



August 13, 2009

Via Electronic Mail

OSWER Docket, EPA Docket Center
Mail Code 2822T
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention Docket ID No. EPA-HQ-RCRA-2009-0315

RE: "Definition of Solid Waste Notice of Public Meeting and Request for
Comments," 74 Fed. Reg. 25,200 (May 27, 2009)

Dear Sir or Madam:

The National Mining Association (NMA) submits these comments in response to the U.S. Environmental Protection Agency's (EPA or the agency) "Definition of Solid Waste Notice of Public Meeting and Request for Comments," 74 Fed. Reg. 25,200 (May 27, 2009) (Public Meeting Notice). NMA strongly urges the agency not to repeal or revise any of the provisions in the "Revisions to the Definition of Solid Waste" final rule published on Oct. 30, 2008. 73 Fed. Reg. 64,668 (Final Solid Waste Rule).

NMA also respectfully requests that EPA deny the Sierra Club's petition for reconsideration and request for stay (Sierra Club Petition) of the Final Solid Waste Rule filed with the agency on Jan. 29, 2009. Furthermore, NMA urges the agency to vigorously defend the Final Solid Waste Rule in the litigation initiated by the Sierra Club in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) through the Sierra Club's filing of a petition for review on Jan. 28, 2009. *American Petroleum Institute v. EPA*, Docket No. 09-1038 (D.C. Cir.).

STATEMENT OF INTEREST

NMA is a national trade association representing the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. NMA has been deeply engaged for almost three decades in the regulatory debate over what constitutes "solid waste" under the Resource Conservation and Recovery Act (RCRA).

Specifically, the mining and mineral processing industry has been laboring under a series of EPA regulatory definitions that improperly and unlawfully characterized as wastes certain valuable in-process secondary materials used in the industry's production operations. These unlawful regulatory definitions were successfully challenged by NMA and its predecessor in a series of cases in the D.C. Circuit, most recently in *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000) (hereinafter *ABR*). *ABR* serves as the impetus for the Final Solid Waste Rule.

NMA has actively participated in all of the major rulemakings addressing the regulatory definition of solid waste. Most recently, NMA submitted extensive comments on the agency's proposed rule, 68 Fed. Reg. 61,558 (Oct. 28, 2003) (2003 Proposal), and supplemental proposed rule, 72 Fed. Reg. 14,172 (March 26, 2007) (2007 Supplemental Proposed Rule), underscoring the statutory limitations on EPA's authority, as recognized by the D.C. Circuit, to regulate in-process secondary materials stored prior to their use in the mining and mineral processing industry's production operations.¹

In addition, NMA specifically addressed the Sierra Club Petition on the Final Solid Waste Rule in a letter to EPA Administrator Lisa Jackson sent on April 21, 2009.² In that letter, NMA supported the agency's Final Solid Waste Rule and countered claims by the Sierra Club that the agency acted arbitrarily, capriciously or otherwise not in accordance with the law by not defining the terms "contained" and "significant release" with more particularity.

In its April 21, 2009, letter, NMA also cautioned that the remedies sought by the Sierra Club (i.e., "baseline design criteria for storage") would violate RCRA, particularly to the extent imposed on the mining and mineral processing industry, because they would push EPA beyond the statutory jurisdictional limits placed upon the agency by Congress, as recognized in *ABR*. NMA reiterated its position on the Sierra Club Petition during the June 30, 2009, public meeting.

¹ NMA incorporates by reference its comments submitted on Feb. 25, 2004, in response to EPA's 2003 Proposal and the comments submitted on June 25, 2007, on EPA's 2007 Supplemental Proposed Rule.

² NMA's letter is in the docket for the Public Meeting Notice. See Document ID: EPA-HQ-RCRA-2009-0315-0006.

NMA COMMENTS ON EPA'S PUBLIC MEETING NOTICE

EPA states in the Public Meeting Notice that it does not plan to repeal the Final Solid Waste Rule or stay its implementation. 74 Fed. Reg. at 25,202. EPA further states that it does not plan to repeal the generator control exclusion or non-waste determination petition process. *Id.* The agency, however, solicits comment on several issues, including: (1) the definition of "contained;" (2) the notification requirement; (3) the definition of legitimacy; and (4) alternative approaches to the transfer-based exclusion. NMA addresses each of these issues below.

I. EPA's RCRA Regulatory Authority is Limited to Secondary Materials that are Discarded

At the outset, NMA again reminds EPA that the agency's regulatory authority under Subtitle C of RCRA is "limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away." *ABR*, 208 F.3d at 1051 (quoting *American Mining Congress v. EPA*, 824 F.2d 1177, 1190 (D.C. Cir. 1987) (hereinafter *AMC I*)). Stated simply, EPA cannot regulate in-process secondary materials that are not discarded. These materials are not "solid waste" under RCRA.

