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December 15, 2009

Internal Revenue Service
CC:PA:LPD:PR (REG-140492-02)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Proposed Regulations Addressing the Definition of Solid Waste Disposal Facilities for Tax-Exempt Bond Purposes (REG-140492-02)

Ladies and Gentlemen:

The National Association of Bond Lawyers ("NABL") respectfully submits the enclosed comments relating to the proposed regulations in REG-140492-02, Definition of Solid Waste Disposal Facilities for Tax-Exempt Bond Purposes (the "Proposed Regulations"), which were published in the Federal Register on September 16, 2009. These comments were prepared by NABL's Tax Law Committee, under the leadership of Charles S. Henck and Perry E. Israel.

I want to re-emphasize that NABL acknowledges and appreciates the substantial efforts made by the Department of the Treasury and the Internal Revenue Service in the preparation of the Proposed Regulations. The Proposed Regulations offer substantial improvements over both the previously proposed regulations and the existing rules, and NABL believes that the Proposed Regulations as written need only a few minor changes to provide truly excellent guidance. Our comments should be viewed in the light of our overall appreciation of the approaches taken by the Proposed Regulations and the considerable time and effort put into their current state.

NABL believes that its participation in the administrative guidance process can aid in the development of, and thereby improve compliance with, the law in the field of public finance. Accordingly, NABL and its members would welcome the opportunity to discuss the enclosed comments or any other aspect of the Proposed Regulations with representatives of the Department of Treasury and the Internal Revenue Service in order to assure that the final regulations defining solid waste disposal facilities are as clear and administrable as possible.

If you have any questions regarding the enclosed comments, please contact Charles S. Henck at (202) 661-2209 or via email at henck@ballardspahr.com.

Sincerely,

Kathleen C. McKinney

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NABL COMMENTS ON REG-140492-02, PROPOSED REGULATIONS ADDRESSING THE DEFINITION OF SOLID WASTE DISPOSAL FACILITIES FOR TAX-EXEMPT BOND PURPOSES

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National Association *of* Bond Lawyers

COMMENTS BY
THE NATIONAL ASSOCIATION OF BOND LAWYERS
TO THE INTERNAL REVENUE SERVICE
REGARDING
NOTICE OF PROPOSED RULEMAKING REG-140492-02

DECEMBER 15, 2009

I. INTRODUCTION

The National Association of Bond Lawyers ("NABL") submits the following comments on proposed rulemaking REG-140492-02 (the "Proposed Regulations") concerning the definition of solid waste disposal facilities. The comments were prepared by an *ad hoc* subcommittee of the NABL Tax Law Committee (the "Committee"). 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. 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 answer any questions that the comments may raise.

NABL is a nonprofit organization comprised of more than 3,000 members. It exists for the purpose 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 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.

II. BACKGROUND

The Law. Section 103(b)(1) of the Internal Revenue Code of 1986, as amended (the "Code") provides that interest on a state or local bond that is a private activity bond will be excluded from gross income if 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) of the Internal Revenue Code of 1954 (the "1954 Code") under which tax-exempt industrial development bonds

could be issued where "substantially all" (generally interpreted as 90%) of the proceeds of the issue 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 Tax Reform Act of 1986, Public Law 99-514 (hereafter, the "1986 Tax Act") [1] provides, in effect, that the definition of solid waste disposal facilities in the 1954 Code is generally imported into section 142(a)(6) of the Code.

Definition of Solid Waste – Existing 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." However, the term is defined in Treasury regulations (the "Existing 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. In general, the Existing Regulations provide that "solid waste disposal facilities" are property used for the collection, storage, treatment, utilization, processing or final disposal of solid waste. (Treas. Reg. § 1.103-8(f)(2)(ii)(a).) Treas. Reg. § 1.103-8(f)(2)(ii)(b) further 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.

Dual Function Facilities. Temp. Treas. Reg. § 17.1(a) provides that if a facility performs both a solid waste disposal function and any other function (a "dual function" facility) the qualified cost of the facility is determined by allocating the cost of the facility between its qualifying and non-qualifying functions by "any method . . .which . . . reasonably reflects a separation of the costs for each function of the property." In the case of a recycling facility, section 1.103-8(f)(2)(c) of the Existing Regulations provides, in effect, that no allocation is required if at least 65% of the material entering the process, determined by weight or volume, is solid waste. This rule generally is referred to as the 65% rule.

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[1] In 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.

First Product Rule. Temp. Treas. Reg. § 17.1(a) also provides a specific rule for determining the extent of the solid waste recycling process. 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,

> 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.

The Audit Program and Industry Response. Beginning in the mid 1990s, the IRS 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 audit efforts raised important – and often troubling – questions about the proper interpretation of the Existing Regulations, particularly as they related to recycling facilities. In response to these concerns NABL submitted comments to the IRS and Treasury on March 21 and June 22, 2001, addressing the application of the Existing Regulations to recycling facilities.

2004 Proposed Regulations and NABL Comments. On May 4, 2004 the IRS and Treasury released a Notice of Proposed Rulemaking (the "2004 Notice") containing new proposed regulations (Prop. Treas. Reg. § 1.142(a)(6)-1 (the "2004 Proposed Regulations")) relating generally to the definition of solid waste facilities for purposes of section 142(a)(6) of the Code. NABL submitted comments ("2004 NABL Comments") with respect to 2004 Proposed Regulations and provided written and oral testimony at the hearing with respect to this proposal. In general, the 2004 NABL Comments contained detailed comments as to both the basic structure and specific provisions of the 2004 Proposed Regulations.

III. THE PROPOSED REGULATIONS

A. Summary of Proposal

On September 16, 2009 the IRS and Treasury issued a notice that withdrew the Notice of Proposed Rulemaking setting out the 2004 Proposed Regulations and published in their place the Proposed Regulations.

Basic Structure: The Proposed Regulations revert to the structural approach used in the Existing Regulations; *i.e.*, they provide a functional definition of solid waste and then define a solid waste facility as a facility that deals with that waste.

Solid Waste Definition: As under the 2004 Proposed Regulations, the Proposed Regulations eliminate the no-value test. The Proposed Regulations define solid waste as garbage, refuse and other solid material that is either "used" or "residual" material. The fact that a recycler pays some amount for the material does not affect its status as solid waste provided that the material is to be introduced into a qualified solid waste process within a reasonable time after such acquisition.

"Used material" is defined as "any material that has been used previously as a component of an agricultural, commercial, consumer or industrial product or as a component of any such product."

"Residual material" is defined as "residual byproduct or excess unused raw material that remains from the production of any agricultural, commercial, consumer or industrial product." The proposed rule provides further that (a) material is residual material "only to the extent that it constitutes less than 5% of the total material entering the process," and (b) "it has a fair market value that is reasonably expected to be lower than that of any product made in that production process."

The Proposed Regulations contain a list of specified exclusions:

a. Virgin material (unless it is residual material).

b. Solids within liquids and gas.

c. Specified precious metals.

d. Hazardous material.

e. Radioactive material.

Qualified Solid Waste Process. The Proposed Regulations describe a "qualified solid waste disposal process" as including (i) a final disposal process (*e.g.*, a landfill), (ii) an energy conversion process (*e.g.*, a waste-to-energy process), or (iii) a recycling process (*e.g.*, a waste paper recycling operation), all as defined more fully in the Proposed Regulations.

First Useful Product Rule. The Proposed Regulations provide rules for determining the endpoint of an energy conversion facility or a recycling facility. In general, the Proposed Regulations provide that the qualifying scope of the process ends at the point where the first usable energy or product is produced in a form that can be sold for consumption in an agricultural, consumer, commercial or industrial operation or activity, whether or not the material or energy actually is sold.

