



STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

ROY COOPER
ATTORNEY GENERAL

P.O. Box 629
RALEIGH, NC 27602

REPLY TO:
Marc Bernstein
ENVIRONMENTAL DIVISION
TEL: 919-716-6600
FAX: 919-716-6767
mbernstein@ncdoj.gov

MEMORANDUM

TO: Donald R. van der Vaart
Division of Air Quality

FROM: Marc Bernstein
Special Deputy Attorney General

DATE: July 20, 2011

RE: Commercial and Industrial Solid Waste Incinerators

This responds to your memorandum of June 13, 2011.¹ On September 28, 2009 this office provided you with an advisory memorandum ("Sept. 2009 Memo") discussing how to determine if a material is a "solid waste" for purposes of §129 of the Clean Air Act ("CAA"). See 42 U.S.C. §7429. On March 21, 2011 EPA published a rule ("Identification Rule") defining the term "solid waste" under Subtitle D of the Resource Conservation and Recovery Act ("RCRA," also known as the Solid Waste Disposal Act) for purposes of §129 of the CAA. Identification of Non-Hazardous Secondary Materials That Are Solid Waste, 76 Fed. Reg. 15,456 (2011). Your inquiry regards the relationship between the Identification Rule and the Sept. 2009 Memo. Specifically, you ask for clarification regarding the extent to which the Identification Rule has superseded the Sept. 2009 Memo and the analysis therein, which you are calling the "ten factor test." The answer depends on which type of material is being analyzed.

SUMMARY RESPONSE

The Identification Rule groups materials into several categories for regulatory purposes. A "discard" analysis is only relevant to the Division of Air Quality's ("DAQ") analysis for the following categories: (a) traditional fuels and clean cellulosic biomass (see 40 C.F.R. §241.2);

¹ This is an advisory memorandum only. It has not been reviewed or approved according to the procedures for issuing Attorney General Opinions.

(b) scrap tires and resinated wood (*see id.* §241.3(b)(2)); and (c) fuels or ingredient products used in a combustion unit that are made from discarded materials (*see id.* §241.3(b)(4)). This “discard” analysis does not implicate all ten factors set forth in the Sept. 2009 Memo. Only a subset of factors, set forth below, remains relevant in the wake of the Identification Rule. Therefore, for these categories, the Sept. 2009 Memo is partially superseded. For the remaining categories, it is entirely superseded.²

BACKGROUND

When reviewing an air permit application, the Division of Air Quality (“DAQ”) must determine whether a source is required to comply with the procedures and requirements of §129 relating to solid waste incineration units. That analysis requires DAQ to determine whether the unit would combust “solid waste.” Section 129 defines “solid waste” by cross reference to RCRA. When the Sept. 2009 Memo was issued, the term “solid waste” was not defined by EPA under RCRA for purposes of §129 of the CAA. Therefore, the Sept. 2009 Memo provided guidance regarding how DAQ should determine whether materials are “solid waste” within the context of §129.

EPA’s Identification Rule promulgated standards and procedures for determining which materials, when used in a combustion unit, would subject a source to §129. In the preamble, EPA discussed the relationship between the new rule and state law. “CAA section 129 states that the term ‘solid waste’ shall have the meaning ‘established by the Administrator pursuant to the Solid Waste Disposal Act[.] Accordingly, the states’ definition[s] of solid waste would not be applicable in determining whether the CAA section 129 standards apply.” 76 Fed. Reg. at 15,546/2. Hence, the Identification Rule, *i.e.*, 40 C.F.R. Part 241, is at least the starting point for this inquiry.

Subsection 241.3(a) generally provides that all “non-hazardous secondary materials that are combusted are solid wastes.” Inherent in this general rule is that any material that is not a “non-hazardous secondary material” does not subject a source to regulation under §129. Section 241.2 states that “traditional fuels” and “clean cellulosic biomass” are “not secondary materials or solid wastes unless discarded.” Any materials that fall within these two definitions need not be analyzed under the framework of §241.3. The Identification Rule also enumerates four exceptions to the general rule that all “non-hazardous secondary material” are regulated under §129 when combusted. *See* 40 C.F.R. §241.3(b)(1)-(4). Finally, a source may petition the Regional Administrator for a case-specific exemption. *Id.* §241.3(c). All told, the rule establishes six regulatory categories of materials for analytical purposes under §129:

- (1) traditional fuels and clean cellulosic biomass (40 C.F.R. §241.2);
- (2) materials that remain within the control of the generator (*id.* §241.3(b)(1));
- (3) scrap tires and resinated wood (*id.* §241.3(b)(2));

² As discussed below, a “discard” analysis is necessary for another category of materials, but in that case the analysis is conducted by the EPA Region, not DAQ.

