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To Whom It May Concern:

We appreciate the opportunity to comment on the EPA's proposed revisions to the exclusions from the regulatory definition of solid waste.

The Clean Air Coalition of Western New York is a grassroots environmental health and justice organization based in Buffalo, New York. The organization's membership is composed primarily of residents of Tonawanda, New York. The town is heavily industrialized and is home to the world's largest sponge-making facility, a coal-burning power plant, a coke plant, several petroleum distribution terminals, two interstate highways and over 45 additional air permitted facilities. Tonawanda was determined an environmental justice zone by the New York State Department of Environmental Conservation.

As announced in the *Federal Register* at 76 FR 44094 (July 22, 2011), EPA is proposing to revise certain exclusions from the regulatory definition of solid waste. These exclusions apply to *hazardous secondary materials* intended for reclamation or recycling that would otherwise be regulated as hazardous wastes under the Resource Conservation and Recovery Act (RCRA).[1] The purpose of EPA's proposed revision is to encourage reclamation either "in a way that does not result in increased risk to human health and the environment from discarded hazardous secondary material"[2] or "in a way that protects human health and the environment from the mismanagement of hazardous secondary materials."[3] We generally support this goal but recommend certain changes in EPA's

[1] We note the distinction between "hazardous secondary materials," which are *not* classified as hazardous waste, and "hazardous recycled materials," which *are* (or *will be*) classified as hazardous waste. For the former, *see* definition in existing 40 CFR 260.10. For the latter, *see* proposed 40 CFR 261.6 and part 266 subpart D at 76 FR 44152-54 (July 22, 2011). As further explained by EPA at 76 FR 44096, footnote 1, "A hazardous secondary material is a secondary material (e.g., spent material, by-product, or sludge) that, when discarded, would be identified as hazardous waste under 40 CFR part 261. A hazardous recyclable material is a hazardous waste[ ] that is recycled. Unlike hazardous secondary materials, hazardous recyclable materials have clearly been discarded and therefore are always solid wastes."
[2] 76 FR 44094 (July 22, 2011).
[3] 76 FR 44095.

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proposed revision, particularly with respect to the existing exclusion given to *coke byproduct wastes* under 40 CFR 261.4(a)(10).

For many years, EPA has excluded certain materials from being regulated as *hazardous* waste by excluding them from the definition of *solid* waste.[4] The list of exclusions in 40 CFR 261.4 was relatively short when first issued in 1980[5] but has grown substantially over the years.[6] Many of the current exclusions are based on the concept that the material in question has not been discarded, and is therefore not waste, but is instead being *recycled* or *reclaimed*.[7] EPA, under its existing regulations, requires some evidence that such recycling is *legitimate* (not merely a sham)[8] and also sets up procedures to ensure that none of the material is discarded during the period when it is excluded from regulatory oversight.[9] Under the revisions now proposed, EPA would strengthen the requirements for demonstrating the legitimacy of recycling.[10] We generally agree with the need to strengthen the requirements. However, we are concerned that the currently proposed revisions would not adequately protect human health and the environment from toxic emissions created by the so-called recycling of coke byproduct wastes under 40 CFR 261.4(a)(10).

The proposed revision of the requirements for coke byproduct wastes under 40 CFR 261.4(a)(10) would merely change the word "recycled" to "legitimately recycled as specified in § 260.43 of this chapter."[11] This proposed change is not sufficient, as the legitimacy-of-recycling requirements in the proposed new language of 40 CFR 260.43 are only marginally protective when applied to the recycling of coke byproduct wastes. This

[4] The exclusion can be expressed in this indirect manner because hazardous wastes "are a subset of solid wastes" and "Materials that are not solid wastes are not subject to regulation as hazardous wastes under RCRA Subtitle C." 76 FR 44097. For more detail, *see* EPA's "History of the Definition of Solid Waste" at 76 FR 44097-103.
[5] *See* 45 FR 33119-20 (May 19, 1980).
[6] *Cf.* 1980 and 2011 editions of 40 CFR 261.4.
[7] 76 FR 44097-98 (July 22, 2011) provides a review of the court decisions that have helped shape the distinction between discarded waste materials and other materials that are being recycled or reclaimed.
[8] 76 FR 44117-19.
[9] *See* 76 FR 44094-154 generally for containment and notification requirements.
[10] 76 FR 44119-26.
[11] *Cf.* 76 FR 44151 (July 22, 2011) and 2011 edition of 40 CFR 261.4(a)(10).

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concern, and our related concerns about containment and notification, are discussed below in more detail.

1. *Four legitimacy factors are not sufficient for coke byproduct wastes.* In its overall regulatory approach,[12] and specifically in its proposed revision of 40 CFR 260.43,[13] EPA relies on four "factors" that must be met to demonstrate the legitimacy of recycling:

- Material being recycled must provide a *useful contribution* to the product or process.
- The recycling process must produce a *valuable product or intermediate*.
- Material being recycled must be managed/handled/stored as a *valuable commodity*.
- Product *must not be more toxic or hazardous* when made from recycled material rather than the analogous raw material.

