

US EPA ARCHIVE DOCUMENT

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 5, 2010

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

No. 09-1269

US MAGNESIUM LLC,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW OF FINAL AGENCY ACTION

BRIEF OF RESPONDENT EPA

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RESPONDENT'S CERTIFICATE AS TO PARTIES,
RULINGS AND RELATED CASES

A. Parties and Amici

All parties appearing in this Court are accurately identified in the Brief for Petitioner.

B. Ruling Under Review

References to the ruling at issue in this Court accurately appear in the Brief for Petitioner.

C. Related Cases

This case was not previously before this Court or any other court. A related case is pending before the United States Court of Appeals for the Tenth Circuit: *United States v. Magnesium Corp. of America*, No. 08-4185 (10th Cir. filed Oct. 8, 2008).

Respectfully submitted,

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GLOSSARY

AOC	Area of observed contamination
APA	Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675
Doc. Record	HRS Documentation Record, US Magnesium, EPA ID No.: UTN000802704, revised 11/2009, EPA-HQ-SFUND-2008-0584-0123
EPA	Respondent United States Environmental Protection Agency
ESA	Endangered Species Act, 16 U.S.C. §§ 1531-1599
HCB	Hexachlorobenzene
HRS	Hazard Ranking System (40 C.F.R. pt. 300, App. A)
HRS Documentation	References attached to the HRS Documentation Record, EPA-HQ-SFUND-2008-0584-0123.1 - 0123.35
HRS Interim Final Guidance Manual	EPA Hazard Ranking System Guidance Manual, Interim Final (November 1992)
JA	Joint Appendix
MagCorp	Magnesium Corporation of America
NCP	National Contingency Plan
NPL	National Priorities List
PCBs	Polychlorinated biphenyls

RCRA	Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k
SCS	SCS Engineers
Support Doc.	Support Document for the Revised National Priorities List Final Rule – US Magnesium, EPA-HQ-SFUND-2008-0584-0125
TSCA	Toxic Substances Control Act, 15 U.S.C. §§ 2601-2695d
USM	Petitioner US Magnesium LLC
USM Br.	Initial Brief of Petitioner US Magnesium LLC

JURISDICTION

The petition filed by US Magnesium LLC (“USM”) challenges a final rule entitled “National Priorities List (“NPL”), Final Rule No. 48,” promulgated by the United States Environmental Protection Agency (“EPA”) on November 4, 2009, pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9605. 74 Fed. Reg. 57,085 (Nov. 4, 2009). This petition was timely filed on November 5, 2009, and the Court has jurisdiction under section 113(a) of CERCLA, 42 U.S.C. § 9613(a), and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2).

STATEMENT OF ISSUES

1. Did EPA act arbitrarily or capriciously when it evaluated the USM Site as one site with four contiguous source areas?
2. Did EPA act arbitrarily or capriciously in scoring three sensitive environments on the USM Site where the record demonstrates that the waste ponds on the site are “habitats” for two at-risk bird species in Utah, and the site is important to the maintenance of a unique biotic community which includes another bird species?
3. Was EPA’s evaluation of the “waste characteristics” for the soil pathway reasonable where: (1) EPA assigned a toxicity score based on a polychlorinated biphenyl (“PCB”) mixture that overlaps with the more toxic PCBs

found at the site; and (2) EPA used an area estimate to calculate the hazardous waste quantity of the ponds because the other methods either could not be determined or estimated with reasonable confidence?

4. Did EPA reasonably conclude that the inactive waste pond is a “workplace area” where the record establishes that USM employees are required to go on, in, or near the pond to collect dead or dying birds on at least a monthly basis?

STATUTES AND REGULATIONS

All pertinent statutes and regulations are provided in the Addendum hereto, except for those statutes and regulations previously reproduced in the Addendum to the Brief for Petitioner.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The NPL is a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. 42 U.S.C. § 9605(a)(8)(B). On September 3, 2008, EPA published in the *Federal Register* a notice of a proposed rule that contemplated adding the USM Site, along with eleven other sites, to the NPL. 73 Fed. Reg. 51,393 (Sept. 3, 2008) (JA____). EPA invited comments on the Proposed Rule and, on November 4, 2009, published in the *Federal Register* a notice of the

final rule that added the USM Site, along with two other sites, to the NPL. 74 Fed. Reg. 57,085, 57,086 (Nov. 4, 2009).

EPA's action in listing the USM Site was taken in response to the threats to human health, sensitive animal species, and the environment caused by releases or threatened releases of hazardous substances generated during manufacturing operations on the USM Facility. Support Doc., § 2, at 8 (JA____). EPA evaluated the USM Site for inclusion on the NPL pursuant to the Hazard Ranking System ("HRS"). See 40 C.F.R. pt. 300, App. A. Because the site's HRS score exceeded the threshold for inclusion on the NPL, EPA added the site to the List. USM filed a petition for review of EPA's Final Rule adding the USM Site to the NPL.

II. STATUTORY BACKGROUND

A. Relevant CERCLA Provisions

Congress enacted CERCLA in 1980 in response to increasing concern over severe environmental and public health effects from releases of hazardous substances into the environment. *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 922, 925 (D.C. Cir. 1985) ("*Eagle-Picher II*"). CERCLA authorizes EPA¹ to undertake removal or remedial actions in response to any release or threatened release into the environment of "hazardous substances" or, in some circumstances, any other

¹ Although Congress conferred the authority for administering CERCLA on the President, most of that authority has since been delegated to the EPA. See Exec. Order No. 12,777, 3 C.F.R. 351 (1991 Comp.) amending Exec. Order No. 12,580, 3 C.F.R. 193 (1987 Comp.).

“pollutant or contaminant.” 42 U.S.C. § 9604(a)(1). Removal actions include actions to “prevent, minimize, or mitigate damage to the public health or welfare or to the environment,” 42 U.S.C. § 9601(23); remedial actions are “actions consistent with permanent remedy,” *id.* § 9601(24). Remedial and removal actions are jointly referred to as “response actions.” *Id.* § 9601(25).

CERCLA also established the Superfund to finance response actions undertaken by EPA. *Id.* § 9611. In addition, CERCLA gives EPA authority to compel action in response to a release or threatened release of a hazardous substance that may pose an “imminent and substantial endangerment” to public health or welfare or the environment. *Id.* § 9606(a).

CERCLA imposes liability for response costs on a variety of parties, including certain past and present site owners and operators, and transporters of hazardous substances at the site. *Id.* § 9607. Such parties are liable for any costs of removal or remedial action incurred by the United States, so long as the costs incurred are “not inconsistent with the national contingency plan.” *Id.* § 9607(a)(4)(A).

B. The National Priorities List

Section 105(a)(8)(A) of CERCLA requires EPA to establish a set of criteria for determining priorities among releases or threatened releases of hazardous substances “for the purpose of taking remedial action and, to the extent practicable

taking into account the potential urgency of such action, for the purpose of taking removal action.” *Id.* § 9605(a)(8)(A). These criteria and priorities are to be based upon factors including relative risk or danger to public health or welfare or to the environment. *Id.* EPA has developed the HRS as an analytical framework to guide such analyses, and the HRS regulations establishing criteria for listing a site on the NPL are part of the National Contingency Plan (“NCP”). *See* 40 C.F.R. § 300.425 & App. A. Sites meeting the criteria established by EPA are eligible for listing on the NPL.² 42 U.S.C. § 9605(a)(8)(B).

The NPL has a very narrow purpose: to establish, quickly and inexpensively, a rough list identifying and prioritizing sites that may warrant response action under CERCLA. *See Wash. State Dep’t of Transp. v. EPA*, 917 F.2d 1309, 1310 (D.C. Cir. 1990). The NPL, therefore, is primarily an informational and management tool.

1. Description and Boundaries of NPL Sites

CERCLA contains no requirement that an NPL listing include a delineation of the boundaries of CERCLA facilities. To the contrary, the statute instructs only that the NPL shall contain “national priorities among the known releases or threatened releases.” 42 U.S.C. § 9605(a)(8)(B). It is significant that CERCLA section 105(a)(8)(B) defines the NPL as a list of “priorities among the known

² The NPL is codified at 40 C.F.R. pt. 300, App. B.

releases or threatened releases throughout the United States.” *Id.* A “release” is broadly defined. It includes “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment” of a hazardous substance. *Id.* § 9601(22). Given this definition of a “release,” the geographic boundaries of a “release” are not delineated before it is known exactly where the hazardous substances lie.

Congress also describes the sites listed on the NPL as “facilities.” *See, e.g., id.* §§ 9605(a)(8)(A)-(B), (c)(1). Congress’s use of the term “facility” is significant because CERCLA’s definition of “facility” includes all sites and areas where hazardous substances have “come to be located.” *Id.* § 9601(9). Because EPA does not generally know where the contamination has come to be located at the time of the NPL listing, the “facilities” listed on the NPL are not defined in precise geographical terms. Furthermore, CERCLA applies to facilities generally and is not limited to inactive facilities. *Id.*

2. Ramification of NPL Listing

As this Court has long recognized, listing on the NPL does not guarantee that any response action will even be taken at a site. *Apache Powder Co. v. United States*, 968 F.2d 66, 69 (D.C. Cir. 1992). The determination of whether a response action will be taken depends upon subsequent, more detailed studies of the risk posed by the site. *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 919-20 (D.C.

Cir. 1985) (“*Eagle-Picher I*”). After further study, if EPA decides to proceed with a remedial action at an NPL site, EPA’s proposed plan is published for public comment. *See* 42 U.S.C. § 9617; 40 C.F.R. § 300.430(f)(3)(i)(A).

