



March 12, 2010

***Via <http://www.regulations.gov>***

OSWER Docket  
EPA Docket Center (Mail Code 5305T)  
Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, DC 20460  
Attn. Docket ID No. EPA-HQ-RCRA-2009-0315

**Re: Draft Environmental Justice Methodology for the Definition of Solid Waste Final Rule, 73 Fed. Reg. 64,668 (Oct. 30, 2008);  
Docket ID No. EPA-HQ-RCRA-2009-0315**

Dear Sir or Madam:

The National Mining Association (NMA) submits these comments in response to a request for comments from the U.S. Environmental Protection Agency (EPA or Agency) on its "Draft Environmental Justice Methodology for the Definition of Solid Waste, Proposed Methodology for Assessing Potential Disproportionate Impacts From the Hazardous Secondary Material Recycling Regulations on Minority, Low-Income, and Tribal Populations," Draft for Public Discussion (Jan, 13, 2009) (Draft Methodology). EPA proposed this methodology in response to concerns raised in the Sierra Club's administrative petition requesting that EPA repeal the regulations titled, "Revisions to the Definition of Solid Waste," 73 Fed. Reg. 64,668 (Oct. 30, 2008) (DSW Rule).

While NMA understands the importance of environmental justice and generally supports the goals of Executive Order 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994), (Executive Order), it also supports EPA's conclusion in the DSW rulemaking that no disproportionate impacts would occur from the DSW Rule. This conclusion was the product of a lengthy rulemaking process with extensive public participation and included a thorough analysis of potential environmental and human health impacts that could result from the implementation of the DSW Rule. In short, EPA's conclusion was well founded.

Reopening the analysis of potential environmental and human health impacts at this juncture of the over 25-year regulatory DSW rulemaking is not necessary to EPA's environmental justice efforts and counterproductive to sound environmental management under the Resource Conservation and Recovery Act (RCRA). Additionally, as set forth in detail below, NMA disagrees with certain elements of EPA's proposed approach to assessing environmental justice impacts of the DSW Rule.

## **Interest of NMA**

NMA is a national trade association representing the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mineral processing machinery, equipment and supplies; and engineering, transportation, financial and other businesses that serve the mining industry. NMA has been deeply engaged for more than 25 years in the regulatory debate over what constitutes a "solid waste" under RCRA.

NMA actively participated in all of the major EPA rulemakings addressing the definition of solid waste, including submitting comments on EPA's most recent supplemental proposed rule. See NMA's Comments, Document ID: EPA-HQ-RCRA-2002-0031-0481.1 (June 25, 2007). NMA supports the final rule as promulgated in 2008 and has filed a motion to intervene in support of the Agency in the Sierra Club's lawsuit. NMA also provided an oral statement at EPA's public meeting held on June 30, 2009, as well as written comments submitted on Aug. 13, 2009. See NMA's Comments, Document ID: EPA-HQ-RCRA-2009-0315-0231.1.

## **COMMENTS ON EPA'S DRAFT METHODOLOGY**

### **I. EPA Thoroughly Studied Potential Hazards During the DSW Rulemaking and there is No Basis for Reopening the Process Again**

The first step in EPA's proposed Draft Methodology would involve identifying potential hazards resulting from the DSW Rule that could create risks to human health and the environment and analyzing the likelihood of these hazards occurring. At the forefront, NMA believes that it is inappropriate to reopen the characterization of potential hazards associated with the DSW Rule because potential hazards were adequately identified and addressed in the rulemaking process.

NMA also disagrees with the request by commenters that EPA assume widespread noncompliance with the DSW Rule and look to pre-RCRA damage cases in evaluating the likelihood of future environmental and human health impacts under the DSW Rule. EPA should not revisit the hazard analysis just to accommodate this request, nor should EPA incorporate this request in its hazard characterization of the DSW Rule. To do so would result in a skewed analysis that relies on an inappropriate starting point— legacy contamination sites—for determining future hazards of modern recycling practices.

At this juncture, the value of reopening the hazard analysis is unclear. EPA has already studied the relevant damage cases extensively and has taken them into account in drafting the DSW Rule. EPA addressed the potential hazards revealed in the damage cases through the conditions imposed by the DSW Rule.

Furthermore, the Draft Methodology recognizes that the marginal impact of recycling under the DSW Rule from currently existing facilities would be minimal. Draft Methodology at 4. Therefore, the focus of hazard characterization would be on the marginal impact from new facilities that initiate reclamation activities for the first time under the DSW Rule. To study the impact of these new recycling facilities, EPA proposes to use the recycling damage cases that were extensively studied throughout EPA's long DSW rulemaking process. EPA previously published the following three studies detailing its analysis:

- *An Assessment of Good Current Practices for Recycling of Hazardous Secondary Materials* (EPA-HQ-RCRA-2002-0031-0354 )
- *An Assessment of Environmental Problems Associated With Recycling of Hazardous Secondary Materials* (EPA- HQ-RCRA-2002-0031-0355)
- *A Study of Potential Effects of Market Forces on the Management of Hazardous Secondary Materials Intended for Recycling* (EPA-HQ-RCRA-2002-0031-0358)

EPA thus spent years analyzing these damage cases and carefully created conditions on recycling hazardous secondary materials to ensure that such materials would not be discarded, and therefore not become solid wastes. The result of this extensive analysis is that when the conditions of the DSW Rule are followed, the likelihood of release is minimized and so are the impacts on surrounding communities.

EPA should not revisit its analysis assuming widespread noncompliance with the rule. Assuming increased environmental risk because damage could result from noncompliance with the rule predetermines the outcome of the hazard analysis. As an initial matter, noncompliance is properly addressed through existing enforcement mechanisms. The Executive Order specifically mandates that an agency's strategy to address environmental justice include promoting enforcement of relevant laws in areas with minority and low-income populations. 59 Fed. Reg. at 7630. NMA is not aware of any legitimate basis for assuming widespread noncompliance with the rule.

