



March 29, 2022

VIA ELECTRONIC SUBMISSION

The Honorable Michael S. Regan
Administrator
Environmental Protection Agency
Washington, DC 20460

Re: Petition to Revise the Non-Hazardous Secondary Material Standard: Proposed Response (Docket ID No. EPA-HQ-OLEM-2020-0550)

Dear Administrator Regan:

On January 28, 2022, EPA published its proposed response denying an industry petition to revise the Non-Hazardous Secondary Material (NHSM) regulations.¹ The NHSM requirements consist of standards and procedures that are used to identify whether non-hazardous secondary materials are solid wastes when used as fuels or ingredients in combustion units. The denied requests included removing the mandatory “contaminant comparison” in the rule’s legitimacy criteria² and removing associated “designed to burn” and other limitations for creosote-treated railroad ties (CTRTs).³ This letter constitutes the Office of Advocacy’s (Advocacy) public comments on EPA’s proposed response.

Advocacy is concerned that the agency overlooked important relevant factors in its proposed decision to retain the limitation on the use of CTRTs. Advocacy believes the agency has the discretion to increase the capacity to use CTRTs as a fuel source. Therefore, Advocacy recommends that EPA take the necessary actions to promote the productive and less impactful use of CTRTs as a fuel source. Advocacy also recommends that EPA address the one-year railroad tie storage timeframe by providing compliance flexibilities for the affected small entities.

¹ Petition To Revise the Non-Hazardous Secondary Material Standard: Proposed Response, 87 Fed. Reg. 4536 (January 28, 2022).

² See 40 C.F.R. § 241.3.

³ See 40 C.F.R. § 241.4.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),⁴ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁵ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁶ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.⁷

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁸

B. The Proposed Response

On January 28, 2022, EPA published its proposed response denying an industry petition to revise the Non-Hazardous Secondary Material (NHSM) regulations. The NHSM requirements consist of standards and procedures that are used to identify whether non-hazardous secondary materials are solid wastes when used as fuels or ingredients in combustion units. The petitioners requested various changes which include:

- 1) Changing the legitimacy criterion for comparison of contaminants in the NHSM to the traditional fuel the unit is designed to burn from "must," a mandatory requirement, to "should consider."
- 2) Removing associated design-to-burn and other limitations for creosote-treated railroad ties (CTRT).
- 3) Revising the definition of paper recycling residuals (PRR) to remove the limit on non-fiber materials in PRR that can be burned as a non-waste fuel.

⁴ 5 U.S.C. §601 et seq.

⁵ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁶ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁷ *Id.*

⁸ *Id.*

In its proposed response, the agency denied all the requested revisions. For the first two requests, EPA explained that the requested changes would negatively affect the NHSM program by increasing the levels of contaminants that could be burned in units that are not appropriately designed to burn them.⁹

II. Advocacy’s Small Business Concerns

Advocacy is concerned that the agency overlooked important relevant factors such as potential environmental benefits and small entity impacts in its proposed decision to retain the limitation on the use of CTRTs as a fuel source. This decision has adverse implications for owners and operators of short lines, who are mostly small businesses. Short line railroads operate 47,500 miles of freight rail in the United States, or approximately 29% of the freight rail infrastructure. Short lines primarily use CTRTs to support their railroad tracks. When CTRTs reach the end of their service, they can be used for energy generation as a fuel source.

In 2016, EPA classified CTRTs as a categorical non-waste fuel under its NHSM rules.¹⁰ The requirements include a mandatory “contaminant comparison” in the rule’s legitimacy criteria¹¹ and an associated “designed to burn” restriction and other limitations for CTRTs to be used as a fuel.¹² Small business representatives of short lines,¹³ included among the petitioners, requested EPA remove these requirements to increase the capacity for the use of CTRTs as a fuel.¹⁴ For short lines, these capacity limitations result in longer timelines and longer transport distances to move ties through fewer eligible facilities. EPA’s proposed decision maintains restrictions on the number of boilers available to burn CTRTs for fuel.

A. Advocacy recommends that EPA take necessary actions to promote the productive and less impactful use of CTRTs as a fuel source.

In granting or denying a petition for a rulemaking, where the non-hazardous secondary material does not meet the legitimacy criteria, the agency can consider whether a non-hazardous secondary material can be considered a non-waste fuel by considering “other relevant factors as appropriate.”¹⁵ The changes requested by the short lines with respect to increasing the capacity to

⁹ While the agency is proposing to deny the third request to revise the definition of PRR, it is alternatively proposing to set a numerical limit of two percent on the amount of non-fiber materials that may be included for the residuals to be considered a non-waste fuel. See 87 Fed. Reg. at 4544 – 4555.

¹⁰ See Additions to List of Categorical Non-Waste Fuels; Final Rule. 81 Fed. Reg. 6687 (February 8, 2016).

¹¹ 40 C.F.R. § 241.3.

¹² 40 C.F.R. § 241.4.

¹³ See Petition for Rulemaking to Amend the Legitimacy Criteria in 40 C.F.R. Part 241, -The Categorical Non-Waste Fuels Classification Criteria for Creosote Treated Railroad Ties and Other Treated Railroads Ties, and the Definition of Paper Recycling Residuals, December 7, 2018. Available here: https://www.epa.gov/system/files/documents/2021-09/crossties_and_prr_nhsm_petition_12-7-2018.pdf

¹⁴ *Id.* at 13-20.

¹⁵ 40 C.F.R. § 241.4 (b)(5)(ii).

use CTRTs as a fuel source promote environmental sustainability, are consistent with EPA's priorities under its waste material management approach, and support the agency's goals to address climate change by reducing greenhouse gas emissions. EPA should take these important and relevant factors into consideration to take necessary actions to promote the productive and less impactful use of CTRTs as a fuel source.

