ORAL ARGUMENT NOT YET SCHEDULED

No. 14-1046 (and consolidated case)

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

CARBON SEQUESTRATION COUNCIL, *et al.*,

Petitioners,

v.

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

Respondents.

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

REPLY BRIEF OF PETITIONERS CARBON SEQUESTRATION COUNCIL, SOUTHERN COMPANY SERVICES, INC., AND AMERICAN PETROLEUM INSTITUTE

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December 18, 2014
(Initial Brief)

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GLOSSARY

As used herein,

API means petitioner American Petroleum Institute;

CO_2 means carbon dioxide;

Council or **the Council** means petitioner Carbon Sequestration Council;

EPA means respondent Environmental Protection Agency;

EPA Br. means the Brief for Respondents;

JA means the Joint Appendix;

Occidental means Occidental Petroleum Corporation (a member of petitioner American Petroleum Institute);

Petitioners Br. means the Opening Brief of Petitioners Carbon Sequestration Council, Southern Company Services, Inc., and American Petroleum Institute;

RCRA means the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (2012); and

Southern means petitioner Southern Company Services, Inc. (a member of petitioner Carbon Sequestration Council).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are in the Addenda.

SUMMARY OF ARGUMENT

Petitioners have standing because the determination that carbon dioxide streams are "solid wastes" – which EPA made in the present rulemaking – imposes regulatory burdens and liabilities upon petitioners that will not exist if the Court vacates EPA's determination. Also, EPA's determination constrains petitioners' business decisions respecting the handling of carbon dioxide streams.

EPA's challenge to petitioners' standing is based upon two serious misapprehensions of the law. First, EPA incorrectly assumes that the injury to petitioners must be of great magnitude. Second, EPA inappropriately asks the Court – in assessing standing – to *assume* that EPA will prevail on the merits of the case.

In the final rule, EPA erroneously assumed that it had no discretion to exclude carbon dioxide streams from the definition of "solid waste," based upon their physical form. Thus, EPA considered the matter to be governed by *Chevron* Step 1. In its brief, EPA abandons that position, and seeks deference under *Chevron* Step 2. Under these circumstances, the Court must vacate EPA's determination. The Court may not uphold the Agency on a basis other than the one the Agency provided in the administrative record.

Even if it could be said that EPA found the statute ambiguous during the rulemaking, EPA would not be entitled to deference because EPA did not consider the issue in a "detailed and reasoned fashion," as required under *Chevron* Step 2. Moreover, the *post-hoc* rationalizations in EPA's brief cannot substitute for deliberations by EPA itself before final action.

In any event, EPA's interpretation conflicts with the clear intent of Congress. Whether carbon dioxide streams are considered uncontained gaseous materials or supercritical fluids (or both), their physical form is not among those enumerated in the RCRA definition of "solid waste."

EPA's reliance upon the word "including" in the definition is misplaced. This Court and others have refused to treat "including" as suggesting illustration where the context indicates Congress used the term as restrictive or definitional. Here, the context and the legislative history establish that Congress used the word "including" in a restrictive sense, because Congress was enlarging the term "solid waste" to cover materials that would otherwise not be considered "solid."

Moreover, notwithstanding EPA's denials, EPA's position on physical form conflicts with EPA's established interpretation respecting gases. Under EPA's precedent, only containerized gases or gases that are condensed to liquid form can be "solid wastes" – all other gases are excluded. Carbon dioxide streams

undeniably start out as gases. The question, then, is whether carbon dioxide streams are *containerized* or *condensed* to liquid form.

The answer is "no." Carbon dioxide streams are *non-containerized* gases that are *compressed* to a supercritical state,[1] and thus are among the "all other gases" that EPA has heretofore said are excluded from the definition of "solid waste." Because EPA has not provided a reasoned explanation for its departure from precedent, EPA's position is unreasonable under *Chevron* Step 2, as well as arbitrary and capricious.

Additionally, EPA's conclusion that carbon dioxide that is captured and stored in Class VI wells for future productive use is "discarded" conflicts with the ordinary meaning of "discarded." EPA's insistence in its brief that sequestration in a Class VI well is necessarily "abandonment" is as arbitrary as EPA's position in the record. This Court has held that establishing abandonment requires an inquiry into facts and circumstances – but EPA's position forecloses any such inquiry.

This case differs considerably from *American Mining Congress v. EPA*, 907 F.2d 1179 (D.C. Cir. 1990) ("*AMC II*"). EPA entirely misses the point that unlike the sludges in *AMC II* that were derived from wastewaters that had *already been discarded*, carbon dioxide saved from emission and stored for future use has *not yet been discarded*. Also, although EPA now says the admitted *protectiveness* of

[1] Supercritical carbon dioxide is also known as "dense phase gas." Petitioners Br. 2 n.1.

Class VI wells is irrelevant, EPA itself found in *AMC II* that the threat to human health and the environment from the impoundments there was a factor in finding the sludges had been "discarded."

In sum, EPA's position on "discard" conflicts with the intent of Congress, because it is at odds with the term's ordinary meaning. Alternatively, EPA's position is arbitrary and capricious and not entitled to *Chevron* Step 2 deference, because it does not reflect the requisite "detailed and reasoned" consideration.

ARGUMENT

I. Petitioners Have Standing.

A. EPA's Determination That Carbon Dioxide Streams Are "Solid Wastes" Imposes Requirements And Liabilities Upon Petitioners That Will Not Exist If The Court Vacates EPA's Determination.

Petitioners' case for standing is straightforward. EPA's determination that carbon dioxide streams are "solid wastes" imposes regulatory obligations and liabilities upon petitioners or their members – none of which will exist if the Court vacates EPA's determination. As explained below, EPA's challenge to petitioners' standing suffers from two serious flaws. First, contrary to well-established law, EPA assumes that the requisite injury (such as the imposition of a regulatory obligation) must be of great magnitude. Second, also contrary to well-established law, EPA asks the Court – in assessing petitioners' standing – to assume that EPA will prevail on the merits.

Petitioners challenge EPA's determination in the final rule that carbon dioxide streams "sequestered for purposes of [geologic sequestration] are . . . RCRA statutory solid wastes." 79 Fed. Reg. 350, 355 (2014) [JA __]. Petitioners Br. 13. That determination triggered the applicability of a pre-existing RCRA regulation, entitled "Hazardous waste determination." 40 C.F.R. § 262.11. That regulation provides that "[a] person who generates a solid waste . . . must determine if that waste is a hazardous waste."

Thus, as a direct result of EPA's determination, generators of carbon dioxide streams, such as petitioner Southern Company Services, Inc. ("Southern"), are injured by the imposition of a regulatory burden. If the Court vacates EPA's determination, the burden will no longer exist. Accordingly, the three elements of Article III standing are established: injury, traceability, and redressability.

EPA argues that the conditional exclusion allows generators to avoid actually testing their streams (EPA Br. 27), but that is not true for generators like Southern who send streams to wells that are not Class VI wells. See Esposito Declaration ¶ 8 (stream sent to Class V well). Moreover, generators who do not test still must determine whether their streams meet the terms of the exclusion, *see* 40 C.F.R. § 262.11(a), and sign a sworn certification of compliance with the conditions of the exclusion, 79 Fed. Reg. 364 [JA __] (codified at 40 C.F.R. § 261.4(h)(4)(i)).

EPA argues that these alternative requirements cannot constitute injury because they are purportedly "minimal." EPA Br. 18. But the Supreme Court has rejected the argument that standing should be limited to those who have been " 'significantly' affected by agency action":

> We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, see Baker v Carr, 369 US 186 . . . ; a five-dollar fine and costs, see McGowan v Maryland, 366 US 420 . . . ; and a $1.50 poll tax, Harper v Virginia Bd. of Elections, 383 US 663 . . . .

United States v. SCRAP, 412 U.S. 669, 689 n.14 (1973).

This Court has faithfully followed the principle of *SCRAP*:

> [T]he "distinct and palpable injury" a party must suffer in order to be deemed to have constitutional standing, *Warth v. Seldin*, 442 U.S. at 501 . . . "need not be tangible or great: an 'identifiable trifle' will do."

Chemical Mfrs. Ass'n v. EPA, 859 F.2d 977, 982 (D.C. Cir. 1988) (citation omitted). *See also Chevron Natural Gas v. FERC*, 199 F. App'x 2, 4 (D.C. Cir. 2006).

Here, the conditions of the conditional exclusion constitute much more than a trifle. The generator must "certify under penalty of law;" maintain the statement on-site for three years; renew the statement every year the generator claims the exclusion; make the statement available within 72 hours of EPA's request; and publish the statement on any publicly available website the generator maintains. 79 Fed. Reg. 364 [JA __] (codified at 40 C.F.R. §§ 261.4(h)(4)(i) and (iii)).

Failure to comply with any of these requirements subjects the generator to liability for substantial administrative, civil and criminal penalties. 42 U.S.C. §§ 6928(a)(3), (d), and (g) (2012).

EPA points out that certain substantive regulatory requirements with which generators must comply (and certify compliance) already exist under the Safe Drinking Water Act and the federal transportation laws. EPA Br. 18. *See* 79 Fed. Reg. 364 [JA __] (codified at 40 C.F.R. §§ 261.4(h)(1)-(4)). But if EPA had not declared carbon dioxide streams to be "solid wastes," the certification requirement would not exist.

Moreover, because compliance with existing requirements under other statutes is a condition of the exclusion, failure to comply with those requirements could trigger additional RCRA and false statement liability. 42 U.S.C. §§ 6928(a)(3), (d) and (g); 18 U.S.C. § 1001 (2012). These liabilities would not exist if EPA had not declared carbon dioxide streams to be "solid wastes."

Also, even if the final rule provides that generators need only *certify* compliance as to activities under their control (EPA Br. 18), generators retain liability for violations of the exclusion's substantive conditions, whether under their control or not:

> [A] violation of a condition at any point in the management of a CO_2 stream (that is otherwise hazardous) would result in that CO_2 stream being subject to all applicable subtitle C regulatory requirements *from the point of generation.*

79 Fed. Reg. 357 [JA __] (emphasis added).

Thus, a generator who relies on the exclusion can be liable for the unlawful management of a hazardous waste, if any party downstream fails to comply with any condition of the exclusion. For this reason, generators are pressured to test their streams – even when sent to Class VI wells – to be able to prove those streams are not "otherwise hazardous." *See* Petitioners Br. 45-46. However, as EPA acknowledged in the rulemaking, generators have no way under the RCRA regulations to determine whether carbon dioxide streams are hazardous. *See id.* at 44-45 (citing Response To Comments 43 [JA __]). This is a conundrum generators like Southern could avoid if EPA had not declared carbon dioxide streams to be "solid wastes."

Astonishingly, EPA argues that the rule does not injure petitioners because they were already required to determine if their carbon dioxide streams are hazardous. EPA Br. 26-27. In other words, EPA assumes that carbon dioxide streams are "solid wastes" (the very assumption petitioners challenge). In so arguing, EPA tramples on the time-honored principle that in assessing standing, a court should assume that the petitioners will succeed on the merits of their claims:

> [The government's] argument assumes that its view on the merits of the case will prevail. But "in reviewing the standing question, the court must . . . assume that on the merits the plaintiffs would be successful in their claims."

Defenders of Wildlife v. Gutierrez, 532 F.3d 913, 924 (D.C. Cir. 2008) (citations omitted). *See also Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012) (same); *Southern Cal. Edison Co. v. FERC*, 502 F.3d 176, 180 (D.C. Cir. 2007) (same).