However, when coke byproduct wastes are recycled in accordance with either the existing or proposed new requirements of 40 CFR 261.4(a)(10), *an additional legitimacy factor is needed* to protect human health and the environment from toxic emissions that occur as a result of the recycling:

- The process *must not release more toxic, hazardous, or noxious emissions* when conducted with recycled material rather than the analogous raw material.

For most other processes involving recycled materials, EPA may correctly assume that emissions are directly controlled by existing regulatory programs, permits, monitoring, etc., such that excessive emissions need not be considered here as a legitimacy factor. However, no such assurance exists for coke-oven emissions, which continue to be governed mainly by archaic measures such as inspectors looking at oven door leaks rather than numerical limits on emissions. These archaic measures are incorporated, for example,

[12] 76 FR 44117-26.
[13] 76 FR 44150-51.

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into Title V permits[14] and the Maximum Achievable Control Technology (MACT) standards for coke ovens.[15] Such indirect regulatory control provides no reasonable protection from excessive emissions when a relatively volatile recycled feedstock (tar sludge) is substituted for a substantial portion of the normal feedstock (coal) in a coke oven. Thus, we ask EPA to add a fifth legitimacy factor (based on comparability of emissions) to 40 CFR 260.43(a).

2. Even if EPA is unable to add a fifth legitimacy factor (based on comparability of emissions) to 40 CFR 260.43(a), we ask that this requirement be added to 40 CFR 261.4(a)(10) as a necessary condition for excluding the wastes listed there from the definition of solid waste.

3. EPA emphasizes in the *Federal Register* notice that it is "not reopening comment on any substantive provisions of the regulatory exclusions or exemptions."[16] We believe that *comparability of emissions* has been an implicit legitimacy factor for recycling, and that our request for this factor to be made explicit should not be construed as a substantive change in EPA policy. Alternatively, if EPA is unable to make comparability of emissions an explicit legitimacy factor for recycling, we ask EPA to specify *other ways to resolve the coke-oven emissions problem* that accompanies the recycling of wastes under 40 CFR 261.4(a)(10).

4. If EPA is unable to make comparability of emissions an explicit legitimacy factor for recycling in the context of this proposed rule, can EPA require *additional monitoring and enforcement* to resolve the coke-oven emissions problem that accompanies the recycling of wastes under 40 CFR 261.4(a)(10)? This could accomplish the same purpose but would not be ideal since the regulator would have the burden of demonstrating

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[14] For example, *see* NYS Department of Environmental Conservation permit 9-1464-00113/00031, issued April 30, 2002, to Tonawanda Coke Corporation.
[15] For example, *see* National Emission Standards for Hazardous Air Pollutants for Coke Ovens: Pushing, Quenching, and Battery Stacks, 71 FR 18008 (April 14, 2003); National Emission Standards for Coke Oven Batteries, 70 FR 19992 (April 15, 2005).
[16] 76 FR 44138 (July 22, 2011).

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noncompliance. The advantage of requiring comparability of emissions as one of the legitimacy factors is that it puts the burden of demonstrating and documenting legitimacy on the recycler.[17]

5. If EPA is unable to make comparability of emissions an explicit legitimacy factor for recycling in the context of this proposed rule, we ask EPA to address the possibility that its *containment requirement* can resolve the coke-oven emissions problem that occurs when materials such as tar sludge are recycled under 40 CFR 261.4(a)(10). EPA's containment requirement, including the new definition of "contained" in 40 CFR 261.10,[18] is mainly concerned with adequate containment of the recyclable material *prior to* the actual recycling process (in this case, prior to the moment the material is recycled to the coke ovens); however, the concerns about leaks, releases, and fugitive emissions are essentially the same. In our understanding, there is a substantial problem of volatilization at the point where materials are recycled back into the coke ovens in our community.[19] We base this conclusion on our own observations (as judged by many of our local residents' noses and burning eyes) coupled with agency reports of the time periods during which tar sludge is being added to the coke ovens. We believe this conclusion is logical based on the well-known presence of volatiles in the recycled material (tar sludge),[20] apparently in a more concentrated form than in the analogous raw material (coal). We cannot tell whether the noxious emissions associated with the recycled material occur mainly at the moment when it is loaded into the ovens or during the subsequent coking process of several hours – but, in either case, we request clarification of whether such

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[17] For example, *see* 76 FR 44125.
[18] 76 FR 44148-49.
[19] Tonawanda Coke Corporation, Tonawanda, NY.
[20] Coal tar sludge is a mixture of coal tar and carbonaceous particles (*see* D. Deer, H. Hatters, and F. Maddalena, "Alternative Disposal Routes for Tar-decanter Sludge and Other Tar Wastes Using the SKJ Process," *Iron & Steelmaker*, November 1987). Coal tar sludge thus either contains, or produces upon heating, a wide range of coal-tar constituents or derivatives including *coal tar pitch volatiles* (*see* ATSDR Tox Profile for Creosote at 17-19, esp. Fig. 2-1). Coal tar pitch volatiles have their own CAS number (65996-93-2) and pose a recognized health concern (for example, *see* www.cdc.gov/niosh/idlh/65996932.html).

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emissions can be construed as *lack of containment* that would disqualify the exclusion under 40 CFR 261.4(a)(10).

