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UPDATE ON MANAGEMENT OF ASH FROM COMBUSTION
OF HOUSEHOLD AND COMMERCIAL WASTES
AT RESOURCE RECOVERY

June 1994

SUMMARY PAGE

White Paper

**UPDATE ON MANAGEMENT OF ASH FROM COMBUSTION
OF HOUSEHOLD AND COMMERCIAL WASTES
AT RESOURCE RECOVERY FACILITIES**

The U.S. Environmental Protection Agency ("EPA") has developed a preliminary strategy for implementing the U.S. Supreme Court's ruling in City of Chicago v. Environmental Defense Fund. In that case, the Court held that municipal waste combustor ash is not exempt from hazardous waste regulation, but must be analyzed to determine if it is a hazardous waste and managed accordingly. The basic elements of EPA's strategy include: (1) deferral of enforcement actions related to waste analysis until August 30, 1994; (2) a six month extension, until December 7, 1994, of the deadline by which facilities that wish to handle hazardous ash by non-exempt methods must file applications for hazardous waste permits; and (3) a decision to classify hazardous ash as a "newly identified waste" that will not be subject to treatment standards until specific standards for ash are developed.

This White Paper updates our May 1994 White Paper on the Supreme Court's decision and addresses issues arising out of EPA's implementation and enforcement strategy.

**UPDATE ON MANAGEMENT OF ASH FROM COMBUSTION
OF HOUSEHOLD AND COMMERCIAL WASTES
AT RESOURCE RECOVERY FACILITIES**

June 1994

This White Paper updates our May 1994 White Paper regarding the impact of the Supreme Court's ruling in City of Chicago v. Environmental Defense Fund, 114 S.Ct. 1588 (1994). In that case, the Court held that ash generated from the incineration of household waste or combined household and commercial or industrial waste in waste-to-energy facilities is not categorically exempt from regulation as a "hazardous waste" under the Resource Conservation and Recovery Act ("RCRA"). Rather, these wastes must be analyzed under RCRA criteria to determine whether they are hazardous wastes subject to RCRA requirements. If the ash is hazardous, it must be managed by exempt methods or at approved hazardous waste facilities.

EPA's position on how facilities handling ash should comply with the Supreme Court's ruling is set forth in (1) a May 20, 1994, draft guidance document on the sampling and analysis of ash; (2) a May 27, 1994, implementation strategy memorandum issued to the EPA Regional Administrators; and (3) a Federal Register notice extending the deadline for submission of RCRA permit applications for facilities that wish to treat or store hazardous ash or accept it for disposal. 59 Fed. Reg. 29,732 (June 7, 1994). States that have obtained authorization from EPA to run their own hazardous waste programs in lieu of the federal program have also begun to issue guidance on their own implementation strategies.

I. The EPA Ash Program

Effective June 1, waste-to-energy facilities must determine, by knowledge or testing, whether their ash is hazardous. Rather than rely on knowledge, most facilities will follow EPA's Toxicity Characteristic Leaching Procedure ("TCLP") to make this determination.^{1/} Absent signs of irresponsible management at these facilities, EPA will not take action until August 30, 1994, to enforce this requirement. However, facilities must be alert to the potential for citizens' suits.

^{1/} On June 23, EPA issued notice of the availability of a draft document titled "Sampling and Analysis of Municipal Refuse Incineration Ash" to assist facilities in designing a plan to test ash under the Toxicity Characteristic rule. (59 Fed. Reg. 32,427.) The draft sampling and analysis guidance provides EPA's "current thoughts" on the minimum testing necessary to characterize residual ash. EPA has solicited comments from affected parties. Comments must be filed by September 21, 1994.