Although EPA's argument assumes that carbon dioxide streams are "solid wastes," EPA's brief concedes – as it must – that EPA made the "solid waste" determination *during* the present rulemaking. EPA Br. 4, 14. In the earlier Class VI rule under the Safe Drinking Water Act, EPA deferred "the issue of RCRA applicability to CO_2 streams" to the present rulemaking. 75 Fed. Reg. 77230, 77260 (2010) [JA __, __]. Indeed, in the Class VI rule, EPA deferred RCRA applicability issues 111 times[2] in responding to a broad range of comments asking EPA *inter alia* to conclude that carbon dioxide streams are not "solid waste,"[3] "discarded,"[4] "susceptible to normal RCRA testing protocols"[5] or "subject to any

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[2] *E.g.*, EPA's Responses to Public Comments on the Proposed Geologic Sequestration Rule: 1.3 Responses to Public Comments on Risk Associated with GS (EPA-HQ-OW-2008-0390-0580) at 101 ("To the extent the commenter is seeking interpretations of RCRA . . . such interpretations are beyond the scope of this rulemaking."); 185 ("EPA disagrees that the Class VI requirements themselves, necessarily have any implications for whether a particular material is a RCRA 'solid waste' . . . ."). This document is Exhibit A to Petitioners' Motion To Supplement The Record.

[3] *Id.* at 72 (Council); 104 (Texas Railroad Commission), 125 (Lignite Energy Council); 131-32 (American Public Power Association); 143 (Edison Electric Institute); 184 (NRG Energy).

[4] *Id.* at 100, 136 (Utility Solid Waste Activity Group); 131 (American Public Power Association).

RCRA waste determination requirements."[6] Thus, the purported status of carbon dioxide streams as "solid wastes" cannot be said to be the *status quo ante* the challenged rule.

In any event, this Court has made clear that the focus of the standing inquiry is not the *status quo ante*, but the action that petitioners maintain the Agency should have taken (*i.e.* – in the present case – determining that carbon dioxide streams are *not* "solid wastes"):

> The proper comparison for determining causation is not between what the agency did and the status quo before the agency acted. Rather, the proper comparison is between what the agency did and *what the plaintiffs allege the agency should have done under the statute*.

Animal Legal Defense Fund v. Glickman, 154 F.3d 426, 441 (D.C. Cir. 1998) (emphasis added), *cert. denied*, 526 U.S. 1064 (1999).

EPA also argues that there is no injury because reliance upon the conditional exclusion is "voluntary – no facility is required to [use] the Conditional Exclusion and, instead, can elect to manage its carbon dioxide streams in accordance with applicable RCRA subtitle C requirements." EPA Br. 33. But petitioners do not claim to be injured by the conditional exclusion. Instead, they are injured by EPA's underlying determination that carbon dioxide streams are "solid wastes." If

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[5] *Id.* at 72 (Council).

[6] *Id.* at 155 (Council).

the Court vacates that determination, petitioners will not have to comply with *any* RCRA requirements, since "solid waste" is the lynchpin of RCRA jurisdiction.[7]

B. EPA's Determination That Carbon Dioxide Streams Are "Solid Wastes" Shapes The Competitive Environment And Constrains Petitioners' Business Decisions Respecting Carbon Dioxide Streams.

The regulatory obligations and liabilities discussed above amply establish petitioners' standing. But there is more. As petitioners showed in their opening brief, there may be circumstances where reliance on the alternative of the conditional exclusion is impossible. Petitioners Br. 17; Esposito Declaration ¶ 19. Specifically, Southern may decide to contract for geologic sequestration of some of the carbon dioxide from the Kemper County facility that is to be transported through a commingled pipeline system (*i.e.*, a system transporting carbon dioxide, some of which goes to enhanced oil recovery operations, some of which goes to Class VI wells for sequestration, and some of which goes elsewhere). Esposito Declaration ¶¶ 13, 14, 19.

In that circumstance, Southern will have no way of knowing whether its carbon dioxide stream is actually sequestered in a Class VI well, so will be unable to certify that the stream was actually sequestered in a Class VI well (and therefore, unable to rely on the conditional exclusion – as EPA has acknowledged).

[7] Nonetheless, injection of carbon dioxide streams remains comprehensively regulated under the Safe Drinking Water Act's underground injection control program.

Yet EPA has provided Southern no way to test its streams to establish that they are not hazardous.

EPA argues that this scenario is too speculative, because Southern has not said it has actually made the decision to send some of the Kemper carbon dioxide stream to a Class VI well. EPA Br. 31. But there is no question that Southern is a generator of carbon dioxide streams or that Southern has already begun to sequester such streams from other facilities. *See* Esposito Declaration ¶¶ 7-10. That Southern may send some of Kemper's carbon dioxide stream to geologic sequestration through a Class VI well is hardly an unreasonable scenario. Indeed, a pipeline has already delivered carbon dioxide for both enhanced recovery and geologic sequestration. EPA, Carbon Dioxide Pipelines in the United States 7, Docket No. EPA-HQ-RCRA-2010-0695-0101 (Jackson Dome pipeline also used to deliver carbon dioxide to Cranfield project) [JA __].

EPA's determination that carbon dioxide streams being sequestered are "solid wastes" will constrain Southern's business decisions regarding the disposition of carbon dioxide streams from Kemper. EPA's determination thus shapes the competitive environment of carbon capture and sequestration. *Vacatur* of EPA's determination would enable Southern to make its decisions free of the prospect of regulation under RCRA. These circumstances establish standing. *See Sabre, Inc. v. DOT*, 429 F.3d 1113, 1118-19 (D.C. Cir. 2005) (standing established

where "[i]t is reasonably certain that [petitioner's] business decisions will be affected.").

EPA also argues that the shared pipeline scenario was "outside the scope of this rulemaking" and that "Southern cannot credibly claim to be injured by EPA's rulemaking just because it may choose to structure its operations outside the specific situations EPA addressed." EPA Br. 31, 32. That makes no sense at all. The fact that EPA chose not to deal with this particular effect of its determination does not mean petitioners are any less injured. Again, EPA's determination imposes constraints on petitioners' business choices. Those constraints will not exist if the Court vacates EPA's determination.

Similarly, it is reasonably certain that EPA's determination will affect the business decisions of Occidental respecting the extent of its use in enhanced oil recovery operations of carbon dioxide captured from emission sources. Hardin Declaration ¶¶ 8-9. If the Court vacates EPA's determination, Occidental's decisions can be made free of potential RCRA regulation and liability. Petitioners Br. 18; Hardin Declaration ¶ 9. Under *Sabre*, this is sufficient to establish standing. Petitioners Br. 18.

EPA's brief does not deal with the principle of *Sabre*. Instead, EPA argues that Occidental's injury is speculative and not traceable to the conditional exclusion, because the conditional exclusion "is not intended to affect the injection

of carbon dioxide" into Class II wells used for enhanced oil recovery. EPA Br. 34, 38.

It is true that the conditional exclusion itself applies only to injection in Class VI wells. But EPA's "solid waste" determination is not necessarily so limited. In the final rule preamble, EPA concluded that "CO_2 streams sequestered for purposes of [geologic sequestration] are 'other discarded material' from industrial and commercial operations and . . . are therefore, RCRA statutory solid wastes." 79 Fed. Reg. 355 [JA __]. This statement was not qualified by the type of well through which carbon dioxide streams may become sequestered.

EPA has expressly stated that it expects carbon sequestration to occur in Class II wells such as those operated by Occidental. In the preamble to the final rule on Class VI wells, EPA said:

> Future deployment of [carbon capture and storage] may fundamentally alter [CO_2-enhanced oil recovery] in the U.S. DOE anticipates that many early [geologic sequestration] projects will be sited in depleted or active oil and gas reservoirs because the reservoirs have been previously characterized for hydrocarbon recovery and may have suitable infrastructure (*e.g.*, wells, pipelines, etc.) in place.

75 Fed. Reg. 77244 [JA __]. And a few days after promulgating the present rule, EPA said that "EPA anticipates opportunities to utilize [carbon dioxide-enhanced oil recovery] operations for geologic storage will continue to increase." 79 Fed. Reg. 1430, 1474 (2014) [JA __, __].

There is little comfort to be found in EPA's heavily qualified statement that

> [S]hould CO_2 be used for its intended purpose as it is injected into [enhanced oil recovery], it is EPA's expectation that such an *injection process* would not *generally* be a waste management activity.

79 Fed. Reg. 355 (emphasis added) [JA __]. *See* EPA Br. 34 (relying on this statement). This statement does not definitively address the status of carbon dioxide streams (*i.e.*, carbon dioxide captured from an emission source) that become *sequestered* through injection into a Class II enhanced oil recovery well.

For these reasons, it is reasonable to expect that EPA's position will influence and constrain the business decisions of Occidental (and any similarly situated companies) respecting the use of captured carbon dioxide streams in enhanced oil recovery. *See* Hardin Declaration ¶ 9. *Vacatur* of EPA's "solid waste" determination will allow Occidental to make its decisions free of potential regulation and liability under RCRA. In the meantime, Occidental's Class II wells remain subject to comprehensive regulation under the Safe Drinking Water Act's underground injection control program.

II. EPA Erroneously Concluded That Its Position On Physical Form Was Compelled, And *Post-Hoc* Rationalizations Cannot Undo That Fatal Error.

A. EPA's Abandonment Of Its Assumption That The Issue Is Governed By *Chevron* Step 1 Requires *Vacatur*.

Petitioners showed in their opening brief that EPA believed its hands were tied as to the question of whether carbon dioxide streams being sequestered in the form of supercritical fluids are "solid wastes." Petitioners Br. 12-13, 33-34. In

other words, EPA thought it had no discretion to promulgate an exclusion from the definition of "solid waste" for such streams because the statute was clear. Indeed, EPA stated in response to the Council's recommendation that such streams be excluded from the definition of "solid waste" that "[a] solid waste regulatory exclusion would need to be based upon a finding that CO_2 streams sent to a UIC Class VI well for purposes of [geologic sequestration] are not being discarded." Response To Comments 27 [JA __]. The necessary inference was that EPA believed the matter was governed by *Chevron* Step 1. *See Peter Pan Bus Lines, Inc. v. FMCSA*, 471 F.3d 1350, 1353 (D.C. Cir. 2006) (inferring from the text of the agency's decision that the agency relied upon *Chevron* Step 1).

Contrary to what it said in the rulemaking, EPA now argues on brief that "*Chevron* step one does not guide the analysis," EPA Br. 50, and EPA seeks "deference" to its determination, *id.* at 58 n.9. However, the Court may uphold the Agency's determination, if at all, solely upon the basis the Agency gave in the administrative record. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *PDK Laboratories Inc. v. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004).

Now that EPA has abandoned the position it took in the record, the Court must vacate EPA's determination. As in *Peter Pan Bus Lines*, the request of the Agency's lawyers for *Chevron* deference cannot be honored, because "it is '[t]he expertise of the agency, not its lawyers,' that 'must be brought to bear on this issue

in the first instance.'" *Peter Pan Bus Lines*, 471 F.3d at 1354 n.3 (quoting *Public Citizen v. FMCSA*, 374 F.3d 1209, 1218 (D.C. Cir. 2004)).

In an obscure, footnote-encased attempt to deny that it had assumed that its position was compelled, EPA asserts that it considered and responded to comments on the subject. EPA Br. 58 n.9. But all of EPA's responses to comments were to the effect that the statute is clear: supercritical carbon dioxide being sequestered is "solid waste." *See* 79 Fed. Reg. 355 [JA __] ("They are, therefore, RCRA statutory solid wastes."); Response To Comments 9 [JA __] ("[I]t is a 'discarded material' within the plain meaning of the term in RCRA §1004(27)."); 189 [JA __] ("RCRA expressly applies to 'solid wastes,' which EPA has explained elsewhere includes CO_2 streams . . . The RCRA regulations apply by their terms.").

B. *Post-Hoc* Rationalizations Cannot Substitute For Deliberations At The Agency Itself.

Moreover, because EPA viewed the statute as compelling its determination, EPA never carried out its duty under *Chevron* Step 2 to consider the issue "in a detailed and reasoned fashion," *Chevron*, 467 U.S. at 865, and never "recognized legitimate competing considerations and evaluated them conscientiously," *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 152 (D.C. Cir. 1984). Instead, EPA briefly parsed the language of the statute, found that language compelled its determination, and then stopped. *See* 79 Fed. Reg. 355 [JA __].

