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**RCRA Docket  
EPA Docket Center  
Mail Code 28221T  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW.  
Washington DC 20460**

**Re: Additions to List of Section 241.4 Categorical Non-Waste Fuels; Proposed Rule (EPA-HQ-RCRA-2013-0110)**

**Dear Sir/Madam:**

The American Forest & Paper Association, American Wood Council, Biomass Power Association, Construction & Demolition Recycling Association, and the National Association of Manufacturers appreciate the opportunity to comment on the proposed rule: Additions to List of Section 241.4 Categorical Non-Waste Fuels (EPA-HQ-RCRA-2013-0110): 79 Fed. Reg. 21006 (Apr. 14, 2014).

As discussed below, we support EPA's proposal to list construction and demolition (C&D) wood fuel, paper recycling residuals (PRRs), and creosote treated railroad ties (CTRTs) as non-waste fuels under 40 CFR section 241.4. The conclusion that these materials are legitimate alternative fuels and not wastes is supported by the Resource Conservation and Recovery Act (RCRA) and by the record before the Agency. Further, listing these materials as non-wastes will allow the continued and increased use of these valuable fuel products.

**I. Under RCRA, Alternative Fuels Are Not Waste Where the Record Shows the Alternative Fuels are Combusted for Legitimate Energy Recovery and Not for Disposal, Where Combustion of the Alternative Fuel is Integral to an Industrial Process and Where the Fuel is Functionally the Same As The Traditional Fuel it Replaces.**

RCRA defines "solid waste" as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material" 42 U.S.C. 6903(27). As EPA has noted: "The key concept is that of 'discard' and, in fact, this definition turns on the meaning of the phrase, 'other discarded material,' since this term encompasses all other examples provided in the definition." 76 Fed. Reg. 15456, 15462 (Mar. 21, 2011).

In reviewing regulations defining when a hazardous secondary material is solid waste, the D.C. Court of Appeals for the D.C. Circuit has emphasized this point. *Association of Battery Recyclers v. EPA*, 208 F.3d 1047, 1051 (D.C. Cir. 2000) (ABR) ("Congress unambiguously expressed its intent that 'solid waste' (and therefore EPA's regulatory authority) be limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away.").

The D.C. Circuit also has provided guidance on what materials can be considered 'discarded' under RCRA. First, it has interpreted the term 'discard' based on the ordinary plain-English meaning of the term which encompasses 'disposed of,' 'thrown away,' or —abandoned.' *American Mining Congress v. EPA*, 824 F.2d 1177, 1188-89 (D.C. Cir. 1987) ("AMC I"). If a person has not disposed of, thrown away, or abandoned a material, it is not discarded, even if it is no longer useful in its original capacity. *AMC I*, at 1185-87. Because RCRA was enacted in response to Congressional concerns over "the rising tide of scrap, discarded, and waste materials," RCRA authority extends only to materials that are part of the waste disposal problem. *AMC I*, at 1185.

Second, the D.C. Circuit has explicitly stated that the term “discarded materials” cannot include materials that are destined for beneficial use of recycling in a continuous process by the generating industry itself, because such materials are not part of the waste disposal problem. AMC I, at 1190. The court also has held that a continuous process of reuse or recycling does not require a closed-loop process or immediate reuse. ABR, at 1056.

Third, EPA has long recognized that even if a material has been discarded, if resources are expended to manufacture a new product using that material, then that new product is no longer a waste. See, e.g., 50 Fed. Reg. 614, 633-34 (Jan. 1, 1985) (new products produced from the reclamation of solid waste are not themselves wastes). As EPA notes, new fuels produced from the processing of non-hazardous secondary materials are not wastes even when used for energy recovery because under RCRA only fuels derived from hazardous wastes must remain regulated under subtitle C of RCRA, not fuels derived from non-hazardous secondary materials. 42 U.S.C. 6924(q); 76 Fed. Reg. at 15469. Responding to the argument that all combustion is *per se* waste disposal, EPA notes:

[M]any equate the burning of any secondary material to discard, as some commenters have argued. This approach does not take into account that the secondary material has in fact been produced in a process that uses the discarded material as a feed stream to produce a safe fuel product that is a valuable commodity and sold in the marketplace no differently than traditional fuels. We view such an approach being a common sense interpretation of the statutory definition of solid waste under RCRA.

75 Fed. Reg. 31844, 31877 (Jun. 4, 2010).<sup>1</sup>

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<sup>1</sup> We would also note that the case law relied upon by those who argue that products cannot be produced from discarded material addresses the status of discarded material *before* it is processed, and not the status of the new products that are the result of processing. *United States v. ILCO, Inc.*, 996 F.2d 1126 (11th Cir. 1993) (addressing the status of lead plates removed from batteries and used as feedstock for a secondary lead smelter, not the status of any lead ingots produced and sold by the smelter); *Owen Electric Steel Co. of S.C. v. Browner*, 37 F.3d 146 (4th Cir. 1994) (addressing the status of slag that is stored and cured before it is sold as aggregate to the construction industry, not the status of the aggregate).

Finally, when evaluating whether discard is occurring, it is appropriate to examine intent. See *American Petroleum Institute v. EPA*, 216 F.3d 50, 58 (D.C. Cir. 2000) (it is arbitrary and capricious to ignore the motivation behind the recycling activity when determining whether a material is a waste) (hereinafter API II); OSWER Directive 9441.1989(19) (Apr. 26, 1989) (EPA-HQ-RCRA-2008-0329-0433) (attached). Where the intent of combustion is legitimate energy recovery, not disposal, an alternative fuel is not a waste. See 76 Fed. Reg. 80452, 80483 (Dec. 23, 2011) (noting resinated wood is not a waste because the purpose of burning these wood residuals is not to destroy or discard them). Intent can be discerned from the actions of persons managing the alternative fuel, including the fact that the fuel is a market commodity. Another way of discerning intent is the use of the fuel. Where a fuel is used in the same way for the same purpose as a traditional fuel, it is functionally equivalent and combusting the alternative fuel is legitimate use, not discard. 40 C.F.R. 241.4(b)(5)(2).

The combustion of C&D wood, CTRTs, and PRRs is not the discard of solid waste. Instead, these materials are either processed into new fuel products and, in some cases, are combusted as part of a continuous industrial process by the generating industry itself. Under either set of facts, these materials are combusted with the intent to replace the energy that would otherwise need to be provided by fossil fuels or other traditional fuels and thus are functionally the same as those fuels. As such, listing these alternative fuels as non-waste fuels under section 241.4 is fully consistent with RCRA.

## **II. Specific Comments on EPA's Proposal**

### **A. Construction and Demolition Wood.**

In proposed 241.4(a)(5), EPA is proposing to list C&D wood as a non-waste fuel when it is processed according to best management practices and the C&D combustors obtain a written certification from C&D processing facilities that the C&D wood has been processed by trained operators in accordance with best management practices. We

support listing C&D wood as a non-waste fuel and provide comments on each component of EPA's proposal below.

