

## **REVISIONS TO THE DEFINITION OF SOLID WASTE; FINAL RULE**

U.S. Environmental Protection Agency  
Public Meeting

Statement of the National Mining Association  
Tawny Bridgeford, Associate General Counsel

June 30, 2009

Good morning, my name is Tawny Bridgeford. I am an Associate General Counsel at the National Mining Association (NMA). NMA appreciates the opportunity to speak today in strong support for the agency's October 30, 2008, final rule that revised the regulatory definition of "solid waste" under RCRA.

### **Statement of Interest**

NMA is the principal representative of the producers of most of America's coal, metals, industrial and agricultural minerals. NMA has been deeply engaged for almost three decades in the regulatory debate over what constitutes a "solid waste" under RCRA. Over that time, the mining and mineral processing industry has labored under a series of EPA regulatory definitions that improperly and unlawfully characterized valuable in-process secondary materials used in the industry's production operations as wastes. These unlawful regulatory definitions were successfully challenged by NMA and its predecessor in the D.C. Circuit, most recently in the *Association of Battery Recyclers (ABR)* case in 2000, which served as the impetus for the 2008 final rule.

### **The Final Rule is Not a Midnight Regulation**

EPA's final rule is 29 years in the making. The tortuous history of this rulemaking spans six Administrations, involves multiple rulemakings, and includes numerous federal court challenges. The most recent chapter in this history began in the wake of *ABR* in 2003 when EPA issued a proposed rule that would have excluded from the definition of solid waste any material generated and legitimately reclaimed in a continuous process within the same industry (the NAICS approach).

EPA issued its final rule in October 2008. All told, EPA spent 5 years just on the development of this portion of the administrative record for this rule. The amount of time and staff resources expended on evaluating the potential options, developing the restructured approach in the rule, and completing studies that support the finalized approach needs to be underscored, particularly since the rule represents a hard fought balance between encouraging environmentally beneficial resource conservation and recovery and protecting the environment and public health from harm (two major goals of RCRA).

NMA strongly urges EPA to deny the Sierra Club's petition and to not upend the progress made by the agency. Among other things, Sierra Club's petition seeks remedies that have already been struck down by the D.C. Circuit as unlawful conditions on secondary materials not in fact discarded. EPA should instead preserve the balance it achieved in the final rule.

### **NMA Comments in Support of the Final Rule**

NMA will submit more detailed comments to the docket. Today, however, we would like to focus on two key issues.

#### **1. EPA Is Barred from Regulating Secondary Materials Not in Fact Discarded**

EPA states that the final rule "more directly considers whether particular materials are not considered 'discarded,' and are not solid and hazardous wastes subject to regulation under Subtitle C of RCRA." As the D.C. Circuit recognized in 1987 and reaffirmed in 2000:

"[C]ongress clearly and unambiguously expressed its intent that 'solid waste' (and therefore EPA's regulatory authority) be limited to materials

that are 'discarded' by virtue of being disposed of, abandoned, or thrown away."

*Association of Battery Recyclers v. EPA*, 208 F.3d 1047, 1051 (D.C. Cir. 2000) (quoting *American Mining Congress v. EPA*, 824 F.2d 1177, 1190 (D.C. Cir. 1987)).

EPA should remain mindful that until the "point of generation," or when the material is actually discarded, the material is not a waste, and EPA does not have jurisdiction under RCRA over the secondary material. In particular, EPA should not consider any of the modifications sought by the Sierra Club to the "contained" and "significant release" aspects of the rule, because they would violate basic jurisdictional limitations under RCRA.

If EPA were to pursue the type of remedy suggested by the Sierra Club in its petition, the agency would be squarely in violation of the D.C. Circuit's opinion in *ABR*, which struck down EPA's attempts in the mining and mineral processing industry to require specific storage conditions for materials not discarded. Moreover, NMA believes that the descriptive language and numerous examples in the preamble provide appropriate benchmarks for facilities and state inspectors to determine whether a secondary material is "contained" and whether a "significant release" has occurred.

Further, the final rule provides the flexibility necessary for meeting the "contain" standard given the range of industrial sectors and individual company sites that may utilize the exclusion. EPA was correct not to mandate specific engineering controls, to recognize that not all technologies are appropriate in each case, and to emphasize that site specific circumstances will play a large role in determining whether a secondary material is "contained."

## **2. EPA Should Not Pursue a Different Approach for Determining Legitimate Recycling**

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 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 of the factors mandatory. Both options are unacceptable both as a practical and legal matter.

Applying the legitimacy standard codified in the final rule to all of the existing RCRA exclusions would create considerable and unwarranted regulatory uncertainty. EPA specifically rejected this approach, finding that applying the four factors to existing exclusions would create confusion among the authorized states and regulated community operating under the existing exclusions. EPA also expressly stated that by codifying the legitimacy criteria it did not intend to raise questions about case-specific legitimacy determinations previously conducted by EPA or the authorized states.

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 industry and authorized states have effectively relied on this memorandum to determine legitimacy. These decisions should not be jeopardized through this rulemaking. To do so would likely lead to branding legitimate recycling processes as illegitimate and causing valuable resources to be wasted.

In addition, EPA explicitly stated in the final rule that some recycling processes may not conform to one or both of the discretionary legitimacy factors and yet those processes would still be considered legitimate. EPA correctly recognized that the "toxics along for the ride" factor may not be relevant for determining legitimate recycling in the mining and mineral processing industry. The rulemaking record more than adequately supports EPA in making that determination.

The public, EPA, the authorized states, and the regulated community would be ill-served if EPA were to reverse its position as it would halt legitimate recycling practices while the industry petitioned the agency for a favorable ruling. The record provides no support for pursuing this impractical, time consuming, resource intensive and environmentally counter-productive exercise.

## **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 rule as adopted.