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February 21, 2012

VIA E-MAIL

RCRA Docket/EPA Docket Center
Attention: DOCKET ID EPA-HQ-RCRA-2008-0329
Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: Proposed Amendments: Non-Hazardous Secondary Materials That Are Solid Waste
76 Fed. Reg. 80452, December 23, 2011

To Whom It May Concern:

The American Chemistry Council (ACC)[1] appreciates the opportunity to provide comments on the above-referenced amendments. While we support many of the changes EPA is proposing in these amendments, we offer, through the attached comments, suggestions to improve the NHSM rule, to maximize emissions reductions while minimizing regulatory burden.

Please do not hesitate to contact me at (202) 249-6426 or at Patricia_Haederle@americanchemistry.com, should you require further information on the attached comments.

Very truly yours,

Patricia A. Haederle

Attachment

[1] *The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $720 billion enterprise and a key element of the nation's economy. It is one of the nation's largest exporters, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure.*

Comments on
EPA's Reconsideration and Proposed Amendments
Non-Hazardous Secondary Materials
That Are Solid Waste
76 FR 80452, December 23, 2011
Docket EPA–HQ–RCRA–2008–0329

Submitted by
The American Chemistry Council

I. EXECUTIVE SUMMARY

The American Chemistry Council ("ACC") appreciates the opportunity to submit comments to the Environmental Protection Agency (EPA) on its December 23, 2011 proposed amendments to the Non-Hazardous Secondary Materials that are Solid Waste (Non-Hazardous Secondary Materials Rule or NHSM), 76 Fed. Reg. 80452, Docket EPA-HQ-RCRA-2008-0329. We appreciate EPA clarifying elements of NHSM through these proposed amendments. We support EPA's efforts to clarify the definition of "solid waste" under RCRA to determine whether a combustion unit is required to meet either emissions standards for solid waste incineration units issued under section 129 of the Clean Air Act (CAA), or emissions standards for commercial, industrial, and institutional boilers issued under CAA section 112. We further appreciate the challenging task that EPA has undertaken to identify nonhazardous materials that are not "solid waste" to guide the beneficial use of various secondary materials, while ensuring protection of human health and the environment. While we support many of the changes EPA is proposing in these amendments, we offer, through the attached comments, suggestions to improve the NHSM rule, to maximize emissions reductions while minimizing regulatory burden.

The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $720 billion enterprise and a key element of the nation's economy. It is one of the nation's largest exporters, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure.

ACC members use various types of units that EPA is proposing to regulate under the relevant CAA sections 112 & 129 regulations, such as solid waste incinerators and energy recovery units, which include boilers and process heaters of various types, sizes, and fuel configuration. The boilers and process heaters meet the heat and steam demands needed to energize the business of chemistry. Thus, Council members will be directly affected by the Agency's decisions that are based on this proposed rulemaking.

The following summarizes ACC comments on the NHSM reconsideration and proposed amendments, which are discussed in greater detail in subsequent sections of this document:

- ACC supports EPA's change to the definition of *contaminants* to refer to constituents found in materials prior to combustion versus those that will result in emissions of air pollutants.
- EPA must remove Section 112(b) pollutants from the definition of *contaminants* as it represents an unacceptable expansion of its authority. Failure to do so would result in the regulation of a number of solid waste incineration units under NHSM, which is

contradictory to what Congress clearly and plainly intended: mutually exclusive regulation of sources subject to Sections 112 and 129 of the Clean Air Act.

- EPA should include carbon monoxide and opacity in Clean Air Act Section 129(a)(4) pollutants excluded from NHSM because they are either unlikely to be found in NHSM or are adequately measured by other parts of the *contaminants* definition.
- ACC supports the proposed changes to allow comparison of groups of contaminants and encourages EPA to further modify the provision with the addition of clarifying language, and to extend this same grouping approach to NHSM used as ingredients in combustion units.
- We urge EPA to reconsider its proposed use of a legitimacy criteria for NHSM used as fuels as it represents a major change in policy for the Agency.
- *Contained gaseous material*, defined as gases that are in a container when that container is combusted, should be retained in the rule.
- In presuming that all secondary materials transferred between companies and used legitimately by a third party as fuel are wastes, EPA is impermissibly extending its jurisdiction over the Resource Conservation and Recovery Act to include materials that may not have been discarded. ACC suggests that EPA revise its standards and procedures for identification to rightly treat NHSM used as fuels in the same manner as NHSM used as ingredients in combustion units.
- ACC encourages EPA to finalize the NHSM rule in advance of finalizing the proposed Commercial and Industrial Solid Waste Incineration Units (CISWI) rule. Until NHSM is promulgated, it remains unclear how many sources will be regulated under the CISWI rule. The continued lack of clarity on whether a secondary material being combusted is a fuel or a waste has precluded sources from being able to make applicability determinations and move forward, and this uncertainty will remain until EPA finalizes its reconsideration of NHSM.
- ACC supports a public non-waste determination petition process, but agrees with EPA that it should be streamlined. We suggest shortening the comment period and delegating the approval authority to the states to expedite the issuance of permits.
- ACC supports the revised definition of *clean cellulosic biomass* and the specificity regarding *biomass crops. We* encourage EPA to further revise the definition to use the term *clean* as opposed to *untreated* when referring to wood pallets, so as to be consistent with the term *clean construction and demolition wood.*
- ACC supports the listing of scrap or off-specification tires and resinated wood as non-waste fuels and encourages EPA to also include pulp and paper wastewater treatment residuals in this category as there are significant data in the record, including some of EPA's own supporting material, to support the addition.

