



December 7, 2018

The Honorable Andrew Wheeler
Acting Administrator
U.S. Environmental Protection Agency
Mail Code 1101 A, Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Re: Petition for Rulemaking to Amend the Legitimacy Criteria in 40 C.F.R. Part 241, -The Categorical Non-Waste Fuels Classification Criteria for Creosote Treated Railroad Ties and Other Treated Railroads Ties, and the Definition of Paper Recycling Residuals

Dear Acting Administrator Wheeler:

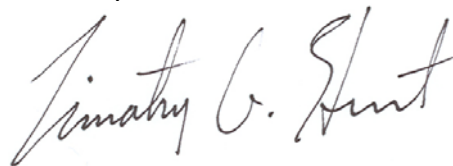
The Association of American Railroads (“AAR”), the Treated Wood Council (“TWC”), the American Wood Council (“AWC”), the American Forest and Paper Association (“AF&PA”), and the American Short Line and Regional Railroad Association (“ASLRRA”) (collectively, “Petitioners”), respectfully submit this joint Petition for Rulemaking seeking to amend 40 C.F.R. Part 241 to remove unsupportable restrictions on Non-Hazardous Secondary Materials (“NHSM”) based on contaminant comparison criteria that are incompatible with recent D.C. Circuit precedent. Specifically, Petitioners seek to (1) remove the mandatory “contaminant comparison” in the rule’s legitimacy criteria at 40 C.F.R. § 241.3; (2) remove the associated “designed to burn” designation for boilers with respect to railroad ties treated with creosote and creosote-borate at 40 C.F.R. § 241.4; and (3) remove unsupported restrictions on the definition of “paper recycling residuals” at 40 C.F.R. § 241.2.

As explained in further detail in the attached Petition, Petitioners’ proposed amendments are warranted by recent legal decisions and public policy. EPA’s final rule on *Additions to List of Categorical Non-Waste Fuels*, 81 Fed. Reg. 6687 (Feb. 8, 2016) (“Final Rule”), determined that creosote-treated railroad ties were a non-waste fuel, but only when combusted in units designed to burn specific fossil fuels involved in fulfilling a contaminant comparison requirement EPA had previously adopted. This contaminant comparison requirement for non-hazardous materials is virtually identical to the contaminant comparison criterion that the U.S. Court of Appeals for the D.C. Circuit vacated in the context of hazardous

materials in *American Petroleum Institute v. Environmental Protection Agency*, 862 F.3d 50 (D.C. Cir. 2017) (“API”). As such, the contaminant comparison criterion in the Final Rule lacks legal support. Further, restrictions that limit the burning of certain railroad ties or other non-waste, non-hazardous secondary materials for energy recovery run counter to the policy behind EPA’s expansion of the categorical non-hazardous secondary materials list to include materials beneficially and economically reused as fuels.¹ EPA has supported the burning of railroad ties in cogeneration facilities by clarifying that such use does not constitute solid waste disposal. Yet, the Final Rule incorporated restrictions, based on the contaminant comparison test, that impose prohibitive costs with no corresponding benefit. These restrictions may lead to millions of railroad ties being disposed in landfills, resulting in unnecessary burdens and costs, as well as increased greenhouse gas emissions (e.g., methane). The changes sought in this Petition constitute deregulatory action under Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,”² and could yield from \$74 to \$95 million in annual cost savings.

We urge EPA to act expeditiously to initiate a rulemaking that conforms EPA’s requirements for non-hazardous secondary materials to those ordered by the D.C. Circuit for hazardous wastes, and removes the mandatory contaminant comparison in the NHSM rule’s legitimacy criteria, the associated “designed to burn” and related restrictions for creosote-treated railroad ties, as well as corrections to the definition of the non-waste fuel “paper recycling residuals.” Please contact me on behalf of Petitioners with any questions or setting up a meeting to discuss the petition.

Sincerely,



Timothy G. Hunt
Senior Director, Air Quality Programs
AF&PA and AWC
On behalf of Petitioners

Cc: Stephen Cook, OLEM
Barnes Johnson, OLEM
Robert Fronczak, AAR
Alice Koethe, AAR
Jeff Miller, TWC
Jo Strang, ASLRRRA

¹ EPA, *Identification of Non-Hazardous Materials That Are Solid Waste*, 76 Fed. Reg. 15,456 (March 21, 2011)(codified at 40 C.F.R. §241); EPA, *Commercial and Industrial Solid Waste Incineration Units: Reconsideration and Final Amendments; Non-Hazardous Secondary Materials That Are Solid Waste*, 78 Fed. Reg. 9,112 (Feb. 7, 2013).

