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United States Environmental Protection Agency
Washington, D.C. 20460
Office of the Administrator

September 18, 1992

MEMORANDUM

TO: All Regional Administrators

SUBJECT: Exemption for Municipal Waste Combustion Ash
From Hazardous Waste Regulation Under RCRA
Section 3001(i)

PURPOSE

This memorandum sets forth the United States Environmental Protection Agency's ("EPA" or "Agency") decision under section 3001(i) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6921(i) (see footnote 1), to treat ash generated from the combustion of nonhazardous municipal solid waste at resource recovery facilities (hereinafter "MWC ash") as exempt from hazardous waste regulation under RCRA Subtitle C. EPA believes that MWC ash can be regulated in a manner that will be protective of human health and the environment under RCRA Subtitles. The determination set forth herein supersedes the Agency's earlier view of section 3001(i) as not exempting MWC ash from hazardous waste regulation. See 50 Fed. Reg. 28702, 28725-26 (1985).

ANALYSIS

Text of the Statute

EPA's determination that MWC ash is exempt from hazardous waste regulation is consistent with the text of section 3001(i). As proclaimed by the title of section 3001(i) -- "Clarification of household waste exclusion" -- in enacting that provision, Congress was building upon the regulatory framework it earlier had established. In enacting RCRA in 1976, Congress indicated that solid waste from households, which frequently includes materials that may contain hazardous constituents, should not be regulated as hazardous waste under Subtitle C. S. Rep. No. 94-988, 94th Cong., 2d

Sess. 16 (1976). EPA codified Congress' intent in the so-called "household waste exclusion," promulgated in 1980, which provides that "any material ... derived from households ... is not hazardous waste" 261.4(b)(1).

In the preamble to the Federal Register notice announcing the household waste exclusion, EPA clearly stated that the exclusion extends to ash remaining after household waste is incinerated: "Since household waste is excluded in all phases of its management, residues after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. 33066, 33098 (1980). The Agency justified its determination that ash derived from the incineration of household waste is subject to the exclusion on the ground that Congress intended to "exclude waste streams generated by consumers at the household level." *Id.* (emphasis added).

In enacting section 3001(i), Congress arguably extended the regulatory exclusion for ash derived from the incineration of household waste to similar residues generated by resource recovery facilities from the incineration of household waste and nonhazardous commercial and industrial solid waste. To the extent that household waste alone is incinerated, section 3001(i) coincides with EPA's earlier interpretation of the household waste exclusion as exempting ash derived from such waste from hazardous waste regulation. The inclusion in section 3001(i) of nonhazardous commercial and industrial waste, along with household waste, suggests that Congress may have intended that MWC ash resulting from the combustion of those combined wastes also should not be subject to regulation as a hazardous waste.

In addition, congressional intent to exempt MWC ash from hazardous waste regulation is suggested by the portion of section 3001(i) which provides that a resource recovery facility shall not be deemed to be "treating, storing, disposing of, or otherwise managing" hazardous waste. (Emphasis added.) Nothing ordinarily is "disposed of" when a resource recovery facility receives or stores a nonhazardous solid waste, and the burning such waste generally is regarded as a type of treatment under RCRA. See RCRA sections 1004(3) and (34), 42 U.S.C. §6903(3) and (34) (definitions of "disposal" and "treatment"). As a result, since MWC ash ordinarily is the only waste "disposed of" by such a facility, Congress arguably intended that MWC ash not be regarded as a hazardous waste.

For the foregoing reasons, EPA believes that the text of section 3001(i) is consistent with the Agency's determination that MWC ash is exempt from hazardous waste regulation.

Legislative History

EPA's determination that MWC ash is exempt from hazardous waste regulation also is consistent with the legislative history of section 3001(i). First, a Report of the Senate Committee on Environment and Public Works addressing section 3001(i) specifically states that "[a]ll waste management activities of such a [resource recovery] facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion" (see footnote 2). S. Rep. No. 98-284, 98th Cong., 1st Sess. 61 (1983) (emphasis added) (see footnote 3). Since MWC ash ordinarily is the only waste "generated" by a resource recovery facility, Congress arguably demonstrated its intent that MWC ash not be regarded as a hazardous waste.

