

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

May 27, 1994

MEMORANDUM

SUBJECT: Implementation Strategy of U.S. Supreme Court Decision in City of Chicago v. EDF, No. 92-1639 (\_\_\_ U.S. \_\_\_, May 2, 1994) for Municipal Waste Combustion Ash

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TO: Regional Administrators (Regions I-X)

Background

On May 2, 1994, the U.S. Supreme Court issued an opinion interpreting Section 3001(i) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6921(i). City of Chicago v. EDF, No. 92-1639 (\_\_\_ U.S. \_\_\_, decided May 2, 1994). The Court held that Section 3001(i) does not exempt ash generated at resource recovery facilities (i.e., waste-to-energy facilities) burning household wastes and nonhazardous commercial wastes from the hazardous waste requirements of Subtitle C of RCRA.

Under the U.S. Supreme Court Rules, the Court's decision will take effect when the Court formally notifies lower courts. The Court must wait at least 25 days before issuing such a notification. Consequently, the decision in City of Chicago v. EDF will take effect as a matter of federal law sometime shortly after May 27, 1994. In response to the Supreme Court's decision, we are issuing this memorandum to all Regions concerning the implementation strategy for bringing waste-to-energy facilities affected by the Supreme Court's decision into compliance with RCRA Subtitle C as quickly as possible. The Agency is also publishing, in the Federal Register, a Notice of Extension of Date for Submission of Part A Permit Applications for waste-to-energy facilities affected by the Supreme Court decision. The Federal Register notice, to be released shortly, finds that there has been "substantial confusion" as to whether owners and operators of facilities managing ash were required to file applications for RCRA hazardous waste permits. As a result, EPA is exercising its authority under 40 CFR 270.10(e) (2) to extend the deadline within which owners and operators of facilities that treat, store, or dispose of ash determined to be a hazardous waste can file their Part A permit applications. EPA is also announcing that we interpret Section 3004(g) (4) of RCRA to apply to ash from waste-to-energy facilities. Under this interpretation, ash is a newly identified waste for the purposes of the RCRA land disposal restrictions (LDRs). Therefore, current LDRs do not apply. Rather, under Section 3004 (9) (4) , EPA will have six (6) months to promulgate LDRs specific to ash determined to be a hazardous waste.

## Overview of Strategy

The U.S. Supreme Court's decision has the effect of regulating a whole new class of entities that were exempt from Subtitle C under EPA's 1992 interpretation of RCRA.<sup>1</sup> EPA recognizes that immediate compliance with all of the RCRA Subtitle C requirements will be difficult because of the economic investment required for full Subtitle C compliance and the fact that facilities may have reasonably relied on past Agency interpretations and statements in managing all ash under Subtitle D. However, the Agency is committed to working with the States and affected facilities to bring all those who manage hazardous municipal waste combustion ash into compliance with Subtitle C as quickly as possible. To that end, on May 24, 1994, the Office of Solid Waste (OSW) issued its draft Sampling and Analysis of Municipal Refuse Incineration Ash as guidance to waste-to-energy facilities on sampling and analysis of ash as a hazardous waste.<sup>2</sup> OSW will publish a Federal Register notice of availability requesting comment on the draft in the very near future. To come into compliance with the requirements of RCRA Subtitle C, waste-to-energy facilities should implement a program for determining whether the ash exhibits a hazardous characteristic. For ash that does exhibit a hazardous characteristic, waste-to-energy facilities may either treat ash on site to eliminate the characteristic (if the facility has RCRA interim status, a RCRA permit, or meets the requirements of 40 CFR § 262.34), or make arrangements for the proper disposal of their ash at approved Subtitle C facilities.

In terms of enforcement response, the Regions should consider a variety of factors in determining whether the ash that is a hazardous waste is being managed in an environmentally irresponsible manner so as to pose a potential threat to human health and the environment. Regions should be prepared to bring formal enforcement actions upon information that management of the ash may present an imminent and substantial endangerment pursuant to RCRA § 7003 and should evaluate whether formal enforcement actions pursuant to Section 3008 (h) of RCRA are appropriate in the event the Agency has information that there is or has been a release of a hazardous waste or hazardous constituents from a facility managing hazardous ash. Other indicators of environmentally irresponsible management of hazardous ash that may warrant a formal enforcement action under Section 3008 (a) of RCRA include, but are not limited to:

- - failure to manage ash that is a hazardous waste in solid waste management units that comply with 40 CFR Part 258;

- - failure to implement or have in place, within 90 days of the effective date of the Supreme Court decision, a method to determine (by knowledge or testing) whether or not the ash produced at the facility exhibits a hazardous waste characteristic (for purposes of this implementation strategy, the facility may sample and test combined fly ash and bottom ash if they are mixed within the municipal combustion unit);

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<sup>1</sup> In evaluating the effect of this decision in authorized states, the Regions should refer to the discussion in the upcoming Federal Register notice regarding the applicability of 40 C.F.R. 270.10(e) (2) to facilities at which hazardous ash is managed.

<sup>2</sup> EPA encourages the use of its draft Sampling and Analysis of Municipal Refuse Incineration Ash Guidance. 40 CFR § 261.24 sets out the requirements for analyzing samples under the Toxicity Characteristic. Portions of the guidance address additional aspects of sample collection and handling. EPA intends to allow facilities to use alternative collection and handling procedures provided they are equally effective.

- - failure to have controls on fugitive emissions during storage and transportation of ash that is a hazardous waste (e.g., minimizing dust emissions through quenching or wetting the ash and by transporting ash in leak resistant containers or trucks and by controlling run-on and run-off from ash handling areas); and
- - reuse in any manner of ash that is a hazardous waste.

In implementing this strategy, the Regions are encouraged to work with their authorized States to develop approaches for ensuring compliance with Subtitle C in the regulated community. Following the creation of the new Office of Enforcement and Compliance Assurance (OECA), the Chemical, Commercial Services, and Municipal Division will work with OECA's RCRA Enforcement Division, the Regions, and the States to identify those issues presenting the greatest compliance challenges and develop strategies to address those concerns. The Regions are also encouraged to work with their States to update state authorized programs where applicable. Finally, Regions are encouraged to provide input from both their offices and their States regarding this strategy and its implementation. Six months after issuance of this memorandum, we will revisit this strategy to gauge its effectiveness and incorporate any improvements or modifications as warranted.

If you have any questions regarding this implementation strategy, please have your staff contact Jon Silberman (202-260-4326) of OE-RCRA, Andrew Cherry of the new Office of Compliance's Commercial Services and Municipal Branch (202-260-3097) , or Andy Teplitzky (202-260-1099) of OSWER-Office of Solid Waste.