Mixed Use Facilities. The Proposed Regulations provide generally that the qualifying cost of facilities used for both a qualifying solid waste disposal function and some other function ("dual function facilities") is determined by allocating costs to the qualifying function using any reasonable basis, based on all the facts and circumstances. These rules provide further that in the case of mixed input processes (*e.g.*, a process into which both solid waste material and other material is introduced) the qualifying percentage is the average annual percentage of waste introduced into the process. The average introduced in any year is determined on the basis of the average percentage, by weight or volume, of the total materials entering the process. Finally, the rule provides that if the average solid waste input is at least 65% then all of the costs of the process are treated as allocable to solid waste disposal.

B. **NABL Comments**

In General

We believe that the Proposed Regulations are a significant improvement over the 2004 Proposed Regulations. We believe that they address many of the concerns NABL had expressed previously with regard to both the interpretation of the Existing Regulations and the structure and language of the 2004 Proposed Regulations, and we very much appreciate the efforts of the Treasury

Department and the IRS in addressing this important area of the law. Most importantly, although we have a number of technical comments about the Proposed Regulations, and some concerns that we feel remain to be addressed, we believe the Proposed Regulations provide a sound structural foundation for dealing with most of the significant issues that have concerned practitioners in this area of the law.

In particular, we believe the decision to adopt the fundamental structure of the Existing Regulations by providing a functional definition of solid waste and further defining qualifying facilities as those facilities that deal with that waste was absolutely essential. Moreover, the clearly stated objective of encouraging recycling addresses an important policy concern. Our comments below should be understood in the context of our overall appreciation of the substantial effort that went into making the Proposed Regulations such clear guidance and our wish only to improve that clarity.

Technical Comments

Although we are in agreement with both the structural approach of the Proposed Regulations and the philosophy they evidence, we believe there are technical issues that should be addressed so that the Proposed Regulations better achieve the desired goals of the IRS and Treasury. Our comments are set forth below. Except as noted section and paragraph references are to sections and paragraphs of the Proposed Regulations. Where appropriate we have suggested specific regulatory language that we believe would effect our suggested changes. For your convenience our suggested changes are shown in a blacklined copy of the Proposed Regulations that is attached to these comments as Exhibit A. In addition, proposed new language set forth in these comments is shown in italics.

1. Section 1.142(a)(6)-1(c) - Definition of Solid Waste

The definition of solid waste is set forth in section 1.142(a)(6)-1(c) and provides generally that "garbage, refuse, and solid material derived from any agricultural, commercial, consumer, or industrial operation or activity" is solid waste if it meets the requirements of paragraphs (c)(1)(i) (*i.e.*, it is either "used" material or "residual" material) and (c)(1)(ii). As discussed more fully below, our basic concern with this provision is that for technical reasons both the introductory language paragraph found in paragraph (c)(1) and the language of paragraphs (c)(1)(i) and (ii) could be read to preclude material from being treated as waste in cases where it appears not to be the intended result.

a. Paragraph (c)(1) – Additional activities

We believe that the introductory language should be modified to make clear that the term solid waste generally can include materials generated as a result of governmental and mining activities. Also, consistent with existing law we believe it would be appropriate to add language clarifying that whether a material is solid is to be determined when that material is at ambient temperature and pressure. *See* PLR 9143036.

b. Paragraph (c)(1)(i)(A) – Used material

The definition describes used material as "any material that has been used previously as an agricultural, commercial, consumer or industrial product or as a component of such product." For reasons set forth in detail below we believe the rule should be modified to provide that it also

includes material produced as a result of governmental operations and mining operations. We suggest the following language:

> *The term used material means any material that has been used previously as an agricultural, mining, commercial, governmental, consumer, or industrial product or as a component of any such product, or in connection with an agricultural, mining, commercial, governmental, consumer, or industrial process the primary purpose of which is not the production of such material.*

c. Paragraph (c)(1)(i)(B) – Residual material

This definition describes residual material as a "residual byproduct" or excess unused raw material remaining "from the production of any agricultural, commercial, consumer, or industrial product, provided (i) that the material constitutes less than 5% of the total material introduced into the production process and (ii) that it have a fair market value that is reasonably expected to be lower than that of any product made in the production process. Although we agree with the intent of this definition, there are technical issues which we would suggest be clarified as discussed below.

- Residual material definition. As noted above the residual material definition refers to materials derived from the production of any "agricultural, commercial, consumer, or industrial product." As written, there are some technical problems applying this definition.

  - The rule does not clearly address circumstances where the residual material is produced during the provision of a service (*i.e.*, where there is no "product"). This could be the case, for example, where market coal is burned to produce energy and ash is produced. Other examples include waste material generated during maintenance operations (*e.g.*, material produced when grass is cut, brush is cleared, or buildings are demolished). Perhaps this issue could be addressed in part by adjusting the definition of "used material" as discussed above. Nevertheless, we believe the definition of residual material also should be adjusted to deal with this concern. See suggested language below.

  - We believe the rule should be modified to provide that the term covers material produced by governmental units carrying out their ordinary governmental functions. In many cases this material will be disposed of or recycled by private entities and there should be no question that this material is waste.

  - We note that Example 3 of the Proposed Regulations clearly envisions that solid waste eligible for qualification may be generated from mining activities. Although mining activities might be characterized as industrial activities, we suggest the final regulations modify the provision so that the inclusion of mining activities is made explicit.

  - An additional concern relates to the interpretation of the term "process" in the context of multiple processes operated at the same site. We believe that the Proposed Regulations should be modified to make clear that a single site might contain more than one "process." For example, an integrated paper operation might have a chipping process that produces pulp quality wood chips and also bark as a residual material (*e.g.*, as described in Example 10), and an operation that uses

the chips to produce paper (which produces both broke and trim pieces as residual material). Either of these operations could be conducted separately by different companies and the fact that they are conducted at the same site by the same company should not disqualify the "process."

- The 5% test: The most significant issues with respect to the residual material definition stem from the 5% test. To be sure, there are technical concerns (*e.g.*, how is it measured; at what points in the process; by whom; how is the determination made if the acquiring party is not the generator of the material), but the fundamental concern is that the test poses insurmountable challenges.

    - This is illustrated by several of the examples in the Proposed Regulations, specifically Examples 2 (residual material from oil refining), 3 (waste coal), 10 (bark stripped from logs). In each case the facts state that the residual material meets the 5% test. In practice, however, the material in these examples would not actually meet the 5% test.

    - For example, in a typical oil refining operation we understand that on a per barrel basis the percentage per barrel represented by the residual material described in Example 2 can range from around 10% to 40% or more of oil introduced into the refining process, depending on the type of oil being processed (*e.g.*, whether it is a "light" or "heavy" crude) and the age of and technology used at the refinery. Similarly, we understand that in a typical logging operation, as described in Example 10, bark might comprise 15% or more of the weight of the log. Finally, as to waste coal, the material used in typical waste-coal fired power plants has been generated over a period of many decades, and it is still being created in coal mining operations. Depending on the type of mine (surface or deep mine), the quality of the coal, and the manner in which it is processed, the material comprising "waste coal" could range from around 10% to 50% of the material removed from the mine.

    - There are numerous other materials that would readily be recognized as residual material under the current definition, such as many types of agricultural waste, but which also would not meet this test. For example, we understand that the waste material produced from sugar cane processing (*e.g.*, the residual fibrous waste produced when the cane is pressed to remove to juice – referred to as baggasse) can comprise 30% of the weight of the cane introduced into the sugar mill).