Second, the Senate Report states that section 3001(i) was enacted to "encourage commercially viable resource recovery facilities and . . . remove impediments that may hinder their development and operation." S. Rep. No. 98-284, 98th Cong., 1st Sess. 61 (1983). As noted above, one of the significant features of section 3001(i) is that it applies to resource recovery facilities that burn both household waste and nonhazardous commercial and industrial waste. If section 3001(i) were interpreted as not exempting MWC ash derived from the incineration of combined household waste and nonhazardous commercial and industrial waste from regulation as hazardous waste, the policy goal stated in the Senate Report could be substantially frustrated. As a practical matter, the cost benefit to a resource recovery facility in being able to burn both household and nonhazardous commercial and industrial waste would be significantly reduced if MWC ash must be disposed of as a hazardous waste, as discussed more fully below.

Third, the Senate Report refers to the wastes being incinerated in resource recovery facilities as "wastes" as follows:

Resource recovery facilities often take in . . .
"household wastes" mixed with other non-hazardous waste
streams from a variety of sources other than
"households." . . . New section 3001[i] clarifies the

original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

Id. (emphasis added). As noted above, the Agency justified its determination that ash derived from the incineration of household waste is excluded from hazardous waste regulation on the ground that Congress intended to "exclude waste streams generated by consumers at the household level." 45 Fed. Reg. 33066, 33098 (1980) (emphasis added). In also using the term "waste stream" in the Senate Report, Congress arguably demonstrated its intent that section 3001(i) be construed as extending the household "waste stream" exclusion to the entire "waste stream" at a resource recovery facility, including MWC ash derived from the burning of combined household and nonhazardous commercial and industrial waste.

In sum, the legislative history of section 3001(i) is consistent with the Agency's determination to exempt MWC ash for hazardous waste regulation.

Policy Considerations

As discussed above, EPA believes that the text and legislative history of section 3001(i) are consistent with the Agency's view that MWC ash is exempt from hazardous waste regulation. Since Congress did not in the statute or legislative history expressly address the precise issue of whether MWC ash should be exempt from hazardous waste regulation, the Agency has discretion to adopt a reasonable interpretation that best serves the goals embodied in section 3001(i). EPA has exercised that discretion in adopting the interpretation set forth herein. EPA believes that the two statutory goals embodied in section 3001(i) -- protecting the environment and promoting resource recovery from nonhazardous solid waste -- are best served by exempting MWC ash from hazardous waste regulation.

EPA has determined that MWC ash can be regulated in a manner that will be protective of human health and the environment under Subtitle D. In particular, EPA recently promulgated new criteria for municipal solid waste landfills at 40 C.F.R. Part 258, 56 Fed. Reg. 50978 (1991). Municipal landfills and monofills receiving MWC ash must comply with those criteria (see footnote 4). The Part 258

criteria impose requirements on municipal landfills that far exceed those previously imposed, including more stringent location restrictions, facility design and operating criteria, ground-water monitoring requirements, corrective action requirements, financial assurance requirements, and closure and post-closure care requirements. The Agency believes the disposal of MWC ash in municipal landfills subject to the Part 258 criteria will be protective of human health and the environment (see footnote 5).

If information comes to EPA's attention suggesting that MWC ash is being managed or disposed of in a manner that is not protective of human health and the environment under Subtitle D, the Agency will consider additional actions, including providing technical assistance, issuing guidance documents, and, if appropriate, promulgating additional regulations to address those situations. In addition, at individual sites, if the disposal of MWC ash may present an imminent and substantial endangerment to human health or the environment, EPA may require responsible persons to undertake appropriate action under section 7003(a) of RCRA, 42 U.S.C. §6973(a).

Resource recovery from municipal solid waste is an important component of EPA's integrated waste management approach, which involves the complementary use of a variety of practices to safely and effectively manage municipal solid waste (see footnote 6). Such activity advances the statutory objective of RCRA (the Resource Conservation and Recovery Act) to reduce the volume of waste that requires disposal. See *id.* at section 1002(b)(8), 42 U.S.C. §6901(b)(8). It also advances the statutory objective of recovering significant amounts of energy from solid waste. See *id.* at sections 1002(d)(2), 42 U.S.C. §6901(d)(2), and 1003(a)(11), 42 U.S.C. §6902(a)(11). For those reasons, EPA agrees with Congress' view, set forth in the Senate Report discussed above, that impediments hindering the development and operation of commercially viable resource recovery facilities should be eliminated where practicable.

