Fritz, Byrne, Head & Gilstrap
FBH&G
Attorneys at Law

Direct Dial Number for JD Head: (512) 322-4742
E-mail address: jhead@fbhg.law

221 West Sixth Street
Ste. 960
Austin, Texas 78701

April 26, 2017

Barnes Johnson, Director
U.S. Environmental Protection Agency
Office of Resource Conservation and Recovery
Mail Code 5103P
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

SUBJECT: Hazardous Waste Regulatory Standards for Thermal Desorption Units used as "Verified Recycler" Facilities

Dear Mr. Johnson:

Thermal desorption units (TDUs) are broadly used to treat hazardous waste and hazardous secondary materials. The application of thermal desorption technology within a recycling or reclamation process has been reviewed by Region 6 in multiple enforcement cases. The resulting allegations and consent agreements have established EPA's regulatory position that TDUs that combust all or a portion of the vent gases derived from the TDU process are performing regulated hazardous waste thermal treatment. As such they are subject to RCRA permitting including the appropriate technical requirements of 40 CFR Part 63 Subpart EEE. As an urgent matter of national policy, this letter seeks clarification of EPA's position for TDUs that are used to recycle hazardous secondary materials as a "verified recycler" under the Definition of Solid Waste (DSW) standards published January 13, 2015.

A TDU is a thermal treatment device that heats solid material to vaporize, remove, and separate organic constituent materials from the solids. The solids are discharged with little or no residual organic contaminants. In the embodiment that is the subject of this letter, the separated organic constituents are typically condensed and recovered as a liquid oil that has considerable value and is an effective substitute for commercial petroleum products; a legitimate recycling activity. The TDU process characteristically generates a vent gas after the condensing system. When high organic content material is processed in the TDU it is quite common for the unit to be designed to combust the vent gas to destroy the hazardous constituents. When the TDU is operated under a RCRA Part B permit, appropriate technical requirements from Part 264 Subparts I, J, O, AA, BB, CC, Part 270, and Part 63 Subpart EEE are all included in the Part 264 Subpart X permit for the unit. Through the RCRA permit, comprehensive and stringent EPA standards are implemented for air emissions control and containment of the hazardous materials.

TDUs Recycling HSM at RCRA TSDF under a Part B Permit.

One application of thermal desorption technology is to commercially reclaim oil from various generators of oil bearing hazardous waste. These hazardous wastes are generated by petroleum refining, production and transportation practices, and are typically listed as either K048, K049, K050, K051, K052, K169, K170, K171, K172, F037 or F038, or may be hazardous by characteristic (i.e. "D" coded). If the hazardous waste recycled in the TDU comes exclusively from the above sources, the oil reclaimed from the TDU may be burned as a non-hazardous fuel if it meets the Used Oil Specification at 40 CFR § 279.11, as per 40 CFR § 261.6(a)(3)(iv)(C). Or, the oil bearing hazardous waste may also contain constituents that are fuels themselves thereby making their recycling into a fuel a legitimate recycling activity; an application of §261.2(c)(2)(ii). The generator may consider these legitimate recycling activities to be managing hazardous secondary material (HSM) for recycling under the January 13, 2015 DSW rulemaking. If the TDU is being operated under a RCRA permit, by those same standards the TDU would qualify as a "verified recycler" and satisfy the generator's obligation to use such a facility for their HSM recycling. In that regard, the hazardous waste could be classified as HSM and not manifested as RCRA hazardous waste, as long as there is a recycling contract between the generator and the TDU recycler, and all other criteria of the DSW rulemaking are being met, including the filing of appropriate notifications and the performance of legitimacy reviews.

TDUs Recycling HSM at an un-Permitted Facility.

On the other hand, if the TDU were not being operated under a RCRA Part B permit it would be necessary for the TDU operator to secure and for the generator to require a "variance" from EPA, or the authorized State in which they operate, specifically authorizing the HSM recycling activity under §260.31(d). The "variance" would need to require that all of the DSW criteria are being met in the absence of a RCRA Part B permit, including both requirements that address the management of recycling residuals such that any residuals generated from the reclamation process are managed in a manner protective of human health and the environment, and requirements to address the potential for risk to proximate populations from unpermitted releases of the HSM. While it is administratively conceivable that such a variance could be prepared, it seems not to be EPA's intention that all of the permit doctrine associated with RCRA permitted hazardous waste thermal treatment could be effectively addressed in such a recycling "variance." In this case, it would appear that the TDU separation process may be legitimate recycling that could be suitable for a variance, but that the combustion step performed on the vent gas is regulated hazardous waste thermal treatment involving destruction and does not appear to be eligible for a verified recycler variance but rather requires a Part B permit. It seems appropriate for EPA to give specific guidance that authorized States and EPA Regional offices <u>not</u> use the DSW HSM "variance" process to grant approval for TDUs performing hazardous waste thermal treatment that would otherwise require a RCRA Part B permit. Please confirm this interpretation.

Again, please confirm my understanding of the above enumerated regulatory standards as they apply to the recycling of HSM in a TDU operated under either a RCRA Part B permit, or being operated as an un-permitted recycler under a DSW "variance."

Your support in clarifying these matters is most appreciated. My client intends to construct and install one or more TDUs in the near future and we see this as a matter of national precedent requiring regulatory certainty on the issues discussed herein.

Please feel free to contact me by letter, e-mail or telephone (as provided on the letterhead) should you have any questions regarding this request for regulatory clarification.

Sincerely,

J.D. Head

cc: Betsy Devlin, US EPA, Division Director
Ross Elliott, US EPA, Associate Division Director
Jessica Young, US EPA, Branch Chief
Tracy Atagi, US, EPA, Team Lead
Sam Coleman, US EPA, Acting Regional Administrator Region 6
Susan Spalding, US EPA, Associate Director Hazardous Waste Branch – Region 6