



August 2, 2010

Lisa P. Jackson, Administrator
U.S. Environmental Protection Agency
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Attention Docket ID No: EPA-HQ-RCRA-2008-0329

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*Re: Identification of Non-Hazardous Secondary Materials That Are Solid Waste --
Proposed Rule*

Dear Administrator Jackson:

Representatives of the Solid Waste Programs in the states of Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont have prepared these comments for submission through our association, the Northeast Waste Management Officials' Association (NEWMOA). These comments are on the *Identification of Non-Hazardous Secondary Materials That Are Solid Wastes; Proposed Rule*, published in the Federal Register on June 4, 2010.

The comments from the NEWMOA-member states center on two main themes:

- All NEWMOA-member states regulate the use of non-hazardous secondary materials (NHSM) as fuel or ingredient, and want to maintain regulatory authority over these materials and their disposition; and
- The NEWMOA-member states want to continue to maximize the diversion of NHSM from disposal by continuing the uses that have already been carefully reviewed and approved through state regulatory programs.

More detail on each of these two general comments is presented below.

Maintaining State Regulatory Control Over Non-Hazardous Secondary Materials and Their Disposition

All of the NEWMOA-member states have well-established programs that review and approve the use of NHSM as fuel or as an ingredient in a manufacturing process. While some states have named their programs differently, in general they are known as beneficial use determination (BUD) programs. BUD approvals are individual authorizations for the beneficial use of a solid waste in a manufacturing process to make a product or as an effective substitute for a commercial product, including use as fuel. The authorization has to be consistent with federal Resource Conservation and Recovery Act (RCRA) regulations, and the state must find that such solid waste can be reused without harming or presenting harm to public health safety or the environment.

Across the NEWMOA-states, longstanding state definitions of solid waste were specifically crafted to ensure that NHSM remain designated as wastes - even if they can appropriately be used as fuels or have other value - in order to ensure continuing statutory authority with regard to them, and to subject their management, processing and use to an appropriate level of regulatory scrutiny. A solid waste is not subject to disposal requirements only if the applicant applies for and receives a BUD (and complies with all of the conditions of that BUD), or an explicit exemption or BUD has been established in the regulations. The NEWMOA-member states believe that continued state oversight of the use of NHSM as fuel or ingredient is required for protection of human health and the environment and want assurance that their regulatory authority is not undermined by this proposed rule.

Clarification is needed as to the impact of the proposed rule on state solid waste regulations. States have promulgated solid waste regulations that in many instances are more stringent than the federal solid waste regulations, and that relate to the NHSMs discussed in the proposed rule. The USEPA's final rule must clearly confirm that: 1) it will only affect the implementation of Clean Air Act regulations; 2) if a NHSM is defined as a non-waste fuel or ingredient under the proposed EPA regulations, that determination would not affect a contradictory definition of that material as a solid waste under state solid waste regulations, or a state's ability to regulate the management of these materials as solid wastes prior to combustion; and 3) the rule will have no effect whatsoever on state solid waste regulations or laws, including solid waste management facility regulations, waste transporter regulations, or state BUD regulations. Within the final rule EPA should specifically state that definition of solid waste in the rule only applies to determinations of whether the emissions from a facility burning a NHSM as a fuel or ingredient are to be regulated under Section 112 or Section 129 of the Clean Air Act (CAA).

The NEWMOA-member states also have the following additional concerns with the proposed rule as it relates to regulatory authority over NHSM used as fuel or ingredient.

Self Certification: The self-certification aspect of the rule in which a user of a NHSM for fuel, or as an ingredient determines whether the "legitimacy criteria" have been met, is a significant concern of the NEWMOA-member states. There is potential for inconsistency in how these determinations are made by users, and the potential for abuse would be significant. As written, there is no opportunity for states to weigh in on a generator's or processor's self-determination with regard to whether a NHSM is exempt and whether it in fact meets all the legitimacy criteria. What if the state regulatory agency (or USEPA) disagrees with the generator's decision? The NEWMOA-member states strongly recommend that all use of a NHSM as fuel or ingredient be subject to review and approval. The review and approval process focuses regulatory resources at the 'front end' to prevent inappropriate reuse, and creates a framework for oversight and enforcement. Enforcement associated with self-implementing legitimacy criteria would be much more labor and resource intensive because significant effort would be required to find violators, establish violations, and deter future violations.