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II. CONTAMINANTS

A. EPA should remove the Section 112(b) pollutants from the definition of "contaminants" for purposes of the legitimacy criteria

EPA is proposing to revise the definition of "contaminants" codified in § 241.2 of the March 11, 2011 final NHSM rule as follows:

> *Contaminants* means all pollutants listed in Clean Air Act sections 112(b) and 129(a)(4), with modifications outlined in this definition to reflect constituents found in non-hazardous secondary materials prior to combustion. The definition includes the following elemental contaminants that commonly form Clean Air Act section 112(b) and 129(a)(4) pollutants: Antimony, arsenic, beryllium, cadmium, chlorine, chromium, cobalt, fluorine, lead, manganese, mercury, nickel, nitrogen, selenium, and sulfur. The definition does not include the following Clean Air Act section 112(b) and 129(a)(4) pollutants that are either unlikely to be found in non-hazardous secondary materials prior to combustion or are adequately measured by other parts of this definition: Hydrogen chloride (HCl), chlorine gas (Cl2), hydrogen fluoride (HF), nitrogen oxides (NOX), sulfur dioxide (SO2), fine mineral fibers, particulate matter, coke oven emissions, diazomethane, white phosphorus, titanium tetrachloride, m-cresol, o-cresol, p-cresol, m-xylene, oxylene, and p-xylene.

It is clear that EPA is trying to focus its proposed final definition in this reconsideration action on the level of pollutants in the secondary materials rather than the *emissions* that may result from the combustion of those materials. ACC believes this is the appropriate focus for defining what is a "solid waste" under RCRA for purposes of § 129 of the CAA since the determination should be made *before* the secondary material is combusted. However, EPA then takes the contrary approach by defining contaminants, at least in part, by reference to the projected emissions resulting from the *combustion* of the secondary material. Additionally, and more fundamentally, EPA impermissibly seeks to expand its § 129 jurisdiction to hazardous air pollutants (HAP) that are regulated under § 112 of the CAA, not under § 129, by including in the definition of "contaminants" "all pollutants" listed in § 112(b).

Section 129(a)(4) specifies the 11 "substances or mixtures" for which emission limits shall be set for solid waste incineration units. That list does not include all of the HAPs listed in § 112(b) of the Clean Air Act. By including "all pollutants" listed in § 112(b) in the definition of "contaminants", EPA is impermissibly expanding the scope of § 129. This expansion of the scope of § 129 is further evident by including as "contaminants" precursors that when combusted "commonly" form HAPs. By doing so, EPA violates the plain language of § 129, ignoring the fact that "Congress made section 129's standards and section 112's standards mutually exclusive by directing that 'no solid waste incineration unit subject to the performance standards under this section and [42 U.S.C. § 7411] shall be subject to standards under section 7412(d).' § 74299h)(2)." *NRDC v. EPA,* 489 F.3d 1250, 1256 (D.C. Cir. 2007). EPA also departs from its own statements on the intended narrow scope of the contaminants to be considered in the legitimacy criteria.

