Office of Advocacy
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Advocacy: the voice of small business in government

July 30, 2010

BY ELECTRONIC MAIL

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Comments on EPA's Proposed Rule, "Identification of Non-Hazardous Secondary Materials That Are Solid Waste," 75 Fed. Reg. 31,844 (June 4, 2010), Docket No. EPA-HQ-RCRA-2008-0329

Dear Administrator Jackson:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits the following comments in response to the U.S. Environmental Protection Agency's proposed rulemaking, "Identification of Non-Hazardous Secondary Materials That Are Solid Waste," 75 Fed. Reg. 31,844 (June 4, 2010). The proposed rule would for the first time define many nonhazardous secondary materials that are now used extensively as fuels or ingredients in combustion units to be "solid wastes" under the Resource Conservation and Recovery Act (RCRA).[1] Accordingly, any combustion unit which burns those materials would henceforth be required to meet rigid emission standards for Commercial and Industrial Solid Waste Incineration units under section 129 of the Clean Air Act (CAA), [2] rather than the relatively flexible hazardous air pollutant control requirements of section 112 of the CAA.[3]

Advocacy is concerned that (1) EPA did not conduct a full analysis of the economic impacts of the proposed rule on small entities, as required by the Regulatory Flexibility Act[4] and Executive Order 12866,[5] and (2) EPA's proposed definition would subject non-

[1] 42 U.S.C. § 6901, *et seq.*
[2] 42 U.S.C. § 7429.
[3] 42 U.S.C. § 7412. Unlike section 112, which distinguishes between small emission sources and large sources, section 129 imposes stringent and costly emission control requirements on all combustion units, regardless of size. While there are over 200,000 combustion units that are subject or soon will be subject to section 112 standards, EPA estimates that only 176 Commercial and Industrial Solid Waste Incinerators subject to section 129 currently operate in the United States.
[4] Pub. L. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 5 U.S.C. § 601, et. seq.).

hazardous secondary materials (NHSM) to regulatory requirements that are needlessly stringent and significantly more complex than their hazardous counterparts. Accordingly, small entities, including small government jurisdictions, will no longer be able to use large volumes of non-hazardous secondary materials such as used oil, scrap tires, biomass, and other materials in boilers, cement kilns, industrial furnaces, and other combustion units. Instead, these entities will have to incinerate these materials in Commercial and Industrial Solid Waste Incinerator (CISWI) units under section 129, at significant effort and expense, and with little or no environmental benefit.[6] As a result, these secondary materials will become more difficult and costly to manage, and highly successful national recycling programs for these materials will be jeopardized. Indeed, disruption of the current reuse/recycling markets for NHSM could increase the potential for improper handling and resultant environmental damage.

Advocacy recommends that (1) EPA develop a Regulatory Impact Analysis for this proposed rule, taking into consideration the economic impacts on small entities who will have to incinerate secondary materials under section 129 rather than combusting them in a boiler or other section 112 unit, and (2) EPA revise the definition of non-hazardous secondary materials that are solid wastes so that it is less restrictive and less complex.

The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. No. 94-305 to advocate the views of small entities before Federal agencies and Congress. Because Advocacy is an independent body within the U.S. Small Business Administration (SBA), the views expressed by Advocacy do not necessarily reflect the position of the Administration or the SBA.[7] The Regulatory Flexibility Act (RFA),[8] as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[9] gives small entities a voice in the federal rulemaking process. For all rules that are expected to have a "significant economic impact on a substantial number of small entities,"[10] EPA is specifically required by the RFA to conduct a Small Business Advocacy Review (SBAR) Panel to assess the impact of the proposed rule on small entities,[11] and to consider less

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[5] Executive Order 12,866, "Regulatory Planning and Review" (58 Fed. Reg. 51,735 (September 30, 1993)), OMB Circular A-4, *Regulatory Analysis* (September 17, 2003) at 46 (provisions for small business impacts analysis) .

[6] EPA estimates that only 176 CISWI units currently operate in the U.S., and only 121 of these could accept any significant volume of NHSM solid wastes. With no new CISWI units expected to come on line, it is not clear how the large volume of NHSM solid wastes generated each year would be managed.

[7] 15 U.S.C. § 634a, *et. seq.*

[8] 5 U.S.C. § 601, *et. seq*.

[9] Pub. L. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 5 U.S.C. § 601, et. seq.).

[10] *See* 5 U.S.C. § 609(a), (b).