Dual Regulatory Systems: The NEWMOA-member states are concerned with the potential for creation of a dual regulatory system that will confuse facilities that process or use NHSM. For example, the proposed rule appears to establish a dual system whereby a NHSM that meets the legitimacy requirement and is managed by the generator (who maintains control over the NHSM

and uses it as fuel in a combustion facility regulated under Section 112) is not a solid waste; whereby the same NHSM that is discarded remains a solid waste, resulting in the combustion facility that wants to use it being regulated under Section 129 even though the combustion unit may be identical.

Legitimacy Criteria: State BUD review processes evaluate a solid waste using legitimacy criteria similar to those proposed by USEPA. A possible alternative approach in the proposed rule might be to rely upon the individual state beneficial use determinations, in those states that have appropriate programs, to determine whether a waste qualifies as a legitimate fuel or ingredient, thus eliminating the need for self-certification or petition for a "non-waste determination" by USEPA. At a minimum, USEPA should utilize the state BUD review processes to develop clarifications as to how to apply the legitimacy criteria. The NEWMOA-member states request that the final rule provide more clear definitions of key terms and guidance about how those terms are to be applied:

- Valuable Commodity – the proposed rule does not provide clear instruction about how to determine whether a material is a “valuable commodity” and what kinds of management practices a facility must incorporate in order to be able to demonstrate that a material is being managed as a valuable commodity.
- Meaningful Heating Value and Use as a Fuel – a more specific definition is needed to determine whether a material provides meaningful heating value.
- Contaminant Levels - A NHSM should have contaminant levels that are comparable to those in traditional fuels/ingredients; however “comparable” needs to be defined.
 - a. The rule should be clarified to specify that the traditional fuel that the NHSM is compared to should be the fuel that would be used if the NHSM was not available.
 - b. For most NHSM used as fuel, some contaminant levels exceed those in the traditional fuel while others are lower. Likewise, a contaminant might be present in the NHSM but non-detect in the traditional fuel or vice versa. Relative risk must be taken into account. For example, the ‘comparable’ standard should be established as a primary determining factor, but a secondary ‘relative significance’ determination should be allowed in situations where a low-impact contaminant without environmental, health, or product quality impacts is present in concentrations above those found in traditional raw materials or is adequately controlled by air pollution control equipment. A one-size-fits-all “bright line” approach to comparable is not appropriate. Leaving the determination of what is comparable up to the user is also not appropriate.
 - c. An issue that often arises in review of BUD applications is that the state and the applicant often disagree on how much data needs to be collected about contaminant levels in a material and how to analyze that data. Under a self-determination process an applicant is likely to perform inadequate characterization.
 - d. In many cases, the use of a NHSM as fuel is used as a percentage of the use of “traditional” fuels at the facility. A facility might not burn fuel from NHSM as the primary fuel. Therefore, the concept of loading rate is important when comparing contaminant levels - the relative contribution from use of NHSM is

a factor that should also be considered. This reasoning is also applicable to the use of NHSM as ingredients in a manufacturing process.

Public Process: There is also no public process in the self-determination process established by USEPA's proposed rule. Combustion of NHSM is almost always controversial with the public and there is a lack of transparency in the proposed decision-making process. In most NEWMOA-member states, the BUD approval process provides opportunity for public comment and/or the permits that are issued are appealable.

Recordkeeping and Reporting: All facilities should, at minimum, be required to provide notification to the appropriate state(s) and USEPA of their proposed use of NHSM as fuel, and documentation which establishes that the NHSM meets the legitimacy criteria. Without notification there would be no reliable way for states to track and regulate these materials.

Petition Process: In the proposed rule, the non-waste determination process whereby a facility may apply to EPA for a determination is vague. The states would prefer that such determinations be made through state BUD programs, as they are already in place, have more explicit standards and provide for more public process. In the event that the final rule empowers USEPA to make non-waste determinations, the final rule should also require USEPA to directly notify state waste programs of non-waste petitions for use in CAA Section 112 facilities. The rule should also require state concurrence with USEPA's decision.

Negative Implications on Diversion of Materials From Disposal

USEPA and the states have goals to conserve resources and maximize the diversion of materials from disposal. In addition, as discussed extensively above, each of the NEWMOA-member states regulates the use of NHSM as fuel or ingredients through their BUD program and plans to continue to do so. The apparent paradox of the proposed rule is that it has the potential to be both too restrictive and too lenient at the same time. It has the potential to exempt certain facilities that the NEWMOA-member states currently review and approve, while at the same time require other facilities that the NEWMOA-member states also review and approve, to comply with new processing and/or emissions standards that will likely force them to shut down or discontinue utilizing an appropriate resource.

