

**BEFORE THE
ENVIRONMENTAL PROTECTION AGENCY**

**EPA-HQ-OLEM-2020-0550
PROPOSED DENIAL OF NON-HAZARDOUS SECONDARY
MATERIALS (NHSM) RULEMAKING PETITION**

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads (“AAR”) and the American Short Line and Regional Railroad Association (“ASLRRA”) (collectively “the Associations”), on behalf of themselves and their member railroads, respectfully submit the following comments on EPA’s January 28, 2022 “Proposed Denial of Non-Hazardous Secondary Materials (NHSM) Rulemaking Petition.” 87 Fed. Reg. 4536 (Jan. 28, 2022) (the “Proposed Denial”).

AAR is a non-profit industry 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. AAR also represents passenger railroads that operate intercity passenger trains and provide commuter rail service.

ASLRRA is a non-profit trade association representing the interests of approximately 500 short line and regional railroad members and 500 railroad supply, contractor, and service company members in legislative and regulatory matters. Short lines operate 50,000 miles of track, or approximately 30% of the national freight network, employing approximately 18,000

people, and connecting manufacturers, businesses and farmers in communities and small towns to larger markets, urban centers, and ports.

Railroads are the most environmentally friendly way to move freight over land. On average, railroads are three to four times more fuel efficient than trucks - a single train can remove several hundred trucks from the nation's congested highways.¹ The industry accounts for roughly 40% of U.S. long-distance freight volumes—more than any other mode—but only 1.9% of the nation's transportation-related greenhouse gas emissions.²

The environmental benefits of rail, coupled with its crucial role in the supply chain and the nation's infrastructure, underscore the importance of continuing to maintain and improve the efficiency, safety, and resiliency of rail networks. A crucial aspect of the ongoing maintenance of our rail rights-of-way is the replacement of worn rail ties with new ties on a regular basis. As such, and as a joint petitioner to the Petition, the Associations' member railroads have a significant interest in this rulemaking. For the reasons described below, the Associations respectfully oppose EPA's Proposed Denial and ask EPA to reconsider its flawed decision.

¹ Association of American Railroads, *Freight Railroads & Climate Change*, at 2 (Mar. 2021) (<https://www.aar.org/wp-content/uploads/2021/02/AAR-Climate-Change-Report.pdf>).

² *Id.*

I. The Proposed Denial Will Result in Increased Landfilling of Crossties and Increased Greenhouse Gas Emissions, in Conflict with EPA’s Stated Policy Goals.

Railroads manage approximately 207,000 miles of track in the United States, with approximately 620 million crossties currently in use.³ Crossties support the metal rails upon which trains run. Most crossties are made from treated wood and must be regularly replaced due to decay or wear. About 23 million crossties are replaced each year.⁴ Used crossties, when taken out of service, are generally first evaluated for reuse in lighter duty uses or landscaping or agricultural purposes. If that is not an option, they are burned as fuel for energy or disposed of in landfills.⁵

Currently, most creosote-treated cross ties (“CTRT”) taken out of service are used for energy recovery.⁶ However, landfill disposal of CTRTs increased in 2017, likely due to a reduction in the number of facilities accepting CTRTs resulting from EPA’s final rule on *Additions to List of Categorical Non-Waste Fuels*, 81 Fed. Reg. 6687 (Feb. 8, 2016) (“2016 Rule”).⁷ While one stated purpose of that rulemaking was to foster beneficial reuse of CTRTs pursuant to clear guidelines, the final 2016 Rule only allows CTRTs to be burned in certain boilers with a

³ Smith, Stephen T., 2018 Railroad Tie Survey, available at <https://www.rta.org/assets/docs/RTASponsoredResearch/Environmental/2019-4-9%20Tie%20Survey%20Report%20Final.pdf>.

⁴ *Id.*

⁵ *Id.*

⁶ M.A. Energy Resources LLC, 40 CFR Part 241, Subpart B – Crosstie Derived Fuel (CDF) Categorical Petition for a Non-Waste *Determination*, petition submitted to EPA Administrator (February 2013).

