

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

SEP 26 1997

Mr. Douglas H. Green  
Piper & Marbury, L.L.P.  
1200 Nineteenth Street, N.W.  
Washington, DC 20036-2430

Dear Mr. Green:

Thank you for your letter dated April 14, 1997 regarding the Environmental Protection Agency's (EPA) Recycled Used Oil Management Standards (40 CFR Part 279). Specifically, you asked if the presence of polychlorinated biphenyls (PCBs) in used oil is one of the criteria for determining whether a used oil fuel meets the fuel specification standard such that it may be burned for energy recovery without further regulation under the Resource Conservation and Recovery Act (RCRA). The presence of PCBs in used oil is not one of the criteria under the RCRA used oil specification standard. However, used oil that contains PCBs is subject to requirements under the Toxic Substances Control Act (TSCA). In that respect, TSCA requirements for the marketing and burning for energy recovery of used oil that contains detectable quantities of PCBs less than 50 parts per million (ppm) incorporate certain RCRA Part 279 "off-specification" used oil requirements *by reference*.

RCRA Requirements

The RCRA used oil specification criteria are set forth at 40 CFR § 279.11. The specification criteria establish which used oil fuels may be burned in nonindustrial burners without regulation under RCRA. As you noted in your letter, the used oil fuel specification sets maximum allowable limits for arsenic, cadmium, chromium, lead and total halogens, as well as a minimum flash point. Although the PCB regulations promulgated pursuant to TSCA are referenced in a note to Table 1 in § 279.11, the presence of PCBs in used oil is not one of the criteria for determining whether used oil that is to be burned for energy recovery meets the fuel specification for purposes of RCRA regulation.

Used oil that is to be burned for energy recovery and that meets the RCRA fuel specifications of § 279.11 ("on-specification" used oil) is not regulated under the authority of Part 279 provided that: (1) certain conditions for used oil fuel marketers are met, and (2) so long as the used oil is not mixed or contaminated with hazardous waste. (Applicable on-specification used oil fuel marketer requirements can be found at §§ 279.72, 279.73, and 279.74(b).) This is the case, notwithstanding that a used oil fuel may contain PCBs. Although the RCRA regulations do not identify the presence of PCBs in used oil as relevant to the determination of whether the used oil is on- or off-specification, the presence of PCBs in used oil is relevant for determining the applicability of the TSCA regulations for the burning of used oil.

FAXBACK# 14117

The TSCA rules (specifically, 40 CFR § 761.20(e)(2)) establish a presumption that detectable quantities of PCBs are present in used oils to be burned for energy recovery. The presumption can be overcome if a marketer determines through testing or other specified procedures that the used oil fuel does not contain quantifiable levels (2 ppm) of PCBs. TSCA rules found at 40 CFR § 761.20(a) and §761.3 (definition of "excluded PCB products"), also prohibit burning for energy recovery of PCB containing used oils at concentrations of 50 ppm and greater. In addition, § 761.1 (b) prohibits dilution to attain PCB concentrations below 50 ppm.

TSCA regulations establish requirements for the marketing and burning for energy recovery of used oils containing detectable quantities of PCBs at concentrations less than 50 ppm (40 CFR §761.20(e)). Some of these requirements are incorporations by reference of Part 279 requirements for the marketing and burning for energy recovery of off-specification used oil. Therefore, by operation of the TSCA rules, used oil that is on-specification under the RCRA rules may nevertheless be subject to certain requirements specified in the RCRA rules for off-specification used oil.

