



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

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

AUG 23 2010

Mr. Nelson D. Johnson
Arnold & Porter LLP
399 Park Avenue
New York, NY 10022-4690

Dear Mr. Johnson:

Thank you for your letter dated July 22, 2010, in which you request concurrence that used toluene, when sold as a fuel additive or for other fuel purposes, is a commercial chemical product and not a solid waste as defined in the Resource Conservation and Recovery Act (RCRA).

In your letter, you state that the toluene is used to extract product from a manufacturing stream that contains benzene, among other things. The toluene extracts the benzene as well as the product, and eventually contains enough benzene that the toluene is no longer suitable for use. You then state that the toluene, benzene and other regulated constituents of the used toluene are all fuels or ordinary components of fuels. Thus, in your opinion, the used toluene is a commercial chemical product that is itself a fuel, and, therefore, not a solid waste under 40 CFR 261.2(c)(2)(B)(ii).

In order for 40 CFR 261.2(c)(2)(B)(ii) to apply, the used toluene mixture would have to be a commercial chemical product. As stated in a comment within 40 CFR 261.33, the phrase "commercial chemical product or manufacturing chemical intermediate" listed in paragraph (e) or (f) of 40 CFR 261.33 refers to a chemical substance which is manufactured or formulated for commercial or manufacturing use. This consists of the commercially pure grade of the chemical, any technical grades of the chemical that are produced or marketed, and all formulations in which the chemical is the sole active ingredient. It does not refer to a material such as a manufacturing process waste, that contains any of the substances listed in paragraph (e) or (f) in 40 CFR 261.33. Where a manufacturing process waste is deemed to be a hazardous waste because it contains a substance listed in paragraph (e) or (f) in 40 CFR 261.33, such waste will be listed in §261.33 or §261.32.

In this case, the used toluene/benzene mixture is not a commercial chemical product because it is not manufactured or formulated for commercial use but is, instead, a waste generated from a manufacturing process as a result of the toluene becoming concentrated with benzene. The toluene becomes contaminated with benzene and once the benzene reaches roughly 15% concentration, the toluene can no longer be used in the manufacturing process and is removed. Thus, the used toluene is a spent material, which is any material that has been used and as a result of contamination, can no longer serve the purpose for which it was produced without processing (40 CFR 261.1(c)(1)).

Additionally, we have consistently interpreted the definition of spent material as applying to "materials that have been used and are no longer fit for use without being regenerated." (see 50 FR 618; 48 FR 14476; RO 11822). We consider "contamination," as used in the definition of spent material, to be any impurity, factor, or circumstance which causes the material to be taken out of service. In 50 FR 624, as you reference in your letter, we state that a material such as a solvent may continue to be used for its original, though not identical, purpose and yet not be classified as a solid waste; however, this is not the case for the used toluene because use as a fuel additive, or for other fuel purposes, was not the original purpose of the unused toluene. Moreover, this interpretation was recently upheld by the U.S. Court of Appeals for the District of Columbia Circuit in *Howmet Corp. v. EPA*, D.C. Cir., No. 09-5360, 8/6/10.

Because the used toluene is a spent material, and not a commercial chemical product, 40 CFR 261.2(c)(2)(B)(ii) does not apply. Under 40 CFR 261.2, spent materials burned for energy recovery are solid wastes, and, if listed or characteristic, are hazardous wastes under RCRA.

If you have any additional questions, please contact Amanda Geldard of my staff at 703-347-8975 or geldard.amanda@epa.gov.

Sincerely,

A handwritten signature in cursive script, appearing to read "Suzanne Rudzinski".

Suzanne Rudzinski, Acting Director
Office of Resource Conservation and Recovery