6. Similarly, if EPA is unable to make comparability of emissions an explicit legitimacy factor for recycling in the context of this proposed rule, we ask EPA to address the possibility that *one of its proposed legitimacy criteria* can resolve the coke-oven emissions problem that occurs when materials such as tar sludge are recycled under 40 CFR 261.4(a)(10). Proposed 40 CFR 260.43(a)(3) indicates that hazardous secondary materials *that are released to the environment and are not recovered immediately* are "discarded"[21] and therefore must be treated as hazardous waste under the existing rule and case law.[22] We request clarification of whether the volatile emissions described in the preceding paragraph fall within the meaning of "released to the environment and…not recovered immediately." In other words, we request clarification of whether such emissions would be interpreted as an instance of noncompliance with 40 CFR 260.43(a)(3) that would disqualify the exclusion under 40 CFR 261.4(a)(10).

7. EPA's "useful contribution" legitimacy factor under proposed 40 CFR 260.43(a)(1)[23] should explicitly limit the *concentration* of material that can be recycled without violating the requirement. It may seem obvious that this is the intended meaning, yet we see the potential for abuse without an explicit limit on the concentration (*e.g.*, on the amount of hazardous secondary material that can be legitimately recycled per unit quantity of product). As currently proposed, the concentration of hazardous secondary material needed to satisfy the "useful contribution" requirement in 40 CFR 260.43(a)(1) is unspecified and is thus apparently unrelated to the concentration that is allowed to be used. In some circumstances, including the recycling of materials such as tar sludge under 40 CFR 261.4(a)(10), there may be an economic incentive to maximize the concentration of material recycled as a means of avoiding disposal costs for that material. Limits

[21] 76 FR 44150.
[22] For example, *see* 76 FR 44097-98.
[23] 76 FR 44150-51; *see also* 44117-126.

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imposed by other legitimacy factors such as proposed 40 CFR 260.43(a)(4) (product hazard/toxicity limit) may not be effective in limiting feedstock concentrations of recycled material, especially when hazardous/toxic constituents are shifted to air emissions rather than the final product.

8. We are also concerned that materials slated for recycling to coke ovens in accordance with 40 CFR 261.4(a)(10) fall outside the scope of the additional protections (*e.g.*, notification, tracking, placarding, etc.) offered by the new rule.[24] In communities such as ours where coke ovens operate, we are concerned about the unmonitored transfer and transportation of materials slated for recycling to coke ovens. These materials do not appear to be well-characterized or routinely monitored by any agency under existing regulations, and we are concerned that the proposed new rule will maintain this status quo which puts our community at risk.

9. Even though materials slated for recycling to coke ovens in accordance with 40 CFR 261.4(a)(10) are *hazardous secondary materia*l, we are concerned that such materials brought to a coke oven from an offsite location which is not under common ownership with the coke oven *will not be subject to the new notification requirements* of proposed 40 CFR 260.42.[25] Because the proposed new notification requirements apply only to facilities operating under §§ 260.30, 261.4(a)(23) or part 266 subpart D, they do not appear applicable to materials brought to a coke oven for recycling from an offsite location which is not under common ownership with the coke oven.[26] We faced this circumstance when materials were brought to the coke ovens in our community (Tonawanda, NY) from the former coke-oven site in Lackawanna, NY, and apparently

[24] 76 FR 44110-112 and 44152-54.
[25] 76 FR 44150.
[26] Materials brought to a coke oven for recycling from an offsite location could conceivably be covered by a written tolling agreement, potentially making them subject to the proposed new notification requirements; however, the blanket exclusion given to materials slated for recycling to coke ovens under 40 CFR 261.4(a)(10) apparently serves as a disincentive for the waste generator and the receiving coke oven to enter into a tolling agreement, simply because the tolling agreement may create a regulatory obligation that does not otherwise exist.

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from other offsite locations as well. In our view, these materials should not be transported without regulatory oversight, with no safeguards against some of the material being lost, discarded, or emitted as volatiles.

10. For *hazardous recyclable materials*, EPA is proposing management "according to the current RCRA Subtitle C requirements, including manifesting and hazardous waste permits for storage…"[27] Even though materials slated for recycling to coke ovens in accordance with 40 CFR 261.4(a)(10) are not classified as hazardous recyclable materials, we believe they should be subject to the same level of monitoring, tracking, manifesting, placarding, etc., when they travel through our community. In view of the fact that "RCRA confers on EPA the authority to regulate discarded hazardous secondary materials even if they are destined for recycling and may be beneficially reused,"[28] we urge EPA to expand the coverage of the new rule to include materials slated for recycling to coke ovens. At a minimum, such materials should be subject to the new notification requirements, but we also urge EPA to close other "serious gaps that could create a potentially unacceptable likelihood of adverse effects to human health and the environment" when such materials are allowed to be transferred and transported without regulatory oversight. We are concerned about the lack of safeguards against some of the material being lost, discarded, or emitted as volatiles.

Sincerely,

Erin Heaney
Executive Director
Clean Air Coalition of WNY

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[27] 76 FR 44096.
[28] 76 FR 44097.