## **1. Definition of Construction and Demolition Wood.**

EPA proposes to define construction and demolition wood as follows:

*Construction and demolition (C&D) wood means wood that is generated from the processing of debris from construction and demolition activities for the purposes of recovering wood. C&D wood from construction activities results from cutting wood down to size during installation or from purchasing more wood than a project ultimately requires. C&D wood from demolition activities results from dismantling buildings and other structures or removing materials during renovation.*

Proposed section 241.2.

We agree that this definition accurately describes C&D wood.

EPA is seeking comment on whether that definition should include disaster debris.<sup>2</sup> We believe that it already includes disaster debris because it does not distinguish between the demolition and dismantling of buildings by nature or by man. However, EPA should make clear its intent with regard to disaster debris. For example, the last sentence of the definition could be amended as follows: "*C&D wood from demolition activities results from dismantling buildings and other structures or removing materials during renovation, or from natural disasters.*"

EPA assumes that management of disaster debris is expedited and less controlled. 79 Fed. Reg. at 21016. That is not accurate. By including disaster debris in the definition of C&D wood, we intend that it be managed in the same way as any other source of

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<sup>2</sup> This question is related to mixed debris from construction and demolition of buildings, as trees and clean wood found in disaster debris are clean cellulosic biomass and therefore traditional fuel. 40 C.F.R. 241.2; 79 Fed. Reg. at 21016.

C&D wood. This management is consistent with practice in the industry and is necessary so processors can ensure that they are supplying a fuel product that meets customer specifications. For example, after Super Storm Sandy, C&D processors did not change their processing practices to manage the debris from that storm. They stored some debris on site until they had the capacity to process it normally. Debris that could not be processed or stored was landfilled.

In addition, C&D processing facility operators will not always know the original source of the material that they receive. Man-made demolition debris will not necessarily be distinguishable from debris created by nature so a requirement that all demolition material be sourced from man-made demolition is impracticable, as well as unnecessary.

We agree with EPA's observation that "much of the C&D wood recovered from construction activities is unused and untreated, thereby falling under the definition of 'clean cellulosic biomass.'" 79 Fed. Reg. at 21011. That material is not classified as a non-hazardous secondary material and is not subject to 40 CFR Part 241. However, we also agree that a mixture of material obtained from construction sites and demolition sites would be considered a non-hazardous secondary material subject to Part 241.

## **2. Processor Best Management Practices.**

We agree that C&D wood that is processed according to best management practices is a non-waste fuel. Further, we strongly support EPA's statement that:

The categorical listing proposed in this rule would allow material to be considered clean biomass without having to test each batch of processed wood for contaminant levels. Instead, the material could be considered clean biomass if certain practices are followed, as described in the rule.

79 Fed. Reg. at 21015 n. 34. However, we are requesting some clarification of the practices that EPA has identified as "best management practices."

**a. Removal of unwanted materials.**

EPA proposes to require:

*Sorting by trained operators that excludes or removes the following materials from the final product fuel: non-wood materials (e.g., polyvinyl chloride and other plastics, drywall, concrete, aggregates, dirt, and asbestos), and wood treated with creosote, pentachlorophenol, chromated copper arsenate, or other copper, chromium, or arsenical preservatives.*

We agree that operators of C&D processing facilities should be trained to remove the materials identified by EPA. We note that in the Florida study cited favorably by EPA, trained operators did not remove 100 percent of the unwanted materials. 79 Fed. Reg. at 21013 n. 23. Consistent with that study, we believe that the above quoted requirement is met if the employees of C&D processors are trained to remove the listed materials. We do not read EPA's proposal to require 100 percent removal of such materials.

Removal of 100 percent of unwanted materials is not technically feasible nor is it compelled by RCRA or the NHSM rule. As demonstrated by the data provided to EPA, processed C&D wood rarely contains contaminants at levels that are higher than biomass or coal.<sup>3</sup> Further, 100 percent removal is not necessary to demonstrate that C&D wood is not discarded.

It is clear from the record that C&D wood is processed with the intent to create a valuable fuel product. This intent is demonstrated by the significant investment made by the nearly 300 companies across the United States that are in the business of processing construction and demolition wood. See Comments filed by Construction

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<sup>3</sup> April 26, 2013 letter from Susan Bodine to Suzanne Rudzinski (Appendix A) (EPA-HQ-RCRA-2013-0110-0025).

Materials Recycling Association Education and Issues Fund (Feb. 21, 2012), (EPA-HQ-RCRA-2008-0329-1928), at 1 (attached).<sup>4</sup>

It also is clear from the record that C&D wood is combusted with the intent of energy production (rather than discard). This intent is demonstrated by the contracts and specifications provided by combustors to ensure that unwanted material is removed and the resulting fuel product can be combusted in compliance with a unit's Clean Air Act permit. December 7, 2012 letter from Susan Bodine to Suzanne Rudzinski, at 2 (EPA-HQ-RCRA-2013-0110-0069); Comments filed by American Forest & Paper Association, et al., Feb. 21, 2012, at 60 (EPA-HQ-RCRA-2008-0329-1946-A1); (EPA-HQ-RCRA-2008-0329-2004) (sample contracts) (attached).

The intent of energy production (rather than discard) also is demonstrated by the fact that most combustors are purchasing this fuel. Two trailer loads of C&D wood has a value of between \$700 and \$900. Comments filed by American Forest & Paper Association, et al., Feb. 21, 2012, at 65 (EPA-HQ-RCRA-2008-0329-1946-A1). In addition to manufacturing facilities that combust C&D wood, there are at least 23 companies across the United States that either own or operate biomass power plants. These plants combust as much as 40 percent C&D wood; without this fuel stream these plants would not be able to remain in operation. December 7, 2012 letter from Susan Bodine to Suzanne Rudzinski, at 1, n.2 and 8 (EPA-HQ-RCRA-2013-0110-0069). The combustors that are not purchasing the fuel are expending resources to produce it themselves. For example, some utilities process C&D wood themselves, for combustion in their own boilers.

Finally, we note that the presence of some non-combustible material in C&D wood (such as some residual dirt adhering to wood) would not create an issue under Part 241 because that regulation addresses combustion only.

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<sup>4</sup> This group has changed its name to the Construction & Demolition Recycling Association.



With the understanding that the rule would require training to remove unwanted materials, rather than achievement of 100 percent removal, we support the above quoted condition.

**b. Management Practices for Positive Sorting.**

EPA is proposing to require:

*C&D processing facilities that use positive sorting - where operators pick out desirable wood from co-mingled debris-must either: (1) exclude all painted wood from the final product fuel, (2) use X-ray Fluorescence to ensure that painted wood included in the final product fuel does not contain lead-based paint, or (3) require documentation that a building has been tested for and does not include lead-based paint before accepting demolition debris from that building.*

These practices are intended to address lead. We believe that the data provided to EPA demonstrates that industry practices appropriately manage lead to ensure that specifications are met and that combustors will meet the limits in their Clean Air Act permits.<sup>5</sup> Nonetheless, we do not oppose the management practices proposed by EPA with the clarifications requested below.

