



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

OFFICE OF RESOURCE
CONSERVATION AND RECOVERY

September 15, 2010

Michael S. Freeman
Earthjustice
1400 Glenarm Place, Suite 300
Denver, CO 80202

Dear Mr. Freeman:

Thank you for your letter of April 27, 2010, to Maria Vickers requesting the U.S. Environmental Protection Agency's (EPA's) opinion as to whether the Resource Conservation and Recovery Act (RCRA) exemption for oil and gas exploration and production (E&P) wastes from hazardous waste regulation (E&P exemption) extends to synthetic (plastic) pit liners used at oil and gas sites. 40 CFR 261.4(b)(5). Our review of this issue was coordinated with RCRA program staff in EPA Headquarters and EPA Region VIII, and with the Colorado Department of Public Health and Environment. We also considered comments provided to us by the Colorado Petroleum Association in a letter dated June 15, 2010. In making this determination we carefully considered all the information provided, the regulatory history, and the Agency's interpretation of Congress' intent when they temporarily exempted drilling fluids, produced water, and other wastes associated with E&P operations from hazardous waste regulation.

You stated that the definition of E&P waste only covers those wastes that are "intrinsic to and uniquely associated with" oil and gas exploration and development. 58 Fed. Reg. 15284 (March 22, 1993). You also stated that plastic pit liners are not unique and intrinsic to the oil and gas exploration industry and are used in numerous other industries such as in fuel storage tank farms, agriculture, fish hatcheries, architecture, engineering and landscaping. The Agency agrees that synthetic pit liners used in E&P operations are not intrinsic to or uniquely associated with operations associated with the exploration, development, or production of crude oil and natural gas. Therefore, although spent synthetic pit liners are wastes derived from E&P operations, they are not covered by the E&P exemption, since they are not intrinsic to or

uniquely associated with operations associated with the exploration, development, or production of crude oil and natural gas.

Please note that this determination is limited to the scope of the RCRA E&P exemption codified under 40 CFR 261.4(b)(5) and is in no way intended to interpret the status of these wastes under state regulations, or to express an opinion on how the management and disposal of synthetic pit liners used at oil and gas sites should be regulated by states. Moreover, EPA's determination that synthetic pit liners used in E&P operations are not covered by the E&P exemption does not suggest that they are hazardous wastes. On the contrary, many wastes generated in E&P operations are not covered by the exemption. The issue EPA is addressing in this reply to your request is whether or not the E&P waste in question (spent synthetic pit liners used in E&P operations) are covered under the exemption.

I hope this adequately addresses your request. However, if you have questions, please contact Bonnie Robinson of my staff by phone at 703-308-8429 or by email at robinson.bonnie@epa.gov.

Sincerely,

A handwritten signature in cursive script, appearing to read "R. W. Dellinger".

Robert Dellinger, Director
Materials Recovery and Waste Management Division

cc: EPA Region VIII – Immediate Office
Chuck Figur, EPA Region VIII
Joe Schiefflin, Colorado Dept. of Public Health and Environment



EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

April 27, 2010

Ms. Maria P. Vickers
Acting Director
United States Environmental Protection Agency
Office of Resource Conservation and Recovery
1200 Pennsylvania Avenue NW
Washington, DC 20460

BY ELECTRONIC MAIL:
vickers.maria@epa.gov

Re: Request for opinion letter on plastic pit liners

Dear Ms. Vickers:

I am writing to request an opinion letter from the Environmental Protection Agency on the question of whether the Resource Conservation and Recovery Act ("RCRA") exemption for oil and gas exploration and production wastes ("exempt waste" or "E & P waste") extends to synthetic (plastic) pit liners used at oil and gas sites. Ms. Bonnie Robinson of your office recommended that this letter be sent directly to you.

In 2008, the Colorado Department of Public Health and Environment and the Colorado Oil and Gas Conservation Commission determined that pit liners are not E & P waste because they are not "unique and intrinsic" to the oil and gas industry. In making this determination, the agencies noted that numerous other industries use plastic pit liners. Colorado rules now require that pit liners used at oil and gas sites be disposed of in compliance with state solid waste laws, just as is required when the liners are used by other industries. As a practical matter, this means that oil and gas companies generally can no longer bury pit liners on site when drilling is completed.

Recently, the Colorado Petroleum Association asked the Colorado Oil and Gas Conservation Commission to repeal this rule and allow companies to return to their earlier practice of burying pit liners on site. I am writing on behalf of a number of conservation organizations, including the Colorado Environmental Coalition, The Wilderness Society, and other groups, to ask for the Environmental Protection Agency's assessment of this legal question.

