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MEMORANDUM

**TO:** Richard C. Creighton  
**FROM:** Richard G. Stoll   
**RE:** Paper for EPA Meeting on Waste-Derived  
"Product" And 5000 Btu Issue  
**DATE:** September 29, 1992

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Mike Benoit asked me to deliver the enclosed paper to you. I understand that you want to send it to EPA people before your October 1 meeting. I suggest you "cover" this with an appropriate CKRC memo signed by you.

Mike asked that you send copies of this to Edgar Marston and Chuck Wiedenhoft. Please let me know if you have any questions; I will be leaving the office before noon today.

cc: Mike Benoit

Some EPA staff apparently believe that when a cement kiln burns HWF comprised of any waste streams rating less than 5000 Btu "as generated," the kiln is burning for purposes of destruction even if the HWF rates 5000 Btu "as burned." A kiln that certified compliance with BIF interim status standards would not be prohibited from such burning, as the "sham recycling" policy no longer applies to such a kiln. But some EPA staff apparently believe that the product from the kiln would be a "waste-derived product" under §266.20. They also apparently believe that pouring concrete on the ground is a "use constituting disposal" under §266.20. We strongly disagree with both positions.

1. EPA staff's position is apparently based upon an interpretation issued in connection with the final "first-third" LDR rulemaking of August 17, 1988. (53 Fed. Reg. 31198, col. 2, copy attached.) Yet the staff position is quite inconsistent with this final rulemaking interpretation. We believe that EPA could not revise this position without further rulemaking.

In the first-third final rule, EPA included within the scope of §266.20 only processes where hazardous waste is being used as an ingredient (material recovery). EPA said that "materials such as cement or aggregate that are produced from raw materials, but come from processes that may be fired by hazardous waste fuels, are consequently not covered by this provision. They do not use hazardous waste as ingredients." Id., emphasis added.

EPA has always drawn a clear distinction among various burning purposes: (1) energy recovery, (2) destruction, and (3) material recovery (ingredient). In fact, EPA has regulated HWF in phases depending upon which of these purposes was being served. EPA began regulating burning for destruction in 1980. With the "Phase I" rules in 1985, EPA began regulating HWF used for energy recovery. With the 1991 BIF rules EPA also began regulating burning for material recovery (or as an "ingredient").<sup>1</sup>

The foregoing all shows that EPA has always considered using hazardous waste for material recovery as an ingredient to be a totally different use than burning for destruction. When EPA

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<sup>1</sup> As EPA stated in the preamble to the final BIF Rules: "Any industrial furnace burning or processing any hazardous waste for any purpose -- energy recovery, material recovery, or destruction -- is subject to today's rule." 56 Fed. Reg. 7138, February 21, 1991. In fact, §266.100(a) of the BIF Rules, stating the general applicability of the rules, also refers to these very separate purposes: "In this subpart, the term 'burn' means burning for energy recovery or destruction, or processing for materials recovery or as an ingredient."

asserted in the first-third final rule that §266.20 applied to cement only when hazardous waste was used as an ingredient, it was necessarily excluding situations where hazardous waste was being burned for purposes of destruction.

In concluding its interpretation in the first-third LDR rulemaking, EPA emphasized: "Products produced in processes that use hazardous waste fuels thus are not covered by Section 266.20 unless the process also uses hazardous wastes as ingredients . . ." Id., emphasis added. Thus, even assuming that EPA could correctly say that burning of HWF "blended up" to meet a 5000 Btu level was for purposes of "destruction" (a point with which we strongly disagree), such a practice would still not subject the kiln's product to §266.20 because the hazardous waste would not be used as an ingredient.<sup>2</sup>

2. In any event, we totally disagree with the concept that a kiln is not achieving bona fide energy recovery when it is burning HWF rated at 5000 Btu. The Btu of individual components of the HWF is irrelevant to the issue of whether the kiln is receiving beneficial fuel value from the HWF as blended.

We also believe EPA staff is taking a highly unrealistic view of industrial practices. The staff focus appears to be on "blending" of <5000 Btu waste at off-site fuel processing facilities. Yet generators commonly engage in such blending practices at their own facilities, so that waste leaves their premises at >5000 Btu even though each component of the waste may not technically have rated 5000 Btu at the point of "generation." EPA seems to have no concern over this type of generator blending, although physically and chemically it is indistinguishable from processor blending.

3. We also vigorously dispute EPA's assumption that application of concrete to the land is a "use constituting disposal." To use concrete for highways or building foundations obviously has a valid commercial purpose that in no way reflects an intent to abandon or discard.

