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Internal Revenue Service
1111 Constitution Avenue, N.W.
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CC:PA:LPD:PR (REG-140492-02)

Re: Proposed Regulations Addressing Definition of Solid Waste Disposal Facilities for Tax-Exempt Bond

Ladies and Gentlemen:

Enclosed are comments of the subcommittee of the General Tax Matters Committee of the National Association of Bond Lawyers addressing the notice of proposed rulemaking (REG-140492-02), Exempt Facility Bonds: Solid Waste Disposal Facilities, RIN 1545-BD04, published in the Federal Register on May 10, 2004 (the "Proposed Regulations"). We appreciate your consideration of the enclosed comments and would be pleased to make ourselves available to discuss the comments or any other aspect of the Proposed Regulations with you and representatives of the Department of Treasury.

If you have any questions or would like to receive other materials or information, please feel free to contact me at (202) 661-2209.

Sincerely yours,

Charles S. Henck
Chairman
Subcommittee on Proposed Solid Waste Regulations
General Tax Matters Committee

Enclosure

cc: Timothy L. Jones
Michael P. Brewer
Rebecca Harrigal
Steve Watson

NATIONAL ASSOCIATION OF BOND LAWYERS

COMMENTS ON PROPOSED REGULATIONS REGARDING THE

DEFINITION OF SOLID WASTE DISPOSAL FACILITIES

I. INTRODUCTION

The following are comments prepared by a subcommittee of the General Tax Matters Committee (the "Committee") of the National Association of Bond Lawyers ("NABL"). These comments were prepared by the Committee in accordance with NABL's purposes. While not all members of the Committee necessarily concur in each of these comments, the comments represent the consensus of the participants. Reference herein to the term "we" or "the Committee" is to the participants identified on the cover page. In addition, certain members of the Board of Directors of NABL have reviewed the comments. We would welcome the opportunity to discuss these comments with representatives of the Department of the Treasury and the Internal Revenue Service ("IRS") and to address any questions that the comments may raise.

NABL was incorporated as an Illinois nonprofit corporation on February 5, 1979, for the purposes of educating its members and others in the law relating to state and municipal bonds and other obligations, providing a forum for the exchange of ideas as to law and practice, improving the state of the art in the field, providing advice and comment at the federal, state and local levels with respect to legislation, regulations, rulings and other actions, or proposals therefor, affecting state and municipal obligations, and providing advice and comment with regard to state and municipal obligations in proceedings before courts and administrative bodies through briefs and memoranda as a friend of the court or agency. NABL currently has approximately 3,000 members.

II. BACKGROUND

The Code. Sections 103(a) and 103(b)(1) of the Code provide generally that interest on a state or local bond that is a private activity bond will not be excluded from gross income unless it is a qualified bond within the meaning of section 141. Section 141(e) provides in part that the term "qualified bond" includes any bond that is an exempt facility bond. The term "exempt facility bond" is defined in section 142(a), which provides that the term includes "any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide" any of 13 listed categories of facilities, including "solid waste disposal facilities" (section 142(a)(6)).

The 1954 Code. The predecessor provision to section 142(a) was section 103(b)(4)(E) of the Internal Revenue Code of 1954 (the "1954 Code")[1], under which tax-exempt bonds could be issued provided that "substantially all" (interpreted as 90%) of the proceeds of such bonds were used to provide any of various categories of exempt facilities, including "sewage or solid waste disposal facilities" described in section 103(b)(4)(E). As discussed in more detail below, the legislative history of the 1986 Tax Act states, in effect, that facilities which qualified as solid waste disposal facilities in the 1954 Code would continue to qualify as solid waste facilities under section 142(a)(6) of the Code.

Definition of Solid Waste – Regulations. Neither section 103(b)(4)(E) of the 1954 Code nor section 142(a)(6) of the Code provide any definition of the term "solid waste disposal facilities." The term is defined in Treasury regulations (the "Regulations") that were promulgated under section 103(b)(4)(E) and that continue to apply for purposes of section 142(a)(6) of the Code. Specifically, Treas. Reg. § 1.103-8(f)(2)(ii)(b) provides as follows:

> The term "solid waste" shall have the same meaning as in section 203(4) of the Solid Waste Disposal Act (42 U.S.C. 3252(4)), except that for purposes of this paragraph, material will not qualify as solid waste unless, on the date of issue of the obligations issued to provide the facility to dispose of such waste material, it is property which is useless, unused, unwanted, or discarded material, which has no market or other value at the place where it is located. Thus, where any person is willing to purchase such property, at any price, such material is not waste. Where any person is willing to remove such property at his own expense but is not willing to purchase such property at any price, such material is waste. Section 203(4) of the Solid Waste Act provides that:
>
> > (4) The term "solid waste" means garbage, refuse, and other discarded solid materials, including solid-waste materials resulting from industrial, commercial, and agricultural operations, and from community activities, but does not include solids or dissolved material in domestic sewage or other significant pollutants in water resources, such as silt, dissolved or suspended solids in industrial waste water effluents, dissolved materials in irrigation return flows or other common water pollutants.

First Product Rule. Solid waste disposal facilities also include facilities that convert or recycle solid waste into other usable materials or heat. Temp. Treas. Reg. § 17.1(a) provides a specific rule for determining the extent to which the waste recycling facilities will qualify for tax-exempt financing as solid waste disposal facilities. This rule, sometimes referred to as the "first product rule," states that, in the case of a solid waste recycling facility that recovers material or heat that has utility or value:

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[1] In the Tax Reform Act of 1986, Public Law 99-514 (hereafter, the "1986 Tax Act"), Congress amended and recodified the rules relating to tax-exempt financing contained in sections 103 and 103A of the 1954 Code.

> the waste disposal function includes the processing of such materials or heat which occurs in order to put them into the form in which the materials or heat are in fact sold or used, but does not include further processing which converts the materials or heat into other products.

This concept is illustrated in an example in section 17.1(c), which describes a situation in which a taxpayer proposes to build a facility that will process discarded waste by separating out metals, glass, and similar materials. The example states that:

> As separated, some of such items are commercially saleable; but [the recycler] does not intend to sell the metals and glass until the metals are further separated, sorted, altered, and cleaned and the glass is pulverized.

The example states that the waste disposal function includes such additional processing of the metals and glass (i.e., up to the point where these materials are sold), but no further processing is included.

The Audit Program and Industry Response. Beginning in the mid 1990s, the Internal Revenue Service undertook to develop a systematic program for auditing tax-exempt bond transactions. An early focus of that effort was bonds issued under section 142(a)(6) of the Code and section 103(b)(4)(E) of the 1954 Code to finance solid waste disposal facilities. Initial audits raised important - and often troubling - questions about the proper interpretation of the current Regulations, particularly as they related to recycling facilities. In response to these concerns NABL, as well as a number of parties and groups (including a number of members of the House Ways & Means Committee), submitted comments to the IRS and Treasury about the application of the Regulations to recycling facilities.

Initial NABL Submission. NABL submitted two sets of comments. The first, dated March 21, 2001 ("NABL I") described NABL's concerns in some detail and suggested regulatory language to address them. In general, the concerns related to the requirement in the Regulations that, on the date of issue of the bonds, the material being disposed of by the facilities must have "no market or other value" at the place it is located (the "no-value test"). The basic problem, as discussed in NABL I, was not the existence of the no-value test; but rather, the manner in which the IRS had begun to apply that test in the context of audits of recycling facilities. Specifically, the concern was that payments made to parties that provided services such as collecting and sorting material waste so that it could be introduced into a recycling process were treated as evidencing that the material had "value" when acquired by the recycler. Since the material acquired by the recycler was said to have value, the IRS took the position that the material did not qualify as solid waste for purposes of the Regulations, and the facility that recycled the material was not considered to be eligible for tax-exempt financing.

It was NABL's view that this analysis was inconsistent with prior rulings and that it created an unjustified barrier to financing recycling facilities with tax-exempt bonds. To address this issue NABL suggested regulatory language that would clarify that any value attributed to the material's possible use as input to a recycling facility would not be treated as "value" for

purposes of the no-value test. Thus, the material still would be treated as waste after it had been collected, sorted and transported to the recycler and the recycling facility would be eligible for tax-exempt financing.

Supplemental NABL Submission. On June 22, 2001 representatives of NABL met with representatives of the Treasury Department, the IRS Tax Exempt Bond Division and the IRS Office of Chief Counsel to discuss NABL's submission and the issues it raised. At that meeting NABL was asked to supplement its initial submission to provide more detail regarding its recommendations. Following this meeting, NABL submitted a supplemental report, dated October 21, 2001 ("NABL II"). NABL II addressed the points raised at the meeting by providing revised regulatory language that elaborated on NABL's original proposal (e.g., by specifying a definition of recycling facilities) and providing examples of the operation of the suggested rules.

Notice 2002-51 and Proposed Regulations. In Notice 2002-51 (2002-2 C.B. 131) the IRS and Treasury requested public comments on the application of section 142(a)(6) to recycling facilities, as well as any other issues relating to financings of solid waste facilities. Subsequently a project to address the application of section 142(a)(6) to recycling facilities was put on the IRS/Treasury "priority guidance plan" for the year ended June 30, 2003 and then for the year ended June 30, 2004.

