RECOVERING RCRA: HOW THE NINTH CIRCUIT MISCHARACTERIZED BURNING AGRICULTURAL BYPRODUCTS AS REUSE IN *SAFE AIR FOR EVERYONE v. MEYER*

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TABLE OF CONTENTS

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INTRODUCTION

Imagine a serene landscape with a grass field and one lone tree off in the distance.[1] Now imagine a billow of smoke coming from the field. Growers are burning the straw and stubble left in the fields after they harvest their crops. The burning helps fertilize the land and will make the future crops healthier.[2] Yet, the smoke from the burning creates severe respiratory problems for residents in areas surrounding the farms.[3] As a result of these negative health effects, burning provokes controversy.[4] Growers argue that the government should play a passive role and allow them to burn without regulation. Meanwhile, residents argue that the government should actively regulate open burning. The Ninth Circuit Court of Appeals addressed these issues in *Safe Air for Everyone v. Meyer* ("*Safe Air*").[5]

The Ninth Circuit established that government cannot play an active role in regulating the open burning of grass residue.[6] The court relied on the Resource Conservation and Recovery Act ("RCRA"). RCRA requires the disposition of all discarded waste to occur in an environmentally sound manner that does not adversely affect human health.[7] Material must fall under RCRA's definition of

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[1] This hypothetical is based on *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1043-45 (9th. Cir. 2004).

[2] *See id.* (describing benefits of burning grass residue to growers, including increasing sunlight to crops for better future yields); *see also infra* note 200 and accompanying text (describing benefits Growers attested to in *Safe Air*); *Grass Seed Industry Awaits Field Burning Season*, STORY OF THE WEEK, July 2, 2003, at 1, *available at* www.oda.state.or.us/information/news/2003/030702burn.pdf (last visited Jan. 4, 2004) (explaining that burning grass residue has helped growers control weeds, insects, and diseases, and explaining that in some areas, it is very difficult for growers to apply alternative measures); RICH FASCHING, BURNING STUBBLE: A FREQUENT QUESTION, AGRONOMY NOTES NO. 129 (1998), *available at* http://scarab.msu.montana.edu/agnotes/docs/129.htm (last visited Jan. 20, 2005) (explaining that burning reduces diseases and changes soil temperature and soil moisture to allow for nutrient availability).

[3] *Safe Air*, 373 F.3d at 1038; *see also infra* Part III.C (using California as example of negative health effects of burning); David Elstein, *Putting out the (Grass) Fire: ARS Scientists Use Other Methods to Curb Weeds, Diseases on Grass Fields*, AGRIC. RES., at 10 (Feb. 4, 2004), *available at* www.ars.usda.gov/is/AR/archive/feb04/fire0204.htm (last visited Jan. 4, 2004) (describing how reduced air quality caused by burning led to some states mandating limits on burning). Burning may also have long-term detrimental effects on soil quality. *See* FASCHING, *supra* note 2 (explaining that burning may: 1) remove extra vegetative material that would add humus and nitrogen to soil; and 2) destroy old vegetation in soil which allows for increased water holding capacity).

[4] *See infra* Part III.A-C (discussing benefits burning provides for growers, and environmental and health concerns about open burning).

[5] *Safe Air*, 373 F.3d at 1035-54.

[6] *See infra* Part II (describing Ninth Circuit's holding in *Safe Air*).

[7] *See* 42 U.S.C. § 6941 (2000) (stating Congress' objective of assisting in developing and encouraging methods for disposal of solid waste which are environmentally sound); *id.* § 6944 (describing criteria for sanitary landfills for solid waste); Meghrig v. KFC Western, Inc., 516 U.S. 479, 486 (citing 42 U.S.C. § 6902(b)) ("[The] national policy behind RCRA is 'to minimize the

solid waste before it is subject to RCRA's disposal requirements.[8] The Ninth Circuit held that grass residue is not solid waste.[9] The court determined that the Growers were not discarding the grass residue when they burned it and were thus not subject to RCRA.[10] This Note argues that the court not only misconstrued the definitions of solid waste and discarded material in RCRA, it also mischaracterized burning as a reuse.

This Note asserts that burning materials should not constitute reuse or recycling.[11] In addition, where reuse involves a process that is extremely harmful to the environment, RCRA should dictate how to manage the waste.[12] Part I introduces the background of RCRA and the subsequent Solid Waste Amendments.[13] It also describes the Environmental Protection Agency's ("EPA") regulations that interpret RCRA.[14] Finally, Part I discusses other court cases that the Ninth Circuit referred to in its decision.[15] Part II recounts the background, facts, holding, and rationale of *Safe Air for Everyone v. Meyer*.[16] Part III argues that the Ninth Circuit did not adhere to the United States Supreme Court's formula for deferring to agencies' interpretation of statutory language.[17] If it had, the court would have found that the grass residue was solid waste

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present and future threat to human health and the environment.'"); Ciba-Geigy Corp. v. Sidamon-Eristoff, 3 F.3d 40, 49 (2d Cir. 1993) (stating that Congress' primary purpose in creating RCRA was to protect public health and the environment); *see also* R. Michael Sweeney, *Reengineering RCRA: The Command Control Requirements of the Waste Disposal Paradigm of Subtitle C and the Act's Objective of Fostering Recycling – Rethinking the Definition of Solid Waste, Again*, 6 DUKE ENVTL. L. & POL'Y F. 1, 9 (1996) ("Presently, health and environmental protection are enforced as RCRA's 'paramount and overriding objective.'"). The Solid Waste Disposal Act was originally created in 1965 and was amended by the Resource Conservation and Recovery Act ("RCRA") in 1976. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 174-75 (4th ed. 2003). I will refer to the entire act and all subsequent amendments by its common name, RCRA.

[8] 42 U.S.C. §§ 6901-6992k; *see* PERCIVAL, *supra* note 7, at 185 ("RCRA's jurisdiction extends to 'solid waste.'").

[9] *Safe Air*, 373 F.3d at 1047.

[10] *See infra* Part II (describing how Ninth Circuit found Growers were immediately reusing grass seed instead of disposing it so that grass seed was not discarded material); *infra* Part III.A (explaining how Ninth Circuit used extrinsic aids in determining that grass seed was not discarded material). If a material is not discarded material within the definition of solid waste, it is not regulated by RCRA. *See infra* Part I.A (describing RCRA's regulatory scope).

[11] *See infra* Part III.C (explaining why burning materials should not be considered reusing them, and RCRA's aims of preventing such environmental harm resulting from waste management).

[12] *Id.*

[13] *See infra* Part I.A (describing statutory background of RCRA).

[14] *See infra* Part I.B (describing EPA's regulatory framework for solid waste).

[15] *See infra* Part I.C (describing cases Ninth Circuit referred to in *Safe Air*).

[16] *See infra* Part II (describing Ninth Circuit's analysis in *Safe Air*).

[17] *See infra* Part III.A (describing why Ninth Circuit should have used *Chevron's* two-step test in analyzing *Safe Air*).

pursuant to RCRA.[18] In addition, Part III maintains that managing waste by burning it is not a reuse.[19] Finally, Part III proposes that RCRA should regulate the reuse of solid waste where such reuse creates an environmentally harmful byproduct.[20]

I. BACKGROUND

RCRA only applies to materials that are solid waste.[21] However, the definition of solid waste in the statute is vague.[22] As a result, both the EPA and courts have had to interpret its meaning.[23]

A. Statutory Definition of Solid Waste

Congress created RCRA with the intent to encourage safe handling of solid waste.[24] RCRA divides solid waste into non-hazardous and hazardous wastes.[25] RCRA primarily focuses on hazardous wastes, creating a "cradle to grave" system of management.[26] Individual states have primary authority for regulating non-hazardous solid wastes under subtitle D of RCRA.[27] As a result, the EPA has limited enforcement authority over non-hazardous waste.[28]

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[18] *See id.* (applying *Chevron's* two-step test to facts of *Safe Air*).

[19] *See infra* Part III.B (describing why burning solid waste is not considered reuse under RCRA).

[20] *See infra* Part III.C (describing RCRA's aim for solid waste management that is performed in environmentally friendly manner that also protects public health).

[21] *See supra* note 8 and accompanying text (clarifying that RCRA only pertains to materials that are defined as solid waste).

[22] *See infra* Part I.A (describing definition of solid waste in statute).

[23] *See infra* Part I.A-C (describing ways in which EPA and courts have construed meaning of solid waste to apply to different materials).

[24] *See* 42 U.S.C. §§ 6901, 6902 (2000) (stating Congress' findings and objectives when it created RCRA).

[25] *See id.* §§ 6903, 6907, 6922, 6923, 6924 (describing regulations for hazardous and non-hazardous waste in RCRA); Jo Jeanne Lown, Note, *Eco-Industrial Development and the Resource Conservation and Recovery Act: Examining the Barrier Presumption*, 30 B.C. ENVTL. AFF. L. REV. 275, 289 (2003) (stating that RCRA divides solid waste into hazardous and non-hazardous wastes).

[26] RCRA regulates hazardous waste from the point it is generated to the point it is disposed. *See* 42 U.S.C. §§ 6921-6925 (detailing management system prescribed within RCRA for hazardous waste generators, hazardous waste transporters, and hazardous waste disposal); *see also* Philip L. Comella, *Understanding a Sham: When is Recycling, Treatment?*, 20 B.C. ENVTL. AFF. L. REV. 415, 420-27 (1993); Rachel Glickman et al., *Environmental Crimes*, 40 AM. CRIM. L. REV. 413, 447-48 (2003); Jesse R. Lee, *Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring* Programs, 20 AM. J. L. & MED. 251, 261 (1994) (explaining RCRA's cradle to grave system).

[27] *See* 42 U.S.C. § 6941 (describing how non-hazardous waste should be regulated); Lown, *supra* note 25, at 289 (explaining that individual states regulate non-hazardous waste pursuant to subtitle D of RCRA).

[28] Lown, *supra* note 25, at 289.

While individual states have primary authority for regulating non-hazardous solid waste, subtitle D outlines specific measures states must follow.[29] If non-hazardous solid waste is burned, then subtitle D takes effect.[30] These measures require states to adopt sanitary landfill requirements.[31] They also require states to disallow open dumping at sites not permitted as sanitary landfills.[32] States are to issue permits to facilities that comply with these and other state guidelines.[33] Before doing so, each state must first submit a State plan to the EPA for approval.[34] Among other specifications, State plans must require that all solid waste be disposed of in a sanitary landfill or in an environmentally sound manner.[35]

State plans that allow burning of solid waste would not comply with subtitle D guidelines. Burning solid waste is neither disposing it in a landfill nor in an environmentally sound manner.[36] Persons or industries may not dispose solid waste in a manner that presents an imminent and substantial endangerment to health or the environment.[37] Thus, a person who burns materials that are solid waste would violate these guidelines.

