being transported overseas due to harsh EPA regulatory requirements).

\textsuperscript{139} See id. (stating building of new refineries will remain at standstill due to harsh regulations).
try’s dependence on foreign oil “has a negative impact on our nation’s foreign policy.”

A more focal impact on the petroleum refining industry is EPA extending its jurisdiction into the petroleum production process itself. Many businesses produce unregulated residuals as a by-product of production, and the Industry Petitioners in API II are attempting to draw the line with EPA. The Agency has yet to produce a rational explanation of its regulation of oil-bearing wastewaters.

Perhaps equally important is the initial petition filed by CMA in API II regarding the regulation of petrochemical recovered oil by EPA. The District of Columbia Circuit initially dismissed CMA’s claim in API II; yet, as of September 2000, the same court is considering a rehearing on the matter. Some commentators believe that due to the substantial burden on refineries to comply with EPA regulations, courts are taking rehearing requests more seriously. Industry Petitioners are still projecting future budgets that include astronomical compliance costs associated with EPA regulations. The D.C. Circuit has provided a glimmer of hope to Industry Petitioners by requiring EPA to justify costly regulations more effectively; as a result, a balance between capitalism and the protection of the natural environment may one day prevail.

Stuart O’Neal

140. State of the Petroleum Industry: Hearing Before the Senate Comm. on Energy and Natural Res., supra note 135, at 17 (elucidating traditional foreign policy objectives that have been adversely affected by our nation’s dependence on foreign oil such as supporting democracy and supporting open economies and free trade).
141. See Telephone Interview with Ralph J. Colleli, Jr., supra note 93 (discussing impacts of EPA regulation).
142. See id. (suggesting that regulation of oil-bearing wastewaters is not necessary).
143. See generally, API II, 261 F.3d at 50 supra note 17 and accompanying text.
144. See id. at 59 (citing importance of CMA’s petition to petrochemical refining industry).
145. Id. (stating procedural history of API II). 
146. See Telephone Interview with Ralph J. Colleli, Jr., supra note 93 (outlining concerns of petroleum refining industry in context of strict EPA regulations under RCRA).
147. See id. (suggesting burden on refineries to comply with EPA regulations has had impact on courts).
149. See id. (projecting impact EPA regulations will have in future).
150. See generally, API II, 261 F.3d at 50. For a further discussion of API II see supra note 17 and accompanying text.