On May 4, 2004 the IRS and Treasury released a Notice of Proposed Rulemaking (the "Notice") containing new proposed regulations (Prop. Treas. Reg. § 1.142(a)(6)-1 (the "Proposed Regulations") relating generally to the definition of solid waste facilities for purposes of section 142(a)(6) of the Code. Finalization of these regulations has not been put on the IRS/Treasury guidance plan for the year ending June 30, 2005.

III. SUMMARY OF PROPOSED REGULATIONS

Definition of Solid Waste - General. Under the current regulations the basic approach to identifying solid waste disposal facilities that qualify for tax-exempt financing is first to identify the solid waste and then to identify those facilities that are used "for the collection, storage, treatment, utilization, processing, or final disposal of solid waste." Treas. Reg. § 1.103-8(f)(2)(*a*). The Proposed Regulations would change this analytical approach fundamentally by defining waste as something that is processed in a specified waste disposal process. In other words, the Proposed Regulations focus on whether a facility is one of several types of specified facilities rather than whether the material being disposed of is "solid waste."

Basic Structure. The present definition of the term solid waste in Treas. Reg. § 1.103-8(f)(2)(ii) consists of two parts: the language containing the no-value test (i.e., "property which is useless, unused, unwanted, or discarded material, which has no market or other value at the place where it is located") and the language quoted from section 203(4) of the Solid Waste Disposal Act (i.e., "garbage, refuse and other discarded solid materials"). The Proposed Regulations would eliminate the phrase containing the no-value test but retain, at least in form, the language from the Solid Waste Disposal Act, albeit without the specific cross reference to that statute. The retained language, however, is defined as being further limited to solid material that is introduced into one of four solid waste disposal processes: (i) a "final disposal process" (e.g., disposal in a

landfill); (ii) a conversion process (e.g., burning in a waste-to-energy plant); (iii) a "recovery process" (e.g., repulping waste paper so that it can be introduced into a paper making process); or (iv) a "transformation process" (definition reserved, although shredding tires for use as roadbed material is given as an example).

In other words, under the Proposed Regulations the determination of what is solid waste is based solely on whether the material is processed in one of the specified types of facilities identified in the Proposed Regulations. The fact that materials are or are not actually "garbage, refuse and other discarded materials" in the ordinary sense appears to be irrelevant. On the contrary, the structure of the Proposed Regulations and their emphasis on the process would preclude tax-exempt financing for facilities used for the handling or disposition of materials that clearly are "solid waste" within the meaning of the Solid Waste Disposal Act, but where the process in question does not fit precisely within the operational or engineering framework set forth in the Proposed Regulations. This apparently would be true even if the same material processed in a listed process or facility would qualify as solid waste.

Definition of Solid Waste - Excluded Items. The Proposed Regulations exclude from the definition of solid waste material that is introduced into a conversion process any material that is (i) a fossil fuel, or (ii) any material that is grown, harvested, produced, mined, or otherwise created for the purpose of converting the material to heat, hot water or steam. Similarly, the Proposed Regulations exclude from the definition of solid waste any precious metal introduced into a recovery process. Finally, the Proposed Regulations exclude from the definition of solid waste generally any material that is either hazardous waste within the meaning of section 142(h) of the Code or radioactive waste.

Definition of Solid Waste Disposal Facility. The Proposed Regulations define a solid waste disposal facility as a facility that (i) performs a solid waste disposal function (as outlined above), (ii) performs a preliminary function (e.g., collection, separation, sorting, storage, treatment, processing, disassembly, or handling of solid material that is directly related to a solid waste function), or (iii) is functionally related and subordinate to a disposal or preliminary function (defined as under present law).

Other Changes. The Proposed Regulations make several other changes to specific rules as discussed below. In particular, in the context of recovery facilities, and potentially in the case of transformation facilities, the Proposed Regulations provide an analogue to the "first product rule" that is more restrictive than the rule currently contained in Temp. Treas. Reg. § 17.1. In addition, the Proposed Regulations replace the 65% rule, as set forth in Treas. Reg. § 1.103-8(f)(2)(ii)(c), with a somewhat similar rule that uses an 80% figure, as well as making other changes to that rule.

IV. SUMMARY OF COMMENTS

A In General.

We are of the view that final regulations in this area (i) should carry out Congressional intent, both when the provision was originally enacted in 1968 and when it was recodified in 1986, and (ii) provide a clear and administrable roadmap both for persons involved in the financing of solid

waste disposal facilities (issuers, conduit borrowers and bondholders) and the IRS. We have reviewed the Proposed Regulations carefully, and although portions of the proposed rules provide a useful starting point, we believe that, on balance, they not only fail to achieve these goals, but also in several cases create interpretive and administrative problems where none previously existed.

Organization. NABL's comments in this regard are divided into two sections: First, we provide comments about the basic structure of the Proposed Regulations and the general regulatory approach they adopt for identifying qualifying solid waste disposal facilities; and second, we provide comments about specific provisions of the Proposed Regulations.

B. Comments Relating to Basic Structure

We believe that the proposal to change the basic regulatory approach to one which identifies solid waste solely by reference to the type of processing it receives is inappropriate for the following reasons.

1. The approach does not provide clear general principles of application and thus will be completely unworkable for facilities that do not fit squarely within a listed category. Similarly, the approach ignores the possibility of technological or other changes that may make the particular processes listed obsolete, and therefore "freezes" the types of facilities that qualify for financing to those specified. This is inconsistent with the language of the Code and Congressional intent, both of which are focused on providing tax exempt financing for those facilities which support the public purpose of disposing of waste materials, rather than simply supporting certain specified technologies.

2. The approach, which purportedly was adopted in part to avoid a perceived problem of circularity with the approach recommended by NABL, in fact merely changes the context in which the purported circularity issue is raised without ever resolving the issue.

3. The approach is affirmatively inconsistent with Congressional intent both in 1968, when the original statutory language was enacted, and in 1986, when that provision was recodified.

4. The approach improperly abandons 30 years of learning and experience with the existing rules without actually addressing the real issues raised with respect to those existing rules.

C. Comments Relating to Other Issues

1. The regulatory language proposed in NABL II would have defined two types of recycling facilities: conversion facilities and recovery facilities. The Proposed Regulations appear to follow this approach to a point (e.g., substituting "process" for "facilities", except that the definition of recovery process is limited to facilities that melt or repulp waste). Other facilities that would have been covered by the NABL II definition of recovery facilities apparently are to be dealt with, if at all, by the definition of "transformation process." We believe the proposal to create a separate definition of a transformation function is misguided. Instead, we recommend that the definition of recovery facility be reworked and broadened to be more inclusive.

2. The Proposed Regulations would revise the first product rule dramatically by limiting the definition of recovery facilities in a way that clearly is inconsistent with the existing Regulations and with Congressional intent to keep the Code provisions consistent with the 1954 provisions (as interpreted prior to the adoption of the 1986 Tax Act). The proposal to revise the first product rule, and the apparent determination by the drafters of the Proposed Regulations to impose additional limits on financing for recycling facilities that have qualified for financing as solid waste disposal facilities for years under Temp. Treas. Reg. §17.1, is unwarranted, is inconsistent with the applicable law and does not address any perceived or actual abuse of which we are aware.

3. The definition of solid waste, as presently set forth in section 1.142(a)(6)-1(c) of the Proposed Regulations, should include the modifying language now contained in Treas. Reg. § 1.103-8(f)(2)(ii)(*b*) (e.g., defining solid waste as material that is "useless, unused, unwanted, or discarded solid material").

4. The conversion of the 65% test in Temp. Treas. Reg. §17.1 to an 80% test, as provided in the Proposed Regulations, and the imposition of the "lowest year" requirement, is overly restrictive, is not warranted by any change in the law or the regulations, and would make the regulations materially more difficult to administer.

5. The effective date provision in the Proposed Regulations states that the new rules will apply only to bonds issued after the effective date of the final rules. We believe the final rules should be electively retroactive.

6. The transition rules would have the effect of making bonds that were fully qualified when issued essentially non-qualified when refunded. This rule is both unfair and unnecessary. At a minimum, there should be included in the final rules a provision that permits the refunding of existing issues provided that the weighted average maturity of the refunding bonds does not exceed 120% of the weighted average economic life of the facilities financed. Such a rule would be consistent with previous transition rules in the tax-exempt bond area (see, e.g. section 1313(a) of the 1986 Tax Act).

7. Specific exclusions from the solid waste definition:

Fossil Fuel. The exclusion, which apparently is intended to exclude commercial quality ("market") coal from the solid waste definition, has the unfortunate collateral side effect of picking up coal waste. This is material that qualifies as solid waste under

current rules and should be treated as such under the final regulations. In addition, the intended exclusion (market coal) would not – or should not – be treated as solid waste under the current rules or under a correctly drafted definition in new regulations. Finally, this exclusion is unnecessary even under the Proposed Regulations because market coal would be excluded under the exception for mined, grown or harvested fuel discussed below, but without the improper exclusion of coal waste (i.e., because it is not mined for the purpose of burning).

Mined, Grown or Harvested Fuel. Like the fossil fuel exception, this limitation would not be required if the solid waste definition is properly drafted.

Precious metals. The scope of - and need for - this provision is unclear. An example should be provided that illustrates the intent of the provision.

Radioactive and Hazardous Solid Waste. These exclusions, which apparently are based largely on language in the Blue Book for the 1986 Tax Act, do not properly reflect either the law or the legislative history of that statute.