Accordingly, the listing does not require action of any private party, nor does it determine the liability of any party for the cost of cleanup actions that may be undertaken at the site. *Kent County v. EPA*, 963 F.2d 391, 394 (D.C. Cir. 1992). Conversely, EPA’s authority to take response actions is not limited to sites on the NPL. Section 104 of CERCLA, 42 U.S.C. § 9604, authorizes EPA to respond to any release or threatened release of a hazardous substance, and the NPL simply comprises a list of those sites among the much larger universe of potential sites to which priority will be given.³

C. EPA’s Authorities and Policies Under RCRA

CERCLA and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (“RCRA”), are two related but separate statutes that provide EPA with complementary (and in some respects overlapping) cleanup authorities. Whereas CERCLA is designed to remedy threats to human health and the environment from unexpected and historical releases of hazardous substances, RCRA is designed to be a proactive program to regulate how hazardous wastes should be managed to

³ By regulation, EPA has provided that it will spend Superfund money for remedial actions *only* at sites that have been included on the NPL. 40 C.F.R. § 300.425(b)(1). But EPA may conduct removal actions, studies, and enforcement of remedial actions at sites not on the NPL. *Id.* § 300.425(b)(1), (4).

minimize releases that threaten human health and the environment. *See S.C. Dep't of Health & Env'tl. Control v. Commerce & Indus. Ins. Co.*, 372 F.3d 245, 256 (4th Cir. 2004). Subtitle C of RCRA regulates the generation, transportation, and treatment, storage, or disposal of hazardous wastes and provides alternative authority by which EPA can order certain corrective cleanup operations. 42 U.S.C. §§ 6921-6939f.

EPA has a longstanding policy of deferring listing a contaminated site on the NPL if the site could be addressed by corrective action pursuant to RCRA Subtitle C. *Apache Powder*, 968 F.2d at 68 (citing 54 Fed. Reg. 41,000, 41,004 (Oct. 4, 1989)). In general, the “Bevill Amendment” to RCRA Subtitle C exempts certain categories of mining wastes from RCRA regulation. 42 U.S.C. § 6921(b)(3)(A)(ii). Appropriately, a site that is exempt from RCRA Subtitle C requirements will remain eligible for listing on the NPL. *Id.* Indeed, even if a waste is not a hazardous waste under RCRA Subtitle C, it may still qualify as a hazardous substance under CERCLA. *See id.* § 6921(b)(3)(A).

III. REGULATORY BACKGROUND

EPA’s principal tool for determining whether to list a site on the NPL is the HRS, 40 C.F.R. pt. 300, App. A. The HRS is a “scientific and mathematical model” used by EPA to provide a preliminary measurement of environmental risks. *Bradley Mining Co. v. EPA*, 972 F.2d 1356, 1357 (D.C. Cir. 1992). It is

intended to measure “relative rather than absolute risk” and consequently has been designed so that it may be “consistently applied to a wide variety of sites.” 40 C.F.R. pt. 300, App. A, § 1.0.

For purposes of HRS evaluation, a “site” is defined as: “Area(s) where a hazardous substance has been deposited, stored, disposed, or placed, or has otherwise come to be located. Such areas may include multiple sources and may include the area between sources.” HRS § 1.1. The HRS defines a “source” as: “Any area where a hazardous substance has been deposited, stored, disposed, or placed, plus those soils that have become contaminated from migration of a hazardous substance.” *Id.* One site may include a number of parcels of land. The boundaries of the site are set by the extent of the contamination and may expand or contract over time as additional information is acquired. *Wash. Dep’t of Transp.*, 917 F.2d at 1310 n.1. Because of the preliminary nature of the information generally available during the listing process, site boundaries are usually delineated only in a very general manner at that time. *See* 73 Fed. Reg. at 51,395 (Proposed Rule) (JA___); 74 Fed. Reg. at 57,086-87 (Final Rule).

The first step in the HRS analysis is the characterization of the sources of contamination, the hazardous substances associated with these sources, and the potential pathways for exposure of humans or the environment to these substances. HRS § 2.2. The HRS regulations allow EPA to evaluate up to four separate

pathways at each site, *i.e.*, groundwater, surface water, and air migration pathways and the soil exposure pathway. HRS § 2.1. In evaluating a source of contamination potentially affecting a pathway, EPA considers the “likelihood of release” for the three migration pathways (“likelihood of exposure” for the soil exposure pathway), the “waste characteristics,” and the “targets.” HRS § 2.1.3. This evaluation involves consideration of, *inter alia*, the toxicity, mobility, and volume of the hazardous substances at each site. HRS § 2.4. Because the purpose of the HRS is only to determine if a site poses enough of a risk to justify further action, EPA need not score all pathways or all sources of hazardous substances at a site. Based on the tables, formulas, and directions in the HRS, each site is ultimately assigned a numeric value. Overall site scores range from 0 to 100. HRS § 2.1.1. Sites scoring 28.50 or above may be added to the NPL. *See* 73 Fed. Reg. at 51,395 (Proposed Rule) (JA____); 74 Fed. Reg. at 57,086 (Final Rule).

STATEMENT OF RELEVANT FACTS

I. SITE HISTORY

The USM Facility is an active manufacturing plant located in Tooele County, Utah, approximately 40 miles west of Salt Lake City, 15 miles north of Interstate 80, and adjacent to the Great Salt Lake. Doc. Record, § 2.2, at 9 (JA____). USM is one of the largest producers of magnesium in the United States

and in the world, and, at the time of proposal, employed approximately 400 workers. *Id.*, § 5.1.3.3, at 28 (JA____); HRS Documentation, Ref. 6 at 2 (JA____).

The USM Facility has been in operation producing magnesium since 1972. Doc. Record, § 2.2, at 9 (JA____). Its manufacturing operations use minerals from the Great Salt Lake surface water and ground water brines, and release a variety of hazardous substances, including PCBs, dioxins, hexachlorobenzene (“HCB”), chlorine gas, and hydrochloric acid. Support Doc., § 2, at 8 (JA____). The USM Facility consists of numerous buildings associated with the manufacturing process, a sewage pond, a landfill, and other areas containing waste material. Doc. Record, § 2.2, at 9 (JA____). An earthen, open-air ditch system transmits facility wastes away from facility process areas and into an earthen, open-air estimated 227-acre active hazardous waste surface impoundment.⁴ *Id.* Four ditches are currently utilized for this purpose: a central ditch, a chlorine ditch, a western ditch, and a main ditch. *Id.* An inactive estimated 815-acre hazardous waste surface impoundment⁵ was the original recipient of facility wastes until approximately 20 years ago when the Great Salt Lake levels rose and flooded the USM Site, causing

⁴ The active waste pond was referred to as 400 acres in several of the cited references. Its estimated area at the time of promulgation was approximately 227.38 acres.

⁵ The inactive waste pond was referred to as 1200 acres in several of the cited references. Its estimated area at the time of promulgation was approximately 814.72 acres.

contaminants to travel into the Lake. *Id.*; see also HRS Documentation, Ref. 10 at 1-3 (JA____ - ____).

Risk assessments show environmental and human health risks on the environment surrounding the USM Facility. The USM Facility is adjacent to the Great Salt Lake and its ecosystem that attracts millions of birds per year and is the habitat for many unique plants and animals of federal and state concern. Doc. Record, § 5.1.3.5, at 29-30 (JA____ - ____); HRS Documentation, Ref. 10 at 2-1 (JA____). Observations indicate mortality to waterfowl from the contamination, and bird egg studies have documented concentrations of PCB and HCB in eggs at or near the USM Facility. Doc. Record, § 5.1.3.5, at 29-30 (JA____ - ____). Moreover, dioxin and HCB are present at levels potentially posing cancer and non-cancer risks to industrial workers. *Id.*, § 5.1.3.3, at 28 (JA____). In fact, blood testing of workers in 2002 and 2004 found elevated levels of dioxin and HCB as compared to the general U.S. population. *Id.*

II. THE UNITED STATES V. MAGNESIUM CORP. OF AMERICA LITIGATION

In January 2001, the United States filed suit in the U.S. District Court for the District of Utah against Magnesium Corp. of America (“MagCorp”), then-owner of the USM Facility, for violations of RCRA. See *United States v. Magnesium Corp. of Am.*, No. 2:01 CV 040, 2007 WL 3046294, at *1 (D. Utah Oct. 16, 2007) (JA____). USM was later brought into that suit in October 2002

after it purchased the facility from MagCorp. *Id.*, at *1 n.1. The United States also filed a second lawsuit against USM and others in May 2005 for violations of the Toxic Substances Control Act (“TSCA”) at the USM Facility. *Id.*, at *1 n.2. The District Court consolidated both actions.

At issue in the MagCorp litigation was whether certain wastewater discharges at the USM Facility were exempt from RCRA regulation pursuant to the Bevill Amendment, 42 U.S.C. § 6921(b)(3)(A)(ii). Both the United States and USM submitted cross-motions for partial summary judgment, which the District Court granted in USM’s favor. In an October 2007 opinion, the District Court found that all of the wastewaters at issue in the suit were exempt from the definition of hazardous waste pursuant to the Bevill Amendment and therefore were not subject to RCRA Subtitle C regulation. 2007 WL 3046294, at *18 (JA___). Following the District Court’s summary judgment ruling, the United States voluntarily dismissed its remaining RCRA and TSCA claims and appealed that decision, which is still pending.

Even when a waste is not a hazardous waste pursuant to RCRA Subtitle C, it may still be a hazardous substance under CERCLA. 42 U.S.C. § 6921(b)(3)(A). Because the Utah District Court determined that USM’s wastewaters were exempt from regulation as a hazardous waste under RCRA Subtitle C, EPA proposed to list the USM Site on the NPL pursuant to CERCLA. This is consistent with EPA’s

policy of listing eligible sites where “materials exempted from the statutory or regulatory definition of solid waste or hazardous waste are managed.” 51 Fed. Reg. 21,054, 21,057 (June 10, 1986).