Under the current NHSM rule, "non-hazardous secondary materials that are combusted are presumed to be solid wastes." *See*, § 241.3(a). For a NHSM not to be considered solid waste, EPA either must grant a petition that the NHSM is a non-waste or the NHSM must meet the legitimacy criteria that determines if the NHSM is a fuel or ingredient used in combustion and not a solid waste. *See*, § 241.3(a)-(b). Under the proposed reconsidered amendments to the NHSM rule, one of the legitimacy criteria is that the "non-hazardous secondary material must contain contaminants or groups of contaminants at levels comparable in concentration to or lower than those in traditional fuel(s) which the combustion unit is designed to burn." 76 Fed. Reg. at 80530. As noted above, as proposed "contaminants means all pollutants listed in Clean Air Act sections 112(b) and 129(a)(4), with modifications outlined in this definition to reflect constituents found in non-hazardous secondary materials prior to combustion." *Id.* at 80529. If the NHSM fails to meet the legitimacy criteria and is combusted, the unit will be subject to the CISWI §129(a)(4) emission standards.

By requiring the legitimacy criteria to compare the levels of § 112(b) HAPs (and § 129(a)(4) substances) to levels found in traditional fuels, EPA is attempting to control the emissions of HAP under § 129 and expanding the number of units that will be regulated as "solid waste incineration units" under § 129 using § 112(b) pollutants.[1] As stated above, this violates the plain language of the CAA and Congressional intent that regulation of sources under § 129 is "mutually exclusive" from regulation of sources under § 112. . *See also*, *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-843 (1984) (holding that if Congress has directly spoken to the precise question at issue, the court must give effect to the unambiguously expressed intent of Congress).

B. EPA should narrowly tailor the NHSM rule to achieve the statutory purposes of § 129

In the final NHSM rule, EPA stated that:

> The purpose of this final rule is to provide a definition of "solid waste" in order to develop emission standards under sections 112 and 129 of the CAA. In particular, this rule codifies requirements and procedures that identify whether the definition of "solid waste" applies to non-hazardous secondary materials burned as fuels or used as ingredients in combustion units. . . . We emphasize that we are articulating a narrow definition in this final rule and are not making solid waste determinations that cover other possible secondary material end uses. (76 Fed. Reg. 15456, 15457, 15462)

In its response to comments on the final NHSM rule, EPA stated that "the contaminants to be considered in the legitimacy criteria should generally be the same that EPA is to consider in establishing emission standards. Thus, we disagree with the commenter who argues that this list

[1] It does not appear that EPA has adjusted the cost/benefit analysis in the § 129 CISWI rule to account for the potential significant increase in units that will be regulated under § 129 as solid waste incineration units based on the revised definition of "contaminants."

is not broad enough because it does not address all heavy metals or organic hazardous pollutants." *Id.* at 15527. Under its own logic, EPA should define "contaminants" narrowly to address only the substances or mixtures specified in § 129(a)(4) for which EPA is establishing emissions standards in the CISWI Rule.

In addition, including § 112(b) pollutants to define NHSM is akin to including other types of hazardous material as NHSM, which EPA flatly rejected in the final NHSM Rule. EPA stated that it was inappropriate to use the hazardous chemicals in Appendix VIII to 40 C.F.R. Part 261 for "determining which contaminants to consider for the purposes of defining non-hazardous solid waste, since the purpose of Appendix VIII is to be used by the Agency to make hazardous waste listing determinations (see 40 CFR 261.11(a)(3)) and the chemicals in Appendix VIII would not apply to non-hazardous wastes." *Id.* at 15525. Similarly, using the 187 HAPs listed in § 112(b) to define NHSM that is burned as a fuel or used as an ingredient, is inappropriate because § 112(b) pollutants are to be regulated through emissions standards established under § 112(d), not to determine contaminant comparability for the purposes of identifying which units will be regulated as "solid waste" incineration units under § 129. Accordingly, EPA should amend the NHSM rule to remove the reference to § 112(b) HAPs from the definition of "contaminants."

C. EPA should exclude carbon monoxide and opacity from the definition

The regulatory definition of "contaminants" in the reconsideration excludes several § 129(a)(4) pollutants because they are either unlikely to be found in non-hazardous secondary materials prior to combustion or are adequately measured by other parts of this definition. In the preamble, EPA suggests carbon monoxide (CO) was not excluded because there is no clear surrogate to exclude it. *Id.* at 80475, n. 18. However, the excluded pollutants were excluded because they were unlikely to be present or are adequately measured by other parts of the definition. The excluded pollutants did not have to meet both criteria. CO meets the first criterion of unlikely to be present in non-hazardous secondary material, which by itself should be sufficient for exclusion.

Similarly, opacity is measured in emissions and is not directly related to any one specific constituent in non-hazardous secondary materials. In addition, it is unclear how one could determine if opacity is present in non-hazardous secondary materials prior to combustion. Because opacity is unlikely to be present prior to combustion, it should also be excluded.