V. DETAILED COMMENTS

A. Principals for Guidance.

The two NABL submissions in 2001 discussed above, as well as those of a number of other commentators submitted contemporaneously, were aimed almost exclusively at addressing a discrete problem raised in audits of bonds issued to finance recycling facilities; that is, the application of the no-value test as applied to those situations. Although the Proposed Regulations apparently are intended to address this problem, they also would do a great deal more. Comments relating both to the general approach of the Proposed Regulations and to a number of specific provisions are set forth below. In making these comments NABL has attempted to follow what we believe are the basic principles that should guide development of regulations in this area:

1. The final regulations should be designed to further national goals of encouraging recycling of waste materials. This issue was alluded to in the Preamble and has been mentioned in public comments on the Proposed Regulations by Treasury and IRS officials. As discussed below, NABL does not believe this goal has been achieved or furthered by the approach adopted in the Proposed Regulations. On the contrary, the Proposed Regulations evidence an apparent antipathy to recycling as a solid waste disposal technique.[2]

[2] We note that an unnamed IRS official was quoted in a recent article in Recycling Times as stating that exemption was for solid waste disposal facilities, not recycling facilities. This, of course, is directly at odds with the statute and its legislative history. It is also at odds with the language of the regulations, which always clearly have treated recycling facilities as solid waste disposal facilities. What is more troubling, however, is our concern that this attitude has worked its way into the drafting of the Proposed Regulations.

2. The final regulations should be consistent with the legislative history of both the original version of the rule in section 103(b)(4) of the 1954 Code, which was adopted in 1968, and the recodified version of the rule as set forth in section 142(a)(6). In this regard, the general approach taken by the Proposed Regulations, as well as in a number of the specific provisions, are in conflict with this legislative history.

3. The fact that a proposed rule might affect the volume of tax-exempt debt is irrelevant. While no one has specifically stated that this was a consideration in drafting the Proposed Regulations, there have been suggestions by government officials that some of the changes were intended to "even things out" from a volume standpoint, and there have been expressions of concern among our members that this was part of the rationale for the Proposed Regulations. It certainly is true that Congress has taken steps to limit the volume of tax-exempt private activity debt through the imposition of a volume cap and limitations on the types of facilities that can be financed. It is equally true, however, that Congress has specifically provided for the issuance of tax-exempt bonds to finance certain types of facilities within volume cap, and that permission should not be frustrated by trying to limit bond issuance in a manner that Congress neither intended nor authorized.

4. The final regulations should provide general rules of application that will guide practitioners and the IRS in analyzing the rules in the context of fact patterns or technological changes not explicitly described in the rules. Stated somewhat differently, in analyzing a newly developed recycling process parties should not be required to incur the delay and expense involved with referring the matter to the National Office to have the process added to a regulatory list.

5. The law has not changed; therefore, changes to the regulations should not result in a disqualification of facilities that can be financed under the existing Regulations. Thus, the object of any changes that are made to the existing rules should be to provide clarity where there was uncertainty, not to make changes to rules that require none. Solely from the standpoint of administrability, the final regulations should not unnecessarily abandon 30 years of learning and experience with the existing rules.

B. Proposed Regulations – Problems Raised by Proposed Structure

The Proposed Regulations can provide a useful starting point for a definition of recycling facilities. That said, the Committee believes that the basic structure of the Proposed Regulations – based on what one IRS official described as a "new paradigm" – is unworkable and inflexible, and that a significant revision of the proposal is necessary both with respect to that structure and to several of the specific provisions of the Proposed Regulations.

1. Defining Solid Waste by Reference to the Manner of its Treatment. We believe the analytical approach of defining solid waste by determining whether the material goes into a defined solid waste process is fundamentally flawed. First, and most importantly, the methodology does not provide a workable approach for analyzing a facility in the context of a proposed financing. To the extent a facility is used to process (or recycle) solid waste it should qualify, regardless of whether the particular process is listed in the regulations. The approach in the Proposed Regulations likely would deter people from considering the tax-exempt financing

of facilities using alternative recycling technologies, and inevitably would lead to delays, if not the outright inability to finance many facilities that should be eligible. The suggestion that additional processes can be added to the regulations as new processes are identified or developed ignores the reality that asking for regulatory relief, or even for relief in the form of private letter rulings, is an uncertain, expensive and time-consuming undertaking. The Code should be neutral in its approach, as there is no legitimate tax policy that favors the existing technologies over as yet unidentified solid waste disposal processes.

Illustrations of Difficulty. The problem with the proposed approach in this regard is illustrated by an exchange at a recent NABL-sponsored panel discussion on the Proposed Regulations. A questioner asked about the status of a "biodigester" that "cooks" animal wastes, ending up with methane gas and animal feed. One of the government panelists, who had participated in drafting the Proposed Regulations, noted that the facility did not appear to qualify as either a conversion facility or a recovery facility, nor was it a final disposal facility. Accordingly, it would not qualify under the Proposed Regulations because it was not listed. In fact, the question from the audience was based the facts in LTR 200226002, in which the IRS ruled, using a straightforward analysis under the existing rules, that the facility was a qualifying solid waste disposal facility under section 142 of the Code. Obviously, this type of facility could be added to a list (e.g. as a transformation facility), but the basic problem would arise every time a facility was not listed[3] or there was some variation between the listed types of facilities and the facility being considered. In other words, this approach freezes the existing definition of qualifying facilities.

The shortcomings with this approach also are illustrated by the apparent difficulty the IRS and Treasury have had in identifying, over the last two years, more than one type of facility that would fit within the definition of the term transformation facilities. While the Notice requests comments on this point, we note that whatever list is finally arrived at using this approach inevitably would be finite, and almost certainly there would be circumstances where an otherwise straightforward financing will be delayed or prevented (e.g., as a result of delays or an unwillingness to make the necessary change). For these reasons we think it is essential that the final rules provide a general, material based definition such as that suggested in NABL II. See also discussion below under "Stated Basis for Approach Used in Proposed Regulations." The final regulations must be written in a way that contemplates and acknowledges changes in processes and technology.

2. Failure to Resolve Questions with the Existing Rules. Another difficulty with the suggested approach is that it does not really eliminate the problems that recently have been associated with identifying solid waste or the no-value test; it simply moves the question into a different and more undefined sphere. Thus, we think that it begs the question to say that solid waste is defined by reference to the facility used to process it. It is still necessary in drafting the final regulations, and in implementation by issuers and their counsel, to make an initial assessment of what types of facilities should be on the list. As a practical matter this requires an assessment of the type of material going into the facility (e.g., by reference either to the general

[3] For example, the concept of recycling computer parts certainly was not contemplated in 1968, or for that matter in 1972, when the solid waste regulations were first published.

definition of waste or to some ad hoc definition used for this purpose) and then making a determination as to whether the facility was used to dispose of or recycle it. Presumably something like that approach would need to be used to identify facilities that fit into the definition of transformation facilities.

3. The Proposal is Inconsistent with the Applicable Legislative History. Section 103(b)(4)(E) of the 1954 Code, the predecessor to section 142(a)(6), was added to the 1954 Code in 1968. The Conference Report for that provision said that, for purposes of the statute, the term solid waste meant solid waste within the meaning of section 203(4) of the Solid Waste Disposal Act. Conf. Rep. No. 1533, 1968-2 C.B. 715, 810. When the existing Regulations were first proposed that definition of the term was adopted, and the no-value test was added when the Regulations were published in final form. Treas. Reg. § 1.103-8(f)(2)(ii)(*b*). The basic structure of the Regulations, which first requires identification of solid waste and then of the facilities used to dispose of waste, has remained unchanged since then.

When Congress recodified the solid waste rules in 1986 it did not change the operative language (i.e., "solid waste disposal facilities"). In addition, as noted in LTR 200226002 (the most recent ruling dealing with the solid waste definition question), the legislative history of the 1986 Tax Act both refers to the existing regulatory test (including the no-value test) and indicates that except as specifically provided solid waste disposal facilities are to be defined as under then present law. See H.R. Rep. No. 99-426, at 497, 531 (1985), 1986-3 C.B. (Vol. 2) 497, 531; H.R. Conf. Rep. No. 99-841, at II-704 (1986), 1986-3 C.B. (Vol. 4) 704. See also S. Rep. No. 99-313, 836 ("rules [for qualified hazardous waste facilities are to be] similar to the present-law rules regarding solid waste disposal IDBs . . . including rules limiting hazardous waste to materials having no market or other value at the place at which they are located"). This history is a clear recognition, acknowledgement and approval by Congress of the general approach reflected in the existing Regulations.

The concern with the Proposed Regulations, in this regard, is that as a practical matter they would render the definition of solid waste essentially meaningless. In fact, the same rules could have been written without ever including the phrase solid waste in the text or in any way describing the material. We believe this abandonment of the historic – and Congressionally endorsed – approach in the current regulations is both unnecessary and unwise, and that it is inconsistent with expressed Congressional intent in this area.

