May 18, 2011

Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460


Dear Administrator Jackson:

The American Forest & Paper Association, American Chemistry Council, American Foundry Society, American Home Furnishings Alliance, American Wood Council, Biomass Power Association, National Association of Manufacturers, NORA –An Association of Responsible Recyclers, Rubber Manufacturers Association, Treated Wood Council, and their members (collectively the “Petitioners”), respectfully request an immediate stay of the final rule entitled: Identification of Non-Hazardous Secondary Materials That Are Solid Waste (76 Fed. Reg. 15456 (March 21, 2011)) (NHSM Rule). Petitions for review of the NHSM Rule have been or soon will be filed. As demonstrated below, the Environmental Protection Agency (EPA or the Agency) has ample authority and justification to grant an administrative stay under Section 705 of the Administrative Procedure Act (“APA”), 5 U.S.C. § 705, pending such review and an administrative stay of the NHSM Rule is required to impart justice and to prevent irreparable harm.

Justice requires a stay because under that final rule, there is substantial uncertainty regarding what is considered a waste and many more materials than intended by EPA likely will now be classified as solid wastes. As a result, the combustion of those materials potentially will be regulated under the Standards of Performance for New
Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units (76 Fed. Reg. 15704 (Mar. 21, 2011)) (CISWI Rule) or under existing CISWI regulations at 40 C.F.R. Subpart CCCC and state implementation plans adopted under 40 C.F.R. Subpart DDDD. EPA should stay the effective date of the NHSM Rule as it decides what steps it will take to ensure that the final rule does not classify more material as wastes than EPA intended.

The final NHSM Rule impacts not only secondary materials that are being burned for energy recovery or used as ingredients in cement kilns, but also secondary materials that are being reused in a continuous industrial process that involves combustion units. The change in the regulation of these secondary materials under the Clean Air Act (CAA) may occur as early as May 20, 2011, when the NHSM Rule goes into effect. Unfortunately, the Agency has been unable to clarify what regulatory impacts and deadlines apply to what units, even though the effective date of the rule is upon us. Furthermore, with the stay of the CISWI Rule, on May 20, 2011, different definitions of waste (including definitions of solid waste as well as commercial and industrial waste) will apply to CISWI units under 40 C.F.R part 60 and 40 C.F.R. Part 241. This situation has created such vast regulatory uncertainty that EPA must stay the effective date of the NHSM Rule until EPA and the regulated community both understand what is considered a waste under the rule, and EPA has an opportunity to correct any unintended consequences.

An administrative stay of the NHSM Rule also is required to prevent irreparable harm pending judicial review because, absent a stay of the NHSM Rule, as of May 20, 2011, many units at facilities around the country may be considered solid waste incinerators. As incinerators (not energy recovery units or waste burning kilns), these units may become subject to the emissions limits for existing units under state plans that implement

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1 EPA has agreed to stay the CISWI rule pending reconsideration and notice of that stay will be published shortly in the Federal Register. Industrial, Commercial, and Institutional Boilers and Process Heaters and Commercial and Industrial Solid Waste Incineration Units, Final rules; Delay of effective dates, Prepublication Copy, signed May 16, 2011 (hereinafter “Boiler MACT and CISWI Stay”).
the 2000 CISWI rule, which remains in effect during the stay of the 2011 CISWI Rule. See Boiler MACT and CISWI Stay, at 8. The compliance date for these existing units is unclear, as is the compliance date for any newly classified incinerators that are modified after September 21, 2011, even if that modification is necessary to meet other Clean Air Act requirements. Moreover, many facilities do not have an option to simply discontinue combustion of material that may be newly classified as a waste. Burning secondary materials for energy recovery may be critical to the economic viability of the operation of the facility. Use of secondary materials as ingredients in combustion units or the reclamation of secondary materials using thermal treatment may be an integral part of a manufacturing process. The primary business of a facility may be the collection and sale of secondary materials or the production of biomass power. These facilities cannot continue to operate under the regime EPA has put in place under the NHSM Rule, and will suffer irreparable harm when that rule goes into effect.

On May 20, 2011, some facilities also may find themselves in violation of their state Title V permit, if their permits contain language that prohibits the combustion of waste material and that rely on federal definitions. Even if a permit does not expressly prohibit waste combustion, many states have separate permitting requirements for waste combustion. As a result, facilities may need to obtain additional state permits to continue to burn secondary material after May 20, 2011.

Finally, even for those facilities that are able to modify their fuel sources or their processes to avoid use of secondary materials or that are able to come into compliance with applicable CISWI emission limits, EPA has not provided Petitioners with sufficient time to make major equipment installations across a large number of existing facilities. Thousands of existing facilities will need to begin to make major compliance investments soon, in light of the pressing compliance deadlines, and will not be able to undo such investments if EPA ultimately changes the NHSM Rule. Furthermore, as a result of the

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2 See, e.g., Indiana Code 13-20-8 (requiring approval of solid waste incinerators); 326 Indiana Administrative Code 11-9-1 (requiring any person who operates a solid waste incinerator to have a solid waste processing facility permit).
NHSM Rule, new facilities will have to make crucial decisions regarding plant upgrades or shutdowns, which may be unnecessary if EPA modifies the NHSM Rule. In addition, to manage costs, some facilities enter into long-term contracts for fuel supplies. Examples of these types of irreparable harms are included in Appendix I.

A stay of the NHSM Rule will not cause harm to any person because the purpose of the NHSM Rule is to determine the applicability of the CISIWI Rule by identifying what secondary materials are solid waste when combusted and EPA has already announced that it plans to reconsider the CISWI Rule. National Emission Standards for Hazardous Air Pollutants; Notice of Reconsideration (“Notice of Reconsideration”), 76 Fed. Reg. 15,266, 15,267 (Mar. 21, 2011). In addition, EPA recently announced that it is staying the CISWI Rule. Thus, there is no need for the NHSM Rule to go into effect while the CISWI Rule is still in flux and no harm will result from a stay.

Finally, even though EPA has granted an administrative stay of the CISWI Rule, a stay of the NHSM Rule is needed to preserve the status quo. The 2000 CISWI Rule was remanded to EPA without vacatur, and remains in effect until it is replaced by a new rule. The stay of the 2011 CISWI rule may provide some relief to energy recovery units and cement kilns that may be newly regulated under section 129 of the Clean Air Act as a result of the NHSM Rule. However, the stay of the 2011 CISWI rule will not preserve the status quo for units that may be newly (and perhaps unintentionally) regulated as incinerators of solid waste as a result of the NHSM Rule. Further, the stay of the CISWI Rule will not prevent facilities from falling out of compliance with state Title V permits or other state requirements that prohibit waste combustion. Only a stay of the NHSM Rule can preserve the status quo while EPA, states, and the regulated community sort through these issues. A stay will give EPA time to determine whether it needs to make

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3 EPA cited these types of harms as a justification for the stay of the CISWI Rule, noting that “thousands of facilities across multiple, diverse industries will need to begin to make major compliance investments soon” which may be irreversible. Boiler MACT and CISWI Stay, at 7. EPA also has cited these types of harms as justification for extending compliance deadlines for CAA rules. See 66 Fed. Reg. 63313, 63341-15 (Dec. 6, 2001) (justifying an emergency compliance date extension because “quite simply, sources are (legitimately) unwilling to make the substantial commitments in time, effort, and capital to comply with standards when they no longer know what those standards will be”).
any changes to the NHSM Rule to ensure that its definition of solid waste is not broader than it intended, and to determine what transition rules are needed to ensure that the CISWI rule and the NHSM Rule work together as intended.

In summary, the grounds for granting an administrative stay pending judicial review are compelling and meet the statutory standards of Section 705 of the APA. Given the far reaching, multi-billion dollar impact of this rule on a wide swath of U.S. industry and the confusion that will ensue if EPA allows the NHSM Rule to go into effect when so many questions remain regarding the applicability of this rule, justice and basic principles of good government require that EPA stay the NHSM Rule for the duration of judicial review.

