Solid Waste Definition

For the past four months, the Industrial Combustion Coordinated Rulemaking ("ICCR") Federal Advisory Committee has reviewed the meaning of solid waste. The meaning of solid waste is important because it is a critical factor in determining whether combustion units are regulated under Section 129 of the Clean Air Act. The ICCR Environmental Caucus agreed with the Coordinating Committee's initial decision to review the meaning of solid waste and provided two representatives on the Solid Waste Task Force. It was the hope of the Environmental Caucus that the Solid Waste Task Force would develop a proposal which underscored the importance of strict adherence with the Clean Air Act and the Resource Conservation Act, and which was consistent with the overarching goal of improving air quality.

This position paper provides a description of the criteria by which any proposal on this issue must be evaluated. By way of summary, the Environmental Caucus believes any ICCR activity on the issue of the meaning of solid waste must be:

> consistent with the plain language of the Clean Air Act;

> consistent with the meaning of solid waste established pursuant to the Resource Conservation and Recovery Act;

> consistent with Congressional intent for Section 129 as revealed by its legislative history; and,

> consistent with the ICCR's mandate as a Federal Advisory Committee.

Moreover, the Environmental Caucus believes that any ICCR activity on the issue of the meaning of solid waste must not:

> engender confusion in the administration of the Clean Air Act or the Resource Conservation and Recovery Act; or,

> avoid or diminish the environmental protection achieved by regulating combustion units.

This position paper will briefly describe the Environmental Caucus' reasons for advancing these criteria. By openly publishing these criteria, the Environmental Caucus intends to avoid unfair surprise to any party and to act in good faith in the ICCR process. These criteria will form the basis of the Environmental Caucus' evaluation of any proposals subsequently made to ICCR's

Coordinating Committee. Finally, the members of the Environmental Caucus continue to research this issue and welcome any responses to the ideas contained in this position paper.

Criterion One - Consistency With The Plain Language of the Clean Air Act

On its face, Section 129 includes the broadest range of incinerator facilities. For example, there are no quantity thresholds in Section 129. Instead, under 129(g)(1), if a facility incinerates "any" solid waste, it is subject to Section 129 and the regulations developed to implement Section 129. The sources for this solid waste are also broadly defined under Section 129, explicitly including solid waste derived from commercial and industrial establishments as well as the general public. Moreover, most waste incinerating facilities will not fall within the three categories of facilities for which section 129 provides blanket exemptions - metal recovering smelters, small power production facilities burning homogeneous fuels like scrap tires, and air curtain incinerators.

Perhaps most importantly, neither the Clean Air Act as a whole nor Section 129 authorize a reworking of the definition of solid waste. Instead, Section 129(g)(6) Congress explicitly states:

The terms solid waste and medical waste shall have the meanings established by the Administrator pursuant to the Solid Waste Disposal Act [42 U.S.C.A. Section 6901 et seq.]. **/1**

This suggests that even if it were desirable to redefine "solid waste" for purposes of Section 129, Congress provided no statutory authorization for this activity under the Clean Air Act. Instead, pursuant to Section 129 itself, any legislative or regulatory reworking of the definition of solid waste must be established by the Administrator pursuant to RCRA. For the same reason, efforts to rework the definition through "around the edge" clarifications should also be viewed with extreme skepticism; Section 129 explicitly refers to the <u>meanings</u> established pursuant to RCRA, not merely the definitions. Consequently, any attempt to create a new approach to the meaning of solid waste must be viewed with extreme skepticism if it is not grounded in, and consistent with, the meanings established pursuant to RCRA.

To express this criterion plainly, Congress could have excluded facilities based on quantities of wastes combusted or based on the sources of these wastes. Congress did not. Congress could have included an extensive list of categories of waste

incinerating facilities which are to be excluded from Section 129. Instead, Congress decided to exclude only three categories of facilities from regulation. Finally, Congress could have provided or authorized a new set of meanings for solid waste for purposes of Section 129. Instead, Congress explicitly deferred to the meanings established pursuant to RCRA.

Criterion Two - Consistency With RCRA

The second criterion addresses the substance of the issue. Simply put, this criterion examines whether a proposal is consistent with the meaning of solid waste established and found in RCRA. As a practical matter, the key question is this - for purposes of the meaning of solid waste contained in RCRA and, in turn, Section 129, is non-hazardous discarded material a "solid waste" if it is subsequently used in a combustion process for its fuel value?

