



February 21, 2012

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

Re: *Non-Hazardous Secondary Materials that are Solid Waste, Docket ID No. EPA-HQ-RCRA-2008-0329, 76 Fed. Reg. 80452 (December 23, 2011)*

Dear Administrator Jackson:

The U.S. Small Business Administration Office of Advocacy (Advocacy) submits the following comments regarding the Environmental Protection Agency’s (EPA) proposal to revise the final rule, regarding non-hazardous materials that are solid waste when used as fuels, that was promulgated on March 21, 2011.¹

EPA promulgated the 2011 Non-hazardous Secondary Material (NHSM) final rule under the Resource Conservation and Recovery Act (RCRA) to identify which secondary materials are solid wastes when combusted as fuel. These solid wastes are subject to more costly and stringent air pollution requirements when combusted for energy recovery, as opposed to non-wastes. Although EPA’s proposed changes are helpful, they do not fully address the serious economic and environmental consequences of the current rule. Small businesses have told Advocacy that EPA’s approach disrupts the large economic activity associated with the recycling of secondary materials for energy recovery, with significant detriment to the environment.

Advocacy recommends that EPA should revise the legitimacy criteria for NHSM and allow facilities to self-certify those secondary materials as non-waste. In addition, EPA should use its rulemaking petition process to designate various NHSM as non-wastes, and avoid disruption of the large existing recycling infrastructure for the designated materials.

¹ 76 Fed. Reg. 80452 (December 23, 2011).

This approach will facilitate the safe and beneficial recycling of secondary material, while maintaining protection of human health and the environment.

Office of Advocacy

Advocacy was established by Congress under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration. Section 612 of the Regulatory Flexibility Act (RFA) also requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.² Moreover, Executive Order (E.O.) 13272 requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy.³ 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.

Under the RFA and E.O. 13272, Advocacy submits the following comments on the proposed revisions to the 2011 final rule.

Overview

In the promulgated NHSM rule,⁴ EPA describes the standards and procedures for identifying whether NHSM are solid wastes under the Resource Conservation and Recovery Act (RCRA) when used as fuels or ingredients in combustion units. EPA recently proposed amendments to the promulgated NHSM rule.⁵ When viewed in the context of analogous requirements applied to hazardous wastes under RCRA Subtitle C, these rules deviate from EPA's long-standing policy approach to determining the legitimacy of recycling activities.

EPA's new approach will place unnecessarily burdensome requirements on facilities to demonstrate the legitimacy of long-standing NHSM combustion activities for energy recovery. Such requirements are unwarranted given that EPA has not produced any evidence that these facilities are performing "sham" recycling (i.e., activity undertaken to avoid the requirements of managing a secondary material as a waste). The new amendments would more likely result in many millions of tons (and in the case of waste oil, millions of gallons) of NHSM being classified as solid wastes, making those materials subject to Clean Air Act (CAA) section 129 emission standards for

² Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified at 5 U.S.C. §§601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

³ Executive Order No. 13,272, 67 Fed. Reg. 53,461 (Aug. 13, 2002).

⁴ 76 Fed. Reg. 15456 (March 21, 2011).

⁵ 76 Fed. Reg. 80452 (December 23, 2011).

Commercial/Industrial Solid Waste Incinerators (CISWI) rather than CAA section 112 emission standards for Industrial, Commercial, and Institutional boilers and process heaters. Because the CISWI standards are much more stringent and costly, NHSM recycling activity will likely decrease substantially, resulting in net negative environmental impacts relative to the status quo. EPA indirectly acknowledges this in describing the environmental benefits of NHSM when used as fuel:

*“The use of secondary materials as alternative fuels and/or ingredients in manufacturing processes using combustion not only recovers valuable resources, it is known to contribute to emission reductions. For example, both greenhouse gas (GHG) and particulate matter (PM) emissions have been reduced as a co-benefit of the use of secondary materials. The use of secondary materials, such as use as a fuel in industrial processes may also result in other benefits, including reduced fuel imports, reduced negative environmental impacts caused by previous dumping (e.g., tires), and reduced methane gas generation from landfills”*⁶

EPA also describes the interplay between economic and environmental benefits from use of NHSM as fuel:

“Economic efficiencies can be improved with the use of secondary materials, when substituted for increasingly scarce virgin materials, because the use of such secondary materials often results in an equivalent level of outputs at lower overall resource use, or in turn, greater outputs could be generated using the same amount of resource inputs. When this occurs, monetary savings resulting from reduced resources and expenditures would, theoretically, be applied to a higher and better use in the economy. This helps advance economic growth as a result of improved industrial efficiency, which, in turn, helps move the country toward material sustainability and energy self sufficiency, while protecting human health and the environment.”