The rule as proposed would likely interfere significantly with the appropriate reuse of resources and increase the quantity of material that is disposed. Uses of NHSM as fuel or ingredients, which a NEWMOA-member state has thoroughly reviewed and approved might no longer be viable under USEPA's proposed rule. Markets for some NHSM could be eliminated and likely result in the NHSM remaining unprocessed and requiring disposal. This would increase demand for virgin materials and fuels, require disposal of materials that have value, and consume landfill space – all negative outcomes that are unnecessary.

The NEWMOA-member states agree that NHSM that have been discarded are generally considered "solid wastes" and units that burn these materials are subject to the CAA Section 129 incineration standards if the NHSM have not been processed into a legitimate ingredient or fuel. The key terms here are "processed" and "legitimate".

Adequate Processing: When the NHSM has been processed to produce a fuel or ingredient product that meets the legitimacy criteria and the specification set by the user of the fuel/ingredient, it should be considered adequately processed for the purposes of the rule for use at facilities regulated under CAA Section 112. Reducing the size of the incoming NHSM to produce a fuel material that meets a size specification should be considered adequate processing. BUD programs in the NEWMOA-member states consider the amount of processing and the specification of the end user before granting a BUD approval. Maintaining state regulatory control over all NHSM whether they are or are not considered a solid waste under the proposed rule would address USEPA concerns regarding speculative accumulation.

Comparable Contaminants: Another concern is whether the ingredient or fuel product produced is “legitimate”. As stated previously, the BUD programs in the NEWMOA-states address the legitimacy criteria contained in the proposed rule during the BUD review and approval process. The NEWMOA- member states have concerns regarding the legitimacy criteria on contaminant levels, as previously discussed.

Unintended Consequences: The NEWMOA-member states are concerned that there will be severe unintended consequences leading to increased disposal of NHSM if the proposed rule is not modified. There is significant concern with regard to the continuing interest and willingness of fuel users to continue to accept NHSM as fuel substitutes. The combustion of certain NHSM in boilers subject to CAA Section 112 in the region is a positive and important aspect of management of some materials such as scrap tires and construction and demolition (C&D) wood. Each of these, as well as off-spec used oil is discussed further below.

Scrap Tires: The presence or absence of steel in scrap tires should not be a factor in the legitimacy of processed tires as a fuel (known as tire-derived fuel, TDF). To the extent that air emissions are a concern with the combustion of tires, it is not a result of the presence of steel. Facilities that require metal removal do so as a result of operational requirements, not to remove metals to meet air emissions requirements. The level of processing required should match the facility’s operational specifications. States that have approved the use of TDF have determined, after thorough analysis and review that it is a beneficial use of tires without the steel removed. A major user of TDF in the NEWMOA-member states are paper mills in Maine where the TDF supplements the use of coal. Reducing the quantity of coal that is combusted provides significant environmental benefits, including reductions in mercury emissions. We are concerned that paper mills and other current users of TDF would choose not to invest the huge capital resources to upgrade from Section 112 to Section 129 facilities in order to be able to keep using TDF that contains steel, and instead cease to accept it.

Requiring an unnecessary processing step to remove the steel would add both cost and air emissions to the processing. Processing facilities that do not currently have the capability of removing steel would have to make capital investments. The additional processing would require additional handling, increasing operation costs, and this additional processing requires the use of fuel to power the equipment, creating unnecessary air emissions, including greenhouse gas emissions. The added cost to processing is likely to make the economics of processing tires for TDF unfavorable. TDF processors would have to increase the price of TDF to recoup the added costs and the increased cost might cause TDF to no longer compete with “traditional

fuels". The result is likely to be that the millions of scrap tires generated in the NEWMOA-member states that are currently used as TDF would not have continued markets. Alternative markets for scrap tires are unlikely to be able to absorb the millions of tires that would no longer be able to be used for TDF under the proposed rule. All the NEWMOA-member states discourage or ban the disposal of scrap tires in landfills because their physical characteristics make them ill-suited for burial. In addition, tires consume significant space in landfills, increasing the need for new landfills. The NEWMOA-member states are concerned that without TDF markets, the illegal disposal of tires would increase and the tire stockpile problems the states have worked so hard to remediate would re-emerge.