First, as noted above, 100 percent removal of unwanted material is not technically feasible, practicable, nor necessary to produce a legitimate fuel product.

Second, one option for removal of lead painted wood is the use of X-ray Fluorescence (XRF) “to ensure that painted wood included in the final product fuel does not contain lead-based paint.” Proposed section 241.4(a)(5)(i)(B). EPA cites University of Florida pilot study of a conveyor system that was funded by the manufacturer of XRF equipment. This is a pilot study that has not been demonstrated for an industrial setting. In fact, it has a throughput of only 20 tons per hour while most C&D processing facilities are permitted to manage 500 tons a day or more and operate only one shift a day. Further, equipment that is used by some glass manufacturers to eliminate

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<sup>5</sup> April 26, 2013 letter from Susan Bodine to Suzanne Rudzinski (Appendix A) (EPA-HQ-RCRA-2013-0110-0025).

ceramics and other unwanted material from glass cullet costs over \$1 million each and is still unable to remove all unwanted material. In contrast, a hand-held XRF gun costs about \$30,000 and can be used to screen a sample of material from a source of demolition debris. It is neither feasible nor practicable to “ensure” all wood painted with lead-based paint is removed using XRF technology. The C&D processors that currently use XRF technology use a hand held gun to test a sample of an incoming load. None use the conveyor system described in the University of Florida study. As demonstrated by the data from the Washington facility that uses a hand held XRF gun, this practice is highly successful in removing lead.<sup>6</sup>

The lead paint testing option raises similar concerns. We assume that EPA is not suggesting that every square foot of painted wood be tested.

We request EPA to modify the description of these management practices to remove the implication that 100 percent removal is technically feasible and practicable and allow C&D processors to screen samples, not every piece of painted wood.

To clarify these issues, EPA could modify the regulatory language as follows:

*C&D processing facilities that use positive sorting - where operators are trained to pick out desirable wood from co-mingled debris - must be trained to: (1) exclude painted wood from the final product fuel, (2) use X-ray Fluorescence to test a sample of painted wood from each source or supplier of demolition debris received by the C&D wood processor to identify and reject wood with lead-based paint, or (3) require documentation that a sample of painted wood from a building has been tested for and does not include lead-based paint before accepting demolition debris from that building.”*

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<sup>6</sup> Id.

In addition, we agree with EPA that some processing facilities receive clean, pre-sorted, material. 79 Fed. Reg. at 21011 (noting that in some cases there is "material segregation prior to arrival at the processing facility").

**c. Management Practices for Negative Sorting.**

EPA is proposing to require:

*C&D processing facilities that use negative sorting - where operators remove contaminated or otherwise undesirable materials from co-mingled debris - must remove fines (i.e., small-sized particles that may contain relatively high concentrations of lead and other contaminants) and either: (1) remove painted wood, (2) use X-ray Fluorescence to detect and remove lead-painted wood, or (3) require documentation that a building has been tested for and does not include lead-based paint before accepting demolition debris from that building.*

While EPA's proposal for facilities that use negative sorting does not include the word "ensure" it raises the same concerns identified above for positive sorting. We request that EPA modify the language for this management practice as well as follows:

*C&D processing facilities that use negative sorting - where operators are trained to remove contaminated or otherwise undesirable materials from co-mingled debris - must be trained to remove fines (i.e., small-sized particles that may contain relatively high concentrations of lead and other contaminants) and must be trained to: (1) remove painted wood, (2) use X-ray Fluorescence to test a sample of painted wood from each source or supplier of demolition debris received by the C&D wood processor to detect and remove wood with lead-based paint, or (3) require documentation that a sample of painted wood from a building has been tested for and does not include lead-based paint before accepting demolition debris from that building."*

**d. Processing Techniques for pentachlorophenol.**

EPA requests comment on the feasibility of reducing pentachlorophenol concentrations in processed C&D wood by excluding or removing utility poles and other industrial wood products known to be treated with the chemical. EPA is already proposing to require

that processors train employees to remove pentachlorophenol treated wood. That is consistent with industry practices and combustor specifications. Pentachlorophenol treated wood is typically a dark brown color and is easily recognizable with visual inspection. Processors also exclude pentachlorophenol by excluding utility poles. We believe that these practices are feasible and no further requirements related to pentachlorophenol treated wood are necessary.

**e. Formaldehyde.**

EPA requests comment on its decision to balance elevated formaldehyde levels with the greater heating value and more consistent moisture content that resinated wood components lend to processed C&D wood, rather than specifically requiring that resinated wood be excluded or removed from C&D debris as part of the best management practices.

We strongly support EPA's decision to balance formaldehyde levels with the fuel value of the resinated wood component of C&D wood to allow formaldehyde levels in C&D wood fuel that are somewhat higher than found in coal or biomass.

First, when formaldehyde is grouped with other VOCs and SVOC and compared to the levels of this contaminant grouping in C&D wood, the levels are comparable to coal.<sup>7</sup>

Second, the only source that we are aware of formaldehyde in C&D wood is resinated wood. EPA has already recognized that resinated wood is a valuable fuel commodity and has identified it as a non-waste fuel. 40 C.F.R. 241.4(a)(2). The basis for this determination includes the recognition that resinated wood is a valuable fuel source due to its high fuel value relative to other wood. 76 Fed. Reg. at 80483. EPA also recognizes that including resinated wood in a fuel mix actually decreases hazardous air

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<sup>7</sup> December 7, 2012 letter from Susan Bodine to Suzanne Rudzinski, at Appendix A (EPA-HQ-RCRA-2013-0110-0069); April 26, 2013 letter from Susan Bodine to Suzanne Rudzinski, Appendix A (EPA-HQ-RCRA-2013-0110-0025).

pollutant emissions. 76 Fed. Reg. at 15502. While not relevant to a determination of whether the contaminant legitimacy criterion is met, this impact on emissions is a relevant factor to be balanced when making a non-waste determination under section 241.4. 78 Fed. Reg. 9112, 9157 (Feb. 7, 2013). As a component of a processed fuel, resinated wood is not being combusted to discard it. On the contrary, as discussed above, it is a component of a product that is a commodity fuel.

**f. CCA-treated wood.**

EPA requests comment on the viability of requiring, as best management practices, C&D processors to either implement formal training programs that emphasize sorting of treated wood from untreated wood or use a PAN<sup>8</sup> indicator stain or XRF technology to provide greater certainty that chromated copper arsenic (CCA) treated wood is removed from the processed C&D wood. 79 Fed. Reg. at 21016.