² 82 Fed. Reg. 9339 (Feb. 3, 2017).

**BEFORE
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**ASSOCIATION OF AMERICAN RAILROADS, TREATED
WOOD COUNCIL, AMERICAN WOOD COUNCIL, THE
AMERICAN FOREST AND PAPER ASSOCIATION, AND
THE AMERICAN SHORT LINE AND REGIONAL
RAILROAD ASSOCIATION**

Petitioners,

Filed with:

The Honorable Andrew Wheeler, Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

**PETITION FOR RULEMAKING TO AMEND THE LEGITIMACY CRITERIA IN 40
C.F.R. PART 241, THE CATEGORICAL NON-WASTE FUELS CLASSIFICATION
CRITERIA FOR CREOSOTE TREATED RAILROAD TIES AND OTHER TREATED
RAILROAD TIES, AND THE DEFINITION OF PAPER RECYCLING RESIDUALS**

Pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e), and the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6974(a), the Association of American Railroads, the Treated Wood Council, the American Wood Council, the American Forest and Paper Association, and the American Short Line and Regional Railroad Association (collectively, “Petitioners”), respectfully submit this joint petition for a rulemaking to amend the legitimacy criteria in 40 C.F.R. Part 241, the conditions applicable to units combusting railroad ties treated with creosote and other wood preservatives and other materials as Non-Hazardous Secondary Materials (“NHSM”) fuels, and the definition of “Paper Recycling Residuals” (“PRR”).

I. PETITIONERS

Petitioners are trade associations with membership spanning the railroad, wood treatment, and pulp and paper industries. The members of all of these groups are directly impacted by the current regulation. The names and addresses of each Petitioner trade association are provided below.

Association of American Railroads
425 Third Street SW, Suite 1000
Washington, DC 20024

Treated Wood Council
1101 K Street, N.W., Suite 700
Washington, DC 20005

American Wood Council
1101 K Street, NW, Suite 700
Washington, DC 20005

American Forest and Paper Association
1101 K Street, NW, Suite 700
Washington, DC 20005

American Short Line and Regional Railroad Association
50 F St NW, Suite 7020,
Washington, DC 20001

II. PETITIONERS' INTERESTS IN THE PROCEEDINGS

The Association of American Railroads (“AAR”) is a trade association whose membership includes freight railroads that operate 83 percent of the line haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States, as well as passenger railroads that operate intercity passenger trains and provide commuter rail service. AAR’s members annually generate millions of railroad ties that have

been treated with wood preservatives including creosote and other wood preservatives. AAR's members wish to promote the beneficial use of ties for energy recovery.

The Treated Wood Council ("TWC") is an international trade association of the wood treating industry, serving more than 400 companies and associations related to the production of treated wood. TWC's members have for many years generated, used, sold, or bought non-hazardous secondary treated wood materials as a legitimate fuel for energy recovery. The Treated Wood Council has a substantial interest in obtaining a national determination that the longstanding, beneficial, and environmentally sound practice of using treated wood for energy recovery constitutes combustion of a non-waste fuel and should continue without interruption.

The American Forest & Paper Association ("AF&PA") serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative — [*Better Practices, Better Planet 2020*](#). The forest products industry accounts for approximately four percent of the total U.S. manufacturing GDP, manufactures over \$200 billion in products annually and employs approximately 950,000 men and women. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 45 states. AF&PA members seek to correct the definition of "paper recycling residuals" to more accurately describe this non-waste fuel and to remove an inappropriate condition in the definition to facilitate a broader use of those materials as a valid source of energy.

The American Wood Council (“AWC”) is the voice of North American wood products manufacturing, an industry that provides almost 450,000 men and women in the United States with family-wage jobs. AWC represents 86 percent of the structural wood products industry, and members make products that are essential to everyday life from a renewable resource that absorbs and sequesters carbon. Staff experts develop state-of-the-art engineering data, technology, and standards for wood products to assure their safe and efficient design, as well as provide information on wood design, green building, and environmental regulations. AWC also advocates for balanced government policies that affect wood products. AWC member companies have boilers that are capable of safely burning treated railroad ties but are excluded since they do not have a history of using fuel oil in their biomass boilers.

The American Short Line and Regional Railroad Association (“ASLRRRA”) is a non-profit trade association representing the interests of approximately 450 short line and regional railroad members and railroad supply company members in legislative and regulatory matters. Short lines operate 50,000 miles of track in 49 states, or approximately 38% of the national railroad network, touching in origination or termination one out of every four cars moving on the national railroad system, serving customers who otherwise would be cut off from the national railroad network.