RCRA's definitions regarding non-hazardous solid wastes are not well-developed and do not directly answer this question. 40 CFR Part 240 et seq. However, a reading of RCRA's regulations as a whole strongly suggests that non-hazardous discarded material is solid waste regardless of whether it is subsequently used as fuel in a combustion process.

The most well-developed definition of discarded material established pursuant to RCRA is found in 40 CFR Part 260 et seq. This definition of discarded material is provided as part of the initial step of the analysis to determine if a material is a hazardous waste. Under this analysis, materials which are discarded are solid wastes. Discarded materials include abandoned materials. Materials which are subsequently incinerated, recycled through energy recovery and/or used to make fuel are abandoned and, in turn, properly characterized as solid wastes. Consistent with this definition, even though secondary materials which are reclaimed and returned to the original process in which they are generated generally are not solid wastes, they are solid wastes if the reclamation involves controlled flame combustion or if the reclaimed material is used to produce a fuel. 40 CFR 261.4.

Criterion Three - Consistency With Section 129's Legislative History

The third criterion by which to evaluate any proposal is its consistency with the legislative history of Section 129 of the Clean Air Act. This legislative history reveals clear

congressional intent to regulate the broadest range of incineration facilities.

Section 129 originated as part of the Clean Air Act Amendments of 1990 ("the 1990 Amendments"). During the Senate debate on the conference report on the 1990 Amendments Senator Bacus, the floor manager of the bill, entered into the record a detailed analysis (denoted "Clean Air Conference Report") of the bill's provisions. Congressional Record Service, 1 A Legislative History of the Clean Air Act Amendments of 1990 1000-01 (1993) (hereinafter "1990 Leg. Hist.").

In the section of this analysis pertaining to Title III, under the heading "Municipal Incinerators", the conference report on the 1990 Amendments announces that "the conference agreement includes a provision to control the air emissions from municipal, hospital, and other commercial and industrial incinerators." H.R. Conf.Rep. No. 952, 101st Cong., 2d Sess. 341 (1990), reprinted in 1990 Leg. Hist. 1791 (emphasis added). The inclusion of "other commercial and industrial incinerators" is important evidence of congressional intent.

The most important part of Section 129's legislative history may be the genesis of the key definitional language in the amendment to the bill on the Senate floor. Section 129 originated in the Senate. The initial version of Section 129 came from the Committee on the Environment and Public Works. This initial version was limited to municipal waste incinerators and perhaps hospital incinerators. Instead of mandating emission standards for "solid waste incineration units", as the final version of 129(a)(1)(A) does, the bill mandated standards for municipal waste incineration unit[s]." 5 1990 Leg. Hist. 7339, 7681-82. Instead of defining "solid waste incineration unit", the bill defined "municipal solid waste incineration unit". 5 1990 Leg.Hist. at 7701.

When the bill reached the floor, Senator Dole successfully proposed an amendment that produced the finally enacted, much broader version of Section 129. The effect of the Dole amendment was to broaden the types of incinerators subject to regulation under Section 129. For example, in offering his amendment, Senator Dole stressed his goal of facilitating "incineration of municipal and other solid waste," and expressed concern that the prior version of the bill would have impeded operation of incinerators other than large municipal solid waste incinerators ("This change will ensure that hospitals, for example, are not precluded from incineration...Industrial incinerators - those burning only

industrial waste from their own facilities - also would have been unable to meet the requirements of the bill."). 4 1990 Leg. Hist. 7049.

In order to accomplish this broadening of the types of incinerators subject to Section 129, the Dole Amendment transformed Section 129(a)(1)(A) from a mandate to regulate "municipal waste incineration units" into a definition of "solid waste incineration unit". Id. at 7256. While the Dole Amendment changed significant parts of the language in this subsection, it retained existing language about "any solid waste material from commercial or industrial establishments or the general public (including single and multiple residences, hotels and motels)." Id. Notably, the Dole Amendment added to the bill a broad definition of "solid waste," id. at 7257 (everything regulated as solid waste under RCRA) corresponding to its intention to broaden the types of facilities subject to regulation under Section 129. This intention is best captured in Senator Dole's statement during the floor debate on the conference report, when he stated directly that "the bill covers all solid waste combustors."