- (4) ingredients in a combustion unit (*id.* §241.3(b)(3));
- (5) fuels or ingredient products used in a combustion unit that are made from discarded materials (*id.* §241.3(b)(4)); and
- (6) materials approved by the Regional Administrator on a case-by-case basis (*id.* §241.3(a) & (c)).

These categories are in part structured around two fundamental principles in RCRA and implementing case law. First, a material that is discarded is a solid waste unless it is rehabilitated by some process beyond mere recycling. *See, e.g.*, 76 Fed. Reg. at 15,476/3. Second, even if a material has not been discarded, it still may be considered a solid waste if the processing and use of that material was done for the purpose of avoiding classification as a solid waste instead of for some legitimate manufacturing purpose. *See id.* at 15,470/2 (“EPA evaluates, first, whether such material is discarded in the first instance. If not, the Agency needs to consider whether that material is legitimately burned for energy recovery.”).

A. Discard

Materials that remain within the control of the generator (Category 2) are presumed under the Identification Rule to not have been discarded, 76 Fed. Reg. at 15,532-33, and therefore no showing is necessary under the Rule regarding discard. Materials used as ingredients in a combustion unit (Category 4) are presumed to not have been discarded if they meet the applicable legitimacy criteria. *See id.* at 15,536/2 (“[T]hese non-hazardous secondary materials should not be considered discarded provided they satisfy the legitimacy criteria.”). If a Category 4 “ingredient” fails the legitimacy test, then it is considered discarded. No separate analysis of the discard status of these materials is required.

To the contrary, Categories 1 (traditional fuels and clean cellulosic biomass), 3 (scrap tires and resinated wood) and 6 (case-specific exemptions) include an explicit prohibition against discard. *See* 40 C.F.R. §241.2 (“These fuels [clean cellulosic biomass and traditional fuels] are not secondary materials or solid wastes unless discarded.”), §241.3(b)(2) (Scrap tires and resinated woods “that have not been discarded and meet the legitimacy criteria” are not solid waste), §241.3(c) (The Regional Administrator may determine that a material that “has not been discarded and is indistinguishable in all relevant aspects from a product fuel” is not a waste.). Category 5 consists of fuels or product ingredients made from discarded materials. It is a prerequisite to the applicability of this exception that the materials be discarded.³ Therefore, a discard determination is necessary for Categories 1, 3, 5 and 6.

³ Category 5 essentially sets forth the criteria under which a material that has been discarded may be rehabilitated from a solid waste into a useful product. Any materials that need to be analyzed under Category 5 may, as a practical matter, already have been determined to have been discarded when it was concluded that the materials do not qualify under any of the other categories. Nevertheless, this memorandum will assume that an assessment of discard may need to be made in the first instance under Category 5.

B. Legitimacy

The Identification Rule also spells out for which categories a legitimacy analysis is required. Materials in Category 1 are presumed to be legitimate fuels. Materials in all other categories are subject to one of the two legitimacy analyses in subsection (d) of 40 C.F.R. §241.3.

DISCUSSION

Your question is whether DAQ should “continue to use the ‘ten factor test’ to determine if the material has been discarded and therefore is a solid waste?” The ten factors primarily address the two key issues discussed above: (1) Whether the materials to be burned have been discarded and (2) whether the materials are legitimately being burned for energy recovery. (The factors also sought general background material for context purposes.)

Analysis of discard remains relevant for materials in Categories 1, 3, 5 and 6. Analysis of Category 6 materials is solely within the purview of EPA. Therefore, as far as DAQ is concerned, discard is only an issue for Categories 1, 3 and 5.

EPA has set forth factors to address legitimacy and provided clear direction regarding which categories to which the legitimacy assessment applies. As discussed above, the legitimacy factors in the Identification Rule apply to Categories 2 through 6 only. Although the factors in the Sept. 2009 Memo that regard legitimacy have been superseded, this does not mean that DAQ need not request from the source any information regarding legitimacy. Where specified in the Identification Rule, DAQ must make a determination of legitimacy using the factors set forth in 40 C.F.R. §241.3(d) and may need to request supporting information from the source in order to make this determination.

Therefore, with regard to materials that fall into Categories 2, 4 and 6, DAQ need not conduct any discard analysis and the factors outlined in the Sept. 2009 Memo regarding legitimacy have been superseded by the Identification Rule. No aspects of the Sept. 2009 Memo continue to apply to these categories.

Regarding Category 1 (traditional fuels and clean cellulosic biomass), Category 3 (scrap tires and resinated wood) and Category 5 (rehabilitated discarded materials), EPA has provided the legitimacy factors and specifically required their consideration. Therefore, the parts of the Sept. 2009 Memo that go to legitimacy are no longer applicable to these categories. That leaves only the factors related to discard from the Sept. 2009 Memo as they apply to Categories 1, 3 and 5.