If possible, we would greatly appreciate it if EPA could issue an opinion letter in the next 30 days so that it can help inform Colorado's consideration of this issue.

For the reasons described below, we believe that Colorado's 2008 determination was correct. Moreover, as a policy matter, the Colorado rule yields substantial environmental benefits that further the goals of federal and state hazardous and solid waste laws.

A. Pit Liners are not exempt waste.

E & P waste is exempt from the definition of hazardous waste under RCRA. *See* 42 U.S.C. § 6921(b)(2)(A). Consistent with federal law, Colorado statutes also exempt E & P waste from the definition of solid waste. C.R.S. §§ 34-60-103(4.5), 30-20-101(6)(b)(VI).

The definition of E & P waste, however, only covers those wastes that are “intrinsic to and uniquely associated with” oil and gas exploration and development. 58 Fed. Reg. 15284 (March 22, 1993). Thus, oil and gas industry waste is subject to solid and hazardous waste laws if it is not unique and intrinsic to the industry. *Id.*; *see also*, 53 Fed. Reg. 25447, 25448 (July 6, 1988) (stating that “wastes not uniquely associated with exploration, development and production” are not exempt); *Exemption of Oil and Gas Exploration and Production Wastes from Federal Hazardous Waste Regulations* (EPA 2002) at 12 (“2002 Guidance”) (flow chart noting that wastes not exempt if not “uniquely associated”).

As Colorado recognized, plastic pit liners are not unique and intrinsic to the oil and gas exploration industry. To the contrary, numerous other industries also use them. *See, e.g.*, <http://www.reefindustries.com/industry.php>; <http://www.etpinfo.com/liners.htm> (liners used in fuel storage tank farms, agriculture, fish hatcheries, architecture, engineering and landscaping). These other industries manage to responsibly dispose of liners in compliance with state and federal laws. There is no reason Colorado’s oil and gas industry cannot do the same.

We believe Colorado’s conclusion is consistent with almost a quarter century of interpretation by the EPA. EPA has long recognized that containment devices used by many different industries are not “unique” to the oil and gas industry and do not become exempt waste when those devices are used to store E & P wastes.

That recognition is reflected in EPA’s 1988 determination that E & P waste should not be regulated as hazardous waste, as well as in clarifications the agency published in 1993. 53 Fed. Reg. 25447 (July 6, 1988) (“1988 Determination”); 58 Fed. Reg. 15284 (Mar. 22, 1993) (“1993 Clarification”). EPA also published a guidance document on the subject in 2002, which takes the same approach.

EPA explained in 1993: “One common belief is that any wastes generated by, in support of, or intended for use by the oil and gas E & P industry . . . are exempt. This is not the case; in fact, only wastes generated by activities uniquely associated with the exploration, development or production of crude oil or natural gas . . . are exempt” 1993 Clarification at 15285 (emphasis added).

In its 1988 Determination, and its 2002 Guidance, EPA provided illustrative lists of wastes that are exempt, and those that are not exempt. Exempt wastes include drill cuttings, produced water, drilling fluids, certain other wastes from operations unique to oil and gas development (such as gas plant dehydration wastes), and some mixtures of exempt and non-exempt wastes such as pit sludges and tank bottoms. 1988 Determination at 25453; 2002 Guidance at 9-11.

By contrast, EPA viewed other wastes generated in a variety of industries as non-exempt, even when used at an oil and gas development site. These include painting wastes, waste oil and filters from compressor engines, hydraulic fluids, various solvents and cleaning wastes. 1988 Determination at 25454-55; 2002 Guidance at 9-11.

Of particular relevance here, EPA addressed drums and trucks used to store or transport E & P waste. The agency distinguished between the drums and trucks themselves, and the wastes they contain. The sludges, bottoms and rinsate from drums and trucks storing exempt waste remain exempt. 1993 Clarification at 15285-86; 2002 Guidance at 10. But the drums themselves (and presumably the tanker trucks) are not exempt from federal hazardous waste laws. *See* 1988 Determination at 25454-55; 2002 Guidance at 11.

This distinction makes sense: while drums and trucks may store E & P waste, they are used widely in a variety of industries and cannot be deemed "unique" to oil and gas development. The oil and gas industry can readily dispose of drums and tanker truck parts in compliance with solid and hazardous waste laws, just as other industries do.