Construction and Demolition Materials: The one NEWMOA state that has Section 112 facilities that use C&D wood as a fuel is Maine. Maine has developed specifications specific to this product to ensure that C&D wood is adequately processed and meets legitimacy criteria, and that human health and the environment are protected. Maine regulations regarding fuel substitution can be found on the internet at www.maine.gov/sos/cec/rules/06/096/096c418.doc in Section 6. C&D material processors in several NEWMOA-member states rely on being able to sell processed C&D wood to facilities in Maine and Quebec, Canada. Many of these C&D processors have made significant investments into systems that utilize mechanical methods and human labor to recover high percentages of incoming material for reuse and recycling, including C&D wood and significantly reduce the amount of C&D waste sent to landfills for disposal or use as alternative daily cover (ADC). We are concerned that biomass boilers would choose not to invest the huge capital resources to upgrade from Section 112 to Section 129 facilities in order to be able to keep using processed C&D wood, and instead cease to accept it.

At a facility that processes C&D wood, some of the incoming C&D wood is coated and some not; some coatings contain contaminants of concern and some do not; and the coatings on C&D wood make up a small fraction of the total quantity of the processed wood. The NEWMOA-member states also do not approve the processing of railroad ties, telephone poles, or pressure-treated wood into fuel intended for Section 112 facilities, or the use of this type of wood as fuel at Section 112 facilities. In addition, Maine requires that users of processed C&D wood for fuel perform extensive sampling and analysis of the incoming material for certain chemical and physical parameters (including in part: arsenic, lead, PCBs, asbestos, plastics, and CCA treated wood), and use of the wood fuel must meet all other standards Maine has established for protection of human health and the environment. Lastly, at biomass boilers in Maine, processed C&D wood is used as a supplement and is not the primary fuel. All of these factors should be able to be considered when assessing the comparable contamination legitimacy criteria.

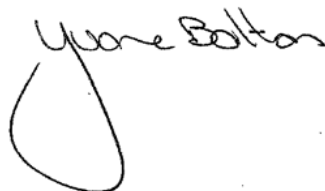
It is not practical or economical for coated C&D wood to be segregated and all the pieces, large and small run through a machine to remove the surface layer as USEPA seems to suggest is feasible in the proposed rule. As with scrap tire processing, adding this expensive and unnecessary step changes the economics of the processing and affects the viability of the product as a fuel. If markets for the reuse of C&D wood are limited, several C&D processors would not have sustainable operations and the processing of all C&D materials would be negatively affected. The quantity of C&D material that ends up disposed or used as ADC in landfills would increase significantly. There would likely be C&D processing to reduce size and generate ADC, but the recovery and use of C&D material outside the landfill would decrease. Although

generation of ADC could be considered diversion from disposal, it should not be considered preferable or even equal to recovery for use outside the landfill. When C&D wood is not removed, it ends up in the landfill where it decomposes to generate methane – a potent greenhouse gas.

Used Oil: The proposed rule mentions off-specification used oil as one of the types of secondary materials that are affected by the rule. The RCRA Subtitle C rules issued in 40 CFR Part 279 were promulgated under the authority of *two* statutes – namely, RCRA Subtitle C, and also the Used Oil Recycling Act (UORA). In the proposed rule it appears that EPA has overlooked the subset of used oils regulated under Part 279 that are not “hazardous” under RCRA, but that are regulated under Part 279 as a result of UORA (specifically, used oils that do not exhibit a characteristic of hazardous waste). This could include not only on-specification, but also off-specification used oils. Most off-specification used oil is not burned as-is, but is instead blended with on-specification used oil or with virgin oil to meet the used oil specification in Part 279. If off-spec used oil is processed through blending to meet the used oil specification in Part 279, the resulting oil should be considered a legitimate fuel product as is currently allowed under Part 279.

Thank you for the opportunity to comment on the proposed rule. The NEWMOA-member states ask that you carefully consider the potential negative impacts of this proposed rulemaking and encourage USEPA to modify the final rule to address the concerns raised in our comments. If you or your staff have any questions regarding the issues raised in these comments, please contact Jennifer Griffith of NEWMOA at 617-367-8558, ext. 303 or jgriffith@newmoa.org.

Sincerely,

A handwritten signature in black ink that reads "Yvonne Bolton". The signature is written in a cursive style with a large, looped initial "Y".

Yvonne Bolton
2010 Chair, NEWMOA Board of Directors
Chief, Waste Management Bureau, Connecticut Department of Environmental Protection