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February 23, 2010

Hon. Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Comments Concerning Proposed Regulations on Solid Waste Disposal Facilities

Dear Commissioner Shulman:

Enclosed are comments concerning proposed regulations on solid waste disposal facilities. These comments represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Stuart M. Lewis
Chair, Section of Taxation

Enclosure

cc: Michael Mundaca, Acting Assistant Secretary (Tax Policy), Department of the Treasury
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**ABA SECTION OF TAXATION
COMMENTS CONCERNING PROPOSED REGULATIONS ON
SOLID WASTE DISPOSAL FACILITIES**

These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Scott Schickli of the Committee on Tax Exempt Financing of the Section of Taxation. Substantive contributions were made by Brant Freer, John van Duys, Chas Cardall, Floyd Newton, and Clifford M. Gerber. The Comments were reviewed by Jeremy Spector, Committee Chair, and John Swendseid, Vice-Chair of the Committee. The Comments were further reviewed by Carol Lew of the Section’s Committee on Government Submissions and by Andrew J. Dubroff, Council Director for the Tax Exempt Financing Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal tax principles addressed by these Comments, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: February 23 , 2010

Executive Summary

We are grateful for the efforts of the Department of the Treasury (the “Treasury”) and the Internal Revenue Service (the “Service”) in crafting new proposed regulations (the “Proposed Regulations”) defining solid waste disposal facilities for purposes of section 142(a)(6).¹ Elimination of the controversial and difficult to apply “no value” test contained in the existing Regulations (the “Current Regulations”)² required a fundamental rethinking of the appropriate regulatory framework. We believe that the Proposed Regulations establish an equitable, reasonably administrable regulatory framework that is consistent with the Code. Our comments and suggestions below are provided to assist in refining the Proposed Regulations to (i) permit the financing of certain types of projects that may be financed under the Current Regulations and that we believe are authorized by the Code but that we believe would be unintentionally precluded if the Proposed Regulations were finalized without change, and (ii) complete a flexible regulatory framework that we believe should produce common-sense results as new technologies develop to improve the extraction of value from waste materials.

In the final Regulations, we suggest that Treasury and the Service:

1. Amend the definition of “residual material” to permit financing of traditional facilities that process agricultural, mining and industrial wastes;
2. Amend the definition of “solid waste” (“Solid Waste”) to clarify that animal manure is included;
3. Replace the 50% floor rule in the definition of “preliminary functions” (“Preliminary Functions”) with the same 65% threshold applicable to mixed-input facilities;
4. Clarify the definition of “first useful product” (“First Useful Product”) by stating that (i) the determination of whether a product could be sold must only be made on the sale date of the relevant bonds and (ii) inability to actually sell a product due to geographic location and handling or transportation costs may be taken into account in determining whether a product is a First Useful Product;
5. Provide detailed guidance as to the nature of operational constraints that defer the point in production when a First Useful Product may reasonably be sold;
6. Amend the definition of “precious metals” to clarify that the presence of trace concentrations of precious metals that, as of the bond sale date, are commercially non-recoverable, will not preclude classification of the material containing them as Solid Waste, and amend the definition of “radioactive material” to clarify that the presence of

¹ REG-140492-02, 74 Fed. Reg. 47,500 (Sept. 16, 2009). References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise indicated.

² Reg. § 1.103-8(f)(2); Reg. § 17.1.

trace concentrations of radioactive material will not preclude classification of the material containing them as Solid Waste;

7. Amend the definition of Solid Waste relevant to a “final disposal process” (“Final Disposal Process”) to include “virgin material” (“Virgin Material”) to permit classification of assets used in traditional disposal activities as solid waste facilities;

8. Amend Example 10 to clarify that the stripping of bark from cut timber is not a Preliminary Function because it occurs as an incidental byproduct of the manufacture of wood products and is undertaken for the principal purpose of such manufacture;

9. Revise Example 9 to clarify the interaction between the First Useful Product and “energy conversion process” (“Energy Conversion Process”) definitions;

10. Identify a threshold amount of radiation that is required for the “radioactive material” exclusion from the definition of Solid Waste;

11. Clarify that determination of whether material is “solid” should be made by reference to the state of the material at ambient temperature;

12. Include a transition rule permitting issuers that directly or indirectly refinance new money bonds originally issued prior to finalization to elect to apply either the new final Regulations or the previously applicable rules; and

13. Confirm that issuers may elect to apply the new final Regulations to any bonds subject to section 142 that are sold prior to finalization.

