



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

**COMMENTS OF THE COUNCIL OF INDUSTRIAL BOILER OWNERS**  
**on**  
**EPA Proposed Reconsidered Rule**  
*Non-Hazardous Secondary Materials That Are Solid Waste*

**EPA-HQ-RCRA-2008-0329**  
**76 Fed. Reg. 80452**

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## **INTRODUCTION**

CIBO is a broad-based association of industrial boiler owners, architect-engineers, related equipment manufacturers, and university affiliates with members representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information within the industry and between industry and government relating to energy and environmental equipment, technology, operations, policies, law and regulations affecting industrial boilers. Since its formation, CIBO has been active in the development of technically sound, reasonable, cost effective energy and environmental regulations for industrial boilers. CIBO supports regulatory programs that provide industry with enough flexibility to modernize – effectively and without penalty – the nation's aging energy infrastructure, as modernization is the key to cost-effective environmental protection.

EPA issued the CISWI rule in conjunction with three other interrelated rules, and has maintained the rules on the same notice and comment calendar.<sup>1</sup> For ease of discussion, the four interrelated rules will be referred to as the “Boiler MACT rules.”

EPA has solicited comments multiple times on an approach to defining “fuel” and “waste” for purposes of the Clean Air Act (CAA) §§ 112 and 129. CIBO has submitted comments on issues raised by this rule and hereby incorporates by reference its prior comments on the ANPR,<sup>2</sup> the June 2010 Proposed Rule,<sup>3</sup> and Petition for Rulemaking.<sup>4</sup>

## **PART ONE – TIMING FOR COMPLIANCE AND COMMENTS**

### **I. EFFECTIVE DATE OF THE RULE**

For the March 2011 Final NHSM rule, EPA established an effective date of May 20, 2011, 60 days after publication in the Federal Register. 76 Fed. Reg. 15456. EPA did not stay the effect of that rule, on the basis that the NHSM rule would not alter compliance obligations under the related boiler MACT and CISWI rules because EPA had delayed the effective dates of those rules.<sup>5</sup> However, on January 9, 2012, the U.S. District Court for the District of Columbia vacated EPA’s Delay Notices,<sup>6</sup> and any compliance obligations for sources covered by the boiler MACT and CISWI rules became effective immediately. EPA recognized that the vacatur

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<sup>1</sup> National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, 76 Fed. Reg. 80,598 (Dec. 23, 2011) (to be codified at 40 C.F.R. pt. 63) (Boiler Rule); National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers, 76 Fed. Reg. 80,532 (Dec. 23, 2011) (to be codified at 40 C.F.R. pt. 63) (Area Source Rule); Commercial and Industrial Solid Waste Incineration Units: Reconsideration and Proposed Amendments; Non-Hazardous Secondary Materials That Are Solid Waste, 76 Fed. Reg. 80,452 (Dec. 23, 2011) (to be codified at 40 C.F.R. pt. 241) (CISWI and NHSM Rule).

<sup>2</sup> See CIBO Comments on NHSM ANPR EPA-HQ-RCRA-2008-0329-0346.

<sup>3</sup> See CIBO Comments on NHSM Proposed Rule EPA-HQ-RCRA-2008-0329-2702.

<sup>4</sup> See CIBO Petition for New Rulemaking on NHSM, Appendix A.

<sup>5</sup> Industrial, Commercial, and Institutional Boilers and Process Heaters and Commercial and Industrial Waste Incineration Units; Delay Notice, 76 Fed. Reg. 28662 (May, 21, 2011).

<sup>6</sup> Opinion, *Sierra Club v. EPA*, No. 11-1278 (DDC Jan. 9, 2012).

triggered some compliance obligations, and on January 18, 2012 EPA announced in a letter to Senator Wyden<sup>7</sup> its plan to address the implications of the vacatur. Then on February 7, 2012, EPA issued a No Action Assurance memorandum that addresses some – but not all – of the implications of the vacatur.<sup>8</sup> EPA’s memorandum assures sources in a limited scope of circumstances that their failure to have met a deadline to file an initial notification would not be the basis of an enforcement action brought by EPA, given that the deadline fell during the period when the Boiler MACT and CISWI rules were not in effect. In the letter to Senator Wyden, EPA asserts that for any “permitting or compliance challenges” arising from the vacatur, EPA will issue a stay for 90 days or longer, and in the event of lawsuits arising from the vacatur, EPA is “confident” that it has the legal tools to address those matters. Notwithstanding its assurances, EPA’s memorandum does not alleviate many pressing continuing compliance concerns faced by sources because the rules remain in effect.

This ongoing uncertainty is created by the timing of the four interrelated rulemaking proceedings and the fact that the rules are now in effect and will be in effect until EPA completes the rulemaking proceedings and issues Final Reconsidered Rules in Spring 2012. Even the publication of the Final Rules will not provide all sources with the final, certain regulatory requirements to which they are obligated. There will remain questions, even once the rules are final, about the classification of a good number sources, specifically, any sources that utilize materials whose status as a NHSM or waste will not be resolved when the rules are finalized. In the Proposed Reconsidered NHSM Rule, EPA proposes to establish new administrative procedures for making those NHSM/waste determinations. Only once EPA makes initial determinations on materials that are presently relied on will those sources be able to be classified as either boilers or incinerators under these rules.

Under the continuing uncertainty of materials classifications, which is unavoidable and not due to any dilatory action by regulated sources, EPA should not make the NHSM rule effective 60 days after publication of the Final Reconsidered NHSM Rule. CIBO recommends that the rule be effective one year after publication, but in any event no sooner than the period of time EPA will allocate to responding to the initial round of petitions regarding materials sources have historically relied on as fuel. Especially in light of the history of these rules and their shifting timeframes, CIBO strongly urges EPA to set a realistic, certain timeframe for making these initial determinations, rather than setting an unrealistically optimistic timeframe, and inviting yet more uncertainty for sources in the near term.

For facilities that currently combust alternative fuel materials, a very near-term effective date is not only unreasonable, but unachievable, as well. The process EPA has specified for determining whether a NHSM is a non-waste fuel or a solid waste is complex and time consuming. In order to satisfy the legitimacy criteria established by EPA, a facility needs to evaluate the material in question. The contaminant criteria may require analysis of multiple samples taken over a period of time. It is unreasonable to expect a facility to complete this within 60 days. The other option available for a NHSM determination, is the petition process EPA is proposing in the reconsideration rule. That process does not specify a timeline or a deadline for EPA making its determination. However, based on the information provided on the process in the Proposed

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<sup>7</sup> See EPA letter to Sen. Wyden, Jan. 18, 2012. Appendix B.