    - Whatever the precise percentage represented by the waste residual material, the basic point is that the percentage of material has no particular relevance in determining whether the material is properly treated as solid waste.

    - In addition to the fact that the 5% test would preclude waste treatment for many – if not most – materials that were intended to qualify as solid waste, in many cases it would be difficult, if not impossible, to determine whether the material met the test. This would be true, for example, where the residual material produced by one party is acquired by another for a recycling operation (*e.g.*, as in the case of certain types of pre-consumer waste paper).

- Although an increase in the threshold percentage might reduce the apparently unintended consequences of this rule there is no reason to believe that any particular percentage would not inappropriately exclude a residual material from the definition of solid waste. Further, we can think of no circumstances where material that should not be treated as solid waste would not also be excluded by a properly applied fair market value test. Accordingly, we recommend that the test be deleted.

- Fair market value test. As noted above the rule provides that material is not residual material unless "it has a fair market value that is reasonably expected to be lower than that of any product made in that production process." This phrasing of the rule raises some technical issues.

  - First, the rule should be modified to allow more than one residual material to be produced in a production operation. This can be accomplished by (i) changing the phrase "to be lower than" to "*to be no higher than*" the benchmark fair market value, and (ii) specifying that the "product" generating the benchmark fair market value must be a product sold in the ordinary course of business, and not another residual material.

  - Second, while we are comfortable with using the concept of "fair market value," we believe the rule should make clear that the phrase "other product" in the last sentence does not include other residual materials. This will avoid situations in which taxpayers are treated differently depending on whether or not they combine more than one process at one site. Thus, for example, assume that a company is engaged in a pulp and paper making operation. The process produces waste in the form of bark from the pulping operation and pre-consumer waste paper from the paper making operation. Assume further that the company is able to sell the pre-consumer waste paper for a nominal sum to waste paper recyclers. Both the bark and the pre-consumer waste paper should be treated as solid waste since the fair market value of each residual material is not higher than that of any product made by the process for sale in the ordinary course of business.

  - Finally, assuming that the residual material definition is modified to deal with material generated by a process that does not produce a material or product intended for sale (*e.g.*, material produced as a result of maintenance operations), we believe the test should reflect the fact that there is no "product" for sale in the ordinary course of business and therefore no application of the fair market value test.

  To address the concerns described above we recommend that the provision be reworded to read as follows:

  Residual material. The term residual material means one or more residual byproducts or excess unused raw materials that remain (i) from any agricultural, commercial, mining, consumer, governmental or industrial process that does not produce a product for sale in the ordinary course of business, or (ii) from the production of any agricultural, commercial, mining, consumer, governmental or industrial product, provided that material produced in connection with the production of a product qualifies as residual material if it has a fair market

value that is reasonably expected on the date of issue of the bonds to be no higher than that of any other product made in that production process for sale in the ordinary course of business.

2. Paragraph (c)(1)(ii). Reasonably expected to be introduced into a qualified solid waste disposal function.

Under the general rule of paragraph (c)(1) material is not solid waste unless the "it is reasonably expected by the person who purchases or otherwise acquires it to be introduced within a reasonable time after such purchase or acquisition into a qualified solid waste process . . . ." This provision should be clarified to make clear that the waste need not be acquired by a third party. We recommend that the language be amended by changing the phrase "person who purchases or otherwise acquires" to "*person who generates, purchases or otherwise acquires*."

3. Paragraph (c)(2)(i). Exclusions from solid waste.

a. Paragraph (c)(2)(i). Virgin material.

The proper application of this rule depends directly on whether the definitions of used material and residual material are modified to address the issues described above. For example, assume that biomass (e.g., grass cuttings, brush cleared from building sites) is generated during construction or maintenance operations. This material should be treated as solid waste (*i.e.,* as used material or residual material – or both) so that if it is introduced into a recycling process (*i.e.,* a waste to energy facility) it is treated as solid waste input. On the other hand, if the same or similar material (*e.g.,* switchgrass for use in a biofuel production process) is grown as a crop specifically for that purpose it should be treated as virgin material within the meaning of this provision.

Assuming the definitions of used and residual materials are modified along the lines described above, we believe an example illustrating this distinction and the points addressed in the discussion above of the used and residual material definitions would be helpful. To that end we suggest modifying Example 4 to read as follows (new language in italics):

Example 4

Company D cuts down trees and sells the *logs* to another company, which further processes the *logs* into *lumber*. In order to facilitate shipping, Company D cuts the trees into uniform logs. The trees are not solid waste because they are virgin materials within the meaning of paragraph (c)(2)(i) of this section. The division of such trees into uniform logs does not change the status of the trees as virgin material.

The facts are in the same as in the above paragraph but Company D also debarks some of the logs and sells the debarked logs to paper mills and the residual bark and sawdust to an incinerator. The bark and sawdust are residual material from an industrial process activity which processes the virgin material and constitute solid wastes.

The facts are the same as in the first paragraph of this example except that the trees cut down by Company D are being cut as a part of an accepted practice of thinning young timber and are not of a size generally useful for other industrial purposes such as lumber or pulpwood. The whole trees are chipped and are incinerated in a boiler. The whole trees removed in this fashion are residual material from an agricultural

process (i.e. growing trees for saw timber or pulpwood) and are not virgin material described in paragraph (c)(2)(i). The incineration of the trees chopped up and removed is an energy conversion process.

b. Paragraph (c)(2)(ii). Solids within liquids and liquid waste.

It is our understanding that this language is intended simply to restate the rule previously contained in section 1.103-8(f)(2)(ii); i.e., that solid waste

> 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.

There is a general understanding of the proper interpretation of the existing rule based, among other things, on a number of private letter rulings dealing with this rule. *See, e.g.*, PLRs 9250045 *and* 9549006. The final rules (or the preamble for those rules) should make clear that no change in the law is intended. We have suggested below additional language for Example 5 to address this point.

c. Paragraph (c)(2)(iii). Precious metals.

We believe that the rule should be modified to reflect that the exclusion does not apply in the case of material put into a final disposal process.

d. Paragraph (c)(2)(iii). Hazardous material.

As in the 2004 Proposed Regulations the Proposed Regulations provide that the term solid waste does not include material that constitutes hazardous waste as defined in section 142(h) of the Code. As in the case of the 2004 Proposed Regulations we believe this rule does not accurately implement the law and that the asserted legal analysis is flawed. In Attachment A to our comments to the 2004 Proposed Regulations we set forth a detailed analysis of the legislative history relating to this issue. A copy of this analysis is attached for your convenience as Exhibit B. As explained in more detail in Exhibit B, the fundamental problem with the analysis summarized in the Preamble to the Proposed Regulations is that the asserted basis for the language in the Proposed Regulations simply does not support the language.

In the Preamble the complete exclusion of hazardous waste is said to be premised on the following language in the Conference Report: "the conferees wish to clarify that solid waste does not include most hazardous waste (including radioactive waste) [emphasis added]." The obvious difficulty with the language in the Proposed Regulations is that it ignores a clear import of the quoted language by excluding all hazardous waste from the definition of solid waste. Similarly, if most hazardous waste is not solid waste it logically follows that some hazardous waste must be solid waste. In sum, we believe that the cited language does not provide sufficient justification for the proposed total exclusion.