Detailed Comments

1. **The definition of “residual material” in the Proposed Regulations should be amended to permit financing of traditional facilities that process agricultural, mining and industrial wastes.**

The definition of Solid Waste is a fundamental element of the Proposed Regulations because facilities eligible for tax-exempt financing must either process Solid Waste or perform tasks preliminary or functionally related and subordinate to such processing.

Solid Waste must be either “used material” or “residual material” and may not be “virgin material.”³ All three types of material are defined without regard to the presence or absence of market or other value.⁴ The definition of “residual material” in the Proposed Regulations would prohibit the financing of a variety of currently financeable facilities that process waste byproducts of agriculture and mining.

The Proposed Regulations generally define “used material” as any material that has been previously used as a product or as a component of a product (“Used Material”), and Used Material is distinguished from both “residual material” and “virgin material.”⁵ For this purpose, “virgin material” is defined as material that has not been processed into a “product” or product component (“Virgin Material”), and the definition is extended to provide that material remains Virgin Material even when it is “cleaned, divided into component elements, modified or enhanced” so long as further processing is required to make it a “product” or product component.⁶ This extension is readily understandable in light of the Proposed Regulations elimination of the no-value test that is included in the Current Regulations. For example, absent a value test, trees would cease to be Virgin Material once they were stripped and debarked, even though such processes are an integral part of the transformation of standing timber into wood products.

Finally, the Proposed Regulations define “residual material” as any residual byproduct or excess raw material remaining from the production of any agricultural, commercial, consumer, or industrial product, subject to two exclusions (“Residual Material”).⁷ First, the material must be less than five percent of the total material introduced into the production process.⁸ Second, the material must have a fair market value that is reasonably expected to be lower than that of “any product” made in that production process.⁹ These exclusions are likely designed to address further collateral consequences of the Proposed Regulations elimination of the no-value test that is included in the Current Regulations, because these exclusions prevent normal manufacturing activities exclusively using valuable inputs from being financed as energy

³ Prop. Reg. § 1.142(a)(6)-1(c).

⁴ Prop. Reg. § 1.142(a)(6)-1(c)(1)(i), -1(c)(2)(i).

⁵ Prop. Reg. § 1.142(a)(6)-1(c)(1)(i), -1(c)(2)(i).

⁶ Prop. Reg. § 1.142(a)(6)-1(c)(2)(i).

⁷ Prop. Reg. § 1.142(a)(6)-1(c)(1)(i)(B).

⁸ *Id.*

⁹ *Id.*

conversion or recycling facilities. These exclusions also operate to prevent tax-exempt financing of a variety of currently financeable facilities that we believe should remain financeable.

It is easy to understand the need for the two exclusions from the general definition of Residual Material. Consider a mined material that is separated in initial processing into two different minerals, each of which can be sold to manufacturers for use in manufacturing a variety of products. Under the Current Regulations, tax-exempt financing could not be used to finance facilities that processed either material because each has value. Under the Proposed Regulations, the absence of the no-value rule would create a possibility that one of the two minerals resulting from the mined material could constitute Solid Waste, even if it were useful and had significant value, because it would be Residual Material under the general definition (*i.e.*, a residual byproduct of the production of a product (the other resulting mineral)). The two exclusions from the Residual Material definition attempt to address the abuse that might otherwise result from elimination of the no-value rule by requiring the material to be de minimis in amount (contrasted with the materials from which it is separated) and to be of lesser value than any of the products made in the production process creating the residual material (*i.e.*, the value standard is relative, not absolute).

We believe that the first exclusion, limiting to five percent the relative “amount” of material that may be Residual Material, has the unintended consequence of preventing financing of facilities that process bulk residual products. As a result, we suggest that this exclusion be eliminated. In its current form, the five-percent test would exclude from the definition of Solid Waste certain types of agricultural waste and mining waste. For example, the nonusable agricultural waste of rice, sugar cane, and other major crop plants measured by weight or volume significantly exceeds the useable portions of such plants. The waste material may constitute the majority of the harvested plant. The same is the case for various types of mine waste. The five-percent test would eliminate the ability to undertake financings of these bulk residual products when the costs of disposing of agricultural and mining byproducts are an increasing burden on our farm and natural resource systems.