We propose that EPA return to the legitimacy determination principles stated in the 2008 final DSW rule (see Advocacy’s October 20, 2011 comments on proposed DSW revisions).⁷ These principles reflect the reality that, when combusted for energy recovery, the use of NHSM with meaningful heating value is a legitimate recycling activity.

⁶ 76 Fed. Reg. 15456, 15467 (March 21, 2011).

⁷ Comments were submitted by Advocacy on October 20, 2011 regarding the DSW revisions proposed on July 22, 2011. Letter found at <http://www.sba.gov/advocacy/816/29631>.

EPA's long-standing formal policy with respect to determining the legitimacy of recycling activities originates with the preamble to the 1985 hazardous waste regulations that first established the definition of solid waste under RCRA Subtitle C.⁸ A 1989 memorandum issued by then Office of Solid Waste Director Sylvia Lowrance set forth a set of evaluation criteria for determining whether an activity was true or "sham" recycling.⁹ EPA considered sham recycling to be, in fact, discard and materials being sham recycled to be solid wastes.¹⁰

In the 2008 final DSW rule pertaining to hazardous wastes, EPA finalized a set of four criteria for determining the legitimacy of hazardous waste recycling activities.¹¹ EPA recognized that the same criteria for legitimate hazardous waste recycling could be equally applied to nonhazardous secondary materials.¹² In keeping with the precedent set by the Lowrance memorandum, EPA did not make all of these criteria mandatory. Instead, only two of the four legitimacy criteria were identified as mandatory: (1) the hazardous secondary material provides a useful contribution to the recycling process or to a product of the recycling process (*Useful Contribution*); and (2) the recycling process must produce a valuable product or intermediate (*Valuable Product or Intermediate*). As stated in the Advance Notice of Proposed Rulemaking (ANPRM) for NHSM, "These two legitimacy factors make up the core of legitimacy, and, therefore, a process that does not conform to them cannot be a legitimate recycling process, but would be considered sham recycling."¹³

Under the final 2008 DSW rule, the two non-mandatory criteria were that: (3) the generator and recycler manage the hazardous secondary material as a valuable commodity¹⁴ (*Manage as a Valuable Commodity*); and (4) the product of the recycling process does not contain significant concentrations of hazardous constituents that are not in analogous products (*Comparison of Toxics in the Product*). Although these criteria must be evaluated, they did not have to be met, "...because the Agency is aware that a legitimate recycling process may not conform to one or both of these two factors."¹⁵

The 2008 DSW final rule preamble provides a detailed discussion of the rationale for the specific criteria and why two of the four factors were not mandatory. EPA used several

⁸ 50 Fed. Reg. 638 (January 4, 1985).

⁹ OSWER directive 9441.1989(19).

¹⁰ 74 Fed. Reg. 41, 52 (January 2, 2009).

¹¹ 73 Fed. Reg. 64668, 64701-710 (Oct. 30, 2008).

¹² While the criteria may be equally applicable, this does not mean however, that hazardous wastes and nonhazardous secondary materials are handled or mishandled the same way. See further discussion in this letter.

¹³ 74 Fed. Reg. 41, 52 (January 2, 2009).

¹⁴ As part of this criterion, you must demonstrate that "[w]here there is an analogous raw material, the hazardous secondary material should be managed, at a minimum, in a manner consistent with the management of the raw material." Some secondary materials are handled differently from the analogous materials.

¹⁵ 74 Fed. Reg. 41, 52 (January 2, 2009).

examples in the October 2008 final rule notice that showed that materials can be legitimately recycled even though not all the criteria are met.¹⁶

In March 2011, EPA promulgated an NHSM rule that deviated from this long-standing approach.¹⁷ As outlined in more detail below, EPA described a process that properly legitimizes the burning of “traditional” and “alternative traditional fuels” as non-wastes, as well as allowing NHSM generators to self-certify that NHSM is a non-waste when combusted for energy recovery under the control of the generator.