For nonhazardous municipal solid waste that can be disposed of either in a Subtitle D landfill or combusted in a resource recovery facility, the comparative economic desirability of those two alternatives significantly is impacted by the application of section 3001(i) to MWC ash (see footnote 7). If MWC ash is not exempt under 3001(i) from hazardous waste regulation, a strong economic incentive may exist to dispose of raw municipal solid

waste in Subtitle D landfills, rather than combust that waste in resource recovery facilities. The costs associated with the disposal of MWC ash in Subtitle C facilities are dramatically higher than in Subtitle D landfills. Although costs vary significantly from region to region, when averaged on a national basis there is over a ten-fold difference between the cost of disposal of MWC ash in a Subtitle C facility compared to a Subtitle D landfill: the cost of transporting and disposing of MWC ash in a Subtitle C facility is approximately \$453.00 per ton; the cost of doing so in a Subtitle D landfill is approximately \$42.00 per ton. For states that combust substantial portions of their solid waste (in resource recovery and other combustion facilities), such as Connecticut (65%), Massachusetts (47%), and Maine (45%), this cost differential could be enormous.

CONCLUSION

In sum, exempting MWC ash from hazardous waste regulation is consistent with the text and legislative history of section 3001(i), and best serves the statutory goals embodied in that provision of protecting the environment and promoting resource recovery from nonhazardous solid waste. For the foregoing reasons, EPA has determined that MWC ash is exempt from regulation as a hazardous waste under RCRA Subtitle C.

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1. As part of the Hazardous and Solid Waste Amendments of 1984, Congress amended RCRA by adding section 3001(i), which provides, in pertinent part:

- (i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous waste for purposes of regulation under

[Subtitle C] if ... such facility ... receives and burns only ... household waste ... and solid waste from commercial or industrial sources that does not contain hazardous waste....

RCRA section 3001(i)(1), 42 U.S.C. §6921(i)(1). Section 3001(i) is codified in EPA's regulations as part of the household waste exclusion. 40 C.F.R. 261.4(b)(1).

- 2 Unlike the legislative history for section 3001(i), the statute does not expressly state that the "generation" of waste by a resource recovery facility is included within the exemption. At most, the absence of that term reflects that Congress did not expressly address the precise issue of whether MWC ash should be exempt from hazardous waste regulation, and does not indicate that Congress intended that MWC ash be regulated as a hazardous waste. In such a circumstance, the Agency has discretion to adopt a reasonable interpretation that best serves the goals embodied in section 3001(i). EPA has exercised that discretion in adopting the interpretation set forth herein, as discussed more fully below.
- 3 The Senate Report is entitled to special weight because the Conference Committee adopted, without change, the Senate version of section 3001(i). H.R. Rep. No. 98-1133, 98th Cong., 2d Sess. 106 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News 5677. In passing the Senate version of section 3001(i), Congress also impliedly adopted the Senate's interpretation of that provision set forth in the Senate Report.
- 4 In the preamble to the Federal Register notice announcing the final Part 258 criteria, EPA stated that "[t]he purpose of part 258 is to establish minimum national criteria for municipal solid waste landfills, including [such landfills] used for . . . disposal of nonhazardous municipal waste combustion (MWC) ash (whether the ash is co-disposed or disposed of in an ash monofill)." See also response to comment document nos. 155, 168, 171, 172, and 199 in the public record for the Part 258 rulemaking (docket number F-91-CMLF-FFFFF).

- 5 The promulgation of the Part 258 criteria is an important step in ensuring that MWC ash can and will be regulated in a manner that will be protective of human health and the environment under Subtitle D. The promulgation of those criteria also has served as an impetus for the Agency's reevaluation of its earlier view of section 3001(i) as not exempting MWC ash from hazardous waste regulation. 50 Fed. Reg. 28702, 28725-26 (1985).
- 6 That approach establishes a hierarchy that prefers source reduction (i.e., the design, manufacture, purchase, or use of materials to reduce the amount or toxicity of solid waste generated) and recycling (i.e., the process by which materials are collected and used as raw materials for new products) over solid waste combustion (including combustion for resource recovery) and landfilling. Solid waste combustion, however, has played and will continue to play an important role in the Agency's integrated waste management approach because the entire solid waste stream cannot be reduced through source reduction and recycling. EPA encourages communities to choose the mix of solid waste options that are most appropriate for them, considering local economic, environmental, and other factors.
- 7 In addition to cost, Subtitle D landfill capacity limitations also may be a significant factor in determining whether municipal solid waste is combusted in resource recovery facilities.