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August 1, 2008

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Martha Seaman
Environmental Rules Specialist
Waste Programs Division
Arizona Department of Environmental Quality
1110 W. Washington Street
Phoenix, AZ 85007

Re: Comments on ADEQ Integrated Solid Waste Rulemaking

Dear Martha:

I am writing on behalf of Metal Management Arizona LLC ("MTLM") to express concerns about the recycling provisions of the draft rule currently under consideration in ADEQ's Integrated Solid Waste Rulemaking. MTLM is particularly concerned about provisions of the draft rule that would define scrap metal in commerce as "solid waste" and would subject scrap metal processing facilities to regulation as "solid waste facilities." As you know, MTLM operates two scrap metal processing facilities in Arizona and has a keen interest in regulation of scrap metal recycling. MTLM understands and appreciates the fact that an exception in subsection R18-13-700 B.2 of the draft rule is intended to provide an exemption for facilities regulated under the special waste rule, but remains concerned about the basic premise of the draft rule and about the direct and indirect impacts of several of its provisions.

As a preliminary matter, MTLM would like to express appreciation for the considerable time and effort ADEQ has invested in the stakeholder process for its Integrated Solid Waste Rulemaking. MTLM strongly supports ADEQ's use of robust stakeholder discussions in the rulemaking process, and has appreciated the valuable opportunity for review and input that the stakeholder process has provided. MTLM understands that there have been complaints concerning the extent of notice and outreach for the stakeholder process, but believes that informal stakeholder discussions are far more useful and constructive than the formal notice and comment rulemaking process provided by law. Accordingly, MTLM believes that improvement rather than any fundamental overhaul of ADEQ's approach is in order. Thus, while recognizing the need for procedural improvements, MTLM commends ADEQ for its efforts and urges it to maintain its demonstrated commitment to meaningful stakeholder involvement in the rule development process.

1. Core Substantive Comments

MTLM's fundamental concerns about the draft rule have been expressed repeatedly, both in the course of ADEQ's stakeholder meetings and in written comment including letters dated August 3, 2007 and May 2, 2008 (copies of which are attached and hereby incorporated in these comments). In summary, MTLM believes that:

- It would be unreasonable and unlawful to characterize scrap metal in commerce as "solid waste" for purposes of ADEQ's solid waste regulatory program.
- Even if scrap metal could be considered "solid waste," Arizona law expressly states that scrap metal processing facilities are not "solid waste facilities" and may not be regulated as such.
- Even if there were some legal basis to characterize scrap metal processing facilities as "solid waste facilities," regulating them as such would be unnecessary and would unreasonably burden environmentally-beneficial activities that ought to be encouraged.

Despite these compelling points, the current draft of the rule would continue to characterize scrap metal as solid waste and would regulate scrap metal processing facilities as solid waste facilities. This would be an unusual regulatory approach that would make Arizona's solid waste rule one of the most burdensome that scrap metal processors face anywhere in the Nation. MTLM does not believe that there is any adequate legal or policy justification for this approach and urges ADEQ to abandon it.

2. Comments on Specific Provisions of the Draft Rule

MTLM's comments on specific provisions of the draft rule are as follows.

a. R18-13-600 - Definitions of "Land disposal" and "Solid waste land disposal facilities"

The definition of "land disposal" is so broad as to include even the momentary placement of solid waste in a waste pile, and the term "solid waste land disposal facility" is defined to include any "solid waste facility in which land disposal occurs." The net effect is to put even a transient waste pile into the same category as a landfill. This surely is not the result intended, but it is quite clearly what the regulatory language says.

ADEQ could resolve this problem in any of several ways. Perhaps the simplest would be to delete the definition of "land disposal" and to modify the definition of "solid waste land disposal facility" to limit it to facilities where disposal – in the plain English sense of permanent disposition – occurs. One specific possibility would be to use the definition of the term "solid waste landfill" set forth at A.R.S. 49-701.30.

b. R18-13-600 - Definition of "Recycling"

The draft definition of "recycling" ought to define what recycling is, and ought to be limited to the recycling of material meeting the statutory definition of "solid waste" (A.R.S. 49-701.01). Unfortunately, the draft definition of recycling fails to encompass all well-recognized forms of recycling and expressly encompasses the recycling of material that is not solid waste. In particular, the draft definition of "recycling" does to not seem to include any recycling activities involving direct use (as opposed to reclamation) of the materials being recycled, and applies to the recycling of material that is not solid waste but "would otherwise become solid waste" if it were not being recycled instead of being discarded.

MTLM has two specific suggestions:

First, ADEQ could simply drop the definition of "recycling." The ordinary meaning of the term "recycling" leaves little to be desired, so there is no obvious need for a specialized regulatory definition of the term.

Second, any regulatory definition of "recycling" ought to be limited to the recycling of material that is "solid waste" under the statutory definition of that term. ADEQ has regulatory jurisdiction over the recycling of material that *is* solid waste, not over material that *isn't* solid waste but "would otherwise become solid waste" if it were not being recycled.

c. R18-13-600 - Definition of "White Goods"

It is not clear that any regulatory definition of the term "white goods" is necessary. In any event, the definition of "white goods" is no place to muddy the waters on the definition of solid waste. The draft definition defines "white goods" as certain materials that have been "discarded for disposal or recycling." MTLM submits that white goods may be "discarded for disposal" but that white goods being recycled in the stream of commerce cannot reasonably be characterized as "discarded" materials. In the United States today, recycling is a normal part of the life cycle for most white goods, with some 90% of all appliance steel being recycled. Suppliers who bring white goods to scrap metal facilities for recycling are not "discarding" them in any recognizable sense of the term; they are *selling* them in a well-established and highly-competitive market. There is an obvious difference between selling a thing and throwing it away, and the draft rule should not suggest otherwise. MTLM suggests that ADEQ delete the definition of "white goods" or limit the definition of "white goods" to discarded material (this could be accomplished simply by striking the words "for disposal or recycling" at the end of the draft definition).

