Attachment D

Support in the Preamble for Determining that Contaminant Levels Alone Do Not Indicate Discard.

In the past, EPA has always viewed the legitimacy criteria as factors may indicate sham recycling, not as a bright line definition of discard. Relics of the long-standing agency review remain in the NHSM Rule preamble. The preamble recognizes that management of a material can be a strong indicator that recycling is legitimate. The preamble also recognizes that contaminant levels *may* be evidence of discard, but are not always an indicator of discard.

EPA's decision on whether resinated wood is a waste (within the control of the generator or if transferred) is based on the circumstances under which the material is handled and combusted. 76 Fed. Reg. at 15499.

As resinated wood residuals transferred off-site are utilized in the same manner as self-generated resinated wood residuals (i.e., contained in the same bins as furnish materials used in the product, transferred via conveyors or ducts), which the plants are specifically designed to burn as a fuel, we agree that this does not constitute discard. Thus, we have determined that resinated wood residuals are not solid waste when transferred off-site for use as fuel, provided the material meets the legitimacy criteria and has not been otherwise deemed to be discarded. We have codified this concept under 40 CFR 241.3(b)(2)(ii). Id.

However, we believe that these materials are not discarded when used within the control of the generator, such as at pulp and paper mills, since these non-hazardous secondary materials are part of the industrial process. 76 Fed. Reg. at 15487.

If, however, the barium were at much higher levels in the non-hazardous secondary material (such as 50 ppm), the levels would not be comparable and it may indicate discard of the barium and sham recycling. 76 Fed. Reg. at 15524.

"Burning is an inherently destructive process, even if there is a beneficial use. Therefore, the Agency needs to be cautious in evaluating whether burning a non-hazardous material for energy recovery, also has a waste destroying intention." 76 Fed. Reg. at 15525,

The Agency discussed various criteria regarding the concept of legitimacy. Specifically, with respect to secondary materials used as a fuel, they should be handled as a valuable commodity, have a meaningful heating value, and contain contaminants that are not significantly higher in concentration than traditional fuel products. For those secondary materials used as an ingredient, they should be handled as a valuable commodity, the secondary material provides a useful contribution, the recycling results in a valuable product, and the product does not contain contaminants that are significantly higher in concentration than traditional products. If these criteria are not met, then sham recycling may be indicated and the secondary material may be a solid waste. 76 Fed. Reg. at 15464 n. 12.

EPA is careful to note that ''legitimacy'' is shorthand for referring to non-hazardous secondary materials that are not thrown away, are saved and are reused by being burned for their value as a fuel. The legitimacy criteria are the factors needed to be examined to make this determination. Thus, for example, it is relevant how the non-hazardous secondary materials is managed and the extent to which contaminants in the secondary material may indicate that the real reason for burning the secondary material is simply its destruction—referred to as ''sham'' recycling. The Agency is not simply ''punting'' to its legitimacy criteria, but believes they provide a valid basis for showing that a non-hazardous secondary material is more commodity like than waste-like. 76 Fed. Reg. at 15471.

A non-hazardous secondary material contains 500 parts per million (ppm) of lead, while the traditional fuel that would or could be burned in the combustion unit contains 475 ppm of lead. These levels would be considered comparable (since it falls within a small acceptable range) and thus, would meet this factor. If, on the other hand, the level of lead in the non-hazardous secondary material was 1,000 ppm, these levels would not be comparable and it may indicate that the nonhazardous secondary material was being burned to dispose of the material and that the activity is sham recycling. 76 Fed. Reg. at 15524.