I. BACKGROUND

Pursuant to CAA Section 129, EPA promulgated a final rule setting forth performance emissions standards for Commercial and Industrial Solid Waste Incineration Units (2000 CISWI Rule). 65 Fed. Reg. 75338 (Dec. 1, 2000). Under Section 129, the term “solid waste” shall have the meaning “established by the Administrator pursuant to the Solid Waste Disposal Act.” 42 U.S.C. 7429(g)(6). The CISWI Rule was challenged in Sierra Club v. EPA (No. 01–1048) (D.C. Cir.). However, after promulgation of the CISWI Rule, the D.C. Circuit issued its decision in a challenge to EPA’s MACT standards for the cement kiln industry. See Cement Kiln Recycling Coalition v. EPA, 255 F. 3d 855 (DC Cir. 2001) (Cement Kiln). Following that decision, for reasons unrelated to the definition of solid waste, EPA requested, and was granted, a voluntary remand without vacatur, of the CISWI rule, in order to address the concerns related to the issues that were raised by the court in Cement Kiln. Because the CISWI rule was not vacated, its requirements remain in effect. See Sierra Club v. EPA, 374 F. Supp. 2d 30, 32–33 (D.D.C. 2005). On September 22, 2005, EPA issued revised definitions of “solid waste,” “commercial or industrial solid waste incineration unit,” and “commercial or industrial waste” (CISWI Definitions Rule). See 70 Fed. Reg. 55568 (Sept. 22, 2005). In the CISWI Definitions...
Rule, EPA defined “commercial and industrial solid waste” to exclude solid waste that is combusted at a facility in a combustion unit whose design provides for energy recovery or which operates with energy recovery. The CISWI Definitions Rule was vacated by the D.C. Circuit in *NRDC v. EPA* (489 F.3d 1250 (DC Cir. 2007)) (*NRDC*). The court stated that the statute unambiguously requires any unit that combusts “any solid waste material at all”—regardless of whether the waste is being burned for energy recovery—to be regulated as a “solid waste incineration unit.” *Id.* at 1260. It is important to note that in *NRDC*, the court did not limit EPA’s authority to determine what is a solid waste under RCRA. Rather, the court held that if a material is a solid waste under regulations established by the Administrator, combustion of the material is subject to Section 129 of the CAA.

In response to *NRDC*, EPA decided to promulgate, for the first time, a regulatory definition of non-hazardous solid waste. While EPA had promulgated regulatory definitions of solid waste for the purpose of implementing subtitle C of RCRA, pertaining to hazardous waste, EPA had never defined solid waste for the purpose of implementing subtitle D, because subtitle D is implemented by states. Because this was a novel exercise for EPA, the Agency first solicited comments on how the RCRA definition of solid waste should apply to non-hazardous secondary materials that are used as fuels or ingredients in combustion units in an Advanced Notice of Proposed Rulemaking. 74 Fed. Reg. 41 (Jan. 2, 2009). EPA published a proposed rule on June 4, 2011. 75 Fed. Reg. 31844 (June 4, 2010). The final NHSM Rule was published on March 21, 2011. 76 Fed. Reg. 15,704 (Mar. 21, 2011).

**II. EPA HAS AMPLE AUTHORITY TO GRANT A STAY.**

EPA has broad authority and discretion to stay the effectiveness of rules promulgated under RCRA under Section 705 of the APA. The criteria that EPA must apply are
significantly less stringent than the criteria generally used by the courts, for example, because a demonstration of irreparable harm is not mandatory.\textsuperscript{4}

“When justice so requires,” EPA may stay the effective date of a RCRA rule pending judicial review, under Section 705 the APA, 5 U.S.C. § 705. See, e.g., Boiler MACT and CISWI Stay; Pre-publication copy, May 16, 2011; Final Rule, Amendments of Final Rule To Postpone Requirements, 61 Fed. Reg. 28,508 (June 5, 1996) (amending the effective date of organic air emissions standards for tanks, surface impoundments, and containers under RCRA); Hazardous Waste Management System: Identification and Listing of Hazardous Waste; Burning of Hazardous Waste In Boilers and Industrial Furnaces, 56 Fed. Reg. 43,874 (Sept. 5, 1991) (providing an administrative stay of the RCRA standards for burning hazardous waste in boilers and industrial furnaces as they applied to the coke by-products recovery process because EPA was evaluating whether to exclude these wastes from the definition of solid waste under Subtitle C). “Justice” includes preventing facilities from incurring “compliance expenditures . . . which may prove unnecessary in light of the projected amendments.” 61 Fed. Reg. at 28,508.

Petitions for review have been or soon will be filed in the United States Court of Appeals for the District of Columbia Circuit. Although the NHSM Rule will become effective on May 20, 2011, EPA can utilize the authority of APA Section 705 either before, or after, the rules at issue have become effective. See 56 Fed. Reg. at 43875 (noting that the boiler and industrial furnace rules took effect on August 21, 1991 and administratively staying those rules on September 5, 1991).

\textbf{III. JUSTICE REQUIRES THAT EPA STAY THE NHSM RULE.}

\textsuperscript{4} The APA contrasts what is required for an administrative stay (“justice so requires”) and a judicial stay (“conditions as may be required” and “irreparable harm”). 5 U.S.C. § 705. Such differences must be given effect, and, even though the Petitioners can show irreparable harm, there is no irreparable harm requirement for an administrative stay under the APA.
The situation here is precisely the type of situation in which an administrative stay should occur. For example, in 1991, EPA provided an administrative stay of its rules for boilers and industrial furnaces that burn hazardous waste, because it was considering changes to the definition of solid waste that would determine what materials were subject to the rules. 58 Fed. Reg. at 43,875. EPA took this action “in order to allow proper evaluation of the comments on the proposed rule [to exempt certain materials from the definition of solid waste], to avoid disrupting beneficial recycling practices that pose no incremental environmental risks over current practice, to preserve the current regulatory status quo, and to avoid undermining the detailed regulatory scheme for coke ovens recently enacted under the amended Clean Air Act [referring MACT standards to be developed under section 112 of the Act]”. \textit{Id.}

In the case of the NHSM Rule, EPA has promulgated a rule that will result in the regulation under section 129 of the Clean Air Act of far more materials than EPA intended to regulate. For example, as demonstrated in Attachment A, many secondary materials that the paper industry currently is using as fuels will not have contaminants at levels that are comparable to or lower than clean biomass. This is a demonstration that a stay is needed to allow EPA to properly evaluate the regulatory and practical implications of this rule.

In fact, when it issued the final rule EPA was unaware that hundreds of millions of tons of material that is currently combusted for energy recovery, combusted as an ingredient, or thermally treated, may now be considered a waste. It is not practical to assume that this material will be combusted in units that meet the requirements of CISWI units under section 129 of the CAA. In fact, at the time of proposal of the CISWI Rule, there were 176 such facilities, according to EPA. Included in the 176 facilities are 36 “burn-off ovens” (very small units for removing part cleaning residuals) and 19 “small, remote facilities.” Neither is suitable for combusting large quantities of solid waste materials. When those two categories are subtracted from the total, 121 facilities remain. These consist of 28 solid waste incinerators, 40 energy recovery units and 53 waste burning kilns. In its economic analysis of the CISWI Rule, EPA did not anticipate that any additional CISWI units would be permitted.
Indeed, the cost of compliance with the CISWI Rule may compel many section 129 permitted facilities to relinquish their permits, further decreasing total burning capacity. Thus, much of the material that is newly classified as solid waste will have to be land filled. Based on the volumes generated cited in EPA’s February 3, 2011, Materials Characterization Papers in the docket for the NHSM Rule, the volume of secondary material that may be land filled following the effective date of the NHSM Rule may include up to 86.8 million tons of pulp and paper residue, 164 million tons of building related construction and demolition debris, 92.8 million tons of coal combustion residuals, 109 million tons of coal refuse, 12.5 million tons of secondary mill residues, 4.6 million tons of scrap tires, and 117 million gallons of off-specification used oil (15 percent of the 780 million gallons generated). The foundry industry estimates that an additional 1 million tons of foundry sand will have to be land filled as a result of the NHSM Rule. In addition, based on industry comments, approximately 87 million cubic feet of creosote treated railroad ties are recycled each year, predominantly for energy recovery. This material, too, will be considered a waste under the NHSM Rule.

EPA clearly did not anticipate these consequences. In the proposed CISWI Rule, EPA stated that many facilities were likely to discontinue use of their CISWI units resulting in an additional 214,000 tons of materials being sent to land fills as a result of the CISWI Rule. 73 Fed. Reg. 31938, 31967 (June 4, 2010). In fact, the volume of material that will need to be land filled is likely to be closer to hundreds of millions of tons. EPA has not considered the economic, environmental, or practical consequences of this extraordinary increase in the volume of material that will now have to be managed as a waste in either the NHSM Rule or the CISWI Rule. EPA should consider those consequences before the NHSM Rule goes into effect.