Advocacy agrees that these activities represent legitimate recycling. However, we do not agree with EPA’s approach to classify off site transfers of NHSM combustion for energy recovery as a waste disposal activity. In sections I and II below, we summarize EPA’s regulatory approach, and provide comments on where we agree and disagree with that approach. In sections III-V below, we describe procedures to redefine how secondary materials can be reprocessed into a non-waste fuels or ingredients (section III), and how secondary materials can be designated as categorical non-wastes (sections IV and V).

EPA should consider modifying the legitimacy criteria for NHSM and allow facilities to self-certify. In addition, we endorse EPA’s new rulemaking petition process for categorizing NHSM as non-wastes as providing regulatory certainty for industry. Furthermore, Advocacy recommends that EPA specifically designate several secondary materials as non-wastes in the final rule, which we identify later in this letter. This approach will avoid the unnecessary and burdensome Regional EPA Administrator petition process in cases where EPA has sufficient information to make these designations, and avoid substantial disruption of the existing recycling infrastructure, while enhancing environmental protections.

I. Legitimacy Determination for Combustion of NHSM for Energy Recovery

General Concepts

EPA considers all NHSM burned in combustion units as solid wastes except in the following circumstances:

- 1) NHSM used as a fuel that remains within the control of the generator (whether at the site of generation or another site within the generator’s control) that meets the legitimacy criteria;
- 2) NHSM used as an ingredient in a manufacturing process (whether by the generator or a third party) that meets the legitimacy criteria;
- 3) Legitimate fuel or ingredient products produced from the processing of discarded NHSM;

¹⁶ 73 Fed. Reg. 64668, 64703-710 (Oct. 30, 2008).

¹⁷ 76 Fed. Reg. 1546 (March 21, 2011).

- 4) NHSM that have received a categorical non-waste fuels designation from EPA;¹⁸ and
- 5) NHSM handled outside the control of the generator, but has been determined through a case-by-case non-waste determination petition process to not have been discarded and to be indistinguishable in all relevant aspects from a fuel product.

As noted above, EPA policy under the NHSM rule allows self-certification of non-waste status (legitimate recycling) for NHSM generators that burn self-generated materials for energy recovery. However, a burdensome and unnecessary petition process is required to receive EPA non-waste determinations when NHSM is transferred for energy recovery via combustion by a third party.

The following two sections describe small business concerns with EPA's approach to legitimacy—how EPA defines discard (first test used in determining waste status), and the specific criteria for evaluating the legitimacy of combustion of NHSM for energy recovery. This is followed by Advocacy comments on the design of EPA's current non-waste exemptions.

Definition of Discard

In its NHSM ANPRM, EPA correctly asserts that it has discretion to determine that transferred NHSM is not a solid waste:

The court also considered whether material is discarded in Safe Food and Fertilizer v. EPA, 350 F.3d 1263 (D.C. Cir. 2003) ("Safe Food"). In that case, among other things, the court rejected the argument that, as a matter of plain meaning, recycled material destined for immediate reuse within an ongoing industrial process is never considered "discarded," whereas material that is transferred to another firm or industry for subsequent recycling must always be solid wastes. 350 F.3d at 1268. Instead, the court evaluated "whether the agency's interpretation of... 'discarded'... is, reasonable and consistent with the statutory purpose." Id. Thus, EPA has the discretion to determine if material is not a solid waste, even if it is transferred between industries.¹⁹

However, in the final NHSM rule, EPA reverses course and assumes that NHSMs sent offsite to third parties are assumed to be wastes, unless EPA makes a non-waste determination.²⁰ In support of this new policy approach, EPA stated that:

¹⁸ EPA has so far provided these designations for only (a) scrap tires that have not been discarded and are managed under the oversight of established tire collection programs, including tires removed from vehicles; and (b) resinated wood.

¹⁹ 74 Fed. Reg. 41, 51 (January 2, 2009).

²⁰ 76 Fed. Reg. 15456, 15466 (March 21, 2011).

*when non-hazardous secondary material fuels are transferred to another party, the Agency generally believed that the material is discarded, since the generator has relinquished control of the secondary material and the entity receiving such materials may not have the same incentives to manage them as a useful product, which results in the materials being discarded. The Agency noted that this lack of incentive to manage as a useful product has been well-documented in the context of hazardous secondary material recycling as evidenced by the results of the environmental problems study performed in support of the 2008 DSW Final Rule and believed that this finding also held true for non-hazardous secondary materials that are used as fuel.*²¹

Advocacy finds no justification in the record that this is true for NHSM (except tires).

