

Douglas H. Green

T 202-344-4483

F 410.244.7742

dhgreen@venable.com

November 21, 2011

Ms. Courtney Higgins
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building
725 17th Street, N.W. Washington, D.C. 20503

Dear Ms. Higgins:

On behalf of NORA, An Association of Responsible Recyclers (formerly the National Oil Recyclers Association), we appreciate the opportunity to meet with your office on Tuesday, November 22, regarding NORA's concerns with the designation of off-specification ("off-spec") used oil fuel as a "solid waste" under EPA's non-hazardous secondary materials ("NHSM") rule. 76 Fed. Reg. 15456 (March 21, 2011).¹ In preparation for that meeting, outlined below are the reasons why this designation is at odds with the use of off-spec used oil fuel as a valuable commodity in the market place and how failure to correct this error will result in the needless elimination of a vibrant fuel oil market and a corresponding loss in revenue and jobs in the used oil fuel industry. To correct this mistake, it is critical that EPA include off-spec used oil fuel in the list of alternative non-waste fuels ("alternative fuels") in the Agency's upcoming revisions to the NHSM rule.

Although NORA submitted extensive comments on EPA's proposed NHSM rule outlining the factual, legal and policy errors with classifying off-spec used oil fuel as a "solid waste" when combusted as a fuel,² we outline below the adverse environmental consequences and adverse economic impact on used oil generators and recyclers that will result if off-spec used oil fuel is not properly classified as an alternative fuel in the revised NHSM rule. First, however, it is important to understand the factual error in the rulemaking record that led EPA to mistakenly designate off-spec used oil fuel as a solid

¹ NORA is a petitioner in the consolidated legal challenges to the NHSM rule in the United States Court of Appeals for the District of Columbia Circuit.

² NORA's comments, submitted to EPA on August 3, 2010, included a comprehensive review of the legislative history of the three federal statutes governing used oil recycling. The legislative history clearly demonstrates that Congress directed EPA to regulate used oil in a way that does not discourage legitimate recycling of used oil.

waste; but for this error, the Agency would have recognized that, when compared to comparable fossil fuels, off-spec used oil fuel readily meets the legitimacy criteria in the NHSM rule and qualifies as a legitimate fuel.

EPA's Factual Error in Designating Off-Spec Used Oil Fuel a Solid Waste

The fundamental error underlying EPA's designation of off-spec used oil fuel as a solid waste was the erroneous assumption that, in comparing off-spec used oil fuels to traditional fuels, the constituents in off-spec used oil must be compared to those in "traditional virgin refined fuel oil." 76 Fed. Reg. at 15502. While EPA was presented with data demonstrating that the contaminants in coal, another traditional fuel, had higher level contaminants than off-spec used oil fuel, EPA refused to compare off-spec used oil fuel to coal on the basis that "coal was not an appropriate comparison for used oil since some combustion units that burn used oil can alternatively only burn fuel oil and not coal (such as space heaters). Thus, used oil should be compared to fuel oil." *Id.* at 15505. As part of this reasoning, EPA incorrectly assumed that off-spec used oil fuel is burned almost exclusively in space heaters, and that because virgin fuel oil, not coal, is the alternative traditional fuel that can be burned in these devices, off-spec used oil fuel must be compared to virgin fuel oil for purposes of assessing the status of off-spec used oil fuel under the NHSM rule. *Id.* This reasoning is incorrect.

Virtually all off-spec used oil fuel is processed and marketed to industries where coal or coke is the predominant virgin fuel being replaced or supplemented by off-spec used oil fuel. Space heaters are not even a participant in the market for off-spec used oil fuel. Off-spec used oil fuel often is purchased by cement kilns, steel mills, or large utility boilers where coal, or in some cases coke, is the predominant virgin fuel used. Depending on market conditions, these facilities also burn alternate fuels, including off-spec used oil fuel, to supplement their fuel use. The point is that the traditional fuel that off-spec used oil fuel replaces in the market place is coal or coke, not virgin refined fuel oil.

