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CLARIFICATION: IS A FACILITY THAT HAS A "PRIMARY PURPOSE" OF  
BURNING HAZARDOUS WASTE FOR DESTRUCTION SUBJECT TO  
REGULATION AS AN INCINERATOR

United States Environmental Protection Agency  
Washington, D.C. 20460  
Office of General Counsel

July 21, 1994

MEMORANDUM

SUBJECT: Response to Issues Raised in January 27, 1994  
Letter from Senators Breaux and Johnston to  
Administrator

FROM: Jean C. Nelson  
General Counsel

TO: Steven A. Herman  
Assistant Administrator  
Office of Enforcement and Compliance Assurance

This memorandum clarifies some of the issues raised in a January 27, 1994 letter from Senators Breaux and Johnston to the Administrator. In that letter, the Senators inquired about the government's position that a facility that has a primary purpose of burning hazardous waste for destruction is subject to regulation as a hazardous waste incinerator. More specifically, they asked if a "primary purpose" test is part of existing law and whether such a standard might stifle innovation in the hazardous waste treatment industry.

The reference to "primary purpose" in EPA's initial response to the Senators was a shorthand encapsulation of various complex regulatory provisions. The following discussion shows in more detail how existing regulations apply to incinerators of hazardous waste.

The first step is to ascertain whether a facility manages a hazardous waste. In order to do this, it is necessary to determine whether a facility manages a solid waste (a necessary precondition

to being a "hazardous waste"). From 1980 to 1985, federal regulations defined "solid waste" to include materials that are "burned or incinerated." 40 C.F.R. 261.2(c)(2)(1981) as promulgated at 45 Fed. Reg. 33119 (May 19, 1980). This provision was amended in 1985. The amended rules continue to state that solid waste includes materials that are "abandoned by being burned or incinerated." 40 C.F.R. 261.2(b)(2) (1991), as promulgated at 50 Fed. Reg. 664 (Jan. 4, 1985). Solid wastes are regulated as hazardous wastes if they exhibit a characteristic of ignitability, corrosivity, reactivity, or toxicity, or if they are specifically listed in the regulations. 40 C.F.R. Part 26 Subparts C and D (see footnote 1).

The next step is to ascertain whether a facility should be subject to regulation as a hazardous waste incinerator. In 1980 and 1981, EPA issued incinerator regulations to reduce environmental hazards associated with using poor operating procedures to burn hazardous wastes. 45 Fed. Reg. at 33250 and 33216 (establishing standards for facilities with interim status); 46 Fed. Reg. 7678-83 (January 23, 1981) (establishing standards for permitting incinerators). An "incinerator" was defined as "an enclosed device using controlled flame combustion, the primary purpose of which is to thermally break down hazardous waste" (see footnote 2). 45 Fed. Reg. at 33074. Hazardous waste incinerator rules applied to devices burning hazardous waste to incinerate them, including

1) operators of incinerators and 2) boilers and industrial furnaces (BIFs) burning hazardous wastes to destroy the wastes. 40 C.F.R. 264.340(a) as promulgated at 50 Fed. Reg. at 665-66. Consequently, since 1980, persons burning hazardous wastes in order to destroy them have been subject to the incinerator regulations because they are engaged in incineration of hazardous wastes, and the devices in which the wastes are destroyed are subject to regulation as hazardous waste incinerators. These rules apply to each hazardous waste that is burned, so that a device burning any hazardous waste for destruction subjects the device to regulation as an incinerator. See e.g., 48 Fed. Reg. at 1158 n. 2 & 4, and 11159-60 (March 16, 1983) (see footnote 3).

We also want to address the Senators' concern that EPA is using a "primary purpose" standard as an economic test to determine whether a device is an incinerator or a BIF. The tests that determine whether a device is an industrial furnace are set out clearly in the definition of "industrial furnace." 40 C.F.R.

260.10 (1991). Specifically, to qualify as an industrial furnace a unit must 1) be an integral component of a manufacturing process (i.e., engaged in making a product), 2) use thermal treatment to accomplish recovery of materials or energy, and 3) qualify as one of the 12 types of devices that are listed in the definition (see footnote 4). EPA has never stated, nor is it the Agency's position, that the amount of revenue a facility makes from receiving hazardous waste for treatment versus the amount of revenue it makes from selling recycled products alone determines the regulatory status of the device. However, we have stated, repeatedly, that this is a relevant factor in determining whether a device is being used for the purpose of destruction rather than legitimate recycling. See e.g. 53 Fed. Reg. at 522 (Jan. 8, 1988). We continue to believe that it is appropriate to examine revenue sources when judging whether a facility is engaged in legitimate or sham recycling.