Nor does the fact that section 142(h)(10) addresses qualified hazardous waste facilities support the proposed interpretation. The simple fact is that most hazardous waste is liquid waste (according to EPA statistics the percentage of liquid waste is approximately 90%), so that prior to the 1986 Tax Act there was no available category for dealing with such material. The clear import of the legislative history of that Act is that Congress simply intended to add a category of exempt facility to

deal with such waste; in other words, Congress was attempting to deal with a gap in coverage. Thus, the exclusion contained in the Proposed Regulations would take a provision that was intended to add to the financing arsenal for dealing with a particular kind of waste and use it as the basis for exactly the opposite: reducing the financing options for such material.

Nor do we think it is relevant that the more inclusive definition might mean that a particular facility (*i.e.*, one dealing with solid hazardous waste) potentially could be financed under more than one category of exempt facility bonds. This is, in fact, a commonplace occurrence (e.g., solid waste facilities that are functionally related and subordinate to an airport or to a sewage facility).

Finally, as a technical matter, if this exclusion is to be retained, the rule should be clarified to specify that material is not solid waste if it is required to be disposed of in a licensed facility as described in section 142(h)(1) of the Code, since technically such facilities may also accept non-hazardous solid waste.

e. Paragraph (c)(2)(iv). Radioactive material.

Although there are some minor bases for distinguishing between the legal analysis applicable to hazardous waste and that applicable to radioactive waste, we believe that the fundamental difficulty with the analysis set forth with respect to radioactive waste is the same as that applicable to hazardous waste, as set forth above and in Exhibit B.

Even if the exclusion is not changed, we recommend that the rule explicitly state that the term "radioactive material" means material subject to regulation under the Nuclear Regulatory Act (10 CFR § 1.1 *et seq.*). This clarification is necessary because some industrial waste material has a small amount of background radiation, but the level does not rise to the level that causes the material to be subject to regulation as a radioactive material.

4. Section 1.142(a)(6)-1(d) – Qualified solid waste disposal process

a. Paragraph (d)(1). Final disposal process

The Committee believes that the definitional exclusion from solid waste for virgin material and precious metals should not apply to materials that are inputs to a final disposal process. To the extent a process is a final disposal process, the Committee feels it is unnecessary to inquire into the potential value of discarded materials. Virgin materials and precious metals that are to be buried permanently in a landfill should not require further inquiry. We recommend that paragraph (c)(2)(i) and paragraph (c)(2)(iii) include the introductory phrase "*except as an input to a final disposal process*".

We also believe the language should be explicit that the reasonable expectation that the containment will continue indefinitely is determined as of the date of issue of the bonds.

b. Paragraph (d)(2) – Energy conversion process

This rule appears to be intended to replace the rule currently contained in Temp. Treas. Reg. §17.1, but not to effect a change in the rules applicable to such facilities. It would be helpful if this were confirmed in the preamble to the final rules.

In addition, we also recommend certain clarifying changes in the definition of energy conversion process, as shown below (new language in italics):

(2) Energy conversion process. The term energy conversion process means a thermal, chemical, or other process that is applied to solid waste to create and capture synthesis gas, heat, hot water, steam, or other useful energy. The energy conversion process begins at the point of the first application of such process. The energy conversion process ends at the point at which the useful energy is first created, or captured in *or incorporated into* the form of a first useful product (as defined in paragraph (e) of this section), provided that, in all events, the energy conversion process ends *at the point at which there is* any transfer or distribution of gas, heat, hot water, steam, or other useful energy.

5. Section 1.142(a)(6)-1(e) First useful product.

We agree with the thrust of this proposed rule, which we believe addresses appropriately an interpretive issue that had arisen under the Existing Regulations. We do have, however, some suggestions to avoid misunderstandings of the interpretation of the rule. In particular, we believe the rule should be modified to make clear that the borrower need not build additional facilities in order to produce a material that can be marketed or to sell intermediate materials at a loss. To this end we suggest the following changes:

First, we suggest revising the first sentence to read as follows (revised language in italics):

> *(1)* The term first useful product means the first product produced from solid waste that is useful for consumption in agricultural, *mining*, consumer, commercial, *governmental* or industrial operation or activity and that *is in a form customarily* sold for such use, whether or not actually sold. [See new language below.]

Second, we suggest designating the existing language as paragraph (1) (as shown above) and adding the following language at the end of the existing provision.

> [Add at the end of the first sentence] In the case of a continuous or integrated production process*, material is not a first useful product unless, after taking into account operational constraints, (i) it can be removed from the recycling or energy conversion process without the necessity of modification of such process through additional capital expenditures or industrial processes, and (ii) it is commercially salable.*
>
> *(2) For purposes of paragraph (1), an intermediate material is commercially salable if the material has a fair market value equal to or greater than the greatest of (i) the cost of disposal of the material in a final disposal process, (ii) the amount paid for the material (unit price), or (iii) the amount the material for which the material could be sold to an unrelated third party (other than for introduction into an energy conservation or recycling process) on the sale date of the bonds without incurring a loss on such sale. Whether a material is commercially salable is determined after taking into account the costs of isolation or extraction of the product in question, the cost to produce the intermediate material, and the costs of shipping and handling to permit its sale. The determination of whether an intermediate product is commercially salable is determined as of the date the bonds are sold on the basis of the market, shipping and handling costs for such product as of that date; subsequent changes in such values, costs or expenses shall not be taken into account.*

6. Section 1.142(a)(6)-1(f) – Preliminary function

We are concerned that this provision may create confusion. The only example of a facility that is said to perform a preliminary function is contained in Example 12. It describes a facility that sorts used bottles, separating those that will be refilled from those that will be crushed, melted and recycled into new glass. As we understand the example, the bottles to be refilled are not solid waste, so that the sorting process is a preliminary function only if more than 50% of the bottles introduced into the facility are damaged bottles that will be crushed and recycled. If it does meet the 50% threshold, then it must be analyzed as a dual function facility, with the non-qualifying function being the processing of the refillable bottles. The implication of the example is that if more than 50% of the input to the facility consists of bottles to be refilled then the facility does not perform a qualifying preliminary function and none of the costs qualify.

One fundamental difficulty with the example is that it is based on a fact pattern that we believe is somewhat unrealistic. As a general matter we understand that refilling of bottles is relatively rare. Moreover, in circumstances where it does occur the refillable bottles are segregated from disposable bottles from the outset (*e.g.*, by the original user) and processed separately. As a practical matter the only returnable bottles that are likely to be recycled are those that were intended to be refilled but were damaged during transport and handling. What this means – at least as to bottle recycling operations such as those described generally in Example 12 – is that the receiving facility for the material either is dedicated principally to bottles to be recycled or to refillable bottles, but not both.

Presumably Example 12 – and perhaps the preliminary function rule itself – was intended to deal with the basic fact pattern reflected in Rev. Rul. 80-197, 1980-2 C.B. 44. We are not aware of any other type of recycling facility that would operate in a manner similar to that described in Example 12 (*i.e.*, sort post-consumer waste to separate waste material to be recycled and non-waste material that is simply to be reused in the manner of refillable bottles and material that like the damaged bottles must be recycled in qualifying recycling facility). Our basic concern is that a general rule based upon unusual facts may be misapplied – either by the IRS or by practitioners.

For example, the rule sets up a potential conflict with the basic rule permitting the financing of functionally related and subordinate facilities. Thus, for example, in the facility described in Example 12 there would be a point – possibly very early in the process – where the refillable bottles have been separated from the waste bottles. After that point all of the facilities dealing with the solid waste material properly should qualify either as waste processing facilities or as facilities functionally related and subordinate to such facilities. Similarly, all of the facilities dealing with the refillable bottles would not qualify either as preliminary facilities or as facilities functionally related and subordinate to qualified solid waste handling facilities. Assume further that more than 50% of the material entering the facility consists of refillable bottles, but that more than 50% of the cost is attributable to the internal facilities specifically designed to handle the solid waste material.