Two examples in the Proposed Regulations raise additional concerns regarding the five-percent test. Example 3 involves waste coal, a low quality byproduct of coal mining that cannot be converted into energy under a normal energy-production process.¹⁰ The example states that the waste coal is less than five percent of the mined ore, but waste coal often constitutes far more than five percent of the mined ore and the greater percentage does not affect the ability to convert the waste coal into energy through normal energy-production processes.

In addition, the mechanics of the required comparison and the application of the five-percent test to the facts presented are unclear. The example compares the “amount” of the waste coal with the amount of the ore without specifying whether the applicable metric is weight or volume or whether the measurement is based on actual facts or

¹⁰ Prop. Reg. § 1.142(a)(6)-1(h), Ex. 3.

reasonable expectations. In addition, the comparison is puzzling because the ore itself can only be obtained by removing the soil or rock overlying the ore deposits, and the example does not mention the existence of the overlying materials.

We believe Example 2 is also ambiguous.¹¹ The example involves a solid byproduct of oil refining that can be used to make asphalt. Again, the example states that the material is less than five percent of the total crude oil that is introduced into the production process, without specifying whether the applicable metric is weight or volume or whether the measurement is based on actual facts or reasonable expectations. Further, it is unclear how the amount of a solid byproduct was compared with a liquid input. Finally, in applying the five-percent test, this example, like Example 3, omits any reference to certain inputs into the process (*i.e.*, any inputs other than crude oil itself).

If Treasury and the Service are concerned that eliminating the five-percent requirement could lead to financing of unintended facilities, alternatives could be provided. For example, the no-value test might be partially reintroduced and Residual Material might be defined as either (i) material that satisfies the general definition of Residual Material, as modified by the comparative-value exclusion and five-percent limitation measured by weight or volume, or (ii) material that has no market value at the location where it was produced on the date of the financing without regard to costs of handling and transportation. If this approach is too burdensome, a special list could be created that identifies specific types of excluded waste materials and provides that others may be identified by subsequent administrative action, as is the case with investments exempted from the federal guarantee provisions under section 149(b).

2. The definition of Solid Waste in the Proposed Regulations should be amended to clarify that animal manure is included.

It is unclear how the Residual Material definition would apply to animal manure, which is an important category of agricultural waste. Industrial dairies and feedlots produce enormous quantities of animal manure. If this animal manure is not properly treated or disposed of, the environmental consequences may be severe. The Proposed Regulations treat crops and livestock as Virgin Material rather than products. This treatment raises a question as to the status of animal manure. It is not Used Material, unless animal feed is viewed as an agricultural product used by livestock and animal manure is the Used Material resulting from this use of the feed (rather than being viewed as the remains of material that has been used as an agricultural product). Animal manure is also unlikely to be Residual Material, because the raising of animals is not a production process within the meaning of the Proposed Regulations. In addition, it is unclear how the five-percent test would apply if the animal manure were a byproduct of a production process. For example, would the test be applied by measuring the weight or volume of consumed food and water?

Treasury and the Service may clarify the status of animal manure either by modifying the definition of Used Material to provide that the remains of food consumed

¹¹ See Prop. Reg. § 1.142(a)(6)-1(h), Ex. 2.

by livestock are Used Products, or by modifying the definition of Residual Material to specifically include animal manure without regard to the five-percent test or the no-value test as described above.

3. The 50% floor rule in the definition of Preliminary Functions should be replaced with the same 65% threshold applicable to mixed-input facilities in the Proposed Regulations.