EPA has already proposed to require processors to be trained to remove treated wood. As noted above, we support this proposal. Visual identification via the color, grain, and shape (such as decking or fencing) of pieces works well to remove CCA treated wood, as demonstrated by the data in the record showing that arsenic and chromium levels in C&D wood are comparable to virgin wood.<sup>9</sup> Thus, the use of additional technology, such as XRF guns or PAN indicator stains would add unnecessary cost and time to the processing of C&D wood. Further, C&D processors that have tried PAN indicator stains have determined that the stains produce false positives and do not truly identify or measure arsenic.<sup>10</sup>

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<sup>8</sup> PAN stands for the chemical name of 1-(2-pyridylazo)-2-naphthol, an orange-red solid with a molecular formula C<sub>15</sub>H<sub>11</sub>N<sub>3</sub>O.

<sup>9</sup> April 26, 2013 letter from Susan Bodine to Suzanne Rudzinski, Appendix A (EPA-HQ-RCRA-2013-0110-0025).

<sup>10</sup> These stains identify copper, but copper is not a contaminant under the NHSM rule. 79 Fed. Reg. at 21016, n. 38.

**g. Trained Operators.**

As noted above, we support EPA's proposal to require C&D processors to be trained to remove unwanted materials and meet the best management practices described above. We do not believe that it is appropriate to describe the specifics of that training. The only elements of the training that are appropriate for regulation are identification of the management practices, not the details of how or by whom the training is provided.

**h. Written Certification.**

In general, we support EPA's proposal to require a combustor to obtain a written certification from the C&D processor that the C&D wood has been processed by trained operators in accordance with best management practices. We also agree that EPA does not need to prescribe the form of the written certification because purchase agreements and contracts are common between a processor/supplier and combustor.

As noted above, some combustors process C&D wood for their own combustion. These combustors should be allowed to self-certify that they complied with best management practices.

Finally, we request EPA to clarify that C&D wood suppliers, including suppliers of wood that has already been separated from debris, are not processors. As EPA notes, these suppliers may engage in "material segregation prior to arrival at the processing facility." 79 Fed. Reg. at 21011. However, the act of material segregation should not make these wood suppliers "processors." C&D processors are the entities that provide the final fuel product to meet customer specification and these are the entities that must meet the requirements of proposed 241.4(a)(5), including certifications.

We also agree that written certification would meet the record keeping requirements for combustors that combust NHSMs under sections 60.2740(u) (Emissions Guidelines) and 60.2175(w) (New Source Performance Standards) for CISWI units and sections 63.11225(c)(2)(ii) for area source boilers and 63.7555(d)(2) for major source boilers.

This is consistent with how EPA allows combustors of tires to document that tires are non-wastes under 40 C.F.R. 241.4(a)(1). See 76 Fed. Reg. 28318, 28322 (May 17, 2011).

## **B. Paper Recycling Residuals**

In proposed 241.4(a)(6), EPA is proposing to list paper recycling residuals (PRRs) as a non-waste fuel when burned on-site in boilers designed to burn solid fuel. We support listing PRRs as a non-waste fuel. As discussed in comments previously provided to EPA, when combusted by the generating industry these materials cannot be considered wastes under applicable D.C. Circuit precedent. *AMC I*, at 1186, 1192-93 (materials recycled in an ongoing industrial process are not discarded and materials that are destined for beneficial use by the generating industry itself are not waste because such materials are not part of the waste disposal problem). Further, a continuous process of reuse or recycling does not require a closed-loop process or immediate reuse. *ABR*, at 1056. In prior comments, we have described the management and combustion of PRRs by the forest products industry.<sup>11</sup> This includes management by mills that do not generate the PRRs, as well as the generating mills. As discussed below, we also believe that this material is a non-waste when used in boilers that can obtain meaningful heating value from PRRs and when processed into pellets for combustion by other entities.

We offer the following comments on EPA's proposal:

### **1. Definition of PRRs.**

EPA proposes to define PRRs as follows:

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<sup>11</sup> Comments filed by American Forest & Paper Association, et al., Feb. 21, 2012, at 55-57 (EPA-HQ-RCRA-2008-0329-1946-A1).

Paper recycling residuals means the co-product material generated from the paper recycling process and is composed primarily of wet strength and short wood fibers that cannot be used to make new paper and paperboard products. The term paper processing residuals also includes fibers from old corrugated container rejects.

Proposed 40 C.F.R. 241.2. It is our understanding that EPA does not intend to distinguish between residuals from recycling paper and residuals from recycling old corrugated containers and that EPA recognizes that these residuals are composed primarily of fibers but that there could include other materials from the paper and corrugated cardboard bales. As EPA has noted:

For example, use of old corrugated cardboard (OCC) rejects (clay, starches, other filler and coating materials, as well as fiber) are not discarded when used within the control of the generator, since these secondary materials are part of the industrial process. OCC rejects can include, and are usually burned in conjunction with, other fuels (such as bark) at pulp and paper mills that recycle fibers. 76 Fed. Reg. at 15472.

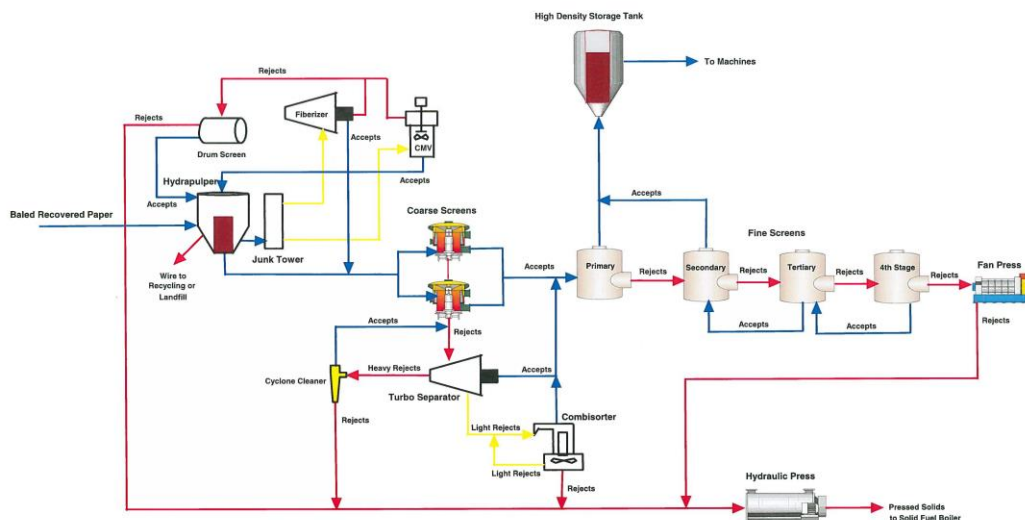
To apply this understanding to both paper and paperboard, we suggest the following revision to the definition:

Paper recycling residuals means the co-product material generated from the recycling of paper, paperboard, and corrugated containers and is composed primarily of wet strength and short wood fibers that cannot be used to make new paper and paperboard products.

