*Representing the Interests of America's Industrial Energy Users since 1978*

Mr. George Faison
Office of Resource Conservation and Recovery
Materials Recovery and Waste Management Division
MC 5304P
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

September 26, 2014

**Re: Supplemental Comments of the Council of Industrial Boiler Owners (CIBO)**
**Proposed NHSM Rule 79 Fed. Reg. 21,006 (Apr. 14, 2014)**
**Docket No. EPA–HQ–RCRA–2013–0110**

Dear Mr. Faison:

These comments supplement CIBO comments on EPA's proposed rule "Additions to List of Section 241.4 Categorical Non-Waste Fuels," 79 Fed. Reg. 21,006 (Apr. 14, 2014).[1] CIBO strongly supports a regulatory outcome that allows CIBO members to continue the traditional practice of using creosote treated railroad ties (CTRTs) as fuel. Consistent with its regulations, EPA should take into account and give appropriate emphasis to several factors that demonstrate CTRTs are non-waste fuel when combusted.

EPA proposes to add CTRT to the list of non-waste categorical fuels only if they are "combusted in units designed to burn both biomass and fuel oil" (79 Fed. Reg. 21,006)[2] or in pulp and paper facilities switching from fuel oil to natural gas only if CTRTs constitute 40% or less of the fuel burned on a monthly basis. 79 Fed. Reg. 21,028. EPA's rationale for this proposal is that the contaminant levels in CTRT are comparable to both biomass and fuel oil when considered together, but levels of certain compounds like PAH are higher than biomass alone. EPA has stated that elevated levels of contaminants in a material may indicate that the material is being discarded. We do not agree that under the governing regulations, a contaminant comparison showing some comparably higher chemical constituent level leads inexorably to the conclusion that the material is a waste.

---

[1] CIBO Comments on the Proposed Rule, EPA-HQ-RCRA-2013-0110-0088.

[2] EPA also seeks comment on an approach that would define CTRTs as fuel if combusted in pulp and paper sources designed to burn biomass and fuel oil that are switching to natural gas. 79 Fed. Reg. 21,028. CIBO supports any non-waste determination that allows for use of CTRTs as a fuel. However, the approach outlined in the proposal does not cover all sources that use CTRTs and establishes a limitation on percentage of CTRT usage that is unreasonably low.

Council of Industrial Boiler Owners
6801 Kennedy Road, Suite 102, Warrenton, VA 20187
Phone: 540.394.9043 Fax: 540.349.9850
E-Mail: cibo@cibo.org

Section 241.4(b)(5)(ii) specifically recognizes the complexity of these determinations and provides EPA with the discretion to rely on other specified factors, or any "other relevant factors as appropriate," to support a non-waste determination without regard to the fuel oil and 40% limitations as proposed. EPA may determine that a material is a non-waste fuel based on the showings that the use of the NHSM is "integrally tied to the industrial production process… functionally the same as the comparable traditional fuel, or other relevant factors as appropriate." 40 CFR 241.4(b)(5)(ii). Although EPA may make a determination based on ANY ONE of these factors, CTRT meets ALL of these factors.

*CTRTs are integrally tied to the industrial production process*

Use of CTRTs as fuel is integrally tied to the industrial production process. Facilities burn particular fuels based on many factors, including combustion unit design, regulation requirements, availability, and cost. Facilities that burn CTRT as 100 percent of their fuel mix undoubtedly rely on the use of CTRT as a renewable energy source (e.g., to meet state renewable portfolio standards). Their use of CTRT is integral to their mandatory compliance with state or local rules and those facilities have adapted their processes to the fuel mix permitted by their regulatory jurisdictions. CTRT is also integral to the economic viability of those facilities. Facilities that burn CTRT as part of their fuel mix rely on it as part of a balancing of fuel costs and also as a material that improves combustion of "wet" biomass fuels. If the power sector replaced CTRT fuel with whole tree chips, less biomass would be available as feedstock and fuel for the forest products industry and costs would increase. Where a facility is not able to burn CTRT as fuel and the result is an increase in energy cost, that use of CTRT is demonstrably integrally tied to the facility's production process.

*CTRTs are functionally the same as biomass*

CTRT fuel is functionally the same as the comparable traditional fuel – biomass. CTRT fuel is delivered to facilities in the same manner, stored in the same manner, and delivered to the boiler in the same manner as biomass. State agencies have recognized that CTRT fuel is functionally the same as biomass fuel when they have issued air permits for its use as fuel. *See e.g.,* GDF SUEZ Comments on Proposed Rule, EPA-HQ-RCRA-2013-0110-0075. Boilers are not specifically designed for CTRT; this material is burned in boilers designed to burn biomass.

