June 24, 2011

The Honorable Mathy Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency
Ariel Rios Federal Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: EPA's Conceptual Approach For Determining Whether Concentrations of Constituents in Secondary Materials Are Comparable to Concentrations in Traditional Fuel

Dear Administrator Stanislaus:

Thank you for meeting with us on Tuesday, June 21, 2011, and presenting your conceptual approach for determining whether concentrations of constituents in secondary materials are comparable to concentrations in traditional fuel.

It is our understanding that your goal is to establish a framework that is flexible enough to accommodate a wide range of materials.

At our meeting you requested additional data regarding traditional fuels, particularly hazardous air pollutant (HAP) data. You also requested additional information regarding the HAPs and section 129 pollutants found in alternative fuels, particularly the number of facilities represented in any dataset, as well as the distribution of the data. The forest products industry has provided you with the raw data behind the average constituent levels that we presented to you previously. You should also have received a database of coal data. Other organizations are seeking additional information in response to your request. In addition, we suggest that your staff examine the database collected by the Office of Air and Radiation from the information collection request that was issued during the development of the Major Source Boiler MACT Rule.

Knowing that you are still gathering data and that your framework is still evolving, we remain concerned that some alternative fuels that have been legitimately used as fuel for decades may not fit within your framework, as we understand it. One example is resinated wood. We believe that some resinated wood may have VOC levels, in the form of formaldehyde, of up to 140 ppm. After CARB II is fully implemented those levels are not expected to exceed 100 ppm. It is unclear to us how comparisons of individual VOCs such as formaldehyde are to be made. According to EPA's material characterization paper for traditional fuels, one type of coal has up to 56 ppm of toluene. Liquid fuels, such as No. 5 fuel oil have VOC levels up to 4800 ppm. If the comparison is made to total VOCs, rather than VOCs that are HAPs, we may find levels of VOCs in virgin wood that are higher than 140 ppm. In addition, it is much less burdensome to measure total

VOCs rather than individual VOCs that are HAPs. As you further develop your concept, please consider these issues.

Another concern arises from EPA's conceptual approach to establishing a benchmark level. If EPA chooses to group contaminants and fuels for comparison to alternative fuels, please note that if you do not use the highest level found in any traditional fuel as the benchmark then by definition you are saying that some traditional fuel will fail the comparability test, even though the high levels of HAPs or section 129 pollutants are due to the natural variability of traditional fuels.

Finally, we are concerned about the presumption that EPA may choose to make that if a combustion unit is designed to burn a single solid fuel, it is designed to burn any solid fuel. We do not believe that is true for all units. For example, a veneer dryer that is designed to burn sander dust physically cannot burn pulverized coal.

At our meeting you also asked us to identify areas of the rule or preamble that may not be consistent with the conceptual approach presented on Tuesday. Understanding that your approach is still evolving, we cannot determine exactly what inconsistencies may or may not exist. However, in **Attachment A** we have provided excerpts from the rule and from the preamble that may support a fuel by fuel, contaminant by contaminant comparison. These excerpts are not exhaustive. In **Attachment B** we have provided the excerpts that may support comparisons to groups of fuels.

As we understand it, EPA's conceptual approach is to issue a guidance document that would establish guidelines for determining how to compare contaminant levels in traditional fuels to contaminant levels in alternative fuels. EPA also is offering to issue comfort letters to entities that wish EPA to confirm that their particular material has contaminant levels lower than or comparable to traditional fuels.

Although we would like to see a written description of your conceptual approach, please be aware that we have deep reservations about the use of guidance documents and comfort letters to provide regulatory clarity, particularly if the final guidance and any letters relying on that final guidance appear to be inconsistent with rule language or preamble language interpreting the rule language.

If EPA's conceptual approach becomes a guidance document that is used to determine what alternative fuels are legitimate fuels, and if that guidance document could be considered a significant change in the NHSM Rule legitimacy criteria, it is possible that the guidance could be challenged in court as a legislative rule that should have been issued following notice and comment rule-making under the Administrative Procedure Act.

In trying to distinguish between legislative rules and policy statements, courts have found that "if a document expresses a change in substantive law or policy the agency intends to make binding, or administers with binding effect, the agency may not rely upon the

statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures." *Gen. Elec. Co. v. E.P.A.,* 290 F.3d 377,383-84 (D.C. Cir. 2002). Courts examine whether the agency establishes a new "binding norm." *Nat'l Min. Ass'n v. Sec'y of Labor,* 589 F.3d 1368, 1371 (11th Cir. 2009).

