



May 11, 2010

EPA Includes Sewage Sludge Destined For Incineration In Solid Waste Definition, State and Regional Groups Urged To Comment

ACTION PLEASE BY:
May 19, 2010

EPA released a suite of proposed rulemakings April 30, on the regulation of commercial and industrial incinerators and boilers under the Clean Air Act (CAA), including [a proposal](#) from EPA's waste office that defines sewage sludge destined for incineration as a solid waste. NACWA has argued for the past two years, since an Advanced Notice of Proposed Rulemaking (ANPRM) revealed EPA's intent to publish a definition of non-hazardous solid waste, that publicly owned treatment works' (POTWs') sewage sludge is not a solid waste and should be regulated under the Clean Water Act (CWA). In its proposal, EPA concludes that the domestic sewage exclusion, which excludes dissolved and solid materials in sewage from the definition of solid waste, does not extend to POTW-generated sludges and that when those sludges are incinerated, they are considered a solid waste.

Again, this is only a proposed rule and there is still time to impact the Agency's initial findings. Once the proposals are published in the Federal Register, expected in the next week or two, NACWA will have 45 days to provide comments. NACWA is already beginning work on its comments and is soliciting information from state/regional groups to assist in that effort. This Alert provides additional information on EPA's proposal and asks state/regional organizations to ***provide input on the needed information items to NACWA's Thea Graybill at tgraybill@nacwa.org by May 19, 2010.***

Background and Potential Impacts

Despite previous determinations that sewage sludge incinerators (SSIs) are most appropriately regulated under Section 112 of the Clean Air Act (CAA), a 2007 ruling by the United States Court of Appeals for the District of Columbia Circuit severely limited EPA's discretion to determine how to regulate incinerators. This decision prompted EPA to change course on sewage sludge incinerators (SSIs) and several other incinerator and boiler units. To meet its obligations under the DC Circuit Court's ruling, EPA initiated a rulemaking to define solid waste under the nonhazardous waste provisions of the Resource Conservation and Recovery Act (RCRA), starting with the January 2, 2009, ANPRM. Under EPA's proposed approach, combustion units burning solid wastes would be regulated under the more onerous Section 129 CAA requirements, while those burning 'legitimate secondary materials' (i.e., not solid wastes) would be regulated under Section 112 of the CAA.

NACWA has been very active on this issue, providing [comments](#) on the ANPRM and sending the top officials in EPA's water, air, and waste offices a letter in September 2009, outlining why sewage sludge should not be considered a solid waste and why SSIs are more appropriately regulated under Section 112 of the CAA. NACWA also met with EPA and Office of Management and Budget (OMB) officials throughout this process.

The impacts of this proposed rule will be significant and potentially broad in scope. For SSIs, the impact will be direct and immediate. In anticipation of EPA's final solid waste definition rule, EPA has already begun developing maximum achievable control technology (MACT) standards under Section 129 of the CAA that will be applicable to

all SSIs. Those standards will be proposed by June or July and finalized in December. Though EPA does have some flexibility to create subcategories in which different MACT standards may apply, the worst-case scenario would likely result in stringent emission standards that many of the current SSIs could not meet, prompting a move away from incineration to other methods of sludge management.

NACWA is working to assess the proposal's impact on other biosolids management activities. EPA has made significant efforts to clarify the extent of its proposal, stating that it is "not making solid waste determinations that cover other possible secondary material end uses" beyond combustion, but the actual impacts on land application of the solid waste determination are still being evaluated. At a minimum, there could be some impact from a public affairs standpoint. The information NACWA is requesting from state and regional groups will be instrumental in determining the extent of any impacts on management options beyond incineration.

Potential Impacts of Clean Air Act Proposals

While the solid waste proposal will ultimately have impacts for SSIs through CAA Section 129 standards, the CAA proposals, also released on April 30, may have a more immediate impact on boilers operated by POTWs. POTW's operating boilers burning oil, coal, or biomass may face emission limits as a result of EPA's area source standards proposed under Section 112 of the CAA. Large boilers, with capacities greater than or equal to 10mmBTU/hr will have new emission limits under the rules being proposed. Small boilers, with capacities less than 10mmBTU/hr, will have no emission limits but will need to perform a 'tune-up' every 2 years. Boilers of any size burning natural gas are excluded from the rules because EPA found that they "do not emit any of the urban HAP [hazardous air pollutants]" at issue. More details on these proposed standards for boilers will be provided to the *Clean Water Exchange* recipients in a forthcoming Alert.

