101 S Capitol Blvd, Suite 1000, Boise, ID 83702
P 800.590.5220 F 208.331.7900

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Mr. Barnes Johnson
Director
Office of Resource Conservation and Recovery
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 5301P
Washington, DC 20460

Dear Mr. Johnson,

After the proposed Oil Bearing Hazardous Secondary (OBSM) Exclusion [261.4(a)(12)] was published in the Federal Register on August 6, 1998 for public comment, EPA was asked if the listed codes, most notably F037, associated with these hazardous wastes would still apply to the residues from recycling OBSM under the new exclusion. EPA followed the question with a letter to interested parties in October of 1998 requesting comment on this "potential loophole." Based on the comments received, the Agency decided "...that it would be an undesirable outcome if listed wastes were only marginally processed, generating residuals that were not recycled and escaped regulation." To remedy this, EPA modified the F037 listing description in the final OBSM rule to include "...any residuals generated from recycling or processing oil-bearing secondary materials that (1) would have otherwise met a listing description when originally generated, and (2) are disposed of or intended for disposal."

When EPA introduced the 2008 definition of solid waste (DSW) rule, it appeared EPA again tried to control this "potential loophole" by including this language: "The material is not otherwise subject to material-specific management conditions under paragraph (a) of this section when reclaimed." [261.4(a)(24)(iii)] As the Agency went through the several iterations of the DSW rule this language remained in both the transfer-based exclusion (TBE) and the verified recycler exclusion (VRE). The confusion began in the preamble to the 2008 DSW rule when EPA decided to delineate which of the exclusions found in 261.4(a) were "material specific" and not eligible for the new exclusion. The 261.4(a)(12) OBSM exclusion was not included as "material specific" thus reopening the "potential loophole"

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for OBSM not only managed under the 2008 transfer-based exclusion but also in states that have adopted the 2015 VRE.

In 1998 EPA made a concerted effort to close the loophole that would lead to the land disposal of a significant amount of untreated chemicals outside of Subtitle C controls. We are now seeing a number of states approve OBSM reclamation facilities under the verified recycler exclusion. Now that the Federal VRE has been court vacated, it is likely in the near future that the TBE will be applied to OBSM by generators and reclaimers without state or Federal approval as is allowed by the TBE. The residues from the recycling processes that do not exhibit a hazardous waste characteristic, and most will not exhibit a characteristic, contain large concentrations of compounds that would require the residues to be treated to meet the concentration-based land disposal restrictions (LDR) found in 268.40. These compounds include Acenaphthene, Anthracene, Benzene, Benz(a)anthracene, Benzo(a)pyrene, Benzo(g,h,i)perylene, bis(2-Ethylhexyl) phthalate, o-Cresol, m-Cresol, p-Cresol, Carbon disulfide, Chrysene, 2,4-Dimethylphenol, Dibenz(a,h)anthracene, Di-n-butyl phthalate, Ethylbenzene, Fluorene, Indeno(1,2,3,-cd)pyrene, Naphthalene, Phenanthrene, Phenol, Pyrene, Toluene, Xylenes, Cyanides, Antimony, Arsenic, Chromium, Lead, Nickel, and Vanadium that require treatment under the F037, F038, K048-K052, K169, K170, K171 and K172 treatment standards. Depending upon the effectiveness of the reclamation process, all of these compounds could be present in the OBSM residues at concentrations well above their universal treatment standards.

We request clarification on the following questions. Was it the intent of EPA's "material-specific" language in the preamble of the 2008 final DSW rule that residues from the reclamation of OBSMs excluded under either the TBE or VRE are a new point of generation where only failing a characteristic waste criteria would trigger the necessity to treat these residues for the compounds listed above to meet the LDR criteria? Or does EPA intend for these residual waste streams to be managed under their listed codes that would have applied to these waste streams prior to recycling, as EPA clarified with the OBSM exclusion in 1998?

Sincerely,

Brian Lindman
Environmental Regulatory Director
US Ecology

Cc: Tracy Atagi - EPA
Jessica Young - EPA