The seminal case on this subject is *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). In that case, plaintiffs petitioned for review of an EPA guidance document arguing that the guidance imposed new monitoring requirements relating to the operation of permit programs under the Clean Air Act. EPA argued that the guidance was not subject to judicial review because it was neither final agency action nor a binding legislative rule. *Id*. at 1020. The District of Columbia Circuit Court of Appeals, however, disagreed. "If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding.'" *Id*. at 1023. In that case, the court relied in part on its determination that the guidance was inconsistent with the rule preamble and response to comment statements made at the time the rule was issued, noting that "the Guidance, of course, charts a very different course." Finding that it was a legislative rule issued without complying with the Administrative Procedure Act, the court set aside the guidance and ruled that it could not be used.

If a guidance document or a comfort letter is challenged and determined to be an invalid legislative rule, the consequence for the Agency is that it will have to withdraw the guidance. However the consequence for any facility operator that relied on that guidance or comfort letter could be non-compliance with Clean Air Act requirements. Such a consequence would be devastating.

EPA's guidance and comfort letters also may be challenged on a case-by-case basis in the context of a facility Clean Air Act permit. The Boiler MACT rule places the following requirements on facility operators:

- Title V permit reports affirming that "No secondary materials that are solid waste were combusted in any affected unit." 40 CFR 63.7545(e)(8)(iii)).

- Keeping records: If you combust non-hazardous secondary materials that have been determined not to be solid waste pursuant to § 241.3(b)(1), you must keep a record which documents how the secondary material meets each of the legitimacy criteria. If you combust a fuel that has been processed from a discarded non-hazardous secondary material pursuant to § 241.3(b)(4), you must keep records as to how the operations that produced the fuel satisfies the definition of processing in § 241.2. If the fuel received a non-waste determination pursuant to the petition process submitted under § 241.3(c), you must keep a record that documents how the fuel satisfies the requirements of the petition process."40 CFR 63.7555(d)(2).

A citizen activist could challenge the validity of a facility's permit, reports, and records alleging that, notwithstanding an EPA guidance or comfort letter, the facility is combusting solid waste. In such a case, the decision of whether a material is a waste or a legitimate fuel in the hands of a court, not EPA. Again, the consequence of losing that case is the devastating consequence of non-compliance with the Clean Air Act.

Bearing these concerns in mind, please understand that while we greatly appreciate the fact that EPA is trying to make its NHSM Rule workable, we are concerned that if EPA makes any significant change to its interpretation of this Rule, that change may have to go through notice and comment rulemaking to be legally valid.

In addition, there are a number of issues that have been raised that would not be addressed by EPA's conceptual framework. Those issues are identified in **Attachment C.**

As you know, we have requested the Agency to administratively stay the NHSM Rule. We reiterate that request and ask that you engage in rulemaking to make any necessary changes to make the NHSM Rule more workable. As we have discussed, expanding the list of traditional fuels to recognize long-time legitimate use of secondary materials as fuels will provide certainty and reduce burden on both EPA and industry. In addition, we believe that the way EPA in the past has evaluated whether recycling is legitimate is flexible enough to allow EPA to recognize additional legitimate recycling. This approach to legitimacy is found in both the April 26, 1989, memorandum issued by then Office of Solid Waste Director Sylvia Lowrance, as well as in the Subtitle C definition of solid waste rule issued in October 2008. In fact, remnants of this approach also are found in the preamble to the NHSM Rule. See **Attachment D.**

In the final NHSM Rule, EPA without explanation deviated from its long-standing approach to recycling legitimacy. It is our understanding that EPA's reluctance to amend the NSHM Rule to address the workability concerns we have raised is due in part to the fact that revisions to the 2008 Subtitle C rule are currently in inter-agency review and EPA may be proposing to adopt for Subtitle C the same legitimacy approach that it promulgated in the NHSM Rule. First, we believe that EPA may adopt different approaches to recycling of hazardous and non-hazardous secondary materials, so we do not believe these two rules should be linked. Second, EPA's conceptual approach to determining comparability of non-hazardous secondary materials to traditional fuels is itself new and thus is de-linked from hazardous material recycling. Third, if EPA continues to believe that these two rules are linked, we hope that EPA is on notice about the workability of its new approach to identifying legitimate recycling. Finally, we believe it is invalid for EPA to prejudge the outcome of a rulemaking and use that expected outcome as a reason to fail to address issues presented by a separate rulemaking.

Please do not let the Subtitle C rule keep you from amending the NHSM Rule to prevent billions of dollars worth of valuable alternative fuels from being sent to landfills. That outcome would contrary to everything that President Obama stands for on the environment and the economy. Please amend the NHSM rule to achieve the goal that you are trying to reach with your conceptual approach.

Thank you for your attention to this matter. If you have any questions, please contact Tim Hunt at 202-463-2588 or tim_hunt@afandpa.org.

Best regards,

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