EPA correctly recognizes that repealing the Final Solid Waste Rule, and in particular repealing the generator control and non-waste determination petition process, "could result in hazardous secondary materials that are not discarded being regulated as hazardous waste." 74 Fed. Reg. at 25,202. NMA agrees with the agency's conclusion. NMA, however, strongly urges EPA not to reopen the rule and pursue the revisions outlined in the Public Meeting Notice as they would also result in the unlawful regulation of legitimately recycled, non-discarded materials under RCRA's Subtitle C program.

NMA believes that the Final Solid Waste Rule represents a reasoned balance of the overarching goals of RCRA to encourage resource conservation and recovery and to protect public health and the environment. Moreover, the Final Solid Waste Rule ends decades of regulatory uncertainty over what constitutes a "solid waste," particularly as it pertains to the mining and mineral processing industry.

NMA cannot support EPA's proposal to reopen the Final Solid Waste Rule and consider additional restrictions on the handling and storage of secondary materials prior to their disposal. As a matter of law, EPA is barred from imposing the precise types of "baseline design criteria for storage" referred to by the Sierra Club in its petition and suggested in the Public Meeting Notice, particularly to the extent that they are imposed on the mining and mineral processing industry and NMA members.

The D.C. Circuit expressly rejected similar attempts by EPA to regulate the storage of in-process materials in the mining and mineral processing industry, stating that the agency “thoroughly ignore[d] the *AMC I* court’s holding that under RCRA, materials must be thrown away or abandoned before EPA may consider it to be ‘waste.’” *ABR*, 208 F.3d at 1053. The D.C. Court then concluded that “material stored for recycling is plainly not in that category.” *Id.* (emphasis added). To reopen the rule and pursue this approach again would mean one thing only: returning to a legally indefensible regulatory definition of “solid waste.”

II. NMA Opposes Any Revisions to the Definition of “Contained”

The Sierra Club claims that the agency abused its discretion and acted arbitrarily, capriciously or otherwise not in accordance with the law by not defining the terms “contained” and “significant release” with more particularity. In response, EPA is considering several new approaches for determining whether a secondary material is “contained,” including: (1) development of a regulatory definition for the term “contained” that would “apply to a range of hazardous secondary materials and reclamation processes;” (2) establishment of specific performance or storage standards as a condition of the transfer-based exclusion; or (3) development of more detailed guidance on what “contained” would mean for different units and management practices.

EPA adequately defined the term “contained” in the preamble to the Final Solid Waste Rule, and thus none of the three approaches outlined by the agency in the Public Meeting Notice are necessary. In fact, EPA provides a commonsense and workable definition: “Generally, such material is ‘contained’ if it is placed in a unit that controls the movement of the hazardous secondary material out of the unit and into the environment.” 73 Fed. Reg. at 64,681. Contrary to assertions by the Sierra Club, EPA provided adequate guidance in the preamble on what it means to “contain” secondary materials managed in non-land-based and land-based units and what constitutes a “significant release.” *See id.* at 64,680-81.

Importantly, EPA evaluated whether to impose specific performance standards or other requirements on secondary materials excluded under the Final Solid Waste Rule. At that time, based on an extensive administrative record, EPA rightfully found that “such detailed measures are unnecessary for hazardous secondary materials that are handled as valuable products that are destined for recycling.” *Id.* at 64,729. EPA correctly reasoned that “specifying further engineering conditions, such as secondary containment, liners, and leak detection systems” was not necessary to “determine which hazardous secondary materials are not discarded.” *Id.* at 64,719. EPA also recognized the need to consider a number of factors including local conditions and compliance with state regulatory programs in determining whether materials are “contained.” *Id.* at 64,729. All in all, the language in the preamble provides appropriate benchmarks for facilities and government inspectors to determine whether a secondary material is “contained.”

EPA's decision is thoroughly supported not only by practical reasons (i.e., industries and storage methods vary too greatly for a single definition of "contained"), but also by D.C. Circuit precedent. If EPA were to revisit this issue and explore "setting specific performance or storage standards," the agency would upend the progress made in the Final Solid Waste Rule by again embarking on the promulgation of a rule that is squarely in violation of *ABR*.

III. NMA Opposes Re-Casting the Notification Requirement as a Condition to the Exclusions

The Final Solid Waste Rule requires regulated entities to notify the appropriate regulatory agency before operating under the exclusions, but failure to notify would not affect the excluded status of the materials in question. If a facility failed to notify, but otherwise appropriately relied upon one of the exclusions, the facility would only be liable for a violation of the notification requirement. 73 Fed. Reg. at 64,682.