III. NPL LISTING

EPA completed its HRS evaluation for the USM Site in 2008. While the USM Site includes multiple sources, EPA evaluated it as one site with four different sources of hazardous substances: EPA designated the inactive waste pond as Source 1, the active waste pond as Source 2, anode dust boxes as Source 3, and stack and fugitive air emissions as Source 4. *See generally* Doc. Record, at 10-19 (JA____-____); Support Doc., § 2, at 8 (JA____). All of these four sources are contiguous areas, as USM’s main plant area containing the locations of the anode dust boxes and the stack/fugitive air emissions are connected to the waste ponds by pipes and ditches. Doc. Record, § 2.2, at 9 (JA____); USM Site Map at Attachment 1. Other possible sources that EPA identified but did not include in the scoring include, but are not limited to, chlorine ditches and other ditches that transport or transported waste to the impoundments, a calcium sulfate pile, anode and cathode header pipe areas, smut piles, and a barium sulfate pile. Support Doc., § 2, at 8 (JA____). Of the four possible pathways, EPA only evaluated the soil and air pathways in the scoring for the USM Site. Doc. Record, at Cover Sheet (JA____).

In evaluating the soil pathway, EPA considered whether there was a threat to the resident population. *Id.*, § 5.1, at 27-30 (JA____-____). “Resident” includes, *inter alia*, “a person working on a property with an area of observed contamination and whose workplace area is on or within 200 feet of the area of observed contamination.” HRS § 5.1.3 (emphasis in original). In considering this threat under the HRS, EPA found that the inactive and active waste ponds are areas of observed contamination (“AOCs”). Doc. Record, § 5.0.1, at 22 (JA____). The inactive waste pond, spanning more than 800 acres, received mixed untreated facility wastes that are allowed to evaporate naturally. *Id.*, § 2.2.1, at 10 (JA____). The active waste pond is over 200 acres and receives wastewaters directly from the USM Facility via a main ditch. *Id.*, § 2.4.2.1.5, at 13 (JA____). Samples collected from both ponds tested positive for HCB, PCBs, dioxins, and furans. *Id.*, § 2.2.1, at 10, 13 (JA____, ____).

USM has employees who, as part of their employment, maintain the ponds and collect distressed or dead birds from or near the ponds and the rest of the USM Site. *Id.*, § 5.1.1, at 27 (JA____); Ref. 24, at 5, 8 (JA____, ____). Because the inactive and active waste ponds are AOCs, are within a workplace property boundary, and within 200 feet of a “workplace area,” EPA assigned a maximum value of 550 for the “likelihood of exposure” factor category for the soil pathway. Doc Record, § 5.1.1, at 27 (JA____). A “workers” factor value was also assigned

based on the number of employees exposed to the AOCs being between 1 and 100, given that the exact number of USM's 400 employees who come into contact with the ponds was unknown. *Id.*, § 5.1.3.3, at 29 (JA____). Moreover, EPA found that all of USM's approximately 400 employees are exposed to air releases and accordingly all were considered in scoring the air pathway. *Id.*, § 6.3.2.3, at 36 (JA____).

EPA also accounted for three sensitive environments for both pathways: (1) a habitat known to be used by the Long-billed Curlew; (2) a habitat known to be used by the American White Pelican; and (3) a unique biotic community which includes the Snowy Plover. *Id.*, § 5.1.3.5, at 29-30 (JA____-____) & § 6.3.4, at 37 (JA____). With respect to the first two, the Curlew and Pelican are both on the Utah Sensitive Species List under the label "wildlife species of concern." HRS Documentation, Ref. 9 at 5 (JA____). Both birds have also been observed numerous times around the USM Site generally, and specifically in and near the waste ponds. Doc. Record, § 5.1.3.5, at 29 (JA____) & § 6.3.4, at 37 (JA____). The U.S. Fish and Wildlife Service issued USM an onsite Migratory Bird Rehabilitation Permit that requires USM to report annually on the death and disposal of these birds. HRS Documentation, Ref. 11 at 1-10 (JA____-____). In fact, between 2002 and 2007, these reports documented the death and disposal of several Pelicans. *Id.*; see also *id.*, Ref. 24 at 10 (JA____). Based on these facts,

along with the physical similarity of the waste ponds to these birds' undisturbed habitats, EPA established that the waste ponds are "habitats" for the Curlew and Pelican. Doc. Record, § 5.1.3.5, at 29-30 (JA____-____) & § 6.3.4, at 37-38 (JA____-____).

Additionally, the Snowy Plover has been identified nesting at the USM Site in a dry portion of the inactive waste pond. *Id.* This is not surprising, given that the largest known concentrations of Snowy Plovers in interior North America are found on the Great Salt Lake, which is currently only 0.25 miles from the inactive waste pond. *Id.*; *see also id.*, § 2.2.1, at 10 (JA____). The Plover's habitat is very similar to the inactive waste pond, as both are typified by alkali and dry mudflats, and sandy areas along river channels. *Id.*, § 5.1.3.5, at 29-30 (JA____-____) & § 6.3.4, at 37-38 (JA____-____). Plovers also prefer beaches, ponds, and shorelines for their habitat, and build their nests on the ground, usually in open or sparsely vegetated areas near water. *Id.* Not only does the inactive waste pond share these characteristics, but several Plovers, their nests, and their eggs—albeit contaminated with PCBs and HCB—have been found there. *Id.* Moreover, small portions of the Great Salt Lake and its ecosystem, including the USM Site, are designated by Utah as "Critical Value Habitat," meaning that they provide "'sensitive' biological and/or behavioral requisites necessary to sustain the existence and/or perpetuation of a wildlife species." *Id.*; HRS Documentation, Ref. 35 at 1 (JA____). EPA

therefore concluded that site overall and the waste ponds in particular are relatively small in size areas that are important to the maintenance of unique biotic communities, such as the Plover, Curlew, and Pelican. Doc. Record, § 5.1.3.5, at 30 (JA____) & § 6.3.4, at 37-38 (JA____-____).

In assessing the “waste characteristics,” the HRS requires that EPA select the hazardous substance potentially posing the greatest hazard for the pathway. HRS § 2.4.1. For the soil and air pathways, EPA assigned a maximum toxicity value of 10,000 for PCBs at the USM Site. Doc. Record, § 5.1.2, at 27 (JA____). This value was based on the documented presence of a combination of PCBs at the USM Site, comprised of both highly toxic PCB congeners (including, but not limited to, three to six chlorines) and the less toxic PCB 209 congener.⁶ Support Doc., § 3.26.4, at 78-80 (JA____-____). Because this mixture contains many of the more toxic PCB congeners found in Aroclor 1254, EPA assessed toxicity at the site based on the PCB mixture Aroclor 1254. *Id.*

In addition to toxicity, the hazardous waste quantity of AOCs (for the soil pathway) and the four sources (for the air pathway) are also considered in the “waste characteristics.” The HRS sets forth four tiers for determining hazardous waste quantity: Tier A (hazardous constituent quantity), Tier B (hazardous wastestream quantity), Tier C (volume), and Tier D (area). HRS § 2.4.2.1. The

⁶ “Congener” refers to the individual chemical form of PCB. See HRS Documentation, Ref. 10 at 4-5 (JA____).

HRS provides directions for evaluating each of the four tiers, as well as criteria for determining whether to proceed to the next level in the hierarchy and the criteria are different for each tier. HRS §§ 2.4.2.1 – 2.4.2.1.4. Given the dearth of reliable data to calculate the hazardous waste quantity of the waste ponds, including what was submitted by USM, EPA used a Tier D area estimate. Doc. Record, § 5.1.2.2, at 27 (JA____).

Once these data, and others not challenged in this petition for review, were entered into the HRS model, EPA computed a score of 59.18 for the USM Site—more than double the requisite score of 28.50 that makes a site eligible for listing on the NPL. *Id.*, Worksheet at 2 (JA____). Therefore, EPA initiated the process of adding the USM Site to the NPL by publishing in the *Federal Register* a Proposed Rule suggesting the addition of the USM Site, along with eleven other sites. 73 Fed. Reg. at 51,393 (JA____).

IV. THE *FEDERAL REGISTER* NOTICE AND COMMENT PROCESS

The *Federal Register* notice proposing the addition of the USM Site to the NPL contains a detailed explanation of the NPL and the listing process. Among other things, the Proposed Rule thoroughly explains that “the site consists of all contaminated areas within the area used to identify the site, as well as any other location where that contamination has come to be located, or from where that contamination came” 73 Fed. Reg. at 51,395 (JA____); *see also* 74 Fed. Reg.

at 57,086 (same language in Final Rule). Accordingly, the Proposed Rule simply listed the USM Site in a table with the information that the site name was “U.S. Magnesium,” the “State” was Utah, and the “City/county” was Tooele County. 73 Fed. Reg. at 51,397 (JA____).

EPA received over 115 comments in support of listing the USM Site on the NPL. Support Doc., § 3, at 8 (JA____). The State of Utah did not oppose the proposed listing. Utah DEQ Comments, at 1 (JA____). Those opposing the listing included USM, the Tooele County Commission, and members of the Utah Senate and House of Representatives. Support Doc., § 3, at 9-10 (JA____-____). Among other things, the Tooele County Commission asserted that the NPL listing would decrease property values, lower property tax revenues, adversely affect the local economy, and was unnecessary. Tooele Comments, at 1-2 (JA____-____). None of the Tooele County Commission’s comments pertained to the HRS score, but EPA responded to all of them. *See, e.g.*, Support Doc., § 3.7, at 25-27 (JA____-____) & § 3.9, at 29-30 (JA____-____).

After considering and responding to all public comments, including USM’s, EPA determined that there was no basis for changing the score. *Id.*, § 3, at 10 (JA____). Therefore, EPA added the USM Site to the NPL on November 4, 2009. 74 Fed. Reg. 57,085 (Final Rule).

