October 20, 2011

BY ELECTRONIC MAIL

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: ***Proposed Revisions to the Definition of Solid Waste, Docket ID No. EPA-HQ-RCRA-2010-0742, 76 Fed. Reg. 44094 (July 22, 2011)***

Dear Administrator Jackson:

The U.S. Small Business Administration Office of Advocacy (Advocacy) submits the following comments regarding the Environmental Protection Agency's (EPA) recent proposal to revise the final rule, *Revisions to the Definition of Solid Waste* (DSW), promulgated on October 30, 2008.[1]

Introduction

EPA promulgated the 2008 final rule under the Resource Conservation and Recovery Act (RCRA) to exclude certain hazardous secondary materials from regulation as hazardous waste. Specifically, the Agency excluded materials that are recycled via reclamation under three very specific circumstances: (1) when materials are generated and legitimately reclaimed under the control of the waste generator, (2) when materials are transferred to another company under specific conditions (transfer-based exclusion), or (3) when EPA or an authorized State agency determines that materials are non-wastes, on a case by case basis via petition process.[2]

The 2008 final rule was the culmination of a process that began in 1992, and was crafted from years of compromise and litigation between industry stakeholders, environmental activists, and EPA. The rule was carefully tailored to encourage recycling and avoid any threat to human health and the environment. Advocacy agrees with the previous EPA statement that the 2008

[1] 76 Fed. Reg. 44094 (July 22, 2011).
[2] 73 Fed. Reg. 64668 (Oct. 30, 2008).

final rule would "encourage the safe, beneficial recycling of hazardous secondary materials…while at the same time maintaining protection of human health and the environment," which is consistent with Congressional mandate in enacting RCRA.[3] Advocacy urges EPA to retain the 2008 final rule, specifically those provisions related to the transfer-based exclusion, the definition of legitimacy, and notification requirements. We believe that these regulatory revisions will yield substantial economic savings to tens of thousands of small quantity generators (SQGs), well in excess of EPA's current estimate, while still meeting the environmental statutory goals. We also agree with some of EPA's proposed additional requirements, such as improved specificity for the containment standard.

Office of Advocacy

Advocacy was established by Congress under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration. Section 612 of the Regulatory Flexibility Act (RFA) also requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.[4]

Moreover, Executive Order (E.O.) 13272 requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy.[5] Further, the agency must include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

Advocacy has represented the interests of small businesses throughout the entire DSW drafting process to the 2008 final rule, and substantial changes to the final rule could unnecessarily hurt small businesses. Under the RFA and E.O. 13272, Advocacy submits the following comments on the proposed revisions to the 2008 final rule.

I. Transfer-Based Exclusion- EPA Should Retain the 2008 Rule Framework

In the regulatory analysis conducted for the 2007 proposed rule, EPA concluded that small businesses would benefit from the transfer-based exclusions in the 2008 final rule, because SQGs "would have a technical advantage for their hazardous wastes to be recycled."[6] EPA's own extensive economic analysis shows that the net industry savings under the 2008 final rule would equal $93.5 million per year.[7] Furthermore, since this estimate excludes the benefits to small quantity generators, EPA has significantly underestimated the magnitude of the benefits to small

[3] 72 Fed. Reg. 14174-75 (March 26, 2007).
[4] Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified at 5 U.S.C. §§601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).
[5] Executive Order No. 13,272, 67 Fed. Reg. 53,461 (Aug. 13, 2002).
[6] U.S. EPA, "Regulatory Impact Analysis: USEPA's 2008 Final Rule Amendments to the Industrial Recycling Exclusions of the RCRA Definition of Solid Waste,'' at 12 (Sept. 25, 2008).
[7] Id. at 9.

businesses, who are primarily small quantity generators.[8] The transfer-based exclusion is extremely important to small businesses, and Advocacy believes EPA should retain the exclusion and not significantly change the terms granting the exclusion.