In the final NHSM rule, EPA states: “It is clear that EPA’s jurisdiction under RCRA applies unambiguously to materials that are discarded and the definition is unambiguous in that it means thrown away, disposed of or abandoned. It is the application of the definition to particular instances that gives rise to ambiguity”.²² It is not clear how EPA concludes that NHSM that are a part of long-established energy recovery markets where generators contractually transfer these materials for use as fuels for the purpose of energy recovery can ever be considered to have been “...thrown away, disposed of, or abandoned.” Scrap tires are the only specific example that EPA provides of a NHSM that is transferred to a third party being considered to be in the “waste stream” by some states.²³ However, the EPA’s NHSM rule specifically categorizes the vast majority of scrap tires as non-wastes.²⁴ This treatment contradicts EPA’s explanation for choosing to break from decades of RCRA policy by assuming in the NHSM rule that third-party transfers indicate non-legitimate recycling by defining such transfers as discards.

It appears to Advocacy that, given the long history of combustion of secondary materials, the primary motivation of combustion is for energy recovery, not discard. EPA has presented no evidence of discard of NHSM, with the exception of discarded tires, over which there is no dispute. There was no reliable evidence of discard for any other secondary material, despite the fact that thousands of firms have been involved in the combustion of dozens of different secondary materials over many decades. The only other damage cases cited by EPA involved a few sites where wooden pallets unfortunately caught fire. The occurrence of fires at pallet storage locations is no more evidence of an intent to discard than a fire caused by smoking in bed provides evidence that the homeowner intended to destroy his home. Furthermore, unlike DSW, where

²¹ Id.

²² 76 Fed. Reg. 15456, 15468 (March 21, 2011).

²³ 76 Fed. Reg. 15456, 15460 (March 21, 2011).

²⁴ In comments provided later in this document, SBA provides reasons why all scrap tires combusted for energy recovery should be classified as non-wastes.

financial difficulty played a major role in the cause of discard, EPA found no cases of financial distress in the NHSM cases.

Instead, the Agency appears to be extrapolating a concern reached from the hazardous waste recycling marketplace, for which the incentives to avoid cradle-to-grave waste management are much greater, and the adverse effect on the environment is much greater. Without any evidence to the contrary, EPA's presumption of discard for transfer of NHSM for combustion for energy recovery purposes is unfounded. The EPA should instead focus on the design and application of appropriate NHSM legitimacy criteria.²⁵

Although the NHSM rule carves out an exception from non-waste status for use of resinated wood for fuel (where resinated wood has slightly higher formaldehyde levels than virgin wood), such exceptions are unnecessary given that the legitimacy criteria (e.g., NHSM has meaningful heating value) are sufficient for determining whether combustion of NHSM for energy recovery represents legitimate recycling. Indeed, in Advocacy's view, EPA is on much stronger legal grounds by asserting that combustion for energy recovery is not discard rather than the opposite conclusion often reached in the final rule.

Legitimacy Criteria

The promulgated NHSM rule included three self-implementing legitimacy criteria that any NHSM must meet in order to be considered a non-waste fuel when burned in a combustion unit (40 CFR 241.3(d)(1)(i)–(iii)). These criteria, which mirror the criteria in the 2008 DSW rule are:

- Have a meaningful heating value and be used as a fuel in a combustion unit that recovers energy (EPA cites 5,000 BTU/lb as a general guideline threshold for meaningful, but also allows for lower BTU ratings);
- Be managed as a valuable commodity, including being stored for a reasonable time frame. Where there is an analogous fuel, the non-hazardous secondary material used as a fuel must be managed in a manner consistent with the management of the analogous fuel or otherwise be adequately contained so as to prevent releases to the environment;
- Have contaminants at levels comparable to or lower than those in traditional fuels which the combustion unit is designed to burn.

²⁵ EPA has complete discretion as to how to regulate “solid waste” under RCRA. The Natural Resources Defense Council case that concerns EPA does not restrain EPA's ability to properly define “solid waste.” The case simply establishes that EPA needs to identify what “solid waste” means. EPA can clearly identify that material burned for energy recovery with a minimum BTU value, and some requirements for managing as a valuable fuel excludes materials from the “solid waste” designation. As the Portland Cement Association stated in its August 18, 2011 NHSM petition to EPA, the fact that “a court has rejected a result an agency reached through improper legal avenues does not mean the agency is precluded from reaching the same result through proper legal avenues.”