Details of EPA's Solid Waste Proposal

EPA's solid waste proposal specifically addresses biosolids, stating that EPA is "proposing that sewage sludge, generated from POTWs and when combusted, be classified as a solid waste, and subject to the CAA Section 129 requirements." In explaining its rationale for this decision, EPA outlines why the domestic sewage exclusion is not applicable and that sewage sludge would not qualify as a legitimate fuel, meaning that sewage sludge would be a solid waste whenever combusted. In recent meetings with EPA, NACWA has proposed the inclusion of a regulatory exemption from the solid waste rules for biosolids managed under the Part 503 regulations. While EPA did not propose this exclusion, the Agency does solicit comment on whether "such an approach is with [EPA's] discretion." This was a specific request from NACWA, to include such language, and this mention in the proposal will provide an opportunity for NACWA and other stakeholders to demonstrate why sewage sludge is more appropriately regulated under the CWA, not as a solid waste.

Domestic Sewage Exclusion Does Not Apply

EPA acknowledges in the proposal that all commenters on the ANPRM preferred that sewage sludge not be defined as a solid waste, but goes on to state that it does not believe that the domestic sewage exclusion that applies to materials entering the POTW, extends to POTW-generated sludges. EPA further states that "sewage sludge burned without energy recovery (i.e., burned for destruction) in an incinerator, is discarded, and thus a solid waste."

Legitimate Fuel Criteria

Only secondary materials that are burned for energy recovery and that meet all of EPA's proposed legitimate fuel criteria will be excluded from the solid waste definition. While SSIs often include some element of energy recovery, EPA notes that waste heat boilers and similar units are not "legitimate energy recover devices" because they receive their energy input from the combustion of off-gases via a separate combustion chamber. More troubling for POTWs are the other legitimacy criteria, namely the level of contaminants. All combustion uses of sludges, whether in SSIs, cement kilns, boilers, or other units, must be able to demonstrate that the sludges have levels of contaminants comparable to traditional fuels to avoid the solid waste stigma. In the proposal, EPA has made an initial determination that it "does not believe that sewage sludge would meet the legitimacy criteria for contaminants," comparing levels of key pollutants in sludge from past EPA surveys to levels commonly found in coal. This will likely have major implications on the use of biosolids as a fuel in any application.

NACWA has already identified significant issues with EPA's analysis. Chief among these concerns is EPA's use of outdated survey information on the level of contaminants in biosolids. NACWA alerted EPA to this issue in its comments on the ANPRM, but will need to reemphasize these concerns in its comments on the proposal and through additional advocacy efforts.

Impacts to other Management Options

EPA attempts to limit the impact of its proposal by stating that it is:

[A]rticulating the narrow definition of which non-hazardous secondary materials are or are not solid wastes when used as fuel for energy recovery or as ingredients in combustion units. We are not making solid waste determinations that cover other possible secondary material end uses.

This language was included to address NACWA's ongoing concerns that a solid waste determination could have broader impacts on land application programs. EPA believes that the proposed regulations "should have no effect on state programs that choose to regulate this material in different ways under different authorities." NACWA is making this portion of the rule one of its priorities to determine what if any impact it will have on non-combustion uses of biosolids.

State/Regional Organization Comments on the Proposal and other Advocacy Efforts

In addition to developing a comment letter for the Association, NACWA will be developing a letter template for individuals to use in sending EPA their own comments. It will be crucial for EPA to hear from as many communities as possible on this issue and NACWA will distribute the letter template several weeks before the close of the comment period. NACWA will also be working to leverage groups from key parts of the country to weigh in with Administrator Jackson on this issue and seeking input from other municipal associations.

Input Needed

State/Regional groups are being asked to provide information on the following questions to strengthen NACWA's comments, address areas on which EPA has sought guidance, and help persuade EPA to modify the draft rule. In particular, NACWA needs information regarding (i) impacts of narrowing the RCRA domestic sewage exclusion; (ii) impacts of classifying sewage sludge as a solid waste when destined for incineration; (iii) potential costs of the new rule for incineration and beneficial use programs; and (iv) other comments and information agencies have regarding the problems with the proposed rule. For all questions below, citations to law, regulations or guidance documents will be very helpful.

NACWA will be asking some individuals to complete a more detailed survey on this information, but requests feedback from the state/regional groups on the items below.

1. Is the use, disposal, transportation, or storage of sewage sludge exempted from regulation as a solid waste by your state environmental agency? For example, do your state's solid waste regulations list sewage sludge disposal activities as exempt from regulation as a solid waste?

2. Do your state's solid waste regulations or definition of sewage sludge reference or incorporate the Domestic Sewage Exclusion (which states that the solids or dissolved material in domestic sewage is not solid waste)?

3. Do you have any information on your agency's cost to incinerate vs. its cost to landfill sewage sludge? We are trying to determine the cost impact of landfilling in lieu of incineration.

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