Collectively, the Petitioners would like to encourage and facilitate the beneficial use of NHSM materials, such as crossties and PRRs.

III. DESCRIPTION OF THE PROPOSED ACTION

Petitioners respectfully request amendments to 40 C.F.R. §§ 241.2, 241.3(d) and 241.4(a)(7)-(10), as outlined below. The amendments would (1) bring the NHSM rule’s

legitimacy criteria into alignment with a recent D.C. Circuit ruling regarding RCRA's definition of "solid waste"; (2) provide for expanded beneficial use of non-waste NHSM, including railroad ties combusted for energy recovery, by removing unnecessary limitations on the types of combustion units that can burn this categorical non-waste material as fuel, and other unsupported restrictions; and (3) remove an unwarranted condition in the NHSM rule's definition of "paper recycling residuals." As further discussed below, the proposed amendments are necessary and appropriate in light of recent legal developments.

Proposed Amendments

Proposed insertions are indicated with bold underline, and deletions are noted as strikeouts.

Petitioners' proposed amendments to 40 C.F.R. § 241.2 are blacklined below.

Paper recycling residuals means the secondary material generated from the recycling of paper, paperboard and corrugated containers ~~composed primarily of wet strength and short wood fibers that cannot be used to make new paper and paperboard products. Paper recycling residuals that contain more than small amounts of non-fiber materials including polystyrene foam, polyethylene film, other plastics, waxes and adhesives, dyes and inks, clays, starches and other coating and filler material are not paper recycling residuals for purposes of this definition.~~

Petitioners' proposed amendments to 40 C.F.R. § 241.3(d), set forth below, follow the language EPA incorporated into the recently adopted final rule for hazardous waste, which was a result of the *API* decision. *Response to Vacatur of Certain Provisions of the Definition of Solid Waste*, 83 Fed. Reg. 24,664, 24,668 (May 30, 2018).

(d) Legitimacy criteria for non-hazardous secondary materials. **In determining whether a material qualifies as a non-hazardous secondary material when used as a fuel, persons must address all the requirements of paragraphs (i) and (ii) of this section and should consider the factor in paragraph (iii) of this section.**

(1) Legitimacy criteria for non-hazardous secondary materials used as a fuel in combustion units include the following:

(i) The non-hazardous secondary material must be managed as a valuable commodity based on the following factors:

(A) The storage of the non-hazardous secondary material prior to use must not exceed reasonable time frames;

(B) Where there is an analogous fuel, the non-hazardous secondary material must be managed in a manner consistent with the analogous fuel or otherwise be adequately contained to prevent releases to the environment;

(C) If there is no analogous fuel, the non-hazardous secondary material must be adequately contained so as to prevent releases to the environment;

(ii) The non-hazardous secondary material must have a meaningful heating value and be used as a fuel in a combustion unit that recovers energy.

(iii) Persons should consider whether the non-hazardous secondary material ~~must~~ contains contaminants or groups of contaminants at levels comparable in concentration to or lower than those in traditional fuel(s) that the combustion unit is capable of burning. In determining which traditional fuel(s) a unit is capable of burning, persons may choose a traditional fuel that can be or is burned in the particular type of combustion unit, whether or not the unit is permitted to burn that traditional fuel. In comparing contaminants between traditional fuel(s) and a non-hazardous secondary material, persons can use data for traditional fuel contaminant levels compiled from national surveys, as well as contaminant level data from the specific traditional fuel being replaced. To account for natural variability in contaminant levels, persons can use the full range of traditional fuel contaminant levels, provided such comparisons also consider variability in non-hazardous secondary

material contaminant levels. Such comparisons are to be based on a direct comparison of the contaminant levels in both the non-hazardous secondary material and traditional fuel(s) prior to combustion. **The factor in this paragraph does not have to be met for the non-hazardous secondary material to be considered a non-waste fuel.**

Petitioners' proposed amendments to 40 C.F.R. § 241.4 are blacklined below.

(7) Creosote-treated railroad ties that are processed and then combusted **in units operating in compliance with all applicable permits** in the following types of units. Processing must include, at a minimum, metal removal and shredding or grinding.

