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MEMORANDUM

SUBJECT: Revised Implementation Strategy for City of Chicago v. EDF Municipal Waste Combustion (MWC) Ash Supreme Court Decision

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Background

Supreme Court Decision

On May 2, 1994, the U.S. Supreme Court issued the opinion in City of Chicago v. EDF, ___ U.S. ___, 114 S.Ct. 1588 (1994). The Court, interpreting Section 3001(i) of the Resource Conservation and Recovery Act (RCRA), held that ash generated at resource recovery facilities (*i.e.*, waste-to-energy facilities burning household wastes and nonhazardous commercial wastes) that exhibits a hazardous waste characteristic is not exempt from the hazardous waste requirements of RCRA Subtitle C. The Court's decision took effect as a matter of federal law on June 1, 1994. It makes eligible for regulation a waste that, under EPA's prior interpretation of RCRA, was exempt from Subtitle C.

Recent EPA Actions

1. Implementation Strategy

On May 27, 1994, the Assistant Administrators for OECA and OSWER issued an implementation strategy for the City of Chicago v. EDF decision to the Regions. This initial strategy intended to bring waste-to-energy (WTE) facilities affected by the decision into compliance with RCRA Subtitle C as quickly as possible. In addition, the strategy stated that EPA would revisit it within 6 months of its issuance. The purpose of this

memorandum is to revise the initial implementation strategy. These revisions define the Agency's approach towards management of hazardous ash generated by WTE facilities.

2. Determination of Point of RCRA Subtitle C Jurisdiction for MWC Ash

In the City of Chicago v. EDF case, the Supreme Court issued a narrowly focused opinion holding that § 3001(i) does not exempt ash generated by WTE facilities. The Court, however, failed to reach the issue of the precise point at which regulation of ash must begin, and § 3001(i) does not expressly address the issue. In an effort to address the issue, EPA recently published a Notice of Statutory Interpretation entitled "Determination of Point at Which Subtitle C Jurisdiction Begins for Municipal Waste Combustion Ash at Waste-to-Energy Facilities" (60 FR 6666, February 3, 1995).

As discussed in the Notice of Statutory Interpretation, EPA believes it is reasonable to interpret § 3001(i) of RCRA to first impose hazardous waste regulation at the point that the ash leaves the "resource recovery facility," defined as the combustion building (including connected air pollution control equipment). Consequently, the point at which an ash hazardous waste determination should be made (and, in the future, at which the Land Disposal Restrictions will begin to apply) is the point at which ash exits the combustion building following the combustion and air pollution control processes. We emphasize that EPA's decision on the appropriate location to make the hazardous waste determination for WTE ash is uniquely based on the Agency's interpretation of RCRA § 3001(i). EPA's analysis and conclusions are not relevant to facilities that do not fall within the scope of RCRA § 3001(i).

Nearly every resource recovery facility is configured differently. In several instances, these facilities are not confined within a single structure enclosed by four walls. A few facilities, in fact, exist where the combustion device is not enclosed at all within a building structure. However, in WTE facilities where the ash always moves between structures in enclosed conveyors, such configurations would fall within the common sense meaning of the "resource recovery facility" that Congress exempted in § 3001(i). These configurations are illustrated in examples one through three, below. In contrast, in the fourth example, ash is exposed to the environment rather than in an enclosed system. The definition of "resource recovery facility" does not include ash handling operations allowing exposure to the environment.

Example 1. -Many resource recovery facilities automatically convey, via enclosed conveyor, the fly ash collected at various locations (including any air pollution control equipment such as the acid gas scrubbers, baghouse filters, and electrostatic precipitators that may exist outside the building where the combustion device is located but are connected to the building via enclosed conveyors) to a quench tank within the combustion device building where it is combined with the bottom ash. The combined ash is then loaded into trucks for direct transport to an off-site disposal facility. In this example, the "resource recovery facility" is composed of the combustion device building, the air pollution control equipment, and the enclosed conveyors. The point at which RCRA hazardous waste jurisdiction would begin for these facilities would be the point where the ash exits the building housing the combustion device.

Example 2. Several resource recovery facilities collect the bottom ash and the fly ash separately and convey these two ash types separately via enclosed conveyors to an ash building where the two ash types are then mixed and loaded into a transport vehicle for off-site disposal. The ash building may abut the combustion device building, or it may be separate from the combustion device building but connected by enclosed conveyors. In this example, the "resource recovery facility" is composed of the interconnected combustion device building, the air pollution control equipment, the ash building, and the enclosed conveyors. The point at which RCRA hazardous waste jurisdiction would begin for these facilities would be the point where the ash exits the ash building.

Example 3. A few resource recovery facilities exist where the combustion device is not housed within a building. In these instances, the combustion device, the air pollution control equipment, the proximate enclosed ash handling areas, and the interconnecting enclosed conveyors constructively constitute the "resource recovery facility." Thus, if fly ash and bottom ash were handled in an enclosed system that operates in the same manner as if a building existed and the fly ash and bottom ash were mixed in an enclosed unit proximate to the combustion device, that management activity would be considered to take place within a "resource recovery facility." In this example, the point at which RCRA hazardous waste jurisdiction would begin would be the point where the combined ash exits the last enclosed ash management unit that is located proximate to the combustion device.