EPA is correct that the “plain meaning” of the term controls. “Discard” means to throw away, abandon or dispose of. *See* 76 Fed. Reg. at 15,508/2; *see also* Sept. 2009 Memo (attaching case summaries that further define “discard”). By way of example, EPA observed that materials that have been landfilled have been discarded. *Id.* at 15,536/2. However, materials may be discarded in less obvious ways. Five of the factors set forth previously in the Sept. 2009

Memo relate to whether materials have been discarded (or relate to relevant background information for context purposes). These five factors are:

1. Identification and description of the unit in which the applicant is requesting permission to burn the fuels. (Factor 1 from the Sept. 2009 Memo.)
2. A narrative description of the process by which the fuel was developed, beginning with virgin materials. The description should include (a) the approximate duration of each phase of the process, (b) the duration between phases, *i.e.*, storage times, (c) the location where each phase occurred in relation to the location where the fuel will be burned, (d) the involvement of any third parties (including contact information for those parties) and (e) whether the fuels were identified for use as fuels at the time they were created. (Factor 2 from the Sept. 2009 Memo.)
3. Identification of any treatment processes actually applied to the fuel at any stage or any treatment plan that applies to the fuel regardless of whether the plan was actually implemented. This should include all plans regardless of whether they were required by law or maintained by the applicant or a third party. This should also include all treatment processes applied by third parties. (Factor 6 from the Sept. 2009 Memo.)
4. To the extent possible, with regard to any third parties that handle the fuels, all of the above information. (Factor 9 from the Sept. 2009 Memo.)
5. Any other information relevant to whether the material has been thrown away, abandoned or disposed of, even briefly. (Factor 10 from the Sept. 2009 Memo (amended).)

DAQ should consider these factors when determining whether materials in Categories 1, 3 and 5 have been discarded.

In your memorandum, you provided the hypothetical example of peanut shells that are collected and sold. “*Clean cellulosic biomass* means those residuals that are akin to traditional cellulosic biomass such as . . . biogases and other crop residues (*e.g.*, peanut shells) . . .” 40 C.F.R. §241.2. Clean cellulosic biomass is “not [a] secondary material[] or solid waste[] unless discarded.” *Id.* Clean cellulosic biomass clearly fits within Category 1. Therefore, so long as the shells meet the definition of “clean cellulosic biomass” and are not discarded before they are recovered for use as a fuel (with reference to the definition of “discard” discussed above, the five factors discussed above and the case law previously provided), then the shells are not a “secondary material.” No analysis under §241.3 would be required. However, if the shells have been discarded at any time before they are recovered for use as a fuel, then they are a “secondary material” and can only avoid the applicability of CAA §129 if the shells qualify for an exception under 40 C.F.R. §241.3.

A practical summary of the categories and requirements under the Identification Rule is attached.

CISWI Categories and Requirements

This summary is intended to provide assistance in implementing §129 of the Clean Air Act. It is not a complete statement of the applicable statute and rules. All CISWI determinations must meet all requirements of the Clean Air Act and implementing regulations. *See* 42 U.S.C. §7429; 40 C.F.R. Part 241.

(1) Traditional fuels and clean cellulosic biomass (§241.2)

No legitimacy determination required

Discard analysis by DAQ required (using five factors set forth above)

(2) Materials that remain within the control of the generator (§241.3(b)(1))

Legitimacy determination by DAQ under §241.3(d)(1) required

Discard analysis not required

(3) Scrap tires and resinated wood (§241.3(b)(2))

Legitimacy determination by DAQ under §241.3(d)(1) required

Discard analysis by DAQ required (using five factors set forth above)

(4) Ingredients in a combustion unit (§241.3(b)(3))

Legitimacy determination by DAQ under §241.3(d)(2) required

Discard analysis not required

(5) Fuels or ingredient products used in a combustion unit that are made from discarded materials (§241.3(b)(4))

Legitimacy determination by DAQ required under §241.3(d)(1) for fuels and §241.3(d)(2) for ingredients

Discard analysis by DAQ required (using five factors set forth above)*

(6) Materials approved by the Regional Administrator on a case-by-case basis (§241.3(a) & (c))

Legitimacy determination by EPA under §241.3(d)(1) required

Discard analysis by EPA required

* Fuels and ingredients qualify as non-hazardous secondary materials that are not solid wastes under this category only if they are discarded in the first instance and then rehabilitated into a useful material. Therefore, the discard analysis must show that the material was discarded and then rehabilitated. For all other categories where a discard analysis is necessary, it must show that the materials have not been discarded.