4. Stated Basis for Approach used in Proposed Regulations. According to public comments by drafters of the Proposed Regulations one reason for the approach taken, and for not using an approach along the lines suggested by NABL (i.e., keep the no-value test, but disregard value attributable to the fact that the material can be recycled) is that the NABL approach resulted in a "circular" definition of waste. In other words, it is argued, solid waste is material with no market or other value, but payments that otherwise would evidence value are disregarded if they are attributable to the fact that the material can be input into a recycling facility. A recycling facility, in turn, was defined as a facility that recycled solid waste. As discussed above, the proposed solution to this problem by the IRS was to effectively eliminate the need for a definition of solid waste, and instead to focus on defining solid waste disposal facilities or processes.

This justification for not adopting the approach suggested by NABL is flawed. First, as discussed above, the approach in the Proposed Regulations does not really avoid the purported problem; it just moves it to a different part of the analysis. Thus, under the proposal, waste is material that goes into a defined disposal facility, and the determination of whether a facility is or should be on the list must be made on the basis of the type of material it processes; i.e., does it recycle or dispose of waste.

The second problem is that the purported circularity of the NABL approach is more theoretical than real. The NABL approach simply acknowledges that there is a cost associated with collecting, sorting and transporting waste material so that it can be recycled, and disregards payments and "value" attributable to such services. Stated simply, the ultimate problem that the NABL approach was designed to deal with was payments with respect to material that otherwise appeared to be waste (e.g., because it is the type of material that, without further processing, would be disposed of in a landfill or by incineration).

Assume, for example, that Company wants to use tax-exempt financing for a facility designed to recycle old newspapers ("ONP") by repulping the material, cleaning it, and producing rolls of recycled content paper. The issue is whether the facility is a solid waste recycling facility. Under traditional analysis used by practitioners, conduit borrowers, and issuers, the first question to be addressed is whether the material to be recycled initially meets the definition set forth in Treas. Reg. § 1.103-8(f)(2)(ii)(b). In other words, is the ONP waste material that is, in the words of the regulation, "useless, unused, unwanted, or discarded material, which has no market or other value at the place where it is located." If it is (e.g., as in the case of newspapers discarded by households for curbside pick-up) the second question is whether any payments will be made to the initial generator of the waste (e.g., the individual who discarded it) or to any intermediate party (e.g., someone who provided collection, sorting or transportation services with respect to the material). Assuming that such payments will be made (e.g., to an intermediate party) the third question is whether the payments will cause the material to have value such that it would not qualify as solid waste when it enters the proposed recycling facility.

As discussed in detail in NABL I, the analysis used for many years to address the payments issue, based in part on the analysis in a number of private rulings, was to determine whether the payments to be made by Company for the ONP exceeded the cost of transportation and handling of the ONP. If not, the ONP was still waste, because the payments are for the costs of getting the material to the recycling facility rather than as payments for the material itself (payments to a third party for transporting the newsprint are a more economical way for the recycler to pick up the newsprint rather than using its own personnel and equipment). If so, the ONP was not waste because although some of the cost is related to transportation and handling, the excess would be evidence that there was a payment for the material itself.

Although this analysis worked reasonably well for many years it was not without problems. For example, the determination of what was a cost of "transportation and handling" was a somewhat open issue that arose in the course of a number of audits of this type of transaction. Additionally, the relevant cost often depended on the source of the material and the transportation distance involved, so it was often difficult to arrive at generally applicable figures. Finally, the audits brought into sharp focus the basic problem of whether the transportation and handling exception applied at all.

The proposal made by NABL generally was intended to deal with the third issue; that is, whether the receipt of payments with respect to the purported waste would cause the waste to be treated as having value. In preparing the NABL proposal, we contemplated that the existing analytical approach would apply to the point where it was necessary to evaluate some evidence of whether the material had value (e.g., a payment made to a party that collected, sorted or transported the material). In other words, the test would not even be applied unless there was a determination that the material fits within the general definition of waste to begin with. If it does, then the question is whether the payments or other indicia of value are attributable to the various processes necessary to get the material into a defined recycling facility. We continue to believe this is a workable solution to this relatively narrow issue.

5. Abandonment of Workable and Well Understood Regulatory Concepts. In order to deal with the questions raised with respect to the existing rules it certainly will be necessary to make changes to those rules. In addition, we recognize the value of recasting the Regulations as regulations under section 142 instead of section 103. That said, it is unwise and in many respects inappropriate to completely abandon the existing analytic framework – one that, except for application of the no-value rule to recycling facilities, has served reasonably well for over 30 years – to replace it with new rules that seem likely to raise similar issues but would not provide a usable mechanism for dealing with them.

Moreover, the preamble indicates that the no-value test is being dropped because of changes that have occurred in the recycling industry since the existing regulations were adopted. While we agree that there have been changes, the ones that have created analytical difficulty are those related to the increased amount of post-consumer material being recycled and the manner in which it is collected, sorted and handled prior to being introduced into a facility that recycles it by converting it into new marketable products.[4] The analytic difficulties raised by these changes can most appropriately be addressed through a narrowly crafted change in the current rules. Alternatively stated, the tax rules, which are intended to favor construction of facilities for disposing of solid waste, should not be revised to frustrate that purpose simply because an industry has developed around an economical and efficient means of collecting, sorting and transporting materials for recycling which otherwise would end up in a landfill.

[4] See also the discussion below relating to the first product rule.

C. Comments as to Specific Provisions.

1. Definition of Transformation Facilities. In the Notice you request comments relating to what should be included within the scope of what you have designated as transformation facilities. For the reasons discussed above NABL does not believe that such a definition should be in the form of a list. Rather, what is required is a general definition of a facility that, in the ordinary sense, recycles solid waste.

NABL II recommended a definition of recycling facilities[5] that would consist of two basic categories: conversion facilities and recovery facilities. Conversion facilities, as defined in NABL II, are conceptually similar to conversion facilities as defined in the Proposed Regulations; that is, waste-to-energy facilities. The term recovery facilities, however, has a significantly broader definition in NABL II than in the Proposed Regulations. In NABL II it was defined generally as facilities that (i) sort waste, (ii) apply thermal, mechanical or chemical treatment to ensure that the waste will properly respond to recycling, or (iii) recycle the waste into usable raw materials up to a defined finish point. In all, the definition of recovery facilities was intended to define recycling (except recycling included in the definition of conversion facilities) from the point beginning after it is first collected and extending to the point established under the existing first product rule in Temp. Treas. Reg. § 17.1.

Recommendation. It appears that one principal difference between the NABL II definition of recycling facilities and those in the Proposed Regulations is that the definition NABL suggested for recovery facilities has been conceptually split in two[6], with the recovery facility definition being reserved for waste that is repulped or melted, and the remainder apparently to be covered in the definition of transformation facilities. As discussed above, we believe that the notion of using a list or similar approach for defining qualifying facilities is not an appropriate approach. For that reason the term recovery facility should be redefined along the lines NABL suggested originally; that is, so as to include facilities that recycle by re-pulping or melting and those that use some other technique. From a legal standpoint, there is no difference between facilities that melt or re-pulp waste and those that process it by shredding or grinding it, drying it, or altering it biologically (e.g., in a digester or in a mulching operation) and there is nothing to be gained, and much to be lost, by trying to separate these categories.

2. Basic Definition of Solid Waste. As noted above we believe that the final regulations should provide an operative definition of the term "solid waste;" that is, one depending on the nature of the material rather than the manner of treatment of the material. Assuming that such a change is made, and even if it is not, we believe the current language should be broadened to incorporate at least some of the operative language of the present rule. In part this recommendation is based on our belief that the basic rules in the existing Regulations, including

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[5] We did not believe that disposal as such (e.g., landfilling or incineration) required elaboration.

[6] We note that some of the functions that we would include in recovery facilities would be covered in the Proposed Regulations under the preliminary function category.

the basic definition of the term solid waste, should remain unchanged except to the extent necessary to rectify specific problems, including the narrow problem associated with the no-value test.

Further, we believe the language from section 203(4) of the Solid Waste Disposal Act, standing alone (and as paraphrased in the Proposed Regulations) is insufficient for the purpose of identifying eligible waste without language similar to that in the present Regulations (i.e., "property which is useless, unused, unwanted, or discarded material, which has no market or other value at the place where it is located"). The quoted language is the source of the no-value test, and it is true that modifications will be necessary to address this point, but it also is true that this language provides a necessary gloss on the language of section 203(4). For example, this language avoids questions about whether the purported material must actually have been discarded. In the context of recycling facilities the object, in effect, is to intercept the material before it has been discarded and put it to productive use, so a failure to include such language leads to unnecessary interpretative difficulties.

3. First Product Rule. The Proposed Regulations would modify significantly the "first product rule" for recycling facilities now contained in Temp. Treas. Reg. § 17.1(a). Because of the proposed changes to the analytic structure used under the current Regulations, however, this change is not made directly. Instead, it is manifested indirectly both in what is written and, to some extent, what is not.

For example, Proposed Regulation § 1.142(a)(6)-1(f) defines "recovery process" to provide that in the case of a process that re-pulps waste (e.g. a waste paper recycling facility) the recovery function (and the qualifying scope of the facility) ends "immediately before the material is processed in the same or substantially the same way that virgin material is processed to fabricate the end product." Section 1.142(a)(6)-1(f)(1). See also section 1.142(a)(6)-1(f)(2) (relating to facilities that fabricate end products entirely from re-pulped, non-virgin material). Similarly, in soliciting comments on the definition of "transformation process," the Notice makes reference to the need for "clear criteria to distinguish a transformation process from a manufacturing process that uses material other than solid waste."