⁷ Smith, Stephen T., 2018 Railroad Tie Survey. It should also be noted that the limitation that CTRTs may only be *combusted* in facilities constructed prior to April 2014 necessarily prevents newer and potentially cleaner facilities from using CTRTs for energy production.

limitation on the amount that can be combusted.⁸ If EPA's Proposed Denial remains, the direct consequence will further increase the amount of CTRTs in landfills.

EPA's Non-Hazardous Materials and Waste Management hierarchy ranks various management strategies from most to least environmentally preferred. The hierarchy "places emphasis on reducing, reusing, recycling and composting as key to sustainable materials management" noting that "[t]hese strategies reduce greenhouse gas emissions that contribute to climate change."⁹ EPA set forth in its hierarchy that disposal in landfills is the *least* environmentally preferred option.¹⁰ Indeed, landfills are the third-largest source of methane emissions in the United States.¹¹ In 2019 alone "[l]andfills accounted for approximately 17.4 percent of total U.S. anthropogenic methane (CH₄) emissions . . ."¹² This means "U.S. landfills released an estimated 114.5 million metric tons of carbon dioxide equivalent (MMTCO_{2e}) of methane into the atmosphere in 2019."¹³

As EPA noted in its Proposed Denial, "combusting CTRT provides an alternative to landfill disposal, which studies have shown may reduce methane emissions from anaerobic

⁸ This occurred through listing CTRTs as a categorical non-waste in the 2016 Rule.

⁹ U.S. 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>.

¹⁰ *Id.*

¹¹ U.S. EPA, Overview of Greenhouse Gases, available at <https://www.epa.gov/ghgemissions/overview-greenhouse-gases#methane>.

¹² U.S. EPA. Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2019. Chapter 7: Waste. April 2021 Available at <https://www.epa.gov/sites/production/files/2021-04/documents/us-ghg-inventory-2021-chapter-7-waste.pdf>.

¹³ U.S. EPA, Frequent Questions about Landfill Gas, available at <https://www.epa.gov/lmop/frequent-questions-about-landfill-gas#howmuchmethane>.

decay and extend landfill capacity.” EPA has also recognized that converting materials “into electricity and heat generates a renewable energy source and reduces carbon emissions by offsetting the need for energy from fossil sources and reduces methane generation from landfills.”¹⁴ Moreover,

[t]he use of secondary materials as alternative fuels and/or ingredients in manufacturing processes using combustion not only recovers valuable resources, it is known to contribute to emissions *reductions*. For example, both greenhouse gas (GHG) and particulate matter (PM) emissions have been reduced as a co-benefit of the use of secondary materials.¹⁵

In fact, the “fuel offset gained by recycling creosote-treated ties for energy recovery is 20 times greater than energy recovery from landfill disposal.”¹⁶ “Furthermore, offsets result in a significant decrease in GHG emissions when ties are recycled for energy compared to a slight increase in GHG emissions when landfilled.”¹⁷

Using CTRTs for energy production (and keeping them out of landfills) supports the Biden Administration’s and EPA’s stated climate change goals and offers better overall protection of human health and the environment. EPA noted that “levels of methane and other GHGs in our atmosphere are contributing to changing Earth’s climate—rising temperatures,

¹⁴ U.S. EPA, Sustainable Materials Management: Non-Hazardous Materials and Waste Management Hierarchy.

¹⁵ 76 Fed. Reg. 15456, 15467 (March 21, 2011).

¹⁶ C. Bolin and S. Smith, "Life Cycle Assessment of Creosote-Treated Wooden Railroad Crossties in the US with Comparisons to Concrete and Plastic Composite Railroad Crossties," *Journal of Transportation Technologies*, Vol. 3 No. 2, 2013, pp. 149-161. doi: 10.4236/jtts.2013.32015.

