



August 13, 2009

BY ELECTRONIC MAIL

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

Re: *Revisions to the Definition of Solid Waste, Notice of Public Meeting and Request for Comments, Docket ID No. EPA-HQ-RCRA-2009-0315, 74 Fed. Reg. 25200 (May 27, 2009).*

Dear Ms. Jackson:

The U.S. Small Business Administration Office of Advocacy (Advocacy) submits the following comments regarding the Environmental Protection Agency's (EPA) request for public comments on possible revisions to the final rule, *Revisions to the Definition of Solid Waste*, (DSW) promulgated on October 30, 2008.¹

EPA promulgated the DSW final rule under the Resource Conservation and Recovery Act (RCRA) to exclude certain hazardous secondary materials from regulation as hazardous waste. Specifically, the Agency excluded materials that are recycled via reclamation under three very specific circumstances: (1) when materials are generated and legitimately reclaimed under the control of the waste generator, (2) when materials are transferred to another company under specific conditions (transfer-based exclusion), or (3) on a case by case basis, when EPA or the authorized State agency determines that materials are non-wastes via a petition process.²

The 2008 DSW final rule was the result of a process that began in 1992, and was crafted from years of compromise and litigation between industry stakeholders, environmental organizations, and EPA. Advocacy agrees with EPA that the DSW final rule would "encourage the safe, beneficial recycling of hazardous secondary materials...while at the same time maintaining protection of human health and the environment," which is consistent with RCRA principles.³ Advocacy urges EPA to retain the 2008 DSW final rule, specifically those provisions related to the transfer-based exclusion, the definition of legitimacy, and notification guidelines. We believe that these regulatory revisions will yield substantial economic savings to

¹ 74 Fed. Reg. 25200 (May 27, 2009).

² 73 Fed. Reg. 64668 (Oct. 30, 2008).

³ 72 Fed. Reg. 14174-75 (March 26, 2007).

tens of thousands of small business generators, well in excess of EPA's current estimate, while still meeting the statutory environmental goals. Furthermore, we urge EPA to address these issues expeditiously and to grant this regulatory relief which has been delayed for nearly two decades.

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.

The Regulatory Flexibility Act (RFA),⁴ as amended by the Small Business Regulatory Enforcement Fairness Act,⁵ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small businesses and to consider less burdensome alternatives. Section 612 of the RFA also requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.⁶

Advocacy has represented the interests of small businesses throughout the entire DSW drafting process to the final rule. Any changes to the final rule could unnecessarily hurt small businesses. Based on our authority under the RFA, Advocacy submits the following comments on possible revisions to the DSW final rule.

Advocacy Comments

Transfer-Based Exclusion

In the regulatory analysis conducted for the draft rule, EPA has concluded that small businesses would benefit from the transfer-based exclusions in DSW final rule, because small quantity generators of hazardous material "would have a technical advantage for their hazardous wastes to be recycled."⁷ EPA's own extensive economic analysis shows that the net industry savings under the DSW final rule would equal \$93.5 million per year.⁸ However, since this estimate excludes the benefits to small quantity generators, Advocacy believes that EPA has severely underestimated the magnitude of the benefits to small businesses, which are primarily

⁴ 5 U.S.C. § 601 et seq.

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

⁶ 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).

⁷ U.S. EPA, "Regulatory Impact Analysis: USEPA's 2008 Final Rule Amendments to the Industrial Recycling Exclusions of the RCRA Definition of Solid Waste," at 12 (25 Sep 2008), *available at* <http://www.regulations.gov/search/Regs/contentStreamer?objectId=0900006480728a11&disposition=attachment&content Type=pdf>.

⁸ *Id.* at 9.

small quantity generators.⁹ The transfer-based exclusion is extremely important to small businesses, and EPA should retain the exclusion and not change the terms granting the exclusion.

It is often not economically practicable for businesses that generate small amounts of hazardous secondary materials to reclaim those materials through on-site reclamation or via direct transfer to reclaimers. The transfer-based exclusion gives small businesses that might otherwise dispose of hazardous secondary materials the ability to participate in the reclamation process.¹⁰ The DSW final rule encourages responsible recycling by allowing intermediate facilities to assist small generators with transport, packaging, storage, and locating responsible reclaimers.¹¹

Furthermore, by exempting hazardous secondary materials transferred to third parties for reclamation, the DSW final rule enables more flexibility, and potentially allows generators to create additional competition in the market between non-hazardous and hazardous waste recycling. The prior regulatory system rewarded larger, established companies, and crowded out any potential competitors or new entrants. The RCRA permitting structure allowed monopolistic pricing, promoted disposal of materials that could be reused, and discouraged conservation of virgin materials.

The pre-2008 regulatory structure often made it cheaper to dispose of hazardous secondary materials in landfills rather than recycling. The transfer-based exclusion does not eliminate regulation of hazardous secondary materials or deregulate the reclamation process: each person in the chain of recycling must still comply with containment, tracking, and recordkeeping requirements. Further, the generator retains liability for choosing a proper reclamation facility. If at any point this “chain of reclamation” is broken (either by “discarding” or failing to comply with requirements), the material is considered hazardous waste, subject to RCRA and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authorities and penalties.