SUMMARY OF THE ARGUMENT

EPA's action in listing the USM Site on the NPL was reasonable and overwhelmingly supported by the administrative record. This listing was warranted due to the significant threats to human health, sensitive animal species, and the environment caused by the releases or threatened releases of hazardous substances generated during magnesium production operations at the USM Facility. EPA's evaluation of the USM Site resulted in an HRS score of 59.18—more than double the 28.50 score required for listing and based on only two of four possible pathways.

None of USM's challenges to EPA's listing decision has merit. First, USM's assertion that EPA improperly aggregated sites at the USM Site is patently false. Consistent with the HRS regulations, EPA properly scored the USM Site as a single site with four sources. This determination, entitled to the Court's deference, was completely rational since all source areas are contiguous, all pose risks to the same targets, all are from the same industrial process, and all are areas where a release from the USM Facility has come to be located.

Second, the record supports EPA's scoring of three sensitive environments in its HRS evaluation of the USM Site. Numerous Long-billed Curlews, American White Pelicans, and Snowy Plovers have all been observed at the USM Site in general, and near the waste ponds in particular. EPA reasonably interpreted its

HRS regulations and relied on the uncontested data in the record to determine that the site (for the air pathway) and the waste ponds and their immediate surroundings (for the soil pathway) are habitats for two of these at-risk species in Utah and are equally important to maintaining a unique biotic community that includes the other.

Third, EPA properly evaluated the waste characteristics for the soil pathway (as well as for the air pathway) at the USM Site. EPA based the toxicity score for this pathway on Aroclor 1254, a PCB mixture that overlaps with many of the more toxic PCB congeners documented at the USM Site. EPA's scientific explanations are due substantial deference and EPA thoroughly explained its reasoning for using Aroclor 1254. Moreover, EPA had good reason to reject USM's Tier A and Tier C estimates of hazardous waste quantity in favor of EPA's Tier D estimates. As EPA explained in response to USM's comments, USM's estimates were too poorly supported to be statistically reliable.

Fourth, USM has not credibly contested EPA's finding that the inactive waste pond constitutes a workplace area. EPA's definition of workplace area is logical and consistent with both the HRS regulations and draft HRS Guidance Manual. And despite how much USM tries to downplay the level of frequency that its employees are in the area of the inactive waste pond, USM's own comments

demonstrate that its workers are exposed to the inactive waste pond on at least a monthly basis as part of their work duties.

USM has not shown that any of EPA's actions were arbitrary or capricious and its entire petition for review should be denied. Even assuming, *arguendo*, that USM prevails on some of its arguments—which it should not—very few alternative HRS scoring scenarios exist that would result in an USM Site score below 28.50 and none are warranted here.

STANDARD OF REVIEW

Because the NPL listing at issue was promulgated after informal notice-and-comment rulemaking procedures pursuant to the APA, 5 U.S.C. § 553(c), it is also reviewable under the APA, 5 U.S.C. § 706(2). *Bd. of Regents v. EPA*, 86 F.3d 1214, 1217 (D.C. Cir. 1996). Therefore, the applicable standard of review is whether EPA's action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Under this standard, a Court must uphold an agency's decision if there is a “‘rational connection between the facts found and the choice made.’” *OZ Tech., Inc. v. EPA*, 129 F.3d 631, 635 (D.C. Cir. 1997) (citation omitted). This deferential standard presumes the validity of agency action. *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976).

In reviewing earlier amendments to the NPL, this Court has stated that judicial review is limited to determining whether EPA's final action for each site was "consistent with 'the Act and the regulations promulgated thereunder, and is not arbitrary.'" *City of Stoughton v. EPA*, 858 F.2d 747, 749 (D.C. Cir. 1988) (quoting *Eagle-Picher Indus. v. EPA*, 822 F.2d 132, 137 (D.C. Cir. 1987) ("*Eagle-Picher III*"). Courts give substantial deference to EPA's interpretation of its own regulations "unless plainly erroneous or inconsistent" with regulations. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). This Court also has stated that it will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Eagle-Picher III*, 822 F.2d at 141 n.40 (quoting *Bowman Transp. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285-86 (1974)).

Given the highly technical issues involved in EPA's decision to list a facility, this Court gives significant deference to its listing determinations. *Bradley Mining*, 972 F.2d at 1359. "[T]he importance of EPA's goals, including protecting human life from potentially disastrous contamination and the congressionally mandated need for speedy action,' means that '[i]t is not necessary that EPA's decisions as to what sites are included on the NPL be perfect, nor even that they be the best.'" *Id.* (quoting *Stoughton*, 858 F.2d at 756). Significant deference is also called for because the NPL represents only "a rough list of

priorities, assembled quickly and inexpensively.’” *B&B Tritech, Inc. v. EPA*, 957 F.2d 882, 884 (D.C. Cir. 1992) (quoting *Eagle-Picher II*, 759 F.2d at 932).

ARGUMENT

I. EPA REASONABLY EVALUATED THE USM SITE AS A SINGLE SITE WITH FOUR SOURCES

USM’s argument that EPA improperly aggregated sources for the air pathway reflects its fundamental misunderstanding of both the HRS and the draft HRS Guidance Manual. Contrary to USM’s contention, *see* USM Br. at 35, EPA did not aggregate the two waste ponds, anode dust boxes, and stack/fugitive air emissions at the USM Site into one single source for HRS scoring purposes. Rather, EPA scored the USM Site in full accordance with the HRS: as a single site comprised of multiple sources. Its actions in doing so were not arbitrary or capricious.

Consistent with the HRS, EPA appropriately concluded that the USM Site was a single site consisting of at least four sources, the areas between those sources, and anywhere that released contamination has come to be located. Support Doc., § 3.29, at 118-19 (JA____-____). The HRS very clearly defines a “site” as “[a]rea(s) where a hazardous substance has been deposited, stored, disposed, or placed, or has otherwise come to be located. Such areas *may include multiple sources* and may include the area between sources.” HRS § 1.1 (emphasis added). Indeed, as EPA stated, “the NPL is a list of releases from facilities and the

location of a listed release is a site. If the release has come to be located in several areas, the release and therefore the site can be composed of multiple sources and the location of any contamination that has migrated from those sources.” Support Doc., § 3.21, at 52 (JA____). As is evident from the Documentation Record, EPA analyzed each source separately, not as sources lumped together into one.⁷ See Doc. Record, at 10-19 (JA____-____).

Essentially, USM has the misconception that by simply associating multiple sources with the USM Site, EPA has improperly aggregated the four sources together into a single source. Yet, aggregating sources into a single source is a very different concept than having one site with multiple sources, and only the latter concept is pertinent to the USM NPL listing. USM repeatedly—and incorrectly—cites to page 51 of Section 4.2 of the draft HRS Guidance Manual as purported proof that EPA erred in scoring the USM Site, but that section deals only with aggregating sources into a single source and is thus irrelevant. USM Comments, at 116-122 (JA____-____); USM Br. at 35-37. This was explained by EPA in response to USM’s comments:

USM has misinterpreted page 51 of Section 4.2 of the draft HRS Guidance Manual. Section 4.2 of the draft HRS Guidance Manual addresses the aggregation of similar sources of the same source type

⁷ EPA did aggregate three anode dust boxes at the USM Site into a single anode dust boxes source, but this is not what USM challenges. Doc. Record, at 16-17 (JA____-____). Instead, USM alleges that EPA combined the anode dust boxes source with the three other sources evaluated at the site, which EPA did not do.

and function at a site into a single source (i.e., combining the multiple anode dust boxes at the site into a single anode dust boxes source) to minimize repetition in writing an HRS documentation record. ...

That all sources were not aggregated into a single source is clear in the HRS documentation record at proposal. The three anode boxes were combined into one source ... However, the anode dust boxes source was not then combined with the other three sources evaluated at the site. Each of the four sources was described and treated as a separate source ... Section 4.2 of the HRS Guidance Manual does not suggest any method to combine all sources at a site into one source, nor were the four HRS sources combined in such a manner.

Support Doc., § 3.29, at 119 (JA____). USM's arguments concerning source aggregation are thus nothing more than a red herring and should be disregarded.

To the extent USM maintains that EPA should have evaluated each of the four sources as four separate sites, that argument must also be rejected. EPA is not required to evaluate the proposed USM NPL listing as four different sites simply because EPA identified four sources, especially where, as here, the four sources are all contiguous areas and each poses a risk to USM's employees and the sensitive animal species that are on or around the USM Facility. *Id.*, § 3.21, at 52-53 (JA____-____); USM Site Map at Attachment 1; HRS Documentation, Ref. 10 at 1-5 (JA____). USM indeed tries to make much of the fact that "the waste ponds are over one-half mile from the smokestack and dust boxes," USM Br. at 16—all the while ignoring that USM's main plant area containing the locations of the anode dust boxes and the stack/fugitive air emissions are connected to the waste ponds by pipes and ditches. *Id.* And, equally important, all four sources are areas where a

release from the USM Facility and from the same industrial process has come to be located. Support Doc., § 3.29, at 119 (JA____). Under these circumstances, EPA reasonably determined that there was only one USM Site that included multiple sources and included all four as eligible sources for the air pathway evaluation. A determination such as this one requires EPA's technical expertise and is entitled to substantial deference. *Bradley Mining*, 972 F.2d at 1359.

