

MEMORANDUM

Subject: Implementation of Vacature of TCLP Use for Evaluating Manufactured Gas Plant (MGP) Wastes in the *Battery Recyclers* Case

From: Elizabeth Cotsworth
Director, Office of Solid Waste

To: RCRA Senior Policy Advisors,
RCRA/Waste Enforcement Program Managers
Regions I-X

This memo is to notify you that the D. C. Court of Appeals, ruling in the case: Association of Battery Recyclers, Inc. et al. v. U.S. Environmental Protection Agency (decided April 21, 2000), vacated the use of the Toxicity Characteristic Leaching Procedure (TCLP) for evaluating manufactured gas plant (MGP) wastes.

In the *Battery Recyclers* case, several aspects of the Agency's Phase IV Land Disposal Restrictions (LDR) final regulations (63 FR 28556, May 26, 1998) were challenged. Among the issues addressed in the Phase IV final regulation was the Agency's earlier court remand in *Edison Electric Institute v. EPA* 2F.3rd 438 (D.C. Circuit, 1993), regarding application of the TCLP to evaluating whether mineral processing and MGP wastes are hazardous wastes. In *Edison Electric*, the plaintiffs challenged application of TCLP to their waste on the argument that the waste is not managed in MSW landfills, as presumed by the TCLP mismanagement scenario. The court held that the information in the record at the time was insufficient to show a rational relationship between the TCLP and a likely mismanagement scenario for mineral processing wastes. The Court's remand required that the Agency provide some factual support that the TCLP mismanagement scenario is plausible for mineral processing and MGP waste. The Phase IV proposal and final rule responded to the Court's remand by providing the required factual support. In the *Battery Recyclers* case, the affected industries challenged the adequacy of EPA's response to the *Edison Electric* remand.

In ruling in the *Battery Recyclers* case, the court found that EPA produced insufficient

evidence that MSW disposal of MGP waste has happened or is likely to happen. The Court concluded that A...the EPA has not justified its application of the TCLP to MGP waste@ and consequently ruled to A...vacate the Phase IV rule insofar as it provides for the use of TCLP to determine whether MGP waste exhibits the characteristic of toxicity.@

Since the court decision, we have received several inquiries concerning the implications of this decision for MGP cleanups. In a recent response to a letter from Vectren Corporation, an Indiana utility company owning a number of MGP sites, Michael Shapiro, Principal Deputy Assistant Administrator for Solid Waste and Emergency Response, provided EPA=s view on this question. As the response states, under the Court=s ruling, MGP waste cannot be classified as Toxicity Characteristic (TC) hazardous, since the TCLP test is part of the TC regulatory definition. Also, because MGP wastes are unlikely to exhibit any of the other hazardous characteristics, they are unlikely to be classified as hazardous under the federal program. As a practical matter, this means that individual MGP cleanups will probably not be regulated under federal RCRA Subtitle C.

For your information, I have attached a copy of Mr. Shapiro=s letter to Vectren. Also, I call your attention to the preamble to the proposed Corrective Action Management Unit (CAMU) Rule, which makes the same point on the Battery Recycling decision and MGP wastes (See 65 FR 51087, footnote 6, August 22, 2000).

Of course, as you know, states may have regulations that are broader in scope than the federal regulations, and they may regulate MGP wastes as hazardous under their own state requirements. Also, many states regulate MGP cleanups under independent state cleanup programs, and state industrial waste requirements may also apply. Therefore, we are encouraging utilities and other parties conducting MGP cleanups to consult with the appropriate state regulatory authorities.

If Regional Office staff have any questions about TCLP or waste classification they may contact Greg Helms at 703-308-8845, or for questions on corrective action issues, Mike Fitzpatrick, at 703-308-8411.

Attachment

cc: RCRA Key Contacts, Regions I-X

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