Indeed, qualified markets for off-spec used oil fuel under EPA's used oil fuel rules (40 CFR Part 279) are overwhelmingly at facilities, such as steel mills, cement kilns and power plants, that also (and primarily) burn coal or coke as their traditional fuel. These are facilities that have controls in place to remove HAPs and other contaminants from their air emissions at levels typically found in coal. Indeed, as set forth in the rulemaking record, the contaminants in off-spec used oil fuel are either lower than or equal to the contaminants in coal. This is crucial because EPA's stated reasons for designating off-spec used oil fuel as a solid waste was the Agency's mistaken conclusion that off-spec used oil could be compared to only one traditional fuel, *i.e.*, virgin refined fuel oil. *Id.*

EPA's decision in this rulemaking to designate scrap tires as an alternative (legitimate) fuel is instructive. The performance of off-spec used oil fuel when measured by EPA's "legitimacy criteria" is superior or equal to the performance of fuel derived

from scrap tires. For examples, the BTU content of off-spec used oil fuel is higher than tire-derived fuel and the collection/recycling system for off-spec used oil fuel is more mature and far better established (the collection/recycling system for used oil operates efficiently and throughout the entire United States). Moreover, there is a healthy and reliable market for off-spec used oil fuel products that has been in place for many decades. However, EPA designated fuel derived from scrap tires as a legitimate fuel. Why? Because EPA compared the constituents in scrap tires to those in coal. Here too, EPA should have compared off-spec used oil fuel to coal because off-spec used oil fuel is burned at the same facilities that also burn coal. Had EPA done so, off-spec used oil fuel would have been designated as a legitimate fuel. It is important, therefore, that EPA correct this mistake in the forthcoming proposal and in the revised NHSM rule.

Adverse Economic Impact/Background

The erroneous designation of off-spec used oil fuel as a solid waste will have a highly detrimental impact on used oil generators and the oil recycling industry. A conservative estimate of the quantity of recovered used oil generated each year in the United States is 1.2 billion gallons. A conservative estimate of the quantity of recovered off-spec used oil generated annually is 120 million gallons. NORA estimates that 45 million gallons of off-spec used oil is generated in EPA Region V that encompasses a significant number of manufacturing facilities including automotive manufacturing facilities. The remaining 75 million gallons of off-spec used oil fuel is generated in the other EPA Regions.

Incineration Capacity Shortfall -- Under the NHSM rule, off-spec used oil fuel must be burned in commercial and industrial solid waste incinerators ("CISWIs") operating in compliance with CAA section 129 air emission standards. As explained in its comments, NORA's estimates that only about 50 CISWIs throughout the entire United States would be available to incinerate off-spec used oil fuel, *in addition to* the other secondary materials designated as solid wastes under the NHSM rule. The actual capacity to incinerate used oil fuels and other solid wastes would be extremely limited even if such facilities were continuously in operation. Put simply, there is not nearly enough CISWI capacity to incinerate off-spec used oil fuel and the other secondary materials designated as solid wastes under the NHSM rule.

Lack of Alternatives to Incineration -- The lack of incineration capacity raises the question of whether there are viable alternatives to incineration in CISWI units. The short answer is no. While theoretically alternatives exist, they are not practical for most of the 120 million gallons of off-spec used oil fuel generated each year.

- Blending: Although the NHSM rule allows blending of off-spec used oil with virgin oil and/or on-spec used to produce on-spec used oil, NORA's comments on the proposed NHSM rule carefully analyzed the costs associated with such blending and concluded that the costs of this option would prevent the processor from offering the blended fuel product at a competitive price. NORA believes

that only about 10 million gallons of off-spec used oil would actually be blended each year to produce on-spec used oil fuel³.