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[29] *See* 42 U.S.C. § 6942 (federal guidelines for plans); *id.* § 6943 (requirements for approval of plans); *id.* § 6944 (sanitary landfills criteria); *id.* § 6945 (upgrading of open dumps); *id.* § 6946 (procedure for development and implementation of State plans); *id.* § 6947 (approval of State plans); *see also* PERCIVAL, *supra* note 7, at 220-22 (detailing subtitle D's requirements); JOHN W. TEETS ET AL., BASIC PRACTICE SERIES: RCRA 11-12, 136 (ABA 2002-03) (explaining federal-state partnership with respect to solid wastes, and that RCRA's provisions primarily govern technical and operational requirements for non-hazardous solid waste).

[30] *See* 42 U.S.C. §§ 6941-6949 (regulating disposal of non-hazardous solid waste). In *Safe Air,* all parties agreed that the materials in question were non-hazardous, so the case focused solely on whether the grass residue was non-hazardous solid waste. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1041 (2004).

[31] 42 U.S.C. § 6944. Congress gave the EPA authority to establish sanitary landfill requirements. *Id.* However, Congress stated that, at a minimum, solid waste disposal at a sanitary landfill must have no reasonable probability of adverse effects on health or the environment. *Id.*

[32] *See id.* § 6943 (stating that State plans must prohibit establishment of new open dumps); *id.* § 6945 (requiring states to close or upgrade existing open dumps).

[33] *See id.* § 6941 (stating that RCRA objective of assisting in developing and encouraging methods for disposal of solid waste in environmentally sound manner which maximize utilization of valuable resources will be accomplished through implementation of State plans that meet minimum federal guidelines); *id.* § 6942 (stating minimum federal requirements for State plans); *id.* § 6943 (describing requirements for federal approval of State plans); *id.* § 6946 (identifying procedure states must follow when developing and implementing State plans); *id.* § 6947 (outlining EPA's role in approving State plans).

[34] *Id.* §§ 6941-6943.

[35] *Id.* § 6943; *see id.* § 6944 (detailing sanitary landfill requirements).

[36] *See infra* Part III.C (regarding environmental and health effects of burning agricultural waste).

[37] To prevail under RCRA's citizen suit provision, a plaintiff must establish that the defendant is "contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B) (2000).

Before burning materials, therefore, one must clarify whether or not those materials fit within RCRA's definition of solid waste. Determining whether a material is a solid waste is not straightforward, however. RCRA's definition of solid waste is broad.[38] In addition to specifically listed items, such as garbage and refuse, the definition includes "other discarded materials."[39] RCRA does not include agricultural grass residue in any of the specific items listed in the definition of solid waste.[40] Thus, the question of whether the grass residue constitutes solid waste under RCRA depends on the meaning of "other discarded materials."[41]

B. Regulatory Definition of Solid Waste

The EPA attempted to clarify the ambiguous language of the statute.[42] The EPA defined discarded material as any material which is abandoned, recycled, or inherently waste-like.[43] The definition of abandoned includes, among other things, materials that are burned.[44] In addition, while the regulations expressly provide some exemptions from the definition of solid waste, burning is not among them.[45] The Ninth Circuit did not rely on the EPA's regulatory definition, however. Instead, the court looked to other circuit decisions on the topic.[46]

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[38] *See id.* § 6903(27) (defining solid waste in RCRA).

[39] *Id.* The statute specifically lists solid waste as 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 . . . ." *Id.*

[40] *Id.*

[41] Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1041 (9th Cir. 2004).

[42] *See* United States v. ILCO, Inc., 996 F.2d 1126, 1131 (11th Cir. 1993) (stating that EPA attempted to fill statutory gap Congress left when it defined discarded material as any material that is "abandoned, recycled, or inherently wastelike" in 40 CFR § 261.2(a)(2) (1992)); Stuart O'Neal, Note, *The District of Columbia Circuit's New Found Vigilance over Costly Regulations Affecting the Petroleum Refining Industry:* United States Environmental Protection Agency v. the American Petroleum Institute, 12 VILL. ENVTL. L.J. 269, 269, 276-78 (explaining that RCRA empowers EPA to interpret meaning of solid waste under RCRA and EPA's definition supplements RCRA's definition).

[43] 40 C.F.R. § 261.2(a)(2) (2001); *see also* United States v. ILCO, Inc., 996 F.2d 1126, 1131 (11th Cir. 1993).

[44] *Id.* §§ 261.2(a)(2)(i), 261.2(b)(2).

[45] The EPA's regulations expressly provide that "solid waste" is "any discarded material that is not excluded" under 40 C.F.R. section 261.4(a) or by variance. *Id.* § 261.2(a)(1). Burning is not specifically excluded under this provision. *See id.* § 261.4(a) (listing all materials excluded from definition of solid waste). In addition, the regulations expressly list the "growing and harvesting of agricultural crops" which are returned to the soil as solid wastes that are not hazardous. *Id.* § 261.4(b)(2)(i).

[46] *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041-45 (9th Cir. 2004).

C. Judicial Interpretation

The Ninth Circuit relied on three cases in determining whether grass residue is solid waste: *American Mining Congress v. United States Environmental Protection Agency ("AMC I"), American Mining Congress v. United States Environmental Protection Agency ("AMC II"),* and *United States v. ILCO, Inc. ("ILCO").*[47] The D.C. Circuit Court's analysis of the meaning of solid waste in *AMC I* and *AMC II* followed a two-part test set forth by the United States Supreme Court in *Chevron v. Natural Resources Defense Council.*[48] The court in *AMC I* held that materials destined for beneficial reuse in an ongoing production process are not solid waste.[49] *AMC II* limited *AMC I's* decision to materials destined for immediate reuse.[50] In *United States v. ILCO,* the court further limited this exception to solid waste by asking whether the original owner of the materials is the one reusing them.[51] If so, then the materials are likely not solid waste.[52] If a salvager or reclaimer is reusing the materials, however, then they are more likely solid waste.[53] This part will first discuss *Chevron* and then will consider the three cases the Ninth Circuit relied on in its *Safe Air* analysis.

Chevron dictates how courts should analyze statutes where an agency has promulgated regulations that speak to an ambiguity in a statute.[54] In 1977, Congress passed amendments to the Clean Air Act that applied to states that had not yet achieved national air quality standards established by the EPA.[55] The amendments required those states to establish a permit program regulating new

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[47] *Id.* at 1043. The court also briefly discussed *Association of Battery Recyclers v. United States EPA,* 208 F.3d 1047 (D.C. Cir. 2000). *Id.* at 1042. *Association of Battery Recyclers* demonstrates how to apply *AMC I*'s holding to materials that have been reclaimed within a mineral process industry. *Id. Safe Air* involves a process entirely different from the mineral processing industry, and the Ninth Circuit only makes fleeting reference to this case. *Id.*

[48] *See* Am. Mining Cong. v. United States EPA *(AMC II),* 907 F.2d at 1186; Am. Mining Cong. v. United States EPA *(AMC I),* 824 F.2d at 1182-83.

[49] *AMC I,* 824 F.2d at 1186.

[50] *AMC II,* 907 F.2d at 1186.

[51] In *ILCO,* the court differentiated between *AMC I,* where the original owner was reusing the materials, to the facts of *ILCO,* where a reclaimer was buying previously discarded materials. United States v. ILCO, Inc., 996 F.2d 1126, 1132 (11th Cir. 1993). The court stated: "[p]reviously discarded solid waste, although it may at some point be recycled, nonetheless remains solid waste." *Id.* (citing Am. Petroleum Inst. v. United States EPA, 906 F.2d 729, 741 (D.C. Cir. 1990); *AMC II,* 907 F.2d at 1186-87).

[52] *Id.*

[53] *Id.*

[54] *See generally* Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) (describing how courts should determine specific issue when Congress is silent or ambiguous in explaining it).

[55] *Chevron,* 467 U.S. at 839-40.

or modified major stationary sources of air pollution.[56] The EPA then promulgated regulations to define the term stationary source.[57] In so doing, the EPA defined an existing plant that contained several pollution-emitting devices as one stationary source encased in a single bubble.[58] Environmental groups challenged the EPA's decision, claiming that the regulations were contrary to the legislative history and Congressional purpose of the amended Clean Air Act.[59]

The D.C. Circuit Court held in favor of the environmental groups and set aside the definition.[60] In reversing this decision, the Supreme Court established a two-part test to guide courts in reviewing an agency's construction of a statute which it administers.[61] First, courts must ask if Congress has directly spoken to the precise question at issue.[62] If it has, then the court must give effect to the intent of Congress.[63] However, if the statute is silent or ambiguous about the specific question at issue, then the court must determine if the agency made its interpretation based on a permissible construction of the statute.[64] A court must follow this two-part test and may not impose its own construction on the statute.[65]

Applying this test, the Supreme Court held that Congress did not have a specific intent regarding the applicability of the bubble concept.[66] The court then found that the EPA's regulatory use of the bubble concept was an appropriate and reasonable policy choice.[67] Thus, the court upheld the EPA's regulations. The two-part test announced in *Chevron* guides courts' decisions regarding statutory interpretation today.[68]

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[56] *Id.* at 840.

[57] *Id.* at 840-41.

[58] *Id.* at 840.

[59] *Id.* at 842.

[60] *Id.* at 841.

[61] *Id.* at 842-66.

[62] *Id.* at 842.

[63] *Id.*

[64] *Id.* at 843.

[65] *Id.*

[66] *Id.* at 845.

[67] *See id.* at 845-66 (describing how EPA interpreted statute and why it was permissible).