[11] Under the RFA, small entities are defined as (1) a "small business" under section 3 of the Small Business Act and under size standards issued by the SBA in 13 C.F.R. § 121.201, or (2) a "small organization" that is a not-for-profit enterprise which is independently owned and operated and is not dominant in its field, or (3) a "small governmental jurisdiction" that is the government of a city, county, town, township, village, school district or special district with a population of less than 50,000 persons. 5 U.S.C. § 601.

burdensome alternatives. Moreover, Executive Order 13272[12] requires federal agencies to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

Background

At the present time, many industries combust non-hazardous secondary materials (NHSM) in the course of their production processes, either as fuel, or as an ingredient in their product, or both. Large quantities of scrap tires, for example, are combusted in Portland cement kilns, both as fuel and because tire ingredients (i.e., rubber, vinyl, steel) are desirable components of the final cement product. Many other facilities combust biomass or used oil in their boilers.[13] Section 129 of the Clean Air Act directs EPA to develop emissions standards for "solid waste incineration units" that combust "any solid waste material from commercial or industrial establishments."[14] Section 129 further provides that the term "solid waste" shall have the meaning "established by the Solid Waste Disposal Act," otherwise known as the Resource Conservation and Recovery Act (RCRA).[15]

In 2005, EPA developed a definition of "solid waste" for materials incinerated in Commercial and Industrial Waste Incinerator (CISWI) units.[16] That definition of "commercial and industrial solid waste" excluded solid waste that is combusted at a facility in a combustion unit whose design provides for energy recovery or which operates with energy recovery – such as a boiler or a cement kiln. The 2005 definition was vacated, however, in *Natural Resources Defense Council v. EPA*,[17] in which the court found that the Clean Air Act requires *any* unit that combusts "any solid waste material at all" to be regulated as a "solid waste incineration unit."[18] EPA developed the current revised definition in response to the court's vacatur of the 2005 definition. EPA certified that the NHSM solid waste definition would not have a significant economic impact on a substantial number of small entities because "no small entities are directly regulated by this rule."[19] Similarly, EPA did not prepare a Regulatory Impact Analysis for this rule, stating that "[t]his action alone does not directly invoke any costs."[20]

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[12] Executive Order 13,272, "Proper Consideration of Small Entities in Agency Rulemaking" (67 Fed. Reg. 53,461 (August 16, 2002)).
[13] EPA is currently developing hazardous air pollutant control standards under section 112 for commercial, institutional, and industrial boilers. *See* 75 Fed. Reg. 32,006 and 75 Fed. Reg. 31,896 (June 4, 2010). Advocacy will be submitting separate comments on those proposed rules.
[14] 42 U.S.C. § 7429(g)(1).
[15] 42 U.S.C. § 6901, *et seq*.
[16] The CISWI Definitions Rule, 70 Fed. Reg. 55,568 (September 22, 2005).
[17] 489 F.3d 1250 (D.C.Cir. 2007).
[18] *Id*. at 1260.
[19] 75 Fed. Reg. 31,890 (June 4, 2010).
[20] 75 Fed. Reg. 31,889 (June 4, 2010).

On May 19, 2010, and July 23, 2010, Advocacy hosted small business roundtables to obtain small business input on this proposal. Roundtable participants informed Advocacy that the proposed NHSM solid waste definition would have profound economic impacts on small entities that now combust these materials in boilers and other combustion units. They believe that the proposed definition would significantly adversely impact many facilities, because they will have to (1) purchase more costly fuels to replace the NHSMs they combust, (2) pay higher prices to incinerate NHSM in CISWI units or otherwise manage them, (3) use less-preferred alternative materials in their production processes, and (4) disrupt long-established, proven recycling programs across the country.

EPA Should Have Prepared A Regulatory Impact Analysis For This Rule

EPA asserts that this proposed definition rule, by itself, has no regulatory impact and will invoke no new costs for any small entities. It is clear, however, that the NHSM solid waste definition becomes the determining factor in characterizing these secondary materials and whether they will be regulated in the section 129 universe or in the section 112 universe. That characterization – which flows from the definition – carries significant direct regulatory consequences. EPA should have analyzed the additional burdens that regulated entities will face when they have to incinerate materials in CISWI units rather than combusting them in traditional units such as boilers or industrial furnaces. Such an analysis is not only required under the Regulatory Flexibility Act,[21] it is also required under Executive Order 12866.[22] The definition rule itself is the most logical and appropriate place to fully consider these potential impacts, since EPA cannot address those impacts through other rulemakings.

