Ex Parte Memorandum

TO: Department of Energy, Office of the General Counsel

FROM: David R. Case, Executive Director, Environmental Technology Council

DATE: December 12, 2019

RE: ETC Meeting with DOE Office of General Counsel Regarding Lack of Administrative Record for DOE's "Proposed Rule Establishing a Fee for Long-Term Storage and Management of Elemental Mercury," 84 Fed. Reg. 53,066 (Oct. 4, 2019).

On Thursday, November 21, 2019, DOE General Counsel Bill Cooper and attorney Matt Urie met with David Case, Executive Director of the Environmental Technology Council (ETC), James Williams, Government Affairs VP for ETC, and Michael Jensen, Senior Counsel for Waste Management to discuss ETC's concerns with DOE's "Proposed Rule Establishing a Fee for Long-Term Storage and Management of Elemental Mercury." The ETC is the national trade association for the hazardous waste management industry, and ETC member companies are engaged in recycling and storage of mercury. Call-in participants included: Tracy Getz and Todd Shrader of DOE OGC; Keith Nelson, Association of Lighting and Mercury Recyclers; Angie Martin, Heritage Environmental; Sixto Ortiz, Waste Management; Phil Retallick, Clean Harbors; Tom Baker, Veolia; Luci Altieri, Waste Management; and Brian Lindman, U.S. Ecology.

Mr Cooper stated that because the subject of the meeting was the DOE's proposed rule, he would listen to our concerns and ask follow-up questions, but would not be able to substantively respond to matters related to the proposed rule. Mr. Case said he understood the groundrules.

Mr. Case alerted Mr. Cooper that DOE's proposed rule is not supported by an administrative record setting forth the relevant factual information and data. The administrative record in Docket ID No. FRDOC-0001-3868 contains only the proposed rule with no supporting documents. There are no summaries on pricing submitted by vendors, not even redacted versions, which are the apparent basis for the cost elements in the proposed rule. Mr. Case pointed out that actual prices for various cost elements "based on pricing from U.S. commercial vendors" were provided in the proposed rule, so there does not appear to be a basis for a CBI claim for the supporting information. There is also no information on DOE costs that are component parts of certain fee elements. Mr. Case stated that lack of a supporting record means interested parties cannot comment effectively on the proposed rule because they cannot verify and understand the cost elements in the proposed fees. Mr. Case stated that the courts have frequently ruled that a full administrative record, consisting of all documents and information relied on by the agency for the proposed rule, is necessary for effective public comment and for judicial review of the final regulation.

To rectify these concerns, Mr. Case requested that DOE compile an administrative record of all documents, post the documents on www.regulations.gov, publish a Federal Register notice and allow the public to submit supplemental comments. Mr. Case acknowledged that a supplemental comment period would delay the storage facility until 2020 and thus require DOE to assume ownership of the stored mercury, but DOE is already required to take custody and indemnify generators so taking ownership of the stored mercury is actually to DOE's advantage.

Mr. Nelson stated he did not understand why DOE allowed only 15 business days for the public to comment on the proposed fee, which poses an existential threat to the florescent lamp recycling industry. Mr. Jensen pointed out that U.S. EPA has stated in Questions and Answers on the Mercury Export Ban Act of 2008 that non-federal generators may continue to store elemental mercury in their RCRA-permitted facilities and thus he urged DOE, for the sake of clarity, to make a similar clear statement. He also asked why DOE chose 15 years as the estimate for when treatment and disposal capacity will be available. Mr. Case noted that it should not take 15 years for EPA to amend its regulations to allow stabilization and landfill disposal of mercury waste. DOE and EPA should work together to get this done within a shorter time frame.

As the meeting concluded, Mr. Case gave Mr. Cooper three documents: (1) ETC Meeting Talking Points, (2) DOE Basis for Elemental Mercury Storage Fee, and (3) ETC's comments to DOE's Proposed Rule, which are attached to this memorandum.

Environmental Technology Council
Talking Points for Meeting with DOE General Counsel, Nov. 21, 2019

Opening remarks

1. Congress has not supported DOE with appropriations
2. DOE staff had difficult challenge to set fee, hard to find data
3. But courts have required admin record of all information relied on
   - necessary for effective public comment and
   - court review of agency action
4. We wanted to give OGC a heads-up before final rule

Review basis for storage fee

1. No supporting documents in admin record, not even redacted
2. Apparent concern for procurement
   - don't know where DOE is in the procurement process
   - but prices fully disclosed in preamble, so not confidential
   - problem is no supporting documentation so we don't know basis
3. Costs are higher than usual and customary

Solution

1. DOE compile admin record of all documents
2. Post documents in docket on regulations.gov
3. Federal Register notice
4. Allow public to submit supplemental comments

Environmental Technology Council
Handout for Meeting with DOE General Counsel, Nov. 21, 2019

