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BRAD HENRY
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April 1, 2009

Mr. Matthew Hale
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 5301P
Washington, DC 20460

Re: Revisions to the Definition of Solid Waste Rule
Position Paper from the Oklahoma Department of Environmental Quality

Dear Mr. Hale:

For your consideration and in response to the January 29, 2009 Petition by the Sierra Club for Reconsideration and Request for a Stay of the Definition of Solid Waste (DSW) Rule¹, the Oklahoma Department of Environmental Quality (DEQ) submits this Position Paper identifying our concerns about the DSW Rule and suggesting possible revisions to the federal rule that may allay some of the concerns of the Sierra Club and state regulatory agencies. The suggested revisions are those we believe have nationwide implications. Additional concerns that would only affect DSW Rule implementation in Oklahoma are not included here; however, a current draft of DEQ's proposed rules for HSM facilities may be found at <http://www.deq.state.ok.us/LPDnew/LPPproprules.htm>.

INTRODUCTION

DEQ supports legitimate recycling and resource recovery of materials that would otherwise be a hazardous waste. But, because of the dubious history of a few hazardous waste recycling facilities, we believe the DSW Rule's concept of limited oversight by regulatory agencies prior to facility operations leaves many potential areas for mismanagement that may result in environmental harm and/or expensive taxpayer clean-up costs at defunct facilities. Without additional up-front oversight, time-consuming and very expensive enforcement actions or government-funded clean-ups may be the result. This is not an effective strategy for industry, state regulatory agencies, or the EPA.

The DEQ believes any revisions to the DSW Rule resulting from the Sierra Club's petition must achieve two results: maintain the recycling legitimacy criteria and incorporate additional safeguards and oversight standards for off-site hazardous secondary materials (HSM) and intermediate handling facilities.

Legitimacy Criteria

DEQ supports the recycling legitimacy criteria of 40 CFR 260.43 because this has finally put into regulatory language many years of EPA interpretations and memos. Any revisions to the DSW Rule must maintain these criteria to ensure both industry and regulatory agencies have comprehensive guidelines to evaluate legitimate recycling. The "toxics along for the ride" issue in particular is one that has needed clarification for many years. While DEQ acknowledges EPA's attempt to clarify this

¹ 73 FR 64668 – 64788, published October 30, 2008.



issue in the DSW Rule, we believe the rule still leaves too much subjectivity. Therefore, we recommend two modifications to the Legitimacy Criteria to remove this subjectivity.

1. Revise the last sentence of 40 CFR 260.43(a) to read: "In determining if their recycling is legitimate, persons must address the requirements of §260.43(b) and must ~~consider~~ affirmatively determine that the requirements of §260.43(c), below, are met."
2. In 40 CFR 260.43(c), all suggestive language (e.g. "should") should be changed to "must" and the last paragraph of 260.43(c) should be deleted.

Additional Requirements for Off-site HSM and Intermediate Facilities

DEQ believes the DSW Rule's self-implementing and self-policing requirements for off-site HSM and intermediate facilities do not provide a comfort level for most regulatory agencies that HSM will always be properly managed. Furthermore, many of the standards do not provide HSM management facilities, or generators performing due diligence at these facilities, with clear guidelines for evaluating their compliance. Therefore, we propose that there be a limited regulatory agency review process prior to any off-site HSM or intermediate facility beginning operations under the DSW Rule, plus additional guidelines for day-to-day operations to maintain compliance.

To accomplish this, we believe certain standards within 40 CFR Part 264 should be incorporated into a regulatory agency review process to provide reasonable and responsible oversight criteria without imposing onerous regulatory and permitting requirements the DSW Rule is intended to alleviate. This will give management facilities clear targets for measuring their compliance and give HSM generators a way to evaluate HSM facility compliance prior to contracting with a facility.

Recommended additional requirements prior to off-site HSM or intermediate facility operations

With the initial notification required by 40 CFR 260.42, we believe off-site HSM and intermediate facilities should also submit the following to the regulatory agency for review and approval:

- identification of the types of units in which HSM will be stored, but limited to containers, tanks, containment buildings, or drip pads;²
- a contingency plan for responses to emergencies, a list of emergency coordinators (at least one of which will always be on site or on call), identification of emergency equipment maintained on site, and an evacuation plan (40 CFR 264.52);³
- a written closure plan equivalent to 40 CFR 264.112(b) demonstrating that facility closure will meet the performance standards of 40 CFR 264.111, to include 264.178 for containers 264.197 for tanks, 264.575 for drip pads, and 264.1102 for containment buildings;⁴

² While the DSW Rule requires that HSM be "contained" (40 CFR 261.4(a)(24)(v)(A)), what constitutes containment is extremely vague. The Preamble attempted to clarify this by insinuating that containment means controlling the material in such a way that a significant release is prevented (73 FR 64748 and 64681). The question then becomes, "What constitutes a 'significant release'?" DEQ believes that HSM can be most easily contained in those management units allowed for generators under 40 CFR 262.34.