The Proposed Regulations treat all costs of property employed in a solid waste disposal process as allocable to the solid waste disposal function if at least 65% of the materials used in that process are Solid Waste.¹² However, the definition of “qualified solid waste disposal processes”¹³ does not include Preliminary Functions,¹⁴ which are subject to a special, less favorable rule. The Preliminary Functions are defined as the collection, separation, sorting, storing, treating, processing, disassembling or handling of Solid Waste that is preliminary to, and directly related to, a qualified solid waste disposal process, *provided that* more than 50% of the material resulting from the function is Solid Waste. Example 12 in the Proposed Regulations, which addresses the treatment of a mixed-function facility that sorts damaged and undamaged bottles, confirms application of the 50% limitation to Preliminary Functions in this context.¹⁵

We believe the 65% mixed-input rule applicable to qualified solid waste disposal processes should apply to Preliminary Functions as well to require at least 65% of the material introduced in Preliminary Functions to be Solid Waste. We also believe the rules for mixed-input facilities should suffice to prevent tax-exempt bonds from financing costs unrelated to the processing of Solid Waste.¹⁶

Further, whether or not the 50% rule is retained or replaced by a consistent 65% rule, we recommend that the percentage test be applied based on reasonable expectations on the bond sale date. Borrowers may have very little control over the subsequent mix of waste and non-waste materials in an input stream, and changes in technology, collection, handling or transportation methods may change the mix in the case of substances such as the bottles addressed in Example 12 by damaging more or less material during collection or transportation.

¹² Prop. Reg. § 1.142(a)(6)-1(g)(2)(ii).

¹³ Prop. Reg. § 1.142(a)(6)-1(d).

¹⁴ Prop. Reg. § 1.142(a)(6)-1(f).

¹⁵ Prop. Reg. § 1.142(a)(6)-1(h), Ex. 12.

¹⁶ See Prop. Reg. § 1.142(a)(6)-1(g).

4. The definition of First Useful Product in the Proposed Regulations should be clarified by stating that (i) the determination of whether a product could be sold must only be made on the sale date of the relevant bonds and (ii) inability to actually sell a product due to geographic location and the costs of handling or transportation may be taken into account in determining whether a product is a First Useful Product.

The First Useful Product definition¹⁷ plays an essential role in defining assets allocable to a “recycling process” (“Recycling Process”).¹⁸ Subject to the operational-constraint exception, a product is “useful” if it is useful to consumers or businesses and “could be sold . . . whether or not actually sold.”¹⁹ The First Useful Product definition is a variant of the no-value rule in the Current Regulations, although the First Useful Product definition is used to determine the last asset in a financeable production flow process, rather than to determine the basic eligibility of an asset for a financeable process. In light of decades of experience in applying the Current Regulations, we believe that the definition of the First Useful Product should be clarified in two respects.

First, we believe that the Proposed Regulations should clarify that the determination of whether a product “could be sold” must be made by taking into account all relevant facts and circumstances, including the costs of handling and transportation of the product from the location where it is produced to the location of potential consumer or business users. For example, a product created in rural South Dakota should not be treated as a First Useful Product because it could be sold if had been created in suburban Chicago.

Second, because the ability to sell a product depends in large part on circumstances beyond a borrower’s control, and because a variety of technological developments may, over time, transform a non-saleable product into a saleable product, we believe the definition of First Useful Product should be amended to clarify that the determination must be made exclusively on the sale date of the bonds. Otherwise, bond-financed assets may cease to be bond-financed assets years after bonds are issued in the absence of a deliberate action by the borrower. A borrower should not be forced into remedial action in these circumstances. Instead, it should be clear that such a future shift in marketability will not, by itself, constitute a deliberate action.

5. The Proposed Regulations should be amended to provide detailed guidance as to the nature of operational constraints that defer the point in production when a First Useful Product may reasonably be sold.

The Proposed Regulations generally provide that assets cannot be allocated to a qualified solid waste disposal process after the point at which the First Useful Product is created. The Proposed Regulations also provide a special rule applicable to continuous or integrated production processes, precluding treatment of material as a First Useful

¹⁷ Prop. Reg. § 1.142(a)(6)-1(e).

¹⁸ Prop. Reg. § 1.142(a)(6)-1(d)(3).

¹⁹ Prop. Reg. § 1.142(a)(6)-1(e).

Product if “operational constraints” (“Operational Constraints”) will not permit the material to be “reasonably extracted or isolated and sold.”²⁰

Example 8 in the Proposed Regulations addresses the application of the Operational Constraint rule in the context of a magazine recycling facility.²¹ As described in the example, even though paper pulp from recycled magazines may be sold, the pulp produced by the borrower was not the First Useful Product because Operational Constraints did not allow for sale of the material without degradation of the pulp. Accordingly, the example concludes that the Recycling Process included further processing of the paper pulp into industrial-sized paper rolls.

