

VIA Hand Delivery



April 21, 2009

The Honorable Lisa P. Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building, Room 3000
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Response to Sierra Club's Petition for Reconsideration of "Revisions to the Definition of Solid Waste," 73 Fed. Reg. 64,668 (Oct. 30, 2008)

Dear EPA Administrator Jackson:

The National Mining Association (NMA) respectfully requests that the U.S. Environmental Protection Agency (EPA or the agency) deny the Sierra Club Jan. 29, 2009, petition for reconsideration of "Revisions to the Definition of Solid Waste" final rule (Sierra Club Petition). NMA also urges EPA to vigorously defend this Oct. 30, 2008, final rule, 73 Fed. Reg. 64,668 (Final Solid Waste Rule), in the litigation initiated by the Sierra Club in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) through Sierra Club's filing of a petition for review on Jan. 28, 2009.

NMA, along with several other industry associations, on March 26, 2009, met with EPA staff, including Senior Policy Counsel Robert Sussman, to discuss the Sierra Club Petition. Together, the industry participants voiced strong support for the Final Solid Waste Rule. In this letter, NMA expands on this message of support and provides the rationale for our opposition to the Sierra Club Petition, particularly as it pertains to EPA's jurisdiction under the Resource Conservation and Recovery Act (RCRA) to regulate mining and mineral processing industry hazardous secondary materials that are stored prior to being used in industry production operations.

Of particular concern to NMA is the position taken by the Sierra Club in its petition regarding the agency's alleged failure to adequately define the terms "contained" and "significant release" in the Final Solid Waste Rule. According to the Sierra Club, EPA abused its discretion and acted arbitrarily, capriciously and otherwise not in accordance with the law by not defining these terms with more particularity. As discussed in further detail below, the Sierra Club's claim is contradicted by the ample guidance in the preamble on what those two terms mean. Furthermore, and perhaps most importantly, the remedy Sierra Club seeks, particularly to the extent imposed on the mining and mineral processing industry, would violate RCRA as it would push EPA

beyond the statutory jurisdictional limits placed upon the agency by Congress. It would also violate the D.C. Circuit's decision in *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000) (hereinafter *ABR*).

INTEREST OF NMA

NMA is a national trade association representing the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. NMA has been deeply engaged for over 20 years in the regulatory debate over what constitutes a "solid waste" under RCRA. NMA actively participated in all of the major EPA rulemakings addressing the definition of solid waste, including submitting comments on EPA's most recent supplemental proposed rule. See NMA's Comments, Document ID: EPA-HQ-RCRA-2002-0031-0481.1 (June 25, 2007).

NMA has also been one of the lead parties in most of the key court cases involving judicial challenges to the numerous prior EPA rulemakings on the definition of solid waste, including *ABR*, which was the impetus for the Final Solid Waste Rule. NMA's predecessor, the American Mining Congress, was the lead petitioner in the first decision that reaffirmed the jurisdictional bounds of EPA's authority under RCRA. *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987) (hereinafter *AMC I*).

RESPONSE TO THE SIERRA CLUB PETITION

I. Contrary to Sierra Club's Contention, EPA's Final Definition of Solid Waste Rule is Not a Bush Administration "Midnight Regulation"

The Sierra Club Petition argues at the outset that "[t]he rush to publish produced a vague and unenforceable rule that arbitrarily and capriciously ignores the significant adverse impacts to the health and the environment that will be caused by the Rule's removal of fundamental RCRA protections." Sierra Club Petition at 1 (emphasis added). This characterization of the regulatory process surrounding the adoption of the Final Solid Waste Rule could not be further from the truth. See Attachment A.

Since the adoption of the original RCRA rules in 1980, EPA and interested stakeholders have engaged in an extensive debate in both the rulemaking and judicial arenas on the critical question of what constitutes a "solid waste" under RCRA. The mining and mineral processing industry in particular has been laboring under a series of regulatory definitions that improperly and unlawfully characterized in-process secondary materials used in production operations as wastes. See 50 Fed. Reg. 614 (Jan. 4, 1985) (rule successfully challenged by AMC in *AMC I*); 63 Fed. Reg. 28,556 (May 26, 1998) (rule successfully challenged by NMA in *ABR*).

Most recently, the debate centered on EPA's Oct. 28, 2003, proposed rule that would have excluded from the definition of solid waste any material generated and legitimately reclaimed in a continuous process within the same industry. 68 Fed. Reg. 61,558. EPA requested comment on this approach, a broader conditional exclusion,

and the codification of legitimacy criteria. This rulemaking represented a broader response to the *ABR* decision of 2000, in which the D.C. Circuit held that EPA could not exert jurisdiction over the mining and mineral processing industry's storage of secondary materials destined for recycling.