EPA did not consider the applicability of the *expressio unius* canon or the canon forbidding surplusage. It did not consider the legislative history. It did not consider whether the existing comprehensive regulatory framework for underground injection under the Safe Drinking Water Act obviated the need for regulation under RCRA. Nor did it deal reasonably with the lack of any clear way to determine whether carbon dioxide streams are "hazardous" under RCRA – even though generators must determine whether their "solid wastes" are hazardous, or risk substantial penalties for violations.

EPA now addresses – in its brief – the *expressio unius* canon, the canon forbidding surplusage, and the legislative history. EPA Br. 54-55, 58, 59. But such *post-hoc* rationalizations of counsel cannot substitute for deliberations at the agency itself. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). And even in its brief, EPA still does not explain why any RCRA regulation is necessary (in light of the comprehensive Safe Drinking Water Act regulations) or why it is reasonable to subject generators of carbon dioxide streams to RCRA liabilities when such generators have no way to determine whether carbon dioxide streams are "hazardous." If EPA truly has discretion to consider carbon dioxide streams to be "solid wastes" – or not – then these are the very "legitimate competing

considerations" that EPA should address in exercising that discretion, *Rettig*, 744 F.2d at 152.[8]

EPA also offers other rationales in its brief for the first time. Most significantly, EPA claims that during the rulemaking EPA articulated more than one reason for determining that carbon dioxide streams fit the statutory definition of "solid waste." EPA says that *in addition to* finding that supercritical carbon dioxide streams are "discarded material," it found that such streams are "like" liquids and gases (which are enumerated in the definition). EPA Br. 54, 57, 58 & n.9.

But EPA does not reveal where in the record it articulated this additional "criterion." The final rule preamble articulates just one criterion: the purported "discarded" nature of the material:

> Like the listed "solid, liquid, semisolid, or contained gaseous material" specifically referenced, CO_2 streams sequestered for the purpose of [geologic sequestration] are "other discarded material" from industrial and commercial operations and, ***therefore***, are of a similar kind to the other types of wastes specifically referenced by the definition.

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[8] EPA asserts (at 58 n.9) that the lack of means to test carbon dioxide streams is "irrelevant," because generators may rely upon the conditional exclusion. Yet as shown above, the issue is relevant because the conditional exclusion does not apply to streams sent to other classes of wells, and does not protect generators from liability for RCRA violations caused by parties downstream. The issue is particularly relevant, if – as EPA now claims – EPA has *discretion* to determine whether carbon dioxide streams are "solid wastes." EPA's failure to deal with this problem in the rule was unreasonable under *Chevron* Step 2, and arbitrary and capricious.

79 Fed. Reg. 355 [JA __] (emphasis added). *See* Response To Comments 26 [JA __] (same language).

Moreover, EPA said in the record that "the RCRA definition of solid waste encompasses 'other discarded material' and *does not speak to materials such as supercritical fluids*." *Id.* (emphasis added). If EPA was finding that supercritical fluids are "like" liquids and gases somehow other than being "discarded materials," it made no sense to say that the definition does not speak to materials "such as" supercritical fluids. Like EPA's other *post-hoc* rationalizations, EPA's purported second "criterion" cannot be relied upon to save EPA's determination.

C. EPA's Position Conflicts With Clear Congressional Intent.

As demonstrated above, the Court must vacate EPA's determination, based on the divergence of the reasoning in EPA's brief from EPA's reasoning in the record. Yet EPA's determination was in excess of EPA's statutory authority, anyway. Petitioners Br. 22-32.

Whether carbon dioxide streams are considered uncontained gaseous materials or supercritical fluids (or both), their physical form is not among those enumerated in the statutory definition of "solid waste": "solid, liquid, semisolid, or contained gaseous material." 42 U.S.C. § 6903(27) (2012). Accordingly, they cannot be "solid wastes." EPA's arguments to the contrary are unavailing.

EPA relies heavily upon the fact that the word "including" precedes the list of forms in the definition, arguing that "including" (or "includes") has been held in some contexts to indicate that a list of things is illustrative, and not exclusive. EPA Br. 50-53. But this Court and others have refused to treat the term as illustrative, where the context indicated Congress used the term as *limiting*. *Dong v. Smithsonian Inst.*, 125 F.3d 877, 880 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 922 (1998); *Adams v. Dole*, 927 F.2d 771, 777 (4th Cir.) ("[T]he term 'including' can also introduce restrictive or definitional terms"), *cert. denied*, 502 U.S. 837 (1991); *Cashman v. Dolce Intern./Hartford, Inc.*, 225 F.R.D. 73, 84 (D. Conn. 2004) ("The term can also be used and construed as restrictive and definitional.").

Here, the context indicates that Congress used the term "including" in a limiting fashion. Petitioners Br. 27-28. This is especially so, considering that where this Court has read "including" to indicate illustration, it has said that "both the enumerated subjects . . . and anything falling within the *ordinary meaning*" of the term at issue are encompassed. *Association of Private Sector Colleges and Univ. v. Duncan*, 681 F.3d 427, 451 (D.C. Cir. 2012) (emphasis added). Here, *no* gases or fluids would fall within the ordinary meaning of the term being defined: "solid waste." Moreover, the ordinary meaning of the term "discarded material" has nothing to do with physical form. So the forms listed do not logically serve as examples of "discarded materials."

EPA says the question is "what other forms would be considered discarded?" EPA Br. 54. The proper question would be, "what forms could *not* be considered discarded?" The physical form of a material has no bearing on whether a material is discarded. If Congress intended to cover all discarded materials, without regard to form, it could have defined "solid waste" as "any discarded material." Thus, reading the list of forms as merely illustrative would run afoul of the presumption against surplusage. Petitioners Br. 26.

The more natural reading is that Congress used the word "including" as restrictive, because it was enlarging the term "solid waste" to cover materials that would not otherwise be considered "solid." An illustration from *Adams v. Dole* is apt:

> [W]hen we say that several colors, "including red, blue and yellow" are in the rainbow, we are giving only examples, and we do not mean that the rainbow does not include other colors. . . . However, the term "including" can also introduce restrictive or definitional terms. If we say that "all licensed drivers, including *applicants* for driver's licenses, shall take an eye exam," the word "including" means "and" or "in addition to." That meaning is derived from the fact that a "licensed driver," by definition, excludes an "applicant," and therefore if we intend to include applicants we must say so.

927 F.2d at 776-77.

Moreover, for the same reasons, the *expressio unius* canon fits the present context very well. Petitioners Br. 25. One federal court has already applied that canon to the definition of "solid waste," finding that uncontained gases are

excluded from the definition. *Center for Community Action and Envt'l Justice v. Union Pacific Corp.*, 42 E.L.R. 20122, 2012 U.S. Dist. LEXIS 83051 (C.D. Cal. 2012), *aff'd on other grounds*, 764 F.3d 1019 (9th Cir. 2014). And, although EPA protests that the point is misplaced (EPA Br. 55), the *expressio unius* canon was implicit in EPA's precedent on the extent to which the definition of "solid waste" covers gases. *See infra* 26.

In its brief, EPA says the *expressio unius* canon *does* apply, but conveniently *only* applies to "contained [gaseous material]": "In that term only, the maxim of *expressio unius est exclusio alterius* applies to indicate the intentional use of one form over the exclusion of another." EPA Br. 57. At the same time, EPA claims that whether a material is "discarded" is not the only relevant criterion; instead, EPA says it additionally considered whether supercritical carbon dioxide is "similar to the other listed forms." *Id.*

As shown above, this alleged second criterion does not appear in the record and cannot be relied upon to defend EPA's decision. Nonetheless – for the sake of argument – consider the implications of EPA's claim. Surely an uncontained gas, although not the same as a contained gas, is at least "similar to" or "like" a contained gas. Both are gases. If *similarity* is enough to defeat the specificity of the other words Congress used ("solid, liquid, semisolid . . . material"), then it should be enough to defeat the specificity of the term "contained gaseous

material." But even EPA concedes that the *expressio unius* canon prevents this result.

EPA says the legislative history discussed in petitioners brief (at 29-31) "fails to shed any light." EPA Br. 59. To the contrary, the legislative history both (1) confirms the more natural reading of the statutory language as specifically expanding (contrary to normal meaning) the term "solid waste," and (2) provides no hint that Congress intended for EPA to expand the term further. As the relevant Senate report explained, Congress expanded the "solid waste" definition "*specifically to include* . . . liquid, semisolid or contained gaseous materials." S. Rep. No. 988, 94th Cong., 2d Sess. 25 (1976) (emphasis added).

In sum, applying all traditional tools of statutory construction (which EPA failed to do), the term "solid waste" does not extend to uncontained gases (such as carbon dioxide streams) or to "supercritical fluids" (such as carbon dioxide streams that have been compressed to the supercritical state). Accordingly, EPA's assertion of RCRA authority over carbon dioxide streams is in excess of EPA's statutory authority, and should be vacated.

III. EPA's Current Position Inexplicably Conflicts With EPA's Precedent On Gases.

Petitioners showed in their opening brief how EPA's current position that supercritical carbon dioxide can be "solid waste" conflicts with EPA's precedent

respecting uncontained gases. Petitioners Br. 36-41. EPA has not provided a reasoned explanation for this inconsistency. *See id.* at 38, 40.

In its brief (at 57), EPA says there is no conflict "because the determination here has nothing to do with contained or uncontained gases." Instead,

> EPA determined that this unique physical form of supercritical carbon dioxide was similar to the "other discarded materials" that are listed as illustrative examples, *e.g.*, supercritical carbon dioxide is like liquid and a gas – not one or the other.

EPA Br. 57.

EPA's claim that it relied on a finding that supercritical carbon dioxide is "like" a liquid and a gas – for some reason *other* than purportedly being "discarded materials" – is a *post hoc* rationalization, as shown above. No matter. EPA's position still conflicts with its historical position as to gases.

Carbon dioxide streams certainly start out as gases. Petitioners Br. 37 (citing EPA's definition of "carbon dioxide stream"). They are transported by pipeline to the injection well. 79 Fed. Reg. 355 [JA __]. Upon injection, the carbon dioxide is in a supercritical state. It is not a liquid, and it is not in a movable vessel or container. *See id.*

Under EPA's precedent, only (1) "containerized" gases or (2) gases that are condensed to liquids can be "solid wastes," because – according to EPA – the statutory definition "excludes *all other* gases." 54 Fed. Reg. 50968, 50973 & n.5 (1989) [JA __, __] (emphasis added). *See In Re: BP Chemicals Americas Inc.*,

Lima Ohio, 3 E.A.D. 667, 670 (1991) [JA __, __]. Because the carbon dioxide is in a pipeline and not in an individual container, it is not "containerized," under EPA's established interpretation. *BP Chemicals*, 3 E.A.D. at 670 [JA __]. Also, the carbon dioxide is compressed to a supercritical state, but *is not condensed to a liquid.*

EPA's precedent expressly contemplates that a substance can start out as a gas and then be converted to something else, *e.g.*, a liquid. Accordingly, EPA's claim that supercritical carbon dioxide is neither a liquid nor a gas (just "like" both of them) begs the question. The question is whether carbon dioxide streams are either containerized or condensed to liquid form – and the answer is "no." Carbon dioxide streams are non-containerized gases that are compressed to a supercritical state, and thus are among the "all other gases" that EPA's precedent excludes from the definition of "solid waste."

Not only does EPA's current position conflict with the express terms of EPA's precedent, it also conflicts with the underlying rationale. EPA's conclusion that the statutory definition "excludes all other gases" necessarily relied upon the *expressio unius* canon (albeit implicitly). *See* Petitioners Br. 38 This is all the more clear considering that the liquid to which an "uncontained" gas might be converted and thus be a "solid waste" is among the physical forms enumerated in the definition.

