UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
ONE CONGRESS STREET SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

November 17, 2004

Steven A. DeGabriele
Director, Business Compliance Division
Bureau of Waste Prevention
Department of Environmental Protection
One Winter Street
Boston, MA 02108

Re: RCRA Wastewater Treatment Unit Exemption

Dear Mr. DeGabriele:

In response to your letter dated October 29, 2004, this letter addresses the issue of the applicability of the wastewater treatment unit exemption under the Resource Conservation and Recovery Act (RCRA) to the proposed wastewater treatment facility at the Texas Instruments site in Attleboro, MA.

I. Background

Based on the September 28, 2004 letter from Francis Veale, Jr., Environmental Safety and Health Manager of Texas Instruments Incorporated (TI) to Christopher Tilden of the Massachusetts Department of Environmental Protection (MADEP), and other information provided by the company, we understand that the proposed facility would operate as follows. TI is proposing to sell the land it currently owns at its Attleboro site to Preferred Real Estate Investment, Inc. (PREI). NewStream, L.L.C. (NewStream) plans to operate the existing wastewater treatment plant on site. NewStream will own and operate the treatment equipment and piping within the building where the treatment plant is located. NewStream also will lease from PREI and maintain the outdoor pipes (and principal indoor piping) which will carry wastewaters from other buildings on the site to the treatment plant. Engineered Materials Solutions, Inc. (EMSI) and TI (for a temporary period) will continue to conduct operations on site which will generate hazardous wastewaters which will be transported through contributing pipes operated by them within their respective buildings and then through the pipes leased by NewStream to the treatment plant. The treatment plant will discharge into a sewer line owned by Attleboro, MA, subject to requirements to be specified in a sewer connection permit to be issued by the MADEP and a pretreatment permit to be issued by Attleboro. In the future, it is possible that additional

companies may locate on site and discharge wastewaters (possibly hazardous) to the treatment plant. The entire proposed system is and will remain hard-piped.[1]

II. Analysis

Since the wastewaters generated by EMSI and TI are hazardous, all of the companies involved in generating them, storing/transporting them on site and treating them are subject to RCRA unless an exemption applies. It seems clear that no exemption other than the wastewater treatment unit exemption could apply. For example, the totally enclosed treatment facility exemption does not apply. As explained in the opinion of Jeffry Fowley of our Office of Regional Counsel dated January 13, 1997, the totally enclosed treatment facility exemption applies only when an entire system is totally enclosed from the point of generation so as to have essentially no potential for any kind of emissions. The material submitted by TI falls well short of establishing that the entire proposed operation will be totally enclosed. For example, it appears that this kind of operation has at least some potential for having fugitive or other air emissions.[2]

While it is the analogous State exemption (for "treatment which is integral to the manufacturing process") that applies in Massachusetts (as part of the federally authorized State RCRA program), the State regulations track the federal regulations in stating that only systems which are "totally enclosed" may qualify for the exemption. The federal exemption is interpreted narrowly and the MADEP needs to similarly interpret its exemption narrowly in order to ensure that its program does not become less stringent than the federal program.[3]

In addition, the domestic sewage exemption will not apply to the proposed operation while the wastewaters remain within the site. As explained in this Region's April 9, 1999 regulatory interpretation letter, that exemption applies only from the point where industrial wastes mix with domestic sewage upon and after being discharged into a municipal sewer line.

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[1] The opinions in this letter are of course subject to the assumption that all of the representations made by TI are complete and accurate.

[2] In a regulatory interpretation letter dated April 9, 1999, this Region noted that when hazardous wastewater is transported in containers, the totally enclosed treatment facility exemption does not apply since the hazardous wastes are being stored or transported other than through hard pipes. But this does not mean that any system using hard piping qualifies for the exemption - rather to qualify for the exemption, the *entire* system must be *totally* enclosed.

[3] Interpreting the totally enclosed treatment system exemption narrowly is environmentally justified since it is a total exemption from RCRA regulation. In contrast, as explained below, it is appropriate to apply the wastewater treatment unit exemption more broadly since there will be alternative regulation under the Clean Water Act whenever that exemption is applied.

Wastewater Treatment Unit Exemption

The federal RCRA regulations exempt wastewaters contained within wastewater treatment units from the hazardous waste treatment, storage and disposal facility requirements in 40 CFR parts 264, 265 and 270. See 40 CFR §§ 264.1(g)(6), 265.1(c)(10) and 270.1(c)(2)(v). These provisions also have been interpreted by the EPA's national program offices to exempt wastewater treatment facilities from compliance with the RCRA generator storage requirements set out in 40 CFR § 262.34. To qualify for this exemption, an owner or operator must meet all of the tests as spelled out in the definition of "wastewater treatment unit" in 40 CFR § 260.10.

It appears that the proposed operation will meet the third test set forth in the regulation - that all wastewaters remain within a "tank" or "tank system." So long as the entire system remains hard-piped, with the pipes within the EMSI and TI buildings remaining connected to the outdoor pipes and those pipes in turn remaining connected to the treatment tanks, the entire system will be a inter-connected "tank system."[4]

It also appears that the proposed operation will meet the second test set forth in the regulation - that all wastewaters are either being treated or are being stored as influent wastewaters (i.e., prior to treatment).[5] Transport of the wastewaters through the EMSI and TI building pipes and through the outdoor pipes is within what the EPA considers to be "storage."