In such circumstances we believe that the correct analysis should be that the only "preliminary function" is carried out by the equipment actually used to sort out the refillable bottles, with the remaining facilities being analyzed as qualifying or non-qualifying, depending on their specific function. Our concern is that the language of the rule would be interpreted too broadly, so as to include the entire facility.

In addition, the operative assumption seems to be that the refillable bottles are never a solid waste. We believe this is true, however, only where they have been kept separate from glass to be recycled. Thus, if refillable bottles are intermingled with glass that can only be disposed of or recycled (*i.e.*, thrown out as household trash) it is solid waste until it is separated from the non-refillable glass.

In light of the above we believe, on balance, that preliminary function rule serves no useful purpose and either should be deleted or the 50% test removed. Alternatively, we suggest that Example 12 be revised to clarify the appropriate treatment of a facility performing a preliminary function such as that described above.

7. Section 1.142(a)(6)-1(g). Mixed use facilities.

a. Paragraph (g)(1). For clarity we suggest adding the phrase "*or facilities functionally related thereto*" after the phrase (in the current draft) "preliminary function."

b. Paragraph (g)(2)(i). In addition, we believe that a clarification is needed to indicate when the waste input measurement period begins. Many waste recycling operations (including, *e.g.*, waste-to-energy plants and waste paper recycling facilities) require an extensive start-up period to test all of the facility's components and learn to operate them efficiently to produce the required energy or product. Because the waste furnish for such facilities can vary in both quality and physical characteristics, an extensive "ramp up" period is generally needed. These are complex systems, and each one can have many unique characteristics to deal with variations in desired product, or in the furnish (*e.g.*, fuel or waste paper) to be processed. Typically these are not situations where the operator can simply throw the switch and the facility runs as intended.

For example, a typical waste coal-fired power plant project often is fired initially with market coal to test the basic power generation features (the boiler, the turbine-generator, etc.). When these have been fully tested and are operating efficiently the operator will start the often lengthy process of learning to introduce the waste fuel efficiently so that the plant meets the applicable design criteria. There is a similar ramp up process involved in learning to operate a waste paper recycling facility. In either case, this ramp up period may continue for some period after the facility is considered to be placed in service for tax depreciation purposes. To address this issue we recommend that the language in this provision be modified to make clear that the measurement period begins when the facility is placed-in-service within the meaning of Treas. Reg. § 1.150-2(c) (*i.e.*, when the facility is, in fact, in operation at substantially the level for which it is designed). We suggest the following change to the first sentence of the provision (new language in italics):

> (i) In general. Except as provided in paragraph (g)(2)(ii) of this section, for each qualified solid waste disposal process, the percentage of the costs of the property used for such process that are allocable to a qualified solid waste disposal process equals the average annual percentage of solid waste processed in that process, *after the facility performing the process is placed in service within the meaning of Treas. Reg. § 1.150-2(c) and* while the issue is outstanding.

c. Paragraph (g)(2)(ii). Paragraph (g)(2)(ii) provides a rule comparable to the 65% rule in the existing regulations. It states that for any qualified solid waste disposal process (*i.e.*, an energy conversion process or a recycling process), if at least 65% of the input the facility is solid waste "for each year that the issue is outstanding" then all of the costs of the facility are treated as allocable to a solid waste disposal process. In contrast to the rule in paragraph (g)(2)(i), which calculates waste

input on the basis of average annual input, the implication of the language in paragraph (g)(2)(ii) is that the 65% test will not be met if the solid waste input for a facility is less than 65% for any one year.

If this is the intended interpretation we believe the rule is unworkable. Depending upon the facts, similarly situated facilities could be are treated quite differently. In addition, issuers and borrowers who expected the waste input to a facility, as calculated under paragraph (g)(2)(i) to exceed 65% might nevertheless be unable to take advantage of the 65% because of the possibility that a shortfall in a single year could adversely effect the tax-exempt status of the issue.

The difficulties we foresee are illustrated by the following example. Assume, that the conduit borrower expects, on the date of issue of the bonds to finance a recycling facility, that at least 75% of the annual input to the facility will be solid waste. The bonds have a term of 20 years. Assume further that once the facility is placed in service it achieves that level of waste throughput. In the tenth year an unexpected event (*e.g.*, a strike or a flood) prevents the operator of the facility from acquiring all the required solid waste. In order to meet its contractual obligations the operator is required to decrease the solid waste input percentage to 50% for one year. After that year the waste input returns to 75% and it will continue at that level. Thus, over both the life of the facility and on an average annual basis the facility would meet the 65% test (the average percentage would be 73.75%), yet the wording of the provision suggests that the facility would not meet the 65% threshold.

Although it is unclear whether this would be treated as a change in use (in which case the qualifying percentage would become the blended average annual percentage as provided in paragraph (g)(2)(i)) or a more serious violation (the bonds never met the requirements of paragraph (g)(2)(ii) because an insufficient waste input in one year). By way of comparison, a facility that averaged only a 65% waste input – and therefore processed less weight on a percentage basis – would have no such concerns. In any case, it seems clear that neither result is justified, nor would it carry out the apparent intent of the IRS and Treasury in drafting the Proposed Regulations.

To address this issue we suggest that paragraph (g)(2)(ii) be revised to make clear that solid waste input is to be measured using the average annual input approach used in paragraph (g)(2)(i). Specifically we suggest the first sentence of the rule be rewritten as follows (new language in italics):

> (ii) Special rule for mixed-input processes if at least 65 percent of the materials processed are solid waste. For each qualified solid waste disposal process, if the *average* annual percentage of solid waste used in that process, *as calculated under paragraph (g)(2)(i),* equals at least 65 percent of the materials used in that process, then all of the costs of the property used for such process are treated as allocable to a qualified solid waste disposal process.

8. Section 1.142(a)(6)-1(h). Examples.

We believe the examples are a useful method of illustrating the proper application of these Proposed Regulations. In addition to the addition of certain examples, as discussed above, we have the following comments with respect to the examples:

Example 3. Waste coal goes by a number of names (e.g., "culm" and "gob"). Accordingly we suggest adding the word "*commonly*" after the phase "coal mining."

Example 4. See above for proposed modifications to this example.

Example 5. For the reasons set forth above we believe this example should be modified by deleting the sentence relating to virgin material and precious metals. We also suggest that the existing paragraph be redesignated as paragraph 1 and the following additional paragraph added:

> *(2) The facts are the same as in paragraph (1), except that in order to transport the residual material from Company E's production facilities to the landfill, or to dewatering facilities which are necessary for disposal in the landfill, Company E constructs a series of pipes and pumps to sluice the residual material to the landfill or dewatering facilities. In the absence of on-going agitation or pumping, the residual material would settle out from the water without any further treatment. The material in this case is solid waste and not liquid waste, and the pipes, pumps and facilities to dewater the residual material prior to placing it in the landfill are functionally related and subordinate to the landfill. The pipes, pumps and other related facilities to clean the water removed from the residual material and return it to the process to be used to sluice additional residual material to the landfill or dewatering facility are facilities that are functionally related and subordinate to the landfill and dewatering facilities.*

Example 6. This example involves the recycling of used tires into roadbed materials. The Committee is uncertain of the meaning of the final sentence in this example. It reads: "This conclusion would be the same if the recycling process took place at more than one plant." The point being made by this sentence is unclear.