*Multiple other relevant factors show CTRT are a non-waste fuel*

The record for this proposed rule supports a finding that CTRTs are non-waste fuel. Among the other relevant factors that are appropriate for EPA consideration and provided by documents in the record are these:

- CTRTs are not disposed of as waste but are managed/recycled purposefully for use as a fuel.
- CTRTs meet all of the legitimacy criteria when compared to biomass except for level of PAH.
- State air permitting agencies have historically allowed combustion of CTRTs as fuel.
- Chipped CTRTs are burned as a renewable fuel and can displace use of fossil fuels.

- Air emissions from combustion of CTRT are equivalent to air emissions from combustion of other types of biomass.
- CTRTs would be landfilled instead of burned if EPA determines that they are solid waste when combusted in boilers that do not burn both biomass and oil.
- A diverse energy portfolio is important and energy costs for facilities burning CTRTs would increase if CTRTs are deemed solid waste.
- Determination that CTRT are solid waste will negatively impact small businesses that process CTRT as fuel for sale to industrial facilities.
- CTRTs are integral to the economic viability of several facilities, as noted in the record. *See* Archer Daniels Midland Company Comments on Proposed Rule, EPA-HQ-RCRA-2013-0110-0090.
- Many boilers burning solid fuel are permitted to burn non-waste fuel oil by distributing it on or otherwise combining it with portions of the solid fuel that is then delivered to the combustion unit using the solid fuel feed mechanisms, so a separate fuel delivery mechanism for injection of liquid fuel oil into the furnace is not a necessary component of a boiler being "designed to burn" fuel oil.

In addition to these relevant factors, EPA should also consider the air emissions from combustion of CTRTs, as compared to biomass. As reflected by the preamble to the proposed rule and assuming EPA has reviewed and analyzed all information included in the docket, EPA is aware of many studies showing that air emissions from combustion of CTRT are equivalent to air emissions from other types of biomass. We understand that this is a waste definition rule that focuses on contaminants present in the fuel, but the purpose of the rule is to determine which air emission standard will apply to specific Clean Air Act-regulated combustion units. Air emissions are clearly relevant to the discussion. CIBO members have provided additional data on contaminant levels in CTRT and combustion ash and their effect on air emissions. *See*, Archer Daniels Midland Company Comments on Proposed Rule, EPA-HQ-RCRA-2013-0110-0090, Attachment A; GDF SUEZ Comments on Proposed Rule, EPA-HQ-RCRA-2013-0110-0075. These data illustrate that CTRT are functionally equivalent from an environmental perspective, to other biomass fuels. The data also support a finding by EPA based on appropriate, relevant factors, that would allow the continued use of CTRT as fuel – without the fuel oil and 40% limiting conditions – consistent with the treatment of other biomass materials with similar air emission profiles.

Courts have recognized broad discretion by EPA to interpret regulatory terms, which EPA can exercise under § 241.4(b)(5)(ii) when making non-waste determinations. *See*, e.g., *Ethyl Corp. v. EPA*, 541 F2d 1, 28 (D.C. Cir. 1976) "[t]he Administrator may apply his expertise to draw conclusions from suspected, but not completely substantiated relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as 'fact,' and the like." Courts have recognized EPA's discretion in other similar contexts, such as "[w]here an industrial by-product may be characterized as discarded or 'in process' material, EPA's choice of characterization is entitled to deference." *American Petroleum Institute v. EPA*, 216 F.3d 50 (D.C. Cir. 2000) quoting *American Mining Congress v. EPA*, 907 F.2d at 1186. These instances in caselaw show that under the present circumstances, even if a material fails to meet the legitimacy criteria, EPA has the statutory interpretive

authority, bolstered by express regulatory authority under § 241.4(b)(5)(ii), to rely on many other relevant factors when making a non-waste determination.

Finally, we note that no party has suggested that the non-waste determination for CTRTs is unlawful or inappropriate. Commenters have suggested only ways to amend the determination to achieve consistency in the use of CTRT and other biomass materials as non-waste fuel. EPA should use the data and rationale in the record to finalize a non-waste determination that allows for the use of CTRTs in combustion units without limiting factors tied to specific fuel-based boiler designs or percentages of fuels combusted.

If you have questions or need clarification, please feel free to contact me.

Sincerely yours,

*/s/ Robert D. Bessette*

Robert D. Bessette
President