~~(i) Units designed to burn both biomass and fuel oil as part of normal operations and not solely as part of start-up or shut-down operations, and~~

~~(ii) Units at major source pulp and paper mills or power producers subject to 40 CFR part 63, subpart DDDDD, that combust CTRTs and had been designed to burn biomass and fuel oil, but are modified (e.g. oil delivery mechanisms are removed) in order to use natural gas instead of fuel oil, as part of normal operations and not solely as part of start-up or shut-down operations. The CTRTs may continue to be combusted as product fuel under this subparagraph only if the following conditions are met, which are intended to ensure that the CTRTs are not being discarded:~~

~~(A) CTRTs must be burned in existing (i.e. commenced construction prior to April 14, 2014) stoker, bubbling bed, fluidized bed, or hybrid suspension grate boilers; and~~

~~(B) CTRTs can comprise no more than 40 percent of the fuel that is used on an annual heat input basis.~~

(8) Creosote-borate treated railroad ties, and mixtures of creosote, borate and/or copper naphthenate treated railroad ties that are processed and then combusted **in units operating in compliance with all applicable permits** in the following types of units. Processing must include, at a minimum, metal removal and shredding or grinding.

~~(i) Units designed to burn both biomass and fuel oil as part of normal operations and not solely as part of start-up or shut-down operations; and~~

~~(ii) Units at major source pulp and paper mills or power producers subject to 40 CFR part 63, subpart DDDDD, designed to burn biomass and fuel oil as part of normal operations and not solely as part of start-up or shut-down operations, but are modified (e.g., oil delivery mechanisms are removed) in order to use natural gas instead of fuel oil, The creosote-borate and mixed creosote, borate and copper naphthenate treated railroad ties may continue to be combusted as product fuel under this subparagraph only if the following conditions are met, which are intended to ensure that such railroad ties are not being discarded:~~

~~(A) Creosote-borate and mixed creosote, borate and copper naphthenate treated railroad ties must be burned in existing (i.e., commenced construction prior to April 14, 2014) stoker, bubbling bed, fluidized bed, or hybrid suspension grate boilers; and~~

~~(B) Creosote-borate and mixed creosote, borate and copper naphthenate treated railroad ties can comprise no more than 40 percent of the fuel that is used on an annual heat input basis.~~

~~(iii) Units meeting requirements in paragraph (a)(8)(i) or (ii) of this section that are also designed to burn coal.~~

(9) Copper naphthenate treated railroad ties that are processed and then combusted **in units operating in compliance with all applicable permits** in units designed to burn biomass, biomass and fuel oil, or biomass and coal. Processing must include at a minimum, metal removal, and shredding or grinding.

(10) Copper naphthenate-borate treated railroad ties that are processed and then combusted **in units operating in compliance with all applicable permits** in units designed to burn biomass, biomass and fuel oil, or biomass and coal. Processing must include at a minimum, metal removal, and shredding or grinding.

IV. **BACKGROUND**

EPA first regulated NHSM used as fuel in 2011. *Identification of Non-Hazardous Secondary Materials That Are Solid Waste*, 76 Fed. Reg. 15,456 (March 21, 2011) (codified at 40 C.F.R. Part 241) (“NHSM rule”). EPA’s analytical framework began with the concept of “discard.” Under this rubric, NHSM that is discarded is solid waste, and, therefore, can be combusted only in an incinerator. To determine whether a secondary material, such as a railroad crosstie, is “discarded” (and thus regulated under Section 129 of the Clean Air Act (“CAA”)), or whether that material is used as a non-waste fuel (regulated under Section 112 of the CAA), EPA established “legitimacy criteria,” as set forth at 40 C.F.R. § 241.3.

In the preamble of the NHSM rule, EPA noted its concurrent development of standards for determining what constitutes a nonwaste *hazardous* material in its Definition of Solid Waste Rule (“DSW rule”).³ EPA stated that the “same concept – legitimacy – applies to both rules.” 76 Fed. Reg. at 15,464. In both cases, the purpose of the legitimacy criteria was to ensure that secondary material was not being “sham recycled” as a way of avoiding CAA Section 129 compliance. To meet the legitimacy criteria, the NHSM rule requires that the secondary material must: (1) be managed as a valuable commodity; (2) have meaningful heating value and be used as a fuel in a combustion unit that recovers energy; and (3) contain contaminants that are comparable to or lower than those in traditional fuel products. 40 C.F.R. § 241.3(d).

In February 2013, EPA amended 40 C.F.R. Part 241 to create categories of NHSM that automatically qualify as “categorical non-waste fuels,” provided certain conditions are met.

Commercial and Industrial Solid Waste Incineration Units: Reconsideration and Final

³ EPA, *Definition of Solid Waste*, 80 Fed. Reg. 1,694 (Jan. 13, 2015), codified at 40 C.F.R. § 260.43(a)(4).

