

February 2, 2009

U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Attention: Docket ID No. EPA-HQ-RCRA-2008-0329

Dear Sir/Madam:

The Solid Waste Subcommittee of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) appreciates the opportunity to review and provide comments on the advanced notice of proposed rulemaking (ANPRM) related to “Identification of Non-Hazardous Materials That Are Solid Waste” published in the Federal Register, Volume 74, No. 1, January 2, 2009. These comments have not been reviewed or adopted by the ASTSWMO Board of Directors. In addition, individual State solid waste programs may also provide comments based on their perspectives and experiences.

Before noting our specific comments, we want to underscore our willingness to continue to work with EPA and others as this rulemaking is developed. The Subcommittee appreciates that the reuse and recycling of industrial materials is one of the four national priority areas in EPA’s Resource Conservation Challenge. This is also an important component of States’ solid waste management programs. A survey conducted in 2006 by the Beneficial Use Task Force of ASTSWMO’s Solid Waste Subcommittee found that 34 of the 40 reporting States have either a formal or informal decision-making process for beneficial use determinations. You might find the survey results regarding various wastes evaluated for beneficial use and their uses, contained within Appendix B of the ASTSWMO Beneficial Use Survey Report, to be of interest; the survey report can be found at: <http://astswmo.org/files/publications/solidwaste/2007BUSurveyReport11-30-07.pdf>. Many of these programs are relatively new compared to other solid waste regulatory activities and the trend is moving toward more States adopting programs or procedures to address this issue. Accordingly, the Subcommittee has a keen interest in this ANPRM.

Besides the guiding principles described in section V.A.2 of the ANPRM, EPA should consider how rules may impact the solid waste management hierarchy that many States’ solid waste management plans and reduction and recycling goals are based upon. With some variation in the description of the components, States’ and EPA’s waste management hierarchy includes the following:

1. Reduce the amount of solid waste being generated;
2. Reuse materials for the purpose it was originally intended;
3. Recycle materials that cannot be reduced or reused;
4. Recover, in an environmentally acceptable manner, energy from solid waste; and,
5. Disposal at a permitted landfill or other approved facility.

Any rules should be examined to ensure that barriers or disincentives to waste reduction through pollution prevention principles have not been unintentionally created. Likewise, caution must be exercised so that markets for acceptable secondary materials are not disrupted to the point where these materials become disposal items.

Most States have developed in statute and/or rules a definition for solid waste, each with their own nuances. This is acknowledged in section IV.B of the ANPRM. State definitions not only apply to solid waste programs but may also be applicable to other environmental programs. In either case there could be unintended negative consequences if no flexibility is provided to States. Before drafting a rule that may create a strict Subtitle D definition of solid waste that has no latitude as far as States being able to include their own interpretive language to address unique circumstances, we respectfully ask the Agency to consider the comments and concerns set forth in this letter.

In section IV.B of the ANPRM it is stated that the Agency does not envision that a Subtitle D definition of solid waste which may result from this rulemaking will impact any other types of management activities for secondary materials, such as landfilling, composting, etc. We would add beneficial use determinations to the list and state our opinion that a Subtitle D definition of solid waste will have an impact on how these materials are currently being managed by States. The rationale for this concern is presented as follows.

Stringency provisions in State law can be problematic. Even where there is no stringency clause an argument often is made by the regulated community to State legislators that the State environmental regulatory agency is going beyond federal requirements. If a material is not defined as a solid waste under Subtitle D then can a State regulate it as such through its solid waste program? Because the specific secondary materials discussed in the ANPRM are fairly ubiquitous, national industry groups may go to States and apply pressure not to go beyond the federal requirements. Conversely, through experience some States have issued exemptions for certain materials and their applications through rules and guidance. If the material is considered to be a solid waste through a Subtitle D definition then one may argue that the State is being less stringent through these exemptions and they must be rescinded.

The Subcommittee appreciates the Agency's acknowledgement of potential impacts this rulemaking may have on States' beneficial use determinations. A point of confusion that needs to be clarified is clearly delineating where in the continuum of being generated as a byproduct to being used in an approved application does a material become defined as a legitimate resource and no longer a solid waste? Most of the discussion in the ANPRM involves secondary materials that are used as alternative fuels or ingredients in industrial

processes. If a material that is used in one of these applications is deemed not to be a solid waste, can that same material be regulated as a solid waste when proposed to be used in another beneficial use? The answer to this question must be considered during this rulemaking.

Section V.A.3.c includes a discussion on processing. The Subcommittee concurs that in most cases a material that is processed to a certain market specification is most likely not to be discarded. But related to the point in the previous paragraph, when would this material meet the non-solid waste definition? For example, there is technology that allows for the production of fuel pellets from the biomass portion of the fines created during the processing of construction and demolition waste. If potential rulemaking defines these pellets as a secondary material, how would this impact a State's ability to regulate the raw construction and demolition waste as a solid waste? What about the fines themselves? This material includes a large portion of inert substances and contaminants that must be removed prior to making the fuel pellet product. We would like to make one last point regarding processing. There are occasional instances where materials are processed solely to reduce their overall volume. In some cases this can be done cheaper than disposal. It may lead to situations where the "processed" material is stored either as speculative accumulation or in fact is sham recycling. We would caution the Agency not to simply use processing as a blanket determination as to what is not a solid waste.

The Subcommittee asks that issues dealing with the management and storage of secondary materials be considered in the rulemaking. In Section V.A.2.a, the Agency recognizes the situation where there is no analogous raw material at a boiler or incinerator site and therefore dedicated containment and handling processes may be necessary to manage the secondary material. Some secondary materials in the pre-processing phase may need to meet storage and handling requirements defined in State solid waste regulations. Or in the case of the burning of whole tires, there is no difference between the circumstances of tires being stored as inventory versus being part of a waste tire stockpile at an approved storage or processing facility. We are concerned that once a material is no longer defined as a solid waste, States would not be able to enforce handling and storage regulations.

Another need for flexibility for States is to be able to address the volatility of secondary materials' markets. Markets can be impacted by a variety of factors including changes in prices for raw materials, prices for other secondary materials that can be substituted in a process, and changes in technology. States' concerns would be in those situations where a material is outside of a Subtitle D definition of solid waste but changes in the marketplace essentially eliminate the secondary material to the point where disposal is the only option. Likewise, there needs to be a mechanism that allows States to consider new materials and uses without having to rely upon EPA rulemaking. And as lessons are learned it is important that States can go back and place new conditions or restrictions on previous determinations or even to rescind a beneficial use determination. Related to this, States are in a better position to review and re-analyze previous beneficial use determinations so that the program remains vibrant and is not relying upon stale data.

Finally, despite the decision of the D.C. Circuit Court of Appeals in *American Mining Congress v. EPA* and their rejection of a more expansive meaning of the term ‘discard,’ no beneficial use should be considered legitimate until it has been explicitly deemed as such by a regulatory body, be it EPA or a State beneficial use program. Though a material may not have been “disposed” and it may be “destined” for reuse, without a requirement for regulatory action and oversight to determine the legitimacy of the reuse the potential for abuse would be significant.

Again, we want to express our thanks for the opportunity to comment and reiterate our willingness to work with the Agency as this rulemaking proceeds. If you have any questions about these comments, you can contact me at 515-281-8927 or at brian.tormey@dnr.iowa.gov.

Sincerely,

A handwritten signature in black ink that reads "Brian Tormey". The signature is written in a cursive style with a prominent initial "B" and a long, sweeping underline.

Brian Tormey
Chair, ASTSWMO Solid Waste
Subcommittee