

August 3, 2010

BOARD OF DIRECTORS

Co-Presidents

G. Vinson Hellwig
Michigan
Larry Greene
Sacramento, CA

Co-Vice Presidents

David Shaw
New York
Lynne A. Liddington
Knoxville, TN

Co-Treasurers

Mary Uhl
New Mexico
Merlyn Hough
Springfield, OR

Past Co-Presidents

Colleen Cripps
Nevada
Arturo J. Blanco
Houston, TX

Directors

Rick Brunetti
Kansas
Joyce E. Epps
Pennsylvania
Andrew Ginsburg
Oregon
Anne Gobin
Connecticut
Cheryl Heying
Utah
James Hodina
Cedar Rapids, IA
Cindy Kemper
Johnson County, KS
John S. Lyons
Kentucky
Richard Stedman
Monterey, CA

Executive Director

S. William Becker

Docket No. EPA-HQ-RCRA-2008-0329
Proposed Rulemaking – Identification of
Non-Hazardous Secondary Materials
That Are Solid Waste

U.S. Environmental Protection Agency
Mailcode: 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

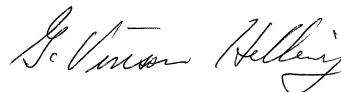
Dear Sir/Madam:

On behalf of the National Association of Clean Air Agencies (NACAA), thank you for this opportunity to comment on EPA's proposed rulemaking, "Identification of Non-Hazardous Secondary Materials That Are Solid Waste," which was published in the *Federal Register* on June 4, 2010 (75 FR 31844).

NACAA is the national association of air pollution control agencies in 52 states and territories and over 165 metropolitan areas across the country. As an association of air quality agencies, NACAA wishes to comment on those issues within the proposed definition that affect air quality and the ability of its members to implement programs pursuant to the Clean Air Act. Attached are our detailed comments on this proposal. NACAA will provide additional comments to the U.S. Environmental Protection Agency regarding the related proposed standards for industrial, commercial, and institutional boilers located at major sources and area sources and the proposed standards for commercial and industrial solid waste incineration units by the comment deadline for those rulemakings.

Thank you for this opportunity to comment on the proposal. Please contact us if we can provide additional information.

Sincerely,



G. Vinson Hellwig
Michigan
Co-Chair
NACAA Air Toxics Committee



Robert H. Colby
Chattanooga, Tennessee
Co-Chair
NACAA Air Toxics Committee

NACAA Comments on EPA's Proposed Rule "Identification of Non-Hazardous Secondary Materials That Are Solid Waste"

Docket No. EPA-HQ-RCRA-2008-0329

August 3, 2010

Pursuant to the solicitation for public comment published in the *Federal Register* by the U.S. Environmental Protection Agency (EPA) on June 4, 2010 (75 *FR* 31844), the National Association of Clean Air Agencies (NACAA) is pleased to provide the following comments on EPA's proposed rule "Identification of Non-Hazardous Secondary Materials That Are Solid Waste."

BACKGROUND

Section 112 of the Clean Air Act (CAA) requires EPA to establish limitations on the emissions of hazardous air pollutants¹ (HAPs) across a broad sector of the industrial sector, including (as relevant here) industrial, commercial and institutional boilers and process heaters (referred to collectively as "ICI Boilers") that are major sources under Title III of the CAA. Section 129 of the CAA requires EPA to issue similar emission standards for new units that combust solid waste. Section 129 also requires EPA to issue HAP emission "guidelines" for existing units that combust solid waste, implemented by state and local permitting agencies by way of plans submitted and approved under section 111 of the CAA. Such EPA guidelines would then effectively become emission standards applicable to both major and area sources of HAP emissions, enforceable by both EPA and state and local authorities. Section 129 further provides that sources subject to regulation under section 129 may not be regulated under section 112 and that the term "solid waste," which determines whether a combustion source is regulated under section 112 or section 129, "...shall have the meaning(s) established by the Administrator pursuant to the Solid Waste Disposal Act {42 U.S.C.A. § 6901 et seq.}."