Waste-to-energy facilities whose ash is hazardous will either need to avoid activities that trigger hazardous waste permit requirements, or file a RCRA Part A application by December 7, 1994, for on-site treatment, storage or disposal. Disposal facilities that wish to avoid the permitting process must not accept hazardous ash. To avoid shutdown or substantial fines, facilities that wish to manage hazardous ash by non-exempt methods must not only meet the extended permit deadline, but must immediately satisfy hazardous waste management requirements. EPA has waived the prior notification deadline under RCRA §3010 for facilities that wish to apply for RCRA hazardous waste permits. EPA identification numbers will be needed (unless the facility has already obtained one for prior hazardous waste generation, treatment, storage or disposal activities). Different procedures and deadlines may apply in states that are authorized to implement the Toxicity Characteristic rule.

Finally, EPA has exempted ash from existing treatment standards and land disposal prohibitions for at least six months while it develops specific treatment standards for ash. EPA's decision to classify hazardous ash as a "newly identified waste" means that untreated, hazardous ash may be landfilled in a hazardous waste landfill until ash-specific treatment standards or disposal restrictions are developed. Other forms of land application are barred for hazardous ash.

II. When and Where Is The Decision Effective?

The Court's decision took effect June 1, 1994. EPA believes that the decision is effective in virtually all states, including authorized states that have unauthorized ash exemptions, or whose regulations regulate ash as a solid waste. The validity of EPA's broad application is subject to question. Facilities in authorized states should consult state law and state interpretations to assist in determining if their ash is hazardous and what handling requirements apply.

III. Ash Disposal Before June 1994 - Retroactivity?

EPA has not yet decided whether prior ash disposal is subject to RCRA hazardous waste rules. Realistically, if EPA decides to impose retroactive liability for past handling practices, it is most likely to follow a case-by-case approach. If sampling after June 1, 1994, shows a facility's ash to be intermittently hazardous, enforcement authorities may not be able to prove that prior ash was hazardous. If ash tests uniformly hazardous, the potential liability is enormous. EPA could subject disposal facilities to hazardous waste permit requirements and standards, closure requirements, financial assurance mechanisms or corrective action. Or EPA could apply Subtitle C standards only to future excavation or treatment of previously disposed ash.

Even if EPA does not make a decision on retroactivity, waste-to-energy facilities should make every effort to ensure that the ash they ship from their facilities is non-

hazardous. If ash is even occasionally hazardous by current testing, the resulting hazardous waste manifests will create a paper trail that may be relied on by potentially responsible parties in landfill cleanup cases to seek an increase in the contributions of ash disposers. Whether or not such arguments prevail, they will be costly to refute.

IV. Avoiding Or Deferring Hazardous Ash Management

Facilities will want to take careful advantage of their facility design and the characteristics of their fly ash and bottom ash. Certain combinations may be non-hazardous. The pH of scrubber solutions may yield a combined fly and bottom ash stream that is non-hazardous and, depending on applicable rules and interpretations, scrubbers may not be considered hazardous waste treatment. Avoiding hazardous ash generation entirely (e.g., by improving front-end metals removal) or reducing its volume and frequency of occurrence, will significantly reduce costs and potential liabilities. In reviewing their options, waste-to-energy facilities must bear in mind that there are few remaining exemptions for handling of hazardous ash and that many options will hinge on how regulatory authorities define the point at which a hazardous waste is generated.

A. "Point of Generation" and Sampling Points

Without explicitly stating where the "point of generation" is located, EPA's implementation memo and sampling guidance offer EPA's preliminary views on where samples should be collected. However, the memo and the guidance are ambiguous and inconsistent: EPA's memo instructs that a facility "may sample and test combined fly ash and bottom ash if they are mixed within the municipal combustion unit." But the memo does not define the boundaries of the municipal combustion unit. (The combustion chamber? The ash accumulation hall?) The guidance says "[e]ach residual waste stream that is stored, transported, or disposed of as a separate unit is considered to be a discrete waste and must be evaluated accordingly." Together these statements suggest that facilities that have historically combined fly and bottom ash may test the combined ash, while facilities that have segregated the two ash streams must test them separately. However, some regions have interpreted EPA's pronouncements to allow facilities to mix fly ash and bottom ash outside the combustion chamber and sample the combined ash. EPA's positions may change in response to public comment.