The proposed definition of – and limitation on – a conversion process, as well as the stated concern about the scope of a transformation process, indicate that an entirely unjustified emphasis is being placed on finding a definition of the scope of recycling facilities that somehow excludes manufacturing or production operations. We believe that this approach not only is materially more restrictive than the current Regulations, but also that it is inconsistent with Congressional intent and is fundamentally misguided.

Issues Relating to Revised First Product Rule.

First, under the current rules the qualifying scope of the facility extends to the point where the recycled material "actually is sold or used." The existing Regulations make it clear that this point is not necessarily reached at the first point where the material has value, but at the point where it is sold or used. This generally is interpreted as being the point at which the material can

be sold or used. See the Example in Temp. Treas. Reg. § 17.1(c).[7] As a general matter, this test in the current Regulations has been relatively easy to apply, and NABL is not aware of any abuse or policy warranting a change at this time.

For example, in a facility that recycles waste paper into paper toweling the qualifying scope is considered to be (1) the portion of the facility that re-pulps and cleans the waste paper (as under the Proposed Regulations) and (2) the paper machine that actually converts the pulp to paper that can either be sold to third parties or used by the recycler to produce retail rolls of paper towels. The facilities that further process the paper after it comes off the paper machine (e.g., by producing the retail-size rolls) are excluded. We believe this point in the process is analogous to the equivalent point in a waste-to-energy plant. Thus, in such a facility (1) the waste is burned, reducing the solid material to exhaust gas and ash, both of which are captured and discharged, and producing heat, and (2) the heat is captured in a heat exchanger to produce steam. At the point where the steam is extracted from the boiler the waste has been processed to the point where the resulting useful "product" (steam) can either be sold as steam to a third party or used by the operator as process steam or to produce electricity.

Second, in either of the analyses described above the net result is that a cohesive financing for a facility that deals fully with the waste is feasible. This is comparable to the result that can be reached under each of the other exempt facility categories. Thus, for example, a sewage facility includes not only the part of the facility that reduces the biochemical oxygen demand, but the additional components that actually are used to discharge the cleaned wastewater. Similarly, in the case of facilities for the furnishing of water the qualifying scope includes all of the assets necessary to furnish water, from the initial collection and cleaning through the actual delivery to individual households.

The approach suggested in the Proposed Regulations, on the other hand, typically would leave the recycler in the position of being required to spend significant additional capital on the portion of the recycling facility necessary to finish the solid waste recycling process, yet that expenditure, however necessary to the ultimate disposal process, would not be eligible for tax-exempt financing. For example, in the case of cleaned waste paper pulp, the material will ferment and become useless in a matter of hours if not introduced into a paper machine or its equivalent, but the latter equipment would not be qualified. Under these circumstances we submit that it is inappropriate to deny the intended incentive.

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[7] See also Senate Report 96-394 at 104, 1980-3 C.B. 222, relating to the Crude Oil Windfall Profit Tax Act of 1979. The report, describing the first product rule, states that "such facilities [referring to solid waste recycling facilities] include property necessary to the processing of solid waste into a form which is commercially marketable, but such facilities do not include property for the further processing of the commercially marketable product of the solid waste."

The basic problem with the approach pursued in the Proposed Regulations is that it appears to be based on the premise that recycling processes on the one hand and manufacturing or production operations on the other are somehow mutually exclusive. The fact is that the process of recycling includes all of the steps necessary to reintroduce the waste material into the stream of commerce. Thus, as implicitly recognized by the Treasury Department in regulations adopted over 20 years ago with respect to the energy tax credit, the proper scope of a recycling process extends from sorting and initial processing through "the point at which a has been created that can be used in beginning the fabrication of an end product in the same way as materials from a virgin substance" (emphasis added). An example included "the newsprint or paperboard stage in paper recycling." See Treas. Reg, § 1.48-9(g) (T.D. 7765, January 19, 1981, 1981-1 C.B. 22). Furthermore, as noted above, Congress was aware, and implicitly endorsed the "first product rule" at the time that it considered changes in the tax-exempt bond area when the 1986 Tax Act was adopted.

4. Proposed Revision of 65% Test. The Proposed Regulations effectively replace the 65% test in the existing Regulations with an 80% test. Other proposed changes to the rule are even more restrictive. In effect the 65% rule provided a safe harbor from the general rule requiring an allocation of costs when a facility performed both qualifying and non-qualifying functions. Under the 65% rule, if 65% of the material entering the recycling process, by weight or volume, was solid waste, no allocation was required. One stated basis for changing the cutoff from 65% to 80% was that the figure was arbitrary to begin with and, given the expansion of the definition of solid waste, it was appropriate to make a corresponding negative adjustment on the amount that can be financed. [8]

Again, the government's charge in this regulation project is not to reduce the amount of tax-exempt bonds. The proper focus is to interpret and to write administrable rules; and rules are not administrable if the regulator can arbitrarily change relevant percentages.

NABL does not believe that there is a valid basis in the law or policy for making a change to this threshold. First, it is clear that the Proposed Regulations would not, in fact, expand the amount of potential tax-exempt financing for recycling facilities. On the contrary, the Proposed Regulations are materially more restrictive in that regard than the existing Regulations, even taking into account the proposed elimination of the no-value rule. More importantly, even if the premise were true it should be irrelevant. As stated previously, unless there is some abuse or

[8] One of the drafters of the Proposed Regulations also suggested that the change from 65% to 80% was in the nature of a "compromise" between (a) the view that the 65% test operated as a safe harbor from the requirement to do an allocation of costs for "dual function" facilities, and (b) the view that somehow the 65% test operated as a "cliff," such that none of the costs of a recycling facility would qualify unless a minimum of 65% of the input to the facility was waste. Both from a straightforward reading of the Regulations and from an analysis of the manner in which they evolved it is clear that the latter view has no merit.

identified policy problem that requires revision to the existing rules, the final rules should not unnecessarily change well-established principles in the area.[9]

Finally, the particular language used in the Proposed Regulations, which says that the applicable percentage is determined on the basis of the lowest percentage for any year, also concerns us. The current rule is administrable – with a 65% figure issuers can determine there is substantial waste input (significantly beyond 50%) and simplify compliance. Many recycling applications require at least some virgin input in order to arrive at a workable process. The 80% proposal would create the potential for "foot faults" because of one anomalous year. With this type of foot fault and high threshold there is significantly less incentive to develop new recycling processes. The proposed change is both punitive and unnecessary to achieve the stated goals of the rule.

Similarly, with respect to the "lowest year" rule, the principal difficulty here is that it treats an aberrational year (e.g., an initial "ramp up" year that uses less waste, or a single low year caused by transportation difficulties) as being more important than the overall use of the facility. We are aware of numerous instances where there are one or more years where the waste throughput is lower than 65%, but where the overall waste usage is materially in excess of that figure.

5. Specific Exceptions to Definition of Solid Waste for Specific Purposes.

a. Fossil Fuel. The Proposed Regulations provide that the term solid waste does not include fossil fuel introduced into a conversion process. Apparently this exclusion was thought to be required because solid waste is otherwise defined as material entering into a conversion process (i.e., a waste-to-energy process), and that without the exclusion, material such as coal would qualify.

We certainly agree that coal mined for sale in the coal market should not be treated as a solid waste. Unfortunately, the exclusion of fossil fuel, without elaboration, would also have the effect of excluding coal waste, which is often referred to as culm or gob, and other similar materials. These types of materials do have some Btu content, (e.g., 3,000 to 8,000 Btu per pound in the case of coal waste), but it is significantly lower than that of market coal (generally more than 10,000 Btu per pound) and in any case it is unmarketable without some sort of recycling (e.g., combustion in a specially designed boiler used as part of a waste-to-energy process). Such facilities qualify for financing under the present rules, and we are not aware of any legal or policy basis for a change.

As noted above, the basic reason for including the fossil fuel exception is that the analytical basis for the determination of whether material is waste depends on the type of process it undergoes. If, as we recommend, the definition of solid waste is restated along the lines of the present rule the specific exception would not be necessary, because there is no sense in which coal (as distinguished from coal waste) would be thought to fit within the definition of solid waste.

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[9] See discussion at section V.B.5. above.

Moreover, if the exception for material that is grown, harvested, produced, mined etc. for the purpose of producing useful energy is retained (see discussion below) the separate reference to fossil fuel is superfluous, since market coal would fit within that definition, while coal waste would not.

b. Material Grown, Harvested, etc. Like the fossil fuel exception described above this exception apparently was made necessary by the "backward" solid waste analysis methodology that would be mandated by the Proposed Regulations. Assuming that the final rules reflect a materials based test, as NABL recommends, this provision would become superfluous. NABL does not agree with what we take to be the rule's intent; that is, that material grown, etc. for the specific purpose of burning to produce usable energy would not be considered solid waste. If, however, the rule is retained, it should be modified to clarify the types of waste to which the exclusion does not apply, such as waste byproducts of typical agricultural operations (e.g., sugar cane harvesting that produces bagasse, or rice harvesting that produces rice hulls, both of which are sometimes disposed of by burning).

c. Precious Metals. The intent of this exception is unclear. This exception requires a specific example or a clear statement of the principle involved in order to provide meaningful guidance. Moreover, we note that NABL is unaware of any identified abuse or policy behind the specificity of this proposed rule.

d. Radioactive and Hazardous Waste. The Proposed Regulations provide generally that solid radioactive waste and solid hazardous waste are not treated as solid waste for purposes of section 142. Although the preamble is silent on this point, public comments from IRS and Treasury officials suggest that the basis for this provision is language in the legislative history of the 1986 Tax Act, particularly the Blue Book. For the reasons set forth in the supplemental comments attached as Exhibit A relating to radioactive and hazardous waste, we believe that the IRS and Treasury view of it, as the public comments have suggested, is simply incorrect, and that such a regulatory provision would be invalid as a matter of law.