[68] The *Chevron* test requires courts to give an agency's reasonable interpretation of an ambiguous statute deference when Congress has delegated authority to the agency to make such a rule with the force of law. United States v. Mead Corp., 533 U.S. 218, 226-27 (2001); Christensen v. Harris County, 529 U.S. 576, 586-87 (2000); *see also* Thomas W. Merrill & John Paul Stevens, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 808 (2002) (citing *Harris* and *Mead* for proposition that *Chevron* test is appropriate in situations where Congress has delegated authority to agency to make rules with force of law, and agency has exercised this authority); *cf.* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 970 (1992) (arguing that Supreme Court does not regard *Chevron* as

AMC I followed the *Chevron* test to interpret the meaning of solid waste.[69] In *AMC I*, trade associations representing mining and oil refining interests challenged the scope of the EPA's final reuse and recycling rule.[70] This rule attempted to regulate secondary materials that are recycled back into the manufacturing process as solid waste.[71] The trade associations contended that the EPA's authority under RCRA only extends to materials that are discarded or intended for discard.[72] Since the materials were being reused within the production process, the trade associations argued that they were not discarded and thus not solid waste.[73]

The D.C. Circuit stated that because the EPA had issued regulations interpreting a statute, the court had to follow the two-part test established in *Chevron*.[74] Applying the first part of the *Chevron* test, the court found that Congress clearly intended to limit the EPA's regulatory jurisdiction to materials disposed of or abandoned.[75] Therefore, Congress did not intend for the EPA to regulate materials reused within an ongoing production process.[76] In so finding, the court held that Congress expressly limited the EPA's authority to regulate materials that are discarded, disposed of, thrown away, or abandoned.[77] The court found that materials destined for beneficial reuse or recycling in a continuous process by the generating industry itself are not solid waste.[78] As such, these materials are outside of the confines of RCRA.[79] Because Congress' intent was clear, the court did not reach the second part of the *Chevron* test. The

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universal test for determining when to defer to administrative interpretations); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 353-63 (1994) (providing data showing that courts are frequently turning to textualism approach rather than *Chevron* test).

[69] Am. Mining Cong. v. United States EPA (*AMC I*), 824 F.2d 1177, 1182 (D.C. Cir. 1987). *AMC I* is the leading decision regarding the definition of solid waste pursuant to RCRA. *See* O'Neal, *supra* note 42, at 278 (stating that *AMC I* is seminal case regarding definition of solid waste); Sweeney, *supra* note 7, at 22 (stating that *AMC I* is leading decision regarding definition of solid waste); *see also* Theresa Elliot et al., *Fourteenth Annual Pace National Environmental Law Moot Court Competition: Measuring Brief*, 20 PACE ENVTL. L. REV. 551, 553 (2002) (stating that *AMC I* set precedent for definition of solid waste).

[70] *AMC I*, 824 F.2d at 1178-80.

[71] *Id.* at 1178.

[72] *Id.* at 1180.

[73] *Id.*

[74] *Id.* at 1182.

[75] *Id.* at 1183-84.

[76] *Id.* at 1182-86.

[77] *Id.* at 1184. "Discarded," "disposed," "thrown away," and "abandoned" parallel the ordinary, plain-English meaning of "discarded." *Id.* at 1184; *see also* O'Neal, *supra* note 42, at 279.

[78] *AMC I*, 824 F.2d at 1186.

[79] *Id.*

court thus found for the trade associations.[80]

AMC II limited *AMC I*'s holding to materials destined for immediate reuse.[81] In *AMC II*, six processing companies challenged a 1988 EPA rule which relisted six wastes generated from metal smelting operations as hazardous.[82] The companies argued that relisting the waste was beyond the EPA's statutory authority.[83] Relying on *AMC I*, the companies argued that three of the six wastes were not discarded. Therefore, the companies reasoned, the wastes in question were not solid or hazardous waste within the meaning of RCRA.[84]

The D.C. Circuit Court held that *AMC I* did not apply to this case.[85] The court reasoned that the wastes in *AMC II* were disposed and not part of the ongoing industrial processes.[86] The court stated that if a material merely has the potential for reuse, then it may still be defined as a solid waste and therefore regulated by EPA.[87]

In reviewing the EPA's rule, the court again looked to the *Chevron* test.[88] First, the court asked whether Congress had directly spoken to the issue at hand.[89] The court held that Congress had not directly spoken to the issue of whether RCRA applies to the materials that the EPA had relisted as hazardous waste.[90] This involved asking whether Congress meant to consider wastes as discarded when the wastes are managed in land disposal units that are part of wastewater treatment systems.[91] The court found that these wastes were not part of the ongoing industrial processes and that Congress had not directly spoken to

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[80] *Id.* at 1187, 1192-93.

[81] Am. Mining Cong. v. United States EPA (*AMC II*), 907 F.2d 1179, 1186 (D.C. Cir. 1990). *American Petroleum Inst. v. EPA* limited *AMC I*'s holding by requiring that secondary products destined for reuse or recycling in a continuous process must be within the generating industry itself for *AMC I* to apply. Am. Petroleum Inst. v. United States EPA, 906 F.2d 729, 841 (D.C. Cir. 1990).

[82] *AMC II*, 907 F.2d at 1181. The six petitioners were: American Mining Congress, ASARCO Inc., the Aluminum Association, the Ferroalloys Assoc., Horsehead Resource Development Corp./Zinc Corp. of America, and Phelps Dodge Corp. *Id.*

[83] *Id.* at 1182. The companies also claimed that the EPA failed to offer adequate reasoned explanation for its decision, and that the EPA promulgated its decision without adequate opportunity for notice and comment. *Id.* The court found merit only in the companies' contention that the EPA did not adequately justify its decision. *Id.* The court remanded the proceedings for further consideration and explanation by the EPA with respect to the bases for relisting the specific wastes. *Id.* This Note is only concerned with the issue of statutory interpretation.

[84] *Id.* at 1184.

[85] *Id.* at 1186.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

this issue.[92]

The court then moved to the second part of the *Chevron* test.[93] The court considered whether the EPA's regulatory interpretation of discard as applied to the wastes in this case was a permissible construction of the statute.[94] The EPA found that hazardous materials, when placed in wastewater treatment surface impoundments, had the propensity to leak into the environment.[95] Because the waste materials had the ability to greatly harm the environment, such materials were a central focus of RCRA's regime.[96] Therefore, the EPA established such wastes to be discarded pursuant to RCRA.[97] The court held that this was a permissible construction of discard under RCRA.[98]

ILCO further limited *AMC I*'s holding by considering the recycler's identity.[99] In *ILCO*, defendant ILCO was a lead smelter that purchased old batteries and used them to produce lead ingots.[100] The production process included breaking open the batteries and removing the lead components, referred to as "plates and groups."[101] ILCO ran the lead plates and groups through its smelting process to produce lead ingots which ILCO then sold. [102] The EPA instituted an action against ILCO, alleging that ILCO violated RCRA and other environmental statutes.[103] The EPA asserted that the reclaimed lead plates and groups were waste products.[104] The lower court agreed and held that

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[92] *Id.*

[93] *Id.* at 1186-87.

[94] *Id.*

[95] *Id.* at 1187.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 1187.

[99] *See supra* note 51 and accompanying text (describing how court considered recycler's identity in its analysis).

[100] United States v. ILCO, Inc., 996 F.2d 1126, 1128-29 (11th Cir. 1993). A lead ingot is made from scrap lead products which are melted down to remove foreign matter and impurities, and converted into drum molds. Schnitzer Steel Prods. Co. v. United States, 45 Cust. Ct. 173, 182 (1960).

[101] ILCO placed incoming batteries in a reclamation process where it cracked them open and drained the sulfuric acid. *ILCO*, 996 F.2d at 1129. ILCO then chipped and washed the rubber or black plastic battery boxes to remove lead particles. *Id.* After that, ILCO removed the lead plates and groups from the broken batteries to run them through the smelting process. *Id.*

[102] *Id.* The process also produced other waste products, including waste acid, wastewater treatment sludge, broken battery casings, and emission control dust and blast slag from the smelting process. *Id.*

[103] *Id.* at 1128-29. The EPA charged ILCO with maintaining storage areas, as well as an incinerator and treatment tank that held hazardous waste, in violation of regulations applicable to their status as an interim facility. *Id.* EPA also charged ILCO with violating regulations pertaining to maintaining other storage facilities and a landfill without a requisite permit. *Id.*

[104] *Id.* at 1129.

the lead plates and groups were subject to RCRA regulations.[105]

ILCO appealed, claiming that they did not discard the lead plates and groups within the meaning of RCRA.[106] To fall within the meaning of discard, ILCO claimed that they would have to "finally and forever" dispose the lead plates and groups.[107] Since ILCO used the plates and groups in their production process, they argued that the plates and groups were recycled, not discarded.[108]

The Eleventh Circuit did not agree with ILCO and upheld the lower court's decision.[109] Citing *AMC I* and *AMC II,* the court explained that whether a material is recyclable is irrelevant to the determination of whether it is discarded.[110] According to the court, even though ILCO found value in components of the spent batteries, the battery itself was discarded.[111] As such, RCRA must regulate it.[112]

In finding that the EPA acted within its authority to regulate the spent batteries as hazardous waste, the court discussed RCRA's scope with respect to the identity of the person reusing the materials[113] The court determined that if the original owner is reusing the materials, then they are more likely not solid waste and are outside of the scope of RCRA.[114] If the original owner is reusing the material, then it follows that no one has discarded the materials at the time of reuse.[115] If, however, a salvager or reclaimer is reusing the materials, then they are more likely solid waste and subject to RCRA regulations.[116] When a

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[105] *Id.* at 1130. The lower court held that the plates and groups were solid waste but were not subject to RCRA's regulations regarding hazardous waste. *Id.* The Eleventh Circuit held that the plates and groups were not only solid waste but were hazardous as well. *Id.* at 1132. Thus, the plates and groups were subject to RCRA regulations governing the storage, disposal, and treatment of hazardous waste. *Id.* at 1130.

[106] *Id.* at 1132.

[107] *Id.*

[108] *Id.* at 1131.

[109] *Id.* at 1132. The Eleventh Circuit referred to *AMC II,* claiming that if the court were to rule otherwise, materials that had the potential to be recycled would never be considered solid waste. *Id.* The Eleventh Circuit affirmed the district court's decision in every respect with one exception. *Id.* The circuit court reversed the lower court's determination that the lead plates and groups are "raw materials," and instead held them to be "hazardous waste." *Id.*

[110] *Id.* at 1132.

[111] *Id.*

[112] *Id.* at 1131-32.

[113] *Id.* at 1131.