The same rationale applies to pit liners. Pit liners are not unique to the oil and gas industry, any more than drums and tanker trucks are. Manufacturers sell pit liners to a range of industries that include agriculture, fish hatcheries, architecture, engineering and landscaping. The same pit liner sold to a fish hatchery does not suddenly become exempt from solid waste laws merely because it is sold to an oil and gas exploration company.

Moreover, a contrary interpretation would carry troubling implications. If every device used to store E & P waste becomes exempt from solid waste laws, then produced water tanks and similar storage equipment also are presumably exempt. We expect that it would only be a matter of time before oil and gas companies begin demanding that state agencies let them bury old metal tanks, drums and even truck parts on-site once their useful life has ended.

B. Treating pit liners as non-exempt waste furthers the goals of RCRA.

The Petroleum Association's proposal also is bad policy. Burying these wastes on-site would allow oil and gas companies to burden current and future residents of Colorado with the industry's environmental costs. Such a practice also undercuts efforts to promote responsible waste management and is inconsistent with the premises of our solid and hazardous waste management laws.

First, burial of pit liners will leave behind a legacy of minimally regulated waste sites for future residents and the public to address. Land uses have changed substantially in the parts of Colorado where oil and gas drilling occurs, and are expected to continue changing in the future. Areas that are now pasture or open space may later be subdivided into residential developments and golf courses. When that happens, construction workers excavating building foundations

inevitably will stumble into these liners – and be exposed to their contents.¹ Moreover, new homes and golf courses often come with sprinkler and irrigation systems, which will exacerbate the threat that sludges disposed of with the liners will migrate into soil and groundwater.

History shows that future landowners and the public – not the companies that bury the waste – eventually will bear much of the burden of remediating these sites. While the Petroleum Association's members may prefer to avoid the expense of removing their pit liners, these are a cost of doing business that the companies should bear.

Second, allowing companies to revert to their earlier waste management practices will discourage stakeholders from making the investments necessary for responsible disposal of these wastes. For example, if pit liners are non-exempt waste, companies can be expected to develop and permit a facility so that they can dispose of liners in a responsible and cost-effective manner. Reclassifying pit liners as E & P waste, however, will eliminate the demand for such a facility and the jobs it would likely create.

Similarly, in 2009, some Colorado government agencies expressed interest in establishing a new landfill (with appropriate engineering and design features) to accommodate disposal of waste liners from the oil and gas industry. The agencies, however, cannot justify the investment in such a landfill without a regulatory requirement creating the demand for such a safe and responsible disposal option.

Third, exempting liners will discourage companies from adopting readily-available practices like pitless drilling. Federal hazardous waste laws recognize that the cost of compliance with strict waste management requirements encourages companies to minimize their waste and invest in new technologies that allow them to manage it better and more cheaply. *See* 42 U.S.C. §§ 6902(a)(1), (5), (10) (goals of RCRA include protecting environment by promoting improved solid and hazardous waste management techniques); *id* §§ 6902(a)(6), (b) (establishing national policy of reducing or eliminating generation of hazardous waste); *see also*, *Steel Manufacturers Ass'n v. EPA*, 27 F.3d 642, 649 (D.C. Cir. 1994) (concluding that “minimizing the overall volume of slag that is to be disposed is, by itself, a sufficient justification” for a waste treatment standard, regardless of other challenges to basis for that standard).

This dynamic has already started to work in Colorado. In areas of northeastern Colorado, where pit liner burial has been banned for years on irrigated crop land, companies have replaced pits with pitless drilling systems. Companies in other parts of the state report that they have also moved to pitless drilling systems and recycling of fluids following the State's 2008 decision that liners are not exempt waste. These operators apparently concluded that it was more cost-effective to use pitless systems than to dispose of pit liners in compliance with solid waste management laws.

¹ The volume of sludges disposed with the pit liners is substantial. We estimate that even a small amount of inevitable residue on the liner can total 30-40 barrels of untreated waste, because of the large size of pits in Colorado.

Ms. Maria Vickers

4/27/2010

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Allowing companies to return to their old way of doing business, however, will create a major disincentive for them to use pitless drilling and otherwise improve their waste management. Such an outcome is counterproductive, as well as inconsistent with federal law.

Thank you for your consideration of this request. Please do not hesitate to give me a call with questions, or if you would like to discuss this request.

Sincerely,

A handwritten signature in cursive script that reads "Michael S. Freeman". The signature is written in dark ink and is positioned above the printed name.

Michael S. Freeman

Cc (by electronic mail):

Ms. Bonnie Robinson (robinson.bonnie@epa.gov)