¹⁷ *Id.*

changes in precipitation and more extreme climate events.”¹⁸ President Biden signed an executive order to address climate change and announced a target for the United States to achieve a 50-52 percent reduction in greenhouse gas emissions from 2005 levels in economy-wide net greenhouse gas pollution in 2030.¹⁹ As has been demonstrated and generally recognized by EPA, using CTRTs for combustion reduces use of landfill capacity, reduces release of methane from landfills, and offsets fossil fuel use and GHG emissions with renewable biogenic fuel use.²⁰

In addition to saving valuable landfill space and limiting GHG emissions, co-generation from the energy recovery of crossties offers several other environmental advantages. EPA has recognized that replacing fossil fuels with biofuels (such as CTRTs) may “reduce some undesirable aspects of fossil fuel production and use, including conventional and greenhouse gas (GHG) pollutant emissions, exhaustible resource depletion, and dependence on unstable foreign suppliers.”²¹ From a resource-depletion perspective, the combustion of used crossties

¹⁸ U.S. EPA, Downstream Management of Organic Waste in the United States: Strategies for Methane Mitigation (Jan. 2022), available at https://www.epa.gov/system/files/documents/2022-01/organic_waste_management_january2022.pdf.

¹⁹ The White House, Executive Order on Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>; The White House, Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (April 12, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

²⁰ See C. Bolin and S. Smith, "Life Cycle Assessment of Creosote-Treated Wooden Railroad Crossties in the US with Comparisons to Concrete and Plastic Composite Railroad Crossties," *Journal of Transportation Technologies*, Vol. 3 No. 2, 2013, pp. 149-161. doi: 10.4236/jtts.2013.32015.

²¹ U.S. EPA, *Economics of Biofuels*, <https://www.epa.gov/environmental-economics/economics-biofuels>.

for fuel is a positive environmental alternative. If 9 million crossties are annually disposed of in landfills rather than burned for fuel, an additional 12.9 trillion BTUs will need to be generated by other fuels – likely fossil fuels.

Lifting the overly restrictive, unnecessary, and arbitrary restrictions on burning of CTRTs for energy would provide environmental and climate change benefits, and the alternative (landfilling) will cause detrimental impacts that run counter to the President’s and EPA’s own policy objectives. As such, the Associations respectfully ask EPA to reconsider the Proposed Denial.

II. The Restrictions that Permit Burning Only in “Existing” Pre-2014 Units and Limit Fuel Use at 40 Percent are Arbitrary and Capricious.

In the 2016 Rule, EPA stated that 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.” The 2016 Rule further required that “CTRTs can comprise no more than 40 percent of the fuel that is used on an annual heat input basis.” These arbitrary restrictions were then copied, without further explanation or justification, into EPA’s *Additions to list of Section 241.4 Categorical Non-Waste Fuels: Other Treated Railroad Ties*, 83 Fed. Reg 5317 (Feb. 8, 2018)(the “2018 Rule”). The restriction to use of pre-2014 boilers and the 40 percent fuel mix limit were thus imposed on CTRTs via the 2016 Rule for creosote-borate treated railroad ties, and for mixtures of creosote, borate and/or copper naphthenate treated railroad ties via

the 2018 Rule.²² AAR's opposition to these two arbitrary requirements formed part of the basis for Petitioners' Rulemaking Petition, which EPA is now proposing to deny.

Although EPA acknowledged Petitioners' arguments related to the boiler restrictions and fuel use cap, the Proposed Denial fails to substantively respond to these arguments, provide any rational basis, or explain how such arbitrary restrictions are required to protect human health and the environment.²³

EPA's sole explanation for the pre-April 2014 requirement was that it was "[b]ased on comments received on the proposed rule" and that April 2014 was "the date of issuance of the proposed rule."²⁴ No technological, environmental, or any other reasonable basis for drawing this distinction between the use of pre-2014 and post-2014 boilers –to burn the same ties – was provided. Indeed, even the date is arbitrary: when asked about this requirement during a meeting with the Small Business Association, EPA acknowledged that the date was selected

²² While CTRTs regulated by the 2016 Rule are mentioned throughout this comment, AAR also opposes the requirements imposed on crossties regulated in the 2018 Rule. AAR's arguments in this comment apply equally to those crossties and the 2016 Rule's restrictions that were similarly applied to them via the 2018 Rule.

²³ "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. Petitioners claimed that, 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. Petitioners felt that 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."

²⁴ Additions to List of Categorical Non-Waste Fuels, 81 Fed. Reg. 6687 (Feb. 8, 2016), available at <https://www.federalregister.gov/documents/2016/02/08/2016-01866/additions-to-list-of-categorical-non-waste-fuels#citation-102-p6722>.

solely based on the date of issuance of the rule. This is a textbook example of an arbitrary rule – it lacks reason and rational foundation that would connect facts with the agency’s actions.