The Solid Waste Disposal Act, as amended, is commonly referred to as the Resource Conservation and Recovery Act ("RCRA"). Two features of RCRA are of particular relevance to this proposal. The first is that, under RCRA, Congress has determined that regulation of solid wastes should primarily remain with state and local governments.² The second is that, under

¹ Hazardous air pollutants are those pollutants that are known or suspected to cause cancer or other serious health effects, such as reproductive effects or birth defects, or adverse environmental effects. Hazardous air pollutants emitted by sources subject to regulation under the proposed rules include benzene, dioxin, asbestos, toluene, mercury, arsenic, beryllium, cadmium, chromium, lead, manganese, nickel, selenium, polycyclic organic matter, acetaldehyde, acrolein, benzene, dioxins, ethylene dichloride, formaldehyde, PCBs, hydrochloric acid and hydrofluoric acid. Section 129 regulations would also require significant reductions of oxides of nitrogen (NO_x), and sulfur dioxide (SO₂).

² "Under RCRA, EPA regulates hazardous solid wastes and may authorize states to do so. Non-hazardous solid waste is predominately regulated by state and local governments. EPA has, however, promulgated some regulations pertaining to non-hazardous solid waste, largely addressing how disposal facilities should be designed and operated. Aside from regulation of hazardous wastes, EPA's primary role in solid waste management includes setting national goals, providing leadership and technical assistance, and developing guidance and educational materials." See, RCRA Orientation Manual 2008: Resource Conservation and Recovery Act", p. II-2, USEPA 2008.

RCRA, the definition of key terms such as “hazardous wastes,” “solid wastes,” “disposal” and “sham recycling” have been often litigated and have posed significant enforcement challenges at the federal, state and local levels.

COMMENT

NACAA limits its comments to those issues that affect air quality and impact the ability of its member jurisdictions to implement CAA permit programs and defers to others, including our colleagues at the Association of State and Territorial Solid Waste Management Officials (“ASTSWMO”), as to which of the two options suggested by EPA (if either) is more appropriate as a matter of solid waste management policy.

EPA’s Rule Should Establish a Clear, Objective Definition

Under section 129 EPA must establish the “meaning” of the term “solid waste.” In its proposal to do so EPA has specifically rejected suggestions that it provide clear lists of those secondary materials that it believes are wastes and those it believes are not. Moreover, EPA also rejects any role for state and local permitting authorities in this process, asserting that, under section 129, it and it alone is responsible for establishing the meaning of solid waste. Instead, EPA proposes two sets of “criteria” for determining whether a secondary material is a solid waste and – importantly – asserts that these criteria are to be self-implementing. These criteria include a number of terms that are susceptible to widely different interpretations: (1) whether a low BTU material³ provides a “meaningful” contribution to the energy needs of a source; (2) whether the level of contaminants in a secondary material is “comparable⁴,” and (3) whether secondary materials have been stockpiled for more than a “reasonable” time. By “self-implementing” EPA means that the source itself would look at the criteria and decide whether its secondary materials are solid wastes. Based on this determination by a source, either section 112 or section 129 limits would apply. However, contrary to this notion, under the CAA (and especially under Title V), while a source may propose that an emission limitation (e.g. Best Available Control Technology) does or does not apply, it is the permitting authority that determines whether a particular requirement applies. Nothing in the narrow language of section 129 suggests that it was intended to alter the role of state and local authorities either in the management of solid wastes or the implementation of CAA permit programs. Indeed, pursuant to section 129 EPA merely promulgates “emission guidelines,” the actual emission limitations are to be implemented in the first instance by state laws submitted to EPA for review and approval in a manner similar to State Implementation Plans developed under section 110 of the CAA. The act further provides a substantive state role in this process, in that states may take into account the remaining useful life of a facility (and other factors) in developing a standard for that facility.⁵ Thus, it would appear that the CAA anticipates a process where the states, in developing plans under section 111(d) of the CAA, incorporate facility-specific limitations that may deviate from EPA’s guidelines where appropriate.

³ EPA rejected the suggestion of a “bright line test of 5,000 BTU/lb as ‘meaningful’ ”.

⁴ This phrase is troublesome in its own right as the number 5 can be “compared to” 7, 50, 500 and 1,000,000. We assume that EPA avoids the term “equivalent” because what it really means is “close enough,” which, of course, is susceptible to widely different judgments.