It is often not economically practicable for businesses that generate small amounts of hazardous secondary materials to reclaim those materials through on-site reclamation or via direct transfer to reclaimers. The transfer-based exclusion gives small businesses that might otherwise dispose of hazardous secondary materials the ability to participate in the reclamation process.[9] The 2008 final rule encourages responsible recycling by allowing intermediate facilities to assist small generators with transport, packaging, storage, and locating responsible reclaimers.[10]

By exempting hazardous secondary materials transferred to third parties for reclamation, the 2008 final rule enables more flexibility, and potentially allows generators to create additional competition in the market between nonhazardous and hazardous waste recycling. The prior regulatory system rewarded larger, established companies, and crowded out any potential competitors or new entrants. The old RCRA Subtitle C permitting structure allowed monopolistic pricing, promoted disposal of materials that could otherwise be reused, and discouraged conservation of virgin materials.

The pre-2008 regulatory structure often made it cheaper to dispose of hazardous secondary materials in landfills rather than recycling. The transfer-based exclusion does not eliminate regulation of hazardous secondary materials or deregulate the reclamation process: each person in the chain of recycling must still comply with containment, tracking, and recordkeeping requirements. Further, the generator retains the liability for choosing a proper reclamation facility, and must make and document "reasonable efforts" to identify a qualified and well-operated recycling facility. If at any point, this "chain of reclamation" is broken (either by "discarding" or failing to comply with requirements), the material is considered hazardous waste, and RCRA and CERCLA authorities and penalties are then made available.

The transfer-based exclusion should encourage more responsible recycling, not less, and will increase the market for recoverable materials that would otherwise be disposed. Furthermore, it provides an alternative to the consumption of virgin materials, an important RCRA goal. According to EPA's estimates, the 2008 final rule would result in 23,000 tons of material being recycled instead of disposed per year.[11] Advocacy believes that the EPA estimate is very conservative.

Since materials are defined as waste only when they are discarded, imposing stringent RCRA permitting rules on materials that are intended to be recycled contradicts the case law and

[8] The RIA cited in the footnotes above relies entirely on benefits to large quantity generators, since the database reflects only information about large quantity generators. Large quantity generators are defined as those generators who generate more than 100 kg./month of hazardous wastes.
[9] 73 Fed. Reg. 64730 (Oct. 30, 2008).
[10] Id.
[11] U.S. EPA, "Regulatory Impact Analysis: USEPA's 2008 Final Rule Amendments to the Industrial Recycling Exclusions of the RCRA Definition of Solid Waste,'' p. 10 (Sept. 25, 2008).

Congressional intent.[12] However, in deference to the concerns of those in the environmental community, we agree with EPA that it is appropriate to adopt certain requirements that arguably fall outside the scope of RCRA in an abundance of caution.

However, EPA's new proposal essentially removes all the streamlined provisions that allowed small businesses to be able to recycle additional wastes. The one deregulatory provision now offered to generators is an extension of the storage time for recycled wastes from 90 days to one year. This single modification to the costly applicable Subtitle C requirements is of little benefit to small firms.

EPA Has Not Adequately Explained the Divergence between the Proposed Rule and the 2008 Final Rule

In the October 2008 final rule, EPA carefully developed the transfer-based approach and other regulatory revisions that would encourage recycling, save costs and yet still protect the environment. The agency exhaustively reviewed the 2008 "damage cases" to determine what regulatory approach would adequately protect the public. After several years of work, EPA developed three exclusions under the 2008 rule (transfer-based, generator-based, and case-by-case exclusions) that "suggests a high level of protection [from] damages to the environment and human health."[13] In the 2008 Regulatory Impact Analysis (RIA), EPA examined the 12 countervailing risks identified by 18 commenters to the 2007 DSW supplemental proposal and tailored the 2008 rule specifically to address these countervailing risks. In the new proposal, EPA does not explain its conclusion that the 2008 rule, including the transfer-based exclusion, no longer provides adequate protection of public health. For example, the "reasonable efforts," notification and financial assurance requirements were specifically developed to guard against the improper discard problems that occurred in the 2008 damage cases.[14] Yet now, EPA relies on the same damage cases in the environmental justice (EJ) analysis to make the exact opposite finding that the 2008 rule does not protect the neighboring communities.

EPA does not provide, either in the preamble or the EJ analysis, a detailed explanation of why the carefully structured regulatory solution was adequate in 2008 and not adequate in 2011.