<sup>8</sup> See EPA No Action Assurance letter, Feb 7, 2012. Appendix C.

Reconsidered rule, the process will certainly take more than 60 days. Based on the number of these petitions EPA is likely to receive, and the administrative backlog this will likely create, sources anticipate a delay in the determinations at least at the onset of the rule.

In addition, facilities need time up-front to do correct classifications for their units before notifying the State within the required 180 days with the classification of the source, for States to be able to develop their SIPs. Within those first 180 days, any facility needing to go through the petition process must depend on timely responses from EPA in the petition process. EPA is likely to be swamped with petitions in the early stages of the rule, and sources need a period of time for the foundational administrative matters to be raised and resolved before the rule is effective.

Another reason to delay the effective date relates to the difficulties associated with a facility switching from coverage under CISWI to coverage under Boiler MACT. These difficulties include the requirement to comply with Boiler MACT before switching coverage. A facility may also experience issues if a material they are presently combusting becomes classified as a solid waste. There may be availability and logistical issues associated with obtaining a replacement fuel. For these reasons, it is critical for the facility to make the initial determination correctly. Sufficient time must be allowed for this to happen.

CIBO believes that an effective date that is one year later than the effective dates of the Industrial Boiler MACT and CISWI final reconsidered rules should permit time for materials determinations and unit classifications, allow States the lead time they need, and sources the necessary time to make physical and operations adjustments for the determined source classification. One year would still allow a minimum of two years for the facility to comply with the Boiler MACT or up to four years in the case of CISWI MACT.

The NHSM rule should not be effective 60 days after publication, which forces sources to risk noncompliance with whatever CAA standards may ultimately apply. The status as fuel or waste for many materials will be determined through an administrative petition process, and it is irrational to expect sources to comply with standards until they know which standards apply. EPA should provide a reasonable period of time at the initiation of the rule.

## **II. THE PERIOD PROVIDED FOR COMMENT WAS ARBITRARILY SHORT**

Under basic principles of due process and administrative law, EPA has an obligation to provide the public with a reasonable opportunity to comment on proposed rules. Specifically, Congress requires EPA to give the public “a reasonable period . . . of at least 30 days” in which to comment on “any regulation” promulgated under the CAA.<sup>9</sup> By the clear terms of the CAA, Congress indicates that 30 days is the minimum time necessary to give the public a reasonable opportunity to evaluate a proposed rule and provide adequate feedback to the Agency. Thus, a comment period meeting the statutory 30-day minimum would be reasonable for a single, ordinary proposed rule. Here, EPA has violated the clear terms of the CAA and deprived sources of a means to adequately protect their interests and rights in the administrative and judicial processes by providing 60 days of comment for four complex interrelated rules.

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<sup>9</sup> 42 U.S.C. § 7607(h) (2006).

Under reconsideration, the rules are no less complex than when they were first proposed in June 2010. A 60-day comment period is particularly inadequate given their complexity, breadth of applicability, and economic impact. EPA has added data on reconsideration for 300 additional sources that must be reviewed and sources face the pressures of sorting complex data and developing thorough comments that address very technical issues. Although EPA released the signed rule proposals almost one month<sup>10</sup> prior to their publication in the Federal Register, it did not provide the majority of the supporting documentation for the proposed rules until publication on December 23, 2011, just two days before the holidays, effectively shortening the comment period.

The four proposed rules under reconsideration make for an enormously broad and costly proposal, which would have a significant economic impact across numerous and diverse sectors of the US economy, with the boiler MACT rule alone imposing capital costs of more than \$5 billion and affecting over 200,000 sources, according to EPA. 76 Fed. Reg. 80622. This economic impact alone, which CIBO estimates to be over \$14 billion,<sup>11</sup> requires a comment period sufficient to ensure thorough consideration of the proposed rules. CIBO joined with 26 other entities and trade associations, representing tens of thousands of affected sources, to ask EPA to extend the comment period by 30 days and explaining in detail why the extra 30 days was needed and justified.<sup>12</sup> On February 14, 2011, just seven days before the comments were due, EPA denied the request.

Sources have done the best under the circumstances to develop thoughtful comments on their concerns and the specific requests for comment EPA made in the four rules, and where necessary or appropriate, and where time permitted, to compile data to support its positions.

## **PART TWO – SPECIFIC ISSUES**

### **I. “CONTAINED GASEOUS MATERIAL”**

In the Final March 2011 CISWI rule, EPA removed from the regulation a longstanding clarifying definition of “Contained gaseous material.” This had the effect of redefining non-containerized gases (those in pipes, pipelines, vents, or ducts) as solid waste. The result was that units using those gases could thereby be subject to CISWI standards.

In the Proposed Reconsidered rule, EPA reversed that course, stating that it “did not intend to create ambiguity by removing the definition of “contained gaseous material” from the CISWI rule. Accordingly, the proposed CISWI reconsideration rule includes the same definition of “contained gaseous material” that was removed from the final CISWI rule.” 76 Fed. Reg. 80463.

This resolution is consistent with longstanding EPA regulatory treatment of contained gaseous materials and for the reasons stated in its Petition for Rulemaking, CIBO supports this outcome.

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<sup>10</sup> EPA posted a version of the rules on its website on December 2, 2011.

<sup>11</sup> How Costs Were Determined for CIBO Boiler MACT Study, January 2012, Appendix D.

<sup>12</sup> See January 18, 2012 Letter of 27 Organizations to EPA, Appendix E.

For the sake of clarity, EPA should include text in the Final CISWI Reconsidered Rule that clarifies that the defined term “contained gaseous material” clarifies the term “solid waste” as it applies to the CISWI rule.

## **II. “PROCESSING” REQUIRED FOR NON-WASTE CLASSIFICATION**

CIBO sought clarification of the requirements for “processing” under 40 CFR § 241.2, because the text of the March 2011 Final Rule was ambiguous in certain important respects. In the Proposed Reconsidered rule, EPA provided a petition process for non-waste determinations, but declined to clarify the regulatory requirements for processing. CIBO restates its concerns advanced in prior comments for this ambiguous, and therefore unreasonable, regulatory requirement.

Sufficient “processing” as discussed under the RCRA hazardous waste regulations was intended to ensure removal or “fixing” of contaminants that would otherwise prevent hazardous wastes from being safely and properly disposed, recycled or reused. The requirement for processing of a *non-hazardous* secondary material does not serve any such public safety purpose and is not necessary for determining whether a material is a non-hazardous waste. Insofar as EPA has concluded that users of materials must demonstrate the legitimate fuel value of a material, that demonstration is fully satisfied by meeting the criteria that demonstrate a material’s ability to add value and be safely and effectively utilized for a beneficial purpose (ex.; as a fuel, animal feed, lubricants, ingredients, etc.). EPA’s declared regulatory justification for those criteria does not rationally support criteria – such as processing – that do not add additional public safety or environmental benefits, and such criteria should be stricken, or made optional.