⁵ See, 42 U.S.C. 7429(b), 7411(d).

EPA's proposed solid waste criteria seem reasonable and have been used in the hazardous waste context for years. However, as illustrated above, the variety and fluidity of U.S. manufacturing operations dictate that such criteria be broad. Because of the inherent lack of objectivity in such criteria, their application should not be left in the hand of the regulated industry. Neither EPA, nor state and local authorities have the resources to police determinations by sources of such broad criteria "after the fact." After-the-fact enforcement actions are far more resource intensive than any permit process and are susceptible to "equity in the ground" arguments where a source asserts that it expended significant capital resources based on its good-faith belief in its determination. A single enforcement action concerning "sham recycling," the Marine Shale case, occupied significant U.S. Department of Justice and Louisiana resources for over three years and litigation costs to the federal and state taxpayers in the millions of dollars. Such costs would have been avoided if the company had been required to obtain in advance a state or federal determination that its hazardous secondary materials were not wastes. Enforcement actions under the CAA concerning the meaning of "routine maintenance" at coal-fired electric utilities similarly consumed significant enforcement resources at the state and federal level. These, too, could have been avoided if a clearer federal definition (as had been proposed) has been afforded "up front."

If EPA does not intend to delegate the fox as the guardian of the henhouse in the fashion its notice suggests⁶, it should clearly set out the role of state and local permitting authorities in the process it does intend and consider the resource demands on those entities as part of its rule-development process. With those resource demands in mind, NACAA urges EPA to be as specific as possible in its rule. Based on a reading of its preamble, 30 years of prior experience has given EPA some clear notions of what it considers to be a waste. For, example, EPA clearly believes that the emissions resulting from combustion of bagasse by sugar producers should fall under section 112 rather than section 129. One hopes that EPA's calculation of Maximum Achievable Control Technology (MACT) floors under sections 112 and 129 reflect a fair degree of certainty in EPA's judgment as to which rule would apply to most sources⁷. For this reason NACAA suggests that EPA adopt the suggestion of various commenters that it promulgate as part of its rule lists of materials that are secondary materials as well as those that are not. We recognize that this is a complex area and that there will be a number of instances where the determination is a close call that depends on specific facts. We believe that EPA is currently in a position to make determinations for over 80 percent of the processes/industries subject to standards under the proposed rules.⁸ For that category of materials where a clear determination cannot be made, criteria similar⁹ to those set out in EPA's proposal could be employed in the case-by-case procedure that EPA suggests. For the most part these criteria have been used by EPA over the years to evaluate whether an entity is engaged in "sham recycling." We see no reason why such "criteria" could not be set out in rules governing RCRA state program and/or

⁶ EPA may simply mean that the source is responsible, in the first instance, for determining which emission limitation applies and that the source thereafter, should apply to the state and local authorities for the appropriate Title V revision.

⁷ If in its MACT-calculation process EPA simply relied on the assertion by a source that its secondary materials were not wastes, the calculation of the MACT floor for both the section 129 and section 112 rules may be incorrect.

⁸ Even if the EPA lists only encompassed 50 percent of the sector; downstream workloads would be significantly reduced. Moreover, such lists would provide examples to guide the regulated community in the application of EPA's criteria.

⁹ NACAA takes no position as to whether the proposed criteria should be modified in some way.

section 111 plan approval and applied by state and local regulatory authorities (rather than simply by sources as set out in the proposal).

Whether as a policy matter those criteria could be employed by a source initially¹⁰, subject to a later review by regulatory authorities (either federal or state/local authorities) or must be approved by those authorities prior to the effective date of the requirement and development of the Title V permit is, we think, dependent on the degree to which EPA harmonizes the section 112 and 129 emission requirements¹¹. It also depends on the outcome of other pending EPA rulemaking actions that may impose sulfur dioxide (SO₂) and oxides of nitrogen (NO_x) control obligations on section 112 sources. These actions include proposed Transport Rule requirements¹² and revisions to the SO₂, particulate matter (PM) and ozone National Ambient Air Quality Standards. The fact that a small percentage of sources might petition for a case-specific determination should not constitute a reason not to provide clarity to the regulated community, state and local regulatory agencies and the public in the large majority of cases where such determinations are not required.