The situation for CO and opacity is the same as for particulate matter and coke oven emissions. Particulate matter (PM) and coke oven emissions were excluded because they are products of combustion unlikely to exist in NHSM prior to combustion. The same can be said for CO and opacity.

III. CONTAMINANT LEGITIMACY CRITERION FOR NHSM USED AS FUELS

A. EPA should reconsider its use of the "Legitimacy Criteria" for NHSM used as fuels

EPA's imposition of the "legitimacy criteria" to non-hazardous secondary materials was a significant new mandate and not the mere "codification" of long-standing EPA guidance set forth in the "*Lowrance Memo*" in 1989. OSWER Directive 9441.1989(19) (April 26, 1989). The *Lowrance Memo* was focused on determining whether *hazardous* waste, not solid waste, was being recycled. The hazardous waste at issue was F006 electroplating sludge which was claimed by companies to be recycled by being used as an ingredient in manufacturing and as a feedstock for a metals recovery smelter. Two issues were being presented to EPA: (1) whether the activities are legitimate recycling, and (2) if it is legitimate recycling, is the activity subject to regulation under §§ 261.2 and 261.6, or is it excluded from EPA authority.

Many years later, when the Agency began moving towards transforming the *Lowrance Memo's* questions into RCRA Subtitle C regulatory requirements, EPA observed:

> It should be noted that today's proposed legitimacy criteria are not intended to apply to recycling of materials that are non-hazardous (*i.e.*, materials that are not listed hazardous wastes, and that do not exhibit a hazardous characteristic). Thus, for example, recycling of non-hazardous household wastes, such as newspapers and aluminum cans, would not be subject to the proposed criteria. Likewise, the proposed criteria would not apply to recycling of non-hazardous secondary materials generated from industrial operations. 68 Fed. Reg. 61558, 61582, n. 14 (Oct. 28, 2003).

Therefore, applying the *Lowrance Memo* to the management and recycling of non-hazardous solid waste, as EPA is doing now, is a major change in EPA policy and not a mere codification of existing practice.

Even within the context of RCRA Subtitle C hazardous waste management, the *Lowrance Memo* did not establish specific requirements that EPA can now claim are merely being codified. The *Lowrance Memo* was guidance addressed to EPA Regional Offices (specifically, the Regional Hazardous Waste Division Directors) not industry. It was intended to assist Regional personnel in making determinations as to whether materials were being legitimately recycled. The *Lowrance Memo* did not impose requirements on industry or create any regulatory requirements. The *Lowrance Memo* presented a number of questions to be asked in order to help determine whether something was being "recycled" or whether the activity was "sham recycling." The *Memo* states that these questions, which have since become known as the "legitimacy criteria", "may be useful in focusing consideration of a specific activity" and that while "there may be no clear cut answers," "taken as a whole, the answers to these questions should help draw the distinction between recycling and sham recycling." Thus, the criteria set forth in the *Lowrance Memo* were a series of factors to be taken into account when evaluating particular situations, and were *not* a set of specific requirements for which "clear cut answers" were expected or for which every recycler had to maintain records demonstrating compliance. The emphasis on considering the answers to the questions "taken as a whole" indicates that EPA did not intend each question

to be an "independent test" that one passed or failed. In this regard, the *Lowrance Memo* was consistent with earlier statements by EPA on this topic, where the Agency discussed various factual situations as "indicators" of possible "sham" recycling, but did not establish fixed criteria with which industry had to positively demonstrate compliance. 50 Fed. Reg. 614, 638 (Jan. 4, 1985).

The "legitimacy criteria" have not historically been applied to the recycling of non-hazardous materials or solid waste. Therefore, transforming the *Lowrance Memo* into a series of regulatory requirements for the recycling of non-hazardous solid waste is a significant change in EPA policy for which the Agency has not provided a reasoned justification. Even in the context of hazardous waste recycling, it is inconsistent with the *Lowrance Memo*, and it is certainly not simply codifying it, to transform that loosely formed inquiry into discrete and independent regulatory requirements that industry has the burden to demonstrate are being met. ACC strongly encourages the Agency to return to the original and intended use of the legitimacy criteria as guidance and not as regulatory requirements.

