

were handled in enclosed systems that operate in the same manner as they would if a building existed and the fly ash and bottom ash were mixed in an enclosed unit proximate to the combustion device, that management activity would be considered to take place within a combustion building as described above. In this circumstance, the point at which hazardous waste jurisdiction would begin would be the point where the combined ash exits the last enclosed ash management unit that is located proximate to the combustion device.

By contrast, where a WTE facility collects bottom ash within the combustion building and collects the fly ash outside the combustion building in, for example, roll-off containers, two distinct exit points from the combustion building exist: (1) the point where the bottom ash ultimately leaves the combustion building and (2) the point where the fly ash leaves the air pollution control devices (located outside the combustion building). The WTE facility operator would thus sample and make a hazardous waste determination at each location. Should the operator determine that either the bottom ash or fly ash as is hazardous, management of that ash would have to be conducted pursuant to RCRA Subtitle C.

#### B. Other Interpretations Considered

Since the Supreme Court decision, the Agency has received numerous letters from states, local governments, industry, environmental groups, and others suggesting various approaches to determining the point at which the ash initially becomes subject to RCRA Subtitle C jurisdiction. For example, a number of comments received in response to the Agency's draft sampling and analysis guidance notice of May 24, 1994, addressed this issue. Some members of the public urged EPA to adopt the interpretation described above. Other members, however, suggested two additional options for interpreting § 3001(i) to establish the point at which ash becomes subject to Subtitle C regulation.

##### 1. Facility Property Boundary

Some members of the public argued that the hazardous waste exclusion under RCRA § 3001(i) applies to all ash management operations within the property boundary of the WTE facility. This interpretation potentially would allow all ash generated at a WTE facility to be managed on-site, without testing, as a non-hazardous waste. It could allow a WTE facility to dispose of ash that would have otherwise failed the TCLP

within the facility property boundary in a landfill that does not meet the requirements of RCRA Subtitle C.

EPA is rejecting the option of designating the point of Subtitle C jurisdiction at the property boundary. The most natural reading of the term "resource recovery facility" is the combustion device itself. Nothing in the text of the statute or the legislative history refers to land holdings or suggests that Congress was familiar with them and the types of waste management conducted on them. Rather, the discussion focuses on the combustion process. EPA believes that an exemption for the entire property would conflict with the general goals of Subtitle C because it would provide too many opportunities for potential mismanagement of ash at the WTE facility without the proper environmental controls. Such a broad reading of RCRA could allow potential mismanagement of ash that tested hazardous within the land boundaries of the facility in units (e.g., waste piles, landfills) that were not appropriately regulated under Subtitle C of RCRA. EPA believes that this option would not strike the balance that Congress intended between section 3001(i)'s goal of promoting resource recovery facilities and the general environmental protection goals of the rest of RCRA Subtitle C.

##### 2. Inside the Combustion Building

Other members of the public argued that the exemption in section 3001(i) ends at the instant that ash is generated. In particular, they objected to any temporary exemption for ash that would allow facility owners to combine fly ash and bottom ash before making hazardous waste determinations. Since combined ash tends to "pass" the TC, postponing regulation until combination has occurred could allow the ash to escape Subtitle C management. These commentators argued that such a "de facto" exemption for WTE ash would be inconsistent with the spirit of the Supreme Court's decision in *City of Chicago*.

EPA has decided not to read the statute to require regulation of ash within the combustion building. This interpretation would permit regulation of the management of hazardous ash within the "resource recovery facility," in apparent contradiction with the text of section 3001(i). Further, requiring sampling, testing, and management of ash from multiple locations could, as described below, be unnecessarily expensive and burdensome in relation to the environmental benefits received. Thus, this interpretation could conflict

with Congress' goal of "promoting resource recovery facilities." S. Rep. 98-284, 98th Cong. at 61.

Many of the people advocating this interpretation maintained that this interpretation would require bottom ash and fly ash to be sampled separately, before a facility owner combines them. Ash, however, may collect in as many as 20 separate locations within an average WTE facility. This interpretation, if applied literally to the first locations where ash becomes identifiable, could lead to a policy requiring that a waste determination be made at each of these locations. Such a policy would only increase the impediments to viable resource recovery facilities.

#### C. Additional Policy Considerations

EPA believes that today's interpretation of § 3001(i) designating the point of Subtitle C jurisdiction at the exit of the combustion building provides an approach that local governments will find practical and implementable, yet environmentally protective. In accordance with today's interpretation, ash that is combined (and conditioned, for example, with lime and/or phosphoric acid) at the end of the combustion process and within the combustion building, and exhibits no hazardous waste characteristics (i.e., it passes the TCLP) when it exits that building, may be sent to a nonhazardous waste facility for disposal.

In comparison, if the Agency had selected the option requiring hazardous waste determinations inside the combustion building, the fly ash and bottom ash that would have been tested separately at locations inside the combustion building and found to exhibit the toxicity characteristic would not be handled much differently. The WTE facility operator could treat (using similar conditioning techniques that are performed inside the combustion building under today's interpretation) the fly ash and bottom ash in on-site tanks, containers, or containment buildings under the provisions of § 262.34. Such treatment does not require a federal hazardous waste (Subtitle C) permit so long as the ash is not retained for more than 90 days. Once the ash ceased to exhibit hazardous waste toxicity characteristics, it too would be combined and sent for disposal in a nonhazardous waste facility. Similarly, once the LDR treatment standards for WTE ash hazardous constituents are promulgated, the ash would be treated (perhaps using some of the same conditioning techniques used today) to meet those standards at which point the ash could