On March 26, 2007, over three years later, EPA published a supplemental proposed rule that outlined a restructured approach to defining what constitutes a "solid waste." 72 Fed. Reg. 14,172. EPA pursued a restructured approach largely based on its evaluation of hundreds of public comments previously submitted on the 2003 proposal. According to the agency, the restructured 2007 proposal reflected an "[examination of] the principles behind the [D.C. Circuit's] holding on the definition of solid waste, rather than trying to fit materials into specific fact patterns addressed by the court." *Id.* at 14,175.

To support its restructured approach, the agency conducted the following three studies: (1) "An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials;" (2) "An Assessment of Good Current Practices for Recycling of Hazardous Secondary Materials;" and (3) "A Study of Potential Effects of Market Forces on the Management of Hazardous Secondary Materials Intended for Recycling." EPA conducted these studies to counter public comments critical of the agency's administrative record and support for streamlined requirements for recycled hazardous secondary materials. These comprehensive studies informed the agency on the types of controls that might be needed to protect the environment from possible mismanagement, improper disposal, or abandonment of recycled hazardous secondary materials.

In 2008, EPA proposed two conditional exclusions for hazardous secondary materials (i.e., listed sludges, listed by-products, and spent materials): (1) generated and legitimately reclaimed under the control of the generator; and (2) generated and transferred to another company for legitimate reclamation. EPA believed that these exclusions "more directly consider[ed] whether particular materials are not considered 'discarded,' and are not solid and hazardous wastes subject to regulation under Subtitle C of RCRA." *Id.* at 14,178. In addition, EPA proposed a non-waste determination petition process and the codification of the so-called legitimacy factors.

EPA published a final rule 19 months later, codifying the exclusions largely as proposed. 73 Fed. Reg. 64,668 (Oct. 30, 2008). EPA also codified a modified petition process for case-specific non-waste determinations. Finally, EPA codified a provision on determining legitimate recycling practices. The final rule became effective on December 29, 2008.

NMA believes the extensive history of this rulemaking, which began in the 1980s and which included a series of proposals in response to a D.C. Circuit remand since 2000, clearly shows that EPA's final rule is not a "midnight regulation" that was "rushed to publication" by any stretch of the imagination. The extensive administrative record developed over the last six years in particular supports the agency's actions. The Final Solid Waste Rule also ends 24 years of debate on the definition of solid waste. The final rule is a well-reasoned and balanced action by the agency and should not be

stigmatized nor reopened simply because it was published at the end of the Bush Administration.

II. EPA Would Jeopardize the Progress Made in the Final Rule by Acquiescing to Sierra Club's Petition for Reconsideration

As EPA is aware, the agency's regulatory authority under Subtitle C of RCRA is "limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away." *ABR*, 208 F.3d at 1051 (quoting *AMC I*, 824 F.2d at 1190). Until the "point of generation," i.e., when the material is actually discarded, the material is not a waste, and EPA does not have jurisdiction under RCRA over the secondary material.

In the Final Solid Waste Rule, however, EPA adopts numerous conditions in the context of the generator control and transfer-based exclusions and has thus exercised jurisdiction over secondary materials that are not in fact discarded. These conditions include that secondary materials managed in non-land-based and land-based units be "contained." 73 Fed. Reg. 64,760 (40 C.F.R. §§ 261.2(a)(2)(ii) & 261.4(a)(23)).

NMA believes, as argued extensively in our comments on the supplemental proposed rule, that EPA's assertion of RCRA authority over secondary materials not discarded is unlawful. The D.C. Circuit, in both *AMC I* and *ABR*, explicitly addressed this issue and rejected EPA's attempts to exert jurisdiction over stored in-process materials that had not been discarded. *ABR*, 203 F.3d at 1053, *AMC I*, 824 F.2d at 1192-93.

NMA, however, supports the Final Solid Waste Rule as adopted. NMA recognizes that the final rule represents a reasoned balance between providing the necessary regulatory relief for encouraging resource conservation and recovery and the need to continue to protect public health and the environment. EPA provided adequate guidance in the preamble on what it means to "contain" secondary materials managed in non-land-based and land-based units. 73 Fed. Reg. at 64,680-81. This guidance provides the necessary flexibility for meeting this standard. EPA also provided several examples to describe what the agency considers a "significant" release. *Id.* The language and examples in the preamble provide appropriate benchmarks for facilities and state inspectors to determine whether a secondary material is "contained."