In contrast, in the final rule EPA ignored the *expressio unius* canon. These unexplained conflicts carry two implications: EPA's current position is not reasonable under *Chevron* Step 2, and is arbitrary and capricious.

IV. EPA Erroneously And Arbitrarily Concluded That Carbon Dioxide That Is Captured And Stored For Future Use Is "Discarded."

Petitioners argued in their opening brief that under the law of this Circuit, the term "solid waste" only includes materials that have been "discarded" in the ordinary sense of the word: abandoned, disposed of, or thrown away. Petitioners Br. 46. Thus, carbon dioxide that is captured from emission sources (rather than being emitted to the atmosphere) and stored in Class VI wells with the intent that it may later be withdrawn for productive use (as in enhanced oil recovery) has not yet been discarded and cannot be "solid waste." *Id.* at 47-51. Moreover, in the final rule, EPA summarily dismissed this argument with an *ipse dixit*. *Id.* at 51-52.

EPA's response in its brief is as arbitrary as was EPA's response to comments. EPA says that the mere sequestration of captured carbon dioxide in a Class VI well is abandonment and this fact could not be clearer. EPA Br. 41, 42. But that is not clear at all.

Where the carbon dioxide has been saved from being emitted to the atmosphere, is securely stored underground, and the operator intends that it may be withdrawn for productive use, there is hardly the permanent "letting go" implicit in

abandonment. At a minimum, "[l]egal abandonment of property is premised on determining the intent to abandon, which requires an inquiry into facts and circumstances." *API v. EPA*, 216 F.3d 50, 57 (D.C. Cir. 2000). But EPA's position forecloses any inquiry into the facts and circumstances: EPA assumes an intent to abandon whenever carbon dioxide is sequestered in a Class VI well.

In its brief (at 42), EPA claims the reuse of sequestered carbon dioxide is "purely hypothetical," and that petitioners have not "offered any factual support." This is not so. As petitioners pointed out in their opening brief, EPA's own economic analysis posited that the Class VI sequestration facilities considered may store carbon dioxide as a staging point for future use in enhanced oil recovery. Petitioners Br. 52.

EPA relies upon *AMC II*. EPA Br. 44-46. But as petitioners showed in their opening brief (at 48-49), *AMC II* is distinguishable on two grounds: (1) the sludges at issue there were derived from wastewaters that had *already been discarded* – while carbon dioxide streams saved from emission have *not yet been discarded*; and (2) EPA had found in *AMC II* that the impoundments used for storage posed a significant threat to human health and the environment – while EPA found here that Class VI wells used for storage are fully protective of human health and the environment.

EPA's brief completely misses the first point. EPA argues that previously discarded materials can be "solid wastes" even if they may be later recycled. EPA Br. 46-48. But that evades petitioners' point that the carbon dioxide streams saved for future use have not *yet* been discarded.[9]

EPA asserts that the protectiveness of Class VI wells is irrelevant. EPA Br. 46. Yet it was EPA itself that reasoned in *AMC II* that the *lack* of protectiveness of the impoundments there was a factor in finding that the sludges were discarded. *See AMC II*, 907 F.2d at 1186. Thus, the "expert judgment" EPA exercised in *AMC II* (*id.*), is now abandoned in favor of a fiat judgment.

EPA also seeks support in the Fourth Circuit's decision in *Owen Electric Steel Co. v. Browner*, 37 F.3d 146 (4th Cir. 1994). To the extent that case suggests that byproducts must be immediately recycled to avoid becoming "solid wastes," it conflicts with the law of this Circuit. *See Association of Battery Recyclers v. EPA*, 208 F.3d 1047, 1052-53 (D.C. Cir. 2000). To the extent EPA relies upon that case in seeking *Chevron* Step 2 deference (*see* EPA Br. 49), it is not helpful. For here, EPA concluded that all carbon dioxide sequestered in Class VI wells is abandoned – without engaging in the "detailed and reasoned" consideration called for by *Chevron* Step 2. *See supra;* Petitioners Br. 51-52.

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[9] For the same reason, *United States v. ILCO, Inc.*, 996 F.2d 1126 (11th Cir. 1993) – *see* EPA Br. 47 – is off point.

EPA's position on the "discard" criterion conflicts with the intent of Congress, because it is contrary to the ordinary meaning of "discard." But even if this is not clear, EPA's position is arbitrary and not entitled to deference. In either case, the Court should vacate EPA's interpretation.

CONCLUSION

The Court should vacate EPA's assertion of RCRA authority over carbon dioxide streams.

DATED: December 18, 2014

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), because this brief contains 6998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(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 2007 in Times New Roman font size 14.

DATED: December 18, 2014 /s/Thomas Sayre Llewellyn

No. 14-1046 (and consolidated case)

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

CARBON SEQUESTRATION COUNCIL, *et al.*,

Petitioners,

v.

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

Respondents.

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

REPLY BRIEF OF PETITIONERS CARBON SEQUESTRATION COUNCIL, SOUTHERN COMPANY SERVICES, INC., AND AMERICAN PETROLEUM INSTITUTE

ADDENDUM:

PERTINENT STATUTES AND REGULATIONS

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Statutes

Regulations

1951—Act Oct. 31, 1951, ch. 655, §25, 65 Stat. 720, substituted ''Public Housing Administration'' for ''United States Housing Authority'' in item 1012.

1949—Act May 24, 1949, ch. 139, §§18, 19, 63 Stat. 92, corrected spelling in item 1012 and substituted ''officers'' for ''offices'' in item 1019.

§ 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

(June 25, 1948, ch. 645, 62 Stat. 749; Pub. L. 103–322, title XXXIII, §330016(1)(L), Sept. 13, 1994, 108 Stat. 2147; Pub. L. 104–292, §2, Oct. 11, 1996, 110 Stat. 3459; Pub. L. 108–458, title VI, §6703(a), Dec. 17, 2004, 118 Stat. 3766; Pub. L. 109–248, title I, §141(c), July 27, 2006, 120 Stat. 603.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §80 (Mar. 4, 1909, ch. 321, §35, 35 Stat. 1095; Oct. 23, 1918, ch. 194, 40 Stat. 1015; June 18, 1934, ch. 587, 48 Stat. 996; Apr. 4, 1938, ch. 69, 52 Stat. 197).

Section 80 of title 18, U.S.C., 1940 ed., was divided into two parts.

The provision relating to false claims was incorporated in section 287 of this title.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of ''principal'' in section 2 of this title.

Words ''or any corporation in which the United States of America is a stockholder'' in said section 80 were omitted as unnecessary in view of definition of ''agency'' in section 6 of this title.

In addition to minor changes of phraseology, the maximum term of imprisonment was changed from 10 to 5 years to be consistent with comparable sections. (See reviser's note under section 287 of this title.)

Amendments

2006—Subsec. (a). Pub. L. 109–248 inserted last sentence in concluding provisions.

2004—Subsec. (a). Pub. L. 108–458 substituted ''be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both'' for ''be fined under this title or imprisoned not more than 5 years, or both'' in concluding provisions.

1996—Pub. L. 104–292 reenacted section catchline without change and amended text generally. Prior to amendment, text read as follows: ''Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.''

1994—Pub. L. 103–322 substituted ''fined under this title'' for ''fined not more than $10,000''.

Change of Name

Reference to United States magistrate or to magistrate deemed to refer to United States magistrate judge pursuant to section 321 of Pub. L. 101–650, set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure.

Short Title of 2004 Amendment

Pub. L. 108–275, §1, July 15, 2004, 118 Stat. 831, provided that: ''This Act [enacting section 1028A of this title, amending sections 641 and 1028 of this title, and enacting provisions listed in a table relating to sentencing guidelines set out as a note under section 994 of Title 28, Judiciary and Judicial Procedure] may be cited as the 'Identity Theft Penalty Enhancement Act'.''

Short Title of 2003 Amendment

Pub. L. 108–21, title VI, §607(a), Apr. 30, 2003, 117 Stat. 689, provided that: ''This section [amending section 1028 of this title] may be cited as the 'Secure Authentication Feature and Enhanced Identification Defense Act of 2003' or 'SAFE ID Act'.''

Short Title of 2000 Amendment

Pub. L. 106–578, §1, Dec. 28, 2000, 114 Stat. 3075, provided that: ''This Act [amending section 1028 of this title, repealing section 1738 of this title, and enacting provisions set out as notes under section 1028 of this title] may be cited as the 'Internet False Identification Prevention Act of 2000'.''

Short Title of 1998 Amendments

Pub. L. 105–318, §1, Oct. 30, 1998, 112 Stat. 3007, provided that: ''This Act [amending sections 982, 1028, and 2516 of this title and section 105 of the Ethics in Government Act of 1978, Pub. L. 95–521, set out in the Appendix to Title 5, Government Organization and Employees, and enacting provisions set out as notes under section 1028 of this title and section 994 of Title 28, Judiciary and Judicial Procedure] may be cited as the 'Identity Theft and Assumption Deterrence Act of 1998'.''

Pub. L. 105–172, §1, Apr. 24, 1998, 112 Stat. 53, provided that: ''This Act [amending section 1029 of this title and enacting provisions set out as a note under section 994 of Title 28, Judiciary and Judicial Procedure] may be cited as the 'Wireless Telephone Protection Act'.''

SHORT TITLE OF 1996 AMENDMENT

Pub. L. 104–292, §1, Oct. 11, 1996, 110 Stat. 3459, provided that: ''This Act [amending this section, sections 1515 and 6005 of this title, and section 1365 of Title 28, Judiciary and Judicial Procedure] may be cited as the 'False Statements Accountability Act of 1996'.''

SHORT TITLE OF 1994 AMENDMENT

Pub. L. 103–322, title XXIX, §290001(a), Sept. 13, 1994, 108 Stat. 2097, as amended by Pub. L. 104–294, title VI, §604(b)(34), Oct. 11, 1996, 110 Stat. 3508, provided that: ''This section [amending section 1030 of this title] may be cited as the 'Computer Abuse Amendments Act of 1994'.''

SHORT TITLE OF 1990 AMENDMENT

Pub. L. 101–647, title XXV, §2500, Nov. 29, 1990, 104 Stat. 4859, provided that: ''This title [see Tables for classification] may be cited as the 'Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990'.''

SHORT TITLE OF 1989 AMENDMENT

Pub. L. 101–123, §1, Oct. 23, 1989, 103 Stat. 759, provided that: ''This Act [amending section 1031 of this title, repealing section 293 of this title, enacting provisions set out as notes under sections 293 and 1031 of this title, and repealing provisions set out as a note under section 293 of this title] may be cited as the 'Major Fraud Act Amendments of 1989'.''

SHORT TITLE OF 1988 AMENDMENT

Pub. L. 100–700, §1, Nov. 19, 1988, 102 Stat. 4631, provided that: ''This Act [enacting sections 293 and 1031 of this title and section 256 of Title 41, Public Contracts, amending section 2324 of Title 10, Armed Forces, and section 3730 of Title 31, Money and Finance, enacting provisions set out as notes under sections 293 and 1031 of this title, section 2324 of Title 10, and section 522 of Title 28, Judiciary and Judicial Procedure, and repealing provisions set out as a note under section 2324 of Title 10] may be cited as the 'Major Fraud Act of 1988'.''

SHORT TITLE OF 1986 AMENDMENT

Pub. L. 99–474, §1, Oct. 16, 1986, 100 Stat. 1213, provided that: ''This Act [amending section 1030 of this title] may be cited as the 'Computer Fraud and Abuse Act of 1986'.''

SHORT TITLE OF 1984 AMENDMENT

Pub. L. 98–473, title II, §1601, Oct. 12, 1984, 98 Stat. 2183, provided that: ''This chapter [chapter XVI (§§1601–1603) of title II of Pub. L. 98–473, enacting section 1029 of this title and provisions set out as a note under section 1029 of this title] may be cited as the 'Credit Card Fraud Act of 1984'.''