[114] *Id.* at 1132. The court differentiated between *AMC I,* where the original owner was reusing the materials, to the facts at hand where a reclaimer was buying previously discarded materials. *Id.* According to the court, "[p]reviously discarded solid waste, although it may at some point be recycled, nonetheless remains solid waste." *Id.* (citing Am. Petroleum Inst. v. United States EPA, 906 F.2d 729, 741 (D.C. Cir. 1990); Am. Mining Cong. v. United States EPA *(AMC II)*, 907 F.2d 1179, 1186-87 (D.C. Cir. 1990)).

[115] *Id.*

[116] *See supra* note 51 and accompanying text (describing difference between original owner

salvager reclaims the spent materials, it is usually after the original owner has discarded them.[117] The identity of the person reusing the materials, therefore, is an important element in determining whether such materials should be regulated under RCRA.

AMC I, AMC II, and *ILCO* are helpful in determining how courts approach the question of whether a material is a solid waste pursuant to RCRA.[118] *AMC I* and *AMC II* also illustrate how courts have used the two-part *Chevron* test in analyzing RCRA's vague definition of solid waste and discarded materials.[119] Although these cases are helpful in determining the meaning of solid waste, discarded materials, and reuse, they do not specifically address agricultural waste.[120] As a result, they are not dispositive on the specific issue of whether burning agricultural waste is reuse.

II. SAFE AIR FOR EVERYONE V. MEYER

The Ninth Circuit relied on *AMC I, AMC II,* and *ILCO* in *Safe Air for Everyone v. Meyer* to determine whether RCRA applied to the open burning of grass residue.[121] In making its decision, the court addressed whether the grass residue was discarded and thus solid waste under RCRA when it was burned.[122] However, unlike the courts in *AMC I, AMC II,* and *ILCO*, the court did not consider the EPA's regulations addressing the issue.[123]

Safe Air for Everyone ("Safe Air") is a non-profit organization made up of individuals concerned about detrimental health effects from the open burning of agricultural residue.[124] Safe Air filed suit against a group of Kentucky bluegrass growers ("the Growers").[125] The Growers use open field burning to dispose of

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reusing material and someone who buys previously discarded material to use in production process).

[117] *Id.*

[118] The Ninth Circuit referred to these cases in determining whether the grass residue is solid waste pursuant to RCRA. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1041-43 (9th Cir. 2004).

[119] *See supra* notes 74-80, 87-97 and accompanying text (describing how D.C. Circuit followed *Chevron* test in determining whether EPA's interpretation of solid waste was permissible in *AMC I* and *AMC II*).

[120] The cases specifically address materials that are neither byproducts of nor related to agriculture. *See infra* Part I.C (describing facts of each case).

[121] *Safe Air*, 373 F.3d at 1037.

[122] *Id.* at 1043-45.

[123] *See infra* Part III.A (explaining that Ninth Circuit did not look to EPA's regulations and arguing that it should have done so).

[124] *Safe Air*, 373 F.3d at 1037-38. Safe Air is composed of individuals from northern Idaho, Washington, and Montana. *Id.* at 1038. Safe Air contends that smoke resulting from open burning "endangers the public because it contains high concentrations of pollutants that create severe respiratory problems for residents in areas immediately surrounding bluegrass farms." *Id.*

[125] *Id.* at 1038.

the straw and stubble that remain after the Growers harvest the grass seed.[126] Safe Air wanted to prevent the Growers from open field burning, claiming that the Growers violated RCRA.[127]

Safe Air filed a complaint in the United States District Court for the District of Idaho, alleging that the Growers violated RCRA by engaging in open burning.[128] Safe Air also sought a preliminary injunction enjoining the Growers from engaging in open burning.[129] To prevail, Safe Air had to establish that the Growers contributed to the disposal of solid waste in a way that presented an imminent and substantial endangerment to health or the environment.[130] Therefore, the case turned on whether the bluegrass residue was solid waste and whether the Growers discarded it within the meaning of RCRA.[131]

The district court held an evidentiary hearing on Safe Air's request for a preliminary injunction.[132] After hearing the testimony of twenty-three witnesses, the district court dismissed Safe Air's complaint.[133] The court held that it did not have jurisdiction to resolve Safe Air's RCRA claim because the grass residue did not constitute a solid waste under RCRA.[134] Safe Air appealed

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[126] *Id.* In Idaho, growers of Kentucky bluegrass pick the seeds when the plants are fifteen to thirty-six inches tall. *Id.* at 1037. To harvest the seed, growers cut the crop close to the ground and prepare it for combining (separating seed from crop). *Id.* The head of the crop is dried out and ripened by a curing process. *Id.* After the curing process is finished, the seed is separated from the straw by a combine. *Id.* The straw is left on the field. *Id.* Stubble, the part of the crop that is not cut from the ground, is also left on the field. *Id.* The seed is then prepared for commercial distribution but the straw and stubble remain in the field. *Id.* Bluegrass growers then use "open burning" to burn the straw and stubble. *Id.* Depending on the productive life of each field, bluegrass growers can repeat this process for several years. *Id.*

[127] *Id.* at 1038.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 1041. Under 42 U.S.C. § 6972(a)(1)(B) (2000), in order to prevail, Safe Air had to establish that the Growers were contributing to the "handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." *Id.* Neither of the parties argued that the straw and stubble was hazardous waste. *Id.* The Growers were not storing, treating, or transporting the waste. *See id.* at 1037 (describing how Growers burned residue instead of storing, treating, or transporting it). Thus, the primary issue was whether the straw and stubble were "solid waste" within the meaning of RCRA. *Id.* at 1041.

[131] *Id.* at 1041.

[132] *Id.* at 1038.

[133] *Id.*

[134] *Id.* The Growers filed a motion to dismiss the complaint due to lack of subject matter jurisdiction. *Id.* The District Court construed this motion to dismiss as proceeding under Federal Rule of Civil Procedure 12, and granted the motion under Rule 12(b)(1). *Id.* In addition to its argument that the court misconstrued the jurisdictional issue of whether grass residue is "solid waste" under RCRA, Safe Air also claimed that the district court erred in granting the Growers' motion to dismiss. *Id.* Because the court held an evidentiary hearing and heard outside testimony, Safe Air argued that the court should have converted the motion to dismiss into a summary judgment motion under Rule 56. *Id.* The Ninth Circuit did not agree with Safe Air. *Id.* The Ninth Circuit

to the Ninth Circuit.[135]

The Ninth Circuit granted summary judgment for the Growers.[136] The court held that the Growers did not discard the bluegrass straw but instead reused it immediately in a beneficial way.[137] As such, the straw and stubble were not solid waste pursuant to RCRA.[138]

To reach its conclusion, the court discussed the language of the statute. Because RCRA includes discarded materials from agricultural operations in its definition of solid waste, the court initially had to determine the meaning of discard.[139] To accomplish this, the court looked to the dictionary definition of discard for its ordinary meaning.[140] The dictionary defined discard as to abandon or give up.[141] Normally, when courts look to the ordinary meaning of words to determine their scope, they stop their search at the dictionary.[142] The Ninth Circuit, however, did not stop its inquiry there. Instead, the court looked both to other circuit courts' decisions and to legislative history to define discard

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held that the district court was not obligated to convert the Growers' motion to dismiss into a motion for summary judgment based exclusively on the fact that it reviewed evidence outside the complaint. *Id.* This Note focuses solely on the second issue, the court's treatment of the issue of grass residue as a solid waste under RCRA.

[135] *Id.*

[136] *Id.* at 1038-48. The district court found for the Growers by dismissing the case for lack of subject matter jurisdiction. *Id.* at 1040. The Ninth Circuit held that the district court erred in characterizing its dismissal as one for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Id.* The court stated:

> "[t]he jurisdictional issue and substantive issues in this case are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits . . . . Whether Safe air alleged a claim that comes within RCRA's reach goes to the merits of Safe Air's action."

Id. Thus, the Ninth Circuit reviewed the district court's decision as if it were a grant of summary judgment on the merits for the Growers and affirmed. *Id.*

[137] *Id.* at 1037-47. The Ninth Circuit held that Safe Air failed to demonstrate that a genuine issue of material fact existed as to whether grass residue is "solid waste" under RCRA. *Id.* at 1037.

[138] *Id.* at 1046-47.

[139] *Id.* at 1041. "Solid waste" is defined in RCRA as "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 materials resulting from industrial, commercial, mining, and *agricultural operations* . . . ." 42 U.S.C. §6903(27) (2000) (emphasis added).

[140] *Safe Air*, 373 F.3d at 1041.

[141] *Id.* (citing New Shorter Oxford Dictionary which defined "discard" as to "cast aside; reject; abandon; give up"). *See* 1 NEW SHORTER OXFORD DICTIONARY 684 (4th ed. 1993).

[142] *Safe Air*, 373 F.3d at 1049 (Paez, J., dissenting); *see also* Paul E. McGreal, *Slighting Context: On the Illogic of Ordinary Speech in Statutory Interpretation*, 52 U. KAN. L. REV. 325, 327 (2004) (stating that, where statute's meaning can be determined from ordinary meaning of its text, it would be contrary to approach of textualism to use extrinsic aids); William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L.J. 865, 865 (1993) (stating that text-based approach to interpreting statutes looks exclusively at words of statute).

and solid waste.[143]

The court found three considerations for determining the scope of solid waste from *AMC I*, *AMC II*, and *ILCO*: 1) whether the generating industry would beneficially reuse or recycle the material in a continuous process; 2) whether the materials are actively reused, as opposed to merely having the potential for reuse; and 3) whether the original owner is reusing the materials.[144] To address the first factor, the court looked to outside sources. The court found that the reuse was beneficial to the new bluegrass harvests based on witness testimony.[145] The witnesses claimed that burning the grass helps restore nutrients to the soil and maximizes the soil's sunlight absorption which increases future crop yields.[146] The witnesses also testified that burning the grass extends the productive life of future fields, and reduces insects which reduces the need for pesticide use.[147] Based on this witness testimony, the court concluded that the Growers were beneficially reusing the grass residue when they burned it.

The court more easily addressed the second and third considerations. For the second factor, the court decided that when the Growers burned the grass residue, they were immediately and actively reusing it.[148] Under the third factor, the court found that because the Growers grew the grass themselves, they were the original owners and the generating industry of the grass.[149] Thus, the court found that the original owners were reusing the materials themselves. According to the court, when the Growers burned the grass residue, they were reusing the material in an ongoing process.[150] The court, therefore, found that the Growers met the three considerations.[151] As a result, the court held that the

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[143] *Safe Air*, 373 F.3d at 1041-43. The Ninth Circuit looked to *AMC I, AMC II,* and *ILCO* in formulating three factors to consider in determining the scope of solid waste. *Id.* at 1043.