As EPA is aware, recycle mills receive paper and paperboard as a feedstock for the production of new paper. The feedstock is fed to the machinery as depicted on the diagram on page 56 of Comments filed by American Forest & Paper Association, et al. Feb. 21, 2012 (EPA-HQ-RCRA-2008-0329-1946-A1) and reprinted below. The



residuals of that industrial process are not discarded but are instead combusted for energy recovery.



## 2. Meaningful Heating Value.

We agree with EPA's conclusion that PRRs meet the meaningful heating value legitimacy criterion, and that they are burned as a fuel to specifically recovery energy. As has been described to EPA, virgin biomass can contain up to 60 percent moisture and can have Btu values as low as 3500 MM Btu/hr., as fired.

Biomass boilers are designed to produce heating value from biomass materials, including PRRs. Thus, a threshold Btu value is not appropriate for this alternative fuel. Even traditional fuel differs across the industry. Some mills rely heavily on coal; others on natural gas; others solely on biomass. The choice of fuel depends on availability, cost, and need. Hogged fuel or coal may be the underlying fuel, but it is supplemented by others – both traditional and alternative. This is done in order to meet the energy needs of the mill – but also to address best management of the boiler as well as air quality requirements. If the hogged fuel is wet, higher Btu value fuel may be added to boost heat value; if the boiler is burning too hot, the addition of a fuel with a lower Btu

value enables the combustor to regulate temperature. EPA has recognized this fact in the context of pulp and paper wastewater treatment sludge fuel. 78 Fed. Reg. at 9161. The same is true of PRRs. Accordingly, we do not support a Btu threshold for PRRs. Most mills do not track that statistic, but instead operate their boilers to ensure good combustion efficiency.

### **3. Other Discarded Materials.**

EPA is requesting comment on materials that may inadvertently end up in a bale of paper or paperboard that is sent to a mill. In particular, EPA appears to be concerned about boxes that are not empty or are contaminated.

The collection, processing, and sorting of recovered fibers is a sophisticated \$8.4 billion business that has been in place for many decades. The Institute for Scrap Recycling Industries (ISRI) represents many of those businesses and has developed a Scrap Specification Circular that is used to describe the various types of recovered fiber and prohibited contaminants in bales. Recycled paper mills that purchase recovered fiber to use as their raw material rely on the Scrap Specification Circular as the basis of their purchase agreements. We have attached a copy of the Circular.

Even for those sales transactions that are direct with suppliers, (WalMart, Target, BestBuy and other big box stores frequently have direct sales agreements with recycle mills) mills and suppliers rely on the ISRI Specifications to assure the quality of the bales of recovered fiber received.

There may be isolated instances when bales contain unwanted materials. The bale may be rejected; the bale may be accepted, but rejected after further inspection; or the bale may be used and the contaminants removed during processing. Given the amount of water and fiber that are processed together, it is unlikely that the contaminants would be at a level of concern.

Furthermore, for those mills that are producing recycled paper that will be used for food-contact packaging, additional testing requirements are in place to assure that the

packaging is of suitable purity according to FDA requirements. That testing is of the final paper – not the incoming bales, however there are practices in place to reduce the likelihood of contamination in the incoming bales. We are not suggesting that testing be required; we are suggesting that there are currently appropriate best practices in place that reduce the probability of contaminants in recycled paper and no additional requirements are necessary.

Finally, please note that rejected bales and boxes are sent to a landfill. They are not burned. In fact, the boiler feeder systems cannot feed bales and boxes to a boiler.

Therefore, EPA's concern with contaminated loads of recovered fibers is unwarranted. As EPA notes, PRRs meet the legitimacy criteria for contaminants so we do not believe that any conditions are needed on how mills obtain and manage recovered paper feedstock.

#### **4. PRRs burned off-site.**

EPA is requesting comment on whether to expand the categorical listing to include PRRs that are burned as a fuel product off-site at other paper recycling mills and commercial power plants.

First, we note that under D.C. Circuit precedent, the use of PRRs by the paper industry should not be treated any differently than the use by the generator. AMC I, at 1186, 1192-93 (materials recycled in an ongoing industrial process are not discarded and materials that are destined for beneficial use by the generating industry itself are not waste because such materials are not part of the waste disposal problem). Mills that do not combust solid fuel can and do send PRRs to mills that have that capability.

Second, we agree with EPA that commercial biomass plants are interested in receiving PRRs as fuel. Like pulp and paper mills, these commercial plants recognize the value of PRRs and have solid fuel boilers that can obtain significant fuel value from biomass

fuels. Their use is dependent on the economics of the transactions – is the energy value sufficient to offset the cost to transport the PRRs to the commercial plants. Third, we are concerned that the current approach requiring that the off-site facility petition the Agency before it could acquire and burn PRRs will add significant administrative costs, especially to small pulp mills – many of whom use 100 percent recycled fiber as feedstock. Most small recycled paper mills do not have solid-fuel boilers. They use small package gas-fired boilers to satisfy their energy needs. They do not have the capacity to use the fuel value of their PRRs on-site and therefore look to off-site partners to find appropriate uses for their PRRs.

We do not have data on how many mills send their PRRs off-site for management. Anecdotally, we understand that PRRs sent off-site are probably dewatered prior to shipment. We believe that the decision to send off-site is an ever-changing situation depending on the economics of transportation, processing, traditional fuel costs, and burning. We do have a number of anecdotes that we think are probably representative of the entire industry. For instance, several mills have been able to partner with local utilities that can use the PRRs as fuel. As mentioned above, there are some mills that contract with commercial biomass energy producers. We also are aware that other biomass energy facilities would like the opportunity to use PRRs as a fuel in the future. Like the forest products industry, these biomass energy facilities use stoker, bubbling bed, fluidized bed, or hybrid suspension grate boilers that are designed to get fuel value from biomass fuels.

We are also aware that some companies are processing PRRs into pellets, dewatering, shredding and mixing to improve the fuel characteristics (achieving BTU values well above 5,000 Btu/pound). These PRRs have the same contaminant levels as unprocessed PRRs, and will be managed and stored like the traditional fuels.

Accordingly, we urge EPA to expand the non-waste determination for PRRs as follows:

*(6) Paper recycling residuals, including old corrugated cardboard (OCC) rejects, generated from the recycling of recovered paper and paperboard products and*  
*(i) burned on-site by paper recycling mills whose boilers are designed to burn solid fuel,*  
*(ii) burned by other forest products industry facilities in boilers designed to burn solid fuel,*  
*(iii) burned in a stoker, bubbling bed, fluidized bed, or hybrid suspension grate boiler, or*  
*(iv) burned by any boiler after dewatering and processing to improve heating value.*

### **C. Creosote Treated Railroad Ties.**

In proposed 241.4(a)(6), EPA is proposing to list creosote treated railroad ties (CTRT) as when processed and combusted in a unit that is designed to burn both biomass and fuel oil.