Pub. L. 98–473, title II, §2101, Oct. 12, 1984, 98 Stat. 2190, provided that: ''This chapter [chapter XXI (§§2101–2103) of title II of Pub. L. 98–473, enacting section 1030 of this title and provisions set out as a note under section 1030 of this title] may be cited as the 'Counterfeit Access Device and Computer Fraud and Abuse Act of 1984'.''

SHORT TITLE OF 1982 AMENDMENT

Pub. L. 97–398, §1, Dec. 31, 1982, 96 Stat. 2009, provided: ''That this Act [enacting sections 1028 and 1738 of this title and amending section 3001 of Title 39, Postal Service] may be cited as the 'False Identification Crime Control Act of 1982'.''

§ 1002. Possession of false papers to defraud United States

Whoever, knowingly and with intent to defraud the United States, or any agency thereof, possesses any false, altered, forged, or counterfeited writing or document for the purpose of enabling another to obtain from the United States, or from any agency, officer or agent thereof, any sum of money, shall be fined under this title or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 749; Pub. L. 103–322, title XXXIII, §330016(1)(L), Sept. 13, 1994, 108 Stat. 2147.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §74 (Mar. 4, 1909, ch. 321, §30, 35 Stat. 1094).

Words ''or any agency thereof'' after ''United States'' and word ''agency'' after ''any'' and before ''officer,'' were inserted to eliminate any possible ambiguity as to scope of section. (See definition of ''agency'' in section 6 of this title.)

The maximum fine of ''$10,000'' was substituted for ''$500'' in order to conform punishment provisions to those of comparable sections. (See section 1001 of this title.)

Minor verbal change was made.

AMENDMENTS

1994—Pub. L. 103–322 substituted ''fined under this title'' for ''fined not more than $10,000''.

§ 1003. Demands against the United States

Whoever knowingly and fraudulently demands or endeavors to obtain any share or sum in the public stocks of the United States, or to have any part thereof transferred, assigned, sold, or conveyed, or to have any annuity, dividend, pension, wages, gratuity, or other debt due from the United States, or any part thereof, received, or paid by virtue of any false, forged, or counterfeited power of attorney, authority, or instrument, shall be fined under this title or imprisoned not more than five years, or both; but if the sum or value so obtained or attempted to be obtained does not exceed $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

(June 25, 1948, ch. 645, 62 Stat. 749; Pub. L. 103–322, title XXXIII, §330016(1)(H), (L), Sept. 13, 1994, 108 Stat. 2147; Pub. L. 104–294, title VI, §606(a), Oct. 11, 1996, 110 Stat. 3511.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §79 (Mar. 4, 1909, ch. 321, §34, 35 Stat. 1095).

Words ''prize money'' were deleted on the ground that they are an anachronism and were so before 1909. (See reviser's note under section 915 of this title.)

Mandatory punishment provision was rephrased in the alternative.

The smaller punishment for an offense involving $100 or less was added. (See reviser's note to sections 641 and 645 of this title.)

The maximum term of ''five years'' was substituted for ''ten years'' and ''$10,000'' was substituted for ''$5,000'' as being more in harmony with punishment provision of similar sections. (See reviser's note under section 1001 of this title.)

Minor changes in phraseology were made.

AMENDMENTS

1996—Pub. L. 104–294 substituted ''$1,000'' for ''$100''.

1994—Pub. L. 103–322 substituted ''fined under this title'' for ''fined not more than $10,000'' after ''instrument, shall be'' and for ''fined not more than $1,000'' after ''he shall be''.

§ 1004. Certification of checks

Whoever, being an officer, director, agent, or employee of any Federal Reserve bank, member

ducing the need for corrective action at a future date;

(6) minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment;

(7) establishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring that the Administrator will, in carrying out the provisions of subchapter III of this chapter, give a high priority to assisting and cooperating with States in obtaining full authorization of State programs under subchapter III of this chapter;

(8) providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery, and disposal practices and systems;

(9) promoting a national research and development program for improved solid waste management and resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery, and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues;

(10) promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources; and

(11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

(b) National policy

The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

(Pub. L. 89–272, title II, §1003, as added Pub. L. 94–580, §2, Oct. 21, 1976, 90 Stat. 2798; amended Pub. L. 98–616, title I, §101(b), Nov. 8, 1984, 98 Stat. 3224.)

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 3251 of this title, prior to the general amendment of the Solid Waste Disposal Act by Pub. L. 94–580.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–616, §101(b)(1), designated existing provisions as subsec. (a).

Subsec. (a)(4) to (11). Pub. L. 98–616, §101(b)(2), struck out par. (4) which provided for regulating the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment, added pars. (4) to (7), and redesignated former pars. (5) to (8) as (8) to (11), respectively.

Subsec. (b). Pub. L. 98–616, §101(b)(1), added subsec. (b).

§ 6903. Definitions

As used in this chapter:

(1) The term ''Administrator'' means the Administrator of the Environmental Protection Agency.

(2) The term ''construction,'' with respect to any project of construction under this chapter, means (A) the erection or building of new structures and acquisition of lands or interests therein, or the acquisition, replacement, expansion, remodeling, alteration, modernization, or extension of existing structures, and (B) the acquisition and installation of initial equipment of, or required in connection with, new or newly acquired structures or the expanded, remodeled, altered, modernized or extended part of existing structures (including trucks and other motor vehicles, and tractors, cranes, and other machinery) necessary for the proper utilization and operation of the facility after completion of the project; and includes preliminary planning to determine the economic and engineering feasibility and the public health and safety aspects of the project, the engineering, architectural, legal, fiscal, and economic investigations and studies, and any surveys, designs, plans, working drawings, specifications, and other action necessary for the carrying out of the project, and (C) the inspection and supervision of the process of carrying out the project to completion.

(2A) The term ''demonstration'' means the initial exhibition of a new technology process or practice or a significantly new combination or use of technologies, processes or practices, subsequent to the development stage, for the purpose of proving technological feasibility and cost effectiveness.

(3) The term ''disposal'' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

(4) The term ''Federal agency'' means any department, agency, or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government including any Government corporation, and the Government Printing Office.

(5) The term ''hazardous waste'' means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

(6) The term ''hazardous waste generation'' means the act or process of producing hazardous waste.

(7) The term ''hazardous waste management'' means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.

(8) For purposes of Federal financial assistance (other than rural communities assistance), the term ''implementation'' does not include the acquisition, leasing, construction, or modification of facilities or equipment or the acquisition, leasing, or improvement of land.

(9) The term ''intermunicipal agency'' means an agency established by two or more municipalities with responsibility for planning or administration of solid waste.

(10) The term ''interstate agency'' means an agency of two or more municipalities in different States, or an agency established by two or more States, with authority to provide for the management of solid wastes and serving two or more municipalities located in different States.

(11) The term ''long-term contract'' means, when used in relation to solid waste supply, a contract of sufficient duration to assure the viability of a resource recovery facility (to the extent that such viability depends upon solid waste supply).

(12) The term ''manifest'' means the form used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage.

(13) The term ''municipality'' (A) means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, or an Indian tribe or authorized tribal organization or Alaska Native village or organization, and (B) includes any rural community or unincorporated town or village or any other public entity for which an application for assistance is made by a State or political subdivision thereof.

(14) The term ''open dump'' means any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944 of this title and which is not a facility for disposal of hazardous waste.

(15) The term ''person'' means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States.

(16) The term ''procurement item'' means any device, good, substance, material, product, or other item whether real or personal property which is the subject of any purchase, barter, or other exchange made to procure such item.

(17) The term ''procuring agency'' means any Federal agency, or any State agency or agency of a political subdivision of a State which is using appropriated Federal funds for such procurement, or any person contracting with any such agency with respect to work performed under such contract.

(18) The term ''recoverable'' refers to the capability and likelihood of being recovered from solid waste for a commercial or industrial use.

(19) The term ''recovered material'' means waste material and byproducts which have been recovered or diverted from solid waste, but such term does not include those materials and byproducts generated from, and commonly reused within, an original manufacturing process.

(20) The term ''recovered resources'' means material or energy recovered from solid waste.

(21) The term ''resource conservation'' means reduction of the amounts of solid waste that are generated, reduction of overall resource consumption, and utilization of recovered resources.

(22) The term ''resource recovery'' means the recovery of material or energy from solid waste.

(23) The term ''resource recovery system'' means a solid waste management system which provides for collection, separation, recycling, and recovery of solid wastes, including disposal of nonrecoverable waste residues.

(24) The term ''resource recovery facility'' means any facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse.

(25) The term ''regional authority'' means the authority established or designated under section 6946 of this title.

(26) The term ''sanitary landfill'' means a facility for the disposal of solid waste which meets the criteria published under section 6944 of this title.

(26A) The term ''sludge'' means any solid, semisolid or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effects.

(27) The term ''solid waste'' means any 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, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C. 2011 et seq.].

(28) The term ''solid waste management'' means the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste.

(29) The term ''solid waste management facility'' includes—

(A) any resource recovery system or component thereof,

(B) any system, program, or facility for resource conservation, and

(C) any facility for the collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid wastes, including hazardous wastes, whether such facility is associated with facilities generating such wastes or otherwise.

(30) The terms ''solid waste planning'', ''solid waste management'', and ''comprehensive plan-

ning'' include planning or management respecting resource recovery and resource conservation.

(31) The term ''State'' means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(32) The term ''State authority'' means the agency established or designated under section 6947 of this title.

(33) The term ''storage'', when used in connection with hazardous waste, means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste.

(34) The term ''treatment'', when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

(35) The term ''virgin material'' means a raw material, including previously unused copper, aluminum, lead, zinc, iron, or other metal or metal ore, any undeveloped resource that is, or with new technology will become, a source of raw materials.

(36) The term ''used oil'' means any oil which has been—

(A) refined from crude oil,

(B) used, and

(C) as a result of such use, contaminated by physical or chemical impurities.

(37) The term ''recycled oil'' means any used oil which is reused, following its original use, for any purpose (including the purpose for which the oil was originally used). Such term includes oil which is re-refined, reclaimed, burned, or reprocessed.

(38) The term ''lubricating oil'' means the fraction of crude oil which is sold for purposes of reducing friction in any industrial or mechanical device. Such term includes re-refined oil.

(39) The term ''re-refined oil'' means used oil from which the physical and chemical contaminants acquired through previous use have been removed through a refining process.

(40) Except as otherwise provided in this paragraph, the term ''medical waste'' means any solid waste which is generated in the diagnosis, treatment, or immunization of human beings or animals, in research pertaining thereto, or in the production or testing of biologicals. Such term does not include any hazardous waste identified or listed under subchapter III of this chapter or any household waste as defined in regulations under subchapter III of this chapter.

(41) The term ''mixed waste'' means waste that contains both hazardous waste and source, special nuclear, or by-product material subject to the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).

(Pub. L. 89–272, title II, §1004, as added Pub. L. 94–580, §2, Oct. 21, 1976, 90 Stat. 2798; amended Pub. L. 95–609, §7(b), Nov. 8, 1978, 92 Stat. 3081; Pub. L. 96–463, §3, Oct. 15, 1980, 94 Stat. 2055; Pub. L. 96–482, §2, Oct. 21, 1980, 94 Stat. 2334; Pub. L. 100–582, §3, Nov. 1, 1988, 102 Stat. 2958; Pub. L. 102–386, title I, §§103, 105(b), Oct. 6, 1992, 106 Stat. 1507, 1512.)

REFERENCES IN TEXT

The Atomic Energy Act of 1954, referred to in pars. (27) and (41), is act Aug. 1, 1946, ch. 724, as added by act Aug. 30, 1954, ch. 1073, §1, 68 Stat. 921, and amended, which is classified generally to chapter 23 (§2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 3252 of this title, prior to the general amendment of the Solid Waste Disposal Act by Pub. L. 94–580.

AMENDMENTS

1992—Par. (15). Pub. L. 102–386, §103, inserted before period at end ''and shall include each department, agency, and instrumentality of the United States''.

Par. (41). Pub. L. 102–386, §105(b), added par. (41).

