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# Treated Railroad Ties/Non-Hazardous Secondary Material Rule: U.S. Environmental Protection Agency Proposed Rule

## Arkansas Environmental, Energy, and Water Law Blog

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The United States Environmental Protection Agency ("EPA") in a November 1st Federal Register Notice proposes to amend the Non-Hazardous Secondary Material Rule ("NHSMR") and add certain treated railroad ties ("TRTs") to the list of categorical non-waste fuels. See 81 Fed. Reg. 75781.

The TRTs proposed to be added are processed creosote-borate, copper naphthenate and copper naphthenate-borate – under certain conditions/depending on the chemical treatment.

By way of background, Section 129(a)(1)(D) of the Clean Air Act directs the EPA to establish standards for Commercial and Industrial Solid Waste Incinerators ("CISWI"), which burn solid waste. The Clean Air Act further provides in Section 129(g)(6) that the term "solid waste" is to be established by the agency under the Resource Conservation and Recovery Act ("RCRA"). Section 2002(a)(1) of RCRA authorizes the agency to promulgate regulations as are necessary to carry out its functions under the statute.

The statutory definition of "solid waste" is found in Section 1004(27) of RCRA. Previous RCRA rulemakings identified certain hazardous materials that the agency decided were not solid waste when burned in combustion units. Processes or operations that burned these non-hazardous secondary materials are not required to be evaluated under the general case-by-case standards and procedures that would otherwise apply to non-hazardous secondary material burned in combustion units.

EPA in a February 8, 2016 rule added three materials to the previous list of "categorical non-waste fuel". One of those additional materials was creosote treated TRTs that are processed and combusted in units designed to burn both biomass and fuel.

EPA has determined to add in this proposal these additional TRTs. The agency describes in the Federal Register preamble the proposed categorical listings as:

- Creosote-borate railroad ties (and mixtures of creosote, copper naphthenate and copper naphthenate-borate railroad ties) that are processed and then combusted in units designed to burn both biomass and fuel oil. Such combustion must be part of normal operations and not solely as part of start-up or shut-down operations. Also included are units at major source pulp and paper mills or power producers subject to 40 CFR part 63, subpart DDDDD that combust these types of treated railroad ties and had been designed to burn biomass and fuel oil, but are modified (e.g., oil delivery mechanisms were removed) in order to use natural gas instead of fuel oil. Again, such combustion must be part of normal operations and not solely as part of start-up or shut-down operations. These

treated railroad ties may continue to be combusted as product fuel in units that have been modified to use natural gas only if the following conditions are met, which are intended to ensure that these materials are not being discarded:

- Must be burned in existing (i.e., commenced construction prior to April 14, 2014) stoker, bubbling bed, fluidized bed, or hybrid suspension grate boilers; and
- Can comprise no more than 40 percent of the fuel that is used on an annual heat input basis.
- Copper naphthenate railroad ties combusted in units designed to burn biomass, or biomass and fuel oil
- Copper naphthenate-borate railroad ties combusted in units designed to burn biomass, or biomass and fuel oil.

[A link to the Federal Register Notice can be found here.](#)