EPA's non-hazardous materials and waste management hierarchy ranks the various management strategies.¹⁶ They are listed from most to least environmentally preferred: source reduction and reuse, recycling, energy recovery, and disposal.¹⁷ In describing energy recovery, EPA emphasizes that “[c]onverting non-recyclable waste materials into electricity and heat *generates a renewable energy source and reduces carbon emissions by offsetting the need for energy from fossil sources and reduces methane generation from landfills.*”¹⁸ This hierarchy is also used by EPA in its sustainable materials management systematic approach to encourage the productive reuse of materials over their life cycles.¹⁹ In explaining this approach, the agency states that “[m]ore productive and less impactful use of materials helps our society remain economically competitive, contributes to our prosperity and protects the environment in a resource-constrained future.”²⁰

EPA's limitations on the use of CTRTs does not follow its own waste management hierarchy. For example, due to the current limitations in the rule, the primary alternative for managing the large volume of railroad ties removed from the rail lines each year is landfill disposal. This is the least environmentally preferred strategy according to EPA. In 2020, short lines replaced 3,157,842 rail ties. Industry data suggests that most of these ties were sent to landfills because of the restrictive criteria for CTRT use as a fuel. In addition, EPA expressly acknowledged that “combusting CTRT provides an alternative to landfill disposal, which studies have shown may reduce methane emissions from anaerobic decay and extend landfill capacity.”²¹

Moreover, excluding CTRTs from the scope of what can be burned for energy generation in lieu of fossil fuels results in an increased use of non-renewable fuels. This is contrary to EPA's recognized benefits of energy recovery in its waste management hierarchy described above. EPA acknowledged that “[u]se of CTRT as an alternative fuel may have the potential to produce various environmental benefits including reducing fossil fuel use, increasing the heat value of the

¹⁶ U.S. Environmental Protection Agency, Sustainable Materials Management: Non-Hazardous Materials and Waste Management Hierarchy, <https://www.epa.gov/smm/sustainable-materials-management-non-hazardous-materials-and-waste-management-hierarchy> (last visited Mar. 24, 2022).

¹⁷ *Id.*

¹⁸ *Id.* [emphasis added]

¹⁹ U.S. Environmental Protection Agency, Sustainable Materials Management Basics, <https://www.epa.gov/smm/sustainable-materials-management-basics> (last visited Mar. 24, 2022).

²⁰ *Id.*

²¹ 87 Fed. Reg. at 4540.

fuel mix and improving the combustion temperature and conditions.”²² The agency has demonstrated that it is well aware of the benefits of using CTRTs for energy recovery in comparison to the adverse environmental impacts of using non-renewable fuels (i.e. fossil fuels) that have to be generated from raw materials and would likely contribute to increased greenhouse gas emissions.

EPA should weigh the benefits of avoiding landfill disposal and reducing the use of non-renewable fuels in favor of promoting the use of CTRTs as a fuel source. These benefits are supported by EPA’s specific waste management hierarchy and its overarching goals to promote environmental sustainability and to address climate change by reducing the emission of greenhouse gases. Specifically, the use of CTRT as a fuel generates an alternative energy source, reduces carbon emissions by offsetting the need for energy from fossil sources, and reduces methane generation from landfills. For these reasons, Advocacy recommends EPA take the necessary actions to promote the productive and less impactful use of CTRTs as a fuel source.

B. Advocacy recommends that EPA address the concern regarding the one-year railroad tie storage timeframe by providing compliance flexibilities for small entities.

Short lines also expressed concerns about compliance with the railroad tie storage timeframes in the NHSM rule to meet the valuable commodity criterion.²³ Specifically, EPA presumes that storage of ties for a year or longer without an end-use determination is not “reasonable,” and indicates that the material has been discarded and is subject to disposal rather than eligible for reuse or recycling.²⁴ This issue is particularly challenging for short lines because track repairs requiring the removal of ties occur on an as-needed basis and it is not always practical for short lines to immediately process the ties. The longer time to process the ties is often due to limited accessibility to remote areas, interference of tie pickup with train service, and other federal service and safety requirements.

In EPA’s response, the agency simply dismisses these concerns by asserting, without providing any basis for its assumption, that the reason for the delay in processing is due to a lack of determination for the end use of the ties by the railroad.²⁵ The agency should conduct outreach with the affected small entities to better understand the reason for delayed tie processing. Advocacy recommends the agency consider alternative compliance timelines and/or standards for handling these railroad ties to demonstrate that they are managed as a valuable commodity.

III. Conclusion

Advocacy recommends that EPA consider the potential environmental benefits of using the productive and less impactful CTRTs as a fuel source and take the necessary actions to promote

²² 87 Fed. Reg. at 4540.

²³ 40 C.F.R. § 241.3(d)(1)(i).

²⁴ 87 Fed Reg. at 4543.

²⁵ *Id.* at 4543.

its use under its NHSM standard. Advocacy also recommends that EPA conduct outreach with affected small entities to address the concern regarding the one-year railroad tie storage timeframe and consider alternative compliance timelines and/or standards for handling these railroad ties to demonstrate that they are managed as a valuable commodity.

Advocacy urges EPA to consider the above issues and recommendations. We look forward to working with you to reduce the regulatory burden on small businesses. If you have any questions or require additional information, please contact me or Assistant Chief Counsel Tayyaba Zeb at (202) 205-6790 or by email at tayyaba.zeb@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Tayyaba Zeb
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: Dominic Mancini, Deputy Administrator
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