In addition to overwhelming the nation’s capacity for managing solid waste, the NHSM Rule also will disrupt beneficial recycling practices that pose no incremental environmental risk. Finally, the NHSM Rule will disrupt the Clean Air Act regulation of

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5 As noted in NORA’s August 3, 2011, comments on the NHSM Rule, the used oil recycling industry does not have the capacity to blend this volume of oil into new oil products.
combustion units that are covered by other MACT standards. As EPA reviews these issues and determines whether changes are needed, it must issue a stay to preserve the status quo.

Although irreparable harm is not required, 5 U.S.C. § 705, Petitioners have demonstrated that serious harm would result from a failure to stay the rule as demonstrated in Section IV.B. below and described in the examples set forth in Appendix I. This demonstration confirms that justice requires a stay.

IV. EVEN UNDER THE MORE STRINGENT JUDICIAL STANDARD, A STAY IS WARRANTED.

While a stay is warranted under the APA, it would be justified even under the more stringent standard employed by the courts. Courts typically consider four factors in determining whether to grant a judicial stay: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” Nken v. Holder, 129 S. Ct. 1749, 1761 (2009). These factors must be balanced against one another, such that “[a] stay may be granted with either a high probability of success and some injury, or vice versa.” Cuomo v. US Nuclear Reg. Com’n, 772 F.2d 972, 974 (D.C. Cir. 1985). All four factors are amply satisfied in this case.

A. Petitioners are Likely to Succeed on the Merits.

EPA’s NHSM Rule is fundamentally flawed because it regulates materials that are in a continuous industrial process and misapplies the legitimacy criteria to identify as wastes materials that are being legitimately recycled. Indeed, it is clear from the final rule that EPA itself recognized that certain materials, such as resinated wood and tire-derived fuel (TDF), are legitimately recycled. But, under the NHSM Rule, these materials may be
considered solid wastes because they may not meet the “comparable contaminants” legitimacy criterion. These examples, and others described below, demonstrate the fundamental flaws of EPA’s approach. Indeed, EPA itself has admitted that the final rule has caused significant regulatory confusion and recently issued a letter clarifying that it did not intend to change the regulatory status of gases in pipelines or the boilers, flares, and oxidizers that may combust those gases, 6 Petitioners believe that EPA also did not intend to effect a substantial change to the regulation of other units such as dryers and chemical recovery units.

1. EPA’s Misunderstanding of the Concept of Discard.

In the NHSM Rule, EPA is asserting authority under RCRA over material that has been used and must be reclaimed prior to reuse. In the context of hazardous waste regulations, EPA had attempted to establish the principle that (with a few exceptions such as characteristic sludges and byproducts and commercial chemical products) such materials are always considered wastes. In a series of opinions, the D.C. Circuit soundly rejected the Agency’s position. Even if a material must be reclaimed before it is reused, it is not a waste if it has not been discarded. A material is not discarded if it is destined for beneficial use or recycling in a continuous process in the generating industry itself because it is not part of the waste disposal problem. *American Mining Congress v. EPA*, 824 F.2d 1177, 1190 (D.C. Cir. 1987) (AMC-1). Solid waste is limited to materials that are discarded by virtue of being disposed of, abandoned, or thrown away. *Association of Battery Recyclers v. EPA*, 208 F.3d 1047, 1051 (D.C. Cir. 2000). These cases address situations where material was being reclaimed prior to reuse. In response to these cases, in 2008 EPA revised its definition of solid waste under subtitle C of RCRA. 73 Fed. Reg. 64668 (Oct. 30, 2008).

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6 See letter dated May 13, 2011, from Suzanne Rudzinski, Director, EPA Office of Resource Conservation and Recovery, to Timothy Hunt, American Forest and Paper Association, clarifying that EPA has not changed its longstanding interpretation of the meaning of the term “contained gaseous material” in the RCRA definition of solid waste. This letter is included as Attachment B.
In the NHSM Rule, EPA is attempting to evade these holdings by shifting its focus from the material that is being beneficially reused to any contaminants in that material. In the NHSM Rule, EPA asserts that, notwithstanding the fact that a material is destined for recycling, is managed as a valuable product, and in fact is a valuable product, it may still be a waste if it has any one of over 190 contaminants at levels that are not comparable to or lower than the level that the contaminant is found in the specific traditional fuel that the facility’s boiler is designed to burn. Under this analysis, a material always can be a waste based on the level of a contaminant, notwithstanding the fact that it has never been discarded.7

This new analysis in effect overturns the D.C. Circuit case law regarding reclamation of secondary materials and is inconsistent with the analysis used by EPA to identify solid waste under Subtitle C of RCRA. Under EPA’s 2008 subtitle C regulations, EPA examines the contaminant levels of a recycled product as part of its determination regarding whether recycling is legitimate, but the legitimacy of the reuse can outweigh the fact that contaminants are present.8 In contrast to the Agency’s long-standing interpretation of the definition of solid waste under RCRA, under the NHSM Rule, the presence of contaminants can trump any fact pattern that demonstrates legitimate reuse. EPA offers no reasoned explanation for this change, in violation of the Administrative Procedure Act.9

Even though the Agency offered no reasoned explanation for its new interpretation of the definition of solid waste, it may believe that it can justify its position that all contaminants that are combusted are solid wastes by considering all combustion for the

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7 Under EPA’s new analysis, reclamation through non-thermal treatment processes also would be considered waste management, potentially regulating recycling processes that have always been considered exempt from RCRA regulation. See 40 C.F.R. 261.6(c)(1).

8 This balancing of factors is how the legitimacy factors have been employed since they were first compiled in an April 26, 1989, memorandum issued by Sylvia Lowrance, the Director of the Office of Solid Waste. See 73 Fed. Reg. 64668, 64705 (Oct. 30, 2008) (discussing application of the legitimacy criteria where levels of contaminants were significantly higher than in unused products, but the recycling was nonetheless found to be legitimate).

purpose of destruction to be waste management. However, EPA itself points out that this interpretation is not valid. See 76 Fed. Reg. at 15463 (citing Safe Air for Everyone v. Wanemeyer, 373 F.3d 1935 (9th Cir. 2004) (noting that bluegrass stubble can be burned to facilitate to return of nutrients to the soil and not be considered a solid waste) (“Safe Air”).

In the NHSM Rule, EPA also has established a paradigm where all secondary material that is transferred out of the control of the generator is presumed to be waste. This bright line fails to give meaning to the statutory definition of solid waste because the transfer of a secondary material to a third party who values that material (as may be demonstrated through purchasing of the material), and then uses it beneficially either in a product or as a fuel, is a demonstration that the material is being legitimately recycled, not that it is discarded. The D.C. Circuit has already held that transferring a material cannot automatically make it a waste. Safe Food and Fertilizer v. EPA, 350 F.3d. 1263, 1268 (D.C. Cir. 2003). In that case, petitioners argued that recycled material destined for immediate reuse within an ongoing industrial process is never considered discarded, whereas material that is transferred to another firm or industry for subsequent recycling must always be so viewed. The D.C. Circuit rejected that argument concluding that RCRA does not compel the conclusion that material destined for recycling in another industry is necessarily discarded.

Finally, in the NHSM Rule EPA is taking the position that once a material is discarded, it must undergo processing before it can be considered a non-waste, even if the material can be beneficially reused without any processing or reclamation. This assertion of control over non-hazardous secondary material is not compelled by RCRA and runs counter to the goals of the statute to increase resource conservation and recovery.

As discussed below, applying the approach set forth in the NHSM Rule to specific secondary materials demonstrates its flaws. EPA is attempting to designate as solid waste materials that clearly have not been discarded.
a. **Scrap tires.**

The preamble of the NHSM Rule recognizes the vital role TDF serves in managing the nation’s scrap tires and correctly identifies TDF as a legitimate secondary fuel. In fact, recognizing the value of TDF, the rule makes a generic determination that this material meets all the indicia of a non-waste determination except one: the legitimacy criteria. The legitimacy criteria include a requirement that a fuel have contaminants at levels that are comparable to or less than traditional fuel. As noted by EPA, TDF compares favorably to some traditional fuels, such as coal and coke. An analysis by the cement industry confirmed this favorable comparison. But, depending on which traditional fuels a boiler is designed to burn, such as biomass, TDF may not fare as well in a contaminants comparison. As a result, under the NHSM Rule, the same TDF that is a product when sent to one facility may be a waste when sent to another facility. Thus, the NHSM Rule creates inequity and a disincentive for pulp and paper mills, other biomass boilers and kilns to continue using TDF as a secondary fuel, which places at risk over 50 percent of the existing TDF market. This arbitrary result is not based on a determination that the use of TDF is somehow not legitimate recycling. This result is based simply on an invalid use of the legitimacy criteria.