In terms of EPA's scoring for the air pathway, USM maintains that EPA should have analyzed the waste ponds separately from the anode dust boxes and stack/fugitive air emissions. Specifically, USM argues that, for the air pathway, EPA combined the "likelihood of release" value from the anode dust boxes and the stack/fugitive emissions with the "waste characteristics" factor value from the quantity for the waste ponds. See USM Br. at 35. This argument, again, rests on USM's mistaken belief that the HRS requires EPA to score the air pathway *by source*, rather than *by site*.⁸

Pursuant to the HRS Sections 6.1 and 6.1.1, the "likelihood of release" value for the air pathway may be established "by demonstrating that *the site* has released a hazardous substance to the atmosphere." (Emphasis added). Likewise, HRS § 6.2, also pertaining to the air pathway, states that the "waste characteristics" value is reached by evaluating "only those hazardous substances available to migrate

⁸ USM claims that EPA did not evaluate waste characteristics for all four sources, see USM Br. at 15, but EPA did. See Doc. Record, § 6.2, at 34 (JA____).

from the sources at *the site* to the atmosphere.” (Emphasis added). On this point, HRS § 2.2.3 instructs that the hazardous substances from *all* sources with a gas or particulate containment factor value greater than zero are considered available to migrate from the sources at the site to the air pathway and are thus properly considered in the scoring of the USM Site. Because the hazardous substances associated with each of the four sources evaluated at the USM Site have gaseous and particulate containment factor values of ten, they are all eligible to be included in the air pathway. Support Doc., § 3.33.1, at 140 (JA____). Accordingly, EPA did nothing arbitrary or capricious in scoring the air pathway.

Finally, USM’s reliance on *Mead Corp. v. Browner* to argue the impropriety of EPA’s actions in scoring the air pathway is unconvincing. *Mead* dealt with a prior EPA Aggregation Policy that allowed aggregation of noncontiguous sites that did not independently qualify for NPL listing into a single NPL site. 100 F.3d 152, 153 (D.C. Cir. 1996). This Court held that EPA lacked statutory authority to use such a policy and vacated EPA’s inclusion of one of the aggregated sites on the NPL. *Id.* at 157. *Mead* is not instructive here. *Mead* dealt with a site aggregation policy that was not even used in this case because, as discussed above, EPA’s evaluation of the USM Site had nothing to do with site aggregation. *Mead* dealt with EPA’s NPL listing of two *noncontiguous* areas, *id.* at 154, whereas the source areas here are all contiguous. And *Mead* dealt with a NPL listing based solely on

an Agency for Toxic Substances and Disease Registry health advisory that on its face applied only to *one* of the two areas listed, *id.*; on the other hand, here EPA's NPL listing of the USM Site was based on the HRS and included a thorough evaluation of *each* of the four sources at the USM Site. Thus, *Mead* offers USM no legal support.

Having failed to point to any arbitrary or capricious action, EPA's consideration of the USM Site as one site with four sources should be upheld.

II. EPA'S ASSIGNMENT OF A SENSITIVE ENVIRONMENTS SCORE FOR THE SOIL AND AIR PATHWAYS WAS NOT ARBITRARY OR CAPRICIOUS

Consistent with HRS Sections 4.1.4.3 and 5.1.3.5, EPA identified and scored three sensitive environments on the USM Site: (1) a habitat for the Long-billed Curlew; (2) a habitat for the American White Pelican; and (3) a unique biotic community including the Snowy Plover. Doc. Record, § 5.1.3.5, at 29-30 (JA____-____) & § 6.3.4, at 37-38 (JA____-____). USM contests all three of EPA's scoring determinations, alleging that EPA "reversed course" from a 1990 Report to Congress where it advised that the USM Facility was not located near any environments with high resource value that warrant special consideration. *See* USM Br. at 39-40. That EPA report—now twenty years old—is in no way contradictory or germane to EPA's HRS evaluation of the USM Site, which is based on updated, reliable, and relevant data. As illustrated below, EPA's scoring

of the USM Site based on sensitive environments was reasonable and supported by the record.

A. Consistent with the Intent of the HRS, EPA Properly Identified the Curlew and the Pelican as “State Designated Endangered or Threatened Species.”

The HRS requires that EPA assign a value of 50 for each “habitat known to be used by *State designated endangered or threatened species*,” as was done for the USM Site. HRS §§ 4.1.4.3 (Table 4-23), 5.1.3.5 (Table 5-5) (emphasis added). This requirement is meant to give due consideration in HRS scoring to those species designated by a state as endangered, threatened, or otherwise in need of conservation action. Support Doc., § 3.28.2.2.1, at 109 (JA___). Accordingly, the term “State designated endangered or threatened species” is a broad, generic concept meant to capture those species at risk in each of the fifty states. It was never intended to be taken literally, as USM contends, to only consider those species specifically labeled as “endangered or threatened” within a particular state. It would be nearly impossible—not to mention extremely futile—to apply a term so literally, as each of the fifty states employs different terminology in identifying state endangered or threatened species.⁹

⁹ EPA made this very point in response to USM’s comments. Support Doc., § 3.28.2.2, at 110 n. 1 (JA___). EPA must interpret this term in 50 states, all of which have different programs for managing state wildlife. It would not be realistic to assume that each state has a program specifically for “State designated endangered or threatened species.”

In this case, Utah has no program or rules in place with the specific label of “State designated endangered or threatened species.” Nevertheless, it is abundantly clear from Utah’s statutory scheme that, in Utah, “wildlife species of concern” *are* “State designated endangered or threatened species”—even though Utah does not specifically use the latter term. USM correctly notes that Utah law defines “threatened” and “endangered” species according to federal designations of those species under the Endangered Species Act (“ESA”). Utah Code Ann. §§ 23-13-2(14), (44) (2010). But Utah’s definitions of “threatened” and “endangered” are neither state-designated (they are federal designations) nor do they target any threatened or endangered species within Utah.

To address these concerns, Utah law authorizes a Sensitive Species List consisting of seven categories of species in need of conservation action within the state:

- (i) wildlife species or subspecies listed under the ESA, and now or previously present in Utah;
- (ii) wildlife species or subspecies de-listed under the ESA during the past six months that are now or were previously present in Utah;
- (iii) wildlife species or subspecies now or previously present in Utah that are currently proposed by the U.S. Fish and Wildlife Service for listing under the ESA;
- (iv) candidate wildlife species or subspecies under the ESA now or previously present in Utah;

- (v) wildlife species or subspecies removed from the ESA candidate list during the past six months that are now or were previously present in Utah;
- (vi) conservation species; or
- (vii) wildlife species of concern.

Utah Admin. Code r.657-48-2(2)(o) (2010); HRS Documentation, Ref. 9 at 1-7 (JA____- ____). Notably, in addition to species listed or proposed under the federal ESA, Utah sensitive species also include “wildlife species of concern,” that are “wildlife species or subspecies *within the state of Utah* for which there is credible scientific evidence to substantiate a *threat* to continued population viability.” Utah Admin. Code r.657-48-2(2)(r) (emphasis added); HRS Documentation, Ref. 9 at 1 (JA____). A species goes through an extensive process before it can receive the “wildlife species of concern” designation. The Utah Division of Wildlife Resources must first propose a species and allow public comment; a committee then considers all relevant data, testimony, and submissions before making a formal written recommendation to the Utah Wildlife Board; and the Board then makes an official designation upon consideration of the same information. Support Doc., § 3.28.2.2.1, at 108 (JA____).

Both the Long-billed Curlew and American White Pelican, having both gone through this rigorous designation process, are included on Utah’s Sensitive Species List as state-designated “wildlife species of concern.” HRS Documentation, Ref. 9

at 5 (JA____). Given this, EPA reasonably found that the Curlew and Pelican are “State designated endangered or threatened species” within the meaning of HRS Tables 4-23 and 5-5. EPA’s finding in this regard is a reasonable interpretation of the HRS regulations, is not plainly erroneous or inconsistent with the HRS, and is entitled to substantial deference. *Auer*, 519 U.S. at 461; *Carus Chem. Co. v. EPA*, 395 F.3d 434, 440 (D.C. Cir. 2005) (“A challenge to an agency’s interpretation of its own regulation ... turns not on whether the *challenger* has articulated a rationale to support its interpretation, but on whether the *agency* has offered an explanation that is reasonable and consistent with the regulation’s language and history.”) (citation omitted) (emphasis in original).

USM’s overly literal interpretation of the HRS and draft HRS Guidance Manual elevates form over substance and is at odds with the very purpose of the HRS regulations and the express mandate of Utah law. The whole point of HRS Sections 4.1.4.3 and 5.1.3.5 is, *inter alia*, to include state-designated species at risk and Utah’s “wildlife species of concern” designations—meant to “identify species for which conservation actions are needed”—unquestionably fall into that category. HRS Documentation, Ref. 9 at 1 (JA____). As EPA reasoned, “[r]egardless of the name used, the purpose is the same—to identify threatened species at risk in Utah and make management recommendations and wildlife

habitat designations early enough to preclude listing under the federal Endangered Species Act.” Support Doc., § 3.28.2.2.1, at 108 (JA____).¹⁰

Finally, EPA’s application of HRS Sections 4.1.4.3 and 5.1.3.5 to the USM Site is not inconsistent with the draft HRS Guidance Manual. The draft manual states that “species listed as ‘significantly rare’ or ‘of special concern’ in the state are not eligible [for scoring as a sensitive environment] *unless* they have been designated as endangered or threatened within the state.” HRS Interim Final Guidance Manual, App. A, § A.2, at A-11 (emphasis added) (JA____). Utah has gone far beyond simply calling these birds “of special concern.” In placing the Curlew and Pelican on Utah’s Sensitive Species List, Utah *has* effectively designated these birds as endangered, threatened, and at risk. And, as explained by EPA in response to USM’s comments, “[n]othing in the HRS or HRS Guidance Manual precludes EPA from considering the Utah State Sensitive Species List or species whose viability in Utah is at risk.” Support Doc., § 3.28.2.2.1, at 110 (JA____).

¹⁰ USM apparently thought the same, previously acknowledging in comments that Utah had no current “practice” of labeling species as “state endangered species” or “state threatened species” and instead relies on the Utah Sensitive Species List. USM Comments, at 103 n. 60 (JA____).

B. There is Ample Evidence in the Record that the Waste Ponds are “Habitats” for the Curlew and Pelican.

USM also contests EPA’s determination that the waste ponds are “habitats” for the Curlew and Pelican within the meaning of HRS Tables 4-23 and 5-5. In particular, USM argues that EPA erred in defining “habitat” and failed to substantiate in the record its finding that the waste ponds qualify as habitats for the Curlew and Pelican. *See* USM Br. at 43-44. Both of these arguments fail.