Specifically, for used oil burners that burn less than 50 ppm PCB-containing used oil, the TSCA rules reference the RCRA regulatory provisions of Part 279 Subpart G, including restrictions on burning, notification requirements, tracking requirements, and certification requirements. For used oil marketers that market less than 50 ppm PCB-containing used oil for energy recovery, the TSCA rules, with limited exceptions, restrict marketing to qualified incinerators, to marketers who market off-specification used oils and to burners as defined in the RCRA Part 279 regulations. The TSCA rules also reference the RCRA regulatory provisions for marketers in Part 279 Subpart H, including record retention, notification, tracking, and certification. *The fact that the TSCA rules incorporate by reference these RCRA standards does not mean that PCB-containing used oil is regulated under RCRA or that such used oil is off specification as defined by Part 279.*

Thank you for your interest in the safe management of used oil. During the preparation of this letter, my office worked with EPA Region VI staff. We are forwarding a copy of this letter to all of the EPA Regional offices to clarify any potential misinterpretation. If you have any further questions regarding used oil management, please contact Tom Rinehart of my staff at (703) 308-4309.

Sincerely,

Elizabeth A. Cotsworth, Acting Director  
Office of Solid Waste

CC: EPA Region 1  
EPA Region 2  
EPA Region 3  
EPA Region 4  
EPA Region 5  
EPA Region 6  
EPA Region 7  
EPA Region 8  
EPA Region 9  
EPA Region 10

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April 14, 1997

BY CERTIFIED- MAIL

Elizabeth A. Cotsworth  
Acting Office Director, Office of Solid Waste  
U.S. Environmental Protection Agency  
Mail Code 5301W  
2800 Crystal Drive, 9th Floor  
Arlington, VA 22202

Re: REQUEST FOR IMMEDIATE CLARIFICATION FROM EPA  
HEADQUARTERS TO EPA REGIONS TO CORRECT ERRONEOUS  
INTERPRETATION OF USED OIL RULES

Dear Ms. Cotsworth:

We write on behalf of the Utility Solid Waste Activities Group ("USWAG")<sup>1</sup> to request your immediate assistance in correcting an erroneous interpretation of EPA's used oil rules concerning the inclusion of PCBs in the used oil specification standard. We understand that this interpretation was communicated from EPA Headquarters to the EPA Regions. Thus far, at least one Region, Region VI, has communicated this information to state enforcement personnel and regulated industries at a recent used oil workshop in Dallas, Texas.

Region VI staff have advised our clients that they will not alter their interpretation of the used oil rules until they receive revised guidance from EPA Headquarters on this issue. This issue is of great importance to many electric utilities that manage on-specification used oil fuels containing 2 ppm to 49 ppm PCBs. Therefore, immediate correction of this error from EPA Headquarters is necessary to prevent EPA Regions and the states from enforcing this misinterpretation and to avoid unnecessary litigation.

**BACKGROUND**

We believe that this problem arose when a former staffer in EPA's used oil program communicated to the EPA Regions that used oil fuel that otherwise meets the used oil fuel specifications in 40 C.F.R. § 279.11, but that contains 2 ppm or more PCBs, must be regulated as off-specification used oil under the Part 279 rules. This information, in turn, was communicated by an EPA Region VI representative at a recent used oil workshop in Dallas, Texas. According to one of our clients, who was present at the workshop, the Region VI staffer stated that used oil containing 2 ppm or greater PCBs was "off-specification" used oil fully subject to the Part 279 rules. Indeed, the

staffer's handouts at the workshop represented that PCBs are included in the specification for used oil fuel. See Attachment A. We also understand that this misinterpretation is being communicated to the public by the RCRA hotline.

The used oil fuel specification at 40 C.F.R. § 279.11 sets allowable limits for arsenic, cadmium, chromium, lead and total halogens, as well as a minimum flash point. PCBs are not a component of the used oil fuel specification. If a used oil handler demonstrates that used oil fuel meets the specification levels at section 279.11, the used oil fuel is no longer subject to Part 279 once the handler documents the specification claim and complies with specific recordkeeping, notification and tracking requirements. 40 C.F.R. § 279.11. Indeed, EPA recently reiterated this point in a letter to the State of Texas. See Attachment B.