Like C&D wood, processing to create railroad tie fuel is a significant commercial activity. There are approximately 15 railroad tie recovery companies in North America with industry-wide revenue of \$65 - 75 million. Draft letter from Paul Noe to Administrator Jackson (Dec. 6, 2012) (EPA-HQ-RCRA-2013-0110-0002), at 3. These companies are not investing in facilities, equipment, and employee time to discard solid waste. These companies are making these investments to create a fuel product that they can sell (or in some cases can use themselves).

EPA notes that approximately two thirds of the approximately 17 million crossties removed from service each year are combusted for energy recovery and the remainder is used for landscaping or is discarded. 79 Fed. Reg. at 21021.<sup>12</sup>

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<sup>12</sup> According to the largest supplier of treated wood products in North America, new crossties insertions are expected to reach 23.7 million in 2015 and about 20 million wood ties are coming out of track per year. See

A major supplier of railroad ties to the forest products industry estimates that in 2005, approximately 550,000 tons of railroad ties were sold to forest products mills for use as fuel. December 6, 2012 draft letter from Paul Noe to EPA Administrator Jackson, at 2 (EPA-HQ-RCRA-2013-0110-0002). Mills pay about \$20 to \$30 a ton for railroad tie fuel. Id. at 6. Twelve mills that combust railroad ties estimated that it would cost the mills around \$50 million a year to replace the fuel value of the railroad ties. Id. at 2. Many of these pulp and paper mills formerly combusted fuel oil, but have moved or are moving away from fuel oil to natural gas.

Biomass power facilities also are significant combustors of CTRTs. The following chart prepared by the Biomass Power Association (BPA) summarizes existing and potential users of CTRTs by state, quantity, boiler type, and existing auxiliary fuel infrastructure.

Location	Quantity/tons (existing & projected)	Boiler Type	Equipped with fuel oil delivery system	Other Fossil Fuels Used
North Carolina	112,000	Stoker traveling grate	N	Nat Gas (formerly propane)
Oregon	40,000		N	Nat Gas
California	30,000	Zurn travel grate		Nat Gas
Wisconsin	90 -100,000	Stoker	Y (formerly coal)	formerly coal
California	40 - 50,000	CFB	Y	Nat Gas
California	50 - 80,000	CFB	N	Nat Gas (formerly TDF, pet coke, coal)
California	110,000	Stoker	N	Nat Gas
North Carolina	75,000	Stoker traveling grate	N	formerly coal
New York	15,000	Circulating Fluidized Bed (CFB)	Y	Formerly oil and coal
New York	10,000	Stoker traveling grate	Y	N
Michigan	61,000	Stoker	N	Nat Gas
Michigan	61,000	Stoker	N	Nat Gas
Michigan	71,000	Fluidized bed	N	Nat Gas (converted from oil)
<b>Total Tons</b>	<b>815,000</b>			

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"Sustainability: It's not easy being green" [http://www.railwayage.com/index.php/m\\_and\\_w/sustainability-its-not-easy-being-green.html?channel=5](http://www.railwayage.com/index.php/m_and_w/sustainability-its-not-easy-being-green.html?channel=5) (attached).

Biomass boilers operated by BPA members are currently permitted to combust over 650,000 tons a year (with additional use projected). Of this amount, only about 270,000 tons are combusted in facilities that currently use fuel oil. However, the use of fuel oil is for start-up. About 71,000 tons are permitted to be combusted in a boiler that was converted from fuel oil.

Another 270,000 tons is combusted in boilers that are currently or soon will be permitted to combust railroad ties in boilers that have been converted from coal to biomass. When an energy generating facility is converted from coal to biomass, there is a reduction in steam generation capacity as compared to original design. This is due to the fact that biomass has roughly 30 percent of the Btu content of most types of coal. Biomass also has a much higher moisture content, which causes capacity limitations. These limitations include reduced heat exchange rates throughout the boiler components, as well as flow constraints with the flue gas system due to higher volumes and mass flow. In order to maintain at or near design rating for the boiler, a portion of higher Btu fuel, such as CTRTs, is incorporated into the fuel mix.

Finally, there are a number of other boilers used at biomass power facilities and in the forest products industry that have never combusted oil or coal. The facilities we have identified are permitted to combust over 190,000 tons of CTRTs a year.<sup>13</sup>

The ability to continue to combust CTRTs is important to the economic viability of all CTRT combustors. Eliminating the use of CTRTs is likely to bring economic hardship to these facilities as they may (i) be unable to procure a substitute fuel, or (ii) face higher fuel prices given their inability to diversify their fuel supply.

For those facilities that are able to remain in business, restricting CTRT combustion is likely to result in an increase in the use of fossil fuel, such as coal. In addition,

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<sup>13</sup> The CTRT use data in these comments are from use within the forest products and biomass power industries only. EPA also has information in the record showing that a variety of other industry sectors currently combust railroad ties, including utilities and chemical manufacturing facilities. 79 Fed. Reg. at 21022.

eliminating the use of CTRTs will disrupt existing markets for CTRT, and send millions of CTRTs to solid waste landfills, erasing years of efforts to find higher uses for these materials.

Those facilities that are not able to afford replacement fuel will shut down, eliminating a source of carbon neutral energy and eliminating facilities that are needed to manage agricultural biomass, forest biomass, and urban wood.

For all these reasons, while we are encouraged by EPA's proposal, we urge the Agency to expand it as described below to reflect that this material is a valuable commodity fuel.

**1. Definition of Creosote Treated Railroad Ties.**

EPA proposes to define creosote treated railroad ties as follows:

Creosote treated railroad ties means railway support ties treated with a wood preservative containing creosols and phenols and made from coal tar oil.

40 C.F.R. 241.2.

Railroad ties are made from hardwoods that are treated with preservatives. As discussed in the August 20, 2010, comments submitted by KRK Consulting LLC (EPA-HQ-RCRA-2008-0329-1569) (attached) use of borate based compounds (usually disodium octaborate tetrahydrate) has recently become prevalent for the protection of railroad crossties. This commenter provided EPA with data demonstrating that the use of borate compounds on wood would not add contaminants at levels that exceed comparable traditional fuels. Based on these data, EPA has already determined that borate treated wood meets the contaminant legitimacy criterion.<sup>14</sup>

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<sup>14</sup> 76 Fed. Reg. 15456, 15484 (Mar. 21, 2011) ("after reviewing data from the one commenter, which shows that the levels of contaminants in this material are comparable to those found in unadulterated wood for the seven contaminants for which data was presented, we believe that such treated wood meets the legitimacy criterion on the level of contaminants and comparability to traditional fuels").



