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Mr. Jamieson Schiff
Textron, Inc.
40 Westminster Street
Providence, RI 02903

Re: Lead Contaminated Soil at Gorham Site

Dear Mr. Schiff:

I understand that Textron will remove slag generated from historic smelting operations at the former Gorham manufacturing plant located in Providence, Rhode Island. Although the slag exceeds the hazardous waste toxicity characteristic level for lead of 5.0 mg/l, Textron believes that the slag is exempt from regulation as a hazardous waste under the Bevill exemption for "slag from primary lead processing" at 40 CFR §261.4(b)(7)(ii)(B), which is incorporated by reference at DEM-OWM-HW R.I. Code R §2.02(B). The Rhode Island Department of Environmental Management (the "Department"), in a letter dated September 18, 2006, has also directed Textron that, after removal of the slag, "*any soil remaining in the slag pile excavation area that exhibits a characteristic of hazardous waste must be removed as if it were hazardous waste*." You have asked me to advise you on two questions relating to the soil removal:

1. Would the soil remaining in the slag pile excavation area be a toxicity characteristic hazardous waste for lead if the slag is exempt under the Bevill exemption?

2. Assuming the Bevill exemption does not apply to the slag (*i.e.*, the slag is not from primary lead processing), do the EPA or Department hazardous waste regulations require removal of soil in the slag pile excavation area if the soil exhibits the hazardous waste toxicity characteristic for lead?

These questions are addressed below, and EPA interpretations upon which I rely are enclosed in Tabs.

Would the soil remaining in the slag pile excavation area be a toxicity characteristic hazardous waste for lead if the slag is exempt under the Bevill exemption?

No. EPA has consistently determined that if Bevill exempt waste is contained in environmental media and causes the media to exhibit a hazardous waste characteristic, the media is covered by the Bevill exemption, and like the Bevill exempt waste, is also not a hazardous waste. This is made clear in the memorandum issued jointly by Sylvia Lowrance, Director of EPA's Office of Solid Waste, and Lisa Friedman, EPA's Associate General Counsel, to Robert Duprey, which is enclosed in Tab 1. In this memorandum, EPA discusses soil contaminated by cement kiln dust, which is a Bevill exempt waste. EPA states that the Bevill exemption applies to both the cement kiln dust and surrounding soil contaminated by the cement kiln dust. Similarly, in the letter that appears in Tab 2, EPA's Director of the Office of Solid Waste explains that precipitation which is contaminated with coal gasification ash waste, which at the time of the letter was a Bevill exempt waste, would also be Bevill exempt and not a hazardous waste.

Thus, if the slag that will be removed from the Providence site is covered by the Bevill exemption for slag from primary lead processing, any soil surrounding it that has become contaminated by the slag, and as a result, exhibits the hazardous waste toxicity characteristic for lead, would not be regulated as a hazardous waste. Therefore, under the Department's directive that any hazardous waste soil must be removed, the soil around the excavated slag would not have to be removed because it would not be a hazardous waste due to the Bevill exemption.

Assuming the Bevill exemption does not apply to the slag (*i.e.*, the slag is not from primary lead processing), do the EPA or Department hazardous waste regulations require removal of soil in the slag pile excavation area if the soil exhibits a hazardous waste characteristic?

No. EPA and Rhode Island regulations and guidance do not require soil that exhibits a hazardous waste characteristic to be removed, even if we assume that the soil and the slag that has contaminated it are not covered by the Bevill exemption. Soil that exhibits a hazardous waste characteristic, can legally remain in the ground. The decision to remove such soil is a cleanup decision dictated by the environmental and health risks of leaving the soil in place; it is not a regulatory decision that is dictated by the hazardous waste storage, treatment or disposal regulations or guidance.

The Department quotes several pages from EPA's guidance document entitled Management of Remediation Waste Under RCRA (the "Guidance"). But nothing the Department quotes, and no other statement in the Guidance, suggests that merely because the soil exhibits a characteristic, it must be removed. As explained below, EPA applies its hazardous waste management requirements to contaminated soil only after the soil is first generated and actively managed. The passages from the Guidance that are quoted by the Department reference this concept of "*when first generated (i.e., first removed from the land, or area of contamination)*," but neither the Department nor the Guidance capture the significance of this concept. To understand its significance, one must review other EPA interpretations.