The proposed NHSM rule revised the third criterion to clarify that: (1) the contaminant comparison can be performed not only on an individual contaminant basis, but also on groups of contaminants; (2) the traditional fuel does not have to be actually burned in the boiler, simply being able to be burned is sufficient (does not require that unit is permitted to burn that fuel); and (3) the contaminant comparisons can be made using ranges of traditional fuel contaminant levels compiled from national surveys, as well as data from the specific traditional fuel being replaced.

While Advocacy appreciates the additional flexibility that these changes provide, we believe that EPA should return to the approach advocated in the ANPRM, which stated that NHSM used as fuel could not contain contaminants that were “significantly higher” than traditional fuel products. This is also consistent with the current DSW language. In keeping with long-standing EPA policy, we don’t view the third criterion as mandatory for establishing the legitimacy of NHSM combustion for energy recovery. Assuming that EPA does not adopt this well-established approach, we recommend that it revise the third criterion to provide the flexibility that EPA currently allows in making categorical non-waste fuels designations, and in evaluating case-by-case non-waste determination petitions.

II. Fuels and Alternative Traditional Fuels

Under the NHSM rule, traditional and alternative traditional fuels are non-wastes when burned in combustion units for energy recovery, and therefore, are not required to meet the NHSM legitimacy criteria. Under the proposed NHSM rule, EPA is identifying additional materials that are “clean cellulosic biomass,” and therefore, traditional fuels. The proposed rule also clarifies that clean construction and demolition wood can be combusted as a traditional fuel if it does not contain contaminants at concentrations not normally associated with virgin wood. Advocacy fully supports each of these changes.

III. Secondary Materials that have been Discarded and Processed into a Fuel or Ingredient that Meet the Legitimacy Criteria Can Be Designated as Non-Wastes

Under the final NHSM rule, EPA considers discarded NHSM that have been sufficiently processed into fuel or ingredient products and used in a combustion unit as a non-waste, provided these materials satisfy the specified legitimacy criteria (as codified in § 241.3(d)(1) for fuels and (d)(2) for ingredients). The Agency defines processing as:

any operations that transform the discarded non-hazardous secondary material into a legitimate fuel or ingredient product, and includes, but is not limited to, operations that remove or destroy contaminants; operations that significantly improve the fuel characteristics of the material, e.g., sizing or drying the material in combination with other operations;

*operations that chemically improve the as-fired energy content; and operations that improve the ingredient characteristics. Minimal operations that result only in modifying the size of the material by shredding do not constitute processing for the purposes of this definition. Prior to any processing, the discarded non-hazardous secondary material would be considered a solid waste and would be subject to the appropriate federal, state, and local laws and regulations”.*²⁶

Advocacy believes that this definition is unnecessarily restrictive, disallowing beneficial reuse of a previously classified waste into a fuel product. Below we summarize EPA’s rationale for its approach to processing. We then analyze the issues, and propose revisions to address EPA’s concerns while increasing overall environmental benefits relative to EPA’s proposed approach.

EPA’s Explanation for its Approach to Processing in the NHSM Final Rule

In the preamble to the final NHSM rule, EPA correctly concluded that it has discretion to identify the types of processing activities that NHSM can undergo to have its discard status removed. If this occurs and if the material meets the required legitimacy criteria, the NHSM would be considered a non-waste when combusted for energy recovery. However, EPA rejected industry arguments that there should be no specific processing requirement because the legitimacy criteria alone are sufficient for ensuring that no sham recycling occurs.

As noted by EPA, “...the degree of processing necessarily will vary depending on the specific material, but the objective is the same—that is, the product from processing must be a legitimate fuel (i.e., a material with a meaningful heating value, with contaminants that are not present at significantly higher concentrations than those of traditional fuel products, and managed as a valuable commodity).”²⁷ We agree with this statement, which correctly focuses on the fact that processing should depend on the specific material, and reflect what is necessary to fully combust the materials. However, EPA veered from this approach in the final NHSM rule by concluding that the same processing into fuels that occurs in the context of non-discarded materials is insufficient for discarded materials.