1988—Par. (40). Pub. L. 100–582 added par. (40).

1980—Par. (14). Pub. L. 96–482, §2(a), defined ''open dump'' to include a facility, substituted requirement that disposal facility or site not be a sanitary landfill meeting section 6944 of this title criteria for prior requirement that disposal site not be a sanitary landfill within meaning of section 6944 of this title, and required that the disposal facility or site not be a facility for disposal of hazardous waste.

Par. (19). Pub. L. 96–482, §2(b), defined ''recovered material'' to cover byproducts, substituted provision for recovery or diversion of waste material and byproducts from solid waste for prior provision for collection or recovery of material from solid waste, and excluded materials and byproducts generated from and commonly reused within an original manufacturing process.

Pars. (36) to (39). Pub. L. 96–463, §3, added pars. (36) to (39).

1978—Par. (8). Pub. L. 95–609, §7(b)(1), struck out provision stating that employees' salaries due pursuant to subchapter IV of this chapter would not be included after Dec. 31, 1979.

Par. (10). Pub. L. 95–609, §7(b)(2), substituted ''management'' for ''disposal''.

Par. (29)(C). Pub. L. 95–609, §7(b)(3), substituted ''the collection, source separation, storage, transportation, transfer, processing, treatment or disposal'' for ''the treatment''.

TRANSFER OF FUNCTIONS

Enforcement functions of Administrator or other official of Environmental Protection Agency related to compliance with resource conservation and recovery permits used under this chapter with respect to preconstruction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, eff. July 1, 1979, §§102(a), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Com-

merce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

§ 6904. Governmental cooperation

(a) Interstate cooperation

The provisions of this chapter to be carried out by States may be carried out by interstate agencies and provisions applicable to States may apply to interstate regions where such agencies and regions have been established by the respective States and approved by the Administrator. In any such case, action required to be taken by the Governor of a State, respecting regional designation shall be required to be taken by the Governor of each of the respective States with respect to so much of the interstate region as is within the jurisdiction of that State.

(b) Consent of Congress to compacts

The consent of the Congress is hereby given to two or more States to negotiate and enter into agreements or compacts, not in conflict with any law or treaty of the United States, for—

(1) cooperative effort and mutual assistance for the management of solid waste or hazardous waste (or both) and the enforcement of their respective laws relating thereto, and

(2) the establishment of such agencies, joint or otherwise, as they may deem desirable for making effective such agreements or compacts.

No such agreement or compact shall be binding or obligatory upon any State a party thereto unless it is agreed upon by all parties to the agreement and until it has been approved by the Administrator and the Congress.

(Pub. L. 89–272, title II, § 1005, as added Pub. L. 94–580, § 2, Oct. 21, 1976, 90 Stat. 2801.)

TRANSFER OF FUNCTIONS

For transfer of certain enforcement functions of Administrator or other official of Environmental Protection Agency under this chapter to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, and subsequent transfer to Secretary of Energy, then to Federal Coordinator for Alaska Natural Gas Transportation Projects, see note set out under section 6903 of this title.

§ 6905. Application of chapter and integration with other Acts

(a) Application of chapter

Nothing in this chapter shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.], the Safe Drinking Water Act [42 U.S.C. 300f et seq.], the Marine Protection, Research and Sanctuaries Act of 1972 [16 U.S.C. 1431 et seq., 1447 et seq., 33 U.S.C. 1401 et seq., 2801 et seq.], or the Atomic Energy Act of 1954 [42 U.S.C. 2011 et seq.] except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts.

(b) Integration with other Acts

(1) The Administrator shall integrate all provisions of this chapter for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of the Clean Air Act [42 U.S.C. 7401 et seq.], the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.], the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136 et seq.], the Safe Drinking Water Act [42 U.S.C. 300f et seq.], the Marine Protection, Research and Sanctuaries Act of 1972 [16 U.S.C. 1431 et seq., 1447 et seq., 33 U.S.C. 1401 et seq., 2801 et seq.], and such other Acts of Congress as grant regulatory authority to the Administrator. Such integration shall be effected only to the extent that it can be done in a manner consistent with the goals and policies expressed in this chapter and in the other acts referred to in this subsection.

(2)(A) As promptly as practicable after November 8, 1984, the Administrator shall submit a report describing—

(i) the current data and information available on emissions of polychlorinated dibenzo-p-dioxins from resource recovery facilities burning municipal solid waste;

(ii) any significant risks to human health posed by these emissions; and

(iii) operating practices appropriate for controlling these emissions.

(B) Based on the report under subparagraph (A) and on any future information on such emissions, the Administrator may publish advisories or guidelines regarding the control of dioxin emissions from such facilities. Nothing in this paragraph shall be construed to preempt or otherwise affect the authority of the Administrator to promulgate any regulations under the Clean Air Act [42 U.S.C. 7401 et seq.] regarding emissions of polychlorinated dibenzo-p-dioxins.

(3) Notwithstanding any other provisions of law, in developing solid waste plans, it is the intention of this chapter that in determining the size of a waste-to-energy facility, adequate provisions shall be given to the present and reasonably anticipated future needs, including those needs created by thorough implementation of section 6962(h) of this title, of the recycling and resource recovery interests within the area encompassed by the solid waste plan.

(c) Integration with the Surface Mining Control and Reclamation Act of 1977

(1) No later than 90 days after October 21, 1980, the Administrator shall review any regulations applicable to the treatment, storage, or disposal of any coal mining wastes or overburden promulgated by the Secretary of the Interior under the Surface Mining and Reclamation Act of 1977 [30 U.S.C. 1201 et seq.]. If the Administrator determines that any requirement of final regulations promulgated under any section of subchapter III of this chapter relating to mining wastes or overburden is not adequately addressed in such regulations promulgated by the Secretary, the Administrator shall promptly transmit such determination, together with suggested revisions and supporting documentation, to the Secretary.

(2) The Secretary of the Interior shall have exclusive responsibility for carrying out any requirement of subchapter III of this chapter with respect to coal mining wastes or overburden for

enforcing the facility's compliance with the State hazardous waste program. The records of such inspections shall be available to the public as provided in subsection (b) of this section. The department, agency, or instrumentality owning or operating each such facility shall reimburse the Environmental Protection Agency for the costs of the inspection of the facility. With respect to the first inspection of each such facility occurring after October 6, 1992, the Administrator shall conduct a comprehensive ground water monitoring evaluation at the facility, unless such an evaluation was conducted during the 12-month period preceding October 6, 1992.

(d) State-operated facilities

The Administrator shall annually undertake a thorough inspection of every facility for the treatment, storage, or disposal of hazardous waste which is operated by a State or local government for which a permit is required under section 6925 of this title. The records of such inspection shall be available to the public as provided in subsection (b) of this section.

(e) Mandatory inspections

(1) The Administrator (or the State in the case of a State having an authorized hazardous waste program under this subchapter) shall commence a program to thoroughly inspect every facility for the treatment, storage, or disposal of hazardous waste for which a permit is required under section 6925 of this title no less often than every two years as to its compliance with this subchapter (and the regulations promulgated under this subchapter). Such inspections shall commence not later than twelve months after November 8, 1984. The Administrator shall, after notice and opportunity for public comment, promulgate regulations governing the minimum frequency and manner of such inspections, including the manner in which records of such inspections shall be maintained and the manner in which reports of such inspections shall be filed. The Administrator may distinguish between classes and categories of facilities commensurate with the risks posed by each class or category.

(2) Not later than six months after November 8, 1984, the Administrator shall submit to the Congress a report on the potential for inspections of hazardous waste treatment, storage, or disposal facilities by nongovernmental inspectors as a supplement to inspections conducted by officers, employees, or representatives of the Environmental Protection Agency or States having authorized hazardous waste programs or operating under a cooperative agreement with the Administrator. Such report shall be prepared in cooperation with the States, insurance companies offering environmental impairment insurance, independent companies providing inspection services, and other such groups as appropriate. Such report shall contain recommendations on provisions and requirements for a program of private inspections to supplement governmental inspections.

(Pub. L. 89–272, title II, §3007, as added Pub. L. 94–580, §2, Oct. 21, 1976, 90 Stat. 2810; amended Pub. L. 95–609, §7(j), Nov. 8, 1978, 92 Stat. 3082; Pub. L. 96–482, §12, Oct. 21, 1980, 94 Stat. 2339; Pub. L. 98–616, title II, §§229–231, title V, §502(a), Nov. 8, 1984, 98 Stat. 3255, 3256, 3276; Pub. L. 102–386, title I, §104, Oct. 6, 1992, 106 Stat. 1507.)

AMENDMENTS

1992—Subsec. (c). Pub. L. 102–386 in first sentence substituted ''The Administrator shall undertake'' for ''Beginning twelve months after November 8, 1984, the Administrator shall, or in the case of a State with an authorized hazardous waste program the State may, undertake'' and ''department, agency, or instrumentality of the United States'' for ''Federal agency'', inserted after first sentence ''Any State with an authorized hazardous waste program also may conduct an inspection of any such facility for purposes of enforcing the facility's compliance with the State hazardous waste program.'', and inserted at end ''The department, agency, or instrumentality owning or operating each such facility shall reimburse the Environmental Protection Agency for the costs of the inspection of the facility. With respect to the first inspection of each such facility occurring after October 6, 1992, the Administrator shall conduct a comprehensive ground water monitoring evaluation at the facility, unless such an evaluation was conducted during the 12-month period preceding October 6, 1992.''

1984—Subsec. (b)(1). Pub. L. 98–616, §502(a), modified directory language for amendment by sec. 12(b)(4) of Pub. L. 96–482.

Subsec. (c). Pub. L. 98–616, §229, added subsec. (c).

Subsec. (d). Pub. L. 98–616, §230, added subsec. (d).

Subsec. (e). Pub. L. 98–616, §231, added subsec. (e).

1980—Subsec. (a). Pub. L. 96–482, §12(a), substituted ''chapter'' for ''subchapter'', ''any officer, employee or representative'' for ''any officer or employee'', ''duly designated officer, employee or representative'' for ''duly designated officer employee'', ''such officers, employees or representatives'' for ''such officers or employees'', ''furnish information relating to such wastes and permit'' for ''furnish or permit'', and ''officer, employee or representative obtains'' for ''officer or employee obtains'', struck out ''maintained by any person'' after ''establishment or other place'', substituted ''officer, employee or representative obtains'' for ''officer or employee obtains'', and inserted ''or has handled'' after ''otherwise handles'' and ''or have been'' after ''where hazardous wastes are''.

Subsec. (b)(1). Pub. L. 96–482, §12(b)(1)–(3), designated existing provisions as par. (1), inserted ''or any officer, employee or representative thereof'' before ''has access under this section'' and substituted ''such information or particular portion thereof shall be considered'' for ''the Administrator (or the State, as the case may be) shall consider such information or portion thereof''.

Pub. L. 96–482, §12(b)(4), as modified by Pub. L. 98–616, §502(a), inserted ''(including records, reports, or information obtained by representatives of the Environmental Protection Agency)'' after ''information''.

Subsec. (b)(2) to (4). Pub. L. 96–482, §12(b)(3), added pars. (2) to (4).

1978—Subsec. (a)(1). Pub. L. 95–609 substituted ''disposed of, or transported from'' for ''or disposed of''.

TRANSFER OF FUNCTIONS

For transfer of certain enforcement functions of Administrator or other official of Environmental Protection Agency under this chapter to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, and subsequent transfer to Secretary of Energy, then to Federal Coordinator for Alaska Natural Gas Transportation Projects, see note set out under section 6903 of this title.

§ 6928. Federal enforcement

(a) Compliance orders

(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated

or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

(2) In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

(3) Any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator or a State under this subchapter and shall state with reasonable specificity the nature of the violation. Any penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subchapter. In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(b) Public hearing

Any order issued under this section shall become final unless, no later than thirty days after the order is served, the person or persons named therein request a public hearing. Upon such request the Administrator shall promptly conduct a public hearing. In connection with any proceeding under this section the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and may promulgate rules for discovery procedures.