We believe that the Operational Constraint rule is an important qualification to the definition of First Useful Product. As currently drafted, however, we believe borrowers are unlikely to be comfortable relying on the Operational Constraint rule without a private letter ruling. As a result, we recommend that the Regulations, when finalized, provide detailed guidance as to the conditions under which material will not be classified as a First Useful Product by virtue of Operational Constraints.

We believe Operational Constraints should be defined to include a redesign of an existing facility to allow earlier extraction of the material or to create a different product. Finally, we believe that the applicable standards should be applied solely on the sale date of the bonds, and not on an ongoing basis. Otherwise, technological developments, improved access to transportation, and declines in the cost of handling and delivery of the intermediate product, all of which are beyond the control of a borrower, could result in a post-issuance transformation of an eligible facility to an ineligible facility. Again, we do not believe a borrower should be forced into remedial action in these circumstances.

6. The definition of “precious metals” in the Proposed Regulations should be amended to clarify that the presence of trace concentrations of precious metals that, as of the bond sale date, are commercially non-recoverable, will not preclude classification of the material containing them as Solid Waste and the definition of “radioactive material” should be amended to clarify that the presence of trace concentrations of radioactive material will not preclude classification of the material containing them as Solid Waste.

The definition of Solid Waste excludes precious metals.²² The Preamble to the Proposed Regulations explains that “recovery of these metals generally would take place with or without a recycling industry.”²³ We understand the concerns raised by precious metals, but we believe the concerns should be addressed differently.

²⁰ *Id.*

²¹ Prop. Reg. § 1.142(a)(6)-1(h), Ex. 8.

²² Prop. Reg. § 1.142(a)(6)-1(c)(2)(iii).

²³ REG-140492-02, 74 Fed. Reg. 47,500, 47,503 (Sept. 16, 2009).

Example 5 in the Proposed Regulations introduces uncertainty into the scope of the precious-metal exclusion.²⁴ The example addresses the status of a landfill, and states the borrower does not expect that a “significant” portion of the material to be placed in the landfill will be precious metals. This statement raises a question as to why, unless precious metals are anticipated to be recovered (with or without a recycling industry), a borrower would ever expect a landfill to receive significant quantities of precious metals. Rational economic behavior must be assumed, and it is unreasonable to expect that a borrower who knew that its landfill will receive waste containing significant quantities of precious metals from a nearby facility would neither recover the precious metals nor sell them to another party that will do so. Further, because the precious metal exclusion is based on actual facts and not reasonable expectations, it could impose a significant administrative burden on borrowers, by requiring them to monitor, on an ongoing basis, precious metal content of material delivered to landfills.

In the case of a final disposal process, we recommend that the definition of Solid Waste not exclude precious metals. No one will intentionally deposit precious metals in a landfill or incinerate or otherwise contain them if they are recoverable as of the issue date of the bonds. Even in cases in which the producer of the waste considers the rate of return on precious metal recovery insufficient to merit undertaking the process, if the precious metal is indeed recoverable, some other party would be willing to pay the producer for the waste, and no economically rational producer would pass up the opportunity to produce an additional return through such sales.

Similarly, we believe the definition of Solid Waste²⁵ should be amended to clarify that the presence of trace concentrations of radioactive material will not preclude classification of the material containing them as Solid Waste. Because radioactivity is measured neither by value, volume, nor weight, a different metric would be required to define the requisite minimal levels of radioactivity.

Finally, we note that the definition of hazardous material²⁶ renders it unnecessary to make a corresponding change to deal with de minimis amounts of hazardous material. Hazardous material is defined as material subject to special permit requirements, and those requirements do not apply to defined trace concentrations of a variety of materials.

7. The definition of Solid Waste in the Proposed Regulations relevant to a Final Disposal Process should be amended to include Virgin Material to permit classification of assets used in traditional disposal activities as solid waste facilities.