In making its arguments, industry asserted that normal processing of coal refuse (mining rejects) and whole tires retrieved from tire piles should be sufficient to constitute the processing needed to convert previously discarded materials to legitimate fuels/ingredients. In each case, this level of processing (or in some cases, less processing) is used in preparing the material for use as fuel when these same materials are recycled in other contexts where discard has not occurred. For example, whole tires collected by used tire collection programs can be burned in cement kilns without any physical processing, while EPA requires that whole tires recycled from stockpiles for use

²⁶ 76 Fed. Reg. 15456, 15550 (March 21, 2011).

²⁷ 76 Fed. Reg. 15456, 15465 (March 21, 2011).

in these kilns be physically shredded and undergo metals removal processing. EPA does not provide any explanation as to why this level of processing is not required when for scrap tires obtained from state collection programs, nor does EPA present a reason why cement kilns that currently combust whole tires are discarding tires, rather than recovering energy. Because EPA did not provide adequate justification why such processing is required for such tires to be a legitimate fuel, EPA's approach to defining processing requirements seems arbitrary and capricious.

Contrary to the stockpiled tire example, EPA now agrees with industry in the final rule preamble where it notes that "sufficiently processed" in the context of reclamation of coal refuse from legacy piles only requires the same level of processing as the same material that is currently mined. "[T]he Agency has changed its view regarding coal refuse that was previously abandoned, such that if the discarded coal refuse is processed in the same way as coal is today, the Agency would not consider the processed coal refuse a solid waste."²⁸ In making this change, EPA attempts to distinguish coal refuse from tires by noting that coal refuse "...has never been used for anything else and is mined as fuel in the first place, while tires are originally produced for a use that is fundamentally different from its current use as a fuel."²⁹ We do not understand why this distinction has any bearing on the level of processing that is required in each case to produce a legitimate fuel.

Therefore, Advocacy proposes that EPA revise its current definition of processing to clarify that the same level of processing that is used to produce a fuel product from an NHSM in the non-discard context is acceptable to remove the discard status from NHSM that has been abandoned, disposed of, or thrown away (see changes to current EPA definition in underlined text):

"Processing means any operations that transform discarded nonhazardous secondary material into a non-waste fuel or non-waste ingredient product. Processing includes, but is not limited to, removal of extraneous debris, sizing for safe and efficient handling, shredding, sorting, segregating, cleaning, culling, racking, drying or other systematic procedures for making a material ready for use as a fuel. For materials that have been discarded, processing also includes the procedures used to process the same non-discarded material into fuel."

²⁸ 76 Fed. Reg. 15456, 15476 (March 21, 2011).

²⁹ 76 Fed. Reg. 15456, 15507 (March 21, 2011).

IV. Rulemaking Petition Process for EPA National Categorical Non-Waste Determination [241.4(b)]

Comments on Overall Petition Process

EPA is proposing to create a rulemaking petition process that would provide an opportunity for entities to submit a rulemaking petition that requests EPA to make categorical determinations that additional NHSM are non-waste fuels. This proposal will allow for petitioners to demonstrate that a NHSM is a non-waste fuel when the legitimacy criteria are balanced with “other relevant factors.” Given the final NHSM rule’s application that all legitimacy criteria are mandatory, this balancing would be necessary to continue a number of long-standing, environmentally protective practices of treating specific NHSM as a non-waste fuel when combusted for energy recovery. We fully support this proposal because it will streamline the promulgated regional-level non-waste petition process [Section 241.3(c)], resulting in national consistency that could not be ensured under the promulgated process. Advocacy welcomes this major improvement over the final rule since it potentially provides certainty for a large number of secondary materials, which can help ensure the timely preservation of the large existing recycling infrastructure, while enhancing environmental protection.

Additional Fuels Warranting Non-Waste Designations

In the proposed NHSM rule, EPA states its intention “...to identify several NHSMs as not being solid waste when burned as a fuel in a combustion unit where the Agency has sufficient information to determine that discard is not occurring when these materials are being used as fuels. Specifically, the Agency recognizes that certain NHSMs may not meet the legitimacy criteria, especially the “contaminant legitimacy criterion,” in all instances, but the material would still generally be considered a non-waste fuel.”³⁰ EPA has proposed the designation of scrap tires (excluding stockpiled tires) and resinated wood as non-wastes. We support those designations. We recommend that EPA promulgate a non-waste designation in the final rule for the following NHSM when combusted for energy recovery because all represent legitimate recycling (e.g., all demonstrate meaningful heating values):