Further underscoring the arbitrary nature of this distinction, the pre-April 2014 requirement in the 2016 Rule for CTRTs is not imposed on construction and demolition materials or paper recycling residuals – which also fall under the 2016 Rule. Limiting CTRT combustion – and CTRT combustion only – to facilities that existed at the “date of issuance of the proposed rule” without justification or explanation is arbitrary and capricious and is therefore in violation of the law.

Similarly, the 2016 Rule’s requirement that “CTRTs can comprise no more than 40 percent of the fuel that is used on an annual heat input basis” also lacks sufficient basis. In the 2016 Rule, EPA states: “As discussed in footnote 114, statements from the pulp and paper industry indicate that CTRTs generally comprise 40% of the total fuel load.” Footnote 114 simply states, “See 78 FR 9149.” In the 2016 Rule’s footnote 116, however, EPA explained that the 40% fuel use cap came from “[s]tatements at [a] meeting between American Forest and Paper Association and Mathy Stanislaus on December 19, 2013 indicat[ing] that CTRTs generally comprise 40% of total fuel load.”²⁵ It appears, therefore, that the 40 percent fuel use cap was promulgated based on general information regarding CTRT use obtained from one meeting with one source. The general information does not appear to have been factual support for a 40 percent fuel use cap, nor a request for one. Whatever the origin of the figure, the data and information within the docket provide no justification for such a cap.

²⁵ *Id.*

The American Forest and Paper Association later notified EPA that “some boilers are permitted to combust up to 50 percent CTRTs and other boilers have permits that have no limits. The allowable percent of CTRT fuel use by an individual boiler is a matter that is best left to the permitting authority. Further, we do not understand how this condition is an indication of legitimate use v. discard.”²⁶ We agree with the American Forest and Paper Association. The percentage of fuel that comes from CTRTs should be determined by individual permitting authorities on a case-by-case basis. A blanket 40 percent cap does not benefit or offer greater protection to the environment or the public, and there is no basis in the record to suggest otherwise.

Such arbitrary restrictions are unrelated to the character of the crossties themselves or the legally relevant question of whether a tie has been *discarded*. Clearly, limiting the burning of CTRT to “existing” facilities, defined as those built before 2014, has the practical effect of phasing out burning CTRT for energy recovery over time. The result of these limitations will be a constant reduction in the already-limited number of available facilities allowed to combust crossties for energy recovery, followed by an attendant decrease in landfill capacity and an increase in GHG emissions. EPA’s failure to justify the bases or fairly contemplate the consequences of these limitations, undermines the industry’s and the Administration’s efforts towards more sustainable solutions. Moreover, they are simply not supported by the facts and lack any rational foundation. *See, Motor Vehicle Mfgs. Ass’n v. State Farm Mutl. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (holding that agency actions that lack a “rational” foundation and lack

²⁶ American Forest and Paper Association, Re: Additions to List of Section 241.4 Categorical Non-Waste Fuels; Proposed Rule (EPA-HQ-RCRA-2013-0110) (June 12, 2014).

a rational connection between the facts found and the conclusions drawn are arbitrary and capricious and therefore violate section 706(2)(A) of the Administrative Procedures Act).

III. EPA’s Refusal to Remove Associated “Designed to Burn” and Other Limitations for CTRT is Not Supported by Facts or Evidence.

The applicable regulations require that “non-hazardous secondary material[s] must contain contaminants or groups of contaminants at levels comparable in concentration to or less than those in the traditional fuel(s) that the combustion unit is *designed to burn*. . . .”²⁷ In response to the Petition, EPA stated that “[w]ithout the designed to burn criterion, contaminant levels could be compared to any traditional fuel or combination of fuels, resulting in a unit burning contaminants under the boiler provisions in CAA section 112 that the unit would otherwise never have been eligible to handle.”²⁸

The Clean Air Act directs EPA to focus on *emissions* from the combustion of fuels rather than on the nature of the fuel combusted. A co-generation facility should be free to use any combination of fuels, including crossties, that result in compliance with all applicable operating permits and emissions limitations. Section 112 of the Clean Air Act addresses emissions of hazardous air pollutants and requires the issuance of technology-based standards for major sources and certain area sources. For area sources, including most co-generating plants, EPA must establish emission standards that require the maximum degree of reduction in emissions

²⁷ 40 C.F.R. 241.3(d)(1)(iii) (emphasis added).