We encourage EPA to expand that definition to include ties treated with a combination of borate and creosote. The use of borate allows for treatment of heartwood (inner layers of wood), a characteristic not achieved by creosote, by itself, as creosote cannot penetrate into heartwood and typically only treats sapwood. Additionally, encapsulating the borate-treated crosstie with creosote adds a hydrophobic outer layer of protection and a barrier that repels white-rot fungi. Lastly, the use of borate reduces the amount of creosote that needs to be used in crossties. A “dual-treated” tie produced today generally contains 15-20 percent% less creosote than the AWPAs recommended level of approximately seven pounds per cubic foot depending on the species of wood being treated.<sup>15</sup>

On December 4, 2013, the Treated Wood Council submitted data to EPA on the constituents of aged wood products that were dual treated with creosote and disodium octaborate tetrahydrate (attached). These data demonstrate that wood that is treated with both borate and creosote has lower PAH levels (and lower metals levels) than wood that are treated with creosote alone. This is not a surprising result as borate compounds are low in contaminants and dual treatment with borate allows less creosote to be used. These data support including dual treated crossties (which are hardwoods) in the CTRT non-waste listing.

The dual treatment of crossties with borate and creosote is not expected to yield unwanted synergistic chemical reactions. In fact, one patented process to simultaneously treat crossties with borate and creosote uses a blended solution of ~10 percent C2-C6 monoalkanolamine ester of boric acid (prepared by mixing C2-C6 monoalkanolamine in an aqueous solution of boric acid) and ~90 percent creosote. This solution is used for the pressure impregnation step in dual treatment. Stella-

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<sup>15</sup> “Borate (which is relatively harmless to the environment) is injected first, and after achieving full penetration into the wood, a lesser amount of creosote is injected.” See “Sustainability: It’s not easy being green” [http://www.railwayage.com/index.php/m\\_and\\_w/sustainability-its-not-easy-being-green.html?channel=5](http://www.railwayage.com/index.php/m_and_w/sustainability-its-not-easy-being-green.html?channel=5)

Jones, the assignee for the above patent, is now offering this single-step boron, creosote treatment at its Russellville, AR, manufacturing facility.

If EPA does not expand this definition to include borate treatment, the utility of the CTRT non-waste listing may be short-lived. Newer railroad ties are treated with both preservatives.<sup>16</sup> As a result, failure to include dual treated ties in the non-waste listing will adversely affect the crosstie processing industry. For some facilities, transportation costs are a large component of the cost of CTRT fuel. To address this issue, some CTRT business partners are evaluating investments in new CTRT processing facilities that are located closer to the facilities that combust them. However, if the non-waste listing does not include dual treated ties, then these CTRT business partners would have a stranded asset when dual treated ties begin to be removed from service. The uncertainty of the status of dual treated crossties will prevent these investments from being made.

## **2. Limitation Based on Designed to Burn**

EPA is proposing to limit the non-waste listing to circumstances where railroad ties are combusted in a unit that is designed to burn both biomass and fuel oil. The reason for this limitation is EPA's concern over PAH levels in creosote which are lower than found in fuel oil but higher than found in coal.

We disagree that such PAH levels compel the conclusion that railroad ties can only be combusted in a unit that can combust fuel oil.

First, EPA notes that: "Information indicating that CTRTs are an important part of the fuel mix due to the consistently lower moisture content and higher Btu value, as well as the benefits of drier more consistent fuel to combustion units with significant swings in steam demand, further suggest that discard is not occurring." 79 Fed. Reg. at 21028.

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<sup>16</sup> "All Class I railroads [are] now using borate-treated wood ties." *Id.*

This is true of any boiler that is able to combust railroad ties. This conclusion supports the determination that CTRTs are functionally equivalent to traditional fuels they replace and, when balanced against the contaminant legitimacy criterion, it should outweigh any implication EPA is inferring from the PAH levels that discard is occurring.

EPA admits that its “legitimacy criteria” are factors to determine if sham recycling is taking place:

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.

76 Fed. Reg. at 15471.

However, absent evidence of adulteration, levels of Clean Air Act pollutants found in an alternative fuel are not evidence of “sham recycling.” API II, at 58 (identifying the concern as “improper disposal of waste materials through adulteration” and noting that “[s]uch activity is called ‘sham recycling,’ ” citing *United States v. Marine Shale Processors*, 81 F.3d 1361, 1365 (5th Cir. 1996)). In API II, this Court determined that a condition related to pollutant levels in a recycled material could be a valid part of a determination that a material is a waste where there are unexpected constituents in the recycled material that could have been added for the purpose of discarding them. However, this Court also noted that a recycler could show that the constituents in a secondary material “are not a product of adulteration, not discarded, and outside EPA’s authority to regulate such material under RCRA.” *Id.* at 59. The record before the Agency makes this demonstration for railroad ties.

Under EPA's proposal, railroad tie fuel that is fed to a boiler that combusts only biomass and coal could be considered a waste. But, it would not be a waste when combusted in a unit that has a feed system for fuel oil. This would be true even if the two boilers were sitting side-by-side at the same facility and were combusting railroad tie fuel purchased under the same contract. This result is arbitrary and capricious.

### **3. Proposal to expand CTRT listing.**

EPA is requesting comment on expanding the non-waste listing to include CTRTs that are: (1) combusted as part of normal operations in existing units that are designed to burn both CTRTs and fuel oil; or (2) combusted in units at major source pulp and paper mills that are being modified in order to use clean fuel, such as natural gas, instead of fuel oil.

We support expansion of the listing and offer the following comments:

#### **a. Major Source Pulp and Paper Mills.**

First, we strongly agree that it is appropriate to balance the fact that a unit has switched from the use of oil to a cleaner fuel such as natural gas with the contaminant legitimacy criterion when determining whether a secondary material should be considered a non-waste under section 241.4(b). This fuel switching is not evidence of any motivation to discard CTRTs.

EPA appears to limit its proposal to expand the listing to include only units "that are currently designed to burn both biomass and fuel oil but are changing (i.e. removing oil delivery equipment) in order to burn natural gas." 79 Fed. Reg. at 21028. We urge EPA to also include mills that have already switched from fuel oil to natural gas, are currently being modified to switch from fuel oil to natural gas, or in the future switch from fuel oil to natural gas. EPA's rationale, which is that the unit was designed to burn fuel

oil and is switching to a more environmentally friendly fuel, applies equally in each of these circumstances.

If EPA decides to limit the types of boilers at pulp and paper mills that can combust CTRTs under the expanded listing, we urge EPA to add hybrid suspension grate boilers to that list. These boilers are similar to the boilers listed and combust railroad tie fuel and other biomass fuels.

**b. Coal to Biomass Conversion Facilities.**

We urge EPA to also expand the listing to allow combustion of CTRTs by biomass boilers that have already or in the future convert from coal to biomass.