DOE Basis for Elemental Mercury Storage Fee

Cost Elements	**Amount**	**Basis in Preamble, 84 FR 53066**
annual storage cost	$810/MT	"based on pricing from U.S. commercial vendors" – **no supporting information in the administrative record**
annual increase	3.5%	"based on pricing from a solicited offer to DOE by a U.S. commercial vendor" – **not in the administrative record, not tied to an OMB approved rate, not based on historical price increases**
receiving charge	$3,250	"based on pricing from U.S. commercial vendors" – **not in admin record, not customary charge by industry**
removal charge from storage facility	$376/MT	based on the receiving charge, increased by 3.5% each fiscal year for sixteen years, then allocated on a pro rata basis using a 15 MT shipment capacity – **not customary charge**
transportation from storage facility to disposal facility	$1,230/MT	"based on the current transportation cost of elemental mercury from generators' sites in Nevada to long-term RCRA-permitted storage facilities" – **costs and calculations not in admin record**
escalation	3.5%	"this [transportation] cost is also escalated at 3.5% each fiscal year for sixteen years" – **no basis in admin record**
treatment and disposal	$37,900/MT	"based on preliminary pricing from a U.S. commercial vendor and includes all DOE costs" "While there is no current regulatory framework to treat and dispose of elemental mercury in the U.S., DOE is assuming" future capacity – **so what is the basis for "preliminary pricing" and "DOE costs"?**
resulting total cost / storage fee (approx $25 per pound)	$55,100/MT	

Environmental Technology Council

1112 16th Street NW • Suite 420 • Washington DC 20036 • (202) 783-0870

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October 25, 2019

Mr. David Haught
U.S. Department of Energy
Office of Environmental Management
Office of Waste Disposal
1000 Independence Ave., SW
Washington, DC 20585

RE: Docket ID No. FRDOC-0001-3868

Dear Mr. Haught;

The Environmental Technology Council (ETC) submits these comments on the Department of Energy's (DOE) "Proposed Rule Establishing a Fee for Long-Term Storage and Management of Elemental Mercury," 84 Fed. Reg. 53,066 (October 4, 2019).

Statement of Interest

The ETC is a national trade association that represents the commercial hazardous waste management industry. The ETC membership includes companies that provide technologies and services for source reduction, fuel blending, recycling, treatment, and secure disposal of industrial and hazardous wastes. The ETC companies conduct mercury collection and reclamation operations such as universal waste programs for mercury-containing thermostats; recycle-by-mail programs for fluorescent and HID lamps, ballasts, and batteries; recycling of fluorescent lights and mercury switches; and household collection and special events for collection of thermometers, switches, lamps, lights and thermostats. ETC member firms own and operate commercial facilities such as mercury retort ovens, mercury distillation units, chemical treatment plants, incinerators, fuel blending facilities, secure landfills, and other types of RCRA-permitted facilities for the proper management of hazardous wastes.

As a result, the ETC member companies are storing elemental mercury from these collection and processing activities and would be directly regulated and significantly

affected by DOE's proposed fees for long-term storage and disposal of elemental mercury.

Overview

The proposed fees are very concerning because they are not supported by an administrative record setting forth the relevant factual information and data. The administrative record in Docket ID No. DOE-FRDOC-0001-3868 contains only the proposed rule with no supporting documentation. There are no minutes of the meetings and teleconferences conducted by DOE with third parties to discuss setting the proposed fees. There are no summaries on pricing submitted by vendors, not even redacted versions, which are the apparent basis for various cost elements in the proposed rule. There is no information on DOE costs that are component parts of certain fee elements. The lack of a supporting record means interested parties cannot verify and understand the cost elements in the fees proposed by DOE and comment effectively on the proposed rule. The courts have frequently ruled that a full administrative record, consisting of all documents and information relied on by the agency for the proposed rule, is necessary for effective public comment and for judicial review of the final regulation. The final storage fee will be held arbitrary, capricious, and contrary to law by the court unless DOE issues a supplemental proposal with a supporting administrative record that allows effective public comment.

Our specific concerns with the proposed management and storage fee include the following:

Impact of DOE Storage Fee

We urge DOE to carefully evaluate whether the storage fee, which we believe is unreasonably high in the proposed rule, will discourage the collection of mercury waste for proper management, and will potentially lead to unsafe and even unlawful disposal of mercury with resulting risk of harm to human health and the environment. DOE should recognize that hazardous waste companies will have to charge the storage fee to customers that need to dispose of mercury waste, and a high fee based on unreasonable pricing proposals and unsupported costs will discourage proper collection. Homeowners who want to dispose of mercury thermometers, municipalities that collect mercury-

containing thermostats at household collection events, small businesses that need to dispose of fluorescent lamps, and others will not be able to afford an unreasonably high fee. Instead, mercury wastes could potentially end up in the municipal waste stream for unwitting disposal in solid waste landfills or be discarded and contaminate surface waters and groundwater.