Example 4. —Some resource recovery facilities may collect bottom ash within the building housing the combustion device and collect the fly ash outside the combustion device building in a manner that exposes that ash to the environment; for example, in roll-off containers. In these instances, the "resource recovery facility" is composed of the building housing the combustion device as well as the air pollution control equipment. In this example, RCRA hazardous waste jurisdiction begins at the two exit points from the "resource recovery facility," specifically, at: (1) the point where the bottom ash ultimately leaves the combustion device building and (2) the point where the fly ash becomes exposed to the environment as it is discharged from the air pollution control equipment into open roll-off containers. The WTE facility operator would thus make a hazardous waste determination at each location. Should the operator determine that either the bottom ash or fly ash is hazardous, management of that ash would have to be conducted pursuant to RCRA Subtitle C.

If you have any questions about EPA's § 3001(i) interpretation, please contact Andrew Teplitzky (703-308-7275) or Allen Geswein (703-308-7261) of OSWER, or Kate Anderson (202-564-4016) or Andrew Cherry (202-564-5011) of OECA.

Revised Implementation Strategy

1. Overview

In the May 27, 1994 implementation strategy, EPA acknowledged that, for economic and technical reasons, it would be difficult for affected facilities to immediately comply with the City of Chicago v. EDF decision and all applicable RCRA Subtitle C requirements. In recognition of this difficulty, EPA adjusted its enforcement priorities for three months for facilities to implement an ash testing program, and for 6 months during which all WTE ash could be disposed of in solid waste management units in compliance with 40 CFR Part 258. Through these actions, EPA has demonstrated a commitment to working with states and the regulated universe to phase affected facilities into compliance with Subtitle C with minimal disruption of waste handling practices at WTE facilities.

EPA now believes that all affected facilities should be on notice of the duties imposed by the Supreme Court in the City of Chicago v. EDF decision and its ramifications for the management of hazardous ash. Since all WTE facilities should now have programs in place to make hazardous waste determinations of their ash, the Agency expects these facilities to manage ash that is determined to be a hazardous waste in full compliance with RCRA Subtitle C.

2. Situations Presenting Potential Health and Environmental Threats and Releases of Hazardous Constituents

In all circumstances, when considering appropriate enforcement responses for potential violations of Subtitle C, Agency personnel should consider whether a facility may be managing its WTE ash in an environmentally irresponsible manner, posing a potential threat to human health and the environment. Regions should, of course, bring actions, pursuant to RCRA § 7003, upon information that improper handling of any ash (whether it is hazardous or not) may present an imminent and substantial endangerment. In addition, Regions should evaluate whether formal enforcement actions pursuant to RCRA § 3008(h) are appropriate in the event the Agency has information that there is or has been a release of a hazardous waste or hazardous constituents from a facility subject to interim status for management of hazardous ash.

3. Enforcement Actions Under RCRA Section 3008(a)

As discussed above, EPA now expects all generators to have in place an effective hazardous waste determination program, including sampling and analysis where appropriate.¹ Facilities which have failed to set up and implement a method to determine whether their ash exhibits a hazardous waste characteristic are appropriate targets for enforcement response.

EPA is aware, however, that because of configurations unique to individual facilities, some facilities may not combine fly ash and bottom ash before it exits the "resource recovery facility." Such facilities may now have to make separate hazardous waste determinations at separate locations for both bottom ash and fly ash. While the previous implementation strategy allowed any WTE facility to sample and test combined bottom ash and fly ash, the Agency's recent § 3001(i) interpretation of "resource recovery facility" may now require some WTE facilities to make separate

¹. On May 24, 1994, OSW issued draft "Sampling and Analysis of Municipal Refuse Incineration Ash Guidance" which assists generators that do not have guidance in place to make a hazardous waste determination in accordance with 40 CFR § 262.4. This manual was intended to provide guidance to waste-to-energy facilities on how to sample and analyze ash to determine whether it is a hazardous waste. Since the release of the initial implementation strategy, OSW published a Federal Register Notice of Availability requesting comment on the draft (59 FR 32427, June 23, 1994). The public comment period closed on September 21, 1994, and OSW is currently evaluating the comments. The final manual is projected to be released in the Spring of 1995.

EPA continues to encourage the use of the draft (and when finalized, the final) "Sampling and Analysis of Municipal Refuse Incineration Ash Guidance" or similar guidance issued by the states.

determinations on the fly ash and bottom ash. EPA will very likely regard as an indicator of environmentally irresponsible management of hazardous ash (which may warrant an enforcement action under RCRA § 3008(a)) any failure to implement, within 75 days of the date of the February 3, 1995, interpretive notice (60 FR 6666), all modifications to existing hazardous waste determination programs necessary to allow separate hazardous waste determinations for fly ash and bottom ash. During the first 75 days, however, environmentally sound management of ash in accordance with the results of combined testing is unlikely to merit an enforcement response.

If you have specific questions as to the appropriate enforcement response for a particular situation, please contact Mark Pollins (202-564-4001) or Kate Anderson (202-564-4016) of OECA-RCRA Enforcement Division.

Thank you for your continued support in ensuring the proper management of hazardous WTE ash. If you have any questions regarding this revised implementation strategy, please have your staff contact Mark Pollins (202-564-4001) or Kate Anderson (202-564-4016) of OECA-Office of Regulatory Enforcement, Andrew Cherry (202-564-5011) of OECA-Office of Compliance, or Andrew Teplitzky (703-308-7275) of OSWER-Office of Solid Waste.

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