EPA Made the NHSM Solid Waste Definition Too Restrictive and Complicated

In several respects, EPA has made the revised NHSM solid waste definition both needlessly restrictive and overly complicated, even as compared to the corresponding solid waste definition that governs ***hazardous*** solid wastes.

- The NHSM "traditional fuels" concept, although borrowed from subtitle C of the Resource Conservation and Recovery Act (the chapter governing hazardous materials), seems more limited than under subtitle C. Materials such as animal manure that have a long history of use as a fuel are excluded in some situations from being considered a traditional fuel. EPA has not explained why it diverged from the subtitle C approach.

- The NHSM solid waste definition focuses on the material being combusted (the input), not on the ultimate emissions from the unit (the output). This is a reversal of the usual framework of the Clean Air Act and of section 112.

[21] 5 U.S.C. § 603.
[22] *See* OMB Circular A-4, *Regulatory Analysis* (September 17, 2003) at 46 (provisions for small business impacts analysis).

- The "discarded materials" concept is more restrictive than under subtitle C of RCRA, and imposes limitations (e.g., NHSMs transferred to a third party are presumed "discarded") that go beyond subtitle C and relevant judicial decisions.[23]

- Legitimacy criteria are more stringent than under subtitle C regulations, and different criteria apply to NHSM used as fuel versus NHSM used as an ingredient, with no consistent basis for the distinction. If a NHSM is used both as fuel and as an ingredient, EPA would decide which legitimacy criteria to apply, depending on what the agency feels is the "primary purpose" of the use.[24]

- As a practical matter, the "processing" requirement for transferred NHSMs means that whole used tires transferred to a Portland cement plant are solid wastes (and must be incinerated in a CISWI unit) even when they have been chipped/shredded without the metal belts being removed, even though the Portland cement plant is capable of using the whole tire in its production process.[25] Requiring the metal belts to be removed imposes a needless step that wastes energy and time, and yields no environmental benefit.

- While subtitle C recognizes that a material that is recycled is not a solid waste if it can be used or reused as an ingredient in an industrial process (provided it is not being reclaimed),[26] under the NHSM solid waste definition a material cannot be used as an ingredient by a third party unless it undergoes what EPA considers to be "sufficient" processing.

- All off-specification used oil is considered a waste under the proposed definition, even though EPA has determined that such used oil is safe for use in space heaters, boilers, and industrial furnaces under RCRA section 3014,[27] and off-spec used oil has been safely utilized for decades.

- The NHSM solid waste definition classifies materials that are legitimately recycled to be solid waste,[28] which is more stringent than the subtitle C regulations.

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[23] *See, e.g., Safe Food and Fertilizer v. EPA*, 350 F.3d 1263, 1268 (D.C.Cir. 2003) (The fact that a person transfers a material to a third party does not mean that the material is discarded). *See also American Mining Congress v. EPA*, 824 F.2d 1177, 1190 (D.C.Cir. 1987)(discarded materials cannot include materials that are destined for beneficial use or recycling in a continuous process by the generating industry itself, because such materials are not part of the waste disposal problem RCRA was intended to solve), *Association of Battery Recyclers v. EPA*, 208 F.3d 1047, 1051 (D.C.Cir. 2000) (materials are "discarded" only when they are disposed of, abandoned, or thrown away).

[24] 75 Fed. Reg. 31,868 (June 4, 2010).

[25] "Used tires that have been shredded/chipped without the removal of the metal belts or wire would not be considered to have been sufficiently processed, and any [tire-derived fuel] that is generated in such a fashion would be considered a waste-derived fuel." 75 Fed. Reg. 31,877 (June 4, 2010).

[26] *See* 40 C.F.R. § 262.2(e).

[27] 42 U.S.C. § 6935.

[28] [D]iscarded non-hazardous secondary materials that are not processed would be considered a waste-derived fuel . . . and thus a solid waste, no matter how legitimate their use as a fuel. 75 Fed. Reg. 31,876 (June 4, 2010).

