

September 12, 2003

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1200 Pennsylvania Avenue, N.W.  
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Dear Michael:

On behalf of the Utility Solid Waste Activities Group ("USWAG"), thank you again for providing us with an opportunity to review the RCRA draft interim guidance for the used oil rebuttable presumption. Given the importance of the rebuttable presumption to the RCRA used oil program, EPA is to be commended on this effort. Set forth below are two general points that we would like to bring to your attention regarding the draft guidance.

1. CESQG/Used Oil Mixtures – As we discussed in our voice mail exchanges, the one error that we did identify in the draft is contained on page 7, under paragraph 3, where the document explains that only mixtures of conditionally exempt small quantity generator ("CESQG") hazardous waste and used oil that *will be burned for energy recovery* are automatically regulated as used oil, while CESQG/used oil mixtures that are recycled by other means (e.g., re-refining) remain subject to the rebuttable presumption (and thus technically could be regulated as a hazardous waste if the presumption is not successfully rebutted). As you know, this position is incorrect. In fact, EPA said as much in its recent used oil clarification rule promulgated on July 30, 2003 (68 Fed. Reg. 44659). In that rulemaking, EPA clarified that mixtures of CESQG hazardous waste and used oil are regulated as used oil under RCRA's used oil management standards, *regardless* of the method by which the used oil is recycled (e.g., burned for energy recovery or re-refining). 68 Fed. Reg. at 44661. Thank you in advance for correcting this error.

2. Rebuttable Presumption and Used Oil Generators – One issue we suggest clarifying in the final guidance is the applicability of the rebuttable presumption to used oil generators. As we discussed in our recent telephone conversation, it would

be useful to clarify that, while used oil generators are subject to the rebuttable presumption (see 40 C.F.R. § 279.21(b)), they do *not* have an affirmative duty to test used oil for total halogen content for purposes of rebutting the presumption. The regulations impose this affirmative obligation on used oil transporters, processors/refiners, and burners. See 40 C.F.R. §§ 279.44, .279.53 and .279.63. As a practical matter, this means that a used oil generator generally would only become subject to the rebuttable presumption if, for some reason, the generator tests or otherwise finds out that its used oil contains greater than 1,000 ppm total halogens. If this were to occur, the generator could either attempt to rebut the presumption, claim it qualifies for an exemption (e.g., used oils contaminated with CFCs removed from refrigeration units where the CFCs are being reclaimed), or treat the used oil as a hazardous waste.

A related issue concerns when the applicable hazardous waste time limits begin (e.g., the 90-day accumulation period) when a generator *does* determine that its used oil must be managed as hazardous waste under the rebuttable presumption. On this point, it would be useful to clarify that any hazardous waste rules (including the applicable time periods) only become applicable at the point in time when the used oil generator first determines that the used oil must be managed as a hazardous waste – *i.e.*, when the generator doesn't or can't rebut the presumption (as opposed to having "back-calculate" to the date when the used oil was first generated). This is evident from, among other things, the construction of the used oil regulations, which establish the regulatory presumption that all used oil will be recycled and thus is subject, at the point of generation, to regulation as used oil under 40 C.F.R. Part 279. See 40 C.F.R. § 279.10(a). Only if and when a generator determines that its used oil fails the rebuttable presumption does such used oil become subject to regulation as hazardous waste, along with any associated hazardous waste time limits. Any other interpretation would be wholly impractical<sup>1</sup> and inconsistent with the regulatory structure of the used oil program.

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<sup>1</sup> For example, under a contrary interpretation, if a used oil generator were to determine more than 90-days after the used oil is generated that the oil fails the rebuttable presumption, the generator could find itself in immediate violation of the hazardous waste 90-day accumulation rule under 40 C.F.R. § 262.34. This would be both inequitable and impractical, given that used oil is presumed to be regulated under the used oil program at the point of generation and generators do not have an affirmative duty to test their used oil for total halogen content.

We think EPA can easily clarify these two points by adding a short paragraph or footnote to the guidance that includes the following explanation:

While used oil generators are subject to the rebuttable presumption, generators do not have an affirmative duty to test used oil for total halogen content. This regulatory obligation is imposed on used oil transporters, processors/re-refiners and burners. As a practical matter, this means that a used oil generator generally would only become subject to the rebuttable presumption if, for some reason, the generator tests or otherwise finds out that its used oil contains greater than 1,000 ppm total halogens. If this were to occur, and the generator were unable to rebut the presumption (or qualify for an exemption from the presumption), the used oil would, at that point in time, become subject to hazardous waste regulation and any associated hazardous waste time limits (e.g., the 90-day generator accumulation provision under 40 C.F.R. § 262.34(a)).

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Thank you again for your efforts in preparing this useful document and providing USWAG with the opportunity to provide you with our thoughts on this important issue. Please call me if you have questions regarding the issues raised above.

Very truly yours,



Douglas H. Green  
On behalf of the Utility Solid Waste  
Activities Group