B. EPA should make additional changes to clarify the comparison for groups of contaminants

EPA has proposed to modify language in § 241.3(d)(1)(iii) to allow comparison between groups of contaminants in addition to contaminants. ACC appreciates EPA doing so, but believes additional changes are needed to this provision to make it clearer that a comparison to groups of contaminants is intended. ACC proposes the following textual changes in § 241.3(d)(1)(iii):

> (iii) The non-hazardous secondary material must contain contaminants or groups of contaminants at levels comparable in concentration to or lower than those in traditional fuel(s) which the combustion unit is designed to burn. In determining which traditional fuel(s) a unit is designed to burn, persons can choose a traditional fuel that can be or is burned in the particular type of boiler, whether or not the combustion unit is permitted to burn that traditional fuel. In comparing contaminants or groups of contaminants between traditional fuel(s) and a nonhazardous secondary material, persons can use ranges of traditional fuel ~~contaminant~~ levels of contaminants or groups of contaminants compiled from national surveys, as well as ~~contaminant level~~ data on levels of contaminants or groups of contaminants from the specific traditional fuel being replaced. Such comparisons are to be based on a direct comparison of the ~~contaminant~~ levels of contaminants or groups of contaminants in both the non-hazardous secondary material and traditional fuel(s) prior to combustion.

In addition, ACC believes that EPA should make the same change in § 241.3(d)(2)(iv) when a non-hazardous secondary material is used as an ingredient in a combustion unit. ACC is proposing a comparable textual change for § 241.3(d)(2)(iv):

> (iv) The non-hazardous secondary material must result in products that contain contaminants or groups of contaminants at levels that are comparable in concentration to or lower than those found in traditional products that are manufactured without the non-hazardous secondary material.

C. Revisions to the contaminant legitimacy criterion for NHSM used as fuels

1. What are contaminants?

As previously discussed in Section III of these comments, ACC supports EPA's proposal to allow groups of contaminants (instead of just single contaminants) to be compared when making a legitimacy criterion determination for NHSM that are used as fuels, as proposed in § 241.3(d)(1)(iii). To be consistent, ACC believes EPA should also extend this same grouping approach to § 241.3(d)(2)(iv), when NHSM is used as an ingredient.

ACC appreciates the examples of potential groupings discussed in the preamble [76 FR 80477 – 804890], and supports EPA's position that other groupings that are technically reasonable could be used as well. By way of support, we provide the following example to illustrate the importance of being able to group contaminants in the evaluation:

Based on the Traditional Fuel Tables that EPA provided, toluene and xylenes are present in Fuel Oils at concentrations up to 380 ppm and 3,100 ppm respectively. If a NHSM had concentrations of those two constituents that were essentially reversed; e.g. toluene 3,100 ppm and xylene at 380 ppm, this material would not meet the existing legitimacy criteria because the toluene was not at a concentration comparable to or lower than the traditional fuel, even though toluene is a beneficial component of fuel. However, under the proposed grouping approach, this material would properly meet the legitimacy criteria since toluene and xylene would be in the same grouping and the combined concentration would be the same in the NHSM and traditional fuel. This is clearly the appropriate outcome, since both of these constituents are beneficial components of fuel.

2. What does designed to burn mean?

ACC appreciates and supports EPA's clarifications and flexibility related to the "designed to burn" language in both the preamble (76 Fed. Reg. 80480) and proposed rule at § 241.3(d)(iii). The addition of the extra explanatory text allows a comparison of the contaminants in the materials being considered for legitimacy against the contaminants in any traditional fuel the unit is designed to burn, not only the traditional fuels the unit actually burns, notwithstanding ACC concerns regarding EPA's revised use of the legitimacy criteria described in prior sections of these comments.

ACC believes this is an appropriate modification because the fate and emission of a contaminant, whether it is contained in a traditional fuel or a material being considered for legitimacy, are as dependent on the design of the combustion unit as they are on the fuel matrix. A boiler or energy recovery unit that is designed to burn solid fuels, is likely to be able to burn several types of solid fuels, as long as each type is within the design criteria of the feed system, the combustion chamber, and any downstream pollution control device, while keeping emissions of contaminants within design limits. Therefore, it is appropriate to be able to include any traditional fuel a unit is designed to burn in the comparison of contaminants.

3. What contaminant comparisons are allowed?

ACC supports EPA's clarification that contaminant comparisons may be made based on ranges of constituents, and appreciates EPA providing some such data for selected traditional fuels on its website.

In addition, ACC believes that EPA may have missed incorporating the same clarifying provision at § 241.3(d)(2)(iv) when a non-hazardous secondary material is used as an ingredient in a combustion unit and we encourage the Agency to do so.

ACC recommends that the following sentence be added to the end of § 241.3(d)(2)(iv):

> In comparing contaminants between traditional products and products produced using non-hazardous secondary material, persons can use ranges of traditional product contaminant levels compiled from national surveys, as well as contaminant level data from the specific traditional product being replaced.

IV. CLARIFICATION OF THE PROCESS FOR SUBMITTAL OF NON-WASTE PETITIONS

EPA is impermissibly expanding its RCRA jurisdiction by creating a presumption that all materials transferred to a third party for combustion have been "discarded". EPA's "non-waste determination" petition process presumes that all secondary materials that are burned are "discarded" and thus "solid waste," and that the burden is on the petitioner to first demonstrate that the material at issue has not been "discarded," and to show that the "legitimacy criteria" have been met. Thus, EPA's beginning point is that (1) all combusting is "discard" and (2) all combusting is "illegitimate." ACC believes this is another impermissible effort by the Agency to regulate secondary materials that have not been "discarded" and thus over which it has no RCRA jurisdiction.

EPA's authority under RCRA is "limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away." *American Mining Congress v. EPA*, 824 F.2d 1177, 1190 (D.C. Cir. 1987) ("AMC I"). *AMC I* further held that the term "discarded materials" could not include materials "destined for beneficial reuse or recycling in a continuous process by the generating industry itself [because they] are not yet part of the waste disposal problem" Id. The D.C. Circuit later struck down an EPA rule that attempted to impose storage and other requirements on secondary materials destined for recycling. *Association of American Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000)("ABR"). In striking down this "conditional exclusion," the *ABR* court observed that the secondary material that EPA was seeking to regulate was "destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away." 208 F.3d at 1056.

However, despite the holdings of *AMC I* and *ABR*, EPA again attempts to extend its RCRA jurisdiction over secondary materials that have not been "discarded, abandoned or thrown away" by creating a presumption that combustion is synonymous with "discard," that all secondary materials transferred between companies are "wastes", and that all such transfers are

presumptively illegitimate. EPA's proposal is a reprise of EPA's failed effort in *ABR* to impose a "conditional exclusion" on materials over which it did not have jurisdiction. Before EPA can impose any requirements on secondary materials based on RCRA, it must first establish that it has jurisdiction over such materials. Congress did not grant EPA default jurisdiction over all secondary materials, with a presumption that all such materials are "solid waste" unless proven otherwise by industry.

EPA is attempting to establish by regulation what Congress and the courts have not allowed: a presumption that secondary materials have been "discarded" and are subject to RCRA unless the facility demonstrates the contrary to be true. Under EPA's proposed formulation, the Agency would not have to prove that secondary materials are "discarded" in order to assert its RCRA jurisdiction. This is contrary to law.

EPA's assertion that it presumptively has RCRA jurisdiction over all transfers of secondary materials to third parties for purposes of combustion is also contrary to law. Much of the U.S. economy relies on transfers of secondary materials from one party to another for beneficial use. In order to exercise RCRA jurisdiction over such activities, EPA must demonstrate that all such secondary materials must have been "discarded, abandoned or thrown away" by virtue of the transfer to third parties. However, such an assumption not only violates common sense, it is also not consistent with the law. The D.C. Circuit has noted that RCRA does not compel the conclusion that transfers of secondary materials between industrial sectors are "discards," and that "firm-to-firm transfers are hardly good indicia of a 'discard' as the term is ordinarily understood." *Safe Food and Fertilizer, et al., v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003). Thus, EPA's assertion of its RCRA authority over all non-hazardous secondary materials transferred to third parties for combustion is impermissible and contrary to years of case law.

While EPA states that it is merely "presuming" that these secondary materials are solid wastes, this is a distinction without a difference since the end result is the same, i.e., EPA is unlawfully extending its RCRA jurisdiction over materials that may not have been "discarded." This results in an otherwise identical secondary material being treated very differently depending on whether or not it used as a fuel by the generator or by a third party, even when the legitimacy criteria are met in both cases. In the first case it is a "fuel". In the second case it is presumed a "waste" and "illegitimate" and cannot be considered a "fuel" unless the third party goes through a petition process where the timeframe for a decision from the EPA Regional Administrator is open and unrestricted. EPA has failed to adequately support and justify this disparate treatment. In fact, EPA concedes that it lacks information to be able to determine whether some of these materials are a waste:

> "The petition process is essential because NHSMs are recycled and managed in many different ways and the Agency may lack specific details in certain cases to know whether or not such NHSMs are or are not waste. (76 FR15472)"[2]

[2] 76 Fed. Reg. 80452 at 80473, (Dec 23, 2011)

Congress did not confer on the Agency the authority to simply presume a material is a "waste" and force the public to prove the contrary, including that their activities are "legitimate." EPA cannot seize jurisdiction in the absence of specific information. Despite the Agency's lack of information it is not dissuaded from "presuming" that all secondary materials transferred to a third party for use as a fuel are discarded and therefore a waste, even when the legitimacy criteria are met. But if the legitimacy criteria are met, then where is the "discard" to justify a waste presumption?