The HRS does not define “habitat.” Although the draft HRS Guidance Manual offers a definition of “species habitat,” the manual is only a draft document and does “not constitute EPA rulemaking.” HRS Interim Final Guidance Manual, at Notice (JA____). “EPA officials may decide to follow the guidance provided in [the draft HRS Guidance Manual] or to act at variance with it, based on analysis of specific site circumstances.” *Id.* The draft HRS Guidance Manual is therefore just that—guidance; it is not mandatory. In evaluating the USM Site, EPA reasonably referred to dictionary and U.S. Fish and Wildlife Service definitions of “habitat” and concluded that “if the physical features of an area match those of a description of the habitat for a species and the species is shown to be present in that area, it is reasonable and sufficient to consider the area habitat known to be used by that species in conducting an HRS evaluation.” Support Doc., § 3.28.2.2.2, at 111 (JA____).

The record is replete with evidence that the USM Site is part of the habitats for the Curlew and Pelican, the physical features of the waste ponds match those of the undisturbed habitats for these birds, and that both birds are present in those areas. First, the Great Salt Lake is a major breeding site for the Curlew, whose habitat tends to be located in and above small patches of vegetation near barren ground and near the edges of barren alkali flats that surround the Lake and the USM Site. HRS Documentation, Ref. 9, App. A at 47 (JA____) & Ref. 32 at 79, 84 (JA____, ____). Similarly, in Utah, the only known breeding colonies of the Pelican are within the Utah Lake/Great Salt Lake ecological complex. *Id.*, Ref. 33 at 1 (JA____). Ideal habitat conditions for the Pelican consist of foraging environments with low gradient bottoms and wetlands where “[w]arm spring and summer days create excellent thermal systems, and nearby mountains, islands, and promontories form late morning updrafts, and of which assist adults in air lifting forage to awaiting young.” *Id.*, Ref. 33 at 2 (JA____). The record further establishes that the USM Site is adjacent to the Great Salt Lake, the known breeding ground for both birds, and is part of the Utah Lake/Great Salt Lake ecological complex. Doc. Record, § 2.2, at 9 (JA____); Support Doc., § 3.28.2.2.2, at 112 (JA____). In fact, the border of the inactive waste pond is, at present, only approximately 0.25 miles from the waterline of the Great Salt Lake. Doc. Record, § 2.2.1, at 10 (JA____). Additionally, the USM Site is surrounded by natural habitat and “exists within a

relatively undisturbed area of very little urban or industrial development other than the facility itself.” HRS Documentation, Ref. 10 at 2-3 (JA____). The record also shows that the active pond is earthen, Doc. Record, § 2.2, at 9 (JA____), and the inactive waste pond has alkali and dry mudflats, and sandy areas along river channels, *id.*, § 5.1.3.5, at 30 (JA____)—all consistent with the physical characteristics of these birds’ undisturbed habitats. Likewise, the stack/fugitive emissions to the air around the site certainly are part of the overall habitat of these species considered in the air pathway. Thus, the entire USM Site, including the ponds and the air above the site, is part of these birds’ habitats.¹¹

Second, both birds have been observed on several occasions at the waste ponds. Curlews have been observed in the area of the inactive waste pond and Pelicans were seen in the active waste pond at the USM Site. Support Doc., § 3.28.2.2.2, at 111 (JA____). Both birds have also been spotted in the general vicinity of the USM Site and annual reports submitted by USM document the death

¹¹ Even though it is only guidance, it is important to note these facts are sufficient to qualify the waste ponds as “species habitats” under the HRS Guidance Manual’s definition. The manual defines “species habitat” as the “place where a population of a species normally lives and its surrounding area, both living and nonliving. Habitat generally is characterized by dominant plant form (e.g., broadleaf deciduous forest) and/or physical characteristics (e.g., fast-moving stream with rocky substrate).” HRS Manual, App. A, § A.2, at A-3 (JA____). As discussed, the Curlew and Pelican normally breed at the Great Salt Lake, which is adjacent to, and in the surrounding area of, the USM Site and the waste ponds. Doc. Record, § 2.2, at 9 (JA____). Likewise, the waste ponds and undisturbed habitats for both birds share the same physical characteristics. Support Doc., § 3.28.2.2.2, at 111-112 (JA____-____).

and disposal of Pelicans onsite between 2002 and 2007. *Id.*; *see also* HRS Documentation, Ref. 11 at 1-10 (JA____-____) & Ref. 24 at 10 (JA____). These birds' continued presence proves that the waste ponds are "habitats" for the Curlew and Pelican. Under the "arbitrary and capricious" standard, EPA's factual determination that the ponds are "habitats" is entitled to substantial deference. *Arkansas v. Oklahoma*, 503 U.S. 91, 112 (1992).

Despite the indisputable facts of these birds' presence and that the ponds match their undisturbed habitats, USM further maintains that the record does not show that "the physical features of the waste ponds match those of the Great Salt Lake" or "which environmental factors present at the ponds provide the basic necessities that the Curlew and Pelican require to survive and reproduce." USM Br. at 44. USM's argument is far beyond what the HRS requires. The NPL represents only "'a rough list of priorities, assembled quickly and inexpensively.'" *B&B Tritech*, 957 F.2d at 884 (quoting *Eagle-Picher II*, 759 F.2d at 932). Hence, EPA's NPL listing decision need not be perfect, or even the best; it need only be reasonable and supported by record. *Bd. of Regents*, 86 F.3d at 1217, 1220. Here, the record shows that it is.

C. EPA Rightly Concluded that the Site is Important to the Maintenance of a Unique Biotic Community.

The HRS also instructs EPA to assign a value of 25 for "[p]articular areas, relatively small in size, important to maintenance of unique biotic communities."

HRS §§ 4.1.4.3 (Table 4-23), 5.1.3.5 (Table 5-5). EPA did so, focused on the fact that portions of the USM Facility important to the maintenance of the Snowy Plover overlap with both the Site overall and the waste ponds.

Again, USM points to the draft HRS Guidance Manual to show that EPA purportedly acted in an arbitrary and capricious manner. See USM Br. at 45. Again, USM is wrong. The draft HRS Guidance Manual suggests four types of areas that qualify as “important for the maintenance of unique, rare, or otherwise ecologically valuable biotic communities.” HRS Interim Final Guidance Manual, App. A, § A-2, at A-15 (JA____). Contrary to USM’s argument, the draft manual does not require EPA to demonstrate that the USM Facility constitutes one of these four area types. Rather, the draft manual unambiguously states that “[t]his definition generally includes *but is not limited to* the following four types of areas.” *Id.* (emphasis added). Nevertheless, EPA determined that portions of the USM Facility do, in fact, fall into the fourth category identified in the draft HRS Guidance Manual as “[a]reas vital for a species that are important to the maintenance of a community.” *Id.*; Support Doc., § 3.28.2.3, at 115 (JA____).

Numerous references in the record support EPA’s finding. First, the Plover species has been observed nesting on the USM Site in the inactive waste pond area and Plover nests containing contaminated eggs have been found there. HRS

Documentation, Ref. 10 at 2-8 – 2-12, 4-26 – 4-30 (JA____ - ____, ____ - ____) & Ref. 19 at 9 (JA____).

Second, the inactive waste pond constitutes an “area” important to the vitality of the Plover. The largest known concentrations of Plovers in interior North America are found on the Great Salt Lake where they carry out their breeding and nesting cycle. *Id.*, Ref. 34 at 1 (JA____). With its proximity to the Great Salt Lake, the USM Facility represents a portion of that habitat. Support Doc., § 3.28.2.3, at 115 (JA____). Steven Wharton, an EPA Ecological Risk Assessor for the Utah region, also concluded that the breeding and nesting areas for the Plover “include salt evaporation ponds and barren to sparsely vegetated salt flats” and that the area near the Great Salt Lake is a breeding ground for the Plover. HRS Documentation, Ref. 13 at 1 (JA____). The inactive waste pond, in particular, shares the characteristics of the Plover’s habitat, in that it has alkali and dry mudflats, and sandy areas along river channels. Doc. Record, § 5.1.3.5, at 30 (JA____) & § 6.3.4, at 37 (JA____). Furthermore, in evaluating the USM Site, EPA considered data from the Utah Division of Wildlife Resources. Notably, these data confirmed that small portions of the habitat around the Great Salt Lake, including the USM Site, are specifically designated by Utah as “Critical Value Habitat,” meaning that they provide “‘sensitive’ biological and/or behavioral requisites necessary to sustain the existence and/or perpetuation of a wildlife species.” HRS

Documentation, Ref. 35 at 1 (JA____). In other words, Utah considers portions of the USM Site quite “important.”

Third, as EPA explained in response to USM’s comments, the pertinent “community” in this case is not just made up of Plovers, but “includes at least the other two endangered species (the Curlew and Pelican) which share the habitat.” Support Doc., § 3.28.2.3, at 116 (JA____). As discussed above, Curlews and Pelicans were sighted several times at the waste ponds, which EPA demonstrated to be their “habitats.”

USM’s argument, *see* USM Br. at 46, that the Plover’s abundance in Utah renders them non-unique or that such abundance is proof that the waste ponds are not vital to their survival, is not supported by the record. The very draft HRS Guidance Manual that USM so steadfastly relies on refers to “[a]reas that are important for the maintenance of unique, rare, *or otherwise ecologically valuable biotic communities.*” HRS Interim Final Guidance Manual, App. A, § A.2, at A-15 (emphasis added) (JA____). Thus, “uniqueness” is not a prerequisite as long as the community is ecologically valuable. Abundance of the Plover does not diminish its value as a biotic community and the record shows that Plovers attempt to rely on the waste ponds for breeding and nesting—unquestionably, a necessary cycle for any species’ continued existence.