In fact, the rule is structured so that there are multiple levels of oversight by private parties and regulatory agencies to ensure that reclamation facilities operating under the rule are in compliance. Generator due diligence required under the DSW Rule ensures that the reclamation facilities receiving hazardous secondary materials are capable of handling them in a lawful manner. Notice and financial

assurance requirements provide for regulatory oversight. And, of course, EPA and the states (as applicable) have full inspection and enforcement authority.

Finally, EPA should not rely on damage cases that pre-date RCRA. Reliance on historic data from legacy sites to predict what modern, compliant operators would do 30 to 40 years later would improperly bias the analysis. Not only has the regulatory landscape changed dramatically since RCRA's enactment, but the DSW Rule's specific conditions such as generator due diligence, financial assurance and notice function serve as safeguards against the kind of damages that occurred before RCRA, when hazardous materials may have been abandoned or otherwise egregiously mismanaged. Pre-RCRA damage cases are simply not analogous to potential damages from a recycling facility operating under the DSW Rule.

## **II. There is No Justification for Reopening Other Conditional Exclusions**

EPA proposes to use the Draft Methodology to conduct a supplementary analysis of environmental justice impacts from the other conditional exclusions that were promulgated prior to the DSW rulemaking. There is no justification in law or policy for broadening the analysis to include other rules.

First, an analysis of the environmental justice impacts of other rules is outside the scope of the Sierra Club's petition on the DSW Rule. Any challenges to past exclusions are stale, and the statutorily mandated periods for administrative and judicial review have expired.

Second, the other exclusions were promulgated under formal notice and comment procedures with public participation, and their conditions were crafted with the same goals in mind as the DSW Rule—to prevent releases to the environment due to discard of solid waste. Many were promulgated after issuance of and in accordance with the Executive Order. The Executive Order provides no authority for EPA to reopen past rulemakings in the name of environmental justice.

Third, if EPA is concerned about disproportionate impacts from noncompliance with existing exclusions, it may use its enforcement authority to address impacts to minority and low-income communities. As stated above, the Executive Order contemplates that enforcement will be part of an agency's environmental justice strategy. In fact, EPA's Office of Enforcement and Compliance recently announced that environmental justice will be an "enforcement goal" for fiscal years 2011 to 2013.

## **III. The Methodology Should Include a Thorough Analysis of Potential Benefits of the Rule and Limit Assumptions that Could Inappropriately Skew the Results**

To the extent EPA revisits the hazard characterization of the DSW Rule through the Draft Methodology, EPA should give equal weight to the potential benefits of the

DSW Rule. EPA's Draft Methodology fails to provide for the same level of "rigorous" analysis of the environmental and life-cycle benefits that the DSW Rule will bring about as it does for potential hazards. The clear meaning of "resource conservation and recovery" must not be lost.

EPA's stated goal in promulgating the rule was to "make it more efficient to safely recycle these materials instead of landfilling or incinerating them." Draft Methodology at i. The Draft Methodology holds as its premise that minority and low-income communities are disproportionately impacted by environmental and human health hazards associated with hazardous waste facilities, which include hazardous waste landfills and incinerators. If generators take advantage of the DSW Rule and reclaim higher volumes of hazardous secondary materials, then the volumes of hazardous wastes being landfilled and incinerated will decrease, with a marginal benefit to communities located near hazardous waste landfills and incinerators as well as those communities located along transportation routes to these facilities.

EPA acknowledges these potential benefits and indicates that it will take them into account "to the extent possible." Draft Methodology at 15-16. EPA should analyze these potential benefits as rigorously as any potential hazards in order that the environmental justice analysis represents a complete and accurate view of the impacts of the DSW Rule.

Additionally, EPA should limit the assumptions it makes in conducting the environmental justice analysis. EPA is considering taking either a qualitative or quantitative approach in determining the likelihood of environmental problems at facilities operating under the DSW Rule. Under a quantitative approach, EPA would be required to make various assumptions about a model facility, including its location, types and amount of materials recycled and likelihood of releases that likely will skew the results.

EPA acknowledges in the Draft Methodology that it will be a challenge to identify the model facility and that the results would "depend greatly" on the assumptions it makes. Draft Methodology at 15. And, as described above, EPA's "model facility" may be influenced by the damage cases it reviews, without adequate consideration of facilities with no environmental problems. Accordingly, EPA should take a qualitative approach that examines how the DSW Rule addresses environmental problems, rather than a quantitative approach that is "greatly dependent" on the various assumptions that would be necessary.

## **CONCLUSION**

The DSW Rule represents a major accomplishment in environmental management. It provides an important and necessary end to the decades of regulatory uncertainty over what constitutes a "solid waste" under RCRA. The final rule also

March 12, 2010

Page Six

provides a tremendous benefit by actually implementing resource conservation and protection.

NMA understands the importance of environmental justice and respects EPA's effort to address environmental justice concerns. However, NMA supports the final rule as promulgated in 2008, including EPA's conclusion that the rule will not result in disproportionate impacts. Changes to the final rule, particularly if the agency's intention were to incorporate unlawful additional performance or technological standards in response to Sierra Club's petition regarding "containment" and "significant release," would result in NMA's withdrawal of its support of the rule in the D.C Circuit lawsuit.

Should any questions arise regarding these comments, please contact me at (202) 463-2629 or [tbridgeford@nma.org](mailto:tbridgeford@nma.org).

Sincerely,

A handwritten signature in black ink that reads "Tawny Bridgeford". The signature is written in a cursive, flowing style.

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Tawny A. Bridgeford  
Associate General Counsel