For example, in the enclosed letter from Sylvia Lowrance to Kristen Goodwin dated April 26, 1993 (see Tab 3), EPA addresses whether soil contaminated by block sand residues from gold/mercury amalgam retorting are subject to Subtitle C hazardous waste controls. EPA first explains that the block sand residues from gold/mercury amalgam retorting lost their mineral

processing Bevill exemption in EPA's September 1, 1989 so-called "de-Bevill" rule. Consequently, EPA concludes that the retort waste residues contained in the soil would be subject to Subtitle C controls (*e.g.*, the requirement not to store or dispose of hazardous waste on the open ground), but only if the soil, which exhibits a hazardous waste characteristic, is actively managed. If the soil is not actively managed and simply left in the ground, EPA concludes that it would not be subject to Subtitle C requirements. (Please note that if the Department has questions regarding this letter, the EPA staff person who was identified for follow-up questions, Bob Tonetti, is still at EPA and can be reached at (703-308-8878).)

Applying this letter to Providence, if the slag at the Providence facility is not covered by the Bevill exemption for slag from primary lead processing, and the soil is contaminated with such non-Bevill exempt slag at levels that exceed the toxicity characteristic for lead, such soil would not be subject to Subtitle C, including any removal requirement, unless it is actively managed. In other words, it can be left in place and it would not violate any RCRA rule or principle.

EPA has also made clear that "*contaminated soil that is left in place is not subject to any hazardous waste management requirements, including any testing.*" Letter from J. Cannon to P. Simon (June 26, 1989) (Tab 4). This letter involved the question of whether lead contaminated soil would have to be tested for the hazardous waste toxicity characteristic using the then-new TCLP protocol, and if it tested positive, removed form the site. EPA confirmed that the soil could stay in the ground without being tested or otherwise subject to RCRA rules Only if the contaminated soil otherwise were removed from the site for cleanup purposes would the generator have to then determine whether the soil is contaminated by hazardous waste, and if so, manage it as a hazardous waste. This shows that the question of whether contaminated soil must be removed for cleanup purposes is a separate question from whether it exhibits a hazardous waste characteristic.

It is important to remember that the slag at the Providence site was generated, disposed, and became contained in soil long before the RCRA rule was promulgated that might have made the slag a hazardous waste. Specifically, the de-Bevill rule was promulgated in 1989 making many formerly exempt mineral processing wastes into hazardous wastes, and retaining the Bevill exemption for only 20 specified categories of mineral processing wastes, including slag from primary lead processing. See 54 Fed. Reg. 36592 (September 1, 1989) (Tab 5). But neither this de-Bevill rule, nor any other RCRA rule, has ever been applied retroactively to require the excavation and removal of all previously disposed material that is not actively managed after the effective date of the new rule.

This principle was confirmed in the just-mentioned 1989 de-Bevill rule Federal Register notice. In that Federal Register notice, EPA said:

> "*Subtitle C requirements would apply only to newly generated or actively managed mineral processing wastes that are removed from the Bevill exclusion and that exhibit one or more characteristics of hazardous waste, not to existing accumulations of these materials unless they are actively managed after the effective date of the rule ... .*"

54 Fed. Reg. at 36596 (September 1, 1989) (Tab 5).

This principle was challenged and upheld by the United States Court of Appeals for the District of Columbia Circuit in *Chemical Waste Management v. EPA*, 869 F.2d 1526 (D.C. Cir. 1989) (Tab 6). Specifically, the Court of Appeals addressed whether EPA's listings of hazardous wastes are retroactive by imposing obligations on wastes which were not hazardous wastes when disposed. The Court of Appeals said:

> "*The RCRA does not require that such wastes be cleaned up or moved from the landfill, nor does the Agency impose any retroactive penalty on a prior disposal of the waste. Under the August rule, however, the Agency announced that leachate which is actively managed after the underlying wastes have been listed as hazardous wastes will itself be deemed a hazardous waste and must be treated to the applicable standards.*"

869 F.2d at 1531.

> "*The Agency has made no effort to impose a legal penalty on the disposal of waste which was not deemed hazardous at the time it was disposed. Nor, in fact, does this regulation require the cleanup of any newly listed hazardous waste.*"

Id. at 1536. Similarly, EPA's regulations do not require soil that exhibits the toxicity characteristic to be removed and cleaned up.

Conclusion

To summarize, if the slag that was generated from the smelter at the Providence, Rhode Island facility is slag from primary lead processing, both the slag and the soil contaminated by it would not be a hazardous waste due to the Bevill exemption. But even if the slag is not from primary lead processing, removal of the soil that contains the slag is not dictated by whether it exhibits a hazardous waste characteristic. Whether the soil exhibits such a characteristic only becomes relevant if and when the soil is removed, i.e., "actively managed."

Please let me know if you have further questions regarding this matter.

Sincerely,

Kenneth M. Kastner

Enclosures