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United States Environmental Protection Agency
Washington, D.C. 20460
Office of Solid Waste and Emergency Response

Mr. Dale L. Gable
Environmental Inspector
Office of Waste Management
Department of Commerce, Labor & Environmental Resources
Division of Environment Protection
1356 Hanford Street
Charleston, West Virginia 25301-1401

Dear Mr. Gable:

Thank you for your letter of April 20, 1994, requesting clarification of how the Resource Conservation and Recovery Act (RCRA) regulations apply to off-specification fuels that are being burned for energy recovery.

Your letter cites a July 31, 1989 letter from EPA which states that the exclusion from RCRA for commercial chemical products that are used for their originally intended purpose (40 CFR 261.2(c)(2)(ii)), applies not only to commercial chemical products that are specifically listed in §261.33 but also to commercial chemical products that exhibit a hazardous characteristic. You ask whether this document reflects current EPA policy. The answer is yes. The interpretation of the §261.2(c)(2)(ii) exclusion provided in the letter you cite is merely a reiteration of the Agency's position as initially clarified in the preamble to the April 11, 1986 technical correction notice to the January 4, 1985 Definition of Solid Waste final rule. In the preamble to the technical correction notice, EPA clarified that "Although we do not directly address non-listed commercial chemical products in the rules, their status would be the same as those that are listed in §261.33 -- That is, they are not considered solid wastes when recycled except when they are recycled in ways that differ from their normal manner of use." (50 FR at 14219)

You also ask whether, under this interpretation of the §261.2(c)(2)(ii) exclusion, off-specification fuels, including gasoline, jet fuel, kerosene, diesel, etc., that exhibit a hazardous characteristic and are burned for energy recovery would

considered as commercial chemical products. Again, the answer is yes. Again, the answer is yes. First, as discussed above, these materials would be considered non-listed commercial chemical products. Second, commercial chemical products are not solid wastes when used as fuels (i.e., burned for energy recovery) if that is their intended purpose. Thus, for example, off-specification jet fuel is not a solid waste if used as a fuel.

Finally, you express concern about the effect that this policy may have on the clean-up of spills of gasoline and other fuels. According to your letter, under West Virginia State requirements, clean-up standards for commercial chemical product spills are more stringent than those for characteristic hazardous wastes. EPA does not make a similar distinction in its approach to spill remediation. EPA's overall approach to the clean-up of environmental contamination is set forth in the July 27, 1990 Proposed Rule on Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities. In essence, EPA believes that different clean-up levels will be appropriate in different situations and are best established on a site-specific basis. In response to your concern, then, spills of commercial chemical product fuels may have to be cleaned-up to lower levels than do spills of characteristic hazardous waste as a result of State requirements, but not as a matter of Federal policy.

I hope this letter addresses your concerns. If you have additional questions pertaining to the definition of solid waste, please call Becky Daiss at (202) 260-8718 or Mitch Kidwell at (202) 260-8551. Questions regarding EPA's approach to corrective action under RCRA should be directed to Dave Fagan at (703) 308-8620.

Sincerely,

David Bussard
Director
Characterization and Assessment Division

Attachment

DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
DIVISION OF ENVIRONMENTAL PROTECTION
1356 Hansford Street
Charleston, WV 25301-1401

April 20, 1994

Sylvia K. Lowrance, Director
Office of Solid Waste 05300
U.S. Environmental Protection Agency
Waterside Mall
401 M Street, S.W.
Washington, D.C. 20460

Dear Ms. Lowrance:

This letter is to request a clarification of an earlier United States Environmental Protection Agency (EPA) policy document from Mr. Devereaux Barnes, Director of the U.S. EPA Characterization and Assessment Division in Washington, D.C. concerning off-specification jet fuel. See the document as an attachment to this letter.

For the sake of discussion, I am assuming that Mr. Barnes intended his decision to include any off-specification fuels including gasoline, jet fuel, kerosene, diesel, etc. that may exhibit a characteristic of hazardous waste and are destined to be burned for energy recovery.

The principle argument that Mr. Barnes uses as a basis for his decision is that fuels are commercial chemical products and are, therefore, not solid wastes when burned for energy recovery, as excluded under 40 CFR 261.2(c)(2) (ii), which states specifically: "commercial chemical products listed in 40 CFR 261.33 are not solid wastes if they are themselves fuels". Mr. Barnes states that "Although the regulatory language found at 261.2(c)(2)(ii), which states that in such cases a commercial chemical product is not a solid waste if it itself is a fuel, only addresses commercial chemical products listed in Section 261.33, it is implicit in the rules that the same reasoning applies to commercial chemical products that are not listed". He goes on to cite an April 11, 1986

Federal Register notice
(50 FR at 14219) as a clarifying discussion of this matter.

It would appear, as set forth in 40 CFR, Part 261, that in order to meet the exclusion of 261.2(c)(2)(ii), the materials must first be listed in 261.33. The phrase commercial chemical product or manufacturing chemical intermediate having the generic name listed in..." refers to a chemical substance which is manufactured or formulated for commercial or manufacturing use which consists of the commercially pure grade of the chemical, any technical grades of the chemical that are produced or marketed, and all formulations in which the chemical is the sole active ingredient. The commercial chemical products, manufacturing chemical intermediates and off-specification commercial chemical referred to in 261.33 are listed specifically as U or P wastes under that Part.

Let us use gasoline or off-specification gasoline as the example for this discussion, since the State of West Virginia has been experiencing significant difficulties in regulating the proper use and management of gasoline wastes. Gasoline is a mixture of volatile hydrocarbons suitable for use in a spark ignited internal combustion engine and having an octane rating of at least 60. The major components of gasoline are branched-chain paraffins, cycloparaffins and aromatics. Since gasoline is not listed specifically as a commercial chemical product or a manufacturing chemical intermediate under 261.33, it does not appear to be subject to the regulatory exclusion of 261.2(c)(2)(ii). Gasoline does contain various concentrations of chemicals which are listed in 261.33, specifically benzene, toluene and xylene. However, these chemicals are not in commercially pure grades or technical grades and none of these chemicals are the sole active ingredients of gasoline.

Off specification gasoline, contaminated gasoline and gasoline contaminated water destined to be burned for energy recovery are all currently being handled as exempted materials by industry in West Virginia, due to the existence of the aforementioned EPA guidance document. Mishandling of these materials is an ever increasing problem due to the lack of regulatory authority under the exclusion. The storage, transportation, record keeping and other requirements of RCRA normally prevent such problems from occurring.

Would not the exclusion for commercial chemical products listed in 261.33 apply only to the actual listed materials that are used as fuels? Chemicals such as methanol, toluene, xylene, hydrazine, methyl hydrazine and 1,1 dimethylhydrazine are specific examples of chemical substances which are frequently used as fuels. These commercially pure or technical grade chemicals would appear to meet the exclusion if they are to be burned for energy recovery and have not been "used or spent".

Is there any case law which would support the Devereaux Barnes document? Does this document reflect current U.S. EPA policy? Since cleanup standards for commercial chemical products are generally more stringent than the cleanup standards for characteristic hazardous wastes, would spills of gasoline or other fuels which meet the Barnes document definition of a commercial chemical product have to be cleaned up to those more stringent background conditions? The designation of any compounds which are fuels as commercial chemical products presents the State with many problems for the current and the future use and disposal of those materials."

Please feel free to contact at the West Virginia Division of Environmental Protection field office in Parkersburg, West Virginia at (304) 420-4635 if you require any further information.

Sincerely,

Dale L. Gable
Environmental Inspector
Compliance Monitoring and Enforcement
Office of Waste Management