EPA's Proposed Rule Will Hurt Successful Recycling Programs

Based on feedback from small entities, Advocacy is particularly concerned that the NHSM solid waste definition will have significant unintended adverse impacts on current nationwide recycling efforts for NHSMs. In the tire industry, for example, small businesses are involved in retreading, repairing, and recycling millions of tires each year. Currently, over 130 million tires are recycled each year, and many of these are combusted in the cement production process. If these tires had to be incinerated in CISWI units or landfilled, this successful recycling effort would be dramatically reduced. Tires would accumulate in tire piles, increasing the risk of tire fires and providing breeding grounds for mosquitoes, including those that carry the West Nile virus.

Similarly, billions of gallons of used oil are generated in the U.S. each year. A large volume of this used oil is currently combusted in boilers and industrial furnaces. Requiring used oil to be incinerated in CISWI units would effectively destroy the reuse/recycle industry, affecting thousands of small businesses that collect, transport, and process used oil. Besides the direct effect on thousands of small businesses like gas stations, garages, and oil change shops, it is doubtful whether there is sufficient CISWI unit capacity to handle the volume of used oil. To the extent it is incinerated, used oil would simply be converted to greenhouse gases rather than being used to recover energy. This high-value fuel would be destroyed without providing any societal benefit. Further, it is likely that improper disposal of this NHSM would increase dramatically.[29]

Moreover, large volumes of biomass are currently combusted in the boilers of thousands of facilities such as pulp and paper plants, sawmills, furniture factories, sugar mills, and other large and small businesses. The NHSM solid waste definition will force these facilities to replace their biomass fuel with fossil fuels. This will substantially increase their fuel and waste management costs, and will also increase the overall emissions of greenhouse gases. Using as an example a medium-sized furniture factory with a 45 mmBtu boiler that uses 12,000 tons of biomass (wood) fuel each year, an industry association has estimated that having to landfill the biomass would cost nearly $200,000 yearly, and purchasing natural gas to burn in the boiler would cost the facility more than $1 million each year.[30] Moreover, because EPA has previously considered biomass to be a carbon-neutral fuel,[31] unlike natural gas, the switch to natural gas would also increase greenhouse gas emissions by an estimated 23,000 tons per year of CO_2 equivalent.[32] This biomass fuel is clean and readily available. Forcing businesses to burn fossil fuels imposes significant new costs with little or even negative corresponding environmental benefit.

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[29] In 1986, EPA concluded that classifying used oil as a hazardous solid waste would result in some 61 million to 128 million gallons of used oil to be disposed of improperly each year. Temple, Barker & Sloan, Inc., *Analysis of Possible Market Impacts Resulting From Stigmatizing Effects of Listing Recycled Oil* (November 1986).

[30] American Home Furnishings Alliance, 2010 Case Study of mid-sized facility requiring 192,000 decatherms of natural gas per year to replace 12,000 tons of wood fuel (internal document).

[31] See e.g., U.S. EPA, *Biomass Combined Heat and Power Partnership: An Overview*, Webinar presented by Bruce Hedman, ICF International (June 25, 2009) at 5 ("Biomass is CO_2 neutral").

[32] American Home Furnishings Alliance, 2010 Case Study.

Recommendations

- EPA should develop a Regulatory Impact Analysis for this rule;

- EPA should make the NHSM solid waste definition less restrictive and less complicated. For example, EPA should broaden the fuels that are considered "traditional fuels." EPA should also make the NHSM solid waste concept of "discarded material" mirror the subtitle C definition. In particular, EPA should reject the presumption that all materials transferred to a third party are discarded materials;

- the legitimacy criteria should conform to the subtitle C requirements;

- EPA should recognize the reuse/recycle exemption; and,

- for used oil handlers, EPA should define NHSM solid wastes to exclude any material that is in compliance with RCRA Part 279 regulations. Because RCRA section 3014 does not define oil as a solid waste, and creates a separate regulatory framework for used oil, EPA clearly has the discretion to craft a separate rule for used oil.

Conclusion

Advocacy recommends that EPA (1) develop a Regulatory Impacts Analysis for this proposed rule, taking into consideration the economic impacts on small entities who will have to incinerate secondary materials under section 129 rather than combusting them in a boiler or other section 112 unit, and (2) revise the definition of non-hazardous secondary material that are solid wastes so that it is less restrictive and less complex.

Please do not hesitate to call me or Assistant Chief Counsel Keith Holman (keith.holman@sba.gov or (202) 205-6936) if we can be of further assistance.

Sincerely,

/s/	/s/
Susan M. Walthall Acting Chief Counsel for Advocacy	Keith W. Holman Assistant Chief Counsel for Environmental Policy

cc: Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget