



2025 M Street, NW
Suite 800
Washington, DC 20036

p: 202.367.1163
f: 202.367.2163
www.nafoalliance.org

Submitted via www.regulations.gov and mail
Proposed Rulemaking—Identification of Non-Hazardous
Secondary Materials That Are Solid Waste
Environmental Protection Agency
Mailcode: 28221T
1200 Pennsylvania Ave., 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, 75 Fed. Reg. 31844 (June 4, 2010)**

To Whom It May Concern:

The National Alliance of Forest Owners (“NAFO”) respectfully submits the following comments in response to the Environmental Protection Agency’s (“EPA’s”) proposed rule identifying which non-hazardous secondary materials that are used as fuels or ingredients in combustion units are considered solid wastes under the Resource Conservation and Recovery Act (“RCRA”). 75 Fed. Reg. 31844 (June 4, 2010). In this letter, NAFO offers suggestions for improving EPA’s proposal to ensure that the final rule does not needlessly hinder or diminish the use of forest-derived biomass as an important source of renewable energy both now and in the future.

NAFO’s mission is to protect and enhance the economic and environmental values of private forests through targeted policy advocacy at the national level. At the time of this submission, NAFO’s members represent 75 million acres of private forests in 47 states. NAFO was incorporated in March 2008 and has been working aggressively since to sustain the ecological, economic, and social values of forests and to assure an abundance of healthy and productive forest resources for present and future generations.

NAFO has a strong interest in ensuring that the appropriate scope of forest-derived materials are properly identified as non-wastes so that they are not subject to

unnecessary requirements and restrictions. The landowners represented by NAFO benefit from growing markets for forestry biomass because these markets consume an expanded array of materials derived from forestry operations and provide revenue streams that expand the use of good forestry practices to improve forest health and reduce forest fire hazard, among other benefits. These growing markets also benefit the U.S. public by motivating landowners to maintain their land in forests and reducing reliance on fossil fuels which contributes to our energy security while reducing impacts to our atmosphere. In addition, as explained in section I below, expanding opportunities for forestry biomass will have important environmental advantages.

While NAFO supports several conclusions in the proposed rule, we remain concerned that the proposed rule would unnecessarily narrow the types of non-hazardous secondary materials that would be identified as non-wastes under RCRA. Experience shows that facilities will simply stop burning for energy recovery those materials that EPA labels “wastes,” since continuing to burn them would require facilities to face the regulatory and public relations burdens of being re-permitted as incinerators. NAFO seeks to have EPA bring clarity and simplicity to the rule so that small and large forest owners and downstream timber and biomass owners can successfully implement the rule where they are subject to its requirements.

I. Renewable energy is a national policy which EPA must follow.

Biomass from sustainably managed forests provides a renewable, low-carbon energy source as an alternative to fossil fuels. As such, forests can play an important role in reducing and managing greenhouse gas emissions. Expanding the sources of renewable energy is a central feature of both national and international policy to reduce reliance on fossil fuels.

The EPA, in considering approaches toward addressing climate change, has long recognized that responsibly managed forests are considered one of five key “groups of strategies that could substantially reduce emissions between now and 2030.” See *Regulating Greenhouse Gas Emissions Under the CAA*, 73 Fed. Reg. 44,354, 44,405 (July 30, 2008). Similarly, the United Nation’s Intergovernmental Panel on Climate Change (“IPCC”) report on mitigation technologies highlights forest management as a primary tool to reduce GHG emissions. *Id.* at 44,405-06; *see also* NAFO, *Carbon Mitigation Benefits of Working Forests* (identifying trading platforms and registries that recognize forest management), *available at* <http://nafoalliance.org/mitigation-benefits-working-forests/>.

President Obama has emphasized that renewable energy derived from feedstocks such as forest biomass hold the key to transitioning the nation to a “sustainable, low carbon energy future.” See Letter from President Barack Obama to Governors John Hoeven and Chet Culver (May 27, 2009), *available at* <http://www.governorsbiofuelscoalition.org/assets/files/President%20Obama's%20Response5-27-09.pdf>; see also President Barack Obama, Memorandum for the Secretary of Agriculture, the Secretary of Energy, and the Administrator of the Environmental Protection Agency, 74 Fed. Reg. 21531-32 (May 5, 2009).

With Presidential endorsement, if not direction, of national renewable energy policy and the role of biomass in that policy, EPA must conduct its programs in a manner consistent with that policy. Moreover, this also suggests that EPA must have a strong justification to impose restrictions on the non-waste category of biomass, a justification lacking in the proposed rule.

II. EPA properly confirms that traditional fuels, including “clean” cellulosic biomass, are not solid waste, but should bring greater clarity to the final rule.

In the proposed rule preamble, EPA appropriately recognizes that clean cellulosic biomass materials are traditional fuels and thus are not solid wastes when burned in a combustion unit. 75 Fed Reg. at 31856.

EPA explains that clean biomass includes, but is not limited to: “forest derived-biomass (e.g., green wood; forest thinning; clean and unadulterated bark; sawdust; trim; and tree harvesting residuals from logging and sawmill materials); corn stover and other biomass crops used specifically for energy production (e.g., energy cane, other fast growing grasses); bagasse and other crop residues (e.g., peanut shells, agricultural seeds); wood collected from forest fire clearance activities; trees and clean wood found in disaster debris; clean biomass from land clearing operations; and clean construction wood.” *Id.* at 31861.

NAFO supports EPA’s conclusion that these materials all constitute types of clean cellulosic biomass that have traditionally been used as fuel sources and that should be expressly identified as non-wastes in the final rule. NAFO recommends that EPA also designate additional types of cellulosic biomass as “clean” biomass, and confirm that they are traditional fuels. Specifically, EPA should make clear that all trees (e.g. dead wood as well as green wood) and all other types of materials taken from the forest, are “clean” cellulosic biomass. In addition, EPA should clarify that clean construction wood is “clean” cellulosic biomass and that this includes clean demolition

wood residuals as well. In finalizing the rule, EPA should confirm that its examples of “clean” biomass in the proposed rule preamble do not constitute an exhaustive list of all such qualifying materials.

III. EPA should recognize that there are additional sources of biomass that are also traditional fuels.

EPA’s proposal would only qualify cellulosic biomass as a traditional fuel if it is “clean.” EPA explains that “clean” material “is defined as those non-hazardous secondary materials that have not been altered (either chemically or through some type of production process), such that it contains contaminants at concentrations normally associated with virgin biomass materials.” 75 Fed Reg. at 31856. Such a restriction, however, has no place in deciding whether secondary materials are traditional fuels any more than it would have in deciding whether coal was a traditional fuel. The test should be simply whether there is a history of fuel use. NAFO believes that if a material was used as a fuel in 1980 – before the beginning of modern solid waste regulation – that material should be presumed to be a traditional fuel without further distinction.

EPA should not unnecessarily restrict its finding that cellulosic biomass is a traditional fuel to “clean” cellulosic biomass. There are other types of biomass that have traditionally been used as fuel sources, such as resinated wood residuals (*e.g.* board trim, sander dust, panel trim). These materials are traditionally used as a fuel source, going back to the 1950s when the first plywood panel plants began operating. In fact, product plant boilers were specifically constructed to burn trim and sander dust. In addition, the combustion of these materials is not significantly different than burning non-resinated wood.

NAFO supports and incorporates by reference the comments of the American Forest & Paper Association (“AF&PA”) and the American Wood Council (“AWC”) on this topic.¹ Whether these materials are classified as non-wastes should not hinge on whether they are used as fuels within the control of the generator; rather, they should automatically qualify as non-wastes as a traditional source of fuel.

¹ NAFO also joins these groups’ objections to the alternative approach set forth in EPA’s proposed rulemaking. See 75 Fed. Reg. at 31885-87. This alternative approach is inconsistent with RCRA, relevant case law, and congressional intent.

IV. EPA should exercise its authority and discretion to narrowly define which secondary material is “discarded” and potentially subject to regulation as a “solid waste.”

EPA’s authority over secondary material is limited to material that is discarded. Under RCRA, only material that has been “discarded” meets the definition of “solid waste.” See 75 Fed. Reg. at 31850; see also *Ass’n of Battery Recyclers v. EPA*, 208 F.3d 1047, 1051 (D.C. Cir. 2000) (“Congress 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.”). As such, if a material is a valuable product or industrial input, and handled as such, EPA cannot regulate it under RCRA.

Certain elements of EPA’s proposal simply ignore this requirement. For example, the proposed rule appears to propose that all transferred material would be “discarded.” See e.g. 75 Fed. Reg. at 31875 (“When non-hazardous secondary material fuels are transferred to another party, we generally believe that the material is discarded . . .”). The mere fact that a fuel is outside the control of the generator, however, does not mean the fuel has been discarded; EPA provides no reasonable basis for making such an assumption. EPA’s proposal thus includes an unjustified proposition that would define solid waste so broadly as to exceed EPA’s authority under RCRA. As such, the proposed rule would severely restrict, as solid waste disposal, industry practices that go back decades and sometimes generations.

In determining which materials qualify as “solid waste,” EPA should not unlawfully expand its definition of “solid waste” to encompass material that is not discarded. Moreover, even where EPA believes that it may have statutory authority to regulate a particular secondary material, such as materials that have been disposed of but that can now be reused, EPA should nonetheless exercise its broad discretion to exclude such material from the regulatory definition of solid waste for non-hazardous secondary material. In order to help advance our nation’s goal of energy independence and to help offset fossil fuel use, EPA should not automatically designate useful fuels as wastes just because they were discarded at some point.

V. The proposed rule's non-waste determination petition process is unworkable and should be amended in the final rulemaking.

Under the proposed rule, EPA would establish a petition process for secondary materials used as fuels outside the control of the generator. 75 Fed. Reg. at 31879. The process would yield a formal determination about whether the material has not been discarded and is indistinguishable in all relevant aspects from a fuel and therefore not a solid waste. EPA's approach is unnecessary and onerous.

While NAFO agrees that the petition process should be available for persons who desire the certainty of an EPA determination regarding their secondary material, it *should not be required* for secondary materials burned for energy recovery by someone other than the generator. Instead, EPA should allow non-generator facilities burning secondary materials to initially determine whether the materials qualify as wastes or non-wastes. Such an approach would be consistent with how RCRA otherwise operates; for example, generators are obligated under RCRA to determine if their wastes are "hazardous waste."

NAFO also recommends that in the final rule, EPA finalize a petition process that is more streamlined and that minimizes the need for case-by-case determinations. One option would be to adopt an approach that is similar to the Applicability Determination process which has been successfully implemented under the Clean Air Act program. In other words, EPA should create a process for determining whether generic materials are fuels so that the agency need not repeatedly review the rule's applicability to similar materials. EPA should not finalize its proposal to conduct notice-and-comment rulemaking for each solid waste decision. These steps are unnecessary and burdensome, and EPA has not identified why such a process would be necessary or appropriate.

NAFO also believes that the petition process should be more flexible and provide greater clarity. For example, the user of the material (e.g. the owner/operator of the combustion unit seeking to burn the secondary material) need not be the person to initiate the petition process. There is no rational basis to restrict the petition process to the material user because anyone purchasing a legitimate fuel is invested in handling it as a valued commodity. The generator or seller of the material should also have the option of gaining certainty by obtaining a specific waste determination approval from EPA through the petition process.