USM failed to establish that EPA's scoring of the USM Site as a unique biotic community was arbitrary or capricious and its petition for review on this issue should be rejected.

III. THE "WASTE CHARACTERISTICS" FOR THE SOIL PATHWAY WERE PROPERLY EVALUATED PURSUANT TO THE HRS

The HRS regulations require EPA to identify the substance at a site posing the greatest hazard and assign that substance a toxicity value. HRS § 5.2.2.1. EPA did just that by looking at not only the most common PCB 209 congener at the USM Site, but also the more toxic PCB congeners that are documented to be present at the site. In doing so, EPA used a toxicity reflecting the toxicity of the PCB mixture Aroclor 1254, whose congeners overlap with the range of more toxic PCBs at the USM Site. This was reasonable and based on factual data in the record. But regardless of whether EPA evaluated the toxicity of hazardous substances at the USM Site as a PCB mixture, individual PCB congeners, or only HCB as urged by USM, *see* USM Br. at 51, the site score would remain the same, so USM's petition should be denied. *See* Support Doc., § 3.26.4, at 78-80 (JA____-____).

USM also contests EPA's estimation of hazardous waste quantity using a Tier D area estimate. *See* USM Br. at 53-59. While USM may have preferred that EPA use a different Tier to estimate this value, that does not render EPA's action arbitrary or capricious. Quite to the contrary, EPA's use of a Tier D area estimate

was due, in large part, to inadequacies in information, including that submitted by USM. EPA thus acted reasonably by only relying on its own Tier D area estimate.

A. EPA Correctly Assigned a Toxicity Value of 10,000 for the Range of PCBs Documented at the USM Site.

1. The PCBs at the site warrant a toxicity value of 10,000.

USM claims that EPA based the toxicity value on substances that were not present at the USM Site, but that supposition is not true. The USM Site has a wide range of PCBs, from highly toxic dioxin-like congeners to the less toxic PCB 209 congener. Support Doc., § 3.26.4, at 78-80 (JA____-____). To account for this varying PCB mixture, EPA used the characteristics of the PCB mixture Aroclor 1254 to assess toxicity at the USM Site. *Id.* This was entirely reasonable, given that Aroclor 1254 predominately contains PCB congeners with three to six chlorines and these same highly toxic PCB congeners were confirmed by USM's own data to be present at the USM Site.¹² USM Comments, Ex. A, at 25 (JA____). EPA's action was also entirely consistent with EPA documents stressing that the presence of a range of PCB congeners is a factor that should be considered when assessing risk at a site. Support Doc., § 3.26.4, at 80 (JA____). To be sure, if EPA

¹² USM argues that "[n]othing in the administrative record demonstrates the presence of any Aroclor-1254 congeners 'significantly above background.'" USM Br. at 50. Here, EPA only scored PCBs as the hazardous substance and therefore presented a background level for PCBs total, not individual PCB congeners. Doc. Record, at 23-24 (JA____-____). As will be explained later in this section, to look at individual congeners is beyond the scope of a screening tool. The methodology for assigning toxicity to individual PCB congeners has not yet been perfected.

only accounted for PCB 209 and failed to account for the more toxic PCBs that are indisputably present at the site, it would most certainly underestimate the risk posed by the USM Site. Assessing the toxicity value based on the toxicity of Aroclor 1254 is most consistent with the hazardous substances actually found at, and the risk actually posed by, the USM Site.

While it is true that PCB 209 was the most prevalent PCB congener reported at the USM Site, in scoring the soil pathway the HRS mandates that EPA assess the substance with the highest toxicity value—not the substance that is the most prevalent. HRS § 5.2.2.1. Therefore, that PCB 209 is in abundance at the USM Site is wholly irrelevant.

So, too, is USM's citation to *National Gypsum*. In *National Gypsum Co. v. EPA*, another NPL listing case, EPA had tested groundwater at the site, but did not ascertain the chemical form of boron contained in the water. 968 F.2d 40, 42 (D.C. Cir. 1992). EPA then based the site's toxicity score on highly toxic boron compounds although the only form of boron known to have been deposited at the site was the less toxic boron oxide. *Id.* Because EPA had no support for its conclusion that compounds other than boron oxide were present at the site, the court ruled that EPA's toxicity score was arbitrary and capricious. *Id.* at 43-44.

A completely different situation exists here. EPA's present determination is not based on assumption or speculation, but on concrete facts and scientific data.

Here, the record supports EPA's conclusion that PCB congeners other than PCB 209 are at the USM Site; that these congeners are more toxic than PCB 209; and that the PCB combination at the USM Site contains the same highly toxic PCB congeners that are in the PCB mixture Aroclor 1254. EPA explained all of this in its response to USM's comments and, as the *National Gypsum* court acknowledged, EPA's scientific explanations are entitled to substantial deference. 968 F.2d at 43.

Also notable is that, in *National Gypsum*, the court was "particularly frustrate[ed]" that EPA assumed the boron found in the groundwater was a highly toxic boron compound when tests were available to determine the precise form of boron contained in the groundwater. *Id.* at 44. Here, in contrast, "[t]he state of the science for determining the presence of all 209 PCB congeners ... at all sites is beyond the scope of a screening tool, and the research necessary to determine the toxicity of each PCB congener individually has not been completed." Support Doc., § 3.26.4, at 78 (JA____). Thus, EPA cannot be expected to use the toxicity factor of individual PCB congeners when that information is, at this juncture, scientifically unavailable. As the only feasible alternative, EPA assigns a toxicity value of 10,000 to *all* PCBs based on the toxicity of Aroclor 1254 at *all* sites in performing *all* HRS evaluations. *Id.*; *cf. Bluewater Network v. EPA*, 370 F.3d 1, 18 (D.C. Cir. 2004) (upholding EPA's regulation of hydrocarbons as means to

control fine particulate matter emissions because hydrocarbons provided “a good proxy” for regulating emissions).

Similarly, even if the toxicity values for the PCBs found at the USM Site were based on individual congeners instead of the Aroclor 1254 mixture, EPA would still assign a value of 10,000. As established above, highly toxic dioxin-like congeners are present at the USM Site that warrant a value of 10,000. *Id.* at 78-79.

2. Even if only HCB was scored, the site score would not change.

Likewise, if PCBs were altogether excluded from EPA’s HRS evaluation, the USM Site score would still score above 28.50. As EPA explained in the record, under this scenario, the documented HCB at the USM Site would be assigned a value of a toxicity factor of 1,000 and, when combined with other values, would result in the same waste characteristics value of 100 for the soil and air pathways. Support Doc., § 3.26 at 64 (JA____) & § 3.26.4 at 80 (JA____). Thus, even if PCBs were excluded from the HRS calculation, the USM Site score would remain above the requisite 28.50.

B. EPA’s Calculation of Hazardous Waste Quantity Value Using a Tier D Area Estimate was Appropriate.

USM asserts that EPA’s use of a Tier D estimate (area) to calculate hazardous waste quantity was impermissible because sufficient data was available for EPA to estimate hazardous waste quantity according to the higher Tier A

(hazardous constituent quantity) and Tier C (volume) estimates. USM further purports that EPA's use of a Tier D area estimate to assign the hazardous waste quantity for a source is contrary to the HRS regulations which, according to USM, mandate that "the lower tiers are to be calculated *if, and only if*, the higher tiers cannot be adequately determined." USM Br. at 58. Again, USM merely repeats arguments that EPA addressed in response to USM's comments without making any attempt to demonstrate why EPA's response was arbitrary or capricious. Moreover, even using the waste quantity estimates presented by USM would still result in the site being placed on the NPL and, thus, even if they were correct, USM's arguments would provide no basis for this Court to vacate EPA's decision. See Support Doc., § 3.27.3.2, at 91 (JA___).

1. The HRS regulations require EPA to use the highest numerical value—not the highest level tier—in assigning hazardous waste quantity for a source.

USM's contention that EPA could not resort to Tier D because the highest tier estimate *must* be used to assign the hazardous waste quantity for a source is plainly erroneous. HRS § 2.4.2.1.5 states:

Select *the highest of the values* assigned to the source (or area of observed contamination) for the hazardous constituent quantity, hazardous wastestream quantity, volume, and area measures. Assign this value as the source hazardous waste quantity value. Do not round to the nearest integer.

(Emphasis added). The “highest” in this context means the highest numerical value—not the highest level tier. Support Doc., § 3.27.2, at 88 (JA____). The HRS therefore envisions that, in determining the source hazardous waste quantity value, EPA will assign a source value for each of the four tiers, if available, and use the highest numerical value as the source hazardous waste quantity value. *See id.* Hence, the highest value controls, not the highest level tier.¹³

2. It was reasonable for EPA to use Tier D, given the lack of reliable data to use other tiers.

USM’s arguments regarding EPA’s rationale for using a Tier D area estimate are similarly without merit. Most egregious is USM’s contention that EPA was obligated to remedy the deficiencies in USM’s data and independently evaluate hazardous waste quantity pursuant to Tier A or Tier C. *See* USM Br. at 53. Expecting EPA to cure defects in USM’s data by performing allegedly relevant analyses and applying that information to an NPL listing decision simply places the burden on the wrong party. Indeed, “parties opposing inclusion of their sites on the NPL are well-positioned to supply EPA staff with any assertedly relevant data.” *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1306 (D.C. Cir. 1991); *see also Nat’l Gypsum*, 968 F.2d at 44 (refusing to hold that EPA must

¹³ The HRS Guidance Manual also supports EPA’s interpretation. Section 6.1 states that “[t]he hazardous waste quantity for each source at a site is determined by evaluating as many of the tiers as necessary to estimate the mass of hazardous substances for the source ... *The highest value among the tiers* used is then selected as the source hazardous waste quantity value.” (Emphasis added).

perform additional, available testing for NPL listing; if EPA does not perform additional tests, it needs only give reasoned explanation for its assumptions). Therefore, it is not EPA's job to patch gaping holes in data proffered by USM in opposition to the NPL listing.