We also wish to address the Senators' concern that regulation necessarily stifles development of new treatment technologies. For example, when the Agency proposed and adopted stricter controls for treatment of hazardous steel electric arc furnace control dust by a recycling treatment technology (zinc recovery), a host of new facilities developed competing treatment technologies in what had previously been a near monopoly market. See 56 Fed. Reg. at 41166 & 41170 (discussing new zinc recovery technologies) (August 19, 1991). These facilities have both offered innovative treatment technologies and complied with regulations designed to assure that their operations are protective of the environment. Indeed, it is a fundamental premise of the 1984 RCRA amendments that facilities should conduct hazardous waste management properly in the first instance in order to ensure adequate environmental protection, and that "properly conducted recycling and reuse" will help achieve the statute's ultimate goals of minimizing waste generation, reducing land disposal, and protecting human health and the environment. RCRA Section 1002(b)(6), 42 U.S.C. §6901(b)(6); RCRA Sections 1003(a)(5) and (6), 42 U.S.C. §6902(a)(5) and (6).

Finally, the Senators ask whether it is the government's position that a product meeting the exemption in 40 C.F.R. 266.20 (1992) must be delisted. If their question is whether delisting is a prerequisite to eligibility for the 40 C.F.R. 266.20 exemption, it is not. See 40 C.F.R. 266.20(a) (1992) (indicating that the provision applies to hazardous wastes; delisted wastes are not hazardous wastes). We also note, however, that 40 C.F.R. 266.20

only applies to legitimate products derived from hazardous wastes, not to hazardous waste residues that merely are claimed to be products.

Please contact me or Lisa Friedman (at 260-7697) if you have any further questions concerning these issues.

Footnotes:

- 1 40 .F.R. 261.4(b) excludes some solid wastes from regulation as hazardous wastes.
- 2 The term "incinerator" has been redefined since 1980 to take into account the design of the unit. See 40 C.F.R. 260.10 (1992).
- 3 EPA further amended the rules in 1991 to provide that the rules controlling air emissions from BIFs that burn hazardous waste apply even to BIFs burning hazardous wastes to destroy them. 40 C.F.R. 266.100(a) (1992) (promulgated February 21, 1991 at 56 Fed. Reg. 7208). Thus, for new BIFs coming on line the primary purpose of the combustion unit no longer determines its regulatory status. *Id.* BIFs burning primarily to destroy may now be regulated as BIFs as long as they meet the criteria set out in the definitions of boiler and industrial furnace. *Id.* This provision does not give devices burning hazardous waste for destruction a new opportunity to obtain interim status where such unit should have obtained but did not obtain interim status as an incinerator. 56 Fed. Reg. at 7143.
- 4 If the unit is an integral component of a manufacturing process and uses thermal treatment to accomplish recovery of materials or energy but does not qualify as one of the 12 devices listed in the definition, the facility may petition the EPA to be considered as an industrial furnace. *Id.* EPA will consider the following factors when reviewing the petition:
  - (i) The design and use of the device primarily to accomplish recovery of material products;
  - (ii) The use of the device to burn or reduce raw

materials to make a material product;

- (iii) The use of the device to burn or reduce secondary materials as effective substitutes for raw materials, in processes using raw material as principal feedstocks;
- (iv) The use of the device to burn or reduce secondary materials as ingredients in an industrial process to make a material product;
- (v) The use of the device in common industrial practice to produce a material product; and
- (vi) Other factors, as appropriate.

Id. as promulgated at 50 Fed. Reg. 661 and revised at 56 Fed Reg. 7206 (February 21, 1991).

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Attachment  
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United States Senate  
Washington, D.C. 20510

January 27, 1994

Honorable Carol M. Browner  
Administrator  
Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

Dear Administrator Browner:

We are in receipt of a letter from Assistant Administrator Steven A. Herman dated August 30 1993 responding to our inquiry concerning a constituent company. Mr. Herman's reply raises issues on which we would appreciate clarification, not as it relates to the constituent company, but rather generically.

Mr. Herman discusses "primary purpose" in his letter, apparently stating that an operation could not be considered as an industrial furnace operating as a recycler if its primary purpose is to destroy hazardous wastes. Is this an additional standard to current law, or is it contained in current statutes or regulations?

We are concerned that such a standard could stifle all new and innovative technologies for dealing with hazardous wastes. We are not aware of any hazardous waste recycling process which does not require a significant payment from the generator of the waste to be economically feasible. Therefore, the primary purpose of all of these technologies could be said to be the destruction of hazardous wastes and recycling might never be available on the scale necessary to deal with our hazardous waste problem.

Mr. Herman also discusses delisting in this letter. Is it your position that a product which meets the exemption of 40 C.F.R. 266.20 must be delisted?

We appreciate your response to our previous communication and look forward to your reply concerning the issues raised in this

RO 13687

letter.

Sincerely,

J. Bennett Johnston  
United States Senator

John Breaux  
United States Senator