In the Public Meeting Notice, EPA requests comment on making the notification requirement a condition of the exclusion. 74 Fed. Reg. at 25,203. In that case, if a facility failed to notify the appropriate regulatory agency of the facility's intent to utilize an exclusion, the facility would be liable for a violation of the notification requirement *and* the secondary material would be considered "discarded" – even if the secondary material was not, in fact, discarded, and the facility's reliance upon the exclusion was otherwise appropriate.

NMA strongly opposes making notification a condition of the exclusions. NMA does not believe that a paperwork exercise like notification is related to the concept of "discard." Notification has nothing to do with EPA's own criteria for whether recycling is legitimate. As it recognized in the Final Solid Waste Rule, EPA can obtain the oversight it desires by retaining notification as a requirement of RCRA and not a condition of the exclusion. 73 Fed. Reg. at 64,739. EPA cites no evidence to support a conclusion that making notification a condition of the exclusions will lead to greater compliance.

IV. NMA Opposes the Proposed Changes to the Definition of Legitimacy

EPA seeks public comment on the applicability of the codified legitimacy definition and whether all of the four factors in that definition should be mandatory. NMA opposes any changes to the legitimacy definition in the Final Solid Waste Rule. NMA urges EPA not to apply the codified legitimacy definition beyond the exclusions and petition process in the final rule. NMA also urges EPA not to make all the factors mandatory. As NMA stated at the agency's public meeting, neither option is defensible.

First, EPA considered applying the legitimacy standard codified in the Final Solid Waste Rule to all of the existing RCRA exclusions as part of that rulemaking. EPA

properly rejected this approach. EPA explained that in codifying the legitimacy factors, the agency “did not intend to raise questions about the status of legitimacy determinations that underlie existing exclusions from the definition of solid waste, or about case-specific determinations that have been made by EPA or the states.” 73 Fed. Reg. at 64,708.

EPA’s decision is rational. There is no support in the record for extending the codified legitimacy definition to existing exclusions, especially given the effectiveness of the 1989 Lowrance Memorandum in distinguishing between legitimate and sham recycling. For 30 years, the regulated community and authorized states have effectively relied on this memorandum to determine legitimacy. EPA even recognizes in the Final Solid Waste Rule that the codified legitimacy criteria “are substantially the same as the existing legitimacy policy.” *Id.* Given this similarity, there is no reason to jeopardize past legitimacy determinations through this rulemaking.

Second, EPA considered whether to make all four legitimacy factors mandatory as part of the Final Solid Waste Rule rulemaking. EPA found, however, that “there will be some situations in which a legitimate recycling process does not conform to one or both of [the discretionary] factors, yet the reclamation activity would be still be considered legitimate.” 73 Fed. Reg. at 64,701. EPA even provides several examples where secondary materials are legitimately reclaimed without meeting one of the discretionary factors.

Importantly, EPA correctly recognized that the “toxics along for the ride” (TARs) factor may not be relevant for determining legitimate recycling in the mining and mineral processing industry. Specifically, EPA found that “[in] many mineral processing operations, the very nature of an operation results in hazardous constituents concentrating in the product as it proceeds through the various steps of the process.” *Id.* at 64,705. EPA then correctly concluded that the TARs factor “may not be relevant because of the nature of the operations.” The administrative record more than adequately supports EPA in making that determination.

If EPA were to make all four of the factors mandatory, the agency would in effect label what it already considers—with adequate support in the record—to be legitimate recycling as sham recycling. EPA’s proposed “solution” to this issue (i.e., a petition or alternative process) would inevitably prove to be lengthy and burdensome and perhaps unworkable, particularly in uncertain economic times such as these.

V. NMA Opposes Repealing the Transfer-Based Exclusion and Revisiting the NAICS Approach Proposed in 2003

EPA is considering whether to repeal the transfer-based exclusion in the Final Solid Waste Rule. One of the alternative approaches EPA identified is to revisit the 2003 Proposed Rule, which excluded from the regulatory definition of solid waste certain

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materials generated and reclaimed in a continuous process within the same industry (those industries sharing the same 4-digit North American Industry Classification System (NAICS) code).

NMA reminds EPA that this approach split beneficiation and processing of minerals into separate industries, ignoring the fact that secondary materials routinely flow between these segments as part of normal production operations. In the Final Solid Waste Rule, EPA recognized this fact, stating "whether materials are recycled within the same NAICS code is not an appropriate indication of whether they are discarded." *Id.* at 64,674. NMA urges EPA to not waste staff resources and time reevaluating an approach that was already struck down for legal and practical reasons.

CONCLUSION

After almost 30 years of debate, EPA has crafted a workable rule that can substantially reduce decades of regulatory uncertainty over what constitutes "solid waste" under RCRA. The final rule achieves RCRA's goals of protecting human health and the environment and encouraging resource conservation. NMA urges EPA to deny the Sierra Club's petition and to implement the Final Solid Waste Rule as adopted.

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

Sincerely,



Tawny A. Bridgeford
Associate General Counsel