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[12] *See American Min. Congress v. U.S. EPA.*, 824 F.2d 1177 (D.C. Cir. 1987) (finding Congress' intent in enacting RCRA was to aid states with waste disposal problems, therefore EPA's jurisdiction is limited to discarded material), and *Safe Food and Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003) (holding hazardous secondary materials destined for beneficial reuse or recycling cannot be considered discarded materials subject to RCRA regulation).

[13] Chapter 11 of the 2008 Regulatory Impact Analysis stated, "Exhibit 11C below presents the five primary categories of known causes --- which account for 96% of all causes in the historical damage cases reference study after subtracting the 4% "unknown causes" category, and compares these causes with the implementation conditions of the 2008 final rule exclusions (as listed in Exhibit 7A of this RIA, plus the legitimate recycling factors described in Chapter 3). As displayed at the bottom of Exhibit 11C, this comparison (i.e., gap analysis) reveals that the 2008 final rule conditions address the damage causes for all three exclusions, which suggests a high level of protection from future recycling operation-related damages to the environment and human health. Furthermore, most all exclusions have three or more protective conditions which address each of the five known primary causes of historical recycling damages."

[14] EPA's failure to contradict any of the specific 2008 RIA Chapter 11 statements suggests that EPA did not properly evaluate the situation in the 2011 proposal. The Agency further admits that "[t]he [2008 rule] conditions themselves were developed in a reasoned manner, but without specific evidence that they would work as intended." 76 Fed. Reg. 44094, 44109 (July 22, 2011).

Indeed, EPA's only basis for the new conclusion in the EJ analysis appears to be an unexplained assumption that the increased risks of the 2008 rule outweighed the increased benefits of the 2008 rule.[15] Further, EPA provides no EJ analysis for the pre-2008 baseline RCRA regulations and their impact on neighboring minority communities to compare with the 2008 final rule EJ analysis.

In addition, EPA states that the existing 39 facilities in six states subject to the 2008 rule experienced no environmental problems and resulted in the savings of 50,000 tons of hazardous secondary material being recycled,[16] an estimate which strongly suggests that EPA significantly underestimated the additional recycling that the 2008 final rule would obtain.[17] EPA should allow these facilities to continue to pursue the 2008 regulatory scheme to provide additional data on whether its concerns are valid, rather than to further disrupt these successful recycling operations which provide substantial operational cost savings, as well as conserving resources.

The EPA EJ analysis is predicated on the assumption that the only regulatory scheme that can properly address hazardous waste chemicals (whether in the form of recycled wastes or wastes) is the original RCRA Subtitle C scheme developed by EPA in the early 1980's. However, there is nothing in this record that suggests that the original RCRA scheme is the only set of regulations that could be developed to satisfy the statutory RCRA requirements for wastes generally, and specifically recycled wastes, particularly given that industrial processes and recycling practices have not remained static since 1980. This is surprising, because EPA has promulgated streamlined RCRA regulations for universal wastes, used oil, and lead-acid batteries, among others. These programs are being successfully implemented. The Agency does not explain how these other streamlined requirements apparently are appropriate, and yet the carefully streamlined 2008 regulations for recycled wastes are not.

EPA believes that the solution to RCRA recycling violations is to substitute additional more stringent RCRA requirements. Adding stringency may simply substitute one set of violations for another set of violations, with no increase of environmental protection. Stated in other terms, just because firms are violating the existing requirements does not mean that the requirements are at fault – it may mean that additional outreach and enforcement is warranted.

The Generator Provisions of Transfer-Based Exclusion are not Justified by EPA

According to EPA's own calculation, 94% of the damage cases occurred at off-site third-party recycling facilities.[18] Yet, EPA justifies adoption of the more stringent requirements on generators which would otherwise be subject to the transfer-based exclusion solely due to reliance on these damage cases. However, the damage cases were not caused by the actions of the generator, but through the actions of the recycler. So, to the extent that EPA has evidence to support regulatory changes anywhere in the transfer-based exclusion, it should be modifying the

[15] 76 Fed. Reg. 44094, 44109 (July 22, 2011).
[16] Id.
[17] The additional 50,000 tons of recycling reflect activities in only 6 states; many more would be able to take advantage of this 2008 rule if the rule were made applicable nationwide. EPA's original estimate for the 2008 rule was only 23,000 tons nationwide.
[18] 76 Fed. Reg. 44094, 44108 (July 22, 2011).

recycler standards alone, not the generator standards. EPA has not explained how adding notifications, more stringent containment standards, or a public hearing for generators would affect the damage cases where the discard is happening solely through the action of the third party recycler after the material has left the control of the generator. With regard to the recycler, EPA did not explain why the financial assurance requirement and other provisions would not provide an adequate incentive against improper disposal.