Example 8. We suggest revising the final sentence to read as follows (new language in italics):

> Further, if the operational or engineering characteristics of Company H's facility allowed for reasonable extraction, isolation, and sale *at a positive value* of the paper pulp independently *without additional capital expenditures relating to the facility,* the first useful product would be the paper pulp and the portion of Company H's facility that cleans and re-pulps the magazines before processing in the paper machine to produce industrial-sized rolls of paper would be a qualified solid waste disposal facility.

Example 10. If the preliminary function rule is retained (see comments above) we recommend modifying the example by revising the last sentence to read as follows:

> *The bark removal process is not a preliminary function merely because it produces material that is solid waste; this process is for the purpose of production of paper and not solid waste disposal.*

Example 12. See comments above at section III.B.6 of these comments.

9. Section 1.142(a)(6)-1(i). Effective Date and Transition Rules

We believe that the final regulations should provide a transition rule for refunding bonds similar to that provided for other regulatory changes relating to private activity bonds.

EXHIBIT A

NABL SUGGESTED CHANGES TO PROPOSED REGULATIONS

§1.103-8[Amended].

Par.3. Section 1.142(a)(6)-1 is added to read as follows:

§1.142(a)(6)-1 Exempt facility bonds: solid waste disposal facilities.

(a) In general. This section defines the term solid waste disposal facility for purposes of section 142(a)(6).

(b) Solid waste disposal facility. The term solid waste disposal facility means a facility to the extent that the facility—

(1) Processes solid waste (as defined in paragraph (c) of this section) in a qualified solid waste disposal process (as defined in paragraph (d) of this section);

(2) Performs a preliminary function (as defined in paragraph (f) of this section); or

(3) Is functionally related and subordinate (within the meaning of §1.103-8(a)(3)) to a facility described in paragraph (1) or (2) of this section.

(c) Solid waste—

(1) In general. Except to the extent excluded under paragraph (c)(2) of this section, for purposes of section 142(a)(6), the term solid waste means garbage, refuse, and other solid material derived from any agricultural, commercial, consumer, or industrial operation or activity if the material meets the requirements of both paragraph (c)(1)(i) and paragraph (c)(1)(ii) of this section.

(i) Used material or residual material. Material meets the requirements of this paragraph (c)(1) if it is either used material (as defined in paragraph (c)(1)(i)(A)) or residual material (as defined in paragraph(c)(1)(i)(B)).

(A) Used material. The term used material means any material that has been used previously as an agricultural, mining, commercial, governmental, consumer~~-~~, or industrial product or as a component of any such product, or in connection with an agricultural, mining, commercial, governmental, consumer, or industrial process the primary purpose of which is not the production of such material.

(B) Residual material. The term residual material means ~~any~~ one or more residual ~~byproduct~~ byproducts or excess unused raw ~~material that remains from the production of~~ materials that remain (i) from any agricultural, commercial, ~~consumer~~mining, consumer, governmental or industrial process that does not produce a product for sale in the ordinary course of business, or (ii) from the production of any agricultural, commercial, mining, consumer, governmental or industrial product, provided that material produced in connection with the production of a product qualifies as residual material ~~only to the extent that it constitutes less than five percent of the total material introduced into the production process and~~ if it has a fair market value that is reasonably expected on the date of issue of the bonds to be ~~lower~~ no higher than that of any other product made in that production process for sale in the ordinary course of.

(ii) Reasonably expected introduction into a qualified solid waste disposal process. Material meets the requirements of this paragraph (c)(1)(ii) if it is reasonably expected by the person who generates, purchases or otherwise acquires it to be introduced within a reasonable time after such generation, purchase or acquisition into a qualified solid waste disposal process described in paragraph (d) of this section.

(2) Exclusions from solid waste. The following materials do not constitute solid waste:

(i) Virgin material. ~~Solid~~ Except as an input to a final disposal process, solid waste excludes any virgin material except to the extent that it is a residual material. The term virgin material means material that has not been processed into an agricultural, commercial, consumer, or industrial product or a component of any such product. Further, for this purpose, material continues to be virgin material after it has been grown, harvested, mined, or otherwise extracted from its naturally occurring location and cleaned, divided into component elements, modified, or enhanced as long as further processing is required before it becomes an agricultural, commercial, consumer, or industrial product or a component of any such product.

(ii) Solids within liquids and liquid waste. Solid waste excludes any solid or dissolved material in domestic sewage or other significant pollutant 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, and liquid or gaseous waste.

(iii) Precious metals. ~~Solid~~ Except as an input to a final disposal process, solid waste excludes gold, silver, ruthenium, rhodium, palladium, osmium, iridium, platinum, gallium, and rhenium.

[Delete] (iv) Hazardous material. Solid waste excludes any hazardous material that is disposed of at a facility that is subject to final permit requirements under subtitle C of title II of the Solid Waste Disposal Act as in effect on the date of the enactment of the Tax Reform Act of 1986 (which is October 22, 1986). See section 142(h)(1) of the Internal Revenue Code.

[Delete] (v) Radioactive material. Solid waste excludes any radioactive material.

(d) Qualified solid waste disposal process. The term qualified solid waste disposal process means the processing of solid waste in a final disposal process (as defined in paragraph (d)(1) of this section), an energy conversion process (as defined in paragraph (d)(2) of this section), or a recycling process (as defined in paragraph (d)(3) of this section). Absent an express restriction to the contrary in this section, a qualified solid waste disposal process may employ any biological, engineering, industrial, or technological method.

(1) Final disposal process. The term final disposal process means either the placement of solid waste in a landfill, the incineration of solid waste without capturing any useful energy, or the containment of solid waste with a reasonable expectation that the containment will continue indefinitely and that the solid waste has no current or future beneficial use.

(2) Energy conversion process. The term energy conversion process means a thermal, chemical, or other process that is applied to solid waste to create and capture synthesis gas, heat, hot water, steam, or other useful energy. The energy conversion process begins at the point of the first application of such process. The energy conversion process ends at the point at which the useful energy is first created, or captured in or incorporated into the form of a first useful product (as defined in paragraph (e) of this section), provided that, in all events, the energy conversion process ends at the point at which there is any transfer or distribution of gas, heat, hot water, steam, or other useful energy.

The energy conversion process ends at the point at which the useful energy is first created or captured in the form of a first useful product (as defined in paragraph (e) of this section), provided that, in all events, the energy conversion process ends before any transfer or distribution of synthesis gas, heat, hot water, steam, or other useful energy.

(3) Recycling process—

(i) In general. The term recycling process means reconstituting, transforming, or otherwise processing solid waste into a useful product. The recycling process begins at the point of the first application of a process to reconstitute or transform the solid waste into a useful product, such as decontamination, melting, re-pulping, shredding, or other processing of the solid waste to accomplish this purpose. The recycling process ends at the point of completion of production of the first useful product from the solid waste.

(ii) Refurbishment, repair, or similar activities. The term recycling process does not include refurbishment, repair, or similar activities. The term refurbishment means the breakdown and reassembly of a product if such activity is done on a product by product basis and if the finished product contains more than 30 percent of its original materials or components.

(e) First useful product. (1) The term first useful product means the first product produced from solid waste that is useful for consumption in agricultural, mining, consumer, commercial, governmental or industrial operation or activity and that ~~could be~~ is in a form customarily sold for such use, whether or not actually sold. ~~A useful product includes both a product useful to an individual consumer as an ultimate end-use consumer product and a product useful to an industrial user as a material or input for processing in some stage of a manufacturing or production process to produce a different end-use consumer product.~~ In the case of a continuous or integrated production process, ~~the determination of when a~~ material is not a first useful product ~~may result from such an integrated process may take~~ unless, after taking into account operational constraints ~~that affect the point in production when a useful product reasonably can be extracted or isolated and sold independently.~~, (i) it can be removed from the recycling or energy conversion process without the necessity of modification of such process through additional capital expenditures or industrial processes, and (ii) it is commercially salable..