²⁸ 87 Fed. Reg. 4543.

of hazardous air pollutants.²⁹ Nowhere in Section 112 is there a mandate for the consideration of feedstock or fuel for these co-generating plants. Therefore, if the unit can meet its permit requirements and the contaminant comparisons are met, the designed to burn qualification should be irrelevant.

The Associations are unaware of any data that supports a claim that emissions from a co-generating plant burning both traditional fuels and crossties would be higher than if the same plant burned only traditional fuels. To the contrary, an independent analysis (documented in Attachments A and B) of the constituents in crossties provides no evidence that their co-generation would result in an adverse environmental effect. In fact, based on the available data for crosstie-derived fuels summarized in Attachments A and B, the contaminants in crossties burned as fuel fall well within the range of contaminants found in one or more of three traditional fuels—coal, biomass and oil.³⁰

EPA’s decision to include the “designed to burn” requirement based on incorrect contaminant comparisons, particularly in the face of conflicting evidence, is not supported by facts or evidence. There is no rational connection between the facts known about crosstie combustion and the conclusions drawn by the agency.³¹

²⁹ 42 U.S.C. § 7412(d)(1) (“The Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c). . . .”).

³⁰ See Attachments A and B.

³¹ See, e.g., *Motor Vehicle Mfgs. Ass’n v. State Farm Mutl. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (holding that agency decisions lacking a rational connection between established facts and the agency’s conclusion violate the Administrative Procedures Act).

IV. EPA's Assumption Regarding Storage Times for Crossties is Incorrect.

In its Proposed Denial, EPA insists “that railroad ties removed from service can be stored for long periods of time without a final determination regarding their final end use, and they are considered discarded” and opines that Petitioners are misreading the EPA’s prior statements.³² EPA’s statement ignores the relevant caselaw.

The D.C. Circuit has previously held that “material stored for recycling is plainly not in [the] category [of thrown away or abandoned materials]” and “[t]o say that when something is saved it is thrown away is an extraordinary distortion of the English language.”³³ EPA is well-aware that crossties are part of a long-established energy recovery market where generators contractually transfer these materials for use as fuel. When crossties are removed from service, they are a valuable commodity that is saved and temporarily staged to be sold to third parties. Although the particular party and final designation may not be determined until after removal from service, that does not change the obvious fact that crossties are valuable, nor does it signify that the crossties are discarded. Importantly, the D.C. Circuit has previously rejected similar arguments to those that EPA now makes.³⁴

³² 87 Fed. Reg. 4544.

³³ *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1053 (D.C. Cir.2000).

³⁴ *American Mining Congress v. United States EPA*, 824 F.2d 1177, 1185 - 87 (D.C. Cir. 1987) (concluding materials were not “discarded” because they “had not yet become part of the waste disposal problem” and observing that through RCRA Congress sought to address the “ever-increasing problem of solid waste *disposal* by encouraging the search for and use of alternatives to existing methods of disposal (including recycling). . .”).

EPA expressly acknowledged this practice in its 2016 Rule, when it concluded that no determination as to discard could be made for at least a year after removal from service. EPA stated:

[T]he Agency concludes that CTRTs removed from service that may be stored in a railroad right of way or other location for **long periods of time that is, a year or longer, without a determination regarding their final end use (e.g., landscaping, as a fuel or landfilled) shows that the material has been discarded and is a solid waste** (see the preamble discussion of discard 76 FR 15463 in the March 21, 2011 rule). The assertion that the CTRTs are a valuable commodity in a robust market does not change the fact that the CTRTs have been **discarded at some point**. NHSMs may have value in the marketplace and still be wastes.