- **Coal refuse in legacy piles** – The proposed NHSM indicates that EPA already believes that this material meets all of EPA’s current legitimacy requirements, and that these materials are sufficiently processed to remove their discard status;
- **Off-specification used oil** – (1) Off-specification used oil should instead be compared to coal/coke for the comparison fuel rather than the virgin fuel oil and (2) the Subtitle C regulations actually indicate that such oil is a

³⁰ 76 Fed. Reg. 80452, 80471 (December 23, 2011).

fuel with significant energy recovery benefits, and should be treated the same as on-specification used oil with respect to combustion in industrial boilers/furnaces;

- **Scrap tires in stockpiles** (when used in cement kilns) – EPA wrongly concluded that removal from discard status when these tires are combusted for energy recovery requires shredding and removal of metals—sufficient processing does not require more processing than that used for this same material in the non-discard context;
- **Treated wood** – This material has higher heating value than virgin wood. This material has been used in cement kilns and other boilers for decades nationwide;
- **Animal manure** – There is growing industry combusting manure for energy recovery; furthermore, there is no reliable evidence of contamination and EPA’s concept of “sufficient processing” is not supported by the record;
- **Pulp and paper sludges** – Sludges from pulp and paper mills, which are handled as valuable materials, have a long history of use as fuels, and their use has been increasing as technical advances make recovering their heating value more cost-effective; and
- **Pulp and paper processing residuals** – There has been a long-standing industry practice of using these materials as a fuel, which have meaningful heating value, are handled as a valuable commodity, and have emissions comparable to those from burning traditional biomass.

Advocacy also believes EPA will avoid the unnecessarily burdensome petition process by making these categorical determinations in the final NHSM. This will avoid substantial disruption of the existing recycling infrastructure, while enhancing environmental protections.

Even if EPA does not agree with our assertion that all of the above NHSM meet the necessary legitimacy criteria, EPA should categorize these alternative fuels as non-wastes “based on a balancing of the legitimacy criteria and other such relevant factors that the Administrator may identify.”³¹ The Appendix to this document presents the supporting details regarding the legitimacy of the recycling of these materials when combusted for energy recovery.

³¹ 76 Fed. Reg. 80452, 80482 (December 23, 2011).

V. Petition Process for EPA Regional Administrator Non-Waste Determinations [241.3(c)]

The 2011 NHSM final rule established a non-waste determination process that provides entities with a petition process for receiving a determination from an EPA Regional Administrator that a NHSM that is used as a fuel, and which is not managed within the control of the generator, can be considered a non-waste fuel. To obtain such a determination, entities must demonstrate that the NHSM has not been discarded and is indistinguishable in all relevant aspects from a fuel product.

Because the non-waste determinations under this petition process are limited in scope to combustion units that are within the geographic area of each EPA Region, Advocacy supports the new national non-waste categorical non-waste determination petition process [under section 241.3(b)] that EPA included in the December 2011 proposed NHSM rule. We suggest, further, that EPA clarify that the region-specific petition process can be used for previously discarded NHSM that has been processed into a fuel as it appears that this is not discussed in the proposed rule.

Conclusion

EPA should re-adopt the legitimacy factors used in the 2008 final DSW rule to allow self-certification of legitimate combustion of non-hazardous secondary materials. In addition, EPA should use its newly proposed national categorization authority to designate several additional non-waste categories beyond the two categories already proposed, based on a balancing of the legitimacy criteria and other such relevant factors that the Administrator may identify. These additional revisions will achieve the Agency's regulatory goals, and protect human health and the environment.

Advocacy appreciates the opportunity to submit comments on the proposed NHSM revisions. We also applaud the substantial work that EPA has done in the short period of time since March 2011 to ameliorate the substantial negative effects of the final rule in this proposal. We look forward to working further with the Agency on developing the final rule. If you have any questions or comments on this letter, please contact me or Kevin Bromberg of my staff at 202-205-6964 or kevin.bromberg@sba.gov.

Sincerely,

/s/

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

/s/

Kevin Bromberg
Assistant Chief Counsel
Office of Advocacy

cc:

The Honorable Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
The Honorable Mathy Stanislaus, Assistant Administrator for
Solid Waste and Emergency Response, EPA

Docket - EPA-HQ-RCRA-2008-0329