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October 19, 1990

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WASTE MANAGEMENT  
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HARRISBURG REGION

Michael R. Steiner  
Assistant Regional Director  
Bureau of Waste Management  
Harrisburg Regional Office  
One Ararat Boulevard  
Harrisburg, PA 17116

Dear Mr. Steiner:

This letter is written in response to your letter of April 20, 1990, affirming the Department's position that certain batches of ash generated by the City's resource recovery facility (the "Facility") can be characterized as hazardous under state law, and thus must be disposed of as a hazardous waste.

Based on its understanding that such letter did not represent a final action by the Department, the City has taken the opportunity to consider fully the Department's position and its impact on the City and the Facility. After careful evaluation of federal and state laws and policies, as well as present, and perhaps future, costs of complying with the Department's interpretation of the law with respect to ash generated by resource recovery facilities, the City must respectfully disagree with the Department's position.

The City believes that the ash from the Facility is exempt under law from regulation as a hazardous waste; that safe disposal should be the main focus and that safety is best served by disposal at the City's B-2 site; that the cost of disposing of the ash as a hazardous waste is exorbitant and a threat to the existence of an environmentally beneficial facility; and that the DER's characterization of the ash as hazardous is in error.

Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, 6941(i) ("RCRA"), as interpreted by two recent federal cases, clearly exempts ash generated by resource recovery facilities from regulation as a hazardous waste. Environmental Defense Fund v. Wheelabrator Technologies, Inc., No. 88 Civ. 0560 (S.D.N.Y. Nov. 21, 1989), Environmental Defense Fund v. City of Chicago, 84 C 3045 (N.D.Ill. Nov. 8, 1989). The City believes that the state is bound by this interpretation as well. Section 3001(i) initially exempted household waste from regulation under Subchapter C of RCRA.

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Pennsylvania adopted this exemption in the Solid Waste Management Act, 35 P.S. § 6018.10, et seq. ("SWMA"), and regulations interpreting it. 25 Pa. Code § 75.261(c)(6). Further, Pennsylvania, pursuant to Section 6926 of RCRA, developed its hazardous waste program to achieve primary authority for hazardous waste management activities within its borders. When Congress clarified that household waste was exempt from regulation as a hazardous waste by specifically acknowledging that ash generated by resource recovery facilities could qualify for this exemption, Pennsylvania, while not specifically adopting the clarification, did not reject it and so is bound by it.<sup>1</sup>

Furthermore, Congress deliberately acted to verify that ash is included in the household waste exemption in accord with its policy to encourage resource recovery facilities. While a state may enact more stringent regulations than the federal government, it cannot act in conflict with clearly stated federal policy. ENSCO, Inc. v. Dumas, 807 F.2d 243 (8th Cir. 1986). By requiring the Facility to incur enormous expense, at a threat to its very existence, to dispose of its ash as a hazardous waste, the state is in direct conflict with a clear federal policy favoring resource recovery facilities. See Wheelabrator; City of Chicago.

Several bills pending before Congress concerning resource recovery facilities focus on the safe disposal of ash generated by such facilities. H.R. 2162, S. 196. The City's ash could be safely disposed of at the B-2 site. The technical specifications for the B-2 ash monofill, designed and constructed in accordance with current municipal waste regulations which went into effect in April, 1988, are more stringent than the specifications currently under consideration by Congress in the above-referenced bills. Indeed, in nearly every technical aspect, the B-2 site is essentially the equivalent of a hazardous waste landfill under both current and proposed Pennsylvania regulations. Safety concerns will also be served by the elimination of the need to transport the ash great distances to a hazardous waste treatment or disposal facility. Based upon the above, it is the City's belief that the risk to the environment will be minimized if the City is permitted to dispose of the ash at the newly permitted and soon to be completed double-lined B-2 site.

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<sup>1</sup> After Congress amended RCRA in 1984 and included this clarification, the Environmental Quality Board amended its hazardous waste regulations, without rejecting the application of this exemption.

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The financial impact of handling and disposing of the ash as hazardous, however, could be financially devastating to the Facility and its customers, and further, could be harmful to the environment in the long run. The economic consequences caused by substantial additional ash disposal costs, over and above what the City has expended to design and construct the B-2 site, will cause a hardship to Harrisburg, its citizens and to other customers of the Facility including the Commonwealth. In addition, the state may risk the loss of a valuable resource recovery facility which conserves landfill space by reducing the volume needed for disposal, and generates steam and electrical energy as well.

Finally, the City contends that the characterization of the ash as hazardous is improper, in that it relies on the EP toxicity test, which has frequently been criticized as being an inaccurate indicator of the presence of hazardous substances in ash material. The City believes it has adequate safeguards in place at the Facility to prevent the acceptance of hazardous waste. (See attached Rules and Regulations of Facility, which are disseminated to all users of the Facility.) The City contends that the resulting ash, which has occasionally barely exceeded the limitations for lead by virtue of the EP toxicity test, is not hazardous, and may safely be disposed of at the B-2 site.

If you have any questions on the City's position with respect to this issue, please call me.

Very truly yours,

  
Howard J. Wein

HJW/mts  
Enclosure

cc: Hon. Stephen R. Reed (w/o encl.)  
John Lukens (w/o encl.)  
Daniel R. Lispi (w/o encl.)  
Michael J. Heilman, Esq. (w/encl.)