Amendments; Non-Hazardous Secondary Materials That Are Solid Waste, 78 Fed. Reg. 9112 (Feb. 7, 2013) (the “2013 Rule”). Notably, these categorical NHSM—scrap tires, resinated wood, dewatered pulp and paper sludges—were deemed to meet legitimacy criteria even though they were not required to satisfy any contaminant comparison-based restrictions. See 78 Fed. Reg. 9112. The 2013 Rule also set forth the steps for proponents to use in filing rulemaking petitions to add other materials to the list.

Following an industry rulemaking appeal, EPA agreed to add additional materials to the “non-waste fuels” list. Accordingly, in February 2016, EPA published *Additions to List of Categorical Non-Waste Fuels; Final Rule*. 81 Fed. Reg. 6687 (February 8, 2016)(codified at 40 C.F.R. § 241.4(b)) (the “2016 Rule”). The 2016 Rule determined that creosote-treated railroad ties (“CTRT”) also qualify as a categorical non-waste when used as a fuel, *provided* that the fuel is combusted in “[u]nits designed to burn both biomass and fuel oil as part of normal operations” and for “[u]nits at major source pulp and paper mills or certain power producers,” if the units “had been designed to burn biomass and fuel oil.” 40 CFR § 241.4(a)(7).

The 2016 Rule also determined that paper recycling residuals qualify as a categorical non-waste when used as a fuel, provided that the residuals contain only “small amounts” of non-fiber materials. See 40 C.F.R. § 241.2, definition of “paper recycling residuals.” t. The 2016 Rule did not provide elaboration or guidance on what constitutes more than small amounts of non-fiber materials for purposes of the definition. The definition also identified paper recycling residuals as being composed primarily of wet strength and short wood fibers.

In 2018, EPA published *Additions to List of Section 241.4 Categorical Non-Waste Fuels: Other Treated Railroad Ties*, finalized on February 8, 2018. 83 Fed. Reg. 5317 (the “2018 Rule”). This rule added other types of treated railroad ties (those treated with creosote-borate, copper naphthenate, and copper naphthenate-borate) to the non-hazardous secondary materials list as categorical non-waste fuels. Although the 2018 Rule provided some relief for the designed-to-burn boiler-type limitations for ties treated with copper naphthenate and copper naphthenate-borate, designed-to-burn limitations for ties treated with creosote-borate remain in place.

V. NEED AND JUSTIFICATION FOR THE PROPOSED ACTION

A. The Contaminant Comparison Criterion in The NHSM’s Legitimacy Criteria and The Use of this Criterion To Limit Combustion Units That Can Burn Railroad Ties Or Other Materials As Non-Waste Fuel Should Be Removed In Light Of *API v. EPA*.

On July 7, 2017, the U.S. Court of Appeals for the D.C. Circuit Court rejected EPA’s use of the contaminant comparison criterion portion of the so-called legitimacy test in the context of the RCRA rules defining “solid wastes” under RCRA’s Subtitle C hazardous waste program (“DSW Rule”). *American Petroleum Institute v. Environmental Protection Agency*, 862 F.3d 50 (D.C. Cir., 2017) (“API”). In light of the Court’s decision, the continued mandatory use of contaminant comparison criteria in the NHSM rule, including limiting railroad tie non-waste fuel classifications to certain types of combustion units, can no longer be justified.

While the hazardous waste counterpart rule included four criteria instead of the three specified in the NHSM rule, EPA stated in developing the DSW rule, with reference to the contaminant comparison requirement, that “[t]his language is consistent with the Identification of Non-Hazardous Secondary Materials that are Solid Wastes final rule (76 FR 15456, March 21, 2011).” 80 Fed. Reg. at 1727. EPA has thus acknowledged the equivalence of the contaminant comparison factor in the two rules (Factor 4 in the DSW rule and Factor 3 in the NHSM rule).

In 2017 the *API* Court invalidated the fourth factor in the DSW rule, finding that “[n]ever in the rulemaking does EPA make out why a product that fails those criteria is likely to be discarded in any legitimate sense of the term.” 862 F.3d at 62. The Court also challenged EPA’s “bare assertion that high levels of hazardous constituents could indicate discard,” and noted that the contaminant comparison at issue was “not a reasonable tool for distinguishing products from wastes.” *Id.* at 60, 63 (internal quotes omitted). The *API* holding, with its critique of EPA’s application of this element of the legitimacy criteria, applies with equal force to the non-hazardous secondary materials legitimacy criteria set forth at 40 C.F.R. § 241.3(d).⁴ *See id.* at 63. Therefore, based on the reasoning and holding in *API*, the contaminant comparison criteria currently contained in the NHSM rule’s legitimacy criteria and the corresponding NSHM rules for railroad ties treated with creosote and other wood preservatives can no longer be used as mandatory elements to determine whether a secondary material is discarded or not.