DOE's storage fee is not just about paying for a long-term storage facility and eventual disposal, it will also impact whether mercury wastes are properly collected and managed in the first instance. Therefore, DOE's goal should be to adopt a storage fee that is as low as reasonably practical so as not to discourage the widest possible collection and safe management of mercury waste.

Annual Storage Fee

DOE gives no basis for the proposed annual storage cost of $810/MT. In order to comment, the ETC would need to know the specific costs for each of the referenced elements: storage/management, dedicated storage area lease, state taxes, and periodic audits referenced at 84 FR 53066 fn 3. If this annual storage fee is based on a pricing proposal submitted by a vendor, DOE should negotiate a lower cost with the vendor, seek additional bids from other vendors, or choose a DOE-owned storage site.

Annual Escalation

The proposed rule states that the 3.5% annual escalation rate "is based on pricing from a solicited offer to DOE by a U.S. commercial vendor." 84 FR 53067 col 1. .DOE must understand that a 3.5% per year price escalation each year for 15 successive years is far higher than historical price increases at hazardous waste storage facilities. DOE should obtain pricing from more than one vendor in order to determine whether a 3.5% annual escalation fee is fair and reasonable. DOE has proposed a 1.3% escalation for transportation, treatment and disposal based on OMB Circular A-94, which is a reasonable rate. The ETC recommends that DOE use the OMB Circular, Consumer Price Index or other accepted index as the annual escalation rate for storage costs and any other charges, instead of a self-serving vendor pricing proposal.

Shipment Receiving Charge

Again, DOE gives no background information as to what are the component cost elements for the shipment receiving charge of $3,250. Historically, no commercial hazardous waste facility has assessed a receiving charge for receipt of hazardous waste, including mercury, for management or storage. This is just not a customary commercial charge and should not be included in the DOE fee. If this receiving charge is included in a pricing proposal, DOE should negotiate with the vendor to remove this charge.

In addition, the proposed receiving fee seems to assume that each shipment will be a full load. ETC member company shipments may range from small to large, so if a small generator ships only a few mercury casks will the charge be adjusted? The ETC recommends that, if a receiving charge must be assessed, it should be adjusted according to the shipment size.

Transportation to Disposal Facility

The proposed transportation cost of $1,230/MT is based on "information received from entities" for transportation from generators' sites in Nevada to RCRA-permitted storage facilities. 84 FR 53067 col. 1. However, DOE has not provided that "information" in the administrative record, so we are not able to effectively comment. We note that transportation costs generally are based on distance traveled and special handling, so a fixed cost is not realistic.

As a better approach, we recommend that DOE allow generators to pay the cost of transportation to the storage facility, rather than including an unrealistic transportation cost in the DOE storage fee. Generators would then be able to obtain a competitive price for transportation on their own. In addition, many ETC companies with mercury in storage operate their own truck fleets and would be able to transport the mercury at cost. There is no reason for DOE to include a transportation cost in the DOE storage fee.

Treatment & Disposal Cost

As DOE is aware, EPA regulations currently prohibit disposal in the U.S. and require retorting of high mercury waste. Lacking actual treatment and disposal cost data, DOE needs to fully set forth the basis for its estimated $37,900/MT cost for eventual

treatment and disposal. The preamble states "[t]he cost of treatment and disposal of elemental mercury is based on preliminary pricing from a U.S. commercial vendor." 84 FR 53067 col. 1. DOE needs to provide this information, in a redacted format if necessary, including a breakdown of DOE specific costs associated with treatment and disposal, so that the ETC can effectively comment. We note that the unspecified vendor's pricing is substantially higher than the historical costs for stabilization and disposal in an OECD country. DOE should also commit in the final rule to petitioning EPA to change the RCRA treatment standard for high mercury waste for disposal in the U.S.

Another area of concern includes the length of storage. We commend DOE for including eventual disposal in the fee structure, since indefinite storage is unrealistic. However, it is not clear why DOE chose 15 years, rather than a shorter time such as 10 years, as the estimate for when treatment and disposal capacity will be available. It should not take 15 years for EPA to amend its regulations to allow stabilization and disposal of mercury waste in the U.S.

Without supportive information for its proposed cost, we cannot determine if the vendor's preliminary pricing is commercially reasonable. Therefore, if the actual costs turn out to be higher than estimated, will DOE assess a surcharge on generators who already paid the fee? If the costs are lower and DOE accumulates a fee surplus, will rebates be made or will the fee simply be lowered for future generators and not for the generators who actually paid the higher fee?