TDF also provides an example of the flaw in EPA’s approach to materials that have been discarded once. In the NHSM Rule, a non-hazardous secondary material that has been previously discarded can be transformed into a legitimate fuel or ingredient through processing. This approach treats similar materials differently for purposes of determining which materials are legitimate fuels, and creates a disincentive to using certain non-hazardous secondary materials as fuels. Requiring extensive processing also uses additional energy and increases air emissions.

In the case of scrap tires, newly generated tires coming off vehicles and entering an established scrap tire collection system are considered fuels, whereas previously stockpiled tires are considered wastes. Previously stockpiled tires could be processed,
physically shredding the tires and removing the metal, in order to be treated as a fuel rather than a solid waste. In practice, previously stockpiled tires are appropriate for limited scrap tire markets, and typically cannot be shredded into processed TDF, due the condition of the tires. One of the only suitable markets for such tires is as whole tire TDF in cement kilns.

While the final rule tries to create a path toward allowing previously discarded scrap tires to be considered fuels, in reality this rule relegates them to being solid wastes destined for landfills. In the cement kiln context, if a previously stockpiled tire were sufficiently processed according to the final rule, the processed TDF could be injected into the kiln as a fuel, along with the metal removed from the tire during processing, since the metal is an ingredient of cement manufacturing. In this example, the only difference between allowing a whole previously stockpiled scrap tire to be considered a fuel and requiring the tire to be processed into TDF chips, with a significant portion of the metal wire removed, is the energy required to process the tire. From an environmental perspective, this approach is less protective, since the additional energy used to process the scrap tire would cause air emissions. Thus, the NHSM Rule imposes an unnecessary reclamation requirement on scrap tires, when the reuse of such materials is no less legitimate than the use of tires obtained from tire collection systems.

b. Coal refuse.

Legacy coal refuse piles are currently used as a fuel source by power plants. This use not only constitutes legitimate recycling of that coal, but also supports coal mine remediation activities. However, as a result of the NHSM Rule, mine remediation activities that have been strongly supported by many state environmental programs may cease because there is no market for the coal. Even though EPA allows such materials to be processed in the same manner as newly mined coal, these materials may still include contaminants above traditional fuel levels. Thus, even if processed, coal refuse could be considered a waste, not based on a determination that it is not legitimately recycled, but based simply on an
invalid use of the legitimacy criteria that forces combustors to consider any material a waste if it has contaminants above levels that are comparable to traditional fuel, no matter how legitimate the recycling activity is.

c. Biomass.

Many biomass urban and agricultural residuals that provide valuable, economical and renewable energy will be classified as wastes under the legitimacy criteria because they will likely fail the legitimacy criterion for comparable contaminants. For example, recycled paper mill residuals and wastewater treatment residuals which are largely unusable paper fibers with good BTU value will become solid wastes due to higher chlorine levels. Given the stigma of being a waste incinerator and the three times higher cost of meeting CISWI standards compared with Boiler MACT, millions of tons of materials will be landfilled and replaced, if it can be afforded, with traditional fuels, most likely fossil fuels, at a total cost of several hundreds of millions of dollars per year. This result is contrary to the Administration’s stated policy of encouraging carbon neutral biomass as an alternative fuel and is another example of legitimate recycling that would be considered waste management under EPA’s misuse of the legitimacy criteria in the NHSM Rule. In addition, enterprises, many of which are small businesses, that collect, process and clean construction and demolition debris into “urban wood” will be harmed as facilities that currently use these high BTU, dry materials will be reluctant to burn these “wastes” in their boilers.

d. Coal combustion byproducts

The final rule stipulates that nonhazardous secondary materials that have not been discarded, and are used as ingredients in combustion units, also must meet the legitimacy criteria. However, once discarded, nonhazardous secondary materials remain solid waste and will not be classified as ingredients unless first processed to some unspecified level acceptable to EPA. EPA has imposed this requirement even where it notes that such
processing is not necessary to make the material any more useful as an ingredient or to serve any particular environmental purpose, and there is no meaningful difference between the discarded and non-discarded versions of the material.

Several examples of concerns regarding EPA’s approach to ingredients are available from the utility industry. First, utilities use carbon burn out units to combust coal combustion byproducts to generate low carbon fly ash which is marketed and sold as a high value cement ingredient. Under the NHSM rule this practice is considered incineration of solid waste notwithstanding the creation of a new product.

Second, electric generation units may add one or more additives to a fuel source to improve the characteristics of the fuel, including adding surfactants to prevent the freezing of coal in cold weather states or processing pulverized coal with cement kiln dust to lower air emissions. It appears that these types of additives which frequently are derived from recycled materials would convert every combustion unit to an incinerator.

Third, coal combustion byproducts are beneficially used as a raw material in the manufacture of cement and as a replacement for cement. Under the NHSM rule, the introduction of coal combustion byproducts into a cement kiln as a replacement raw material could convert the kiln to a CISWI. If this were to occur, this important beneficial use market for coal combustion byproducts would be adversely impacted.

In each of these examples, the determination that the coal byproduct is a waste would not be based on any analysis of whether or not the use of the material is legitimate recycling. Rather, EPA’s NHSM Rule presumes that this material is a waste based on its erroneous use of the legitimacy criteria and its requirement that secondary materials that have been discarded once must undergo unnecessary processing before reuse can be considered legitimate. As noted above, these arbitrary requirements are not consistent with RCRA.
e. Resinated wood.

Like TDF, in the NHSM Rule EPA recognized that resinated wood is a legitimate secondary fuel and made a generic determination that this material meets all the indicia of a non-waste determination, except one: the legitimacy criteria. This recognition was based on a showing of the value of this material and the fact that its use is integral to the economic viability of many facilities. However, like many other valuable fuels, the legitimacy criteria may preclude resinated wood from being used as a fuel, even after new regulations regarding formaldehyde levels in wood products are promulgated. Resinated wood may contain formaldehyde at levels that exceed what is found in clean biomass.

Based on these formaldehyde levels, resinated wood could automatically be considered a solid waste that can only be burned in a CISWI unit, no matter how legitimate its use as a fuel is and no matter how critical this fuel is to the industry.

This is another clear example of EPA regulating a material that has not been discarded. This material is highly valued within the wood products industry for its high fuel value relative to other wood fuels generated and burned at these facilities for energy recovery. Many facilities rely on mixing of these low moisture content wood materials with higher moisture content wood materials to improve combustion. Moreover, there exists within the wood products industry a developed market for purchase and sale of resinated wood between independent companies. Furthermore, formaldehyde that might be present in resinated wood as a “contaminant” will be combusted and controlled to comparable degrees regardless of whether it is burned in a boiler or CISWI unit. Thus, there is no added environmental protection from burning resinated wood in CISWI units than in boilers. Diverting resinated wood from boilers into landfills would actually be a negative impact to the environment, as would replacing a carbon neutral fuel with a fossil fuel.
f. Foundry sand.

In the preamble to the NHSM Rule, EPA for the first time asserts that foundry sand that is thermally reclaimed on-site and reused in the same process loop, is considered discarded and is therefore a solid waste subject to section 129 CAA standards when placed in a combustion unit. 76 Fed. Reg. at 15519. Thus, foundry sand is another clear example of how EPA has moved away from the principles articulated by the D.C. Circuit. Foundry sand is reused in a continuous industrial process, much like the processes reviewed in prior cases that the D.C. Circuit has determined are not waste disposal. As discussed above, in the NHSM Rule, EPA is now saying that all thermal reclamation is waste management, even when it occurs in a continuous industrial process. This new interpretation is contrary to D.C. Circuit case law and contrary to EPA’s prior positions regarding the RCRA regulation of foundry sand. As recently as 2008, EPA determined that “while the used sands in the sand loop arguably have toxics-along-for-the–ride, EPA did not raise questions about the legitimacy of the recycling, given the overall nature of the operations.” 73 Fed. Reg. at 64705. Having determined that foundry sands are not discarded, EPA has no basis for its new determination in the NHSM Rule that thermal treatment of these non-discarded materials is now waste treatment. In Safe Air, the 9th Circuit held that bluegrass stubble can be destroyed to release nutrients and allow their reuse in soil without turning the stubble into solid waste. Similarly, foundry sand contaminants can be destroyed to allow the reuse of the sand without being considered a waste.