EPA notes that for pulp and paper mills: “Information indicating that CTRTs are an important part of the fuel mix due to the consistently lower moisture content and higher Btu value, as well as the benefits of drier more consistent fuel to combustion units with significant swings in steam demand, further suggest that discard is not occurring.” 78 Fed. Reg. at 21028. We agree with this statement and note that it also is true when an energy generating unit is converted from coal to biomass. As discussed above, this conversion results in a reduction in steam generation capacity as compared to original design. To maintain at or near design the rating for the boiler, a portion of higher Btu fuel, such as CTRTs, is incorporated into the fuel mix.

EPA also says with respect to pulp and paper mills: “The nature of the CTRTs as a product fuel does not make it a waste on switching to the cleaner natural gas for the boiler.” *Id.* Again, we agree with this statement and note that it also is true for biomass boilers that have switched from coal to cleaner biomass.

While coal-to-biomass conversion facilities generally are not designed to burn fuel oil, EPA can balance other relevant factors against the contaminant legitimacy criterion. To

successfully convert from coal to biomass, a conversion facility must be able to co-fire a higher Btu fuel as needed. It is environmentally preferable to avoid the use of coal or fuel oil for that higher Btu fuel. Accordingly, EPA should not punish or discourage facilities that switch from coal to biomass by taking away the ability to co-fire CTRTs. The environmental benefits of this conversion, including reduction in lifecycle greenhouse gas emissions, is another relevant factor that EPA can consider as part of a decision to list a fuel as a non-waste under section 241.4.

### **c. Other Biomass Boilers**

As discussed above, there are a number of biomass boilers in both the forest products and biomass power industries that rely on CTRT fuel but are not current or former users of either oil or coal.

Combustion of CTRTs is environmentally preferable to the use of fossil fuels. According to a life cycle analysis of alternative end of life uses of CTRTs, each tie used for energy results in a net offset of carbon dioxide emissions of approximately 249 pounds and if all railroad ties were recycled for energy use, the result would offset the greenhouse gas and fossil fuel use equivalent to a city of nearly 100,000 people.<sup>17</sup>

The importance of reducing carbon dioxide emissions, the importance of maintaining capacity for managing agricultural biomass and urban wood, and the importance of CTRT fuel to the continued economic viability of many facilities all are other relevant factors for EPA to balance with the contaminant legitimacy criterion. In addition, as high Btu value fuel, CTRTs are functionally equivalent to traditional fuels that these solid fuel boilers would otherwise combust (such as coal).<sup>18</sup> These factors, in addition to the fact

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<sup>17</sup> Stephen Smith and Chris Bolin, Creosote-Treated Ties, End-of-Life Evaluation (Feb. 18, 2010) (EPA-HQ-RCRA-2013-0110-0044).

<sup>18</sup> Under 40 C.F.R. 242.4(b)(5)(2), whether an alternative fuel is functionally the same as a comparable traditional fuel is a basis for identifying a fuel as a non-waste even if it does not meet one or more of the legitimacy criteria. In the proposed rule, EPA suggests that contaminant levels in CTRTs preclude a determination that CTRTs are functionally the same as a comparable traditional fuel. 79 Fed. Reg. at 21027-28.

that CTRT fuel is a valuable commodity that is bought and sold in commerce, all support a determination that CTRT fuel is not a waste when combusted in any biomass boiler.

**d. Limitation on CTRT Use.**

We request that EPA not impose a condition that CTRT fuel comprise no more than 40 percent of the fuel that is used on a monthly basis. While companies keep purchase records they do not track the fuel mix on a monthly basis. In addition, some boilers are permitted to combust up to 50 percent CTRTs and other boilers have permits that have no limits. The allowable percent of CTRT fuel use by an individual boiler is a matter that is best left to the permitting authority. Further, we do not understand how this condition is an indication of legitimate use v. discard.

If EPA believes that this condition is important and can explain how it helps to distinguish legitimate use, we suggest that the condition allow up to 50 percent CTRT use, specify how the percentage is to be measured, and allow the limit to be met on a yearly, not monthly, basis. It will be easier for combustors to demonstrate compliance with this condition on a yearly basis using records that are already kept.

**4. Comparison to more than one traditional fuel (biomass and fuel oil).**

We agree that the NHSM Rule allow a comparison to more than one traditional fuel when evaluating legitimacy and that the traditional fuels used can be both solid and liquid fuels.

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This analysis is inconsistent with both the structure of section 242.4(b)(5)(2), which allows the functionality of a fuel to be balanced against the contaminant levels. And, as the contaminant levels in CTRTs do not affect its value as a fuel, this analysis also is inconsistent with the definition of the term “function,” i.e., “the special purpose or activity for which a thing exists or is used.” <http://www.merriam-webster.com/dictionary/function>

EPA notes that combustion units are often designed to burn multiple traditional fuels, and some units can and do rely on different fuel types at different times based on availability of fuel supplies, market conditions, power demands, and other factors. We agree that it would be arbitrary to restrict the combustion for energy recovery of NHSMs based on contaminant comparison to only one traditional fuel if the unit could burn a second traditional fuel chosen due to such changes in fuel supplies, market conditions, power demands or other factors. Further, we agree that if a unit can burn both a solid and liquid fuel, then comparison to either fuel would be appropriate. In fact, opposite conclusion would mean that contaminants in a traditional fuel that a unit is actually burning could be considered elevated, when compared to another traditional fuel that the unit is actually burning. This would be an absurd result.

#### **5. Recordkeeping.**

EPA requests comment on whether the NHSM rule should impose a recordkeeping requirement. The Boiler MACT and CISWI rules already have record-keeping requirements. We believe that no additional records are necessary. In addition, we note that the existence of a record is not an indication of whether or not discard is occurring under RCRA and we strongly urge EPA to continue to rely on the record-keeping requirements under the Clean Air Act rules.

#### **6. Suggested language.**

To implement the recommendations discussed above, we suggest the following regulatory language:

*(7) Creosote-treated railroad ties and railroad ties that treated with both creosote and a borate compound that are processed and combusted -  
(i) in units designed to burn both biomass and fuel oil;*



*(ii) in existing stoker, bubbling bed, fluidized bed, or hybrid suspension grate boilers at major source pulp and paper mills that have been, are being, or will be modified to use clean fuel, including natural gas, instead of fuel oil[;]*

*(iii) in existing stoker, bubbling bed, fluidized bed, or hybrid suspension grate boilers at facilities that have been, are being, or will be modified to use biomass as a primary fuel, instead of coal; and*

*(iv) in any stoker, bubbling bed, fluidized bed, or hybrid suspension grate boiler that uses biomass as a primary fuel where high Btu value fuel enhances the operation of the boiler and use of railroad ties will minimize the use of coal or other fossil-based solid fuels.*

### **III. Conclusion**

Thank you for developing this proposed rule and for considering the foregoing comments. We urge you to finalize this rule promptly to allow companies to plan for the future use of these materials.

If you have any questions about these comments, please contact Susan Bodine at 202-371-6364 or [susan.bodine@btlaw.com](mailto:susan.bodine@btlaw.com).