The transfer-based exclusion should encourage more responsible recycling, not less, and will increase the market for recoverable materials that otherwise would be disposed. Furthermore, it provides an alternative to the consumption of virgin materials, an important RCRA goal.¹² According to EPA’s estimates, the DSW final rule would result in the conservation of 902 tons of virgin materials per year.¹³ Again, we and others believe that the EPA estimate is very conservative.

Since materials are defined as waste only when they are discarded, imposing stringent RCRA permitting rules on materials that are intended to be recycled contradicts RCRA case law

⁹ The RIA cited in footnote 7 relies entirely on benefits to large quantity generators, since the database reflects only information about large quantity generators. Large quantity generators are defined as those generators who generate more than 100 kg./month of hazardous wastes.

¹⁰ 73 Fed. Reg. 64668, 64730 (Oct. 30, 2008).

¹¹ *Id.*

¹² The Resource Conservation and Recovery Act (RCRA) of 1976, 42 U.S.C. § 6902(a) (2008).

¹³ U.S. EPA, *supra*, at 10.

and Congressional intent.¹⁴ However, in deference to the concerns of those in the environmental community, we agree with EPA that it is appropriate to adopt certain requirements that arguably fall outside the scope of RCRA in an abundance of caution.

Legitimacy Criteria

In the DSW final rule, EPA codified the so-called four “Lowrance” legitimacy criteria that have long been applied by EPA in determining whether secondary materials are being legitimately recycled. Although some people believe that the materials are only legitimately recycled when all four legitimacy factors are satisfied, EPA has made it very clear in several examples in the *Federal Register* notice that materials can be legitimately recycled by generators even if all four criteria are not met.¹⁵ To our knowledge, no one criticizing the EPA approach to legitimacy has explained how these examples fail to demonstrate the validity of EPA’s approach. Additionally, no one has explained how the current application of the Lowrance principles has caused any adverse effects on health or the environment. Since there is no evidence that the current approach is broken, no “fix” is required.

Environmental Justice

Advocacy believes that questions of environmental justice are important considerations for every rule promulgated by EPA. Advocacy disagrees with the assertion that EPA failed to consider environmental justice concerns when promulgating this particular rule.¹⁶ Specifically, Advocacy disagrees with the assumption that there is no other way to protect human health and the environment than to require that all secondary materials, even those intended for recycling, must comply with the current RCRA regulatory scheme for hazardous wastes. The Agency’s imposition of a variety of additional requirements should assure local communities that environmental justice concerns were properly addressed by EPA.

Many commentators correctly noted that hazardous material disposal facilities are housed in poorer, lower income and rural areas with higher populations of minorities.¹⁷ However, the rule does not change any regulations regarding the disposal of materials that are hazardous wastes. The DSW final rule only affects the recycling of hazardous secondary materials that have not been discarded by generators. As the record shows, EPA conducted an extensive risk analysis of the DSW rule prior to the final rule being promulgated, and concluded that there would be no net risks to future environmental, human health, and safety overall expected from the rule.¹⁸ Advocacy agrees with EPA’s conclusion that there could be no expected disproportionate impact on minority or low income communities because there are no overall countervailing risks expected from the rule.

¹⁴ See *American Min. Congress v. U.S. EPA.*, 824 F.2d 1177 (D.C. Cir. 1987) (finding Congress’ intent in enacting RCRA was to aid states with waste disposal problems, therefore EPA’s jurisdiction is limited to discarded material), and *Safe Food and Fertilizer v. EPA.*, 350 F.3d 1263 (D.C. Cir. 2003) (holding hazardous secondary materials destined for beneficial reuse or recycling cannot be considered discarded materials subject to RCRA regulation).

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

¹⁶ See “Transcript of 2008 Definition of Solid Waste Final Rule Public Meeting Held on June 30, 2009,” <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064809f7367>.

¹⁷ *Id.*

¹⁸ U.S. EPA, *supra*, at 120, 123.

Flexibility for State Programs

Some states would like to add provisions or more complexity to the DSW final rule, while many states would like to retain the relative simplicity of the current rule, and want to move forward. The best way to accommodate both interests and to conserve state and Federal resources may be to retain the current provisions. This would allow the states that want to do more, have state-specific issues, or have more resources, to add their own provisions. The large number of states who favor the DSW final rule would be able to adopt it. EPA should consider issuing additional guidance to address how states and industry should comply with the new rules instead of imposing additional regulatory restrictions.

Conclusion

Advocacy appreciates the opportunity to submit comments on the DSW final rule. Advocacy applauds the work that EPA has done over the years to reach this final rule, and believes that it represents an appropriate compromise between stakeholders that will not have detrimental effects on the environment or small businesses. Advocacy believes that EPA should allow implementation of the DSW final rule as it stands. Advocacy asks EPA to work quickly to address these issues in order to eliminate the uncertainty brought about by the agency's request for comments on possible revisions of the final rule.

Please feel free to contact Kevin Bromberg (Kevin.Bromberg@sba.gov) at (202) 205-6964, or Anna Rittgers (Anna.Rittgers@sba.gov) at (202) 205-7348 if you have any questions or require any additional information.

Sincerely,

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cc: Kevin Neyland, Acting Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget

Docket EPA-HQ-RCRA-2009-0315