³ We believe a well-operated facility handling this type of material will already have some sort of emergency response plan; therefore, we do not believe setting a minimum standard for such a plan will be excessively burdensome to industry.

⁴ To develop reasonable estimates for the cost of closing a facility as a hazardous waste TSD facility, as required by 40 CFR 261.142(a), it seems prudent that a considerable amount of forethought go into determining exactly what this encompasses. We believe such guidance is especially important due to the strong likelihood that many HSM facility operators may have no previous experience with the tasks associated with closure of a hazardous waste

- closure cost estimates meeting the requirements of 40 CFR 261.142 that are clearly based upon both the closure tasks outlined in the closure plan and having those tasks performed by a third party;
- financial assurance meeting the requirements of 40 CFR 261.143 for the approved cost estimates; and
- liability insurance in sufficient detail to demonstrate compliance with 40 CFR 261.147.

Recommended requirements for routine operations

Except for the recycling legitimacy criteria of 40 CFR 260.43, the DSW Rule contains very few routine operational requirements for off-site HSM or intermediate facilities. DEQ believes some prudent operational and training requirements should be instituted to help ensure the facility is operated to minimize the possibility of releases or other actions that may cause the HSM to lose its exempt status, such as requirements to:

- amend the contingency plan as needed, always have an emergency coordinator on site or on call, and implement emergency procedures during emergencies (40 CFR 264.54, 264.55, and 264.56);
- ensure site security via artificial or natural barriers, 24-hour surveillance, and signs (40 CFR 264.14);
- implement an inspection protocol for equipment, valves, pumps, tanks, containers, safety and emergency equipment, and maintain inspection records (40 CFR 264.15);⁵
- ensure ignitable, reactive, or incompatible HSM is separated, ensure “No Smoking” signs are used, and prevent dangerous reactions (40 CFR 264.17);⁶
- ensure ignitable hazardous secondary materials are not stored or processed within fifty feet (50’) of the site perimeter (40 CFR 264.176);⁷
- always maintain and operate the facility to minimize the possibility of fires, explosions, or releases; maintain internal communications and alarms, telephones, fire extinguishers, and water; test communications and alarms as needed; ensure employees managing HSM have access to communications or alarms at all times; and maintain aisle space in container storage areas (40 CFR 264.31 – 264.35);
- implement a personnel training program to ensure employees know regulatory requirements for maintaining HSM exemption, responses to emergencies, use of alarm systems, etc. (40 CFR 264.16);⁸ and
- submit updated closure plans and cost estimates as needed.

facility. Unfortunately, the DSW Rule provides no guidance. Requiring a detailed plan for equipment decontamination, structure demolition, assessment of soil contamination, etc. using the 40 CFR Part 264 performance standards will demonstrate this has been given significant thought.

⁵ We believe these operational standards will go a long way toward minimizing the chance of a “significant release” and demonstrating that HSM is “contained.”

⁶ These are prudent standards to ensure both employee safety and containment under 40 CFR 261.4(a)(24)(v)(A).

⁷ This is a prudent standard to ensure the safety of surrounding properties.

⁸ We believe minimum standards for employee training will help employees understand the nature of the material being handled, the associated employee safety concerns, and the significant regulatory burdens that may fall into place if HSM is improperly managed or released, causing it to be regulated as a hazardous waste. Initial training should be within six months of employment, with annual refresher training.

Additional Requirements for HSM Generators

The DSW Rule contains very few requirements for generators of HSM, namely that HSM be contained, generators perform a due-diligence evaluation of the facility that will receive the HSM, and generators maintain records of HSM shipments. Due to the vagueness of the DSW Rule with respect to containment, DEQ believes the Rule should be revised to identify specific measures that will help ensure HSM is "contained." As with hazardous waste generators, a prudent standard is to require that HSM be stored in containers, in tanks, on drip pads, or in containment buildings meeting the applicable standards of 40 CFR 262.34(a)(1). Meeting these requirements will go a long way toward demonstrating that HSM is "contained" as required by 40 CFR 261.4(a)(24)(v)(A).

Another requirement for ensuring HSM maintains its exempt status is that it not be speculatively accumulated. However, the DSW Rule requires no positive actions by generators to ensure this is achieved. To improve the ability of generators and regulatory agencies to evaluate compliance with the speculative accumulation provision of 40 CFR 261.4(a)(24)(i), the rule should include a requirement for accumulation start dates on each container of HSM, as well as procedures to ensure HSM is not speculatively accumulated in tanks, on drip pads, or in containment buildings.

We believe each of these measures will be relatively simple to implement and do not represent an arduous regulatory burden that will undermine the goal of the DSW Rule—improved recycling of hazardous secondary materials. The DEQ appreciates the opportunity to provide this Position Paper in an effort to expand dialogue with all stakeholders and improve the DSW Rule. If I may be of further assistance, please contact me at (405) 702-5100.

Sincerely,



Scott A. Thompson, Director
Land Protection Division
Oklahoma Department of Environmental Quality

cc: Michelle Peace, EPA Region 6/6PD-C