B. Consequences for On-Site Management

EPA has taken the position that the statutory "household waste exclusion" does not exempt all ash management activities within the waste-to-energy facility from RCRA Subtitle C regulations. EPA's June 7 notice takes the position that RCRA's household waste exclusion terminates at the point that ash is generated and any subsequent on-site handling of hazardous ash is subject to Subtitle C compliance. EPA's implementation memorandum indicates that on-site treatment of hazardous ash is permissible only if the facility has RCRA

interim status, a RCRA permit, or treats the waste in methods exempt from permit requirements.

Without a "facility" exemption, waste-to-energy facilities must be certain that their customary practices, as well as any changes designed to avoid hazardous ash, either comply with applicable rules or fall under an existing regulatory exemption (e.g., treatment of ash in 90-day accumulation tanks). Until regulatory authorities clearly define the point in the ash handling process at which a hazardous waste is generated, these facilities are vulnerable to agency or citizen enforcement for impermissible dilution or illegal treatment. Enforcement actions might also be brought against businesses who have accepted ash for off-site transportation, processing or disposal.

If the point of generation is defined as the truck leaving the facility (at least for facilities that have historically combined fly ash and bottom ash), then treatment of combined ash prior to that point should not constitute treatment of a hazardous waste. Accordingly, operators who chemically condition the ash for off-site shipment would not be conducting impermissible dilution or illegal treatment. Indeed, any ash handling whose intentional or coincidental effect is to remove the Toxicity Characteristic before the waste is loaded into transport vehicles could be permissible.

If the point of generation is somewhere before the transport vehicle, any changes in ash handling practices that remove the Toxicity Characteristic will come under closer scrutiny. If the point of generation is located on the ash conveyor (in facilities that segregate fly and bottom ash), these facilities may be subject to enforcement if they now begin to mix fly and bottom ash before sampling.

Existing state protocols were promulgated before the Supreme Court clarified the RCRA status of ash. Accordingly, reliance on them (particularly those portions of them that define the sampling point) may be risky. Nonetheless, many states have developed sampling protocols tailored exclusively to ash and many aspects of these protocols may still be valid. EPA has declined to take a position on whether existing state protocols meet federal standards.

V. EPA Enforcement Strategy

EPA has instructed its regional offices to focus their enforcement activities on certain types of "environmentally irresponsible" conduct and to delay enforcement actions relating to the requirement to determine if ash is hazardous. This suggests that EPA will look at each facility's overall record in deciding whether to enforce.

VI. Potential Legislation

There will be considerable pressure for a legislative fix to mitigate the costs and circumvent uncertainties associated with implementation of the Supreme Court's decision. One proposal currently under development would exempt waste-to-energy ash from Subtitle C requirements (including testing and Subtitle C permit requirements) if it is disposed of in monofills or cells within existing landfills.

In view of the other environmental laws under active Congressional review at the moment, it is questionable whether such legislation will be enacted in this Congress. However, it is possible that legislation may be passed in the next Congress. Congress may face pressure to impose a moratorium on ash regulation until a comprehensive scheme can be developed. Alternatively, EPA may simply extend its current implementation strategy (possibly with some welcome clarifications) until a comprehensive regulatory scheme is in place.

VII. Conclusion

The current EPA proposals do not provide adequate protection or flexibility in a situation that EPA helped to create. During the public comment period on the guidance, affected parties should seek clarification of the point of generation and EPA's enforcement policies. In the meantime, facilities in authorized states that anticipate problems in satisfying the EPA program or permitting schedule should be carefully examining state rules and federal approvals to see whether more favorable state rules or interpretations apply. All affected facilities should proceed cautiously in close consultation with regulatory authorities, and with the knowledge that existing guidance may change and that citizens' groups may take more aggressive enforcement than the responsible agencies.

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