When an on-specification used oil fuel contains 2 ppm to 49 ppm PCBs -as is sometimes the case with dielectric fluids managed by electric utilities - it is subject to TSCA's used oil marketer and burner requirements at 40 C.F.R. § 761.20(e).<sup>i</sup> PCB-containing used oil fuels may only be burned in (a) TSCA qualified incinerators or (b) units that are qualified to burn off-specification used oil, as specified in Part 279, Subpart G. Thus, although the PCB-containing used oil fuel meets the Part 279 fuel specification - and thus is exempt from the Part 279 management standards - it is subject to TSCA requirements and can only be burned in a unit that, at a minimum, complies with the Part 279 used oil burner standards. We suspect that this distinction may be the source of confusion in the misinterpretation from EPA Headquarters to the EPA Regions, and the resulting statements by Region VI staff at the recent used oil workshop in Dallas.

We have attached relevant portions of the Federal Register which demonstrate that PCBs are not included in the used oil fuel specification. In EPA's 1985 final used oil burning rule, the Agency explicitly excluded PCBs from the used oil fuel specification. 50 Fed. Reg. 49164, 49181-82 (November 28, 1995) (see Attachment C). In the 1992 final rule adopting the Part 279 used oil management standards, EPA adopted the pre-existing used oil fuel specification. The used oil specification table adopted as 40 C.F.R. § 279.11 in 1992 contained no reference to PCBs. 57 Fed. Reg. 41566, 41580, 41614-15 (September 10, 1992) (Attachment D). Finally, in the 1993 used oil technical amendment, EPA added a footnote to the used oil specification table stating simply that "Applicable standards for the burning of used oil containing PCBs are imposed by 40 C.F.R. 761.20(e)." 58 Fed. Reg. 26420, 26425 (May 3, 1993) (see Attachment E).

Again, EPA staff may have misunderstood the reference to the TSCA burning rules included in the 1993 technical amendment as adding PCBs to the specification table in § 279.11.<sup>ii</sup> Clearly, this point was added to the table simply as a cross-reference to remind readers that even though on-specification used oil is not subject regulation under 40 C.F.R. Part 279, it may be subject to the TSCA used oil burner and marketer requirements under 40 C.F.R. § 761.20(e).

## **REQUEST FOR CLARIFICATION**

Because of the confusion this erroneous interpretation may create for used oil handlers, USWAG requests that EPA Headquarters immediately provide written clarification to the EPA Regions and authorized states correcting this error. In particular, we ask that EPA Headquarters reiterate to the Regions and authorized states that used oil fuel that meets the used oil fuel specifications in 40 C.F.R. § 279.11, but that contains 2 ppm to 49 ppm PCBs, is not subject to regulation as off-specification used oil fuel under Part 279. While such used oil fuel is subject to applicable TSCA requirements under 40 C.F.R. § 761.20(e), the oil is not regulated as "used oil" under 40 C.F.R. Part 279.

We appreciate your immediate attention to this matter. Please do not hesitate to call me (202-861-3847) or my colleague, Marianne Thiede (202-861-3936), if we can provide any further information that will help to clarify this issue.

We look forward to hearing from you soon.

Very truly yours,

Douglas H. Green  
Counsel to the Utility Solid Waste  
Activities Group

Enclosures

cc: Alex Schmandt, Esq., Office of General Counsel  
Mr. Henry W. Baney, Office of Pollution Prevention and Toxics  
Ms. Lou Ella Roberts, Region VI  
Ms. Nancy Jones, Region VI

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<sup>i</sup> In contrast, used oil containing 50 ppm or more PCBs is subject to the more stringent PCB disposal requirements at 40 CFR 761.60. However, used oil containing 50 ppm or more PCBs is excluded from regulation under Part 279. See August 5, 1996 Settlement Agreement, *EEI v. EPA*, No. 93-1474 (D.C. Cir).

<sup>ii</sup> Even if this had been EPA's intent—which it clearly was not—the Agency could not have amended the specification table in this substantive manner through a technical amendment.