(c) Violation of compliance orders

If a violator fails to take corrective action within the time specified in a compliance order, the Administrator may assess a civil penalty of not more than $25,000 for each day of continued noncompliance with the order and the Administrator may suspend or revoke any permit issued to the violator (whether issued by the Administrator or the State).

(d) Criminal penalties

Any person who—

(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. 1411 et seq.],

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter—

(A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. 1411 et seq.]; or

(B) in knowing violation of any material condition or requirement of such permit; or

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(4) knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter (whether such activity took place before or takes place after November 8, 1984) and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(5) knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter required by regulations promulgated under this subchapter (or by a State in the case of a State program authorized under this subchapter) to be accompanied by a manifest;

(6) knowingly exports a hazardous waste identified or listed under this subchapter (A) without the consent of the receiving country or, (B) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement; or

(7) knowingly stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under this subchapter—

(A) in knowing violation of any material condition or requirement of a permit under this subchapter; or

(B) in knowing violation of any material condition or requirement of any applicable regulations or standards under this chapter;

shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

(e) Knowing endangerment

Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous

waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than $1,000,000.

(f) Special rules

For the purposes of subsection (e) of this section—

(1) A person's state of mind is knowing with respect to—

(A) his conduct, if he is aware of the nature of his conduct;

(B) an existing circumstance, if he is aware or believes that the circumstance exists; or

(C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(2) In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury—

(A) the person is responsible only for actual awareness or actual belief that he possessed; and

(B) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

Provided, That in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.

(3) It is an affirmative defense to a prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(A) an occupation, a business, or a profession; or

(B) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.

The defendant may establish an affirmative defense under this subsection by a preponderance of the evidence.

(4) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subsection (e) of this section and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(5) The term ''organization'' means a legal entity, other than a government, established, or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons.

(6) The term ''serious bodily injury'' means—

(A) bodily injury which involves a substantial risk of death;

(B) unconsciousness;

(C) extreme physical pain;

(D) protracted and obvious disfigurement; or

(E) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(g) Civil penalty

Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

(h) Interim status corrective action orders

(1) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 6925(e) of this title, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.

(2) Any order issued under this subsection may include a suspension or revocation of authorization to operate under section 6925(e) of this title, shall state with reasonable specificity the nature of the required corrective action or other response measure, and shall specify a time for compliance. If any person named in an order fails to comply with the order, the Administrator may assess, and such person shall be liable to the United States for, a civil penalty in an amount not to exceed $25,000 for each day of noncompliance with the order.

(Pub. L. 89–272, title II, §3008, as added Pub. L. 94–580, §2, Oct. 21, 1976, 90 Stat. 2811; amended Pub. L. 95–609, §7(k), Nov. 8, 1978, 92 Stat. 3082; Pub. L. 96–482, §13, Oct. 21, 1980, 94 Stat. 2339; Pub. L. 98–616, title II, §§232, 233, 245(c), title IV, §403(d)(1)–(3), Nov. 8, 1984, 98 Stat. 3256, 3257, 3264, 3272; Pub. L. 99–499, title II, §205(i), Oct. 17, 1986, 100 Stat. 1703.)

REFERENCES IN TEXT

The Marine Protection, Research, and Sanctuaries Act, referred to in subsec. (d)(1), (2)(A), probably means the Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. 92–532, Oct. 23, 1972, 86 Stat. 1052, as amended. Title I of the Marine Protection, Research, and Sanctuaries Act of 1972 is classified generally to subchapter I (§1411 et seq.) of chapter 27 of Title 33, Navigation and Navigable Waters. For complete classification of this Act to the Code, see Short Title note set out under section 1401 of Title 33 and Tables.

AMENDMENTS

1986—Subsec. (d)(4). Pub. L. 99–499, §205(i)(1), inserted ''or any used oil not identified or listed as a hazardous waste under this subchapter''.

Subsec. (d)(5). Pub. L. 99–499, §205(i)(1), (2), inserted ''or any used oil not identified or listed as a hazardous waste under this subchapter'' and struck out ''; or'' after ''accompanied by a manifest;''.

Subsec. (d)(6). Pub. L. 99–499, §205(i)(3), inserted at end ''; or''.

Subsec. (d)(7). Pub. L. 99–499, §205(i)(4), added par. (7).

Subsec. (e). Pub. L. 99–499, §205(i)(5), inserted ''or used oil not identified or listed as a hazardous waste under this subchapter'' and substituted ''(5), (6), or (7)'' for ''(5), or (6)''.

1984—Subsec. (a)(1). Pub. L. 98–616, §403(d)(1), in amending par. (1) generally, expanded authority of Administrator by empowering him to determine that a person ''has violated'' a requirement of this subchapter, and to assess a civil penalty for a past or current violation.

Subsec. (a)(3). Pub. L. 98–616, §403(d)(2), in amending par. (3) generally, substituted provision that any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator or a State under this subchapter and shall state with reasonable specificity the nature of the violation, and provision that any penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subchapter, and that in assessing such a penalty, the Administrator take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements, for provision that if such violator fails to take corrective action within the time specified in the order, he shall be liable for a civil penalty of not more than $25,000 for each day of continued noncompliance and the Administrator may suspend or revoke any permit issued to the violator, whether issued by the Administrator or the State.

Subsec. (b). Pub. L. 98–616, §233(b), inserted ''issued under this section''.

Subsec. (c). Pub. L. 98–616, §403(d)(3), substituted provisions relating to penalties for violation of compliance orders for former provisions which set forth requirements for compliance orders.

Subsec. (d). Pub. L. 98–616, §232(a)(3), amended closing provisions generally. Prior to amendment, closing provisions read as follows: ''shall, upon conviction, be subject to a fine of not more than $25,000 ($50,000 in the case of a violation of paragraph (1) or (2)) for each day of violation, or to imprisonment not to exceed one year (two years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.''

Subsec. (d)(1). Pub. L. 98–616, §232(a)(1), inserted ''or causes to be transported'' and substituted ''this subchapter'' for ''section 6925 of this title (or section 6926 of this title in case of a State program)''.

Subsec. (d)(2). Pub. L. 98–616, §232(a)(2)(A), struck out ''either'' after ''subchapter'' in provision preceding subpar. (A).

Subsec. (d)(2)(A). Pub. L. 98–616, §232(a)(2)(B), (c), substituted ''this subchapter'' for ''section 6925 of this title (or section 6926 of this title in the case of a State program)'' and struck out ''having obtained'' before ''a permit under''.

Subsec. (d)(2)(C). Pub. L. 98–616, §232(a)(2)(C), added subpar. (C).

Subsec. (d)(3) to (5). Pub. L. 98–616, §232(a)(3), in amending pars. (3) and (4) generally, expanded par. (3) by providing criminal penalties for one who knowingly omits material information from documents required to be filed, maintained or used under this subchapter, expanded par. (4) by providing criminal penalties for one who knowingly fails to file required material under this subchapter, and added par. (5).

Subsec. (d)(6). Pub. L. 98–616, §245(c), added par. (6).

Subsec. (e). Pub. L. 98–616, §232(b), in amending subsec. (e) generally, struck out provisions referring to violations of interim status standards and omission of material information from permit applications, struck out provision requiring proof of ''unjustifiable and inexcusable disregard for human life'' or ''extreme indifference to human life'' for conviction under this subsection, and inserted provision increasing maximum prison sentence to fifteen years for violation of subsec. (d)(1) through (6) of this section by one who knowingly places another person in imminent danger of death or serious bodily injury, replacing former provision calling for maximum imprisonment of two years, or five years in cases evidencing extreme indifference to human life.

Subsec. (h). Pub. L. 98–616, §233(a), added subsec. (h).

1980—Subsec. (a)(1). Pub. L. 96–482, §13(1), (2), struck out ''the Administrator shall give notice to the violator of his failure to comply with such requirement. If such violation extends beyond the thirtieth day after the Administrator's notification'' before ''the Administrator may issue'' and substituted ''compliance immediately or within a specified time period'' for ''compliance within a specified time period''.

Subsec. (a)(2). Pub. L. 96–482, §13(2), struck out ''thirty days'' after ''violation has occurred''.

Subsec. (b). Pub. L. 96–482, §13(3), substituted ''order shall become final unless, no later than thirty days after the order is served'' for ''order or any suspension or revocation of a permit shall become final unless, no later than thirty days after the order or notice of the suspension or revocation is served''.

Subsec. (c). Pub. L. 96–482, §13(4), authorized orders for suspension or revocation of permits.

Subsec. (d). Pub. L. 96–482, §13(5), in par. (2), designated existing provisions as subpar. (A) and added subpar. (B), in par. (3), inserted provision requiring the statement or representation to be material, added par. (4), and in provisions following par. (4), inserted provision authorizing a fine of $50,000 and a two year imprisonment for violation of par. (1) or (2).

Subsecs. (e) to (g). Pub. L. 96–482, §13(5), added subsecs. (e) to (g).

1978—Subsec. (d)(1). Pub. L. 95–609, §7(k)(1), inserted provision relating to title I of the Marine Protection, Research, and Sanctuaries Act.

Subsec. (d)(2). Pub. L. 95–609, §7(k)(2), inserted provisions relating to treatment or storage of hazardous wastes and relating to title I of the Marine Protection, Research, and Sanctuaries Act.

TRANSFER OF FUNCTIONS

For transfer of certain enforcement functions of Administrator or other official of Environmental Protection Agency under this chapter to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, and subsequent transfer to Secretary of Energy, then to Federal Coordinator for Alaska Natural Gas Transportation Projects, see note set out under section 6903 of this title.

§ 6929. Retention of State authority

Upon the effective date of regulations under this subchapter no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations, except that if application of a regulation with respect to any matter under this subchapter is postponed or enjoined by the action of any court, no State or political subdivision shall be prohibited from acting with respect to the same aspect of such matter until such time as such regulation takes effect. Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from im-

study that show compliance with the treatment rate limits and the storage time and quantity limits. The following specific information must be included for each treatability study conducted:

(i) The name, address, and EPA identification number of the generator or sample collector of each waste sample;

(ii) The date the shipment was received;

(iii) The quantity of waste accepted;

(iv) The quantity of ''as received'' waste in storage each day;

(v) The date the treatment study was initiated and the amount of ''as received'' waste introduced to treatment each day;

(vi) The date the treatability study was concluded;

(vii) The date any unused sample or residues generated from the treatability study were returned to the generator or sample collector or, if sent to a designated facility, the name of the facility and the EPA identification number.

(8) The facility keeps, on-site, a copy of the treatability study contract and all shipping papers associated with the transport of treatability study samples to and from the facility for a period ending 3 years from the completion date of each treatability study.

(9) The facility prepares and submits a report to the Regional Administrator, or state Director (if located in an authorized state), by March 15 of each year, that includes the following information for the previous calendar year:

(i) The name, address, and EPA identification number of the facility conducting the treatability studies;

(ii) The types (by process) of treatability studies conducted;

(iii) The names and addresses of persons for whom studies have been conducted (including their EPA identification numbers);

(iv) The total quantity of waste in storage each day;

(v) The quantity and types of waste subjected to treatability studies;

(vi) When each treatability study was conducted;

(vii) The final disposition of residues and unused sample from each treatability study.

(10) The facility determines whether any unused sample or residues generated by the treatability study are hazardous waste under §261.3 and, if so, are subject to parts 261 through 268, and part 270 of this chapter, unless the residues and unused samples are returned to the sample originator under the §261.4(e) exemption.

(11) The facility notifies the Regional Administrator, or State Director (if located in an authorized State), by letter when the facility is no longer planning to conduct any treatability studies at the site.