More importantly, EPA was right to conclude that "further engineering controls, such as secondary containment, liners, and leak detection systems" were not needed to determine whether a secondary material is discarded. 73 Fed. Reg. 64,719. EPA was also right to conclude that not all technologies are appropriate in each case. *Id.*

Sierra Club's petition suggests that it will seek additional baseline design standards if EPA were to reconsider the final rule. Sierra Club's sought after remedy would squarely violate the D.C. Circuit's opinion in *ABR*, which struck down EPA's attempts in the mining and mineral processing industry to require specific storage conditions for materials not discarded.

In the rulemaking at issue in *ABR*, EPA attempted to create a "conditional exclusion" from the definition of solid waste for the mining and mineral processing industry. As

The Honorable Lisa P. Jackson
April 21, 2009
Page Five

part of the exclusion, and allegedly to ensure that the material was "contained" and to prevent releases, EPA established a series of conditions relating to storage, including the precise type of "baseline design criteria for storage" referred to by the Sierra Club in its petition. 63 Fed. Reg. at 28,581.

The D.C. Circuit, however, struck down these storage conditions holding that EPA could not, in the context of the mining and mineral processing industry, exert RCRA jurisdiction over the storage of secondary materials destined for recycling. *ABR*, 208 F.3d at 1051-53. Thus, as a matter of law in the wake of the *ABR* decision, EPA cannot grant the relief sought by the Sierra Club to the extent it would affect the mining and mineral processing industry and NMA members.

CONCLUSION

EPA's Final Solid Waste Rule represents a major accomplishment. It provides an important and necessary end to the decades of regulatory uncertainty over what constitutes a "solid waste" under RCRA. The final rule also provides a tremendous benefit by encouraging resource conservation and protection.

NMA fully supports the final rule as promulgated in 2008 and has filed a motion to intervene in the Sierra Club's lawsuit in support of the agency. NMA, however, would withdraw its support if EPA were to reconsider the final rule, particularly if the agency's intention were to incorporate unlawful additional performance or technological standards in response to Sierra Club's position regarding "containment" and "significant releases."

Sincerely,



Tawny A. Bridgeford
Associate General Counsel

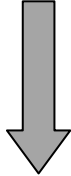
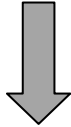


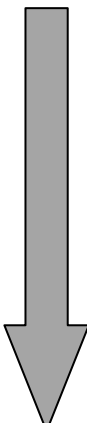

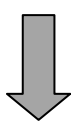
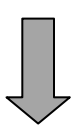
Enclosure

CC: EPA Senior Policy Counsel, Robert M. Sussman

ATTACHMENT A

Definition of Solid Waste Regulatory Process: Mining & Mineral Processing Specific

Timeline

<i>Resource Conservation and Recovery Act (RCRA)</i> 42 U.S.C. §6901 et. seq.	1976
	
<i>RCRA Interim Final Rule – Definition of Solid Waste Provisions</i> 45 Fed. Reg. 33,090-33102 (May 19, 1980)	1980
	
<i>RCRA Definition of Solid Waste Proposed Rule</i> 48 Fed. Reg. 14,472 (April 4, 1983)	1983
	
<i>RCRA Definition of Solid Waste Final Rule</i> 50 Fed. Reg. 614 (Jan. 4, 1985)	1985
	
<i>American Mining Congress v. EPA (AMC I)</i> 824 F.2d 1177 (D.C. Cir. 1987) (Challenging the 1985 Definition of Solid Waste Rule)	1987
	
<i>Land Disposal Restrictions Phase IV – Final Rule</i> 63 Fed. Reg. 28,555 (May 26, 1998)	1998
	
<i>Association of Battery Recyclers v. EPA</i> 208 F.3d 1047 (D.C. Cir. 2000) (Challenging the “Land Disposal Restrictions Phase IV” Rule)	2000
	
<i>Final Rule: Response to Court Order Vacating Regulatory Provisions</i> 67 Fed. Reg. 11,251 (March 13, 2002) (Responds to <i>ABR</i> and announces plans to propose a separate rule to revise the definition of solid waste)	2002
	

ATTACHMENT A

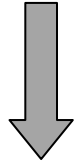
Definition of Solid Waste Regulatory Process: Mining & Mineral Processing Specific

Timeline

Definition of Solid Waste Proposed Rule

68 Fed. Reg. 61,558 (Oct. 28, 2003)

2003



Definition of Solid Waste Supplemental Proposed Rule

72 Fed. Reg. 14,172 (March 26, 2007)

2007



Definition of Solid Waste Final Rule

73 Fed. Reg. 64,668 (Oct. 30, 2008)

2008

Definition of Solid Waste Final Rule Effective

Dec. 29, 2008