

March 17, 2010

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

Dear Administrator Jackson:

On behalf of national environmental and public health organizations, we write to seek your help on an issue of great importance to communities across the country. As you may know, EPA's Office of Solid Waste and Emergency Response (OSWER) is scheduled to propose its first ever regulatory definition of non-hazardous solid waste by April 16, just days before the 40<sup>th</sup> anniversary of the EPA and Earth Day. We are deeply concerned that OSWER's proposed definition of solid waste will exempt and deregulate thousands of industrial facilities that burn their waste on site from any significant obligation to control the toxic air pollution they create.

This critical definition will determine whether industrial facilities that burn spent solvents, plastics, used oil, sludges and other industrial wastes in on-site incinerators are required to control the toxic air pollution they generate, or are allowed to release it – uncontrolled – into nearby communities. We are concerned that the proposed definition could cover, at most, the waste burned at only a few hundred industrial facilities. Thousands of American communities located near other industrial facilities that burn their waste in on-site incinerators would be denied badly needed relief from the devastating health effects that the toxic pollution generated by these waste-burning facilities can cause. To make matters worse, such a definition would encourage even more industrial facilities to burn their waste in unregulated on-site incinerators – adding to the burden of toxic pollution and discouraging recycling and responsible waste disposal alternatives.

As Congress recognized when it adopted the 1990 Clean Air Act Amendments, the uncontrolled or poorly controlled combustion of solid waste can result in significant emissions of toxic metals such as mercury and cadmium, persistent and highly carcinogenic organic pollutants such as dioxins, acid gases, and particulate matter. 42 U.S.C. § 7429(a)(4). So concerned was Congress with the hazards caused by this pollution that it ordered EPA to issue highly protective emission standards, monitoring requirements, operator training requirements and siting requirements for all units combusting such waste no later than November 15, 1994. 42 U.S.C. § 7429(a)(1)(D).

These standards still do not exist. Much of this 15-year delay resulted from misguided attempts by previous administrations to exempt incinerators that recover energy from the Clean Air Act's incinerator requirements. When that deregulatory scheme was finally reviewed by the D.C. Circuit under the prior administration, that Court rejected it as flatly unlawful. *NRDC v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007). In the last days of the Bush administration, however, EPA sought to resuscitate the same rejected approach by issuing an advanced notice of proposed rulemaking (ANPRM) that effectively excluded waste burned for energy recovery from the definition of "solid waste" under RCRA. It is that approach that we are deeply concerned will govern EPA's upcoming proposal.

The definition of solid waste advanced in the ANPRM contravened both the Clean Air Act and RCRA for reasons that are explained in comments submitted by Earthjustice and Sierra Club and summarized in a letter that more than 85 community groups submitted to OSWER Assistant Administrator Mathy Stanislaus last August.

Any definition of solid waste that excludes plastics, spent solvents and other industrial wastes that are burned for energy – either on-site or off-site – would exempt thousands of industrial facilities from protective emission standards. For example, it would exclude as many as 1,700 chemical plants that may burn spent chemicals and other wastes in on-site incinerators, allowing those incinerators to be operated without any significant pollution control, operating, or monitoring requirements. Although the combustion of waste chemicals in uncontrolled or poorly controlled incinerators would almost certainly send toxic air pollution into nearby communities, the people in those communities would be unable even to learn the identity and quantity of toxins to which they were being exposed, much less protect themselves and their families by demanding that pollution control and monitoring equipment be installed.

Further, by promulgating a definition that allows industrial waste to be burned on-site in uncontrolled incinerators, EPA will make on-site incineration more attractive than recycling or safer disposal methods. A narrow definition of waste also would exacerbate the challenges facing States that need to reduce PM<sub>2.5</sub> and ozone pollution to comply with national ambient air quality standards. By significantly reducing the number of facilities that are subject to Clean Air Act emission standards, it will force States to seek larger cuts from fewer facilities.

It would be very difficult for EPA to issue a final definition of solid waste that is protective and legally defensible if the only definitions the agency proposes are narrow and deregulatory. Indeed, issuing only narrow definitions in the proposal could preclude EPA from issuing a broad definition in the final rule even if the agency ultimately concludes that a broader and more protective definition is required. At a minimum, such an approach could result in substantial delay by necessitating a supplemental proposal and another round of public comment. It bears emphasis that the solid waste definition is an integral part of EPA's air toxics standards for industrial incinerators that are now more than 15 years overdue and subject to a December 16, 2010 court-ordered deadline that already has been extended repeatedly. Further delay of these standards – as would likely result from the need for a supplemental proposal – would violate the court order and would severely prolong and exacerbate the exposure to toxic pollution in communities who already have waited far too long for relief that Congress intended EPA to have put in place by 1994.

We urge you to keep all of EPA's options open by including the approach to defining solid waste definition we recommended in comments on the ANPRM, along with any other options EPA may choose to propose. We believe our recommended approach is the only one that is appropriate, protective and legally defensible. We also believe that proposing only narrow definitions of solid waste would conflict directly with the commendable goals and priorities that you have set for EPA, especially your welcome regard for environmental justice. A deregulatory waste approach would put public health at risk in communities all across the country.

We wish to express our appreciation to OSWER Assistant Administrator Mathy Stanislaus for meeting with many of us and hearing our concerns. We hope to further discuss this important issue with him and his staff in the future. However, because of the issue's urgency and the health consequences to so many people in so many communities, we ask for your help to prevent an outcome that would be tragic and completely unnecessary.

Sincerely,

Charles D Connor  
President and CEO  
American Lung Association

Frank O'Donnell  
President  
Clean Air Watch

John DeCock  
President  
Clean Water Action

Trip Van Noppen  
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