(g) *Dredged material that is not a hazardous waste.* Dredged material that is subject to the requirements of a permit that has been issued under 404 of the Federal Water Pollution Control Act (33 U.S.C.1344) or section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1413) is not a hazardous waste. For this paragraph (g), the following definitions apply:

(1) The term *dredged material* has the same meaning as defined in 40 CFR 232.2;

(2) The term *permit* means:

(i) A permit issued by the U.S. Army Corps of Engineers (Corps) or an approved State under section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344);

(ii) A permit issued by the Corps under section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1413); or

(iii) In the case of Corps civil works projects, the administrative equivalent of the permits referred to in paragraphs (g)(2)(i) and (ii) of this section, as provided for in Corps regulations (for example, see 33 CFR 336.1, 336.2, and 337.6).

(h) *Carbon dioxide stream injected for geologic sequestration.* Carbon dioxide streams that are captured and transported for purposes of injection into an underground injection well subject to the requirements for Class VI Underground Injection Control wells, including the requirements in 40 CFR Parts 144 and 146 of the Underground Injection Control Program of the Safe Drinking Water Act, are not a hazardous waste, provided the following conditions are met:

(1) Transportation of the carbon dioxide stream must be in compliance with U.S. Department of Transportation requirements, including the pipeline safety laws (49 U.S.C. 60101 et seq.) and regulations (49 CFR Parts 190–199) of the U.S. Department of Transportation, and pipeline safety regulations adopted and administered by a state authority pursuant to a certification under 49 U.S.C. 60105, as applicable.

(2) Injection of the carbon dioxide stream must be in compliance with the applicable requirements for Class VI Underground Injection Control wells, including the applicable requirements in 40 CFR Parts 144 and 146;

(3) No hazardous wastes shall be mixed with, or otherwise co-injected with, the carbon dioxide stream; and

(4)(i) Any generator of a carbon dioxide stream, who claims that a carbon dioxide stream is excluded under this paragraph (h), must have an authorized representative (as defined in 40 CFR 260.10) sign a certification statement worded as follows:

I certify under penalty of law that the carbon dioxide stream that I am claiming to be excluded under 40 CFR 261.4(h) has not been mixed with hazardous wastes, and I have transported the carbon dioxide stream in compliance with (or have contracted with a pipeline operator or transporter to transport the carbon dioxide stream in compliance with) Department of Transportation requirements, including the pipeline safety laws (49 U.S.C. 60101 et seq.) and regulations (49 CFR Parts 190–199) of the U.S. Department of Transportation, and the pipeline safety regulations adopted and administered by a state authority pursuant to a certification under 49 U.S.C. 60105, as applicable, for injection into a well subject to the requirements for the Class VI Underground Injection Control Program of the Safe Drinking Water Act.

(ii) Any Class VI Underground Injection Control well owner or operator, who claims that a carbon dioxide stream is excluded under paragraph (h) of this section, must have an authorized representative (as defined in 40 CFR 260.10) sign a certification statement worded as follows:

I certify under penalty of law that the carbon dioxide stream that I am claiming to be excluded under 40 CFR 261.4(h) has not been mixed with, or otherwise co-injected with, hazardous waste at the Underground Injection Control (UIC) Class VI permitted facility, and that injection of the carbon dioxide stream is in compliance with the applicable requirements for UIC Class VI wells, including the applicable requirements in 40 CFR Parts 144 and 146.

(iii) The signed certification statement must be kept on-site for no less than three years, and must be made available within 72 hours of a written request from the Administrator, Regional Administrator, or state Director (if located in an authorized state), or their designee. The signed certification statement must be renewed every year that the exclusion is claimed, by having an authorized representative (as defined in 40 CFR 260.10) annually prepare and sign a new copy of the certification statement within one year of the date of the previous statement. The signed certification statement must also be readily accessible on the facility's publicly-available Web site (if such Web site exists) as a public notification with the title of ''Carbon Dioxide Stream Certification'' at the time the exclusion is claimed.

[45 FR 33119, May 19, 1980]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 261.4, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

§ 261.5 Special requirements for hazardous waste generated by conditionally exempt small quantity generators.

(a) A generator is a conditionally exempt small quantity generator in a calendar month if he generates no more than 100 kilograms of hazardous waste in that month.

(b) Except for those wastes identified in paragraphs (e), (f), (g), and (j) of this section, a conditionally exempt small quantity generator's hazardous wastes are not subject to regulation under parts 262 through 268, and parts 270 and 124 of this chapter, and the notification requirements of section 3010 of RCRA, provided the generator complies with the requirements of paragraphs (f), (g), and (j) of this section.

(c) When making the quantity determinations of this part and 40 CFR part 262, the generator must include all hazardous waste that it generates, except hazardous waste that:

TABLE 1—LABORATORY XL PROJECT PARTICIPANT INFORMATION—Continued

Institution	Approx. number of labs	Departments participating	Location of current hazardous waste accumulation areas
University of Vermont, Burlington, VT.	400	Colleges of: Agriculture and Life Sciences, Arts and Sciences, Medicine, and Engineering and Mathematics; and Schools of: Nursing, Allied Heath Sciences, and Natural Resources.	Given Bunker, 89 Beaumont Ave., Burlington, VT.

(2) Each University shall have the right to change its respective departments or the on-site location of its hazardous waste accumulation areas listed in Table 1 of this section upon written notice to the Regional Administrator for EPA-Region I and the appropriate state agency. Such written notice will be provided at least ten days prior to the effective date of any such changes.

(k) Generators in the Commonwealth of Massachusetts may comply with the State regulations regarding Class A recyclable materials in 310 C.M.R. 30.200, when authorized by the EPA under 40 CFR part 271, with respect to those recyclable materials and matters covered by the authorization, instead of complying with the hazardous waste accumulation requirements of §262.34, the reporting requirements of §262.41, the storage facility operator requirements of 40 CFR parts 264, 265 and 267, and the permitting requirements of 40 CFR part 270. Such generators must also comply with any other applicable requirements, including any applicable authorized State regulations governing hazardous wastes not being recycled and any applicable Federal requirements which are being directly implemented by the EPA within Massachusetts pursuant to the Hazardous and Solid Waste Amendments of 1984.

(l) The laboratories owned by an eligible academic entity that chooses to be subject to the requirements of Subpart K of this part are not subject to (for purposes of this paragraph, the terms ''laboratory'' and ''eligible academic entity'' shall have the meaning as defined in §262.200 of Subpart K of this part).:

(1) The requirements of §262.11 or §262.34(c), for large quantity generators and small quantity generators, except as provided in Subpart K, and

(2) The conditions of §261.5(b), for conditionally exempt small quantity generators, except as provided in Subpart K.

NOTE 1: The provisions of §262.34 are applicable to the on-site accumulation of hazardous waste by generators. Therefore, the provisions of §262.34 only apply to owners or operators who are shipping hazardous waste which they generated at that facility.

NOTE 2: A generator who treats, stores, or disposes of hazardous waste on-site must comply with the applicable standards and permit requirements set forth in 40 CFR parts 264, 265, 266, 268, and 270.

[45 FR 33142, May 19, 1980, as amended at 45 FR 86970, Dec. 31, 1980; 47 FR 1251, Jan. 11, 1982; 48 FR 14294, Apr. 1, 1983; 53 FR 27164, July 19, 1988; 56 FR 3877, Jan. 31, 1991; 60 FR 25541, May 11, 1995; 61 FR 16309, Apr. 12, 1996; 62 FR 6651, Feb. 12, 1997; 64 FR 52392, Sept. 28, 1999; 69 FR 11813, Mar. 12, 2004; 73 FR 72954, Dec. 1, 2008; 75 FR 13003, Mar. 18, 2010; 75 FR 1253, Jan. 8, 2010]

§262.11 Hazardous waste determination.

A person who generates a solid waste, as defined in 40 CFR 261.2, must determine if that waste is a hazardous waste using the following method:

(a) He should first determine if the waste is excluded from regulation under 40 CFR 261.4.

(b) He must then determine if the waste is listed as a hazardous waste in subpart D of 40 CFR part 261.

NOTE: Even if the waste is listed, the generator still has an opportunity under 40 CFR 260.22 to demonstrate to the Administrator that the waste from his particular facility or operation is not a hazardous waste.

(c) For purposes of compliance with 40 CFR part 268, or if the waste is not listed in subpart D of 40 CFR part 261, the generator must then determine whether the waste is identified in subpart C of 40 CFR part 261 by either:

(1) Testing the waste according to the methods set forth in subpart C of 40 CFR part 261, or according to an equivalent method approved by the Administrator under 40 CFR 260.21; or

(2) Applying knowledge of the hazard characteristic of the waste in light of the materials or the processes used.

(d) If the waste is determined to be hazardous, the generator must refer to parts 261, 264, 265, 266, 267, 268, and 273 of this chapter for possible exclusions or restrictions pertaining to management of the specific waste.

[45 FR 33142, May 19, 1980, as amended at 45 FR 76624, Nov. 19, 1980; 51 FR 40637, Nov. 7, 1986; 55 FR 22684, June 1, 1990; 56 FR 3877, Jan. 31, 1991; 60 FR 25541, May 11, 1995; 75 FR 13004, Mar. 18, 2010]

§ 262.12 EPA identification numbers.

(a) A generator must not treat, store, dispose of, transport, or offer for transportation, hazardous waste without having received an EPA identification number from the Administrator.

(b) A generator who has not received an EPA identification number may obtain one by applying to the Administrator using EPA form 8700–12. Upon receiving the request the Administrator will assign an EPA identification number to the generator.

(c) A generator must not offer his hazardous waste to transporters or to treatment, storage, or disposal facilities that have not received an EPA identification number.

Subpart B—The Manifest

§ 262.20 General requirements.

(a)(1) A generator who transports, or offers for transport a hazardous waste for offsite treatment, storage, or disposal, or a treatment, storage, and disposal facility who offers for transport a rejected hazardous waste load, must prepare a Manifest (OMB Control number 2050–0039) on EPA Form 8700–22, and, if necessary, EPA Form 8700–22A, according to the instructions included in the appendix to this part.

(2) The revised manifest form and procedures in 40 CFR 260.10, 261.7, 262.20, 262.21, 262.27, 262.32, 262.34, 262.54, 262.60, and the appendix to part 262, shall not apply until September 5, 2006. The manifest form and procedures in 40 CFR 260.10, 261.7, 262.20, 262.21, 262.32, 262.34, 262.54, 262.60, and the appendix to part 262, contained in the 40 CFR, parts 260 to 265, edition revised as of July 1, 2004, shall be applicable until September 5, 2006.

(b) A generator must designate on the manifest one facility which is permitted to handle the waste described on the manifest.

(c) A generator may also designate on the manifest one alternate facility which is permitted to handle his waste in the event an emergency prevents delivery of the waste to the primary designated facility.

(d) If the transporter is unable to deliver the hazardous waste to the designated facility or the alternate facility, the generator must either designate another facility or instruct the transporter to return the waste.

(e) The requirements of this subpart do not apply to hazardous waste produced by generators of greater than 100 kg but less than 1000 kg in a calendar month where:

(1) The waste is reclaimed under a contractual agreement pursuant to which:

(i) The type of waste and frequency of shipments are specified in the agreement;

(ii) The vehicle used to transport the waste to the recycling facility and to deliver regenerated material back to the generator is owned and operated by the reclaimer of the waste; and

(2) The generator maintains a copy of the reclamation agreement in his files for a period of at least three years after termination or expiration of the agreement.

(f) The requirements of this subpart and § 262.32(b) do not apply to the transport of hazardous wastes on a public or private right-of-way within or along the border of contiguous property under the control of the same person, even if such contiguous property is divided by a public or private right-of-way. Notwithstanding 40 CFR 263.10(a), the generator or transporter must comply with the requirements for transporters set forth in 40 CFR 263.30 and 263.31 in the event of a discharge of

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2014, the foregoing Reply Brief Of Petitioners Carbon Sequestration Council, Southern Company Services, Inc., and American Petroleum Institute (Initial Brief) was served electronically through the Court's CM/ECF system on all registered counsel.

DATED: December 18, 2014 /s/Thomas Sayre Llewellyn