II. Legitimacy Criteria – The 2008 Final Rule Approach Should be Retained For Newly Excluded Facilities

In the October 2008 final rule, EPA codified the so-called four "Lowrance" legitimacy criteria that have long been applied by EPA in determining whether secondary materials are being legitimately recycled. The 2008 preamble provides a long detailed discussion of the rationale for the specific criteria and why two of the four factors were not mandatory. Despite this explanation, some believe that unless all four legitimacy factors are satisfied on a mandatory basis, then the materials are not being legitimately recycled. However, EPA made it very clear in several examples in the October 2008 final rule notice that materials can be legitimately recycled even though not all the criteria are met.[19] There has been no evidence of any adverse effects on health or the environment through the current application of the Lowrance principles.

In addition, it appears very likely that there are many hundreds, if not more, of recycling processes that would fail at least the fourth criterion, that of excessive contamination level. Under the new proposal, the facility would need to demonstrate that any Appendix VIII hazardous constituents were "comparable or lower than" the constituents in the virgin comparison substance. EPA proposes to replace the current criterion of "significantly elevated" with "comparable or lower than," which significantly tightens the regulation from the 2008 rule criterion. Given the thousands of facilities using hazardous secondary materials, the large diversity of industrial processes, and the existence of hundreds of Appendix VIII constituents that are subject to this test, the new tightened version of the legitimacy criterion appears bound to put hundreds, if not more, of recycling processes in violation of the criterion.[20] Any secondary material that contains a detectable amount of a new Appendix VIII constituent would automatically disqualify a material whether or not the secondary material is completely suitable for its intended purpose, and the detected constituent has no effect on the material's use or hazard to the public.

EPA's experience with the March 21**,** 2011 Non-Hazardous Secondary Material (NHSM) rule is instructive.[21] The Agency codified the same exact language ("comparable or lower than") as the DSW proposal with regard to comparability factor #4 in the NHSM. This language was strongly opposed by industry representatives who found that their secondary materials would fail this criterion. EPA believed that many secondary materials burned as fuels would pass the legitimacy criteria, but industry members pointed out that many alternative fuels that EPA

[19] 73 Fed. Reg. 64668, 64703-710 (Oct. 30, 2008).
[20] EPA proposed that there be only "comparable or lower" Appendix VIII constituents in the secondary material to meet Factor #4 for legitimacy. Appendix VIII contains the list of contaminants used to characterize hazardous wastes by EPA.
[21] 76 Fed. Reg. 15456 (March 21, 2011).

expected to be legitimate contained either Appendix VIII constituents not in the comparison fuel, or had constituents that were up to as much as 10 or 100 times the concentration of a constituent in the comparison fuel. In response, the Agency very recently announced plans to issue new rulemaking to revise its regulation, allowing resinated wood, and perhaps other materials to be considered "nonwaste" fuels.[22] We fully expect that analogous problems will occur in the new proposal for the definition of solid waste.

III. Legitimacy Criteria – Do Not Impose Retroactively on Facilities with Current Exclusions

In a reversal of the 2008 determination on this issue, EPA has now proposed to impose the legitimacy criteria on those activities with current exclusions. In addition, the Agency proposes to require documentation of this determination, and a petition to the permit authority where the four mandatory factors are not satisfied.

This will be a significant burden on thousands of facilities. In 2008, EPA determined that it would add unnecessary burden and confusion to apply these criteria to the currently excluded activities. EPA explained that the Agency had already decided that these activities were legitimate recycling when the exclusions were established earlier by EPA.