Many NHSMs do not require any processing at all to make them valuable and safe for beneficial use. In summary, we believe that a processing requirement for non-hazardous secondary materials provides no environmental purpose or benefit to the public while creating a burden to the regulated community. We therefore suggest any such requirement or evaluation, be removed during this reconsideration. If not, we suspect this nebulous processing requirement would be subject to further scrutiny under Executive Order 13563.

## **III. NON-HAZARDOUS SECONDARY MATERIALS TRANSFERRED OUTSIDE THE CONTROL OF THE GENERATOR**

The Final March 2011 NHSM Rule treats secondary materials differently based on whether they remain in the custody of the generator. In its Petition for Rulemaking, CIBO sought to have EPA reconsider this approach, which as CIBO pointed out in extensive comments on the Proposed Rule, is contrary to the longstanding RCRA principle that the baseline determination of whether a secondary material is a solid waste depends is whether it is “discarded.” In the Final NHSM Rule, EPA interprets the term “discard” to mean “nonhazardous secondary material” a) that is not within the control of its generator; and b) is not legitimately burned as a fuel. 76 Fed. Reg. 15,471. This means that nonhazardous secondary materials transferred to a third party for use as fuel are deemed solid wastes. CIBO suggests the term “discarded” more appropriately applies to “nonhazardous secondary materials” a) that are not within the control of its generator; or b) are not legitimately reused, recycled or burned as a fuel. 76 Fed. Reg. 15,471. For if the materials secondary or follow-on use is legitimate, there is not sufficient environmental or other

benefit to added regulation. Certainly, this material is similar to any other product sold for a beneficial use and the EPA does not have the authority to arbitrarily deem it waste.

In the Proposed Reconsidered Rule, EPA insists that it has not “arbitrarily determined that secondary materials transferred between companies are wastes.” 76 Fed. Reg. 80473. EPA summarizes its approach thus: “except for materials described in 241.3(b), and newly proposed section 241.4, combusted non-hazardous secondary materials are “presumed” to be solid wastes.” 76 Fed. Reg. 80473. Under these provisions read together, a generator that transfers to another facility for use as a fuel, any material except certain scrap tires and resinated wood (241.3(b)), has discarded the material by virtue of the transfer. The same material combusted at the site of the generator, assuming it meets the legitimacy criteria, is a fuel. What renders the rule arbitrary in this regard is differential treatment for the same material retained onsite and transferred. A facility can apply the legitimacy criteria and determine a material is a non-waste fuel and use it onsite as a fuel. However, should that operator make the same determination and transfer the material (except for resinated wood and some scrap tires), that material would be a waste.

On the other hand, many CIBO members routinely purchase and transport non-hazardous secondary materials generated at 3rd party locations to their sites for legitimate use as fuel. These materials are actually being sourced and purchased as fuels from others so automatically meet the first two legitimacy criteria contained in RCRA: 1) be handled as a commodity with an established market; and 2) have sufficient BTU content to support their use as fuel. The 3rd legitimacy criteria: contain contaminants that are not significantly higher in concentration than traditional fuel products, is addressed as appropriate, in the users air permit rather than in a duplicative non-waste determination process. To require these materials being sourced from 3rd parties to undergo an unnecessary regulatory review and approval process simply because they are produced at another location, is not an effective or proper use of agency authority or deserving of the regulated communities support.

Therefore, CIBO reasserts the arguments against this irrational approach as stated in its Petition and earlier comments, as contrary to law and unworkable for sources that routinely handle such materials and wish to maximize their value as fuels. We suggest that 3<sup>rd</sup> party supplied NHSMs can, and are, reasonably self-classified as fuels (and other usable materials) by the sellers and purchasers of these materials. We recommend that EPA strike the current mandatory regulatory petition process for NHSM transferred off site and instead suggest and support a more aligned approach which calls for a mandatory, documented, self-determination process with an optional regulatory determination process.

#### **IV. PETITION PROCESS FOR NON-WASTE DETERMINATION BY REGIONAL ADMINISTRATOR**

Under the final NHSM rule, and further discussed in the Proposed Reconsidered Rule, the only way a generator can transfer a material (other than resinated wood and some scrap tires) and have it be defined as NHSM, is to seek a Petition for non-waste determination from the EPA Regional Administrator and have EPA grant the petition. If the petition is granted, the generator may transfer the materials for combustion as NHSM. 241.3(c)(final rule). The status of the material, pending the petition process, is waste; if EPA grants the petition, the material is



considered NHSM dating from the filing of the Petition. 76 Fed. Reg. 80473. EPA views this petition process as helpful to sources and as absolutely necessary to protect the public: “We believe that the petition process provides an important assurance to the community on waste status and relevant standards and also provides an opportunity to demonstrate that the particular NHSM was not discarded.” 76 Fed. Reg. 80473.

EPA is aware of the longstanding reliance by sources on the ability to make reasonable decisions, consistent with the law and important RCRA principles, to utilize some materials as fuels and dispose of other materials as waste.<sup>13</sup> As discussed above in the context of the limitations EPA places on transfer of materials, EPA should allow sources to self-determine that materials are NHSM and transfer them for use as fuel to third parties. The petition process should be voluntary only, so that sources that would like confirmation of their conclusions from EPA, have the opportunity to obtain that regulatory certainty. Otherwise, sources should be allowed to make decisions regarding their secondary material streams as they have in the past. As CIBO has noted in other comments, the petition process does not increase environmental protection.

**Non-discarded NHSM.** EPA seeks comment on another question in the context of EPA’s granting or denying a petition, which EPA describes as turning on EPA’s determination of whether the material has been discarded: “whether or not the regulatory text should also be changed to address this situation as it relates to the petition process where such NHSM has not in fact been discarded.” 76 Fed. Reg. 80473. By this question, CIBO believes EPA seeks comment on how EPA should handle the circumstance in which a petition should be denied based on the legitimacy criteria, but where the material has not, in fact, been discarded.

The petition process can result in two possible outcomes: petition granted or petition denied. EPA states that “the ultimate question” EPA must answer for each petition is “whether or not the NHSM has been discarded.” 76 Fed. Reg. 80473. This seems very straightforward, and it is insofar as EPA considers “discard” to include meeting the legitimacy criteria: “If the applicant is able to demonstrate that such NHSM has not been discarded, *including meeting the legitimacy criteria*, it is likely that the Agency will grant the petition.” 76 Fed. Reg. 80473 (*emphasis added*). In the easiest case, the facts will show that the material has not been discarded and it meets the legitimacy criteria, and EPA will grant the petition, i.e., the material will be defined as NHSM. In the easiest case of the opposite scenario, the facts will show that the material was discarded, and whether or not the legitimacy criteria are met, EPA will deny the petition, i.e., the material will be defined as waste.

