To: CN=Nicole Kraft/OU=R2/O=USEPA/C=US@EPA[]
Cc: []
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From: CN=Lenny Grossman/OU=R2/O=USEPA/C=US
Sent: Wed 4/18/2012 6:14:01 PM
Subject: Fw: AES

----- Forwarded by Lenny Grossman/R2/USEPA/US on 04/18/2012 02:13 PM -----

From: Gary Nurkin/R2/USEPA/US
To: Lenny Grossman/R2/USEPA/US@EPA
Cc: George Meyer/R2/USEPA/US@EPA, William Sawyer/R2/USEPA/US@EPA
Date: 04/18/2012 11:03 AM
Subject: AES

Lenny, I think that your draft letter is a pretty good response to the Boxerman letter.

However, I have read, or rather skimmed, the information you sent me and have the following questions that hopefully you can address.

If the LEAF test is viewed as a more advanced or better version of the TCLP, how does flunking a TC test or even a LEAF test demonstrate an imminent harm under 7002(a)(1)(B) or 7003? Flunking a TC test would demonstrate that a solid waste is a HW but not that the hazardous waste is, itself, causing an imminent harm. Similarly, wouldn't the same rationale apply to LEAF? Even, if it doesn't, all that LEAF shows is a possibility of leaching nothing more. Here, however, even if the Coal Combustion Residuals (CCRs) flunk the LEAF test, the proposed rule (75 FR 35128) exempts CCRs from the definition of hazardous waste so the CCRs remains a solid waste notwithstanding its flunking of LEAF. Thus, the question remains how flunking LEAF or TC proves, in and of itself, an imminent harm for purposes of either 7002(a)(1)(B) or 7003? As TC demonstrates, leaching in and of itself may prove a solid waste is a hazardous waste but not that the hazardous waste is causing an imminent or substantial harm to the environment.

If this makes sense then wouldn't groundwater monitoring be a more useful tool in proving an imminent harm than utilizing the LEAF or TC tests? Alternatively, if we have a failure under LEAF or TC but groundwater monitoring indicates that there is no impact on the water table or even drinking water, can we say there is an imminent harm for purposes of either 7002(a)(1)(B) or 7003?

Certainly the Indiana evidence mentioned in your letter is useful but does not necessary prove or support an imminent harm argument in a different geographic location where the CCR is bound up in a different matrix.

It appears to me, that in the context of the proposed CCR rule, we can only state and the LEAF tests will document that CCRs are solid wastes. GW monitoring or other evidence of substantial endangerment or harm to the environment will still be needed to prove an imminent harm for purposes of 7002(a)(1)(B) or 7003 and as of now we have no support to document an imminent harm.

If you disagree, please advise as to how and where I am wrong.

Gary