> Regarding the existing exclusions in the regulations, EPA acknowledges that, in establishing a specific exclusion, we have already determined in the rulemaking record that the specific recycling practice is excluded from the definition of solid waste provided all the conditions of the rule are met. ….. However, to avoid confusion among the regulated community and state and other implementing agencies about the status of recycling under existing exclusions, we have decided that the focus of this rule should be the specific changes it is making to the definition of solid waste in the form of the exclusions and non-waste determinations finalized today. Thus, the legitimacy factors codified in 40 CFR 260.43 only apply to the exclusions and non-waste determination process being finalized in this rule and we do not expect implementing agencies to revisit past legitimacy determinations based on this final rule preamble language.
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> 73 Fed. Reg. 64743 (October 30, 2008).

EPA has not explained in the new proposal why facilities would suddenly determine that the recycling was not legitimate, and why this burden would not be unnecessary. Further, EPA has made no connection between the damage cases and illegitimate recycling. It has demonstrated that recyclers are violating RCRA and discarding hazardous secondary material – but in no way do these damage cases appear to establish that the underlying exclusion was improperly granted by EPA. In other words, the fact that facilities carelessly allowed lead to leak from recycled lead-acid batteries does not mean that the original recycling effort was illegitimate; it means that the operator was violating the applicable RCRA regulations. These violations indicate the need for more enforcement, not a need for more paperwork.

[22] October 14, 2011 letter from Administrator Lisa Jackson to Senator Wyden regarding NHSM.

IV. We Support Some Additional Proposed Requirements on Facilities Subject to Other Recycling Exclusions and Exemptions

Advocacy does support consideration of some of the additional minor requirements that add more specificity and environmental protection, but does not support the full panalopy of RCRA Subtitle C requirements.[23] The proposed containment requirement, while it perhaps could be further refined, does appear to provide some useful additional specificity for the requirement to properly contain the hazardous secondary material. Additional notification requirements also should be evaluated. Lastly, the addition of a specific requirement on speculative accumulation, to avoid potential discard, as discussed in the preamble at Section IX.B.2, seems to be appropriate.

V. EPA Should Expand the Applicability of the High Value Waste Streams

To its credit, EPA proposed a category of high value secondary materials that are used in re-manufacturing for a streamlined set of rules, using the justification that these high value materials would provide adequate justification that these wastes would not be discarded. However, EPA's narrow classification of only 18 specific solvents eliminates consideration of other equally high value products that are not covered by EPA's current proposed exclusion. Metal-bearing hazardous secondary materials are managed as a valuable commodity because of their metal content. Therefore, transferring those materials to a third party for reclamation does not involve discard. Such products could include metal bearing products of high metal concentration such as F006.

VI. Flexibility for State Programs

Some states would like to add provisions or more complexity to the current rule, while others would like to retain the relative simplicity of the current rule. The best way to accommodate both interests and to conserve state and Federal resources would be to retain the current provisions with some modifications. This would allow the states who want to do more, have state specific issues, or have more resources, to add their own provisions. The large number of states who favor the current DSW would be able to adopt the 2008 final rule with some improvements, as discussed above.

Given the exemplary track record of the facilities in the six states that are implementing the current rule documented by EPA, it seems to be an excellent opportunity to allow those states and perhaps others who are interested in that regulatory program to continue to implement the 2008 regulatory scheme. EPA could then carefully observe the advantages and disadvantages of such a program. It may well be that the enforcement and outreach programs of these states, in implementing these regulations, is a significant factor in the substantial increase in recycling activity and the problem-free implementation. Further observation of the programs will provide a stronger basis for a new regulatory program than speculation about what effect the program might do, especially in light of the importance of this issue.

[23] 76 Fed. Reg. 44094, 44138-40 (July 22, 2011).

Conclusion

Advocacy appreciates the opportunity to submit comments on the DSW proposed rule. Advocacy applauds the substantial work that EPA has done over the years, and still believes, based on the current evidence, that the 2008 final rule with some improvements represents an appropriate compromise between stakeholders that will not have detrimental effects on the environment or small businesses. We look forward to working further with the Agency on developing the final rule. If you have any questions or comments on this letter, please contact me or Kevin Bromberg of my staff at 202-205-6964 or kevin.bromberg@sba.gov.

Sincerely,

/s/

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

/s/

Kevin Bromberg
Assistant Chief Counsel
Office of Advocacy

Copy to: The Honorable Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

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