EPA may be sued over some of those determinations – but EPA is likely to be sued over these rules in any event and making these decisions early will (a) reduce overall resource demands on all parties and (b) ensure that these matters are resolved before the effective date of the standard rather than in the years thereafter.

EPA Should Establish “Comparable” MACT Standards for Similarly Situated Sources

Because of the statutory reliance on the term “discard” in the RCRA definition of “waste” and the variation in the calculation of the performance of relatively small numbers of sources, there are occasions where sources that combust materials with exactly the same properties in identical combustion units may be subject to widely different MACT floors. For example, under the EPA proposals (based solely on calculations of MACT floors) a unit that combusts waste coal from mining operations conducted in the past ten years may face substantially less stringent PM and mercury emission limits than a unit that burns what are known as “legacy operations” (i.e., those that occurred more than 30 years ago). This disparity will serve as a disincentive to the use of waste coal from old coal waste piles; even though such waste coal will ordinarily have a higher heat content and use of older (pre-environmental regulation) coal waste piles will provide a greater environmental benefit to our streams and aquifers. Similarly, under the EPA proposals large producers who combust wet wood from one or more contractually dedicated

¹⁰ We note that at some point the emission limitation will have to be incorporated in a Title V permit (for most sources) and that state regulations under sections 111 and 129 will have to be submitted to EPA for review and approval.

¹¹ It is also dependent on the extent to which the law requires that Title V permits be in place at this time and the law governing modification of Title V permits.

¹² EPA cannot impose SO₂ and NO_x limits on ICI Boilers under the authority of section 112. However, NACAA believes that to fully address interstate transport of pollution under section 110(a)(2)(D) of the CAA, EPA will have to impose SO₂ and NO_x limitations on large emitters other than power plants. The proposed NAAQS revisions will also likely lead to requirements for reduction of criteria pollutant emissions by ICI Boilers. To the extent that the requirements for each of these groups are similar, the need for upfront review is reduced.

sources may see a competitive advantage compared to smaller operations that rely on spot purchases of feedstock for their operations¹³.

We believe it will prove difficult for EPA to conclude that a level of emission performance in the section 112 group is “infeasible” where EPA concludes that such a level of performance has been achieved by similar units in the section 129 group (or vice-versa). Where it is feasible¹⁴ and reasonable to do so, EPA should reduce this disparate impact on similarly situated units and satisfy its obligation to set emission limits based on application of maximum achievable technology, not merely promulgate a set of MACT floors. Along with the clear public health benefits of such an approach, years of litigation about the classification applicable to a specific source will be minimized to the extent that applicable limits for section 129 and section 112 sources are conformed by “beyond the floor” determinations and CAIR rules for similarly situated units.

CONCLUSION

Thank you for the opportunity to comment on EPA’s proposed definition of solid waste. NACAA believes that EPA’s most recent proposals are a vast improvement over earlier efforts and that these proposals provide a framework that will form the basis for lawful, protective regulation of emissions of HAPs within the affected industrial sectors. NACAA will comment on EPA’s proposals for HAP emission limits for these sectors and intends to continue to work with EPA and other stakeholders towards the adoption and implementation of air toxics regulations that are protective of the public health, yet sensible and cost-effective.

¹³ There are other instances where the section 129 limit for a particular source may be less stringent than the limit that may apply under section 112. While unlikely given the overall stringency of section 129 limits, there may be sources that decide to operate under section 129 rather than section 112. Such a source could legitimately “qualify” for a less stringent limit (for it) simply by claiming that its secondary materials are solid wastes or by burning a nominal quantity of new materials that are solid wastes.

¹⁴ We agree that EPA must consider cost in determining whether to promulgate “beyond the floor” standards. However, we think it unlikely that EPA’s discretion is unbounded, given the otherwise prescriptive nature of Title III of the CAA. Further, costs incurred by a source in meeting a section 129 floor are, per se (or per dictum), reasonable for that unit and, presumably establish a floor of what should be considered “reasonable costs” as applied to similarly situated units.