However, EPA’s approach does not provide for the more complicated possible case in which the material was not, in fact, discarded, and the legitimacy criteria are not met. In that case, EPA would presumably deny the petition on the basis of failure to meet the legitimacy criteria. But such denial would wrongly identify the material as discarded and therefore waste, which has legal implications under RCRA far beyond this rulemaking.

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<sup>13</sup> EPA greatly overstates the extent of the boiler population that would ever utilize non-traditional fuel, by referencing “nearly 200,000 boilers and incinerators that can be used to burn such NHSMs.” 76 Fed. Reg. 80474. EPA has consistently used this figure to describe the entire area and major source boiler populations (187,000 area, 14,000 major), which includes the smallest area source boilers. A more accurate figure would reflect those boilers that are capable of burning both traditional fuel and materials that could be deemed waste, that is, the universe of boilers that could realistically be defined as either section 112 boilers or section 129 incinerators.

This untenable outcome is the result of EPA having defined waste not based on whether it has been discarded, according to existing RCRA definitions, but according to its being discarded *and* failing to meet the legitimacy criteria. In response to EPA's request for comment, CIBO has already argued in prior comments that EPA should abandon this construct, which creates unnecessary complications and subverts RCRA principles.

Assuming EPA will finalize its proposed approach, CIBO suggests that EPA establish a third category of petition response, which could be a restricted grant of the petition. EPA could grant the petition for purposes of finding that the materials are not discarded and therefore not waste, but restrict their transfer on the basis that they do not fully meet the legitimacy criteria. This or a similar approach would reflect the longstanding terminology of the RCRA program but still ensure EPA's desire that the materials not be randomly transferred to any third party for combustion as non-waste fuel, but instead be transferred only under limited conditions until a clarification or exception to the specific legitimacy criteria could be provided (pilot period).

In response to an anticipated objection that this complicates the approach EPA proposes, CIBO suggests that it is not more complicated than EPA's proposed approach and it has the benefit of not throwing into confusion the operations of thousands of facilities that depend on clarity in bedrock RCRA terminology such as "discard." This approach would provide the ability to test fire materials and collect sufficient data to fully determine the relevant legitimacy criteria for that particular material. This approach additionally would engage business in partnerships which support our Nation's search for viable alternative fuels and resource conservation while not requiring governmental funding or violating the principals of RCRA or the Clean Air Act.

**Petition procedures.** EPA asks "whether any other changes could be made to the non-waste determination petition process to streamline the process, while at the same time provide EPA with the opportunity to ensure that such NHSMs are not being discarded. For example, because the public has had the opportunity to comment on the basic criteria in determining whether the NHSM should be considered a non-waste fuel, we are seeking comment on whether the Agency should further streamline the process by not seeking public comment on each individual petition. 76 Fed. Reg. 80474.

CIBO response: notice and comment would not improve the petition process, but a timeframe for decision making would improve the process. CIBO considers analysis of the legitimacy criteria to be a science-based assessment, which is within EPA's expertise and would not be enhanced by public comment. It is difficult to imagine what additional information the public could add to the consideration of a petition, where the source itself has all factual information relevant to the constituents of the materials, and EPA has maintained accurate baseline information about constituents of traditional fuels that form the basis of the contaminant comparison. In addition, the issues presented by a non-waste petition are comparable to those posed by an applicability determination. Each requires EPA to apply its regulatory criteria to a set of site-specific circumstances. EPA does not seek public comment on applicability determinations, perhaps because, here, the public cannot provide any additional factual information nor does it bring specialized expertise beyond that of EPA with respect to the issue to be decided.

EPA pledges in the Preamble that it does not intend the process to be “time consuming or extensive.” 76 Fed. Reg. 80474. If EPA is sincere in that statement, then it should establish a process that is disciplined, science-based and that ensures a neutral decision by a date certain. From the perspective of CIBO members, EPA has already sought and obtained the public’s views on the policy direction that it should take for handling materials with fuel value. EPA has already considered over several stages of rulemakings for several years, public comment representing every possible perspective, and EPA has concluded that it will adopt a highly conservative approach to energy-rich materials that could be used as fuels, or disposed of as waste. At this point, the role of the public for purposes of persuading EPA to adopt one or another regulatory pathway, has run its course. EPA has made program decisions. What is left is the routine application of the program elements to specific facts presented by sources needing science-based, timely decisions regarding the handling of their process materials. At this point, sources need EPA to determine the precise status of specifically identified materials under the terms of its regulatory criteria. This is a science question that has immediate implications for the source subject to EPA’s regulations. The EPA determination should be based on science, which is within EPA’s expertise without public comment. For the success of this process, it must be streamlined. If sources cannot obtain clear decisions in a reasonable period of time, they will default to disposal of materials rather than finding ways to recover the energy value from the materials, which will further undermine RCRA principles.

In light of the above discussion, CIBO suggests that EPA adopt a streamlined and efficient process for making these non-waste determinations. We believe that a process similar to its applicability determination process which is commonly used for many Clean Air Act NSPS and permitting applicability questions would be a better model rather than the proposed petition process EPA suggests. EPA’s applicability determinations are generally made in a timely manner allowing industry certainty and allowing industry the opportunity to move forward with projects in an effective manner.

Certainty and timely decisions are very important for this process, given tight regulatory deadlines. Industrial facilities which currently combust materials that are considered to be fuels today, must know whether or not EPA will continue to consider those materials to be fuels or not. If EPA concludes they are fuels, the facility would design retrofit requirements to meet the Boiler MACT or Area Source standards, whereas if EPA concludes the material is a waste, the entity either needs to design the unit to meet CISWI standards, or in the case where the fuel/waste is generated on site, the site needs to develop a process for alternative use of the material outside of combustion. Given a three- year regulatory timeline for compliance with Boiler MACT, and given that it can take almost that much time for a company to study how to meet the requirements, procure funding, order and install equipment and demonstrate compliance, the regulated community recommend that EPA establish a non-waste determination process that would in the vast majority of cases take no more than 6 months for a final determination.

In cases where the NHSM is not discarded, we believe that there should be a presumption that the material is fuel. However, given EPA’s current NHSM presumption and criteria which requires that a material would also have to meet legitimacy criteria even when it is not discarded to be non-waste, we strongly recommend that EPA establish a much more streamlined process

such as an applicability determination process to promptly make non-waste determinations, consistent with the regulated community's needs.