- Re-refining: Re-refining—the production of lubricants and feedstock for lubricants—constitutes a theoretical alternative to incineration in CISWI units. Most off-spec used oil fuel, however, contains quantities of halogens and water that makes it unsuitable for re-refining. NORA believes that only about 10 million gallons of off-spec used oil fuel would be re-refined each year.
- Landfill Disposal: Virtually all municipal and industrial landfills prohibit disposal of used oil. Any landfill that would accept used oil would first require the used oil to be processed, solidified and tested. In addition to the fundamental problem of lack of landfill capacity, the processing, solidification and testing costs constitute financial obstacles that preclude landfilling of off-spec used oil as an alternative to incineration.
- Incineration in Hazardous Waste Facilities: While theoretically an option due to limited CISWI capacity, the costs would be staggering. The extremely high cost of hazardous waste incineration (\$3.50 to \$5.00 per gallon) would not decrease if the remaining 100 million gallons of off-spec used oil generated annually were diverted to the hazardous waste incinerator market. To the contrary, the new “demand” for incinerating 100 million gallons of off-spec used oil would be met by ever increasing prices for incineration. NORA estimates that if the current NHSM rule were fully implemented (*i.e.*, requiring the incineration of off-spec used oil fuel), the cost of incineration is likely to double due to increased demand.

Consequently, because no practical legal alternative exists for the vast majority of off-spec used oil fuel that must be incinerated in CISWIs, there is no “safety valve” that solves the problem. This creates a costly yet unresolvable dilemma for both generators and the used oil recycling industry. OMB (and EPA) should recall a comparable problem of lack of incineration capacity when RCRA’s land disposal restrictions (“LDRs”) were implemented in the late 1980s and early 1990s. The lesson from that experience is that the absence of disposal capacity significantly increases the costs of management, transportation and alternative disposal options (assuming such options exist).

³ The practical distinction between off-specification used oil fuel and on-specification used oil fuel is that the former is limited to use as a fuel product in certain specified devices, such as steel mills, cement kilns and utility boilers, while the latter does not have these restrictions. *See* 40 C.F.R. § 279.11. Both categories of used oil fuel, however, are valuable fuel commodities and in fact are only considered to be “disposed” of when *not* burned for energy recovery or otherwise recycled. *See* 40 C.F.R. § 279.81.

Adverse Economic Impact on the Used Oil Recycling Industry

Through its elimination of the viable and mature market for off-spec used oil fuel, the NHSM rule transforms off-spec used oil fuel from a valuable fuel commodity into an undesirable solid waste. Without the NHSM rule, off-spec used oil fuel is a valuable commodity that is bought and sold in a well-established and stable nation-wide market through its use as a fuel in cement kilns, steel mills and other industrial boilers. Under the NHSM rule, however, off-spec used oil fuel loses its value as a fuel and must instead be incinerated as a solid waste either in the limited number of CISWIs or hazardous waste incinerators (assuming capacity is available). The used oil recycling industry, in turn, will have no interest in collecting off-spec used oil fuel because there will be no buyers for this material as there would no longer be a viable commercial market for materials that only can be combusted in CAA section 129 CISWIs or hazardous waste incinerators. In addition, used oil processors will not collect off-spec used oil fuel and incur the cost of perpetual storage.

Overall, the used oil recycling industry will lose approximately 10 percent of its sales revenue as a result of not being able to collect, process and sell off-spec used oil fuel products. NORA estimates that, at current prices, the loss of revenue from sales of off-spec used oil fuel will be approximately \$120 million. The impact on the members of the industry that collect and process oily wastewater will be far more severe because those companies charge their generator customers for the collection and processing of the oily waste water. NORA believes that, for some companies, the loss of this revenue will be devastating and will result in the closure of businesses and the loss of hundreds of jobs.

It should be noted that the loss of revenue will *not* be offset by a corresponding decrease in operating costs. The fixed costs—paying for and maintaining storage tanks, trucks and equipment—will remain the same. The only cost savings will result from laying off otherwise productive employees.

Adverse Economic Impact on Generators of Off-Spec Used Oil

A major cost, management and compliance burden will be imposed on generators of off-spec used oil as the result of designating off-spec used oil fuel a solid waste under the NHSM rule. The manufacturing sector of the economy will be hit hardest because manufacturers are the primary generators of off-spec used oil.