VI. The “legitimacy” criteria are unnecessarily stringent.

Under RCRA subtitle C, some hazardous secondary materials that would otherwise be subject to regulation under RCRA’s “cradle to grave” system are not considered solid wastes if they are “legitimately” recycled. 75 Fed. Reg. at 31851. Under subtitle C, legitimate recycling includes burning hazardous secondary materials for energy recovery. *Id.* To avoid “sham” recycling, EPA established “legitimacy” criteria for the reuse of hazardous wastes to help determine whether such reuse had sufficient economic motives and was not designed simply to avoid regulation. Under the proposed rule, secondary materials used in a combustion unit that are not a legitimate fuel or ingredient, when evaluated under the legitimacy criteria, would be considered solid wastes.²

NAFO supports EPA’s plan to integrate the concept of legitimacy into the proposed rulemaking for non-hazardous secondary materials. However, EPA has indefensibly proposed imposing tighter legitimacy criteria for non-hazardous materials than apply in the hazardous waste program. For example, whereas EPA recognizes that legitimate recycling of hazardous materials can occur even if certain legitimacy criteria are not met, see, e.g. 73 Fed. Reg. 64668, 64701 (Oct. 30, 2008), the proposed rule would require that all legitimacy criteria be satisfied. *E.g.* 75 Fed. Reg. at 31880. In addition, of particular concern, the proposed regulation would include a legitimacy criteria for both fuels and ingredients that the “contaminants [are] at levels comparable or lower to those in traditional fuels.” 75 Fed. Reg. at 31893. In contrast, for hazardous materials, the regulation speaks of contaminants not being present “at levels that are significantly elevated from those found in analogous products.” 40 C.F.R. § 260.43(c)(2)(ii).

² The rule explains:

For legitimate fuels, non-hazardous secondary materials must be handled as a valuable commodity, have meaningful heating value, be used as a fuel in a combustion unit that recovers energy, and contain contaminants at levels comparable to those in traditional fuels. . . . For legitimate ingredients, the non-hazardous secondary material must be handled as a valuable commodity, provide a useful contribution, result in a valuable product or intermediate, and result in products that contain contaminants at levels that are comparable in concentration to those found in traditional products that are manufactured without the non-hazardous secondary material.

75 Fed. Reg. at 31856.

In the final rule, EPA should at least be consistent with the regulations applicable to **hazardous** materials and use the “significantly elevated” language. The combustion of materials with contaminant levels that are comparable or insignificantly elevated over traditional fuels simply does not indicate “sham” recycling. Establishing a more stringent criterion for non-hazardous materials without a reasonable basis would be arbitrary and capricious.

NAFO also notes that EPA should amend its definition of “contaminant” to make clear that it excludes constituents that contribute to the materials’ value as a fuel or as an ingredient in a combustion unit. The presence of such constituents would support the legitimacy of the material as a fuel.

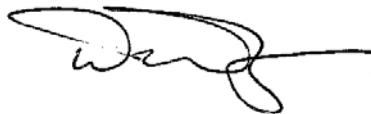
There is also no need for the stringent legitimacy criteria in the proposed rule because the concerns that motivated such requirements for hazardous wastes are not present for non-hazardous materials. The relatively moderate burdens of non-hazardous waste regulation do not create incentives for sham recycling. In addition, the non-hazardous materials by definition do not present the type of substantial environmental dangers that may have been relevant in the hazardous waste program. Notably, the combustion of non-hazardous materials will generally be tightly regulated regardless of whether they are classified as wastes or as fuels, and may well be subject to tighter precombustion standards as fuels than as wastes.

NAFO recommends that, in the final rule, EPA adopt a more lenient approach to the legitimacy criteria. NAFO supports and incorporates by reference the comments of AF&PA and AWC on this issue.

Conclusion

NAFO appreciates the opportunity to comment on this important rulemaking.

Respectfully Submitted,



David P. Tenny
President and CEO
National Alliance of Forest Owners