(2) For purposes of paragraph (1), an intermediate material is commercially salable if the material has a fair market value equal to or greater than the greatest of (i) the cost of disposal of the material in a final disposal process, (ii) the amount paid for the material (unit price), or (iii) the amount the material for which the material could be sold to an unrelated third party (other than for introduction into an energy conservation or recycling process) on the sale date of the bonds without incurring a loss on such sale. Whether a material is commercially salable is determined after taking into account the costs of isolation or extraction of the product in question, the cost to produce the intermediate material, and the costs of shipping and handling to permit its sale. The determination of whether an intermediate product is commercially salable is determined as of the date the bonds are sold on the basis of the market, shipping and handling costs for such product as of that date; subsequent changes in such values, costs or expenses shall not be taken into account.

[First alternative - Delete] (f) Preliminary function. A preliminary function is a function to collect, separate, sort, store, treat, process, disassemble, or handle solid waste that is preliminary to and directly related to a qualified solid waste disposal process. [Second Alternative – Delete this sentence] [A function qualifies as a preliminary function only if more than 50 percent of the total materials that result from the function is solid waste in each year that the issue is outstanding.-]

(g) Mixed-use facilities—

(1) In general. Except as otherwise provided in paragraph (g)(2) of this section, if a facility is used for both a qualified solid waste disposal function (including a qualified solid waste disposal process or a preliminary function, or facilities functionally related thereto) and a nonqualified function, then the costs of the facility allocable to the qualified solid waste disposal function are determined using any reasonable method, based on all the facts and circumstances. See §1.103-8(a)(1) for allocation rules on amounts properly allocable to an exempt facility.

(2) Mixed inputs—

(i) In general. Except as provided in paragraph (g)(2)(ii) of this section, for each qualified solid waste disposal process, the percentage of the costs of the property used for such process that are allocable to a qualified solid waste disposal process equals the average annual percentage of solid waste processed in that process-, after the facility performing the process is placed in service within the meaning of Treas. Reg. § 1.150-2(c) and while the issue is outstanding. The average percentage of solid waste processed in such process for any year is the average percentage, by weight or volume, of the total materials processed in that process that constitute solid waste for that year.

(ii) Special rule for mixed-input processes if at least 65 percent of the materials processed are solid waste. For each qualified solid waste disposal process, if the annual percentage of solid waste used in that process for each year that the issue is outstanding equals at least 65 percent of the materials used in that process, as calculated under paragraph (g)(2)(i), then all of the costs of the property used for such process are treated as allocable to a qualified solid waste disposal process. The percentage of solid waste used in such process for any year is the percentage, by weight or volume, of the total materials used in that process that constitute solid waste for that year.

(h) Examples. The following examples illustrate the application of this section:

Example 1. Nonqualified unused material--cloth.

Company A takes wool and weaves it into cloth and then sells the cloth to a manufacturer to manufacture clothing. The cloth is material that has not been used previously as an agricultural, commercial, consumer, or industrial product or as a component of any such product. Accordingly, the cloth is not solid waste.

Example 2. Residual material from refining of crude Oil.

Company B takes crude oil and refines it into various products, including finished motor gasoline, distillate fuel oil, and jet fuel. The balance of the crude oil remaining after this production process is in the form of a nonhazardous material which subsequently is used to make asphalt. This nonhazardous material constitutes less than 5 percent of the total crude oil that was introduced into the production process and it has a fair market value that is reasonably expected to be lower than that of any product produced in that oil refining process. The portion of the crude oil that remains after the refining process as the nonhazardous material is residual material within the meaning of paragraph (c)(1)(i)(B) of this section that qualifies as solid waste. The portion of the facility directly related to the production of asphalt from such residual material may be treated as a qualified solid waste disposal facility up to the point of the production of a first useful product (here asphalt) within the meaning of paragraph (e) of this section from the residual material.

Example 3. Residual material--waste coal.

Company C mines coal. Less than 5 percent of ore mined is low quality byproduct of coal mining commonly known as waste coal, which cannot be converted to energy under a normal energy-production process because the BTU content is too low. Waste coal has a lower fair market value than any product produced in the coal mining operation. Waste coal is solid waste because it is residual material within the

meaning of paragraph (c)(1)(i)(B) of this section and Company C reasonably expects to introduce the waste coal into a solid waste disposal process. A facility that converts this waste coal into energy may be treated as a solid waste disposal facility.

Example 4. Virgin material--logs.

Company D cuts down trees and sells the ~~lumber~~ logs to another company, which further processes the logs into lumber ~~into paper~~. In order to facilitate shipping, Company D cuts the trees into uniform logs. The trees are not solid waste because they are virgin materials within the meaning of paragraph (c)(2)(i) of this section. The division of such trees into uniform logs does not change the status of the trees as virgin material.

The facts are in the same as in the above paragraph but Company D also debarks some of the logs and sells the debarked logs to paper mills and the residual bark and sawdust to an incinerator. The bark and sawdust are residual material from an industrial process activity which processes the virgin material and constitute solid wastes.

The facts are the same as in the first paragraph of this example except that the trees cut down by Company D are being cut as a part of an accepted practice of thinning young timber and are not of a size generally useful for other industrial purposes such as lumber or pulpwood. The whole trees are chipped and are incinerated in a boiler. The whole trees removed in this fashion are residual material from an agricultural process (such as growing trees for saw timber or pulpwood) and are not virgin material described in paragraph (c)(2)(i). The incineration of the trees chopped up and removed is an energy conversion process.

Example 5. Qualified solid waste disposal process--Landfill.

(1) Company E plans to construct a landfill. The landfill will not be subject to the final permit requirements under subtitle C of title II of the Solid Waste Disposal Act (as in effect on the date of enactment of the Tax Reform Act of 1986). Company E expects that the landfill will be filled entirely with material that will qualify as solid waste within the meaning of paragraph (c) of this section. Company E does not expect that a significant portion of the material placed in the landfill will be virgin materials or precious metals. Placing solid waste into a landfill is a qualified solid waste disposal process. The landfill is a qualified solid waste disposal facility.

(2) The facts are the same as in paragraph (1), except that in order to transport the residual material from Company E's production facilities to the landfill, or to dewatering facilities which are necessary for disposal in the landfill, Company E constructs a series of pipes and pumps to sluice the residual material to the landfill or dewatering facilities. In the absence of on-going agitation or pumping, the residual material would settle out from the water without any further treatment. The material in this case is solid waste and not liquid waste, and the pipes, pumps and facilities to dewater the residual material prior to placing it in the landfill are functionally related and subordinate to the landfill. The pipes, pumps and other related facilities to clean the water removed from the residual material and return it to the process to be used to sluice additional residual material to the landfill or dewatering facility are facilities that are functionally related and subordinate to the landfill and dewatering facilities.

Example 6. Qualified solid waste disposal process--Recycling Tires.

Company F owns a facility that converts old, previously used tires into roadbed material. The used tires are used material within the meaning of paragraph (c)(1)(i)(A) of this section that qualifies as solid waste. Between the introduction of the old tires into the roadbed manufacturing process and the completion of the roadbed material, the facility does not create any interim useful products. The process for the manufacturing of the roadbed material from the old tires is a qualified solid waste disposal process as a recycling process and the facility that converts the tires into roadbed material is a qualified solid waste disposal facility. This conclusion would be the same if the recycling process took place at more than one plant.