d. R18-13-700.B-C - Identification of recycling facilities subject to solid waste regulation

As discussed in MTLM's previous written comment, the statute provides a broad exemption for recycling – specifically including scrap metal processing – but does authorize the regulation of facilities recycling "solid waste" that has a "significant adverse effect" on the environment. A.R.S. 49-701.29, 49-701.26. The obvious implication is that some material being recycled can nevertheless be considered "solid waste" (i.e., discarded material), but that regulatory jurisdiction over such "solid waste" is limited to material having a "significant adverse effect" on the environment.

These concepts are not new; they reflect the pattern of hazardous waste regulation under the Resource Conservation and Recovery Act (RCRA). The RCRA regulations provide an elaborate regulatory definition of "solid waste" to address the question of when materials that are being recycled nonetheless qualify as "solid waste" under a statutory definition that is virtually identical to that provided in A.R.S. 49-701.01. These elaborate regulations were designed to err on the side of overbreadth because they apply only to materials that – if they are solid wastes – would qualify as hazardous wastes. 40 C.F.R. § 261.1(b)(1). Materials falling under this regulatory definition of solid waste are generally regulated as hazardous waste. 40 C.F.R. § 261.6(a)-(b). However, the regulations recognize that even the recycling of *hazardous waste* involves productive processes that should not be regulated as waste management activities. For this reason, the recycling process itself is generally exempt from hazardous waste regulation. 40 C.F.R. § 261.6(c). It is apparent that a broadly similar approach was intended to apply under Arizona's solid waste law. The draft rule, however, takes an entirely different approach.

First, the draft rule would regulate the recycling of material that cannot reasonably be characterized as solid waste. This is apparent both from the materials the rule specifically identifies as solid waste (including valuable scrap metal moving in the stream of commerce) and from the criteria set forth for the identification of "recycling facilities" (which provide a definition of solid waste that is far broader even than the intentionally overbroad definition of "solid waste" that the RCRA regulations provide).

Second, regulation under the draft rule would not target facilities recycling material that has a "significant adverse effect" on the environment as the statute contemplates. Indeed, instead of targeting *wastes* that have a "significant adverse effect" on the environment, the draft rule targets specific recycling *processes* that are presumed to have a significant adverse effect on the environment. As a result, the draft rule would target relatively innocuous recyclable material (scrap metal) and would regulate scrap metal processing facilities that the Statute (49 A.R.S. 701.29(d)) explicitly exempts from regulation. Compounding this problem, the draft rule produces a completely illogical result. If ADEQ is concerned about environmental issues associated with end-of-life vehicles as the draft regulation suggests, it would be logical to focus on the part of the recycling process where the most substantial environmental issues associated with end-of-life vehicles (e.g., the management of fuel and other vehicle fluids) arise. Instead the draft rule arbitrarily triggers regulation only at scrap metal processing facilities, at a point in the process when such issues should already have been addressed.

Finally, it appears that the aim of the draft rule is to do what even the hazardous waste regulations do not do: to regulate the recycling process itself. As the RCRA regulations recognize, it is one thing to regulate waste recycling facilities to ensure that waste ostensibly being recycled is recycled rather than disposed of; it is another to regulate what amounts to a production process. It is hard to see why regulation of productive processes would be necessary or appropriate in the context of non-hazardous recyclable material when it has long been considered unnecessary and inappropriate in the context of hazardous recyclable material.

MTLM believes that ADEQ should revise its approach to the solid waste recycling issues to ensure that:

- Solid waste regulation does not extend to materials that are not solid waste;

- The definition of "solid waste" is narrower – not broader – for purposes of solid waste regulation than it is for purposes of hazardous waste regulation; and

- The actual recycling process is not constrained by regulation.

At a minimum, there are two specific changes that MTLM believes to be necessary:

First, section R18-13-700B.2 of the draft rule (which identifies common high-volume scrap metal feedstock materials as solid waste) should be deleted. As already indicated, feedstock material purchased by scrap metal processors is not solid waste and scrap metal processors cannot be classified or regulated as "solid waste facilities."

Second, section R18-13-700.D.2. of the draft rule should be deleted. This section provides a definition of "solid waste" ("recyclable solid waste") that is broader than the definition of "solid waste" provided by statute and broader even than the overly-broad definition of "solid waste" that applies in the context of hazardous waste.

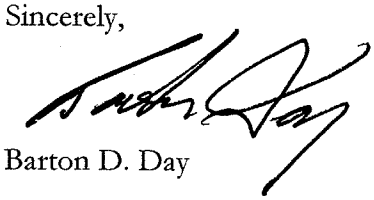
3. Conclusion

MTLM's fundamental concern is that the draft rule would achieve a result that the statute quite clearly precludes: it would regulate scrap metal processing facilities as solid waste facilities. The regulations imposed would be among the most burdensome MTLM has encountered anywhere in the Nation, and would unquestionably discourage environmentally beneficial recycling activity. Accordingly, MTLM urges ADEQ to delete section R18-13-700B.2 of the draft rule and to delete related provisions under which scrap metal being recycled could be considered "solid waste."

MTLM appreciates the opportunities ADEQ has provided for real and substantial dialogue concerning these important issues and remains hopeful that its substantive concerns will be appropriately resolved.

Please let me know if there is any additional information that MTLM can usefully provide with respect to these issues.

Sincerely,



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attachments