As indicated above, the lack of incineration capacity creates a monumental obstacle. Assuming, for purposes of argument, that enough used oil incineration capacity will exist when hazardous waste incineration units are combined with the limited number of CISWIs, NORA estimates that the price for incineration will increase dramatically. As explained above, NORA estimates that it is likely that the price of incineration for off-spec used oil will likely double to approximately \$10.00 a gallon due to the sharp rise in

demand and limited capacity for these services. Given the 100 million gallons of off-spec used oil requiring incineration on an annual basis when the NHSM rule is implemented, incineration costs will jump to approximately \$1 billion a year for off-spec used oil alone. Importantly, this amount does not include either the de-watering step in the treatment process (approximately \$4.00 a gallon) or the transportation costs which will depend on the distance to the nearest available incineration facility. NORA estimates that the transportation cost will be a minimum of \$.50 per gallon or \$50 million. Nor does it include the costs of storing off-spec used oil prior to incineration. Even assuming the availability of incineration capacity, generators will need to store off-spec used oil because the "available" incinerators may not have the capacity to incinerate for months or years after the off-spec used oil has been generated. Constructing storage capacity (which will involve purchasing or leasing additional land and acquiring storage permits or other governmental approvals) will be expensive and take years to accomplish.

Adverse Environmental Consequences and Enforcement Costs

Unfortunately, experience has demonstrated that many generators of used oil will not be able to absorb a steep hike in waste management costs, particularly if the generator was previously paid for this valuable material as a supplemental fuel. EPA recognized this point in 1985 when the Agency properly determined not to classify used oil as a hazardous waste due, in large part, to the concern that if used oil lost its value as a commodity, widespread improper disposal would result. With the sudden disappearance of viable recycling outlets due the designation of off-spec used oil fuel as a solid waste, some used oil generators will turn to improper disposal outlets. By definition, many of these options will be unlawful, resulting in adverse environmental consequences.

Moreover, increased unlawful disposal will result in increased enforcement costs including expensive civil and criminal prosecutions. The cost to the federal government of a criminal investigation leading to a trial and appeals can easily exceed \$1 million.

Another adverse effect of the NHSM rule is that the collection of state and local government programs for the collection of do-it-yourself ("DIY") used oil will cease to exist. Until an entity tests the used oil and declares it to be on-spec, all used oil is considered off-spec. Before the implementation of the NHSM rule, off-spec used oil was considered a valuable product and the testing costs are willingly assumed by the used oil processor. After the implementation of the rule, however, the collector/processor will not be interested in off-spec used oil fuel and will not collect DIY used oil unless the operators of the collection program (primarily agencies of local governments) conduct the testing and demonstrate that each load of the used oil is on-spec. Regular testing of DIY used oil is expensive and most government agencies do not have the funds to assume a permanent new expense. Therefore, most of these programs will be terminated. DIY oil generators will have few available disposal outlets and unfortunately, based on past experience, will dispose of their used oil improperly with adverse environmental or health consequences.

Conclusion

EPA's designation of off-spec used oil fuel as a solid waste was based on the erroneous assumption that the alternative traditional fuel to off-spec used oil fuel is virgin refined fuel oil. This is not correct. Off-spec used oil fuel is used as a supplemental or alternative fuel in combustion devices that also combust coal and/or coke as traditional fossil fuels. When compared to these fossil fuels, off-specification used oil fuel readily meets the legitimacy criteria in the NHSM rule and qualifies as a legitimate alternative fuel.

Further, designation of off-spec used oil fuel as a solid waste will have adverse economic and environmental consequences. The absence of incineration capacity and the lack of viable alternatives to incineration will create a chaotic situation resulting in major economic burdens on the industry and widespread job losses. Rather than creating an environmental benefit, the NHSM rule will needlessly eliminate an otherwise viable and environmentally beneficial used oil fuel market. These problems can be corrected if EPA's properly classifies off-spec used oil as a legitimate alternative fuel in the revised NHSM rule.

If you have any questions or need additional information before or after our meeting on November 22nd, please contact me.

Sincerely,



Douglas H. Green
On behalf of NORA

cc: Christopher Harris, Esq.
General Counsel, NORA