Without notice or an opportunity for comment, EPA has fundamentally changed the metal casting industry by eliminating the legitimate reuse of foundry sand in a continuous industrial process. EPA reached this conclusion even though foundry sand is not combusted in a thermal recovery unit, but instead the contaminants are removed so the foundry sand can be reused. The process that occurs within a thermal sand reclamation unit is similar to the metal casting process itself, in that the binders associated with the
molding and core sand that come in close proximity with the molten metal are removed as part of the casting process.

Under EPA’s line of reasoning in the final rule, a host of processes not previously contemplated by the agency could become regulated under the CISWI Rule. This result runs counter to the purpose of RCRA, the Clean Air Act and EPA’s policy to promote reducing, reusing and recycling of secondary materials by promoting the disposal of foundry sand, rather than its reclamation and reuse. This result also is invalid under the Administrative Procedure Act.

In addition, because thermal reclamation does not involve energy recovery and does not take place in a waste-burning kiln, facilities may have to stop reclaiming their foundry sand on May 20, 2011, providing no time to find alternative supplies of new sand and disposal options for used sand. Due to the high cost of sand resulting from competing industrial uses (such as the natural gas industry which uses the same sand for hydraulic fracturing) many metal casters will no longer be able to remain competitive and may have no choice but to cease operations.

g. Off-specification used oil.

Under the NHSM Rule, on-specification used oil is a product while off-specification used oil is considered a waste. Both are traditional fuels. Both categories have very high BTU value, are treated as valuable petroleum products, are regulated under 40 CFR Part 279, and have stable markets. By classifying off-specification used oil as a discarded material EPA is now limiting the beneficial reuse of this valuable fuel, and will relegate it to destruction in a waste incinerator.

The determination that off-specification used oil is a waste is not based on the legitimacy of the use of the oil as fuel. Instead, it is based on an arbitrary determination that any contaminants above the levels in the used oil specification turns used oil into a waste.
This bright line determination is not supported by RCRA. In fact, as added by the Used Oil Recycling Act of 1980, section 1004(37) of RCRA defines recycled oil as: “[A]ny used oil which is reused, following its original use, for any purpose (including the purpose for which the oil was originally used). Such term includes oil which is re-refined, reclaimed, burned, or reprocessed.” 42 U.S.C. 6903(37). This definition does not distinguish between on- and off-specification used oil. Thus, Congress clearly identified burning used oil as an action that is distinct from waste disposal and directed EPA to develop separate management program to address, and promote, this recycling activity. Specifically, section 3014(a) states that: “The Administrator shall ensure that such regulations do not discourage the recovery or recycling of used oil, consistent with the protection of human health and the environment.” 42 U.S.C. 6935(a).

In response to this mandate, EPA developed the Used Oil Management Standards. Under these standards, off-specification used oil can be burned for energy recovery in certain facilities. EPA's used oil management regulations are premised on the presumption that used oil which is not disposed of will be recycled: "EPA presumes that used oil is to be recycled unless a used oil handler disposes of used oil, or sends used oil for disposal." 40 C.F.R. § 279.10(a)("Applicability"). EPA made this presumption, in part, because used oil is nearly always managed for recycling and/or combustion for significant energy recovery. A vast marketplace has developed to recycle used oil, including the combustion of both on- and off-specification used oil. It should be apparent that a pre-existing regulatory determination that materials will be "recycled" is contradictory to EPA's decision in this rulemaking that the same materials have been discarded making them a solid waste. Off-specification used oil has been successfully managed for nearly two decades by the Agency's used oil program, which has led to the recycling of substantial quantities of these materials. For the Agency to determine that used oil is a solid waste and has been discarded simply because it is off-specification reverses the decisions that EPA made in establishing the used oil program. In fact, by requiring off-specification used oil to be incinerated, EPA is now violating the Used Oil Recycling Act.
h. Treated wood.

Creosote railroad ties are composed of two materials that EPA considers to be traditional fuels: coal tar and wood. Creosote railroad ties also are collected and handled under the same kind of management system EPA found acceptable for tires. However, notwithstanding the fuel value, the collection and management system, and the legitimate use of creosote railroad ties as a fuel, in the NHSM Rule EPA has determined that this material is a waste, again because of the levels of contaminants found in the material. 76 Fed. Reg. at 15483.

Accordingly, instead of allowing the transfer of this valuable fuel product to third parties for beneficial use as fuel to avoid burning virgin wood or other traditional fuels, creosote railroad ties will be forced into landfills. The cost of this diversion to landfills will run to many hundreds of millions of dollars, and with current negative economic conditions and the thin operating margins for many businesses that will no longer be able to use these materials as combustible biomass, the result is expected to be significant adverse impacts on operations and lost jobs. Moreover, replacing this biomass with fossil fuels and relegating these and other valuable secondary materials to landfills, will have an adverse impact on the environment. Again, this result is not based on any analysis of whether or not the use of railroad ties as fuel is legitimate recycling. Rather, it is an arbitrary result based on an erroneous use of the legitimacy criteria.

2 Unintended Consequences.

After publication of the NHSM Rule, EPA learned that, perhaps unintentionally, it has created confusion regarding the regulation of gaseous material under RCRA. Similarly, EPA has fundamentally changed the regulation of process units such as dryers, lime kilns and chemical recovery units. These changes were made without adequate notice or an opportunity for comment.
a. **Gases.**

With respect to gases, the statutory definition of solid waste under RCRA includes “contained gaseous material.” 42 U.S.C. 6904(27). Since EPA first examined this issue in 1982, EPA has always interpreted “contained gaseous material” to mean gas in a container, not gases flowing through pipelines to flares or boilers. 47 Fed. Reg. 27520 (June 24, 1982). The purpose of this interpretation is to delineate where RCRA regulation ends and Clean Air Act regulation begins. 47 Fed. Reg. at 27530. To ensure that this interpretation of RCRA carried through to the implementation of section 129 of the Clean Air Act, the 2000 CISWI Rule defined “contained gaseous material” as follows: “Contained gaseous material means gases that are in a container when that container is combusted.” 40 C.F.R. 60.2265.

In the Response to Comments on the NHSM Rule, EPA called this long-standing interpretation into question. NHSM, Response to Comments, at 212. Moreover, while the 2011 CISWI rule deleted the definition of “contained gaseous material,” from the CAA regulations, the NHSM Rule did not include that definition in new Part 241. 76 Fed. Reg. at 15761. Finally, the NHSM Rule includes several gases in the definition of traditional fuel. 40 C.F.R. 241.2.

At no stage of the NHSM rulemaking process did EPA provide any notice that it intended to change its interpretation of the term “contained gaseous material.” Neither the advanced notice of proposed rulemaking (74 Fed. Reg. 41 (Jan. 2, 2009)) nor the notice of proposed rulemaking (75 Fed. Reg. 31844 (June 4, 2010), nor the final NHSM Rule (76 Fed. Reg. 15456 (Mar. 21, 2011)) include any discussion of this term. EPA did receive a comment on the proposed rule from the American Chemistry Council and a comment from the American Petroleum Institute, asking that EPA clarify that contained gaseous material includes only gas in a container. These comments assumed that is what EPA intended and merely sought clarifying language.
Similarly, the proposed CISWI rule (75 Fed. Reg. 31938 (June 4, 2010)) provided no notice that EPA intended to change its interpretation of the term “contained gaseous material.” EPA did not even propose to delete the definition of that term from the 2000 CISWI rule. 75 Fed. Reg. at 31983. However, this definition is deleted in the final CISWI Rule with no discussion of this change in either the preamble or the response to comments document. 76 Fed. Reg. at 15761.

Based on this failure to provide any opportunity for notice and comment, Petitioners agree with EPA’s assertion, in its May 13, 2011, letter to Tim Hunt, that EPA has not changed its long-standing interpretation of “contained gaseous material,” under which that term only encompasses gases in containers. The D.C. Circuit has held that such an action would violate the Administrative Procedure Act. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (agency violates APA if it makes a "fundamental change in its interpretation of a substantive regulation without notice and comment"); *Alaska Professional Hunters Association Inc v. Federal Aviation Administration*, 177 F.3d 1030 (D.C. Cir. 1999) (same).