## V. PETITION PROCESS FOR CATEGORICAL NON-WASTE FUEL DETERMINATION BY ADMINISTRATOR

EPA proposes a petition process for a party to seek a determination that a material, when combusted, is categorically a non-waste fuel. EPA proposes that this determination be made by the Administrator through existing procedures under RCRA for rulemaking petitions, which include public notice and comment and possibly a public hearing.

CIBO supports the availability of a petition process as a business necessity, especially as new alternative fuels become available. CIBO also supports ensuring consistency across EPA regions, which would be achieved through an informal rulemaking signed by the Administrator. The process in theory provides an opportunity for petitioner to overcome the failure of a material to meet the legitimacy criteria and demonstrate a material's superior value as a fuel based on other relevant factors. § 241.4(proposed), 76 Fed. Reg. 80530. CIBO has been critical of the requirement that non-hazardous materials be subject to legitimacy criteria, which were developed under RCRA for hazardous waste. Therefore, to the extent that the proposed rule offers an opportunity for materials to be shown to have fuel value even where they may not meet EPA's legitimacy criteria, CIBO supports that approach as consistent with the longstanding RCRA principles.

CIBO believes that where EPA can establish categorical determinations of materials as non-waste, EPA minimizes burden on both governmental agency personnel as well as the regulated community while meeting the regulated community's needs for certainty and timeliness. Thus CIBO encourages EPA to review data in the record and make categorical non-waste determinations where possible.

Both when presented with a request for a categorical determination or when EPA receives a specific request for an individual determination, CIBO makes these additional recommendations to make the process workable from the perspective of the regulated community.

**Deadlines.** The process should be subject to timeframes with strict limits on extending deadlines. As discussed above, sources need certainty regarding what will or will not constitute a fuel, in order to develop Clean Air Act compliance plans. Long delays by EPA in decisions on petitions will render the petition process useless.

**More detailed, transparent process.** In the final rule, EPA should provide additional details about the process to ensure its transparency and integrity. For example, the EPA office that will handle the petitions and take the lead on decision making should be identified. As is provided in the case of petitions to the Regional Administrator, this process should be accessible through a petition filed by a single entity, multiple entities or a trade or other association on behalf of the regulated community. Another detail that should be incorporated here is that a non-waste determination that is granted should be effective as of the date on which the petition is filed, particularly for materials that have not been discarded, as is the case in the existing Regional Administrator petition process. If ultimately EPA determines that the material is a waste vs. a

non-fuel, the entity should be able to discontinue combusting that material rather than face retroactive penalties for not meeting CISWI requirements.

Again, as discussed in the section above, we urge EPA to establish a streamlined process – especially for petitions on individual situations vs. categorical determinations. We envision that some sources may want to obtain agency confirmation of their applicability determinations before committing capital to comply with Boiler MACT standards. Therefore we ask EPA to consider an optional applicability confirmation process which could work similar to EPA’s applicability determination process.

Alternatively, for the various types of Petitions, EPA could establish a new streamlined and transparent approach to the non-waste determination process. There are many different processes which have been used in industry and within state and federal government agencies to improve efficiency of existing processes, including “value stream mapping,” “lean analysis” or “kaizen” processes . These processes are often used to “deconstruct” the current steps in a process, identify and eliminate unnecessary steps and come up with a more efficient process for making decisions. These processes have been used by state agencies as well as the federal government. In fact, recognizing that this process has been helpful within industry and within Government processes, in March, 2010 ECOS and US EPA developed a MOU to foster the use of these business process improvement techniques across state environmental agency activities and to build capacity among the states to share expertise and produce better and more efficient environmental results.

In the case of this new regulation with this newly created petition process, now is the ideal time to map out an efficient process. Before a process is established it is easiest to design an optimal process. As in construction or renovations to one’s house, in a new construction processes, it is easier to design an ideal process, without having to work around construction details which were ideal in the original design, but are difficult to work around to get the ideal re-design. (e.g. consider the case, for example where a load bearing wall is between two rooms that you want to open up to make a single large open room.) In an administrative process, it is often the case that the organizational design was created when things worked differently and this design may impede rather than promote efficiency in decision-making. Because the business community’s need is great and the agency’s optimal time for creating such a process is now, we urge US EPA to establish and communicate a clear, efficient and timely process for waste/fuel determinations.

## **VI. COMPARABLE CONTAMINANT LEGITIMACY CRITERIA**

CIBO opposes as beyond EPA's authority and irrational the imposition of legitimacy criteria as the basis for determining that a non-discarded, nonhazardous material is a waste, for all the reasons set forth in prior comments.

In the Proposed Reconsidered rule, EPA responded to comments regarding the non-workability of the comparable contaminant criterion. EPA seeks comment on how the revised contaminant legitimacy criterion would apply to specific fuels. 76 FR 80471.

CIBO supports the increased flexibility in the reconsidered approach to comparing contaminants. However, CIBO members remain very concerned that imposing this comparison to fuels remains

ill-fitted to an analysis of materials that are non-hazardous. Even with the added flexibility, sources still face a risk that sometime after a source makes a fuel determination, EPA could take a different view of the materials and conclude the materials were waste. The criterion, even as broadened in the reconsidered rule, gives sources little predictive ability for the regulatory outcome. Because the risk sources face is noncompliance with the CAA, this is too critical an issue, and it is not rational, for EPA to leave this requirement so vague. Risk adverse sources may avoid the risk of noncompliance by not using energy-rich materials as fuels, which is contrary to the principle goal of RCRA to recover and conserve energy and other resources

CIBO recommends that EPA take specific administrative measures to increase predictability as much as possible, including real-time transparency with legitimacy criteria determinations (particularly comparable contaminant determinations) and a published, disciplined petition process for such determinations. Over time, as EPA develops a record for decisions on petitions, sources will better know how EPA will implement this very elastic provision. EPA should establish a database and immediately post determinations for other sources to review. Both the RA and Administrator determinations should be posted to the site. This will enhance consistency and predictability for regulated sources. In addition, sources need to know that their petitions will be handled within a clear timeframe. It is not reasonable for EPA to force sources to submit to an indefinite period of time for making fuel decisions, particularly where EPA has made every indication that it does not intend the petition process to be overly complex or lengthy. A rational approach would be to establish a process with a decision assured by a date certain, and a process to make known to all regulated sources the basis of and outcome of EPA's interpretations of its regulatory criteria.