Mercury 99.5% Purity

DOE should not require that elemental mercury received for storage be 99.5% pure because the mercury will eventually just be disposed. Neither MEBA nor the legislative history specifies any purity requirement or limitation for elemental mercury. We understand that DOE does not want to receive mercury-contaminated media, consumer products, mining ores, combustion co-products, or other waste-like materials for storage, but there is no compelling reason why generators must refine mercury to 99.5% purity for purposes of DOE storage and disposal. ETC member companies collect mercury, for example, as broken or discarded thermometers from high school chemistry

lab cleanouts and household collection events. There is no way to know with certainty that the collected mercury is 99.5% pure, and the cost and burden of sampling, testing, and possibly further refining the mercury is not warranted. It should make no difference if the mercury is less than 99.5% pure, as long as the physical properties of elemental mercury are suitable for storage and ultimate disposal.

Therefore, we strongly recommend that DOE adopt a lower purity requirement of 95% or a corresponding physical standard. In fact, as long as the mercury is shipped in a specification package for mercury that complies with DOT requirements at 49 CFR 178, the mercury should be suitable for storage and eventual disposal. The DOT hazardous materials regulations require mercury to be shipped in casks or containers that are corrosion resistant and suitable for long term storage.

Storage at RCRA-Permitted Facilities

DOE should clearly state in the final rule that non-federal generators are not required to send elemental mercury to the long-term storage facility (but may do so on a voluntary basis) and may continue to store their mercury on-site. Non-federal generators may continue to store elemental mercury in their RCRA-permitted facilities pending their decision to arrange for environmentally sound disposal in accordance with 15 U.S.C. § 26111(c)(7)(D). DOE essentially acknowledges this point at 84 FR 53058 col. 1, but we urge DOE to make a more explicit statement in the final rule. We note that the U.S. Environmental Protection Agency (EPA) has clearly stated in Questions and Answers on the Mercury Export Ban Act (MEBA) of 2008: "After the export ban takes effect, will storage of elemental mercury be mandatory? No. Transfer to DOE's facility or facilities will be voluntary."[1] For the sake of clarity, we urge DOE to make a similar clear statement.

ETC similarly urges that DOE clarify whether generators that certified in writing that they will ship elemental mercury to the DOE storage facility will be able to revisit these agreements and retain the option of on-site storage if they determine that the storage fees, once finalized, are prohibitively expensive. *See* 42 U.S.C. § 6939f(g)(2)(B) (authorizing on-site storage prior to acceptance at the DOE storage facility without

[1] *See* https://www.epa.gov/mercury/questions-and-answers-mercury-export-ban-act-meba-2008#Storage.

addressing the scenario of continued on-site storage once the DOE storage facility is operational). These certifications were made a number of years ago when it was understood that DOE was planning to charge a fee for storage only, without the additional costs of transportation, treatment and disposal.

DOE Ownership of Received Mercury

We believe there will be a great deal of confusion over who actually owns the elemental mercury in long-term storage at the DOE facility. For example, how should generators account for potential liabilities for DOE-stored mercury in their financial and accounting statements? What will happen if generators want to remove the mercury that they "own"? Will DOE keep each generator's elemental mercury separate and identified in the event that ownership rights are asserted? This confusion will increase over time, especially as some generators may become insolvent and go out of business, and other generators are acquired or merge with other companies.

While MEBA does not expressly require DOE ownership of elemental mercury in long-term storage, MEBA § 5(a)(2) does state that DOE "shall accept custody, for the purpose of long-term management and storage, of elemental mercury generated within the United States and delivered to such facility." Also MEBA § 5(e)(1) states in relevant part:

> "[T]he Secretary shall hold harmless, defend and indemnify in full any person who delivers elemental mercury to a designated facility ... from and against any suit, claim, demand or action, liability, judgment, cost or other fee arising out of any claim for personal injury or property damage (including death, illness, or loss of or damage to property or economic lost) that results from, or is in any manner predicated upon, the release or threatened release of elemental mercury as a result of acts or omissions occurring after such mercury is delivered to a designated facility."

Since custody and liability are the two most basic elements of ownership, DOE should accept ownership of the elemental mercury once it has been delivered and the storage fee is paid. DOE should take title and provide generators with some type of certification of ownership so there is no future confusion regarding legal ownership of the stored mercury. DOE ownership will actually be the simplest and best practice for the agency as well, avoiding future costs and confusion if the question of ownership is disputed.

Fee Adjustments

DOE should provide notice and an opportunity for public comment on proposed fee increases in the future. Simply announcing fee increases without notice and comment would violate the Administrative Procedure Act.

Conclusion

Thank you for the opportunity to submit these comments. We look forward to DOE's response to our concerns in a supplemental proposal with a full administrative record, or in a final rule if DOE decides not to issue a supplemental proposal, and in a Response To Comments Document that Federal agencies typically prepare in a rulemaking. If you have any questions or require further information, please do not hesitate to contact the undersigned.

Sincerely,

James A. Williams
Vice Present for Government Affairs