Example 7. Nonqualified refurbishment.

Company G purchases used cars and restores them. This restoration process includes disassembly, cleaning, and repairing of the cars. Parts that cannot be repaired are replaced. The restored cars contain at least 30 percent of the original pieces. While the cars are solid waste, the refurbishing process is not a qualified solid waste disposal process. Accordingly, Company G's facility is not a qualified solid waste disposal facility.

Example 8. Qualified solid waste disposal facility--first useful product rule--paper recycling.

Company H employs an integrated process to re-pulp discarded magazines, clean the pulp, and produce retail paper towel products. Operational constraints on Company H's process do not allow for reasonable extraction, isolation, and sale of the cleaned paper pulp independently without degradation of the pulp. Company H further processes the paper pulp into large industrial-sized rolls of paper which are about 12 feet in diameter. At this point in the process, Company H could either sell such industrial-sized rolls of paper to another company for further processing to produce retail paper products or it could produce those retail products itself. In general, paper pulp is a useful product that is bought and sold on the market as a material for input into manufacturing or production processes. The discarded magazines are solid waste because they are used material within the meaning of paragraph (c)(1)(i)(A) of this section. Company H's facility is engaged in a recycling process within the meaning of paragraph (d)(3) of this section to the extent that it repulps and cleans the discarded magazines generally and further to the extent that it produces industrial sized rolls of paper under the particular circumstances here. \Specifically, taking into account the operational constraints on Company H's facility that limit its ability reasonably to extract, isolate, and sell the paper pulp independently, the first useful products within the meaning of paragraph (e) of this section from Company H's recycling process are the industrial-sized rolls of paper. The portion of Company H's facility that produces industrial-sized rolls of paper is a qualified solid waste disposal facility, and the portion of Company H's facility that further processes the industrial-sized rolls of paper into retail paper towels is not a qualified solid waste facility. Further, if the operational characteristics of Company H's facility allowed for reasonable extraction, isolation, and sale of the commercially salable paper pulp independently, without additional capital expenditures relating to the facility, the first useful product would be the paper pulp and the portion of Company H's facility that cleans and re-pulps the magazines before processing in the paper machine to produce industrial-sized rolls of paper would be a qualified solid waste disposal facility.

Example 9. First useful product rule—energy conversion process.

Company I receives solid waste from a municipal garbage collector. Company I burns that solid waste in an incinerator to remove exhaust gas and to produce heat. Company I further processes the heat in a heat exchanger to produce steam. Company I further processes the steam to generate electricity. The first useful product in this process is the useful energy in the form of steam. The facilities used to burn the solid waste and then capture the steam as useful energy are qualified solid waste disposal facilities because they process solid waste in an energy conversion process. The generating facilities used for further processing of the steam to create electricity do not engage in the energy conversion process and are not qualified solid waste disposal facilities.

Example 10. Preliminary function.

Company J owns a paper mill. At the mill, logs from nearby timber operations are processed through a machine that removes bark. The stripped logs are used to manufacture paper. The stripped bark represents less than 5 percent of the logs processed into paper and has a lower fair market value than any product produced from the paper mill. The stripped bark falls onto a conveyor belt that transports the bark to a storage bin that is used to store the bark briefly until Company J feeds the bark into a boiler. The conveyor belt and storage bin are used only for these purposes. The boiler is used only to create steam by burning the bark, and the steam is used to generate electricity. The stripped bark is solid waste because it is residual material within the meaning of paragraph (c)(1)(i)(B) of this section and because Company J expects to introduce the bark into a conversion process within a reasonable period of time. The creation of steam

from the stripped bark is an energy conversion process that starts with the incineration of the stripped bark. The energy conversion process is a qualified solid waste disposal process. The conveyor belt performs a collection activity that is preliminary and that is directly related to the solid waste disposal function. The storage bin performs a storage function that is preliminary and that is directly related to the solid waste disposal function. Thus, the conveyor belt and storage bin are solid waste disposal facilities. The bark removal process is not a preliminary function ~~because it is not directly related to the energy conversion process and it does not become so related~~ merely because it ~~results in~~ produces material that is solid waste~~;~~ this process is for the purpose of production of paper and not solid waste disposal.

Example 11. Mixed-input facility.

Company K owns an incinerator financed by an issue and uses the incinerator exclusively to burn coal and solid material to create steam that is used to generate electricity. Each year while the issue is outstanding, 40 percent by volume and 45 percent by weight of the solid material that Company K processes in the conversion process is coal. The remainder of the solid material is either used material or residual material within the meaning of paragraph (c)(1)(i) of this section. Sixty percent of the costs of the property used to perform the energy conversion process are allocable to a solid waste disposal function.

Example 12. [See comment III.B.6 of NABL Comments] Mixed-function facility.

Company L owns and operates a facility financed by an issue and uses the facility exclusively to sort damaged bottles from undamaged bottles that may be re-used. The damaged bottles are directly introduced into a process that melts them for use in the fabrication of an end product. The damaged bottles are solid waste within the meaning of paragraph (b)(1) of this section, and the melting process is a qualified solid waste disposal process as a recycling process within the meaning of paragraph (c)(3) of this section. Refilling the bottles is not a qualified solid waste disposal process. Each year while the issue is outstanding, more than 50 percent, by weight or volume, of all of the bottles that pass out of the sorting process are damaged bottles that are processed in a recycling process. The sorting facility performs a preliminary function, but it also performs another function. The costs of the sorting facility allocable to the preliminary function are determined using any reasonable method, based on all the facts and circumstances.

EXHIBIT B

ATTACHMENT A TO NABL COMMENTS ON 2004 PROPOSED REGULATIONS

ATTACHMENT 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 using specially designed and built facilities specifically intended for that purpose.

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 Report 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 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) 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).

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 Has Consistently 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, provided that it otherwise met the definitional requirements (i.e., it was "solid" and "waste") to the contrary. 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[1] (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 regarding the confirms this interpretation. The Solid Waste Disposal Act, which was enacted in 1965 as P.L. 89-272 (as originally enacted, the "1965 Act")[2], was amended in 1970 by the 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.

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

2 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).

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 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[3] 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 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 n 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

[3] 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.

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 to the to 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 both the Conference Report and the floor statement by Chairman Rostenkowski cited as support for the proposition 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, we believe that the weight of the Blue Book language – and for that matter the floor colloquy of Chairman Rostenkowski – are materially undercut by the fact that 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). They were not in any sense part of the record at the time of those votes.

Post-1986 IRS Interpretation. The interpretation suggested by the IRS and Treasury in the context of the Proposed Regulations and the audit 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 impose - or confirm the existence of - any additional restrictions on facilities for handling solid wastes that happen to be hazardous or dangerous.

The same issue was originally addressed by the IRS in 1989. See LTR 8924009. The facts and analysis were comparable to that in the FSA discussed above. What is perhaps more important is that the publication of the ruling led to at least one conversation between a lawyer in the branch that issued the ruling and private practitioners who inquired whether the ruling reflected the IRS analysis of the same language as it relates to radioactive solid waste. The representative stated that the conclusion was equally applicable to radioactive waste. While we recognize that neither a private ruling nor a conversation with an IRS official constitutes authority binding on the IRS, the fact is that in the tax-exempt bond area, by implicit mutual agreement, this was often 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 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 the 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.[4] 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, provides for penalties that apply 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 Report, 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."

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.

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[4] 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 Report states 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).