EPA thoroughly explained its use of a Tier D area estimate in lieu of Tiers A, B, and C. That USM vehemently disagrees with EPA's explanation is insufficient to render it arbitrary or capricious. And that USM's expert, SCS Engineers ("SCS"), submitted its own evaluations of Tiers A and C does not make those evaluations "adequately determined." *See* USM Br. at 53.

For example, USM faults EPA for rejecting its "waste dimension" estimate for Tier A, *see* USM Br. at 56, but USM wholly failed to support the basis of its underlying calculations. In arriving at its Tier A estimate for the active waste pond, SCS excluded the portion of the pond not covered by water without providing any rationale, whatsoever, for this exclusion. As EPA pointed out, liquid may have simply evaporated from those areas of the pond not currently covered with water. Support Doc., § 3.27.5.1, at 96 (JA____). Doubling the areas shown in SCS's aerial photographs, as USM urges, does not somehow make SCS's omission forgivable since hazardous substances may still be present in those areas

that SCS did not test at concentrations different than in the areas tested. *Id.* Its figures were therefore incomplete and appropriately rejected.¹⁴

Likewise, USM provided no statistical analysis for EPA to conclude that SCS's depth or concentration estimates based on, at most, 30 samples of an area several hundred acres in size were an adequate representation of the active waste pond. *Id.*, § 3.27.5.1, at 96-97 (JA____-____) & § 3.27.5.3, at 98 (JA____). Of SCS's supposed 30 samples, 19 lack even basic information concerning depth observations. *Id.*

USM's waste dimension estimate for the inactive waste pond fares no better. Again, SCS's reliance on 26 samples of the inactive waste pond, over 800 acres in size, suffers statistical flaws. *Id.*, § 3.27.5.3, at 98 (JA____). USM altogether neglected to provide EPA with the depth measurements underlying its volume estimate for the inactive waste pond. Without this information, it is impossible for EPA to accept USM's depth estimates with any level of confidence. *Id.*, § 3.27.5.1, at 96 (JA____). It was also not clear to EPA why SCS distinguished between the differences in the depth of waste in two portions of the inactive pond, as SCS made no attempt to explain this random distinction. *Id.*

As a result, USM's Tier A estimates fell woefully short of being "estimated with reasonable confidence" as the HRS regulations require. HRS § 2.4.2.1.1.

¹⁴ Furthermore, SCS's estimates did not identify all hazardous substances in the waste ponds. Support Doc., § 3.27.5.3, at 98-99 (JA____-____).

And for many of the same reasons that USM's estimates were unacceptable for Tier A, they were equally insufficient for Tier C.¹⁵ Support Doc., § 3.27.4, at 93 (JA___).

EPA therefore reasonably calculated hazardous waste quantity pursuant to a Tier D area estimate. Further, that EPA acknowledged that its original Tier D area estimates were high, and corrected them in the Revised HRS Documentation Record, Doc. Record, § 2.2.1, at 10 n. 3 (JA___) & § 2.4.2.1.5, at 13 n. 4 (JA___), illustrates EPA's willingness to adjust its HRS evaluation when an error has been made.

IV. EPA RATIONALLY CONCLUDED THAT THE INACTIVE WASTE POND IS A "WORKPLACE AREA"

USM contends that EPA improperly assigned the maximum "likelihood of exposure" factor value for the soil pathway based on its determination that the inactive waste pond is an "area of observed contamination" "within a workplace property boundary *and* within 200 feet of a workplace area." USM Br. at 59. USM's sole argument here is that the inactive waste pond is not a "workplace area," as USM does not contest EPA's determination that the inactive waste pond qualifies as an "area of observed contamination" or is "within a workplace property boundary." Nor does USM dispute EPA's finding that the active waste

¹⁵ Neither USM nor EPA provided suitable data for the Tier B hazardous wastestream quantity estimate.

pond constitutes a workplace area. Nevertheless, USM's contention that EPA erred in finding that the inactive waste pond is a "workplace area" should be rejected.

In assessing the threat to the resident population from the soil pathway, the HRS requires that EPA assign a maximum value of 550 for the likelihood of exposure when there is an observed contamination in, *inter alia*, a "workplace property boundary and within 200 feet of a workplace area." HRS §§ 5.1, 5.1.1. While the term "workplace" is not defined in the HRS, EPA reasonably interpreted the HRS regulations and considered the "workplace" at the USM Site to include "any areas workers come into contact with as part of carrying out their work tasks." Support Doc., § 3.22, at 55 (JA___); *Carus Chem.*, 395 F.3d at 439 (substantial deference is given to EPA's interpretation of its own regulations). The inactive waste pond constitutes such an area.

USM contends that "[t]he record contains no evidence that any employees work at the inactive waste pond" and "the employees all work in the manufacturing area, which is well over 200 feet away." USM Br. at 59. Yet, it is evident from USM's own comments that at least one USM worker regularly comes into contact with the inactive waste pond as part of his employment. Indeed, a USM employee, J. Roger Francom, stated that he drives around the waste ponds once a month to

retrieve dead or distressed birds, as is required by the U.S. Fish and Wildlife

Service collection permit that was issued to USM:

only *infrequently* do I exit my truck when performing these inspections. When I exit my truck, it is simply to get a better look at the ponds. No other employees *normally* come into contact with the waste pond area. Access to the waste pond area is limited by locked gates, and employees would not *readily* be able to access the area of the waste ponds without a key or combination even if they wished to do so.

USM Comments, Ex. F, at 163, ¶ 2 (emphasis added) (JA____). Clearly then, Mr. Francom works around the inactive waste pond on a monthly basis. It was also reasonable for EPA to conclude that sometimes Mr. Francom *does* exit his truck in performing inspections; sometimes *other* employees do come into contact with the waste pond area; and *other* employees may readily access the waste pond area as long as they have a key or combination. Other documents also support EPA's determination that USM workers have to go on, in, or near the inactive waste pond to collect dead or dying birds. HRS Documentation, Ref. 11 at 1-10 (JA____-____) & Ref. 25 at 1 (JA____). In fact, this process was conducted, usually resulting in dead wildlife being found, nearly monthly in 2006 and multiple times in some months in 2007. *Id.*, Ref. 11 at 1-10 (JA____-____) & Ref. 24 at 10 (JA____). There can thus be no credible dispute that the inactive waste pond constitutes a workplace.

USM tries to impose a requisite level of frequency of worker visits to an area for it to qualify as a “workplace,” but nowhere does the HRS set forth any requisite frequency of contact. USM also cites the preamble of the HRS to support its view that areas of infrequent contact are outside the context of a “workplace,” but USM has yet again misinterpreted the HRS. The relevant portion of the preamble to the HRS states:

The 200-foot limit accounts for those situations where the property boundary is very large, and exposure to contaminated surficial materials is unlikely or infrequent because of the distance of residences, schools, or work places from an area of observed contamination on the same property.

55 Fed. Reg. 51,532, 51,560 (Dec. 14, 1990). This section does not state that areas of infrequent contact are excluded from the workplace. Instead, it explains that the 200-foot limit was specifically put into place to account for instances, such as this one, where workers may infrequently work in remote parts of a workplace property that is near an AOC. No matter how purportedly infrequent the contact with the workplace area, the only requirement is that the worker works on or within 200 feet of an AOC on a workplace property—and USM does not dispute that the inactive waste pond is an AOC on a workplace property. Support Doc., § 3.24, at 59 (JA___). Therefore, because the record shows that USM workers have to go on, in, or near the inactive waste pond as part of their employment, EPA

reasonably concluded that it constitutes a “workplace area” and assigned a maximum value to the likelihood of exposure factor value for the soil pathway.¹⁶

Even if the Court is somehow inclined to find that the inactive waste pond does not constitute a “workplace area”—which it should not do—alternatively, the maximum “likelihood of exposure” value could also be based on sensitive environments in the immediate area of the active waste pond, as demonstrated above in section II, *supra*. *Id.*, § 3.25, at 60-61 (JA____-____); HRS §§ 5.1, 5.1.1 (value of 550 required for AOC “[w]ithin boundaries of a terrestrial sensitive environment”). These sensitive environments being associated with the active waste pond was not presented in the rationale for assigning the likelihood of exposure factor category, but the HRS only requires that they be correctly documented as such, which they were. *See* Support Doc., §§ 3.28.2.1 - 3.28.2.3, at 105-115 (JA____-____).

¹⁶ USM altogether ignores the draft manual’s definition of “workplace area.” The draft manual defines it as “[a]ny area where workers are regularly present. Areas receiving *only brief but regular use* (e.g., parking areas, lunch areas) may qualify as work areas.” HRS Interim Final Guidance Manual, § 9.5, at 371 (emphasis added) (JA____). The draft manual also counsels that “[l]ikelihood of exposure rather than duration is the important factor in determining if an individual may be exposed to hazardous substances at a workplace area.” *Id.* at 374 (JA____). This is entirely consistent with EPA’s approach here.

CONCLUSION

For all of the above reasons, the petition for review should be denied.

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August 2, 2010

CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

Pursuant to Federal Rule of Appellate Procedure 37(a)(7)(C), I certify that the foregoing Brief of Respondent EPA contains 13,869 words, exclusive of front matter and certificates, as counted by the “word count” feature of my Microsoft Office Word software.

/s/ T. Monique Jones

T. Monique Jones

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2010, the foregoing Brief of Respondent EPA was electronically filed and served by means of the Court's CM/ECF system upon the following counsel of record:

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Attachment 1



URS
OPERATING SERVICES

MAGNESIUM CORPORATION
TOOELE COUNTY, UTAH

FIGURE 2: Site Map and Sample Locations

