UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

November 25, 1992

David Bozaan
Groundwater Technology
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Chadds Ford, PA 19317

Dear Mr. Bozaan:

Thank you for your October 23, 1991 letter to David Bussard concerning recovered petroleum products. I apologize for the long delay in answering your questions. I understand that you have since contacted and received responses from most of the states in which you conduct business. As a matter of policy, we always suggest that members of the regulated community do just that, since states can promulgate stricter standards.

1. The "Free Product" Issue.

In your letter, you referred to a preamble statement from the Toxicity Characteristic final rule (published on March 29, 1990, at 55 Federal Register 11836) that defines wastes as hazardous under the Resource Conservation and Recovery Act (RCRA) Subtitle C regulations. The statement in question refers to cleanups of contaminated soil and groundwater from petroleum product storage tanks regulated under RCRA's Subtitle I program for underground storage tanks (USTs). It reads:

> "Moreover, the UST cleanup activities involving the most contaminated media and debris are also likely to involve free product recovery. Free product recovery would not be subject to Subtitle C requirements because the material being recovered is not a waste."

This statement was intended to describe the status of recovered "free product," or products that had been stored, spilled, and were subsequently recovered for use or reuse in their normal manner. If the product was going to be discarded instead of used in its normal manner, it would be a waste (and, potentially, a hazardous waste). In order to qualify for an exemption, the generator has the burden of proving that a material is not a solid waste, or is conditionally excluded from regulation (40 CFR 261.2); a generalized assertion that a material is being recycled does not necessarily satisfy this burden. The Agency discussed this issue in more detail with respect to commercial chemical products in the preamble to the Land Disposal Restrictions Third Third Final Rule (55 FR 22671, June 1, 1990). In that preamble (see attached), the Agency described some of the considerations that may be appropriate in characterizing the legitimacy of a claim that a spilled material is not a solid waste based on its being recycled. You should continue to deal with the implementing agencies for detailed guidance on what will satisfy this

burden. Generally, you will likely be asked to show that the material is suitable for, and actually is used as fuel, or to make a fuel.

2. Commercial Chemical Products.

Under the Subtitle C regulations defining materials as "solid wastes" potentially subject to the hazardous waste requirements, commercial chemical products that are reclaimed are not wastes (see 40 CFR 261.2(c)(3)). Although the regulation specifically says "commercial chemical products listed in 40 CFR 261.33," we meant also to include commercial chemical products that are not specifically listed in 40 CFR 261.33 as well (for example, a commercial chemical product that exhibits the ignitability characteristic identified at 40 CFR 261.21). We clarified this principle in a technical correction notice published on April 11, 1985 (55 Federal Register 14219, copy enclosed).

In addition, the regulations at 40 CFR 261.2(c)(2) state that, when used as fuels, commercial chemical products listed in 40 CFR 261.33 are not solid wastes if they are themselves fuels. The same logic applies to commercial chemical products that are not specifically listed, but that exhibit a hazardous characteristic. Although the April 11, 1985 technical correction notice could be read to imply that commercial chemical products burned for energy recovery are wastes, please be assured that a commercial chemical product normally used as a fuel (such as gasoline) is considered to be used in a manner consistent with its normal product use if it is burned for energy recovery or used to produce a fuel. Thus, it would not be a waste [see 40 CFR 261.2(c) (2) (ii)].

3. Specific Questions.

Q) Is recovered free product regulated as a Subtitle C waste if the waste disposal facility which receives the material puts it into a fuels blending program? (If yes, then gasoline, we presume, would be classified as a D001 ignitable hazardous waste).

A) Recovered free product that is normally used as a fuel is not regulated as a RCRA Subtitle C waste if it is used as an ingredient to make a fuel (e.g., by blending into fuel). Gasoline is not regulated as a RCRA Subtitle C hazardous waste when it is put into a fuel blending program. In contrast, a commercial chemical product that is not normally used as a fuel, e.g., a pesticide, would be a RCRA Subtitle C waste if put into a fuel blending program.

Q) Would free product recovered from a UST corrective action (Part 280, Subpart F) be excluded from being regulated as a D018 to D043 toxicity characteristic hazardous waste?

A) Commercial chemical products normally used as fuels, that are free product recovered from a UST corrective action under 40 CFR Part 280, Subpart F, and that are put into a fuel blending program, are not regulated as wastes and thus would be excluded from regulation as a D018 to D043 waste (as well as any other EPA hazardous waste number). If the same commercial chemical product is sent for disposal, however (e.g., in

a landfill), it is a waste and thus may be a hazardous waste[1].

Commercial chemical products that are not normally used as fuels would be wastes if they are to be burned for energy recovery[2]. Thus, typically, recovered free products that are not normally used as fuels would be regulated as hazardous wastes if they were sent to be burned or used in fuel, and exhibited one of the hazardous waste characteristics (or were specifically listed).

Q) Is recovered free product excluded from Subtitle C regulation if it is reused as gasoline by either: 1) being refined by a refinery for resale, or 2) being added to a large bulk storage tank for resale without processing?

A) Gasoline that is recovered and used as a fuel, either by sending to a refinery for re-refining, or combining with other gasoline directly for resale, with no processing (or with some processing, for that matter), is not a waste and thus is excluded from RCRA Subtitle C regulation.

I hope this letter responds to your questions. If you have further questions, please contact Julie Lyddon of my staff at (202) 260-8551. I would, however, encourage you to continue checking with the implementing agency (RCRA-authorized state or EPA regional office) whenever you have questions about specific sites or circumstances.

Sincerely,

Jeffery D. Denit
Deputy Director,
Office of Solid Waste

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[1] Note that petroleum-contaminated media and debris identified as D018 through D043 wastes are excluded from regulation as a hazardous waste under 40 CFR 261.4 (b) (10).

[2] See footnote 1.