Criterion Four - Consistency With ICCR's Mandate

The fourth criterion by which to evaluate ICCR-generated positions regarding the meaning of solid waste is related to limits on ICCR's activities. As a federal advisory committee, the ICCR is limited in scope. The Charter establishing ICCR describes this authority in the following manner:

> 2. AUTHORITY. It is determined that the establishment of this committee is in the public interest and supports the EPA in performing its duties and responsibilities under Sections 111, 112 and 129 of the Clean Air Act (CAA), as amended in 1990.

ICCR does not have a mandate to range freely through federal environmental laws and regulations, recommending changes as it sees fit. ICCR is not an environmental star chamber. For example, the ICCR has no mandate whatsoever in relationship to RCRA. Yet, for purposes of Section 129, the meaning of solid waste must be derived from RCRA. To the extent ICCR is working toward or contemplating recommendations to the Administrator to change established, RCRA-based meanings of solid waste, it is acting beyond the grant of its authority as a federal advisory committee. Individual participants in ICCR may wish to address this RCRA-based issue, but ICCR is not the appropriate venue. Correspondingly, the Solid Waste Task Force was directed to review the meaning of solid waste and to attempt to develop an approach which is consistent with RCRA and with 40 CFR

Part 261, not to develop its own "blank slate" approach.

Criterion Five - Avoiding Confusion In The Administration of RCRA and the Clean Air Act

The fifth criterion is whether a proposal will engender confusion in the regulation of solid waste. At this point, there are no inconsistencies in this regulatory scheme . Within RCRA, Part 240 is simply less elaborate than, not inconsistent with, Part 260. Part 240's simple definition is older, but Part 260 had taken form by 1985, well before the Clean Air Act Amendments. Although the Part 260 definition is more elaborate, largely because the majority of RCRA flows through this analysis, the definitions are consistent. That is, the RCRA definition of solid waste is consistent whether it is free-standing (Part 240) or the first part of the determination of whether a material is a hazardous waste (Part 260). Developing different meanings of solid waste within RCRA and/or strictly for purposes of the Clean Air Act would create a more complex, potentially conflicting, system. Perhaps for this reason, Section 129 simply, prudently and unambiguously defers to RCRA.

As a related issue, it is important to be mindful that Section 261's analysis of solid waste is the first step in the determination of whether a waste is also hazardous. That is, in order to be a hazardous waste, a material must first be classified as a waste. If broad categories of combusted material are no longer classified as wastes, it will create a regulatory loophole.

Criterion Six - Will Regulation of Combustion Units Be Avoided or Diminished?

The final criterion addresses what is at stake if a proposal enables a combustion unit to avoid regulation under Section 129. If exempted from Section 129, there is no assurance that hazardous air pollutants from exempted units will be regulated at all. In addition, even if these units are regulated under other provisions of the Clean Air Act, they will not required to achieve equally protective standards.

Combustion units which are not regulated under Section 129 will fall into Section 112, which mandates the development of MACT standards for hazardous air pollutants. However, unlike Section 129, which contains no quantity thresholds, Section 112 applies to major sources (10 tons per year or more of any hazardous air pollutant, or, combined HAP emissions of 25 tons per year or more). Consequently, any proposal which enables incinerators to avoid

regulation under Section 129 may enable non-major sources to avoid HAP regulations altogether. In addition, there are no assurances these sources will be captured in Section 112's area source program.

Even if sources are regulated under Section 112, the quality of environmental regulation is not comparable to Section 129. Section 129 includes a non-discretionary duty to regulate particulates, opacity, sulfur dioxide, hydrogen chloride, oxides of nitrogen, carbon monoxide, lead, cadmium, mercury, and dioxins and dibenzofurans. By contrast, Section 112 does not authorize the regulation of criteria pollutants and provides broader discretion on which HAPs will be regulated. Section 129 contains operator certification and emission/operation monitoring requirements which are not found in Section 112, including a provision which allows public inspection of monitoring results. Section 129 mandates an analysis of methods to remove or destroy pollutants "before, during or after combustion", suggesting a more aggressive analysis of pollution prevention than required under Section 112. Unlike Section 112, new sources under Section 129 are subject to siting requirements which minimize, on a site specific basis, potential risks to public health and the environment.