

DATE: June 20, 2002

TO: All RR Staff
All Waste Staff

FROM: Mark Giesfeldt - RR/3
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SUBJECT: Applicability of the TCLP Test to MGP Wastes

Background

Following the adoption of the Toxicity Characteristic Leaching Procedure ("TCLP") as the test to determine whether a solid waste exhibits the characteristic of toxicity by the U. S. Environmental Protection Agency ("EPA"), the validity of the application of this test to several different wastes was challenged by various industries. The electric utility industry specifically challenged the applicability of the TCLP test to manufactured gas plant waste "MGP waste").

In a series of cases, the United States Court of Appeals for the District of Columbia Circuit ruled on the industry petitions for review. In a 1993 case brought by the electric utilities, *Edison Electric Institute v. EPA*, the court held that under the federal Administrative Procedure Act, EPA must show a "rational relationship" between the hypothetical worst case mismanagement scenario assumed under the TCLP and the actual way wastes tested by TCLP are disposed. In other words, the court wanted EPA to provide evidence that MGP remediation waste has been or would be disposed of in a municipal landfill. Failure to make this connection between the test and disposal method would render the rule arbitrary and capricious. The court remanded the case to EPA for action consistent with the court ruling. The court's holding in *Edison Electric* was reaffirmed a few years later in *Columbia Falls Aluminum Co. v. EPA (1998)*.

The *Association of Battery Recyclers* case deals with the same issue; the applicability of TCLP to MGP waste under the Phase IV LDR Rule. Because EPA failed to provide the court with the information it found lacking in *Edison Electric*, the court vacated the rule on April 21, 2000 as it applies to testing MGP waste using TCLP. The court stated:

"Here, the EPA has demonstrated the possibility that MGP waste from remediation sites could be disposed of in a municipal landfill but has not produced a shred of evidence indicating that has happened or is likely to happen." (emphasis added).

For this reason, the court vacated the Phase IV Rule "insofar as it provides for the use of TCLP to determine whether MGP waste exhibits the characteristic of toxicity."

The District of Columbia Circuit Court of Appeals is the exclusive venue for review of RCRA regulations, and its interpretation of RCRA binds EPA. Therefore, the court's decision in *Association of Battery Recyclers* applies to all EPA Regions.

Following the Court of Appeals decision, EPA issued a letter to an Indiana Company explaining their interpretation of the court's decision. The letter indicated that: "the TCLP leach test cannot be used under RCRA to determine whether MGP waste is hazardous. Since MGP remediation waste is not a listed hazardous waste, it would only be classified as RCRA hazardous if it exhibited any one of the ignitable, reactive or corrosive hazardous characteristics." This letter summarized EPA's position on the management of MGP remediation waste in the wake of the *Association of Battery Recyclers* decision.

In the Federal Register, dated March 13, 2002, EPA chose to codify the *Association of Battery Recyclers* decision by amending 40 CFR § 261.24 to exempt MGP waste from TCLP testing. The federal regulation was amended to read: "A solid waste (***except manufactured gas plant waste***) exhibits the characteristic of toxicity if, using the Toxicity Characteristic Leaching Procedure [TCLP] . . . the extract from a representative sample of waste contains any of the contaminants listed in Table 1 at the concentration equal to or greater than the respective value given in that table." (The words in bold were added to the existing TCLP regulation.)

After discussions with the MGP team, the program attorneys in the Bureau of Legal Services, and Waste and RR Program representatives, we have concluded that, as a matter of program policy, we should follow EPA's lead, and start the process to amend s. NR 605.08 (5), Wis. Admin. Code, to exempt MGP waste from TCLP testing. We are confident that, if MGP waste is not subject to TCLP testing, the Department will still have sufficient regulatory authority to ensure that MGP remediation waste is properly managed and disposed of. Eliminating TCLP testing for MGP waste will allow us to reduce sampling costs and minimize delays in the remediation of MGP waste sites, while we continue to regulate MGP remediation activities, and MGP waste treatment and disposal, under air management and solid and hazardous waste rules, to ensure that human health and the environment are protected.