While we appreciate EPA’s letter of May 13, 2011, clarifying that EPA did not intend to make any changes to its interpretation of the statute, Petitioners remain concerned that a letter to an individual does not provide sufficient clarification for the regulated community. We request EPA to look for more formal ways to clarify the current regulatory status of gases under RCRA. In the meantime, the regulatory uncertainty created by EPA is another justification for an administrative stay of the NHSM Rule.

b. **Dryers, lime kilns, and chemical recovery units.**

Under the NHSM Rule secondary material that is placed in lime kilns and chemical recovery units is presumed to be solid waste, classifying these units as solid waste incinerators. The only way to escape solid waste regulation for material that is being
reused by the same company is to prove that the secondary material meets the legitimacy criteria. It is clear that EPA did not realize that its definition swept so broadly.

For example, in the preamble to the 2011 CISWI Rule, EPA states:

The Solid Waste Definition Rule exempts materials pursuant to subtitle C of RCRA. Any SARU, chemical recovery unit, recovery furnace, or lime kiln that is exempt pursuant to subtitle C of RCRA is not a CISWI unit subject to this final rule unless the unit combests material that is solid waste and is not specifically exempt from the definition pursuant to subtitle C of RCRA. We are currently not aware of any subtitle C exempt facilities burning such materials. We are also not aware of any lime kilns that are combusting solid waste as that term is defined in the Solid Waste Definition Rule.

76 Fed. Reg. at 15176 (emphasis added). EPA was unaware that its solid waste definition would encompass materials that are placed in SARUs, chemical recovery units, recovery furnaces, and lime kilns.

EPA’s failure to understand the scope of its new regulatory definition is ample grounds for a stay of the effective date of that definition until EPA fully understands what it has done and is able to correct any unintended consequences.

B. Petitioners’ Members Will Be Irreparably Harmed by the NHSM Rule Absent a Stay.

Absent an administrative stay of the NHSM Rule, Petitioners’ members will suffer irreparable harm. On May 20, 2011, some Petitioners’ members will be faced with the choice of continuing to operate combustion units that use secondary materials as ingredients or shutting them down (which may require entire facilities to shut down) because they are uncertain if EPA considers their secondary materials to be solid wastes. On May 20, 2011, Petitioners’ members will be faced with the choice of continuing beneficial recycling activities that involve thermal treatment or discontinuing their recycling activity because the compliance deadline for existing thermal treatment units is
uncertain. Finally, on May 20, 2011, Petitioners’ members will have to review the economic viability of their operations that use or produce secondary material for energy recovery if they do not think the material can meet the legitimacy criteria for contaminants. Economic decisions regarding operations, fuel supply contracts, and air pollution control equipment will have to be made very soon. In each of these categories of impacted facilities, the regulatory uncertainty created by the NHSM Rule and its relationship to the CISWI Rule may cause plants to shut down temporarily, or even permanently, adversely impacting families, communities, and the overall economy. These impacts constitute irreparable harm.

Given the stay of the CISWI Rule, existing facilities with newly regulated energy recovery units or cement kilns may now have a longer period of time to come into compliance with the 2011 CISWI standards and may decide to use that time to remain in operation and install additional air pollution control equipment. However, Petitioners cannot wait very long before making decisions regarding whether they will discontinue the use of secondary fuels entirely or make the investments needed to ensure timely compliance with the new, stringent standards. Thousands of existing facilities will need to begin to make major compliance investments soon, in light of the pressing compliance deadlines, and will not be able to undo such investments if EPA ultimately changes the NHSM Rule. Furthermore, as a result of the NHSM Rule, new facilities will have to make crucial decisions regarding plant upgrades or shutdowns, which may be unnecessary if EPA modifies the NHSM Rule. Examples of these types of irreparable harms are included in Appendix I.

In the context of a stay, irreparable harm is an injury for which a party will not be adequately compensated through money damages or other corrective relief if ultimately successful on the merits. *Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958). Economic losses unrecoverable from an immune federal agency and losses threatening a company’s viability both constitute irreparable harm. *See Smoking Everywhere, Inc. v. FDA*, 680 F. Supp. 2d 62, 76–77, n.19 (D.D.C. 2010)
(finding that an FDA order prohibiting the import into the United States of the plaintiff’s sole product constituted irreparable harm justifying a preliminary injunction), aff’d sub nom. Sottera, Inc. v. FDA, No. 10-5032, 2010 WL 4942132, at *7 (D.C. Cir. Dec. 7, 2010) (upholding the district court’s finding of irreparable loss as “entirely reasonable”); see also Cal. Pharms. v. Maxwell-Jolly, 563 F.3d 847, 852 (9th Cir. 2009) (holding that a reduction in Medi-Cal revenue under a California law would cause irreparable harm to the plaintiffs because the plaintiffs would not be able to recover the economic losses); Kan. Health Care Ass’n v. Kan. Dep’t of Soc., 31 F.3d 1536, 1543 (10th Cir. 1994) (economic damages support a finding of irreparable harm when the damages would not be recoverable even if plaintiffs are successful in their litigation).

Even facilities that do not face shutdown face irreparable harm as a result of wasted expenditures. The D.C. Circuit recently granted a motion for expedited consideration of a challenge to the Portland Cement MACT. Order, Portland Cement Association, Inc. v. EPA, No. 10-1359 (D.C. Cir. Jan. 19, 2011). In order to justify expedited consideration, a party “must demonstrate that the delay will cause irreparable injury.” D.C. Cir. Handbook at 34. In that case, petitioners argued that they faced irreparable injury from having to commit resources to implement a MACT rule that was subject to challenge and potential change. By granting the motion, the D.C. Circuit clearly indicated that the harms in question constituted irreparable harm. It necessarily follows that the broader impact the NHSM Rule will have across multiple industries, combined with the significant legal uncertainty created by the rule similarly constitutes irreparable harm and warrants a stay.

Petitioner American Forest & Paper Association estimates that the total annual cost to the forest product industry alone of replacing fuels and disposing of resinated wood and other biomass residuals will be close to $2 billion. For many mills, these billions in costs will put mills at risk of closure and the high paying jobs they support. Moreover, even those mills that stay in business will suffer irreparable harm as they secure contracts for replacement fuels at higher costs because they will be unable to recoup those costs from
EPA. Across all industries, those costs and the resulting irreparable harm will be even higher.

EPA also should consider the irreparable harm to the nation’s solid waste disposal capacity as it considers granting a stay of this rule. As noted above, hundreds of millions of tons of solid waste will require disposal because they can no longer be burned for energy recovery. EPA has no plan for addressing this impact.

C. A Stay Would Not Harm EPA or Other Parties and Is in the Public Interest.

These rules threaten significant harm to Petitioners’ members and the economy at a time when manufacturers are attempting to recover from the steepest economic downturn since the 1930s. Compliance costs resulting from the application of the NHSM Rule could cost thousands of manufacturing jobs in the United States and hurt America’s global competitiveness.

Staying this rule will not cause any environmental harm. The purpose of the NHSM Rule is to identify what units are subject to section 129 of the CAA under the 2011 CISWI Rule. Any applicability of this rule to the existing CISWI requirements would be, we believe, inadvertent. This rule should have no applicability until EPA completes its reconsideration of the CISWI Rule. Thus, a stay of the NHSM Rule will not harm EPA or other parties.

Given the fact that no parties will be harmed by the stay and the irreparable harm to Petitioners members that will occur absent a stay, a stay also is in the public interest.

V. CONCLUSION

For the foregoing reasons, EPA should administratively stay the NHSM rule pending review.
Should you have any questions or comments concerning this petition, please feel free to contact any of the undersigned, or Timothy Hunt at the American Forest & Paper Association at (202) 463-2588. Mr. Hunt has kindly agreed to convey any questions or comments to the undersigned for response.