ACC submitted comments on this issue in response to EPA's 2010 NHSM proposed rule and we will not repeat the many points made in those comments, but we incorporate them by reference in these comments.[3]

ACC recommends that EPA correct the inappropriate presumption that NHSM used legitimately as fuel by third parties is a waste, by revising § 241.3(b)(1) as follows:

(1) Non-hazardous secondary materials used as a fuel in a combustion unit ~~that remain within the control of the generator and~~ that meet the legitimacy criteria specified in (d)(1) of this section. [4]

If § 241.3(b)(1) was revised as noted above, then NHSM used as fuels would properly be treated the same as NHSM used as ingredients in combustion units in § 241.3(b)(3). This § 241.3(b)(1) revision would also then allow for removal of § 241.3(c) in its entirety, since there would no longer be the need for that type of non-waste determination.

V. CONTAINED GASEOUS MATERIAL

ACC strongly supports EPA's proposal to reinstate the definition of "contained gaseous material" that was codified in the 2000 CISWI rule, and appreciates EPA's statements that it did not intend to change or reverse its long-standing interpretations of what constitutes "contained gaseous material." Deviating from this long and well-established position would have severe consequences for a ACC member companies and a broad range of industries that process or use gases. Accordingly, ACC agrees with EPA that the following definition of "contained gaseous material" should be reinstated in the regulations:

> *Contained gaseous material* means gases that are in a container when that container is combusted. [§60.2265 and §60.2875]

VI. EFFECT OF THIS PROPOSED RULE ON OTHER PROGRAMS

[3] EPA-HQ-RCRA-2008-0329-1165; 8/3/10 ACC Letter with comments to June 2010 NHSM Proposed Rule.

[4] ACC does not concede that EPA's use of the legitimacy criteria as regulatory requirements rather than guidance is appropriate. This draft language merely follows the existing language and requirements in § 241.3(b)(1) and (b)(3).

EPA suggests that the reconsideration proposals for the CISWI and boiler rules are consistent with the revisions in this Proposed Rule and that the NHSM revisions resulted in only minimal changes to the inventories for CISWI and boilers. (76 Fed. Reg. 80486). ACC disagrees with this assertion in that the effect on inventories cannot be fully evaluated until NHSM is finalized, since it is still unclear how many sources will be regulated under CISWI, as opposed to the § 112 boiler rules. The continued lack of clarity on whether a secondary material being combusted is a fuel or a "waste" has precluded sources from being able to make applicability determinations and move forward. ACC therefore strongly encourages EPA to finalize the NHSM rule prior to finalizing the CISWI rule.

VII. CATEGORICAL NON-WASTE DETERMINATIONS

A. Specific NHSM used as fuels

EPA is proposing to add scrap tires, off-specification tires and resinated wood to the categorical list of non-waste fuels (76 Fed. Reg. 80472). ACC generally supports the exclusion of scrap/off-specification tires and resinated wood from being considered as solid wastes, and encourages EPA also to exclude Pulp and Paper Waste Water Treatment Residuals (WWTR), as discussed in Section V of these comments.

B. Additional request for comment (pulp and paper sludge)

EPA has requested information regarding pulp and paper sludge in order to make a categorical determination that pulp and paper sludge is a non-waste fuel (76 Fed. Reg. 80472). As part of development of the NHSM proposal, EPA issued a document, *Resinated Wood, Scrap Tire, and Pulp/Paper Waste Water Treatment Residuals (WWTR) Support Document*, which provides record evidence that wastewater treatment residuals from pulp and paper mills are not solid waste when burned for energy recovery, consistent with tire-derived fuel and resinated wood. However, EPA has elected not to list WWTR as a non-waste fuel under § 241.4. However, EPA ultimately did not propose to list WWTR as non-waste fuel. ACC understands that the American Forest & Paper Association is submitting, to this docket, data in response to EPA's request for information and a request that EPA list WWTR as a non-waste fuel. ACC supports and incorporates that data and comments by reference, and encourages EPA to list WWTR as a non-waste fuel.

