The EPA Ash Memorandum

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Since the passage of the Resource Conservation and Recovery Act (RCRA) in 1976 the Environmental Protection Agency has articulated a number of conflicting and difficult to understand policies, but none more so ambiguous perhaps than its policy with respect to the classification and disposal of municipal waste combustion ash (MWC Ash). Part of the confusion resulted from the failure of Congress to describe explicitly its position with respect to MWC ash when it established an exclusion for household waste from classification and regulation as hazardous waste.

In May 1980, EPA promulgated the hazardous waste regulations that implemented RCRA, Subtitle C. In the preamble to these regulations, EPA first described the "household waste exclusion" as the "intent of Congress". This was based on the Senate Report which said, in part:

"The hazardous waste program is not to be used to control the disposal of substances used in households or to extend control over general municipal waste based on the presence of such substances".

Since municipal solid waste generally included a combination of household waste and non-hazardous commercial and industrial waste, the exclusion was not applicable. Thus it was incumbent on owners/operators of municipal solid waste combustion facilities to determine whether or not their ash was hazardous by conducting appropriate analysis or tests.

Environmentalists argue that incineration is a waste processing not a waste disposal technology and that its products pose substantial management problems of their own. In particular, incineration is perceived to enhance the mobility and availability of toxic metals and to produce unacceptable levels of dioxins and furans. Thus they argue for cradle to grave ash management under Subtitle C of RCRA based on the toxicity characteristics exhibited by ash. (They presented data that showed that samples of fly ash are highly leachable and almost always exceeded federal criteria for hazardous waste based on their lead and cadmium content. They also presented data that showed that bottom ash and combined ash often exceeded the criteria of lead.)

In an effort to clarify the exclusion, Congress included a revision to Section 3001(c) of RCRA in 1984 with passage of the Hazardous and Solid Waste Amendments, tieing the household waste exclusion to resource recovery facilities without specifically mentioning ash. The law indicated that a facility that takes only household and non-hazardous commercial and industrial waste and has in place a program to prevent the inclusion of hazardous waste in its waste stream would not be deemed to be managing hazardous waste. Clearly this would imply that ash generated by such a facility would not be considered a hazardous waste. Despite this, when EPA codified the rule in the Code of Federal Regulations, it stated in the preamble that it did not believe it was Congress' intent to exempt ash if the ash from a resource recovery facility were tested and exhibited the characteristics of a hazardous waste.

New York State, among others, has long argued that it would be misguided public policy to regulate ash generation from incinerators and resource recovery facilities as hazardous waste subject to Subtitle C if states could ensure adequate protection of public health and the environment through a different regulatory construct. Several draft bills were introduced into Congress to achieve this end but none succeeded. In the interim EPA tried to take a low profile on the issue ruling that in authorized Subtitle C states, it was the state's responsibility to determine if and when actual testing of municipal solid waste ash was needed to be conducted to determine the presence of a hazardous characteristic.

In 1986, in response to a growing interest in the ash question, EPA issued a series of memoranda and letters interpreting HSWA such that if MWC ash did exhibit any of the hazardous waste characteristics, then EPA believed it should be managed as a hazardous waste under Subtitle C of HSWA. Since then, EPA testified before Congress that although the statute is ambiguous, it believed its interpretation to not exclude ash from hazardous waste regulation was correct. The testimony also makes clear, however that EPA believes that ash could be managed safely under RCRA Subtitle D - Municipal Solid Waste Landfill criteria. Accordingly, the Agency indicated it would support Congressional legislation that would provide EPA with clear authority to regulate MWC ash under Subtitle D.

The EDF charged in two lawsuits (in 1987) that facilities in Chicago and New York weren't managing their ash as a hazardous waste. Chicago and New York argued that such ash falls under the household exclusion of RCRA.

The results were conflicting:

- NY Federal District Court rejected EDF's arguments and on appeal, it was upheld by 2nd U.S. Circuit Court of Appeals.
- Chicago Federal District Court concurred with the 2nd U.S. Circuit Court of Appeals' decision.
- But the 7th U.S. Circuit Court of Appeals overturned that decision.

So what we have is essentially two different Circuit Courts having opposing decisions.

EPA continually turned to Congress for guidance over this issue through a series of draft RCRA reauthorization bills. When these efforts faltered Congress decided to give itself more time to resolve the problem by issuing through the 1990 Clean Air Act Amendments a two-year prohibition to EPA from treating MWC ash as a hazardous waste until November 15, 1992.

Subsequently, in 1992 the Supreme Court was asked to review the case and asked then-Administrator William Reilly to state EPA's opinion. In a September 18, 1992 memorandum, Reilly argued that there are three bases for his determination that MWC should be covered by the household waste exclusion:

1) Text of the Statute

2) Legislative History

3) EPA Policy considerations (including the belief that Subtitle D would adequately protect the environment from ash disposal).

Text of the Statute - The text of the statute reads as follows:
Section 3001(i): Clarification of the Household Waste Exclusion

- "A resource recovery facility .... shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous waste ....."

Legislative History (S. Rep. No. 98-284, 98th Cong, 1st Sess. 61 (1983) The legislative history is defined in two pertinent statements:

Report of the Senate Committee on Environment and Public Works addressing Sections 3001(i) states

- **"all 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."** (MWC ash is the only waste normally "generated" by a resource recovery facility.)

- **"(Section 3001(i) was enacted to) encourage commercially viable resource recovery facilities and ------ remove impediments that may hinder their development and operation."**

(It is recognized that the cost benefit to a resource recovery facility is its ability to burn both household and non-hazardous commercial and industrial waste. This would be lost if the MWC ash had to be disposed of as a hazardous waste. Hazardous waste disposal costs approximately $500 per ton.)

Policy Considerations

One argument to support the EPA flip-flop over the classification of MWC ash is concern existing prior to 1990 that Subtitle D landfills lacking modern liner technology did not provide the technology that could be considered protective of human health and the environment. With the promulgation of Part 258 criteria, requiring minimum landfill technology and ground water monitoring comparable to those required for handling hazardous wastes under Subtitle C, the Agency is satisfied that disposal of MWC ash in these facilities would be fully protective of human health and the environment.

The Supreme Court used Reilly's decision to remand the EDF lawsuit back to the 7th Circuit Court of Appeals. The 7th Circuit Court refused to change its original decision in a January 12, 1993 decision.

That brings us to the present. Chicago is appealing again to the U.S. Supreme Court.

At this time, EPA is continuing to follow Congressional activity and current judicial action regarding this subject. Clearly, this issue has not been resolved. The ultimate decision about how MWC ash should be managed will likely rest with the Courts and/or the Congress.

We have not yet heard from this administration what changes if any will be made in EPA policy with respect to MWC ash. It is my expectation that Washington will have something to say before the end of the summer and that the revised policy will temper the implications of the Reilly memo. In the interim this is the policy that will be followed in all areas outside the jurisdiction of the Seventh Circuit Court of Appeals, Chicago.