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

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

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EMERGENCY MANAGEMENT

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David Wieties
Vice President of Operations
Illini Environmental, Inc.
8895 California Drive
Caseyville, Illinois 62232

Dear Mr. Wieties:

Thank you for your letter to Mathy Stanislaus dated August 29, 2016, regarding whether your company may receive mixtures of fuel and water as a recoverable commercial chemical product, in cases where the mixture consists of water in excess of 0.5 ppm benzene, but there is no free product.

As described in your letter, Illini Environmental receives drums of gasoline-contaminated water (or water-contaminated gasoline) that have been produced from the maintenance of the sumps, spill buckets and interstitial spaces of the gasoline dispensing secondary containment system. In some cases the gasoline/water mixture contains free product that can clearly be reclaimed as a commercial chemical product, sometimes the mixture is dilute enough that it is RCRA non-hazardous, and in some cases the gasoline/water mixture has no free product and no measurable flash point, but has benzene in concentrations above 0.5 ppm, which would cause the mixture to exhibit the RCRA toxicity characteristic for benzene (D018) under 40 CFR 261.24.

Your letter specifically focused on the third case, requesting whether Illini Environmental may receive this mixture (i.e., water with an excess of 0.5 ppm benzene with no free product) as an excluded commercial chemical product, bulk this mixture with contaminated fuel and then deliver the bulked fuel/water mixture to a fuel recovery facility.

As your letter correctly noted, commercial chemical products are not considered a solid waste when used to make a fuel if they themselves are fuels (see 40 CFR 261.2(c)(2)(ii)).[1] While the EPA does not have a "bright line" cut-off for determining at what point a mixture of fuel and water would be considered simply a contaminated wastewater rather than commercial chemical product fuel contaminated with water, the underlying issue is whether the recovery of the fuel product from the mixture would be legitimate recycling under the RCRA regulations.

[1] While the regulatory citation is specific for commercial chemical products listed in 40 CFR 261.33, EPA guidance has made clear that the solid waste exclusion applies not only to commercial chemical products that are specifically listed in 40 CFR 261.33 but also to commercial chemical products that exhibit a hazardous waste characteristic. (50 FR 14219, April 11, 1985).

Under the definition of legitimate recycling found at 40 CFR 260.43, the first factor to consider in determining whether recycling is legitimate is whether the hazardous secondary material (i.e., the fuel-water mixture) provides a "useful contribution."[2] The language in 40 CFR 260.43(a)(1) explains that the hazardous secondary material provides a useful contribution if it:

(i) Contributes valuable ingredients to a product or intermediate; or

(ii) Replaces a catalyst or carrier in the recycling process; or

(iii) Is the source of a valuable constituent recovered in the recycling process; or

(iv) Is recovered or regenerated by the recycling process; or

(v) Is used as an effective substitute for a commercial product.

In the case of fuel/water mixtures, such mixtures would be considered as providing a useful contribution if the fuel product is recovered by the recycling process (40 CFR 260.43(a)(1)(iv)).

Furthermore, the preamble to the 2015 definition of solid waste final rule makes it clear that the point that this determination is made is before the hazardous secondary material is mixed with another material:

> "In a situation where more than one hazardous secondary material is used in a single recycling process and the hazardous secondary materials are mixed or blended as a part of the process, each hazardous secondary material would need to satisfy the useful contribution factor. This requirement prevents situations where a worthless hazardous secondary material could be mixed with valuable and useful hazardous secondary materials in an attempt to disguise and dispose of it." (80 FR 1723, January 13, 2015).

Therefore, if the fuel/water mixture that exhibits the hazardous characteristic for benzene does not have recoverable fuel product prior to being bulked with other mixtures, it would not be making a "useful contribution" as defined in 40 CFR 260.43(a)(1) and would not be considered a commercial product being legitimately recycled. In that case, it would need to be managed as a hazardous waste.

In addition, it should be noted that authorized states are the primary implementers of the RCRA program, and can be more stringent than the federal program, so it is best to consult with the applicable state regulatory authority on this issue as well. I hope this memo addressed your question. If you have any further questions on this matter, please contact Tracy Atagi of my staff at 703-308-8672.

Sincerely,

Barnes Johnson, Director
Office of Resource Conservation and Recovery

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[2] In addition to meeting the first legitimacy factor discussed in this memo, any hazardous secondary material being recycled would also have to meet the other three factors found in 40 CFR 260.43.