## **VII. "CONTINUOUS PROCESS" DEFINITION**

Under the March 2011 Final NHSM Rule, certain recovery units not previously regulated under the CISWI standards were regulated as CISWI units. Specifically, units that process foundry sand in a thermal reclamation unit (TRU) would be considered incinerators subject to CISWI standards. 76 Fed. Reg. 15,519. EPA's treatment of foundry sand in the Final NHSM Rule undermined the longstanding principle that sources can recovery/reclaim materials in a continuous process. Therefore, CIBO requested reconsideration of this issue.

In the preamble to the Proposed Reconsidered NHSM Rule, EPA appropriately concludes that such units should not be regulated as incinerators under CISWI. 76 Fed. Reg. 80,463. EPA included a new definition for "Foundry Sand Thermal Reclamation Unit" as "a type of part reclamation unit that removes coatings that are on foundry sand. A foundry sand thermal reclamation unit is not an incinerator, waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart." 76 Fed. Reg. 80,522.

EPA's reasoning is appropriate as these units are reclamation units that remove coatings that are on foundry sand, which allows re-use of the sand. Therefore, these reclamation units "conserve natural resources (i.e., virgin sand) and minimize the use of landfill capacity for foundry sand." 76 Fed. Reg. 80,463. CIBO provided supporting rationales and discussion in its Petition for Rulemaking following the Final NHSM Rule.

## VIII. COAL REFUSE

In its Petition for Rulemaking, and in prior comments, CIBO has argued that coal refuse is clearly defined as a fuel under federal law and this rule should define it as a fuel to ensure consistent regulatory treatment under federal law and multiple state laws that are built upon federal law. The Final NHSM Rule defined currently mined coal refuse as a fuel, but was unclear with respect to the treatment of coal refuse from legacy piles. In an August 15, 2011 interpretive letter,<sup>14</sup> EPA clarified that legacy coal refuse is similar in every relevant respect to currently generated coal refuse and would in fact meet the various criteria under the NHSM rule to be considered non-waste fuel. 76 Fed. Reg. 80486. As EPA notes in the Preamble to the Proposed Reconsidered rule: “EPA expects that post-processed coal refuse from legacy piles satisfies EPA’s contaminant legitimacy criterion. Thus, post-processed coal refuse from legacy piles are not being discarded when used as fuel and, therefore, we are taking comment on specifically identifying them as a non-waste fuel in § 241.4.” 76 Fed. Reg. 80486.

CIBO response: for all of the reasons in prior comments and additional reasons noted here, coal refuse from legacy piles should be identified as a non-waste fuel in § 241.4. This would reflect EPA’s analysis and discussion in the Proposed Reconsidered rule and could be accomplished by inserting this text in § 241.4(a):

“(3) Coal refuse that is not considered currently-generated coal refuse under this rule, but that is processed in the same manner as currently-generated coal refuse and is mined or remined pursuant to the Surface Mining Control and Reclamation Act of 1977.”

The specific reference to coal refuse in § 241.4(a) as a non-waste fuel is fully supported by EPA’s analysis in the Proposed Reconsidered rule. In addition, coal mining has deep statutory and regulatory pedigrees that strongly support the definition of legacy coal refuse as a fuel.

Congress, through the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and the Energy Policy Act of 1992 directed that the Office of Surface Mining Reclamation and Enforcement (OSMRE) develop and implement programs regulating past and present coal mining activities. These Acts and OSMRE’s implementation of their provisions address the mining and re-mining of coal refuse and its use as a fuel. Energy Policy Act § 2503(e), 30 U.S.C. §1251a (amending SMCRA).

OSM in implementing SMCRA has developed a comprehensive program to regulate coal mining activities, including the mining and re-mining of coal refuse. As a result, OSM’s implementing regulations at 30 CFR 700.5 expressly include the extraction of coal from coal refuse piles within the definition of “surface coal mining operations.” On this basis, OSM has historically interpreted the permitting requirements and the performance standards promulgated under the permanent regulatory program for all surface coal mining operations to apply to operations that either remove refuse or reprocess it on-site. This means that, both types of operations are currently subject to the same regulations for mining coal.

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<sup>14</sup> See 76 Fed. Reg. 80473, *citing* August 15, 2011 letter from EPA to the Anthracite Region Independent Power Producers Association (ARIPPA).

In addition, in §515(b)(1) of SMCRA (30 U.S.C. § 1265), Congress directed that performance standards for surface coal mining operations “maximize the utilization and conservation of the fuel resource being recovered.” The objective of this provision is to encourage maximum utilization of the coal resource so that the same site is not reaffected by successive operations as has sometimes occurred. OSM has concluded that abandoned coal refuse constitutes a solid fuel resource that often degrades the environment. Accordingly, the performance standards developed by OSM pursuant to §515(b)(1) are appropriate for handling abandoned coal refuse as a solid fuel at remining operations.

Section 2503(e) of the Energy Policy Act of 1992, which provides for treatment of legacy coal sites under the Abandoned Mine Land provisions, reflects Congress’s judgment that abandoned coal refuse is a fuel and directs OSMRE to develop a regulatory program to encourage the remining of coal refuse sites under SMCRA for the recovery of the fuel resource and reclamation of the sites. Congress clearly views legacy coal refuse as a valuable energy resource, as demonstrated by its direction that the mining and remining of coal refuse be conducted pursuant to the principles and regulatory and permitting requirements of SMCRA.

In addition, this language change would ensure that the coal refuse is a fuel and minimize overlapping regulatory jurisdiction that could evolve.

## **IX. BIOMASS MATERIALS**

In this proposed rule, EPA addressed comments regarding the irrational treatment of biomass materials in the March 2011 Final Rule. In this Proposed Reconsidered rule, EPA has revised the §241.2 definition of “clean cellulosic biomass” and provided some examples of materials that would meet the revised definition.

*“Clean cellulosic biomass means those residuals that are akin to traditional cellulosic biomass, including, but not limited to: Agricultural and forest derived biomass (e.g., green wood, forest thinnings, clean and unadulterated bark, sawdust, trim, tree harvesting residuals from logging and sawmill materials, hogged fuel, wood pellets, untreated wood pallets); urban wood (e.g., tree trimmings, stumps, and related forest derived biomass from urban settings); corn stover and other biomass crops used specifically for the production of cellulosic biofuels (e.g., energy cane, other fast growing grasses, byproducts of ethanol natural fermentation processes); bagasse and other crop residues (e.g., peanut shells, vines, orchard trees, hulls, seeds, spent grains, cotton byproducts, corn and peanut production residues, rice milling and grain elevator operation residues); wood collected from forest fire clearance activities, trees and clean wood found in disaster debris, clean biomass from land clearing operations, and clean construction and demolition wood. These fuels are not secondary materials or solid wastes unless discarded. Clean biomass is biomass that does not contain contaminants at concentrations not normally associated with virgin biomass materials.”*

The definition as revised remains ambiguous because it continues to include this requirement: “Clean biomass is biomass that does not contain contaminants at concentrations not normally



associated with virgin biomass materials.” This sentence perpetuates the uncertainty of the prior definition, because sources cannot know what comparisons are permissible and what concentration levels are appropriate.