⁴ On a petition for rehearing, on March 6, 2018, the U.S. Court of Appeals for the D.C. Circuit upheld vacatur of factor four in the DSW rule in its entirety and explained that the earlier version of the rule which required that factor four need only be “considered” replaced the vacated version of Factor 4. *API v. EPA*, 883 F.3d 918, 923 (D.C. Cir. Mar. 6, 2018).

In fact, EPA has recognized that the contaminant comparison should not be a determining factor for whether a material is being discarded. In its 2016 Rule on *Additions to List of Categorical Non-Waste Fuels*, EPA expressly noted that “CTRTs do not become wastes solely because of the switch to natural gas.”⁵ EPA reasoned that facilities that have demonstrated the ability to burn fuel oil and biomass should not be penalized for switching to natural gas, a fuel that creates less air pollution. In addition, EPA properly determined that resinated wood should qualify as a categorical non-waste fuel under the NHSM rule, despite expressly recognizing that this material “may not meet the regulatory contaminant legitimacy criteria in every situation.” 78 Fed. Reg. 9112, 9156 (Feb. 7, 2013). This prior EPA precedent is fully consistent with the Court’s decision in *API* and underscores the need to eliminate the contaminant comparison as a mandatory factor in the NHSM rule’s legitimacy criteria generally, and as a condition as applied to individual NHSMs.

As currently applied, the contaminant comparison criterion means that the exact same railroad tie is considered a solid waste when burned in one unit, but as a non-waste fuel when burned in another. EPA has acknowledged that the character of the NHSM does not change depending on the design of the boiler it goes to, and has offered no rationale for how the existence of a fuel oil nozzle in a boiler informs the question of whether railroad ties are being legitimately used as fuel, or in fact are simply being discarded in a hypothetical “sham recycling” operation. Adding further to the illogic of the current rule, the “designed to burn”

⁵ 81 Fed. Reg. 6687, 6731 (February 8, 2016).

requirement is applied only to some railroad ties; units not designed to combust both biomass and fuel oil may still burn other NHSM.

In addition, EPA has imposed other restrictions unrelated to the characteristics of the NHSM itself— including a requirement that the facility in question must have been built before April 2014 and that the amount of NHSM combusted in that facility may not exceed 40% of the total fuel mix in a given year. In adding these various requirements regarding the characteristics of the *combustion unit*, the characteristics of the *material* and the motivation of the recycler are essentially rendered irrelevant to the determination of whether the material is a solid waste. This is contrary to RCRA case law and an arbitrary and unreasonable basis on which to decide whether the material is, in fact, being discarded or legitimately used as fuel.

Finally, EPA included guidance in the 2016 Rule related to railroad tie storage as it impacts NHSM eligibility. In the preamble to that rule, EPA discussed its presumption that storage of ties for a year or longer without an end-use determination is not “reasonable,” and indicates that the material has been discarded. This is incompatible with the realities of railroad operations, as unlike discrete facilities from which valuable secondary materials are easily reclaimed, the railroad right-of-way extends over thousands of miles across the United States.⁶ Over these huge expanses of territory, railroads replace sections of track as needed, setting aside ties meant for reclamation. The ties are collected when it is safe to arrange for crews (including processing company contractors) and equipment to get to these widespread and potentially remote locations. Many locations where ties are removed are not readily

⁶ As of 2016, the trackage of AAR’s member railroads covered 162,141 miles.

accessible except by rail, and tie pickup interrupts freight and passenger train service and competes with safety-related operations such as track maintenance and inspection. Train service and safety are regulated by the Surface Transportation Board and Federal Railroad Administration, respectively. Due in part to those agencies' requirements, service and safety must take precedence over tie recovery. Further, due to restrictions mandated by the NHSM regulations (including the designed-to-burn requirements), EPA has effectively limited the number of cogeneration facilities available to use the railroad ties as fuel. Consequently, the recovery facilities that are available may be far away from a tie recovery area. These challenges make it unrealistic to collect used ties within one year of removal from service—but for reasons completely unrelated to the determination of whether ties are managed as a “valuable commodity” under the NHSM framework. Moreover, EPA has recognized that “the reasonable timeframe for storage may vary by industry.” 81 Fed. Reg. 6725. In the context of railroad crosstie management, three or more years is a reasonable storage timeframe. Accordingly, EPA should reconsider its guidance regarding storage of treated railroad ties.

