

**KEY ISSUES ON EPA'S PROPOSED REGULATORY REVISIONS TO
THE DEFINITION OF SOLID WASTE
FOR THE MINING & MINERAL PROCESSING INDUSTRY**

The mining and mineral processing industry has identified several key issues regarding the application of the U.S. Environmental Protection Agency's (EPA) proposed revisions to the Resource Conservation and Recovery Act (RCRA) regulatory definition of solid waste to the industry's use of secondary materials in its production processes. As proposed, EPA's revisions have the potential to expand EPA's current regulatory jurisdiction over the mining and mineral processing industry's production operations and thereby unnecessarily and unlawfully limit and curtail valuable recycling and reclamation.

The mining and mineral processing industry seeks targeted clarifications to ensure that the final rule is in fact deregulatory in nature and does not subject the industry to unwarranted RCRA regulation and enforcement. These clarifications are imperative for ensuring that the final rule does not subject the industry to regulatory uncertainty. Furthermore, these clarifications will ensure that the final rule in fact fulfills the statutory goal of encouraging safe, environmentally sound recycling and resource conservation.

**IMPACT ON MINING AND MINERAL PROCESSING INDUSTRY PRODUCTION
AND ASSOCIATED STORAGE**

Issue: EPA's proposed "generator control" and "transfer-based" exclusions require that secondary materials "managed" in "land-based units" be "contained." These proposed provisions, without further clarification, could jeopardize the regulatory status under RCRA of the mining and mineral processing industry's active land-based copper and gold leach stockpiles and associated land-based storage units in violation of RCRA and contrary to numerous EPA prior RCRA rulemakings. These units are critical elements of the mining and mineral processing industry's production operations in which a number of secondary materials generated within the industry, e.g., metal and acid streams, are reused to obtain the maximum recovery of target metals and minerals. The industry's management of in-process secondary materials in these units does not constitute discard. Thus, EPA has no authority under RCRA to require the management of these materials or the units themselves to be "contained."

Remedy: EPA should state in the preamble to the final rule that the conditional provisions on "land-based units" in the "generator control" and "transfer-based" exclusions do not apply to the mining and mineral processing industry's land-based production units, including copper and gold leach stockpiles. EPA rightfully disavowed jurisdiction over these land-based production units in the 1998 Phase IV land disposal restriction rule. EPA should disavow jurisdiction again in the final definition of solid waste rule.

Application of the "contained" standard to the storage of mineral processing materials prior to reclamation is unlawful under D.C. Circuit precedent. However, if EPA adopts a "contained" standard in the final rule applicable to land-based storage of secondary materials in the mining and mineral processing industry, as opposed to production, EPA should explicitly state in the preamble that facilities may demonstrate their compliance by relying on existing state regulatory programs that control or address releases, such as Arizona's Aquifer Protection Program, as proof that secondary materials when stored are adequately "contained."

APPLICATION OF THE PROPOSED LEGITIMACY CRITERIA TO THE MINING & MINERAL PROCESSING INDUSTRY

EPA proposes two criteria that facilities must "consider" in determining whether their recycling of secondary materials is legitimate (in addition to two "mandatory" criteria). If EPA codifies these two factors for consideration as proposed, and without providing further clarification, the mining and mineral processing industry faces regulatory uncertainty and the threat of increased and unwarranted regulation and enforcement.

Issue #1: Management of Secondary Materials as a Valuable Commodity: The first factor relates to whether a facility manages the secondary materials as a valuable commodity. A mining and mineral processing facility must either manage the secondary material in the same manner as analogous raw materials, or if no analogous raw materials exist, the secondary material must be "contained." By requiring "non-analogous" materials to be "contained," EPA is again interjecting an unlawful condition on the storage of non-discarded, in-process materials. To the extent that the mining and mineral processing industry's secondary materials are deemed to be "non-analogous," the industry's prior determinations by EPA and authorized State agencies that a recycling practice is legitimate could be called into question since containment has never previously been a prerequisite for being considered legitimate recycling. Consequently, this factor has the potential to unduly subject the industry to regulatory uncertainty and the risk of increased and unwarranted regulation and enforcement.

Remedy: EPA should eliminate this factor. To the extent it is adopted in some form, EPA should clarify that the mining and mineral processing industry's use of secondary materials is legitimate if the industry manages the secondary materials consistently with the industry's management of its raw materials. If EPA finalizes the "contained" standard, EPA should explicitly state in the preamble that a facility may use the storage unit's design elements, local and geological conditions, and state regulatory programs that control or address releases to demonstrate proof of "containment."

Issue #2: Management of Secondary Materials and "Toxics Along for the Ride": The second factor is "toxics along for the ride" (TAR). For the mining and mineral processing industry, the TAR factor is an inappropriate indicator of whether sham recycling is occurring. The recycling of in-process materials is intrinsic to mining and mineral processing production, as the industry seeks to maximize the recovery of the target metal(s) and mineral(s) present in the virgin ore. Any increase in the levels of non-target metals in a product that might result from the use of in-process secondary materials is not an indicator of sham recycling. The products produced in the mining and mineral processing industry meet rigid and technical specifications and/or contract requirements, which limit the amount of non-target metals that can be present in the product.

Remedy: EPA should explicitly state in the preamble to the final rule that products from the mining and mineral processing industry that meet industry specifications, even if they contain elevated levels of non-target metals, are examples of legitimate recycling.