81 FR 6725 (emphasis added). Nowhere in the 2016 Rule preamble does EPA state that CTRTs removed from service are *immediately* deemed a waste. Although EPA also noted in 2016 that “railroad ties removed from service are considered discarded because they can be stored for long periods of time without a final determination regarding their final end use,” for EPA to now ignore the remainder of EPA’s 2016 preamble and interpret that statement to mean a CTRT is considered *immediately* discarded when removed from service is not a fair reading. The 2016 Rule preamble stands for the proposition that only when CTRTs are removed from service and remain on the right of way for more than a year without determination of their final use are CTRTs considered discarded.

EPA also asserts, without support, that “lengthy storage of the treated railroad ties generally occurs because the railroad has not determined the end use of the ties, not because

the ties are being stored for later transfer to a preestablished buyer.”³⁵ This assumption is not accurate or logical. Storage for more than one year could occur for a variety of reasons including rail traffic safety issues and accessibility obstacles. In fact, many locations where crossties are removed and placed for pickup are accessible only by rail. Furthermore, a used crosstie pickup can only occur after Federal Railroad Administration operations, such as track maintenance and safety inspections.

As such, the Associations request EPA correct its statements in the Proposed Denial and reconsider the request to extend the reasonable time to 3 years.

V. Two site-specific issues in Georgia do not justify one-size-fits-all rulemaking.

In EPA’s Proposed Denial, EPA referenced two Georgia facilities that processed and combusted CTRTs in a manner that resulted in citizen complaints and a change in Georgia’s law. These are unique, facility-specific situations that are best resolved by the applicable permitting authority instead of a one-size-fits-all rulemaking.

Georgia Renewable Power built biomass fueled power plants in Madison and Franklin County, Georgia. Both plants were built and permitted as biomass renewable electric energy producing plants permitted to use various fuels, including CTRTs and other construction and demolition biomass waste fuels.³⁶ CTRTs were shipped to the facilities and then processed on site. The CTRT fuel was then stockpiled until combusted.

³⁵ *Id.*

³⁶ Noise, odor, and dust can also result from the processing or combusting of other biomass or construction and demolition materials.

In April 2019, prior to the facilities' startup, the Georgia Environmental Protection Division ("GEPD") revised the facilities' permits to include belt dryers, which are known to cause emissions and may not have been appropriate for these specific facilities.³⁷ Residents near both facilities began complaining about dust, odor, and noise shortly thereafter. The permits were subsequently revised to limit crosstie use in February 2020 and later revised again to prohibit crosstie use in August 2020. The prohibition was the result of a law passed in Georgia in August 2020 which stated:

Permits issued for biomass boilers shall prohibit the use of railroad ties treated with creosote compounds or treated with naphthenate compounds for purposes of commercial electricity generation, unless the boiler also provides steam or electricity to any co-located forest products processing plant.³⁸

The law targeted the two facilities and was not a universal condemnation of CTRT use. This is evident by the exemption for certain pre-existing boilers that had no prior issues, recognizing that CTRTs can be processed and combusted properly, without nuisance.³⁹

The issues that occurred at the two Georgia facilities were preventable and best addressed through equipment design and construction and through operating permits. For instance, the facilities' permits did not adequately address noise, odor, or fugitive dust, nor were proper controls included in the facilities' equipment design.⁴⁰ Improved design,

³⁷ GEPD Meeting Summary with Permits Attached (June 30, 2020), available at <https://www.regulations.gov/document/EPA-HQ-OLEM-2020-0550-0008>.

³⁸ Georgia House Bill 857 was introduced and signed into law on August 4, 2020. The law is available at <https://www.legis.ga.gov/api/legislation/document/20192020/195317>.

³⁹ *Id.*

⁴⁰ GEPD Meeting Summary with Permits Attached (June 30, 2020).

permitting, and oversight likely could have prevented most of the problems that occurred. EPA recognized these deficiencies while summarizing received citizen complaints, stating:

However, these issues may not have been caused by the *combustion* of CTRTs; rather, inefficient boiler operations and the grinding process likely caused many of these problems, according to the permit writer for the two plants in question. Notably, the large majority of complaints arose from residents near the Madison County facility, where CTRT grinding takes place.⁴¹

We also agree with EPA’s statements in its Proposed Denial that as “was done in Georgia, state and local governments have authority under their state solid waste and water programs, as well as local ordinances, to address citizen complaints associated with the management and processing of CTRT prior to their use as a non-waste fuel, including problems associated with dust, excess noise, and runoff.” Any issues with CTRT processing or combustion should be handled by the local permitting authority on a case-by-case basis, as each situation is unique and requires individual regulation—blanket rulemaking is not a remedy for these two incidents. The overwhelming majority of CTRT processing and combustion is done in a manner that causes no nuisance. This is clearly preferable to increased landfilling of CTRTs, with its attendant GHG emissions.