The definition of Solid Waste excludes Virgin Materials.²⁷ Virgin materials include certain agricultural waste, dirt excavated in the course of construction, forest slash and lawn waste. These materials threaten the environment, public safety, or both unless they are recycled, disposed of, or transformed into energy. If these materials are to

²⁴ See Prop. Reg. § 1.142(a)(6)-1(h), Ex. 5.

²⁵ Prop. Reg. § 1.142(a)(6)-1(c)(2)(v).

²⁶ Prop. Reg. § 1.142(a)(6)-1(c)(2)(iv).

²⁷ Prop. Reg. § 1.142(a)(6)-1(c)(2)(i).

be disposed of in a Final Disposal Process, there should be no potential for abuse. As a result, we believe the definition of materials eligible to be introduced into a Final Disposal Process should be expanded to include Virgin Material deposited into a landfill with the expectation that the Virgin Material will not be recycled.

In addition, we believe it would be helpful to clarify potentially conflicting statements in Example 5 in the Proposed Regulations.²⁸ The third sentence states that all materials to be introduced into the landfill will be Solid Waste. The fourth sentence states that the borrower does not expect that a “significant” portion of the material deposited in the landfill will be Virgin Materials or precious metals. Presumably, all material introduced into the landfill is meant to be Solid Waste other than insignificant amounts of Virgin Materials and precious metal.

8. Example 10 in the Proposed Regulations should be amended to clarify that the stripping of bark from cut timber is not a Preliminary Function because it occurs as an incidental byproduct of the manufacture of wood products and is undertaken for the principal purpose of such manufacture.

Example 10 in the Proposed Regulations states that a bark removal process is not a Preliminary Function because it is not “directly related” to the subsequent Energy Conversion Process, while conveyors and bins that transport and store the bark prior to its introduction into a boiler are “directly related” to the Energy Conversion Process.²⁹ The separation of the bark from the tree must occur before the bark can be burned without destroying the valuable timber to be processed into paper products. However, bark separation is as directly related to the subsequent processing of the timber as it is to the subsequent processing of the bark itself, and the functional relationship between bark removal and energy conversion appears to be as “direct” as the functional relationship between energy conversion and bark transportation and storage. We agree that the bark removal process, under these circumstances, should not be an activity that is financeable with solid waste bonds, while bark transportation and storage are activities that should be financeable with solid waste bonds. We believe, however, that this conclusion has nothing to do with the absence of the required “direct” relationship between bark stripping and the subsequent Energy Conversion Process, because the relationship is in fact direct. Rather, bark stripping should be excluded from the definition of a Preliminary Function because it is not undertaken for the sole or principal purpose of collecting or separating bark for use in an Energy Conversion Process. Rather, bark stripping should be viewed as an essential step in the manufacturing of wood products from cut timber, with the bark being an incidental or residual byproduct of such manufacture. Example 10 itself recites that the bark transportation and storage are undertaken “solely” for the Energy Conversion Process, while the bark stripping is not. Clarifying the rationale for conclusion that stripping the bark is not a Preliminary Function will reduce uncertainty regarding the financeability of Preliminary Functions in other contexts. Without clarification, the only reason we know that conveyors and bins are financeable is because Example 10 says so.

²⁸ Prop. Reg. § 1.142(a)(6)-1(h), Ex. 5.

²⁹ Prop. Reg. § 1.142(a)(6)-1(h), Ex. 10

9. Example 9 in the Proposed Regulations should be revised to clarify the interaction between the First Useful Product and Energy Conversion Process definitions.

The First Useful Product is defined as the first product produced that “could be sold, whether or not actually sold.”³⁰ The interaction between this definition and the definition of an Energy Conversion Process under the Proposed Regulations is unclear.³¹ For example, Example 9 in the Proposed Regulations addresses a process by which Solid Waste is burned to produce steam that is then used to power a steam turbine that generates electricity.³² The example states that the steam is the First Useful Product. The example’s conclusion, that the electric generators are not part of the Energy Conversion Process, is consistent with the Current Regulations, but the rationale, which is that the steam is the First Useful Product, is not necessarily consistent with the definition of a First Useful Product. The definition of an Energy Conversion Process recognizes the problem by stating that “in all events, the energy conversion process ends before any transfer or distribution of ...steam.”³³ The definition of an Energy Conversion Process should be modified to eliminate the application of the First Useful Product rule in defining the end point of such process, as the Proposed Regulations currently provide an overriding process termination rule.