Sincerely,

[Signature]

Jan A. Poling
Vice President, General Counsel and Corporate Secretary

On behalf of,

AMERICAN FOREST & PAPER ASSOCIATION
AMERICAN CHEMISTRY COUNCIL
AMERICAN FOUNDRY SOCIETY
AMERICAN HOME FURNISHINGS ALLIANCE
AMERICAN WOOD COUNCIL
BIOMASS POWER ASSOCIATION
NATIONAL ASSOCIATION OF MANUFACTURERS
NORA—AN ASSOCIATION OF RESPONSIBLE RECYCLERS
RUBBER MANUFACTURERS ASSOCIATION
TREATED WOOD COUNCIL

Enclosures:
Attachment A (data on wood products industry fuels)
Attachment B (May 13, 2011, letter from Suzanne Rudzinski to Tim Hunt)
Appendix I (examples of harm)
Mr. Tim Hunt  
Senior Director, Air Quality  
American Forest and Paper Association  
1111 Nineteenth Street, N.W.  
Washington, D.C. 20036

Dear Mr. Hunt:

I would like to thank you and other representatives of forest products industries for meeting with my staff on April 26, 2011, to discuss your concerns with the Identification of Non-Hazardous Secondary Materials That Are Solid Waste (NHSM) final rule. We are evaluating a number of the concerns you raised, but wanted to get back to you quickly on the “contained gas” issue that you raised in that meeting and in an issue paper that you forwarded to us on April 13, 2011. We understand that our response to the fourth comment in Part 3b.I.3. of the document Responses to Comments Document for the Identification of Non-Hazardous Materials that are Solid Waste (February 2011) has created concerns among the regulated community that the Environmental Protection Agency (EPA) has changed a long-standing interpretation of what constitutes a "contained gaseous material" for purposes of defining the term “solid waste” under the Resource Conservation and Recovery Act (RCRA). We have not changed our prior interpretation but would like to clarify the response.

EPA was responding to a comment requesting that we include in the NHSM final rule a definition of "contained gaseous material." The Agency does not believe that including such a definition in the rule is necessary. However, our response seems to have caused confusion about whether the Agency was changing its prior interpretations regarding the burning of gaseous materials, for example in fume incinerators, and whether or not such burning is considered to be treatment of a solid waste by burning.

The response does not change any previous EPA positions. We clarify here that the Agency's previous statements and interpretations remain effective. Thus, burning of gaseous material, such as in fume incinerators\(^1\) (as well as other combustion units, including air pollution control devices that may combust gaseous material) does not involve treatment or other management of a solid waste (as defined in RCRA section 1004 (27)).

\(^1\) See, for example, 47 FR 27530, June 24, 1982, where it states “Fume incinerators which are used to destroy gaseous emissions from various industrial processes, for example, are not subject to regulation under RCRA."
We also note that since the Agency did not solicit comment on this issue in the proposal, and did not analyze or address it in the preamble to the final rule or in the Regulatory Impact Analysis (RIA) for the rule, it is clear that the Agency did not intend to issue an interpretation that would change previous EPA statements regarding how "contained gaseous material" is interpreted for purposes of RCRA and for purposes of section 129 of the Clean Air Act.

Thank you for your continued interest in protecting the environment. If you have further questions you may contact George Faison, of my staff, at faison.george@epa.gov or 703-305-7652.

Sincerely,

[Signature]

Suzanne Rudzinski, Director
Office of Resource Conservation and Recovery
Appendix I

EXAMPLES OF HARM RESULTING FROM FAILURE TO STAY THE NHSM RULE

Example Group 1 – wood products industry

1. This facility manufactures resinated wood boards that are used in doors. It employs over 450 people and has been in operation since the 1920s. Economic conditions caused this facility to lay off 62 employees in 2009 and 83 employees in 2010. Under the NHSM Rule, the resinated wood used as a fuel by this facility could be considered a solid waste because it likely will have formaldehyde levels up to 500% higher than virgin wood. Based on the levels of production in 2010, it would have cost this company over $608,000 to replace the 33,304 tons of resinated wood fuel that it used in 2010 with other biomass fuels, based on a cost of $18.28 per ton. The company also would have had to pay over $1,592,000 to dispose of the resinated trimmings that it burned in 2010. Thus, the total cost to this one facility resulting from the NHSM Rule would have been over $2,201,000 in 2010. These costs put the jobs of additional employees at risk as the company makes economic decisions regarding how to comply with the CISWI Rule. The company will not wait three to five years to make decisions regarding where to make investments. Thus, absent a stay of the NHSM Rule, the company and its employees at this facility may suffer irreparable harm if the company decides the facility is no longer economically viable. Even if the facility stays in operation, the company will need to secure contracts for replacement fuels. The increased cost of fuel under these contracts constitute irreparable harm because the facility will not be able to recover those costs from EPA.

3. This facility is a wood products mill located on the West Coast. This facility mixes 14,540 BDT (bone dry tons) of urban wood with (wet) bark hog fuel for biomass energy systems. The use of the dry material is necessary to manage combustion. This facility pays $48/ton for this urban wood, at a total current cost to the facility of $697,920 a year. Under the NHSM Rule, urban wood may be a solid waste based on coatings, sap stains, and other wood treatments. On the West Coast, the three dry replacement clean biomass options have an average cost of $71.66 per ton. Thus, 14,540 BDT/year of clean biomass will cost $1,042,033/year. The incremental cost to this one facility of replacing urban wood with clean biomass will be $344,000 annually.

These facts strongly support a judicial determination that the urban wood is a valuable product (costing $48/ton in the marketplace), not a waste. However, the facility will have to secure contracts for replacement fuels. Accordingly, the facility will suffer irreparable economic harm the increased costs of those fuel contracts, because the facility will not be able to recover those costs from EPA.
4. This facility is a wood products mill located in the Southeast that combusts resinated biomass residuals that are generated on-site in three units. This resinated wood would likely be a solid waste under then NHSM Rule, due to formaldehyde levels. This facility estimates that the cost of replacing this resinated wood with natural gas will be approximately $3,585,600 a year. The facility also would have to incur additional disposal costs for its resinated wood if this material is considered a waste when used as an ingredient to make new paper products. These costs, which the facility will likely begin to incur during the pendency of the appeal of the NHSM Rule, will not be recoverable from EPA and therefore support a finding that the NHSM Rule will cause this facility to suffer irreparable harm.

Example Group 2 – thermal treatment

1. Over 100 metalcasting facilities operate one or more thermal sand reclamation units as part of the continuous industrial process. This company is a metalcasting facility that pours molten metal into sand molds to produce metal castings. The sand molds and cores are formed by mixing sand with clay or resin binders to form a cavity into which the molten metal is poured.

When the metal castings are cooled, the molds are broken to remove the castings from the sand in a process referred to as “shakeout.” After the casting is separated from the mold and core sand, it is sent off for cleaning. During the shakeout process sand fines that become airborne are typically collected using conventional particulate matter control systems such as a baghouse. The molds and sand cores are placed into a mechanical reclamation process consisting of a vibratory drum with perforations and a series of conveyors and screens. Sand (hereafter referred to as return sand) that passes through the drum and screens is returned to the mold making process to be used to make new molds. Some foundries also process the return sand in a thermal sand reclamation unit that helps to remove additional residual binder and dust, thus making the sand more amenable to reuse (even better than virgin sand).

The entire process of making sand molds and reclaiming return sand for producing new molds is referred to as the sand loop. Foundries typically recycle foundry sand within the sand loop at least 20 times before it can no longer be reused for molds and must be either discarded or beneficially used in some fashion. This company treats approximately 17,280,000 pounds of sand each year in a thermal sand reclamation unit.

According to the preamble to the NHSM Rule, the company’s thermal sand reclamation unit will now be considered a CISWI unit because it thermally treats a secondary material. In order for a thermal sand reclamation unit to meet the applicable emission limits associated with the CISWI standards, additional controls will have to be installed. These controls will increase the capital costs of the unit by a factor of 1.7 to 2.7 times. The cost for these thermal and reclamation units ranges from $500,000 to $1,200,000 (depending on the size of the unit needed), so the cost of the required add-on control equipment would range from $1,000,000 to $2,500,000. This dramatic increase in
equipment cost does not include operational costs, which will increase operational costs by approximately 25 percent. Such compliance cost increases will make the operation of thermal sand reclamation units no longer cost effective or economically viable. In addition, the cost of permitting and emissions testing for these units would be approximately $60,000 to $100,000.

This company employs 100 people and currently generates revenues of seven million dollars per year. As a result of the high increased compliance costs imposed by the new regulatory requirements, this company will no longer be able to thermally reclaim its foundry sand to facilitate reuse of the sand within the foundry and will have to purchase an additional 8,640 tons of new sand at a cost of $735,000 annually and will face an increase of $302,000 annually in cost for the disposal or beneficial use of its sand. The combined increase in operational costs for the purchase of new sand and management of used sand is more than one million dollars annually. Absent a stay, the company will begin to incur these costs immediately because the solid waste incinerator standards may apply to thermal sand reclamation units as early as May 20, 2011.