However, if the companies involved wish to claim the exemption, it is imperative that the proposed operation be structured so as to meet the first test set forth in the regulation - that the wastewaters be within a wastewater treatment facility that is subject to regulation under either section 402 or 307(b) of the Clean Water Act (CWA). This requires that the entire operation from the point of generation within the EMSI and TI buildings to the point of discharge to the municipal sewer be subject to CWA regulation. In this situation, the necessary requirements need to be contained in a pretreatment permit to be issued by Attleboro under CWA 307(b). However, the necessary requirements could first be included in a sewer connection permit to be issued by the MADEP, which could then serve as a model for the Attleboro permit.

The CWA regulation will substitute for RCRA regulation in two distinct ways. First, regulating the discharge into the municipal sewer through such things as numerical effluent limitations in the pretreatment permit will justify not regulating the treatment process itself under a RCRA treatment permit. Second, regulating the EMSI and TI pipes and the outdoor pipes (as well as the treatment tanks themselves) through applying a requirement for proper operation and maintenance (typically found in pretreatment permits) will justify not regulating those units under RCRA generator or other requirements.

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[4] If new companies locate on site and generate hazardous wastewaters, their discharges similarly will need to go through an inter-connected hard-piped system in order to maintain the exemption.

[5] If hazardous sludge is generated by the operation, it will of course be subject to RCRA regulation. How and when those requirements will apply is beyond the scope of this opinion letter.

For the RCRA exemption to be claimed, at a minimum NewStream must be specified in the pretreatment permit as being responsible for the operation and maintenance of the pipes that it leases as well as being responsible for the operation and maintenance of the treatment units themselves as well as being responsible for the municipal sewer discharges.[6] Also, EMSI and TI must be specified in the permit as being responsible for the operation and maintenance of the pipes they operate within their buildings (and any other tank system facilities within their building used to store or transport the wastewaters).

In interpreting the federal requirements applicable to the proposed project, we are making use of guidance issued by the EPA Office of Solid Waste on June 1, 1990. See Letter from David Bussard to James Mulligan (Faxback 11519). As noted there, the EPA has applied the wastewater treatment unit exemption to operations involving more than one company located on a contiguous site, but only if all the companies involved in handling hazardous wastewaters are made subject to CWA regulation. As explained there (in example 1) if facilities being used to handle hazardous wastewaters "are unregulated by the NPDES program, it would be inappropriate to exempt them from RCRA regulation."

The minimum specifications set out in this letter are consistent with the June 1, 1990 EPA guidance. In example 2 of that guidance, the EPA stated that for the RCRA exemption to apply when two companies were handling hazardous wastewaters discharged through a common point, a CWA permit must be issued to both companies as co-signatories or co-permittees, or the permit must expressly cover both companies "so that CWA authorities can prescribe and enforce tank system requirements" at both companies. In the situation before us, only the inclusion in a CWA permit of NewStream as being responsible for the pipes that it leases and the inclusion of EMSI and TI as being responsible for their indoor pipes will achieve that objective and thus "cover" those companies under the permits in the sense meant by the EPA guidance. Simply specifying in the permit that the pretreatment authority recognizes that wastewaters are being generated by EMSI and TI is not sufficient to invoke the RCRA exemption. While we recognize that TI in an internal analysis interpreted the June 1, 1990 guidance differently, through this letter we are now ending any possible confusion.

It also should be emphasized that this letter simply sets out the minimum specifications which the MADEP should follow in order to ensure that its RCRA program is not less stringent than federally required. The MADEP is of course free to apply the wastewater treatment unit exemption in a more stringent manner. Also, this letter simply sets out the requirements under RCRA for obtaining an exemption. Attleboro, and the EPA and MADEP water programs, may decide to impose requirements based on the Clean Water Act or other provisions which go

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[6] We understand that NewStream and PREI are planning to agree by contract that while NewStream will be responsible for funding the costs of day to day operation and maintenance of the pipes, PREI will be responsible for funding any required major capital reconstructions. This side agreement does not restrict the regulatory authority of the EPA, MADEP or Attleboro and is acceptable only if NewStream nevertheless accepts full and unconditional responsibility under the CWA for the operation and maintenance of the pipes (or if both NewStream and PREI are included as being responsible for the pipes in the permit).

beyond the minimum steps needed to exempt the facilities from RCRA.[7]

Finally, in specifying the minimum provisions that need to be included in a CWA permit in order to invoke the RCRA exemption, we do not intend to limit other EPA (or State or local) regulatory authority. For example, in the event that one of the outdoor pipes was to leak hazardous wastewater, this would be considered a release of hazardous waste under RCRA. The wastewater treatment unit exemption applies only while the wastewater remains within the exempt units. Whether or not they are included in the water permit as being responsible for the operation and maintenance of the outdoor pipes, any generators of the wastewater, New Stream as pipe operator and PREI as pipe owner would all be liable for any leaks from the pipes.

I hope that this letter will be of assistance to the MADEP's ongoing efforts to address the situation. Please feel free to contact me should you need any further EPA assistance.

Sincerely,

Marv Rosenstein, Chief
Chemical Management Branch

cc: Margaret Stolfa, MADEP General Counsel
Francis J. Veale, Jr., Texas Instruments
Ralph Child, Esq., counsel to Texas Instruments

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[7] Specifying what CWA requirements must be included in the pretreatment permit is beyond the scope of this opinion letter.