In light of *API* and EPA's acknowledgement that the relevant NHSM language is consistent with that of the DSW rule, the use of contamination comparison criterion as a determinative factor for whether a material has been discarded should no longer be mandatory. This includes restrictions on units qualified to combust creosote-treated railroad ties and paper recycling fuels as non-waste fuels. As such, we respectfully request EPA amend the regulations as proposed in Section III, above.

B. Removing Unjustified Restrictions On The Beneficial Use of Railroad Ties and Other Similarly Situated NHSM As A Non-Waste Fuel For Energy Recovery Furthers EPA’s Goals And Provides Overall Benefits To The Environment.

As the agency charged with environmental protection, EPA should encourage the widespread use of railroad ties and other similarly situated NHSM as fuel, rather than restrict that use and condemn valuable fuel sources to landfills. The regulatory revisions requested in this Petition promote environmental sustainability, consistent with EPA’s Waste Management Hierarchy,⁷ eliminate undue and burdensome regulation, and reduce costs associated with such regulatory burdens.

According to a survey conducted jointly by the Railway Tie Association, the American Short Line and Regional Railroad Association (“ASLRRA”) and the AAR, railroads generated an average annual total of 23,975,000 ties as part of track upgrade projects in the period from 2013 to 2016.⁸ The survey indicated that railroads sent 81.3% of those ties to cogeneration facilities. As reflected in the joint comments previously submitted by AAR, TWC, and AF&PA on January 3, 2017, the designed-to-burn criteria disqualified approximately 58% of the existing boiler capacity to burn these railroad ties. This capacity limitation means it takes much longer to move ties through the fewer eligible facilities, and railroads must transport the ties longer average distances to reach an eligible facility.

⁷ See EPA, *Sustainable Materials Management: Non-Hazardous Materials and Waste Management Hierarchy*, available at <https://www.epa.gov/smm/sustainable-materials-management-non-hazardous-materials-and-waste-management-hierarchy>.

⁸ *2014 Railroad Ties Survey for the Railway Tie Association, the Association of American Railroads, and the American Short Line and Regional Railroad Association*, by Stephen T. Smith, Stephen Smith Consulting, April 6, 2015, revised August 12, 2015.

Capacity limitations will only worsen as older facilities are phased out and increasingly replaced by facilities built after 2014, which are subject to additional limitations on use of railroad ties. Like the facility designed-to-burn criteria, this age-of-facility criterion is also wholly unrelated to the character of the NHSM itself, and the legally relevant question of whether it is discard or a legitimate fuel.

The primary alternative for managing the large volume of railroad ties removed from the rail lines each year is landfill disposal. Indeed, if substantial numbers of ties are excluded from the scope of what can be burned for energy generation in lieu of fossil fuels, the result will be an increased use of non-renewable fuels – and an increase in the volume of ties sent to landfills. The landfilling of railroad ties would take up a football field 70 stories high – annually. As the landfilled ties decay, they release greenhouse gases— including methane— into the Earth’s atmosphere, an outcome that is contrary to public policy and EPA’s stated goals.

Further, at a cost of \$70 to \$90 per ton, landfilling the additional railroad ties will cost railroads an additional \$74 to \$95 million per year. Reduction of these burdensome and unnecessary costs is consistent with Executive Order 13771 and EPA’s August 17, 2018, Memorandum reinforcing the work of EPA’s *Regulatory Reform Task Force*.⁹

Throughout the rulemaking process, EPA has consistently and unambiguously agreed with Petitioners that burning of treated wood – including railroad ties – in cogeneration facilities is a legitimate use of non-wastes as fuel, and one that increases the overall efficiency of cogeneration. This conclusion is supported by abundant data included in the administrative record. See, e.g., *Additions to List of Categorical Non-Waste Fuels Notice of Proposed*

⁹ https://www.epa.gov/sites/production/files/2018-08/documents/reg_reform_taskforce_20180817.pdf.

Rulemaking Preamble, 79 Fed. Reg. 21,024 (April 14, 2014), Docket ID No. EPA-HQ-RCRA-2013-0110; *January 3, 2016, Join Industry Comments to Additions to List of Section 241.4 Categorical Non-Waste Fuels: Other Treated Railroad Ties*, Docket ID No. EPA-HQ-OLEM-2016-0248. The overall environmental benefits of burning ties for energy recovery and policy considerations further support the revisions requested in this Petition.

C. The Definition of “Paper Recycling Residuals” Should be Corrected to be Consistent with *API* and Remove Qualifiers that Unnecessarily Limit Use of PRR as a Non-Waste Fuel.