C. Petition process

ACC generally supports the public petition process for seeking a categorical determination for NHSMs to be listed as non-waste fuels, and EPA efforts to streamline the process. The preamble indicates that:

> the Agency is proposing to create a rulemaking petition process in section 241.4(b) that would provide persons an opportunity to submit a rulemaking petition to the Administrator, seeking a categorical determination for additional NHSMs to be listed in section 241.4(a) as non-waste fuels. (76 Fed. Reg. 80472)

Further, EPA discusses the petition process and

> requests comment on whether any other changes could be made to the non-waste determination petition process to streamline the process, while at the same time provide EPA with the opportunity to ensure that such NHSMs are not being discarded. *Id.* at 80473-4.

ACC generally supports a petition process such as this, but believes it should not be limited to NHSM used as fuel. EPA should extend the petition process to include consideration of NHSM used as ingredients in combustion units. ACC sees no reason why the uses of the NHSM should be determinant in the availability of this petition process. This could be done by changing the title of § 241.4 to "Non-Waste Determination for Specific Non-Hazardous Secondary Materials When Used as a Fuel or Ingredient in Combustion Units," and then making corresponding changes to the sub-paragraphs of § 241.4 as needed to allow for both fuels and ingredients.

The Agency states that it "does not intend that the application review process itself be either time consuming or extensive" , *id. at* 80474, and ACC concurs with EPA that the process should be streamlined wherever possible. We suggest that the Agency could shorten the public comment period to fourteen days unless the Agency receives an extension request, in which case, the period should be no more than thirty days. The Agency could also delegate authority to the states for this petition process as an additional means to expedite the process.

VIII. REVISED DEFINITIONS (CLEAN CELLULOSIC BIOMASS)

A. ACC generally supports EPA's revision of the definition

EPA is proposing to revise the definition of "clean cellulosic biomass" codified in § 241.2 of the March 21, 2011 final NHSM rule.[5] ACC generally supports the revised definition of clean cellulosic biomass with the inclusion of additional revisions as discussed in the following sections.

EPA is proposing to revise the definition as follows:

> "*Clean cellulosic biomass* means those residuals that are akin to traditional cellulosic biomass, including, but not limited to: Agricultural and forest derived biomass (e.g., green wood, forest thinnings, clean and unadulterated bark, sawdust, trim, tree harvesting residuals from logging and sawmill materials, hogged fuel, wood pellets, untreated wood pallets); urban wood (e.g., tree trimmings, stumps, and related forest derived biomass from urban settings); corn stover and other biomass crops used specifically for the production of cellulosic biofuels (e.g., energy cane, other fast growing grasses, byproducts of ethanol natural fermentation processes); bagasse and other crop residues

[5] Identification of Non-Hazardous Secondary Materials That Are Solid Waste; Final Rule, 76 Fed. Reg. 15456 (March 11, 2011).

(e.g., peanut shells, vines, orchard trees, hulls, seeds, spent grains, cotton byproducts, corn and peanut production residues, rice milling and grain elevator operation residues); wood collected from forest fire clearance activities, trees and clean wood found in disaster debris, clean biomass from land clearing operations, and clean construction and demolition wood. These fuels are not secondary materials or solid wastes unless discarded. Clean biomass is biomass that does not contain contaminants at concentrations not normally associated with virgin biomass materials."

ACC supports the concept of excluding, by definition, those materials from being considered as secondary materials or solid waste, unless they are discarded. ACC strongly urges EPA to add the following clarifications to the revised definition.

B. ACC strongly supports EPA's clarification regarding corn stover and biomass crops

ACC strongly supports inclusion of the following clarification "*...corn stover and other biomass crops used specifically for the production of cellulosic biofuels (e.g., energy cane, other fast growing grasses, byproducts of ethanol natural fermentation processes)...* " This is particularly important to entities developing projects to produce ethanol from cellulosic feedstocks in order to achieve the renewable fuels standard (RFS) mandate, and combustion of these byproducts as fuel is integral to the design and economics of these projects. This wording is consistent with EPA's regulatory approach for ethanol production facilities in its Prevention of Significant Deterioration (PSD) Program (72 Fed. Reg. 24060-24078, May 1, 2007, Prevention of Significant Deterioration, Nonattainment New Source Review, and Title V: Treatment of Certain Ethanol Production Facilities Under the "Major Emitting Facility" Definition).

C. EPA should use the word "clean" instead of "untreated" when referencing wood pallets

ACC supports the inclusion of wood pallets in the definition, but requests EPA reconsider use of the word "untreated" when referring to wood pallets and replace it with the word "clean". EPA does not define the word "untreated" and its use is going to create confusion. ACC recommends that it be replaced with "clean" which is an adjective used in the definition to distinguish other materials (e.g., "*clean construction and demolition wood).*" ACC also requests that EPA delete the last sentence in the "clean cellulosic biomass" definition as it is redundant and potentially confusing.