6. Effective Date and Transition Rules. The Proposed Regulations would provide (i) that they are prospective only, (ii) that changes made by the new rules will not apply to bonds issued before their effective date, and (iii) that the new rules will not apply to bonds issued to refund those bonds provided that the refunding does not result in an extension of maturity. We believe there are a number of significant problems with the way these rules are structured.

a. First, these are interpretive rules and government representatives have made clear that the prospective effective date does not protect bonds issued before their effective date where the law has not changed. For example, as discussed above and in Exhibit A the Proposed Regulations state publicly for the first time that radioactive and hazardous solid waste are not solid waste for tax-exempt bond purposes. As discussed in detail in Exhibit A, however, this position is at odds with the position taken for over 20 years by the IRS and conveyed to the bond community both in private letter rulings and other forms of informal advice. Although these forms of guidance may not be legally binding on the IRS it certainly is the case that borrowers in the affected industry have relied on this advice in issuing bonds aggregating billions of dollars. As a matter of fairness if any such change of position is to be made by the government – and this

absolutely would be such a change – it should be made truly prospective, and the final regulations should clearly so state.

b. We believe the new rules should be electively retroactive, as has been the practice for most recently adopted regulations in the tax-exempt bond area.

c. The proposed refunding transition rule should be broadened to permit refundings that extend the maturity of the issue as long as there is compliance with the 120% test. There has been no change in the statute, and absent some identified abuse, any bond issue that was valid when originally issued should not be penalized – i.e., by subjecting the bond to more stringent refunding requirements - as a result of a change in regulatory policy. This is the policy applied by Congress (see, e.g., section 1313 of the 1986 Tax Act), and it should be applied here.

EXHIBIT A

NATIONAL ASSOCIATION OF BOND LAWYERS

SUPPLEMENTAL TO COMMENTS ON PROPOSED REGULATIONS - APPLICATION OF SOLID WASTE DEFINITION TO HAZARDOUS AND RADIOACTIVE MATERIAL

This material supplements and expands upon our comments (the "Comments") on Notice 2002-51 and Prop. Treas. Reg. § 1.142(a)(6)-1. These supplemental comments relate specifically to provisions in Prop. Treas. Reg. § 1.142(a)(6)-1(c)(v) and (vi) and the definition of solid waste. Defined terms used in these supplemental comments have the same meaning as in the Comments.

I. INTRODUCTION

Under Prop. Treas. Reg. § 1.142(a)(6)-1(c)(v) and (vi) material that is treated as hazardous waste within the meaning of section 142(h) of the Code or is radioactive waste is excluded from the definition of solid waste, with the effect that facilities used to dispose of such material are not qualifying solid waste disposal facilities within the meaning of section 142(a)(6). We also are aware that the questions addressed by these proposed regulatory provisions have been raised in the context of audits of private activity bonds issued to finance such facilities. As set forth in the Comments, and as discussed in detail below, we believe that the proposed rules do not correctly reflect the applicable law.

II. THE WASTE MATERIAL

Hazardous Waste. Subtitle C of Title II of the Solid Waste Disposal Act, as in effect on October 22, 1986, provides special permit requirements for facilities used to dispose of certain hazardous materials ("hazardous waste"). The hazardous waste subject to these requirements can consist of liquid, gaseous or solid material. Our comments relate only to the portion of such hazardous waste that is solid.

Radioactive Waste. Operations at nuclear power plants and certain industrial and medical facilities produce liquid, gaseous and solid radioactive waste material that must be disposed of by using specially designed and built facilities specifically intended for that purpose. The solid waste material has no market or other value.

III. DISCUSSION

As indicated above and in the Comments, we believe that the proposed rules as to the status of hazardous waste and radioactive solid waste for purposes of section 142(a)(6) are erroneous. We believe that the position expressed in the Proposed Regulations conflicts with the clear language and Congressionally approved legislative history of the statute, the current Regulations, and over 20 years of interpretation of that language by the IRS.

A. Application of the Language of the Code and Present Regulations to Radioactive Solid Waste.

The Code. Sections 103(a) and 103(b)(1) of the Code provide generally that interest on a state or local bond that is a private activity bond will not be excluded from gross income unless it is a qualified bond within the meaning of section 141. Section 141(e) provides in part that the term "qualified bond" includes any bond that is an exempt facility bond. The term "exempt facility bond" is defined in section 142(a), which provides that the term includes "any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide" any of thirteen listed categories of facilities, including "solid waste disposal facilities" (section 142(a)(6)).

The 1954 Code. The predecessor provision to section 142(a) was section 103(b)(4) of the 1954 Code, under which tax-exempt bonds could be issued where "substantially all" (interpreted as 90% by regulation) of the proceeds of the bonds were used to provide any of various categories of exempt facilities, including "sewage or solid waste disposal facilities" as set forth in section 103(b)(4)(E) of the 1954 Code.

Current Definition of Solid Waste. Although neither section 103(b)(4)(E) of the 1954 Code nor section 142(a)(6) of the Code provide any definition of the term "solid waste disposal facilities," this term is defined in the applicable Regulations that were promulgated under section 103(b)(4)(E). Specifically, Treas. Reg. § 1.103-8(f)(2)(ii)(*b*) provides as follows:

> The term "solid waste" shall have the same meaning as in section 203(4) of the Solid Waste Disposal Act (42 U.S.C. 3252(4)) [the "Solid Waste Disposal Act"], except that for purposes of this paragraph, material will not qualify as solid waste unless, on the date of issue of the obligations issued to provide the facility to dispose of such waste material, it is property which is useless, unused, unwanted, or discarded material, which has no market or other value at the place where it is located. Thus, where any person is willing to purchase such property, at any price, such material is not waste. Where any person is willing to remove such property at his own expense but is not willing to purchase such property at any price, such material is waste. Section 203(4) of the Solid Waste Disposal Act provides that:
>
> > (4) The term "solid waste" means garbage, refuse, and other discarded solid materials, including solid-waste materials resulting from industrial, commercial, and agricultural operations, and from community activities, but does not include solids or dissolved material in domestic sewage or other significant pollutants in water resources, such as silt, dissolved or suspended solids in industrial waste water effluents, dissolved materials in irrigation return flows or other common water pollutants.

The Regulations presently provide a straightforward two-part test for determining whether material is solid waste: (i) the material must be solid, and (ii) it must have no market or other value on the date the bonds are issued. The Regulations provide no further definition of or

limitation on the term "solid waste" for these purposes. In particular, there is no provision in the Code, the 1954 Code, or the Regulations that indicates that the qualification as solid waste for purposes of section 103(b)(4)(E) of the 1954 Code or 142(a)(6) of the Code is in any way dependent on whether the waste is radioactive or is otherwise dangerous to store or handle.

B. The IRS Consistently Has Interpreted the Term "Solid Waste Disposal Facility", as Contained in Section 142(a)(6), as Including Radioactive Solid Waste.

In all of its prior public pronouncements as to the status of radioactive and hazardous solid waste the IRS consistently has ruled that the material is solid waste, provided that it otherwise met the definitional requirements (i.e., it was "solid" and "waste"). Thus, for example, in LTR 8506113 the IRS considered the application of the tax-exempt financing rules to radwaste facilities installed in connection with the construction of a nuclear power plant. In this case the taxpayer requested rulings concerning its proposed issuance of tax-exempt bonds to finance pollution control facilities[10] (within the meaning of Section 103(b)(4)(E) of the 1954 Code) and solid waste facilities at the plant, including the "Solid Radwaste Facility" ("SRF"). The ruling states that the SRF was to collect radioactive solid waste from the liquid radwaste facility, radioactive resins used as filter media in demineralizers, and radioactive trash. The ruling further states that the taxpayer had represented that the waste was "useless and totally without value." The IRS ruled that "the radioactive resins and trash are solid wastes within the meaning of section 1.103-8(f)(2)(ii)(b) of the Regulations."

Several other rulings are to the same effect. *See* LTR 8326082 (which superseded and modified LTR 8310095) which holds that "the [facility for disposing of solid radioactive waste] is designed and will be used to dispose of material that qualifies as solid waste within the meaning of 1.103-8(f)(2)(ii)(b) of the regulations." *See also* LTR 8332143, ("Solid Radwaste System" was "a solid waste disposal facility under section 1.103-8(f)(2)(ii)(*b*) of the Regulations"); and LTRs 8435020 and 8406040 (both relating to the same project). We are not aware of any rulings prior to the 1986 Tax Act that addressed the issue of hazardous waste as such, but there have been two such rulings since then. See discussion below.

C. The Term Solid Waste, as Used in the Solid Waste Disposal Act, Includes Solid Waste that is Radioactive and Hazardous.