[144] *See id.* at 1043 (citing Am. Mining Cong. v. United States EPA (*AMC I*), 824 F.2d 1177, 1186 (D.C. Cir. 1987) to evaluate whether material is "destined for reuse or recycling in a continuous process by generating process itself"); *id.* (citing Am. Mining Cong. v. United States EPA (*AMC II*), to evaluate whether "the materials are being actively reused, or whether they merely have the *potential* of being reused"); *id.* (citing United States v. ILCO, Inc., 996 F.2d 1126, 1131 (11th Cir. 1993) to determine whether "materials are being reused by its original owner, as opposed to use by salvager or reclaimer"); *see also infra* Part I.C (describing *AMC I* case); *infra* Part I.C (describing *AMC II* and *ILCO* cases).

[145] *Safe Air*, 373 F.3d at 1043. It is also unusual for a court to use witness testimony in its discussion of finding the ordinary meaning of a word. *See supra* note 142 (explaining that text-based approach does not involve using any extrinsic aids).

[146] *Safe Air*, 373 F.3d at 1043-44.

[147] *Id.*

[148] *Id.* at 1043-46.

[149] *Id.*

[150] *Id.* at 1043-45.

[151] *Id.*

grass residue was not disposed, and was thus not solid waste.[152]

The court also used legislative history to reinforce its position that Congress did not intend to regulate grass residue as solid waste.[153] Congress was concerned about the growing problems of landfills resulting from the mismanagement of waste products.[154] Congress' major objective in enacting RCRA was to increase reclamation and reuse practices.[155] In addition, the court noted that Congress declared agricultural products which are returned to the soil as fertilizers or soil conditioners to be outside RCRA's scope.[156] The Ninth Circuit concluded that the bluegrass residue was the type of agricultural product that Congress wanted to exclude from regulation.[157]

In sum, the court held that the Growers were not discarding the bluegrass residue because the Growers were beneficially reusing the residue. Therefore, the residue was not solid waste pursuant to RCRA. The court concluded that holding otherwise would be contrary to legislative intent. The court, however, did not follow the approach required by the United States Supreme Court in *Chevron* to define the terms discard and solid waste. As a result, the court's decision is flawed.

III. ANALYSIS

The Ninth Circuit should have deferred to the EPA's regulations addressing the burning of agricultural waste when it decided *Safe Air*.[158] Its failure to do so resulted in a decision that is both bad policy and contrary to legislative intent.[159] Subsection A of this part argues that the Ninth Circuit should have followed the

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[152] *Id.* at 1043-47.

[153] *See id.* at 1045-46 (detailing court's discussion of legislative history in its analysis).

[154] One of RCRA's objectives is to prohibit future open dumping on land and require the conversion of existing open dumps to sanitary landfills, which do not pose a danger to the environment or to health. 42 U.S.C. § 6902(3) (2000); *see also supra* note 7 (explaining that Congress' primary purpose in creating RCRA was to protect public health and environment); *infra* Part III.A-C (discussing Congress' intent in creating RCRA).

[155] *Id.*

[156] *Safe Air*, 373 F.3d at 1045 (citing H.R. REP. NO. 94-1491, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6239-41).

[157] *Safe Air*, 373 F.3d at 1046. Safe Air argued that RCRA's legislative history is unpersuasive because agricultural products can be mulched and returned to the soil in a safe manner. *Id.* at 1046 n.13. Safe Air argued that when the Growers burned the straw and stubble, some of the residue was being carried into the air while only part of it was being returned to the soil. *Id.* The court did not agree, and held that "the determination of whether grass residue has been 'discarded' is made independently of *how* the materials are handled." *Id.* As such, the residue is not automatically discarded when a portion of it becomes airborne smoke. *Id.*

[158] *See infra* Part III.A (arguing that Ninth Circuit should have followed *Chevron* test and deferred to EPA's regulations defining solid waste).

[159] *See infra* Part III.B-C (describing Congressional intent).

two-part *Chevron* test when it decided *Safe Air*.[160] Subsection B argues that the Ninth Circuit's decision was also mistaken because burning is not a reuse within the meaning of RCRA.[161] Finally, subsection C analyzes the policy implications of the Ninth Circuit's decision.[162] Subsection C contends that any time a proposed reuse has negative environmental effects, it should fall under RCRA's scope.[163]

A. Looking Beyond the Plain and Ordinary Meaning: The Regulations Should Guide the Court's Determination of Solid Waste

The Ninth Circuit claimed it followed established principles of statutory construction in its decision.[164] The court stated that interpreting the plain and ordinary meaning of discard and solid waste within RCRA was the appropriate starting place in its analysis.[165] However, instead of interpreting the ordinary meaning of these words, the court looked to other circuit courts' interpretations.[166] Under *Chevron*, the court must defer to an agency's interpretation of the statute, rather than to other circuit courts' decisions.[167] Because the EPA had established regulations pertaining to the issue at hand, the court should have looked to those regulations in its decision.[168]

Instead of looking to the plain and ordinary meaning of the statute, under *Chevron*, the court must first consider whether Congress addressed the specific issue.[169] Proponents of the *Safe Air* decision might argue that because the

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[160] *See infra* Part III.A (arguing that Ninth Circuit should have followed *Chevron* test).

[161] *See infra* Part III.B (arguing that Congress did not intend for burning to escape RCRA's jurisdiction).

[162] *See infra* Part III.C (discussing policy implications of *Safe Air* decision).

[163] *See infra* Part III.C (arguing that RCRA should regulate all forms of solid waste management that are environmentally harmful or damaging to public health, even if they constitute reuse).

[164] *Safe Air*, 373 F.3d at 1041.

[165] *Id.*

[166] *Id.* at 1041-42.

[167] *See infra* Part I.C (discussing *Chevron* holding).

[168] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984). In *Chevron*, the United States Supreme Court held that if Congress has not directly addressed the precise question at issue, then a court should not impose its own construction on the statute as it would if there were no administrative interpretation. *Id.* The court stated: "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

[169] *See id.* at 842. *Chevron* deference must be given to an agency's reasonable interpretation of a statute when Congress has delegated authority to the agency to make such a rule with the force of law. *See supra* note 68 (introducing this rule). RCRA required the EPA to promulgate regulations regarding solid waste with the force of law. *See* 42 U.S.C. § 6907 (2000) (requiring EPA Administrator to establish guidelines for solid waste management); *see also* Lown, *supra* note 25, at 289 (explaining RCRA's requirements of EPA to promulgate regulations to carry out various RCRA provisions); Elliott, *supra* note 69, at 583 (stating that Congress delegated authority to EPA to make

administrative regulations were not before the court, the court was not bound to use the *Chevron* test. The Growers were not contesting the EPA's regulations, so that they were not at issue in the case.[170] Instead, the Growers were contesting the scope of RCRA. As such, proponents would say that the administrative regulations were not before the court, so that the court was not bound by *Chevron.* Instead, the court was supposed to follow statutory rules of construction, as it did.[171] This argument, however, fails.

The EPA was within its power to create regulations pertaining to RCRA.[172] When Congress leaves a gap for an agency to fill, it delegates authority to the agency to define the scope of a specific provision in the statute.[173] In such a case, a court must defer to the agency's reasonable interpretation rather than substitute its own statutory construction for the agency's.[174] Therefore, the Ninth Circuit should have considered the EPA's regulations in its decision.

Under the first part of the *Chevron* test, the Ninth Circuit should have considered whether Congress' intent was clear.[175] The court should have asked whether Congress clearly intended for discarded material to include agricultural wastes that are burned.[176] Congress was not clear when it enacted RCRA. The statute is ambiguous as to whether discarded material includes agricultural wastes that are burned. The statutory language implies that it includes agricultural waste materials.[177] The statute states that solid waste includes discarded material resulting from agricultural operations.[178] It is not clear, however, whether Congress considered agricultural materials that are burned to

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rules carrying force of law in RCRA). In addition, RCRA's definitions of solid waste and disposal are ambiguous. *See infra* Part I.A (describing how these definitions are ambiguous). Therefore, because RCRA is ambiguous and gave the EPA the power to promulgate regulations with the force of law, the Ninth Circuit should have used the two-part *Chevron* test.

[170] There are no EPA regulations at issue in *Safe Air*. *See Safe Air,* 373 F.3d at 1035-47. The Growers were not contesting the EPA's regulations, but rather were saying that RCRA did not apply to them at all. *Id.*

[171] *See id.* at 1041 (describing court's analysis of statutory rules of construction); *see also infra* Part II (recounting court's application of plain and ordinary meaning of discard to its analysis).

[172] *See* note 170 and accompanying text (explaining that Congress gave EPA authority to carry out RCRA provisions).

[173] *Chevron*, 467 U.S. at 843-44. The delegation of authority may be explicit or implicit. *Id.*

[174] *Id.* Also note that the D.C. Circuit stated in *AMC I* that the ordinary or plain meaning is "not necessarily determinative." Am. Mining Cong. v. United States EPA (*AMC I*), 824 F.2d 1177, 1184 (D.C. Cir. 1987). The court went on to state that while they would consider the ordinary meaning of "discarded," it was not conclusive. *Id.* at 1185.

[175] *See infra* Part I.C (describing and explaining *Chevron* test).

[176] *See id.* (describing *Chevron* test); *infra* Part II (explaining that primary issue in *Safe Air* was whether definition of discarded material in RCRA included burning grass residue).

[177] The definition of solid waste includes "*any* . . . discarded material resulting from . . . agricultural operations . . . ." 42 U.S.C. § 6903(27) (2000).

[178] *Id.*

benefit future crops as discarded.[179]

Because Congress' intent was unclear, the court should have considered next whether the EPA's regulations were a reasonable interpretation of the statutory provision.[180] The EPA's regulations define solid waste as any discarded material not excluded under the statute or by variance.[181] Agricultural residue is not among those exclusions listed in the statute.[182] The regulations also state that materials generated by the growing and harvesting of agricultural crops which are returned to the soils as fertilizers are solid wastes.[183] In addition, the regulations include burning within the definition of discard.[184] Therefore, the regulations indicate that the grass residue is within the meaning of solid waste and discard for purposes of RCRA. Thus, the EPA's regulations are a reasonable interpretation of RCRA.