Most manufactured products may often or frequently come in contact with the soil in their normal use. Workers often put steel girders and plastic pipes on the ground. When anyone places such a product on the soil is that use constituting

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<sup>2</sup> We do not agree with EPA's interpretation even as it applies to the "ingredient" use for the reasons set forth in parts 3-5 of this paper. At the very least, however, this interpretation prevents EPA from subjecting cement product to §266.20 when there has been burning for energy recovery and/or destruction.

disposal? What if someone paints a line on a highway: if in the staff's view a highway is a disposal site, is putting paint on the highway a use constituting disposal? Can RCRA jurisdiction be absurdly boundless?

4. EPA is precluded by the Bevill amendment to RCRA from subjecting cement product to §266.20. Bevill applies not only to "cement kiln dust waste" (§3001(b)(3)(A)(iii)), but also to any other solid waste from the "processing of an ore or mineral" (§3001(b)(3)(A)(ii)). While we firmly believe clinker that will be used to make cement cannot be considered a solid waste, EPA would logically have to consider it a solid waste to subject it to RCRA.

If cement product is a solid waste at all, however, it is clearly a solid waste "from the processing of an ore or mineral." Under the Bevill amendment, EPA could not regulate such a waste unless and until EPA performed the necessary Bevill study and rulemaking for such a waste. EPA to our knowledge has no plans to perform a Bevill study on cement clinker.

5. The staff position is also founded upon application of the mixture and derived-from rules (MADFRS). We find it highly ironic and inappropriate that EPA staff would try to push this position in light of the fact that EPA is preparing to substantially revise the MADFRS with its proposed Hazardous Waste Identification Rule (HWIR). Once the HWIR rule is final, it appears highly unlikely that concrete would ever possibly be deemed a hazardous waste. At the very least, before EPA goes forward with any further consideration of applying §266.20 to concrete, it should complete the HWIR and consider whether there is any further purpose to pursuing the issue.

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not wastes at all because they are not being "discarded".

EPA has decided to finalize the proposed rule with respect to hazardous waste derived products that are placed on the land, except that EPA is not taking any action with respect to fertilizers that use waste K061 as an ingredient (so that such fertilizers will remain exempt from regulation). EPA is conditioning the regulatory exemption for the reasons stated in the proposal, most particularly because the land disposal restrictions statutory provisions indicate that wastes are not to be placed on the land until they have been pretreated to meet the standards EPA established pursuant to section 3004(m). Where a waste-derived product is produced from more than one prohibited waste, the waste-derived product would have to meet the treatment standard for each hazardous waste that it contains, and if there are different treatment standards for common constituents, then the "product" would have to meet the most stringent of those standards.

EPA also solicited comment on an appropriate tracking system for hazardous waste-derived products to document that these materials meet the applicable treatment standards. Hazardous wastes sent to recycling facilities for ultimate use in waste-derived products that are to be placed on the land are already subject to regulation under section 268.7 (as well as the rest of subtitle C), and so persons shipping such wastes already must notify the recycler that the wastes are prohibited (§§ 268.7(a) and 268.21). EPA has decided, however, that once the recycler produces a waste-derived product that meets the treatment standard, the recycler is not required to notify the receiving facility that it (the receiving facility) is receiving a hazardous waste. The ultimate user of the hazardous waste-derived product is not a normal disposal facility, but rather operates as a commercial entity. As such, this entity is not a meaningful

regulatory authority will be on notice of the location of each shipment and that the shipment has met the applicable treatment standards for the hazardous wastes contained within the waste-derived product.

EPA has further determined that fertilizers produced from hazardous waste K061 should remain exempt from all regulation for the present time. For a further discussion of this determination, see section III. A. 7.

EPA also wishes to take this opportunity to clarify, in response to comment, that the underlying regulatory provision § 268.20, does not apply to materials, such as cement or aggregate, that are not produced from hazardous wastes. This is true even for cement or aggregate produced in a furnace that is powered in whole or in part by hazardous waste fuel. Section 268.20 applies when a process "use(s) hazardous wastes as ingredients" to produce a product that is then applied to the land (50 FR 628; January 4, 1985). To be covered by the rule, a product must "contain" the hazardous waste. Materials such as cement or aggregate that are produced from raw materials, but come from processes that may be fired by hazardous waste fuels, are consequently not covered by this provision. They do not use hazardous waste as ingredients. Section 268.20 thus applies when hazardous wastes are incorporated directly into a product which is to be applied to the land; hazardous wastes recycled in this way thus really are being disposed. There is no such direct link with disposal when hazardous wastes are used to power a process that may be producing a material that will be used on the land. Products produced in processes that use hazardous waste fuels thus are not covered by section 268.20 unless the process also uses hazardous wastes as ingredients in a product destined for land application.

Finally, EPA responds briefly to those commenters alleging that materials used in a manner constituting disposal are

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