Petitioners also request that EPA amend the definition of “paper recycling residuals” (“PRRs”) to correct the description and remove the vague definitional condition that PRRs that “*contain more than small amounts of non-fiber materials . . . are not paper recycling residuals.*” 40 C.F.R. § 241.2 (emphasis added).¹⁰ This condition is overly vague and directly at odds with the Court’s decision in *API*.

As an initial point, the current definition describes PRRs as “composed primarily of wet strength and short wood fibers.” This is not correct, as some residuals from recycling paper, paperboard and corrugated containers are not composed primarily of wet strength fibers or short-wood fibers, but nonetheless cannot be used to make new paper or paper products and therefore are burned for their energy value. PRRs contain fibers that, either for strength or size reasons, cannot be recovered because they are too small or weak to be used in making new paper. However, the repulping of recovered fibers can result in a variety of strengths and sizes of fibers in PRRs, despite best efforts, so the current limitations are unnecessarily restrictive

¹⁰ The categories of “non-fiber materials” identified in the definition include “polystyrene foam, polyethylene film, other plastics, waxes and adhesives, dyes and inks, clays, starches, and other coating and fill material”

and limiting. Therefore, this qualifier in the definition should be stricken because it incorrectly limits the true universe of PRRs that can be combusted for their fuel value.

In addition, the second sentence in the definition precluding materials that contain “more than small amounts of non-fiber materials” from qualifying as PRRs also should be removed. This condition suggests that the list of non-fiber materials identified in the definition are somehow viewed as contaminants in PRRs. But, as discussed above, in vacating the contamination comparison criterion in the DSW rule, the D.C. Circuit made clear that the mere presence of some contaminants in a material destined for legitimate recycling is not the basis for finding that the material has been “discarded” and thus subject to regulation as a solid waste. To reiterate, the Court found that “[n]ever in the [solid waste] rulemaking does EPA make out why a product that fails those criteria [*i.e.*, contains contaminants at levels higher than in comparable virgin products] is likely to be discarded in any legitimate sense of the term.” *API*, 862 F.3d at 62. And, as explained above, the Court challenged EPA’s “bare assertion that high levels of hazardous constituents could indicate discard,” and noted that the contaminant comparison at issue was “not a reasonable tool for distinguishing products from wastes.” *Id.* at 60, 63 (internal quotations omitted).

This logic applies with equal force to the NHSM rule and, in particular, warrants removal of the “small amount” of non-fiber materials limitation in the regulatory definition of PRRs. As was the case with hazardous secondary materials destined for recycling, the presence of more than “small amounts” of non-fiber materials in PRR destined for use as fuel is not an indication of “discard” and cannot be justified as the basis for excluding PRRs destined for legitimate use as a fuel from classification as a non-waste fuel. Therefore, EPA’s argument that “[c]ombustion

of such materials remaining in the PRRs after recycling constitutes burning of a solid waste; and as such, units burning those materials would be subject to CAA section 129 standards” is inconsistent with the *API* ruling. Accordingly, EPA should remove the condition in the definition of PRRs that only “small amounts” of non-fiber materials may be present in PRRs to qualify as a non-waste fuel when burned for energy recovery.

In addition to being inconsistent with the D.C. Circuit’s holding in *API*, the “small amount” limitation is overly vague. While members of the regulated community have used good faith efforts in determining that PRRs burned as fuel meet this condition, it is well established that “a statute which either forbids or requires the doing of an act so vague that men of common intelligence must necessarily guess at its meaning and differ as to its applications, violates the first essential of due process of law.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (internal citation omitted). The “small amount” criterion in the definition of PRRs falls squarely within this “impermissibly vague” infirmity and should be removed from the definition to help ensure that “those enforcing the law do not act in an arbitrary or discriminatory way.” *FCC v. Fox*, 567 U.S. at 253(internal citation omitted).

VI. CONCLUSION

The NHSM rule’s legitimacy criteria must be amended to remove the mandatory use of a contaminant comparison in determining whether a non-hazardous secondary material qualifies as non-waste fuel when burned for its fuel value. Moreover, railroad ties are a legitimate fuel, the benefits of which have been acknowledged by EPA through designation as a categorical non-waste fuel under 40 C.F.R. § 241.4. The Part 241 regulations must be amended to remove the now-invalidated designed-to-burn criteria and other unsupported restrictions for railroad

ties and other similarly situated NHSM. In addition, while PRRs have already been established as legitimate fuel, the caveat restricting PRRs to “small amounts” of non-fiber contaminants should be removed to maintain consistency with other NHSM and the ruling in *API*. Overall, Petitioners’ proposed amendments are consistent with RCRA, with applicable case law, and are supported by sound environmental, agency, and public policy.