Treas. Reg. § 1.103-8(f)(2)(ii)(b) provides, in part, that "the term 'solid waste' shall have the same meaning as in section 203(4) of the Solid Waste Disposal Act," (the "Solid Waste Disposal Act") and goes on to quote the language of section 203(4). There is nothing in the quoted language that in any way purports to limit the definition of solid waste to material that is not radioactive or hazardous. Nor is there any indication in the legislative history of the Solid Waste Disposal Act that suggests that any such limitation was intended. Subsequent action by Congress confirms this interpretation. The Solid Waste Disposal Act, which was enacted in 1965 as P.L. 89-272 (as originally enacted, the "1965 Act")[11], was amended in 1970 by the

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10 Under the 1954 Code, "air or water pollution control facilities" was an exempt category under section 103(b)(4)(F).

Resource Recovery Act of 1970, P.L. 91-512 (the "1970 Act"). The 1970 Act made no change to the definition of solid waste in section 203(4). The 1970 Act did, however, add a new section 212 to the 1965 Act that required the Secretary of Health, Education, and Welfare to submit to Congress

> a comprehensive report and plan for the creation of a system of national disposal sites for the storage and disposal of hazardous wastes, including radioactive, toxic chemical, biological and other wastes which may endanger public health and welfare.

As stated in the Senate report on the 1970 Act (S. Rep. No. 91-1034, 91st Cong., 2d Session (1970)) (the "1970 Senate Report"), "hazardous materials are often present in solid wastes." 1970 Senate Report at 16. The 1970 Senate Report goes on to state that "it is the opinion of the committee that further information is needed on the desirability and feasibility of a system of solid waste disposal sites for hazardous materials." *Id*. In identifying the types of hazardous solid waste that the study should address, the 1970 Senate Report, like new section 212 of the Act, specifically listed radioactive waste.

There were no further changes to the Act made before 1972[12] when Treas. Reg. § 1.103-8(f)(2)(ii)(*b*) was adopted and the language of section 203(4) incorporated into the Regulations. Thus, at the time the regulatory definition of solid waste was promulgated by Treasury the specific statutory solid waste definition cross referenced by section 1.103-8(f)(2)(b)(ii) clearly included radioactive solid waste.

D. Government Arguments.

Although the IRS and Treasury have not issued any definitive statement of the basis for the conclusion that radioactive and hazardous wastes are excluded from the definition of solid waste

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(...continued)

[11] As stated in section 202(b) of the 1965 Act, its purposes included the initiation and acceleration of "a national research and development program for new and improved methods of proper and economic solid-waste disposal," and to that end provided for modest annual appropriations (ranging up to $32,500,000) through the fiscal year ending June 30, 1969 to carry out its purposes. In 1968 the 1965 Act was extended for one year at approximately the same funding level. P.L. 90-574. The 1968 extension did not modify the language of section 203(4).

[12] The Solid Waste Act was amended and recodified extensively by the Resource Conservation and Recovery Act of 1976, Pub. Law 94-580. At that time the provision originally enacted as section 203(4) of the 1965 Act was amended by adding some types of waste (e.g., liquid and contained gases) to the definition and excluding others (in the latter case, largely for agency jurisdictional reasons). As illustrated by the rulings relating to radioactive solid waste, discussed above, and LTR 9143036, discussed below (see footnote 6), these changes were not viewed as modifying the definition of solid waste for purposes of the tax-exempt financing rules.

for purposes of section 142(a)(6) of the Code, there have been various arguments made by governmental personnel in public discussions of the Proposed Regulations and in the context of administrative actions involving specific bond issues. These arguments, as discussed in more detail below, all derive from the language and legislative history of the 1986 Tax Act. These arguments are discussed below.

Argument 1. That the Legislative History of the 1986 Tax Act States that Radioactive Waste and Hazardous Waste are Excluded from the Definition of Solid Waste Under Code § 142(a)(6)

Conference Report Language. As shown above, before 1986 the plain language of section 103(b)(4)(E) of the 1954 Code and Treas. Reg. § 1-103-8(f)(2)(ii)(b), the Solid Waste Disposal Act definition of solid waste as incorporated into that regulation, and the IRS interpretation of these rules as set forth in several IRS rulings on this issue, all lead to the conclusion that radioactive solid waste material and hazardous waste were not excluded from the definition of solid waste for purposes of section 103(b)(4)(E). Additionally, as acknowledged by the IRS (see, e.g., LTR 200226002), the pre-1986 Tax Act definition of the term solid waste was "imported" into the post 1986 Tax Act version of the solid waste financing rules. Thus, there should be no need for a further analysis of the 1986 Tax Act. Nevertheless, the IRS, in written discussions of this issue in the context of the administrative actions described above, spends considerable effort analyzing the language and legislative history of the 1986 Tax Act, particularly those portions relating to solid waste disposal facilities and the addition of the new exempt facility category for qualified hazardous waste disposal facilities described in sections 142(a)(10) and 142(h).

In this regard, these discussions have focused focus closely on a sentence in the conference report for the 1986 Tax Act which states that "[t]he conferees wish to clarify that solid waste does not include most hazardous waste (including radioactive waste)." Conf. Rep. No. 99-841, 1986-3 C.B. Vol. 4 (the "Conference Report") at II-704. From this language (and the language in the Blue Book discussed below) the IRS and Treasury apparently draw the conclusion that neither hazardous nor radioactive solid waste are included within the definition of solid waste for purposes of section 142(a)(6). What thus far has not been made clear is whether this means that the term solid waste never included such materials or whether the exclusion arose as a result enactment of the 1986 Tax Act.

Correct Interpretation of Conference Report Language. We believe that this conclusion completely misconstrues the sentence in question. As to the reference to "most hazardous waste (including radioactive waste)," we believe this language merely alludes to the fact that most of such waste is either liquid or gaseous, and thus falls outside the well established scope of the solid waste definition. This interpretation is confirmed by the Conference Report's discussion of the new hazardous waste rules, where it states, in its discussion of then present law, that "solid waste facilities do not include facilities disposing of liquid or gaseous waste, including most hazardous waste." Conference Report at II-706. Absolutely nothing in this language indicates that Congress had any intent to impose any new limitation on the scope of the solid waste definition as it applied to solid hazardous or radioactive waste.

The Blue Book. In public comments about the Proposed Regulation Treasury officials, in justifying the position taken as to radioactive and hazardous waste, also have cited the Blue Book, which states that "Congress did not intend the term solid waste to include hazardous waste, including any radioactive waste." Taken at face value the language would appear to support the conclusion reflected in the Proposed Regulations.

Upon a more careful examination, however, we think it is clear that reliance on the language in the Blue Book is even less well founded than reliance on the Conference Report language. First, and most important, the quoted language essentially misquotes the Conference Report in that it omits the word "most" before the phrase "hazardous waste." Stated simply, this completely changes the meaning of the sentence. Thus, as a matter of syntax, the notion that solid waste does not include "most hazardous waste (including radioactive waste)" necessarily indicates that it does include some of such waste. In addition, as a matter of statistics, over 75% of hazardous waste is liquid, a fact implicitly acknowledged in the Conference Report. Thus, a statement to the effect that solid waste does not include most hazardous waste is obviously correct, without any implication that it does not include hazardous waste that is solid.

Second, and equally important, the courts consistently have held that Blue Book[13] language such as that in question is accorded little if any weight where, as here, the statute is unambiguous and the Blue Book is inconsistent with the statute and the legislative history of the provision in question.[14] We also note that the IRS and Office of Chief Counsel have taken the same view of Blue Book language. Thus, in LTR 9330002, discussed in Blue Cross & Blue Shield United of Wisconsin v. U.S., 56 Fed. Cl. 697 (2003), the IRS argued that the Blue Book for the provision in question and a Senate colloquy containing similar language were incorrect and contrary to the language of the statute at issue. The IRS determined that the unambiguous language of the statute on its face did not permit the interpretations given by the Blue Book and the Senate colloquy. In so arguing, it found that generally the "Blue Book does not rise to the level of legislative history because it is authored by congressional staff and not by Congress."

Finally, any perceived support for the Blue Book language thought to be derived from the floor colloquy of Chairman Rostenkowski is materially undercut by two factors. First, the colloquy was delivered on October 2, 1986, after the Conference Report had been considered and voted on by the House (September 25, 1986) and the Senate (September 26 and 27, 1986). Thus, it was not in any sense part of the record at the time of those votes. Second, as noted twice by

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13 The term Blue Book, as used here, refers generically to general explanations of tax legislation prepared from time to time by the Joint Committee staff.

14 See, e.g., Rivera v. Commissioner, 89 T.C. 343, 349 (1987) ("[T]he General Explanation does not technically rise to the level of legislative history because it is authored by a congressional staff and not by Congress."); Estate of Hutchinson v. Commissioner, 765 F.2d 665, 669-70 (7th Cir. 1985) (General Explanation "does not rise to the level of legislative history, because it was authored by Congressional staff and not by Congress," but can be indicative of what Congress did in fact intend when the staff views that are expressed are consistent with whatever other evidence of legislative intent is present).

Chairman Rostenkowski, a floor colloquy delivered with respect to a bill crafted in conference, such as the 1986 Tax Act, is of little import unless delivered in both the House and Senate.[15] NABL is aware of no statement in the Senate supporting the Blue Book statement, or for that matter dealing with radioactive or hazardous solid waste in any respect.