Under *Chevron,* courts should defer to an agency's reasonable interpretation of a statute unless the regulations are arbitrary, capricious, or manifestly contrary to the statute.[185] Congress enacted RCRA to encourage the safe handling of waste.[186] The EPA was merely filling in a statutory gap dealing with agricultural products in a manner that was consistent with this Congressional intent.[187] Therefore, the court should have deferred to the EPA's regulations.

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[179] This is especially true after *AMC I* and *AMC II,* where the court construed Congressional intent so as not to include materials that are actively reused in a continuous process by the generating industry itself. *See infra* Part I.C (describing those cases). By construing the ordinary meaning of discard, the court would consider whether the Growers had "drop[ped], dismiss[ed], let go or g[o]t rid of as no longer useful, valuable or pleasurable the post-harvest crop residue." *Id.* Safe Air presented evidence that it was necessary for the grass residue to be removed from the fields so that sunlight could permeate the soil for the new crop. *Id.* The Growers agreed that the residue had to be removed from the fields to maintain seed production and to limit insects and parasites that would otherwise make the field their home. *Id.*

[180] This is the second part of the *Chevron* test. *See infra* Part I.C (describing two-part *Chevron* test).

[181] 40 C.F.R. § 261.2(a)(1) (2001). The EPA's regulations specifically say that solid waste is "any discarded material that is not excluded under 40 C.F.R. section 261.4(a)." *Id.*

[182] *See* 40 C.F.R. § 261.4(a) (listing all materials excluded from definition of solid waste).

[183] 40 C.F.R. § 261.4(b)(2)(i). The regulations make this statement to differentiate solid wastes from hazardous wastes, exempting agricultural crops which are returned to the soil as fertilizer from the definition of hazardous waste. *Id.*

[184] 40 C.F.R. §§ 261.2(a)(2)(i), 261.4(b)(2).

[185] Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984).

[186] PERCIVAL ET AL., *supra* note 7, at 175-79.

[187] *See generally Chevron,* 467 U.S. at 848 (discussing how EPA filled gap left by Congress' amendments to Clean Air Act when it created regulations). In *Chevron,* the Supreme Court found that the EPA acted reasonably when it created its regulations interpreting the statute's meaning. *Id.* As a result, the Supreme Court deferred to the EPA's regulations. *Id.* Similarly, the EPA was acting consistently with Congressional intent when it enacted regulations regarding the burning of solid waste. *See infra* pp. 37-38 (describing why EPA's regulations are consistent with Congressional intent).

Instead of turning to the plain and ordinary meaning of discard to define solid waste, the Ninth Circuit should have followed the *Chevron* test. If it had done so, the court would have deferred to the EPA's regulations defining agricultural waste that is burned as solid waste.[188] The court's failure to follow case law, however, was not the only problem in its decision in *Safe Air.*

B. Agricultural Burning is Not Reuse

The court's decision is also flawed because it mischaracterized burning as a reuse. Courts have struggled with whether to classify reused materials as solid waste.[189] The *AMC I* court determined that materials destined for beneficial reuse in an ongoing process by the generating industry itself were not solid waste.[190] Referencing *AMC I,* the Ninth Circuit declared that the Growers were reusing the grass residue when they burned it.[191] As a result, the court found that the grass residue was not discarded and was thus not solid waste.[192]

In asking whether burning the grass was reuse, however, the court turned to the issue of whether such burning was beneficial to the Growers.[193] The court should not have considered such benefits in making its decision.[194] The court likened the burning process to the processes in *AMC I, AMC II,* and *ILCO,* but those cases involved different practices than burning.[195] The byproducts involved in those cases were beneficial before they were processed, rather than after it.[196] Finally, a process involving burning waste products was exactly what Congress intended to avoid when it created RCRA.[197] Congress' aim in RCRA

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[188] *See infra* pp. 37-39 (describing why Ninth Circuit should have deferred to EPA's regulations under *Chevron* test).

[189] *See infra* Part I.C (discussing how three courts analyzed whether reused materials should be classified as solid waste).

[190] Am. Mining Cong. v. United States EPA (*AMC I*), 824 F.2d 1177, 1186 (D.C. Cir. 1987).

[191] Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1043-47 (9th Cir. 2004).

[192] *Id.* at 1047.

[193] *See id.* at 1043-47 (discussing witness' testimony about whether burning grass was beneficial for Growers).

[194] For example, in *United States v. Marine Shale Processors,* the defendant claimed that contaminated soil was not solid waste because the defendant was beneficially reusing it as feedstock. United States v. Marine Shale Processors, 81 F.3d 1361, 1366 (5th Cir. 1996). The Fifth Circuit rejected the defendant's argument, holding that the district court should have allowed the jury to consider whether the defendant's burning activity amounted to sham recycling. *Id.* In *United States v. Self,* the Tenth Circuit did not dispute that the burning of secondary materials generally amounts to a discard. United States v. Self, 2 F.3d 1071, 1077-79 (10th Cir. 1993). In that case, the court agreed with the EPA that the statutory definition of solid waste generally allows the EPA to regulate materials being recycled. *Id.*

[195] *See infra* Part I.C (describing processes in those cases).

[196] In each of those cases, the reused materials acted as substitutes for raw materials going back into the production process. *See infra* Part I.C (describing facts of cases).

[197] *See infra* Part III.B-C (describing Congress' intent when it created RCRA).

was to prevent solid waste management resulting in harm to the environment or public health, which is exactly what burning does.[198]

1. *AMC I*, *AMC II*, and *ILCO* are Not Controlling on Whether Reuse Includes Burning

The Ninth Circuit looked to *AMC I*, *AMC II*, and *ILCO* to hold that the grass residue was destined for beneficial reuse and being actively reused by its original owners.[199] The court reasoned that since burning the grass residue had beneficial effects, the process was beneficial reuse and thus the residue was not solid waste.[200] The court's use of the holdings in these cases, however, was inappropriate for two reasons. First, the recycling or reuse processes in those cases were significantly different than the open burning involved in *Safe Air*.[201] Second, the byproducts involved in those cases were beneficial before they were reused, whereas the grass residue's benefits were realized only after it was reused.[202] Thus, the court should not have relied on these circuit court decisions.

Agricultural burning is distinguishable from the reuse or recycling processes discussed in *AMC I, AMC II,* and *ILCO.* As such, those cases should not be controlling. *AMC I* and *AMC II* dealt with practices involved in mining and oil refining processes.[203] *ILCO* involved a lead smelter that reclaimed spent batteries.[204] When the *AMC I* court declared that products destined for beneficial reuse are not solid waste, the court referred to a situation in which the products were reused in the production of new products.[205] A process that reuses materials by burning them is different from one which reuses them as a substitute for other raw materials. Encouraging material reuse so that new

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198 *See supra* note 7 (describing Congressional intent).

199 *Safe Air*, 373 F.3d at 1043.

200 *Id.* at 1043-45. The Growers presented evidence that the grass residue contains nutrients that are beneficial to bluegrass fields when they are returned to the soil. *Id.* at 1043-44. According to the Growers, there are four critical benefits that open burning carries for bluegrass Growers: 1) it extends the productive life of bluegrass fields; 2) it restores beneficial minerals and fertilizers to bluegrass fields; 3) it reduces or eliminates insects on bluegrass fields, thus reducing the need for pesticides; 4) it blackens the soil on the fields which increases crop yield for the following crop because it maximizes the soil's sunlight absorption. *Id.* Safe Air agreed that there are benefits to open burning bluegrass residue, though one witness testified that open burning does not necessarily reduce the need for pesticides. *Id.* at 1044.

201 *See supra* notes 182-85 and accompanying text (describing differences in processes).

202 *Id.*

203 Am. Mining Cong. v. United States EPA (*AMC II*), 907 F.2d 1179, 1179 (D.C. Cir. 1990) (*AMC II* involved processing companies); Am. Mining Cong. v. United States EPA (*AMC I*), 824 F.2d 1177, 1178 (D.C. Cir. 1987).

204 United States v. ILCO, Inc., 996 F.2d 1126, 1128-29 (11th Cir. 1993).

205 *See AMC I*, 824 F.2d at 1181.

materials do not have to be used is exactly what RCRA aimed to achieve.[206] Burning materials, however, is contrary to RCRA's intent of encouraging safe handling of waste in an environmentally sound manner.[207] Therefore, burning grass residue is distinguishable from the processes involved in *AMC I*, *AMC II*, and *ILCO*.

In addition, the parties in the other circuit cases found value in the byproducts before they processed them. [208] While burning grass residue is beneficial for future crops, it is not the same as putting the materials directly into the production process. When reusing materials in the production process, one is eliminating the need for a new material to go into that process.[209] It has the same benefit that the newer material would provide.[210] In addition, there is no added environmental or public health threat from utilizing the reused material.[211] Burning, on the other hand, results in both environmental harm and detrimental health effects for the public.[212] Moreover, there are other, more environmentally friendly ways, to add nutrients to future crops.[213] These methods do not emit the harmful air particles that burning does, but still help increase future crop

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[206] *See* 42 U.S.C. § 6941a (2000) ("[S]olid waste contains valuable energy and material resources which can be recovered and used thereby conserving increasingly scarce and expensive fossil fuels and virgin materials."); *see also* 42 U.S.C. § 6902(a)(6) (stating that one of RCRA's objectives is to minimize generation of hazardous waste and land disposal of hazardous waste "by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment"); Barry Needleman, *Hazardous Waste Recycling under the Resource Conservation and Recovery Act: Problems and Potential Solutions*, 24 ENVTL. L. 971, 972, 976 (1994) (explaining that RCRA's goal is to encourage recycling which makes economic and environmental sense for several reasons, including saving producer costs of obtaining raw materials, reducing disposal costs, and easing burden on environment by reusing materials instead of placing them in land, air, or water); James E. Donnelly, Note, *Numbers Never Lie, but What do they Say? A Comparative Look at Municipal Solid Waste Recycling in the United States and Germany*, 15 GEO. INT'L ENVTL. L. REV. 29, 31 (2002) (stating that in addition to conserving landfill space, recycling can help to reduce need for raw materials in production process).

[207] *See infra* Part III.C (describing negative health and environmental effects from open burning).

[208] *Id.* at 1178; *AMC II*, 907 F.2d at 1179; *ILCO*, 996 F.2d at 1128-29.

[209] *See supra* note 206 (explaining how reusing materials will reduce need for new or raw materials in production process).

[210] *Id.*

[211] *Id.*

[212] *See infra* Part III.C (describing some of health and environmental problems resulting from open burning of agricultural byproducts).