Two conditions must be satisfied for the steam to be a First Useful Product. First, the steam must be capable of being sold. Second, Operational Constraints must permit the steam to be reasonably extracted and sold. It is not always possible to sell steam produced from combustion of Solid Waste because steam is not transportable beyond a short distance. There may not be an adjacent industrial facility that will use and pay for steam. It is unclear how the Operational Constraint rule would apply to the steam in this situation. The definition of an Energy Conversion Process provides that, despite the First Useful Product rule, “the energy conversion process ends before any transfer or distribution of synthesis gas, heat, hot water, steam or other useful energy.”³⁴ If a special First Useful Product rule is intended for energy conversion, the definition of First Useful Product should clarify the “transfer or distribution” reference to indicate either that (i) this is a special modification of the First Useful Product rule applicable to the definition of an Energy Conversion Process, or (ii) it is a separate rule, in addition to the First Useful Product rule, applicable to Energy Conversion Processes. Any changes should be reflected in the analysis in Example 9.

³⁰ Prop. Reg. § 1.142(a)(6)-1(e).

³¹ See Prop. Reg. § 1.142(a)(6)-1(d)(2).

³² Prop. Reg. § 1.142(a)(6)-1(h), Ex. 9.

³³ Prop. Reg. §(a)(6)-1(d)(2).

³⁴ Prop. Reg. § 1.142(a)(6)-1(d)(2).

10. The Proposed Regulations should be amended to identify a threshold amount of radiation that is required for the “radioactive material” exclusion from the definition of Solid Waste.

The natural state of many materials in nature contains low levels of radioactivity, (e.g., coal), and refining materials might reduce the naturally occurring radioactivity levels. Even normal household products can contain low levels of radioactivity (e.g., watches with radium faces, residential smoke detectors, electric devices, glassware and ceramics). An exclusion of all radioactive material from the definition of Solid Waste would mean that even small amounts of naturally occurring radioactivity in residual waste would preclude qualifying an otherwise traditional disposal process. Because the potential breadth of this exclusion appears to be unintended, we recommend that Treasury and the Service identify a threshold of radiation that is required for exclusion.

11. The Proposed Regulations should be amended to clarify that the determination of whether material is “solid” should be made by reference to the state of the material at ambient temperature.

Few materials are solid at all temperatures. To avoid controversy and uncertainty, and to facilitate administration, we recommend that the Regulations, when finalized, provide that the determination of whether material is “solid” should be made by reference to the state of the material at ambient temperatures.³⁵

12. The effective date of the Proposed Regulations should be amended to include a transition rule permitting issuers that directly or indirectly refinance new money bonds originally issued prior to finalization to elect to apply either the new final Regulations or the previously applicable rules.

The absence of an election regarding the effective date of the new Regulations could prevent the refinancing of transactions that do not comply with the new final Regulations despite the fact that these Regulations had not been promulgated when the original new money bonds were sold. On the other hand, if the original new money bonds happen to comply with the new final Regulations, we do not believe any policy would be served by not permitting the issuer to apply the new Regulations. We therefore believe that the effective date of the final Regulations should include a transition rule permitting issuers that directly or indirectly refinance new money bonds originally issued prior to publication of the final Regulations in the Federal Register to elect to apply either the new final Regulations or the previously applicable rules.³⁶

³⁵ See Prop. Reg. § 1.142(a)(6)-1(c)(1).

³⁶ See Prop. Reg. § 1.142(a)(6)-1(i).

13. Guidance should confirm that issuers may elect to apply the new final Regulations to any bonds subject to section 142 that are sold prior to the finalization.

The Proposed Regulations would permit elective application of the new final Regulations to any bonds that are sold before the date that is 60 days after publication of the final Regulations in the Federal Register.³⁷ It is not clear whether the elective application of the final rules was intended to be available for bonds sold before publication of the final Regulations in the Federal Register. We believe that the Regulations, when finalized, should confirm that elective application of the new Regulations also is available for any bonds sold before publication of the final Regulations in the Federal Register.

³⁷ *Id.*