Post-1986 IRS Interpretation. The interpretation suggested by the IRS and Treasury in the context of the Proposed Regulations and the administrative proceeding also is inconsistent with the view taken by the IRS in rulings and other informal advice since enactment of the 1986 Tax Act. Most recently, in FSA 200207010 the Service ruled that a facility that processes solid hazardous waste can qualify as a solid waste disposal facility as defined in section 142(a)(6) of the Code. The FSA held that the fact that the waste material in question was hazardous waste did not prevent the facility from qualifying as an exempt solid waste disposal facility. The FSA noted that Treas. Reg. § 1.103-8(f)(2)(ii) does not exclude hazardous waste from the definition of solid waste and that section 142 of the Code does not contain any language indicating that a facility that treats a waste material that is both solid and hazardous cannot be financed with solid waste disposal facility bonds if the facility otherwise meets the Code requirements for solid waste disposal facility bonds. Finally, the ruling states that the legislative history of the hazardous waste rules supports the conclusion reached. Thus, it states that:

> The legislative history to the 1986 Act supports our conclusion. As noted above, the Conference Report to the 1986 Act states that solid waste disposal facilities do not include facilities disposing of liquid or gaseous wastes, including most hazardous wastes. It appears that Congress, in enacting 142(a)(10), was operating from the premise that most hazardous waste is liquid or gaseous, so that most hazardous waste processing facilities could not be financed as solid waste facility bonds. By addition of the provision allowing for tax-exempt financing of qualified hazardous waste facilities, *Congress apparently meant to expand the types of hazardous waste disposal facilities that can be financed with tax-exempt bonds; but not to change current law governing solid waste disposal facility bonds* [emphasis added]."

The analysis in the ruling as to the effect of the 1986 Tax Act is essentially identical to our analysis as set forth in these supplemental comments. The FSA rejects any notion that the language and legislative history of the relevant provisions of the 1986 Tax Act were in any way intended to impose new limitations on the scope of the existing solid waste rules. More specifically, the FSA rejects the conclusion that the 1986 Tax Act's hazardous waste rules

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[15] Thus, in his remarks to the Congress on September 25, 1986, Mr. Rostenkowski stated the following regarding the effect of colloquies with other members of Congress regarding the intent behind, or effect of, specific provisions in the tax legislation:

> [B]ecause we are discussing a conference agreement rather than a bill of merely one House of the Congress, for a colloquy to be considered as reflective of the conference agreement, it should be discussed in substantially similar manner in both the House and the Senate. Otherwise, the views expressed can be considered only the views of one House and not necessarily reflective of the decisions made by the conferees.

impose - or confirm the existence of - any additional restrictions on facilities for handling solid wastes that happen to be hazardous or dangerous.

The IRS originally addressed the same issue in 1989. See LTR 8924009. The facts and analysis were comparable to that in FSA 200207010 discussed above. In the 1989 ruling the IRS held that:

> By representation, some or all of this solid waste will be hazardous. The Conference Report for the Tax Reform Act of 1986 makes it clear, however, that solid waste does not include most hazardous waste (1986-3 Vol. 4) C.B. II-683, 704). Further on in this report, it is noted that solid waste disposal facilities do not include facilities disposing of liquid or gaseous wastes, including most hazardous waste, (at II-706). It appears that Congress, in enacting section 142(a)(10) of the Code, was operating from the premise that most hazardous waste is liquid or gaseous, so that most hazardous waste processing facilities could not be financed under existing laws in regard to exempt facility bonds. By addition of the provision allowing for tax-exempt financing of qualified hazardous waste bonds, Congress apparently meant to correct this deficiency in the law and not to change current law governing solid waste disposal bonds. Therefore, solid waste may include hazardous waste as long as it is not liquid or gaseous in form.

The fact is that, in the tax-exempt bond area, by implicit mutual agreement, rulings such as LTR 8924009 often were the method used to convey or "signal" IRS legal positions. What is equally, if not more important, is that less than 18 months after publication of the Blue Book, the IRS advised the tax-exempt bond community by this LTR that solid waste financing was available for hazardous and radioactive solid waste, and now, 18 years later, the IRS and Treasury are attempting to change that conclusion on the basis of legislative history that is, at best, ambiguous, and at worst, affirmatively misleading.

Argument 2. The Addition of Section 142(a)(10) to the List of Exempt Facilities Alters the Determination of what Constitutes a "Solid Waste" for Purposes of Section 142(a)(6)

The IRS Analysis. In the context of the administrative proceeding referred to above the IRS has argued that the 1986 Tax Act's addition of new sections 142(a)(10) and 142(h), providing for financing of "qualified hazardous waste facilities," supports the conclusion that Congress intended to restrict financing for radioactive and hazardous solid waste facilities. First they have asserted - correctly - that the definition of qualified hazardous waste facilities, as contained in section 142(h), and the legislative history of that rule, make it clear that radioactive waste is not within its scope. From this premise, however, the IRS has made an argument that we believe is totally inconsistent with the provisions of both the Code and the Regulations. In short, the IRS argues that Congress, by adopting the qualified hazardous facility rules, created an exclusive category for tax-exempt financing of facilities for processing waste that is inherently dangerous. Thus, it was argued, if material is dangerous to handle (as in the case of radioactive or hazardous solid waste) but does not fit within the specific requirements of sections 142(a)(10) and 142(h), it cannot be financed under any other exempt facility category, apparently notwithstanding the fact

that it may also be material that would otherwise fit within the definition of solid waste under section 142(a)(6).

The IRS based this argument on two purportedly applicable canons of statutory construction: (i) the canon to the effect that "the specific governs over the general," and (ii) the "plain meaning" rule. As we understand the argument on the first point, the solid waste provision under section 142(a)(6) is the "general" rule, and the qualified hazardous waste facility rule in sections 142(a)(10) and 142(h) is the "specific" rule. The IRS argued that any issuer considering the application of the exempt facility rules to a facility for disposing of waste that is hazardous must apply the test of section 142(h), and if the facility does not meet the requirements of that section it is not an eligible facility under section 142, without regard to whether the facility met the requirements of another provision of section 142 – *i.e.*, the solid waste rule in section 142(a)(6).

Application of Canons of Construction. We believe this argument completely misapplies the canon relating to the specific prevailing over the general.[16] The issue here involves a statute written in the disjunctive (i.e., bonds are exempt facility bonds if proceeds "are used to be used provide (1) airports, (2) . . . or (13) qualified public educational facilities"). It is well established that such statutes generally are to be construed as "setting out separate and distinct alternatives." United States v. Behnezhad, 907 F.2d 896, 898 (9th Cir.1990). Thus, a disjunctive "or" ordinarily means that the conditions stand on equal footing and that compliance with any one condition satisfies the requirement. Kiernan v. United States Railroad Retirement Board, 698 F.2d 1067, 1072 (10th Cir.1983). As stated by another court, "normally, use of a disjunctive indicates alternatives and requires they be treated separately unless such a construction renders the provision repugnant to the Act." George Hyman Const. Co. v. Occupational Safety and Health Review Commission, 582 F.2d 834, 840 n. 10 (4th Cir.1978). Thus, where a statute involves provisions separated by a disjunctive, the statute is satisfied if any of the provisions is met, and a court need not, and will not, undertake an analysis of the specificity or generality of each of the provisions.

The proposed reading of the hazardous waste rules also is inconsistent with section 150(b)(4) of the Code, which provides for penalties in the case of a "change of use" of facilities financed with exempt facility bonds. Under this provision, there is a change of use if "such facility is not used for a purpose for which a tax-exempt bond could be issued on the date of such issue." Stated differently, and contrary to the implication of the IRS argument, the use of a facility will continue to qualify (i.e., there is no change of use) if the facility is used for any purpose listed in section 142(a), not the just one that is the most "specific."

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16 The IRS appears to limit its reliance on the plain meaning rule to its discussion of the scope of the qualified hazardous waste facility rules. As discussed below, it does not appear to apply this test to its own analysis of the actual language of section 142. Thus, in describing the requirements of section 142(a)(6), the IRS stated in a document submitted to the taxpayer that "the only requirements are that the material be waste and solid." Under this reading it is clear that a facility for storing radioactive waste that is both waste and solid fits within the definition of section 142(a)(6).

Plain Meaning. We believe that this argument also ignores the plain language of the statute. Section 142(h), by its terms, defines the term qualified hazardous waste facilities "for purposes of subsection (a)(10)." There is no indication that Congress intended the provision to have any effect on the interpretation of section 142(a)(6) or any other provision of section 142. There also is no indication in the statute or legislative history to suggest that Congress intended to make section 142(a)(10) and section 142(h) in any way determinative of the qualification of facilities under any other exempt facility category in section 142.

IV. CONCLUSION

As shown above, the Treasury and the IRS, in asserting that radioactive waste and hazardous material cannot qualify as solid waste under section 142(a)(6), are reaching legal conclusions that (i) are inconsistent with the plain language of the statute and Regulations, (ii) inconsistent with the longstanding IRS ruling position on the question, and (iii) inconsistent with the plain language and legislative history of the definition of solid waste in the Solid Waste Disposal Act. In addition, in reaching these conclusions the Treasury and the IRS adopt novel readings of the 1986 Tax Act and its legislative history that are both unsupported by the applicable statutory and legislative language and inconsistent with the IRS's reading of these provisions. Under these circumstances we submit that proposed rule should be deleted.