[213] Some states limit or prohibit agricultural burning. *See, e.g.*, *Grass Seed Industry*, *supra* note 2, at 1 (explaining that Oregon has limited its allowable agricultural burn acres each year). Washington State's policy is that growers who contribute to air pollution through agricultural burning must play a role in protecting air quality. WASHINGTON DEPT. OF ECOLOGY, AGRICULTURAL BURNING, http://www.ecy.wa.gov/programs/air/aginfo/agricultural_homepage.htm (last visited Jan. 10, 2005).

yields.[214] Therefore, the Growers may reuse the residue in a beneficial manner that does not including burning.

2. Allowing Burning to be Considered Reuse Contradicts Congressional Intent

Discarding waste materials by burning them is exactly what Congress attempted to avoid when it enacted RCRA.[215] The statutory language shows that in enacting RCRA, Congress wanted to avoid hazardous particles entering the air.[216] Yet the Ninth Circuit allowed such practices when it decided *Safe Air.*

The Ninth Circuit found that Congress did not intend to include agricultural products that Growers reuse as solid waste.[217] In a committee report, Congress stated that a great deal of agricultural waste is reclaimed or put to new use.[218] Congress, however, did not want such waste considered as a discarded material within the meaning of the statute.[219] Congress stated that this type of waste was not a part of the disposal problem that they were addressing in RCRA.[220] The Ninth Circuit found that this statement demonstrated Congressional intent. The committee report does not, however, show Congress' intent to exclude agricultural residue from the definition of solid waste.[221]

Instead, Congress was likely referring to methods in which the agricultural byproducts are returned to the soil in an environmentally safe manner. When Congress discussed the agricultural waste as being reclaimed or put to new use, it was not clear whether a new use included burning the waste.[222] A grower may return agricultural byproducts to the soil in different ways, such as through

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214 *Id.*

215 *See* H.R. REP. NO. 94-149, at 37-38 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6275, 6325-26. Congress expressed a special concern with waste that was burned. *Id.*

216 RCRA defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste . . . into or on any land or water so that such solid waste . . . or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3) (2000).

217 Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1045-46 (9th Cir. 2004). The court cited a House Report which stated that "[a]gricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation. *Id.* at 1045 (citing H.R. REP. NO. 94-1491, at 3, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6239-41).

218 *Safe Air*, 373 F.3d at 1046 (citing H.R. REP. NO. 94-1491, at 3, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6239-41).

219 *Id.*

220 *Id.*

221 *See Safe Air*, 373 F.3d at 1046.

222 Congress did not specifically define "new use," and there are other uses agricultural byproducts can go towards besides burning. *See* H.R. REP. NO. 94-1491, at 3, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6239-41 (failing to provide definition for new use).

composting.[223] Congress was concerned with harmful waste management practices when it enacted RCRA.[224] As such, Congress would want to encourage returning agricultural byproducts to the soil in an environmentally friendly way. The EPA's interpretation of the statute is also indicative of Congress' intent. The EPA included agricultural burning within the definition of solid waste.[225] Thus, Congress likely intended RCRA to apply to situations such as burning grass residue, but not to beneficial reuse programs, such as composting.

Growers may argue that requiring them to abide by RCRA would contradict the intent of the statute because it would encourage them to dispose of residue in landfills.[226] They may argue that if RCRA prohibited them from burning the residue, they would have to dispose it in landfills instead. This would increase the volume of waste going to landfills.[227] There are, however, other alternatives to burning the residue.[228] Washington State's Department of Ecology dedicated a report to finding viable alternative uses for grass straw.[229] These included composting, selling the grass on the feed market, and using the materials in building products.[230] These methods would provide growers with a beneficial use of the residue that avoids landfill disposal and is not harmful to the environment or public health.[231] Thus, requiring growers to abide by RCRA would not contradict the statute's goal of limiting land disposal.

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[223] WA STATE DEPT. OF ECOLOGY, STATUS REPORT ON ALTERNATIVE USES FOR GRASS STRAW 2 (1999) [hereinafter WA DOE, ALTERNATIVE USES].

[224] *See supra* note 7 (describing Congressional intent).

[225] *See infra* Part I.B (describing EPA's regulations).

[226] *See* PERCIVAL, *supra* note 7, at 175-79.

[227] Waste in a landfill does not decompose. *See* UNITED STATES ENVTL. PROT. AGENCY, LANDFILLS: TEACHER FACT SHEET 3, *available at* http://www.epa.gov/epaoswer/osw/kids/quest/pdf/47factsh.pdf (last visited Feb. 8, 2005); Resource and Environmental Management Program of Ithaca College, http://www.ithaca.edu/remp/recycling.html (last visited Feb. 8, 2005). Thus, if growers are unable to burn waste, they may put it in landfills instead, increasing landfill usage.

[228] *See infra* notes 212-13 and accompanying text (describing some available alternative uses); *see also* Seeds, Inc. v. State Dep't of Ecology, 1999 Wash. App. LEXIS 2042, at *2 (describing alternative grass residue removal techniques to burning, including tilling, needle-nose or rotary raking, crewcut vacuuming, and baling).

[229] WA DOE, ALTERNATIVE USES, *supra* note 223.

[230] *See id.* at 1-40 (detailing how such alternatives have been used and their success). Straw from agricultural crops, including wheat and rye, may also be used to make paper. *See* BILLY STERN, MAKING STRAW FROM MONTANA'S STRAW: A GUIDE TO MAKING STRAW PULP A REALITY 1-43, *available at* http://www.nativeforest.org/pdf/Straw_report.pdf (last visited Jan. 10, 2005) (describing how such straw may be used to make paper).

[231] *See supra* notes 228-30 and accompanying text (describing alternative methods to putting grass residue in landfills).

Growers may also argue that they have been using open burning to enrich the soil for years and it provides great benefits to them.[232] If the court were to require growers to comply with RCRA, it could be an immense burden on them.[233] This may discourage agricultural production, which is a vital part of the national economy.[234] RCRA, however, is not concerned with economics.[235] Regulating open burning of agricultural materials falls squarely within RCRA's purpose to curb the negative health effects of mismanaging waste materials.[236] While the growers have a valid concern, it is not relevant for RCRA purposes.[237]

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[232] *See* Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1040-54 (9th Cir. 2004) (describing benefits of burning to growers); IDAHO CODE § 22-4801 (Michie 2003) (explaining that crop burning is and has been helpful to Idaho growers); SACRAMENTO METRO. AIR QUALITY MGMT DIST., BURNING QUESTIONS: A QUICK GUIDE TO UNDERSTANDING AGRICULTURAL AND OPEN BURNING IN SACRAMENTO COUNTY 1, *available at* http://www.spareheair.com (last visited Jan. 10, 2005) [hereinafter SACRAMENTO AQMD, BURNING QUESTIONS] (explaining how agricultural burning has historically been important to growers in Sacramento).

[233] Growers may claim that instead of burning the residue, they will have to pay for it to be transported to a landfill or other management facility. *See infra* notes 226-27 and accompanying text (explaining that growers may dispose agricultural residue in landfills if they cannot burn residue). In addition, growers may argue that they will need to buy fertilizers to gain the benefits that burning otherwise provides. *See infra* notes 2, 200 (describing benefits of burning to growers).

[234] Food products were the United States' second greatest export in 2002, accounting for over twelve percent of overall U.S. manufacturing shipments. U.S. CENSUS, U.S. MANUFACTURING SHIPMENTS - TOTAL AND E-COMMERCE VALUE: 2002 AND 2001, http://www.census.gov (last visited Dec. 14, 2004).

[235] RCRA does not mention any form of cost consideration in its provisions. *See* 42 U.S.C. §§ 6901-6992k (2000) (containing all statutory provisions). The Ninth Circuit conceded this point in *Safe Air*: "We recognize that the issue of monetary value does not affect the analysis of whether materials are "solid waste" under RCRA." *Safe Air*, 373 F.3d at 1043 n.8. *See also* United States v. ILCO, 996 F.2d 1126, 1131 (holding that fact that discarded materials are solid waste under RCRA does not change just because someone has found value in components).

[236] *See infra* Part III.C (describing RCRA's aim for solid waste management that is environmentally friendly and not harmful to public health, and how burning is harmful to both environment and public health).

[237] If economics alone drove decisionmakers, many environmental regulations would fail because they are generally cost inefficient. *See* Jack J. Landau, Chevron, U.S.A. v. NRDC: *The Supreme Court Declines to Burst EPA's Bubble Concept*, 15 ENVTL. L. 285, 286 (1985) ("The inefficiencies of controlling pollution without attending to the costs of compliance have been well known for years . . . . However, suspicious environmentalists and skeptical, activist judges have strongly opposed attempts to implement pollution abatement programs that take costs into account."); Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms*, 37 STAN. L. REV. 1267, 1267-68 (1985) (stating that many environmental statutes place primary emphasis on implementation of uniform regulatory standards. Such statutes often create benefits that are difficult to assess but which are extremely costly: "[S]uch statutes as the Clean Air Act (CAA), Occupational Safety and Health Act (OSH Act), and Federal Water Pollution Control Act (FWPCA) impose billions of dollars in annual compliance costs on society and also entail significant indirect costs including decreases in productivity, technological innovation, and market competition."); *see also* Todd B. Adams, *New Source Review under the Clean Air Act: Time for More Market-Based Incentives?*, 8 BUFF. ENVTL. L.J. 1, 3-64 (2000) (describing high costs associated with Clean Air Act). *But see* Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159,

C. RCRA Should Manage the Reuse of Solid Waste That Involves a Process Which is Extremely Harmful to the Environment or Public Health

Even if burning the grass could be a reuse, it should still comply with RCRA. While Congress wanted to encourage recycling and reuse practices, its primary purpose in enacting RCRA was to reduce the amount of waste and encourage a safe way of handling it.[238] Allowing processes that are detrimental to the environment or public health to escape RCRA would contradict Congress' intent.[239]

Burning is not a safe way of handling solid waste.[240] It is not safe for public health or the environment.[241] As such, when a product is burned, it should not escape RCRA's regulatory controls, even if it is considered reuse.

California's problems with air quality provide an example of the detrimental effects of open burning.[242] California's Central Valley has experienced serious problems with air pollution that stem largely from open burning of agricultural waste.[243] The smoke from open burning operations contains ozone-forming compounds and significant amounts of fine particles and other pollutants.[244] Toxic residue from compounds in the smoke can linger in the air for weeks.[245] If those compounds are inhaled, they can lodge deep in

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160 (arguing that current environmental regulatory infrastructure is neither as irrational nor as inefficient as critics have claimed).