Even though TCLP testing will not be required, the waste generator must still determine if the MGP waste exhibits the characteristics of ignitability, reactivity or corrosivity. If MGP waste is found to be mixed with contamination from non-MGP sources, the mixture may be subject to TCLP testing. In addition, if non-hazardous MGP waste is proposed to be disposed of in a landfill, the requirements in the NR 400 rule series (air management rules) and the NR 500 rule series (solid waste rules) will still have to be satisfied. If waste is generated during the treatment of MGP waste, that waste is not exempt from the TCLP test and the generator will have to determine if it exhibits any of the hazardous waste characteristics.

New Process for Managing MGP Remediation Wastes

It is our intent to ask the Natural Resources Board to amend s. NR 605.08 (5), Wis. Admin. Code, by incorporating the federal TCLP exemption for manufactured gas plant (MGP) waste. This effort will be undertaken as part of the on-going hazardous waste rule revision process. In the interim, before the rule revisions become effective, DNR staff who are overseeing MGP site cleanups statewide should generally utilize enforcement discretion and not require RPs to conduct TCLP testing of manufactured gas plant waste, as long as the waste has been properly characterized and is not ignitable, reactive or corrosive and is not mixed with contamination from non-MGP sources. If DNR staff think that TCLP testing should be required in a specific case, the issue should be brought to the regional RR and WA Team Supervisors for a joint decision on how to proceed. This joint decision making process is intended to follow our interim Process Guidance For HW Determinations. Once the Guidance for Hazardous Waste Remediation is finalized, the responsibility for the TCLP testing decision will be the RR Team Supervisor.

It is critical for all DNR staff who are overseeing MGP site cleanups to realize that if MGP waste is proposed to be landfilled, it must be properly characterized in order to determine whether or not the requirements of ch. NR 506 and the NR 400 rule series will be met. Staff should recognize that the TCLP exemption for MGP waste may not apply to contaminated media in which MGP waste is found to be mixed with other wastes. It is anticipated that proper characterization of MGP waste prior to landfilling will typically consist of a total waste analysis. The specific constituents to be tested for should be determined on a case-by-case basis and may include analysis for volatile organic compounds, semi-volatiles, metals and cyanide. If leaching tests are to be performed, it is recommended that alternatives to the TCLP test (such as the ASTM-D3987 water leaching test) be utilized. The Waste, Air and RR Programs should work closely together to ensure that planned remedial actions and the ultimate waste management options are integrated to the greatest degree possible, both before the hazardous waste rules are revised and after.

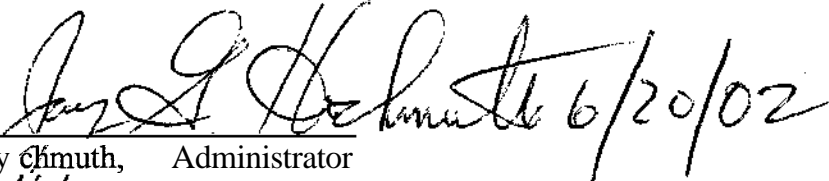
Future Activities

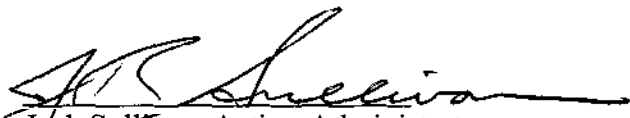
During the discussions with the MGP Team, several issues were identified that the Team felt needed more detailed guidance. The MGP Team, in cooperation with representatives from the Waste Program, intends to prepare additional guidance to assist staff to consistently address these issues. A brief summary of the guidance that has been requested includes:

1. The overall process to be used to ensure MGP wastes are properly managed,
2. How to deal with mixed waste situations (i.e. MGP wastes and other non-MGP waste streams), and
3. When to be concerned about reactivity of certain waste streams.

This supplemental guidance is likely to take several months at a minimum to complete. If anyone has questions regarding this memo, please do not hesitate to contact either Mark Gordon at 266-7278 or John Melby at 264-8884.

APPROVED:


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