The application of solid waste incinerator standards to thermal sand reclamation units at metalcasting facilities will cause irreparable harm to the facility, its employees, the surrounding community, and the economy.

**Example Group 3 – producers of secondary fuels**

1. This company is in the business of recycling used oil. Its business is to collect used industrial oily waters from local companies, dewater the oil, and then sell the dewatered oil to other companies (burners with CAA section 112 permits) as off-spec fuel. The industrial oil that is the primary part of its business does not meet used oil specifications but, under EPA’s used oil management standards, can currently be burned in boilers and industrial furnaces. As demonstrated in NORA’s August 3, 2010 Comments on the Proposed Rule, blending the off-spec used oil with either virgin petroleum or on-spec used oil is not economically feasible for companies handling large volumes of off-spec used oil. Under the 40 CFR Part 279 the off-spec used oil cannot be sold to businesses operating space heaters. Disposal of used oil into landfills is not an option because (1) landfill capacity is extremely limited; and (2) most states and local governments prohibit disposal of used oil into landfills. Once this rule is in effect, the market for off-specification used oil will disappear as companies switch to other fuels to avoid the CISWI standards. As a result of these restrictions, the NHSM Rule will severely limit the markets for its products and may drive this company out of business. This result may occur pending the review of this rule. To prevent this from happening and to preserve the status quo, EPA must grant a stay of the NHSM Rule. This company employs over 100 people and currently produces 4 - 5 million gallons of off-spec fuel per year. This situation will cause irreparable harm to the facility, its employees, the surrounding community, and the economy.

2. All NORA members are part of an integrated used oil recycling system that includes local governments, used oil processors, and end users. By eliminating the market for off-
specification used oil the NHSM Rule will cause irreparable harm to this entire recycling system. This is particularly true of the used oil generated by “do-it-yourself” (“DIY”) oil changers that is collected by local governments. These local government used oil collection centers will not benefit from the CISWI exemption for space heaters because they are not burning the oil themselves in such units. Further, local governments will not be able to presume that this oil is on-spec and will be compelled to conduct such tests (at considerable expense) and to segregate on-spec used oil from off-spec used oil (and additional expenses). Under the NHSM Rule these local governments would be compelled to contract with incinerators with section 129 permits to burn the off-spec used oil (a major expense). No used oil collector would voluntarily pick-up off-spec used oil from local government DIY collection facilities because there will be no market for it. Because of the great expense involved in handling DIY collection facilities, it is likely most such facilities will be forced to close, leaving DIY oil changers with fewer recycling options.

Currently, about 15 percent of the used oil generated in the United States is off-spec used oil, primarily industrial oils. Virtually all of it is burned for energy recovery. Small quantities are blended to produce on-spec used oil or re-refined to produce lubricants or lubricant feed stocks. There is nowhere near sufficient capacity to re-refine the used oil that is currently used as fuel. As a result, this volume will be incinerated, at a significant cost, or will be disposed of improperly. The improper disposal caused by NHSM Rule will cause irreparable harm to the environment. Under the NHSM Rule there will not be any feasible recycling options, and as disposal costs increase dramatically, the result will be an increase in the mismanagement of used oil – which is exactly the situation that EPA’s Used Oil Management Standards (40 CFR Part 279) were carefully designed to prevent.

**Example Group 4 – producers of biomass energy**

Biomass energy companies develop, build and operate clean energy facilities that utilize clean, unadulterated woody waste materials as fuel from urban and forestry environments. These power facilities are not only environmentally friendly, but also are cost-effective and reliable and bring a new source of electricity to U.S. communities, eliminating dependence on imported fossil fuels. Data provided to EPA show that urban wood (C&D material) is higher than coal in cadmium but lower in all other constituents. One contaminant at non-comparable levels is enough to make the wood a waste under the NHSM Rule. Moreover, EPA may want a comparison to virgin wood – and that comparison may not be favorable.

1. One company owns and operates a 47 MW (net) power plant located in California. The plant began commercial operation in February, 1992. The facility utilizes urban wood wastes and agricultural residue fuels collected from throughout California’s Inland Empire. Through collection of agricultural residues, the plant has virtually eliminated open-field burning in the Coachella Valley. In addition, according to Riverside County officials, the plant is critical to the County’s compliance with California’s landfill diversion law as a result of its acceptance of over 300,000 tons per year of urban wood
wastes that would otherwise be land filled. It may be difficult for urban wood to meet the legitimacy criteria. Although the facility specifies in its purchase agreements that only clean wood is acceptable, de minimis quantities of contaminated wood inevitably are comingled with the supply. These de minimis quantities may lead to a determination that the plant’s fuel supply is a waste.

2. The facility is a biomass-fired power plant with a 50 MW nominal rating. The plant's main source of fuel is wood waste provided by area manufacturing processes, opportunistically sourced wood and managed forest initiatives. The plant is permitted and uses railroad ties and cotton gin secondary material (up to 50% by weight) as well as plywood trimmings, particle board; paper mill sludge; brooder house poultry material (10% by weight maximum). Economic viability of the plant is dependent upon the ability to opportunistically source wood based material as a fuel. Urban wood and secondary wood material from certain manufacturing processes may be resinated wood and may not meet the legitimacy criteria. The company has used these types of fuels for over 20 years and its environmental air quality record proves that even with this wide variety of fuels, it is only a minor source with regard to Hazardous Air Pollutants. Elimination of these types of fuels will only drive fuel cost higher and have, at best, a de minimis effect on air quality.

Example Group 5 – scrap tires

Rubber Manufacturers Association ("RMA") member tire manufacturers are committed to the concept of shared responsibility for tires after they complete their useful lives on vehicles. The success of this commitment is evident in the fact that nearly 90 percent of annually generated scrap tires in the U.S. go to end use markets. In 1990, only 11 percent of scrap tires went to end use markets. The remaining tires were legally land filled or illegally stockpiled. In 1990, there were an estimated one billion scrap tires in legacy stockpiles throughout the United States. Today, scrap tires in stockpiles have been reduced about 80 million tires, which are concentrated in just a few states. RMA has worked to develop the market infrastructure to successfully manage and reuse scrap tires, and is extremely proud of the progress in the area of scrap tire management.

Tire-derived fuel (TDF) is the oldest and most mature market for scrap tires in this country. As EPA recognizes in the final rule, industrial facilities across the country, including cement kilns, pulp and paper mills and electric utilities, use TDF as a supplemental fuel to increase boiler efficiency, decrease air emissions and lower costs. The final NHSM rule creates a disincentive to using TDF in pulp and paper mill and other biomass boilers, which would cause the number of tires in illegal stockpiles in the United States to rise again. In addition, in those states that allow landfilling of whole or shredded scrap tires would see an increase in landfilling, which would make valuable secondary materials unavailable for recycling and recovery.

In the case of scrap tires generated at tire manufacturing facilities, RMA members are harmed directly by the final rule. The final rule considers “scrap tires used in a combustion unit that are removed from vehicles and managed under the oversight to
established tire collection programs” not to have been discarded. Such scrap tires are
deemed not to be wastes when combusted if they meet the legitimacy criteria. However,
scrap tires that are scrapped as a result of quality control programs at a tire manufacturing
facility do not meet the plain language of these criteria, since they are not “removed from
vehicles.” Factory scrap tires enter the same types of established tire collection programs
as do other scrap tires and are indistinguishable from other scrap tires when legitimacy
criteria are applied. Creating a distinction between scrap tires removed from vehicles and
those coming directly from tire manufacturers would create a disincentive to beneficial
use of factory scrap tires as a fuel and increase the number of scrap tires in landfills.

Two longstanding environmental concerns with outdoor scrap tire stockpile formation are
the risk of fire and mosquito infestation. An increase in the number of tires going to
landfills or stockpiles would have a disparate impact on environmental justice
communities located adjacent to landfills or properties containing tire piles. Because the
final rule will decrease the number of tires combusted for fuel, there would be an increase
in the number of tires going to landfills or being illegally dumped will increase. As a
result, communities located in the vicinity of a landfill or tire pile face an increased risk
of mosquito born diseases and stockpile fires.