

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460**

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

The Honorable Saxby Chambliss
United States House of Representatives
1708 Longworth Office Building
Washington, DC 20515

Dear Congressman Chambliss:

Thank you for your August 5, 1996 letter in response to the language I suggested be used in an upcoming regulatory proposal to exclude process wastewaters that are recycled and reused at wood preserving facilities from regulation as a solid waste under the Resource Conservation and Recovery Act (RCRA).

My staff and I have carefully considered your comments and have discussed them in great detail with our Office of Enforcement and Compliance Assurance (OECA) and our Office of General Counsel (OGC). I have concluded that the most appropriate course is to propose the following regulatory text modifying 40 CFR 261.4(a)(9):

(9) (ii) and

(9) (iii) wood preserving wastewaters and spent wood preserving solutions that are recycled and reused on-site in the production process for their original intended purpose at wood preserving facilities; provided that these wastewaters and spent wood preserving solutions are managed to prevent release to the land and the groundwater and that the units can be visually or otherwise determined to prevent such releases; and provided that if these wastewaters are collected or managed on drip pads, those pads are in compliance with the regulatory drip pad standards, regardless of whether the facility would generate less than 100 kg per month of hazardous waste once such wastewaters are excluded under this provision.

This language makes three changes to the proposed text suggested in your letter. The reasons for each of these changes are discussed below:

"... original intended purpose..."

I believe it is important that EPA retain the phrase "for their original intended purpose". When we initially raised the possibility of developing an exclusion for in-process wastewaters recycled on-site at wood preserving facilities, we said that a decision to grant such an exclusion would be based upon the degree to which the industry could demonstrate that the handling of these materials at wood preserving facilities meets, on an industry-wide basis, a number of criteria that are regularly used by the Agency to grant site-specific variances from classification as a solid waste. These criteria are listed in 40 CFR §260.31(b) (1)-(8). Among them, we mentioned "the extent to which the material is handled before reclamation to minimize loss" as being of particular interest in making this determination. Another criterion particularly relevant to this issue is "whether the reclaimed material is used for the purpose for which it was originally produced when it is returned to the original process...".

At many wood preserving facilities once water has been used to wash hazardous wastes off drip pads, it is collected and returned to a tank in order to be used to treat wood, with no releases to the environment. Because such a recycling operation (provided that there are no releases to the environment) adequately addresses the eight variance criteria we cited in our notice in the August 22, 1995 Federal Register, I am prepared to recommend proposing an exclusion for wastewaters and wood preserving solutions that are reused for their original intended purpose. However, I am not comfortable making the same assertion with respect to other uses, such as use in a cooling tower.

"...visually or otherwise determined..."

I believe that EPA should retain the phrase "...and that the units can be visually or otherwise determined to prevent such releases...", To ensure that a provision "to prevent release to the land and the groundwater," is meaningful that provision must, in some way, be verifiable. Give the level of pre-existing, historic contamination at some wood preserving facilities, it would be very difficult, if not impossible, for inspectors to verify whether or not the units on which or in which the wastewaters are being managed a preventing release unless such a provision is included.

We have given much consideration to the point that the American Wood Preservers Institute (AWPI) has made on several occasions, that some other exclusions from the definition of solid waste granted by EPA are conditioned only upon the requirement that the excluded material not be land disposed; and that those exclusions do not require that an inspector be able to "visually Or otherwise determine that a management unit prevents releases. There is an important difference between this potential exclusion for wood preserving wastewaters and spent wood preserving solutions and some of the other exclusions that EPA has granted. In other exclusions where there is a ban on land placement, the object is to keep these materials from being placed directly on the land or in a landfill. Therefore, compliance with such a provision can be verified by simply observing where a material is placed. However, with the wastewaters, a determination that they are being managed to prevent loss requires a judgement about the integrity of the unit in which the waters are placed; and not simply an observation of where a material is placed. The person making such a determination in the case of wastewaters and spent wood preserving solutions would need to be able to visually inspect the unit.

"... in compliance with..."

The staff in both OGC and OECA are very concerned that the phrase "subject to" will not accomplish what we are all seeking. They are concerned about the circular logic of requiring that excluded wastewaters and spent wood preserving solutions be managed on drip pads that are subject to the regulatory drip pad standards when, by virtue of the exclusion that requires this, the drip pads might no longer be subject to those standards because they are not being used to manage a solid waste. This would be confusing for both the industry and regulators and is inconsistent with our goal of simplifying and clarifying RCRA regulations.

AIn compliance with@ would clarify that regardless of the regulatory status of the wastewaters, if they are managed on a drip pad the drip pad must comply with subpart W. The industry is supportive of the subpart W drip pad standards. We want to be sure that there is no confusion concerning the necessity of complying with these standards (when managing these wastes on a drip pad) as a condition for being granted this exclusion.

We understand that AWPI is concerned that use of the phrase "in compliance with" could cause a facility to lose this exclusion because of a minor violation of the standards and therefore become subject to taxation in some states. We note, however, that the use of "in compliance with" would be consistent with the current regulatory language in 40 CFR §262.34(a)(1)(iii) that exempts these facilities from hazardous waste permit requirements as long as they operate in compliance with subpart W drip pad standards. We are not aware that any facilities have had to obtain permits, so it would appear that this phrasing is not causing the sort of problem that AWPI envisions.

Each of the changes discussed above has a strong constituency within the Agency. We are always willing to discuss other options and to continue what has been a very constructive dialogue. However, given the fragile nature of the consensus we needed to build within the Agency to get as far with this issue as we have, changes to this language (other than minor clarifications) are unlikely to be acceptable to others within EPA. Therefore, this is the language that I am prepared to recommend that EPA propose. My recommendation on this matter should not be construed as a final Agency position. The process for proposing a rule will involve review and approval at the Assistant Administrator level and above within EPA and clearance through the Office of Management and Budget.

We look forward to hearing from you upon your review of this letter. If you have any questions, please let me know or have your staff contact Stephen Bergman at (703) 308-7262.

Sincerely,

Michael Shapiro, Director
Office of Solid Waste