Treated seeds are a biomass material that contain additives to virgin biomass but are these additives considered contaminants? And though these additives may not be found in virgin seeds, they are not harmful at the concentrations found in seed. Therefore, should any concentration above natural, especially when combusted as fuel, be prohibited and require additional waste regulation? CIBO does not believe that to be the case.

Rail road ties and utility poles are other biomass materials that are treated with an energy rich substance (coal tars) to decrease insect infestation and rot in their first use. The coal tar treatment actually benefits the energy content of this biomass material, and makes them a desirable alternative fuel. These materials are not discarded because of their value as a fuel, are sold under long term agreements for use as a fuel and would easily be classified as a non-waste under a legitimacy evaluation; however, would not meet the currently proposed definition of “biomass” and thus produce additional regulatory burden for the suppliers and users of these materials without providing any environmental benefit.

In summary, treated wood is a valuable fuel commodity that is legitimately used for energy recovery by CIBO members. This use provides strong economic, environmental, and societal benefits. Therefore, CIBO members believe treated woods are properly classified as biomass, not waste, so that they may continue to be appropriately used as fuel.

CIBO members support the inclusion of treated woods and other treated biomass materials in the biomass category by removal of the last sentence from the currently proposed definition of clean cellulosic biomass. This revision would solve a host of regulatory inconsistencies, without causing environmental harm or undue regulatory burden on boiler owners and operators. In fact, the last sentence of that definition can be read as being redundant to the first sentence, and for regulatory certainty purposes the last sentence should be deleted.

In its discussion at 76 Fed. Reg. at 80,472, EPA said that its “decision on whether resinated wood is a waste (within the control of the generator or if transferred) is based on the circumstances under which the material is handled and combusted.” 76 Fed. Reg. at 15,499. EPA disagreed with comments urging that resinated wood be considered a “traditional fuel,” “since it can have contaminants [specifically, formaldehyde] at levels greater than traditional fuels.” Id. Nonetheless, “EPA recognizes that some specific types of non-hazardous secondary materials, such as resinated wood residuals, are more like valuable commodities than solid wastes. Resinated wood is a secondary material that, upon examination, is not discarded when used on-site or transferred off-site to a different company.” 76 Fed. Reg. at 15,499-500.

Based on its analysis, EPA said it “would consider resinated wood residuals used as a fuel in a combustion unit as not being a solid waste, provided these materials satisfy the specified legitimacy criteria for fuels.” 76 Fed. Reg. at 15,500. The specified legitimacy criteria encompass four aspects. To qualify, NHSM must: (1) be managed as a valuable commodity, (2) have meaningful heating value, (3) be used as a fuel in a combustion unit that recovers energy,

and (4) contain contaminants at levels that are comparable to or lower than those in traditional fuels which the combustion unit is designed to burn. 76 Fed. Reg. at 15,460. However, in the actual regulatory language, set forth for codification in 40 C.F.R. § 241.3(b)(2)(iii), EPA went further and without reservation or reference to the contaminant level legitimacy criterion included “[r]esinated wood used in a combustion unit” on the list of specific “non-hazardous secondary materials that are not solid wastes when combusted.” 76 Fed. Reg. at 15,550.

EPA also offers the following clarification in the current reconsideration:

While we acknowledge that these [formaldehyde contaminant] levels [in resinated wood] may not always meet the contaminant legitimacy criterion in every situation, in today’s action, we are proposing a categorical non-waste determination for resinated wood that is used as fuel. We are proposing to codify this determination, balancing the legitimacy criteria and other relevant factors based on the fact that resinated wood residuals that are used as fuels represents [sic] an integral component to the wood manufacturing process and, as such, resinated wood residuals are not being discarded when burned as fuels. That is, the purpose of burning these wood residuals (including the resins that they contain, which themselves contribute to the heating value of the material) is not to destroy or discard them, as they are clearly considered and managed as a valuable commodity to the wood manufacturing process. 76 Fed. Reg. 80483.

CIBO fully agrees with EPA’s conclusions regarding the status of resinated wood materials as an NHSM fuel when used for energy production, but EPA’s reasoning inevitably raises a question why any NHSM treated wood, which shares most or all of the traits EPA identifies as indicia of resinated wood’s status as a non-waste, should not also be classified the same way. Like resinated wood, treated wood is regarded as a sought-after fuel by many manufacturing and electricity generating operations. At least one CIBO member owns and operates a co-generation plant, which was specifically designed to combust biomass of which treated wood railroad ties and utility poles are its major fuel source, and the resultant energy produced an integral part of the facility’s survival.

Like resinated wood, treated wood is managed as a desirable fuel for its higher BTU levels due to low moisture content and the extra heat potential of preservative chemicals (creosote). Just as with resinated wood, the high commercial value of treated wood and its established market, make clear that it is handled as a valuable product whether under control of the generator or not. As is the case with resinated wood, nonhazardous treated wood’s contaminants are low in concentration, contribute to heating value, and are not among the chemicals of concern listed in the proposed rule (76 Fed. Reg. at 80471). And like the facilities that depend on resinated wood for their economical operation, the loss of treated wood as a fuel feedstock would cause severe disruption in the operation of plants dependent on using these materials. All these factors support that, just as EPA concluded after “balancing” the key considerations for resinated wood, NHSM treated wood is not being discarded when used as fuel by the generator or transferred. EPA should amend the definition of biomass as indicated above to ensure consistent treatment of materials.

Separately, CIBO would support a specific inclusion of treated woods and other treated biomass materials used as fuel, in the non-waste category, in the same way that EPA determined that resinated wood is not a solid waste when used as a fuel regardless of whether it remained within the control of the generator.” 76 Fed. Reg. at 80,472. Similar to its evaluation of resinated wood used as fuel, EPA could conclude that other NHSM treated wood and biomass materials used as fuels, are not properly classified or regulated as wastes, and cover these materials through a categorical exclusion.

**Clean Biomass definition for specific materials.** CIBO supports the revision of the definition of clean cellulosic biomass relative to the listed materials and supports the concept of excluding, by definition, these materials from being considered as secondary materials or solid waste, unless they are discarded.