VI. EPA failed to analyze the impact of its proposed denial on short line railroads.

The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), 5 USC 601 et seq., generally requires an agency to prepare a regulatory flexibility analysis of any rule, subject to notice and comment

⁴¹ EPA, *Compilation of Citizen Complaints Regarding Combustion of Creosote-Treated Railroad Ties* (2021), available at <https://www.regulations.gov/document/EPA-HQ-OLEM-2020-0550-0003>.

rulemaking requirements under the Administrative Procedure Act, or any other statute. This analysis must be completed unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. In its Regulatory Impact Analysis supporting its Proposed Denial, EPA stated that the rule “will not have a significant economic impact on a substantive number of small entities,” because “it would not change the substantive requirements of the regulations,” and have “no net regulatory burden for all directly regulated small entities.”⁴²

However, EPA failed to analyze the impact of its Proposed Denial on short line railroads. The overwhelming majority of the approximately 600 short line railroads in the United States are considered small entities pursuant to SBA’s regulations at 13 CFR § 121.201. On average, short line railroads employ fewer than 30 people and have \$7.7 million or less in revenue.⁴³ Short line railroads inherited track that had experience years of deferred maintenance by their previous owners and must devote a significant portion of revenue to rehabilitating their infrastructure. Most short lines must invest a minimum of 25% of their annual revenues in such rehabilitation, which is a percentage far higher than almost any other industry in the country.⁴⁴ EPA did not analyze the cost to the short line railroad industry to manage wooden rail ties as waste when they could instead be used as fuel, as proposed by the petition.

⁴² See “Assessment of the Potential Costs, Benefits, and Other Impacts for the Proposed Rule,” EPA-HQ-OLEM-2020-0550-0007, page 10.

⁴³ *Short Line and Regional Railroad Facts and Figures*. American Short Line and Regional Railroad Association, 2017; reprint Dec. 2019. Page 1.

⁴⁴ *Id.*

On March 11, 2022, the U.S. Small Business Administration (“SBA”) hosted an Environmental Roundtable meeting to discuss EPA’s Proposed Denial. The roundtable was attended by staff from EPA’s Office of Resource Conservation and Recovery, Materials and Waste Management Division, staff from SBA’s Office of Advocacy, and the Chair of ASLRRA’s Environmental Committee. ASLRRA shared a presentation providing a short line railroad perspective on rail tie management, showing that short line railroads are small businesses that face significant economic challenges. Industry data suggests that the majority of rail ties that short line railroads replace on an annual basis are shipped to landfills.⁴⁵ Modifying the legitimacy criterion for comparison contaminants in the NHSM would allow short line railroads to manage more railroad ties as fuel rather than waste. Additionally, it would allow short lines to safely store ties for an appropriate amount of time prior to processing the ties. This will result in a net benefit by reducing greenhouse gas emission while providing a valued fuel source for the industry.

VII. CONCLUSION

The Associations appreciate this opportunity to comment on EPA’s Proposed Denial. Unfortunately, EPA’s analysis is flawed and arbitrary, and demonstrates a lack of understanding of the lifecycle of crossties and their beneficial use for energy production. The Associations respectfully request that EPA reconsider its Proposed Denial and revise the 2016 and 2018 Rules to better conform to the factual record before it, as well as the express goals of the Biden

⁴⁵ In 2020, short line railroads replaced 3,157,842 wooden rail ties.
<https://rtax.memberclicks.net/assets/docs/21Crossties/2021SepOct/Tie%20Demand%20Outlook.pdf>

Administration and EPA with respect to beneficial use of materials and reduction of greenhouse gas emissions.

Respectfully submitted,

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