[238] *Safe Air*, 373 F.3d at 1040-54; PERCIVAL, *supra* note 7, at 175-79.

[239] *See supra* note 7 (describing Congressional intent).

[240] Allowing burning to escape RCRA could not have been Congress' intent, especially since Congress expressed a special concern with waste that was burned. *See* H.R. REP. NO. 94-1491, pt. I, at 37-38, 90, *reprinted in* 1976 U.S.C.C.A.N. at 6275-77, 6325-26; *see also id.* at 17-24, *reprinted in* 1976 U.S.C.C.A.N. at 6254-62 (listing improper disposal practices that resulted in harmful air pollution); *cf.* Am. Mining Cong. v. United States EPA (*AMC II*), 907 F.2d 1179, 1187 (D.C. Cir. 1990) (concluding that, where disposal or treatment process posed danger to public health, material disposed of should be considered "discarded").

[241] *See* Moon v. N. Idaho Farmer's Ass'n, 96 P.3d 637, 640 (Idaho 2004) (reviewing preliminary injunction granted by district court to enjoin Kentucky bluegrass growers from burning grass residue because of harm smoke caused neighbors); SACRAMENTO AQMD, BURNING QUESTIONS, *supra* note 232, at 1 (describing health effects Californians face from open burning); David I. Stanish, *Will the Takings Clause Eclipse Idaho's Right-to-Burn Act?*, 40 IDAHO L. REV. 723, 726 (2004) (explaining environmental and public health effects from burning); *infra* notes 212-19 (describing health effects California has faced as result of open burning).

[242] *See infra* notes 223-32 and accompanying text (describing health issues Californians face as result of agricultural open burning).

[243] *See* SACRAMENTO AQMD, BURNING QUESTIONS, *supra* note 232, at 1-2 (describing air pollution problems in Central Valley). Two types of air pollution are prevalent in San Joaquin Valley: Ozone and Particulate Matter ("PM") 10. MERCED/MARIPOSA COUNTY ASTHMA COALITION, AIR POLLUTION AND ASTHMA IN THE CENTRAL VALLEY 1 [hereinafter MERCED, ASTHMA]. A major source of PM 10 is burning. *Id.* at 4.

[244] SACRAMENTO AQMD, BURNING QUESTIONS, *supra* note 232, at 1.

[245] *Id.*

the lungs.[246] Air pollution is harmful to public health and the environment.

Smoke particles can also contribute to chronic lung disease and cancer.[247] A serious lung disease resulting from poor air quality caused by open burning is asthma.[248] The Central Valley has the highest prevalence of asthma in California.[249] The effects of asthma have been especially harmful to children in the area.[250] It accounts for over half of all school absences, and as many as one in six children carry an inhaler.[251] As a result, burning agricultural residue is a major concern for Californians.[252]

Currently, California cannot prohibit agricultural burning but it does regulate it.[253] The California Air Resources Board designates permissive burn days where it allows for a specific number of acres of agricultural burning to take place.[254] Only growers who have a permit may burn on such days.[255] The burning may not take place on days when there is stagnant air or unhealthy ozone levels.[256] In addition, the California Legislature passed legislation requiring the burning of rice straw to phase down in the Sacramento Valley Air Basin.[257]

Similarly, while the federal government does not ban open burning of agricultural waste, it should regulate it. RCRA provides an appropriate vehicle for such regulation. Because agricultural residue is solid waste when it is

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[246] *Id.*

[247] *Id.* The pollutants can also aggravate heart disease, trigger headaches and allergies, and increase the severity of other pre-existing health problems. WA STATE DEPT. OF ECOLOGY, FOCUS ON AGRICULTURAL BURNING 1 (2003) [hereinafter WA DOE, FOCUS].

[248] MERCED, ASTHMA, *supra* note 243, at 8-9. In one case in Idaho, a woman died as a result of her asthma which was exacerbated by bluegrass residue burning. Stanish, *supra* note 241, at 723 (describing death of Marsha Mason, whose death certificate stated cause of death as severe asthma attack and severe air pollution caused by field burning).

[249] *Id.* at 9.

[250] *Id.* at 8-9.

[251] *Id.* One in six children in Fresno carry an inhaler. *Id.* at 9.

[252] California specifically adopted a Smoke Management Program to address potentially harmful impacts of smoke particles from agricultural burning, as well as from forest and range land burning management programs. *See* California Air Resources Board Smoke Management Program, http://www.arb.ca.gov/smp/smp.htm (last visited Jan. 10, 2005). Growers obtain their permits to burn fields from this division of the Air Resources Board. *Id.*

[253] SACRAMENTO AQMD, BURNING QUESTIONS, *supra* note 232, at 1; *see, e.g.*, CAL. HEALTH & SAFETY CODE § 41865 (Deering 2004) (requiring reduction of rice straw burning in Sacramento Valley Air Basin).

[254] SACRAMENTO AQMD, BURNING QUESTIONS, *supra* note 232, at 1; *see, e.g.*, CAL. HEALTH & SAFETY CODE § 41865 (Deering 2004) (regulating agricultural burning of rice straw).

[255] SACRAMENTO AQMD, BURNING QUESTIONS, *supra* note 232, at 1.

[256] *Id.*

[257] CAL. HEALTH & SAFETY CODE § 41865(c) (Deering 2000). Washington also passed legislation limiting open burning of grass seed. *See* Seeds, Inc. v. State Dep't of Ecology, 1999 Wash. App. LEXIS 2042, at *2-24 (upholding statute).

burned, RCRA will require growers to dispose of it in an environmentally safe manner.[258]

RCRA should reach beyond open burning, however. While California provides an illustration of some negative health effects of waste mismanagement, such environmental and health problems are evident around the country.[259] Thus, any material that is reused in a beneficial manner should be handled in a way that would not harm the environment or public health. RCRA was enacted in part to address air and water pollution and other environmental problems caused by the mismanagement of solid waste.[260] Allowing the handling of waste materials in an environmentally harmful manner would contradict the intent of RCRA.[261] Thus, RCRA should regulate a material that is beneficially reused if that material must go through a process that is harmful to the environment or to human health. A byproduct that would otherwise be solid waste if it were not being immediately reused should not escape the scope of this regulation.

Critics may argue that some environmental issues are outside the scope of RCRA. For example, RCRA is not meant to deal with air quality, but rather to deal with waste.[262] Critics may also argue that RCRA provides exemptions for other burning activities that may have adverse impacts on air quality, such as incineration.[263] Nevertheless, RCRA has rules governing air pollution.[264] These rules regulate facilities that manage waste and cause air pollution as a result of their management techniques.[265] RCRA's focus on solid waste includes regulating the adverse effects of managing the waste, which may include

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[258] *See supra* note 7 (describing RCRA's objectives of requiring that solid waste be managed in environmentally sound manner that does not hurt public health).

[259] For example, in Washington State, about 250,000 acres of fields, along with collected trimmings and cuttings, are burned annually. WA DOE, FOCUS, *supra* note 247, at 1. An estimated 40,000 tons of pollution are emitted into the air from the agricultural burning. *Id.* In Idaho, the state Department of Environmental Quality receives hundreds of complaints during the field burning season regarding health problems and the haze associated with open field burning. Stanish, *supra* note 241, at 726.

[260] 42 U.S.C. § 6901(b)(3) (2000) ("[I]nadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for environment and for health.").

[261] *See id.* (describing why handling waste in environmentally unsafe manner would contradict RCRA's intent).

[262] H.R. REP. NO. 94-149, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6239, 6239-41.

[263] 42 U.S.C. § 6921(i).

[264] DEBORAH HITCHCOCK JESSUP, WASTE MANAGEMENT GUIDE: LAWS, ISSUES & SOLUTIONS 100 (1992). EPA developed air pollution control rules under RCRA, primarily to govern emissions from hazardous waste incinerators. *Id.* EPA also used RCRA to establish national guidelines for solid waste incinerators. *Id.*

[265] *Id.*

regulating air emissions, water emissions, or other impacts.[266] Critics, therefore, are wrong to believe that RCRA does not affect environmental issues that do not directly involve land disposal of waste.

Congress intended RCRA to discourage activities, such as growers burning solid waste on their fields, which result in harmful air pollutants. Congress intended it to encourage the safe handling of solid waste in all situations, even when its regulations may be burdensome to industry or individuals. Finally, while Congress encourages reuse and recycling in RCRA, these methods should only be employed when they can be done in a manner that is safe for the environment and public health.

CONCLUSION

RCRA, through all of its intricacies, is ambiguous.[267] It does not clearly define solid waste or discarded material.[268] Congressional intent about whether RCRA should apply to agricultural byproducts that are burned is also unclear.[269] As a result, the Ninth Circuit should have looked to the EPA's regulatory definitions to decide the issue.[270] The regulations make clear that agricultural byproducts which are burned and returned to the soil are solid waste.[271]

Because Congress enacted RCRA to require waste materials to be handled in an environmentally safe manner, no waste materials that are burned should be within its scope.[272] Growers who are concerned about the regulatory burden posed by RCRA have other options to burning that are better for public health and the environment.[273] For instance, growers may compost agricultural residue.[274] For grass straw in particular, growers may sell the residue on the feed market.[275] RCRA will live up to its intended purpose only if it can stop harmful waste management practices, such as burning, completely.[276]

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[266] JESSUP, *supra* note 264, at 100.

[267] *See infra* Part I.A (describing RCRA's provisions as ambiguous).

[268] *Id.*

[269] *See infra* Part III.A (explaining that it is unclear whether RCRA applies to agricultural burning).

[270] *See infra* Part III.A (explaining why Ninth Circuit should have followed *Chevron* two-part test).

[271] *See infra* Parts I.B, III.A (describing EPA's regulations and explaining how they apply to agricultural burning).

[272] *See infra* Parts II.B, III.C (arguing that burning is not considered reuse and that RCRA should regulate any form of solid waste management that is harmful to public health and/or environment).

[273] *See infra* notes 212-13, 254-55 and accompanying text (describing some available alternative uses).

[274] WA DOE, ALTERNATIVE USES, *supra* note 223, at 2.

[275] *Id.*

[276] *See infra* Part III.C (describing RCRA's aim for solid waste management that is

environmentally friendly and not harmful to public health, and how burning is harmful to both).