

August 2, 2010

Lisa P. Jackson, Administrator
U.S. Environmental Protection Agency
Mail Code 2822 T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention Docket ID No: EPA-HQ-RCRA-2008-0329

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

Dear Administrator Jackson:

The Northeast States for Coordinated Air Use Management (NESCAUM) offers the following comments on the U.S. Environmental Protection Agency's (EPA's) Notice of Proposed Rulemaking (NPR), published on June 4, 2010 in the Federal Register, entitled *Identification of Non-Hazardous Secondary Materials That Are Solid Waste* (75 FR 31844 - 31892). NESCAUM is the regional association of air pollution control agencies representing Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

NESCAUM strongly supports EPA's efforts to clarify definitions of secondary materials and solid waste so that facilities can properly determine whether or not they would be classified under EPA's boiler or incinerator regulations. In addition, we support efforts that encourage the reuse of secondary materials when beneficial reuse options exist, however, those options must ensure that combustion of these materials does not turn a solid waste solution into an air pollution problem.

The proposed rulemaking provides a workable construct for regulatory authorities to make determinations; however, it lacks appropriate oversight by regulatory agencies. Additionally, the proposed determination process requires that several key decisions be made to properly delineate solid wastes from secondary materials. The rule, as proposed, sorely lacks the detail necessary to allow for accurate determinations. Furthermore, lack of regulatory mechanisms to ensure compliance, such as review of determinations and notification to regulatory agencies, places an undue and troublesome burden on air pollution control compliance and enforcement programs to enforce solid waste regulations. These issues pose serious implementation issues for this rule as proposed.

The following items detail specific areas where NESCAUM encourages EPA to develop clear and comprehensive constructs to ensure proper adherence to the proposed rule.

Self Determination

One of NESCAUM's primary objections to this proposed rule is that it relies solely on the owner or operator of a regulated facility to self-determine whether or not a material is a secondary material or a solid waste. The entire process leans too heavily on a self-determination process with no certification program, tracking systems, or regulatory guidance. Lack of notification and approval by an appropriate regulatory agency creates a "catch me, if you can" system. Furthermore, the lack of neither federal tracking systems for secondary materials or solid waste, nor any requirements for processors to certify materials, creates a rule that is not enforceable as a practical matter. EPA must create a clear process for meeting the standard, as well as a tracking mechanism so that compliance and enforcement staff can readily determine compliance status. NESCAUM suggests that EPA develop either a tracking system to allow for review of determinations or some type of certification system at processing facilities to provide end users with appropriate documentation on materials.

Discard

EPA proposes that a material that is not discarded is not a solid waste, basing the determination not on constituents of the material itself but rather solely on the basis of where it last resided. This provision creates an unequal regulatory platform. Under this construct, when a facility combusts an on-site-generated material on-site, the material would be considered non-waste and the combustion unit, a boiler. Alternatively, when an off-site facility combusts that exact same material, only by the fact of it leaving the generator facility would the material be considered solid waste, and the combustion unit, an incinerator. NESCAUM suggests that a given secondary material should receive the same solid waste classification and be subject to the same emissions standards regardless of whether it is combusted on or off the site of generation.

Sufficiently Processed

As with other portions of this rule, the term "sufficiently processed" lacks clarity. Lacking clear definitions for specific secondary materials processing will lead to a patchwork system of processing, leaving the end user with the burden of determining if a processing facility has "sufficiently processed" a material. For example, "sufficiently processed" for a tire could mean that a tire processing facility removed metal to the ASTM standard or it could mean that the facility took some effort to remove the metal. NESCAUM suggests that EPA provide processing standards for common secondary materials that provide clear guidance so that states or facilities can accurately determine if a material has been "sufficiently processed."

Non Waste Petition Process

NESCAUM recommends that EPA develop and implement a national non-waste petition process to ensure that determinations of whether or not a material is a solid waste for combustion purposes are made uniformly. NESCAUM also suggests that EPA incorporate opportunities for interested parties such as state agencies and the general public to comment on these petitions

prior to final determinations to provide process transparency. Finally, NESCAUM requests that EPA create a national database for these determinations to ensure wide access to this information. This database should be clearly delineated from state beneficial use application processes and their corresponding data systems since these processes serve two separate issues. Such an approach would create national uniformity in determinations.

Legitimacy Criteria

NESCAUM finds EPA's proposal for legitimacy criteria sorely lacking clear direction and definitions to guide decision-makers on how to make proper determinations. First, the proposal must have clearer criteria for what is a valuable commodity. Secondly, meaningful heating value must be defined. NESCAUM suggests that EPA define a minimum Btu value for a secondary material to have a "meaningful" heating value. Finally, EPA must provide clear guidance on what fuel a material must compare itself to in order to determine if it is as clean as a "virgin" fuel. EPA has provided to state agencies a description of what it classifies as "traditional fuels." In EPA's June 9, 2010 "Frequently Asked Questions" paper for the Combustion Webinar, EPA defines those items as:

Fuels that have been historically managed as valuable fuel products rather than being managed as waste materials. Examples include fossil fuels (e.g., coal, oil, including used-oil meeting on-specification levels, natural gas), and their derivatives (e.g., petroleum coke, bituminous coke, coal tar oil, refinery gas, synthetic fuel, heavy recycle, asphalts, blast furnace gas, recovered gaseous butane, coke oven gas), as well as clean cellulosic biomass (e.g., green wood, forest thinnings, sawdust, bagasse, peanut shells, etc.).

We appreciate the preliminary answers that EPA has given regarding traditional fuels, however that information still lacks the detail necessary to make determinations. NESCAUM provides the following examples to highlight this issue:

- Used oil: Will used oil, which originally was #2 fuel oil, meet the specification for virgin #2 oil, used oil specifications, #6 oil or some other specification limit?
- Tires: Tires are not on EPA's list of traditional fuels, however within the proposed definition of solid waste, tires could potentially be considered a secondary material. What traditional fuel should a tire be compared to?
- Derivatives of natural gas refining liquids separation and other processing: To what traditional fuels should gas or liquid fuels manufactured from natural gas be compared?

NESCAUM recommends that EPA require that the secondary material be compared to the fuel that it is displacing to determine if it is "as clean as a traditional fuel." Furthermore, implementing regulatory agencies require more guidance than what is provided in the rule preamble; therefore we request that EPA develop a guidance document that includes fuel comparison charts to ensure consistent application of the rule.

Alternative Process

In general, NESCAUM does not support the alternative approach proposed by EPA that considers all discarded secondary materials a “solid waste.”

We look forward to working with you to ensure that the new definition of solid waste makes sense, can be implemented by states, maximizes resources, and achieves our public health protection goals. If you or your staff has any questions regarding the issues raised in these comments, please contact Lisa Rector of NESCAUM at 617-259-2095.

Sincerely,

A handwritten signature in cursive script, appearing to read "Arthur N. Marin".

Arthur N. Marin
Executive Director