CIBO specifically supports inclusion of the following clarification “...*corn stover and other biomass crops used specifically for the production of cellulosic biofuels (e.g., energy cane, other fast growing grasses, byproducts of ethanol natural fermentation processes)*...” This is particularly important to entities developing projects to produce ethanol from cellulosic feedstocks in order to achieve the RFS mandate. This wording is also consistent with EPA’s regulatory approach relative to PSD for ethanol production facilities.<sup>15</sup>

## **X. PULP AND PAPER RESIDUALS**

EPA is seeking comment on pulp and paper primary cellulosic fibers and secondary wastewater treatment residuals (which in the re-proposed rule EPA calls pulp and paper sludge, but which we refer to as Pulp and Paper Wastewater Treatment Residuals or WWTR) to determine if it is appropriate to classify WWTR as a non-waste when used as a fuel. EPA is requesting documentation of how the WWTR are integrated into the production process; if it is consistently used as a legitimate fuel and not discarded; data such as contaminant levels of HAP and heating value; types of processing steps, such as dewatering; and management of sludges both within and outside generator control.

On this issue, CIBO agrees with and supports the more detailed comments submitted by the American Forest & Paper Association (AF&PA). The data in the record, as well as data submitted by AF&PA, demonstrate that WWTR is a legitimate fuel and CIBO urges EPA to make a categorical determination to add WWTR to the list of materials, which when combusted are defined as non-waste fuels, just as EPA has proposed to classify resinated wood and scrap tires. EPA has sufficient data for this class of materials and EPA should streamline the administrative processes and provide certainty to the regulated community who currently generate and combust these materials by finalizing a categorical determination that WWTR are non-wastes when combusted. This would facilitate the continued practice of efficient utilization of pulp and paper by-products for combustion, which minimizes purchase of other more expensive fuels which would be needed to replace this fuel source, if WWTR were no longer able to be combusted in existing boilers. EPA would also make it easier for these facilities to

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<sup>15</sup> Prevention of Significant Deterioration, Nonattainment New Source Review, and Title V: Treatment of Certain Ethanol Production Facilities Under the “Major Emitting Facility” Definition, 72 Fed. Reg. 24060-24078, (May 1, 2007).

meet sustainability goals which seek to maximize utilization of valuable by-products and support combustion of biomass.

Additionally, we are providing the following information about use of these materials by industry.

Most boilers at pulp and paper mills are specifically designed to handle a variety of fuels; few boilers are designed to burn just traditional fuel. Even mills with boilers specifically permitted to burn WWTR also burn other fuels. Over the years, industry has recognized the benefit of burning secondary materials, particularly those generated onsite because it is cost effective, and typically they are derived from and have characteristics similar to traditional fuel, particularly the biomass used to produce pulp and paper products.

Boilers rely on a variety of traditional and alternative fuels, such as coal, natural gas, or biomass. The choice of fuel depends on availability, cost, and need. Hogged fuel or coal may be the main fuel used in the boilers at pulp and paper mills, but it is supplemented by other traditional and alternative fuels in order to meet the energy needs of the facility, address best management of the boiler, and meet air quality requirements. If the hogged fuel is wet, boiler operators may need to add coal or resinated wood to boost heat value; if the boiler is burning too hot, the addition of fuel sludge enables the operators to regulate temperature. But, WWTR may be burned because it has the best fuel value for the price. Boiler conditions, fuel availability, energy needs, air quality requirements, as well as costs, are all considered when the energy manager determines the right mix of fuel in any given day. The question of whether the quality of the WWTR is appropriate for a particular facility is based on the boiler design. As such, there are some boilers well suited to burn it; others cannot.

The overwhelming majority of industry combusting WWTR remove water from the materials prior to material handling operations and combustion. Most of the industry uses belt presses, screw presses, steam heated filter presses, or steam heated rotary driers. In all instances, the goal is to raise the solids content, and thus the Btu value.

Decisions of what fuels to combust in a boiler are based on the type of boiler at the particular mill, the type of WWTR generated, the cost of other fuels (both traditional and alternative) in the area of the facility, and the operating conditions of the boiler. Some boilers are not designed to burn WWTR – just as some boilers are not designed to burn coal or natural gas -- so boiler operators use other fuels. Some facilities may not produce WWTR with sufficient fiber, resulting in a fuel that is not viable. Some facilities have built boilers that burn primarily WWTR, supplemented by other fuels (such as natural gas or coal). There is no one scenario for boilers that combust wastewater sludges. However, WWTR that is burned for energy is used because it is a quality fuel. As a practical matter, larger facilities may be more likely than smaller facilities to be able to utilize paper fines and WWTR as fuel at their facilities since a larger facility would be likely to generate more paper fines and would therefore have a greater economic savings to offset the additional costs it would take to design and install material handling and dewatering equipment and to justify the more costly type of boiler which could combust those materials.

As EPA recognizes, in most cases these WWTR are generated and utilized on site, however, in a few cases we are aware of, these materials may be sold to and combusted by nearby power plants particularly where the boilers at the pulp mill site were not designed to accommodate such fuels. As such, in the vast majority of cases these materials remain in the control of the generator or are managed under purchase agreements with another entity as a fuel and are never discarded in the first instance. For example, one CIBO member with a facility supplies under a purchase agreement its pulp mill wastewater primary clarifier sludge to an Electric Utility Generating plant burning various sources of biomass. We believe that particularly in cases where these materials have not been discarded in the first instance EPA should presume these materials to be non-wastes and entities should not have to file individual petitions to ensure this presumption is met. EPA concluded in the 2011 NHSM final rule, “The final rule will retain the proposed approach –pulp and paper sludges managed within control of the generator are a non-waste fuel as they would seem to meet all of the legitimacy criteria... (See 76 Fed. Reg. 15488, March 21, 2011)”. 76 Fed Reg. 80484. Noting EPA has already concluded these residuals meet all the legitimacy criteria, we therefore ask EPA to finalize a categorical determination that these materials are non-waste fuel as they concluded in the final rule and add these materials to the listed materials at 241.4 (a).

## **XI. SMALL BUSINESS IMPACTS**

EPA seeks comment on potential impacts of the proposed rule on small entities. 76 Fed. Reg. 80487.

CIBO recommends that EPA conduct extensive outreach to small entities to help them understand implications of these complicated rules. Given the very small sources covered by these rules, it is highly likely that many small entities are unaware that they are covered by the rules, much less understand their complexities in order to comply.

We also request, so as not to overburden or threaten small businesses, which are often the suppliers of by-products or materials for use as fuel, that the self-determination, regulatory petition or administrative process for determination of the material as NHSM rather than waste, be acceptable if prepared by the generator, buyer, trade association or other interested party.