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FEB 18 1983

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February 8, 1983

MEMORANDUM TO RCRA/SUPERFUND FILE

I. Enforcement Guidance on Burning Hazardous Waste as Fuel

In an effort to close what is considered by many to be a loophole in the RCRA regulations, EPA issued a guidance memorandum on January 18, 1983 outlining the Agency's policy for determining when burning hazardous waste or hazardous waste-derived fuels in boilers will be considered legitimate recycling under 40 C.F.R. § 261.6(a)(1) and thus exempt from regulation. This memorandum is the first step in the Agency's plan to regulate more extensively the blending and burning of hazardous waste as fuel.

The guidance document explains that the current exemption for recycled hazardous waste is confined to "beneficial" and "legitimate" uses, and that blending and burning of hazardous wastes as fuels can be a type of recycling within the exemption so long as those activities constitute legitimate, and not sham, recycling. Although the Agency will generally determine whether recycling is legitimate on a case-by-case basis considering all the circumstances, the memo provides a number of factors to be weighed in determining what constitutes "sham burning." Of primary significance in most cases is the energy value of the hazardous wastes being blended. Direct burning of wastes with little or no heat value usually will not be considered to be legitimate recycling. Similarly, it may not be legitimate recycling to burn mixtures of hazardous wastes as fuel, or mixtures of wastes and non-waste fuel, when one or more of the hazardous wastes has little or no heat value. Knowingly adding wastes with little or no heat value to a material intended to be burned as fuel likely will be considered sham recycling. Enforcement personnel will use the heating value of low energy commercial fuels, such as wood or low-grade subbituminous coal, as a benchmark for determining whether wastes have adequate heat value to be considered legitimate fuels. (The memorandum includes a partial list of the Part 261, Appendix VIII hazardous constituents that have heating values below those of commercial fuels.)

Other criteria which are likely to be considered in determining whether particular burning activities are legitimate recycling include whether usable heat is recovered from the unit; whether recovered heat is used only

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to preheat combustion air; the nature of the device in which the wastes are burned; the degree to which wastes are consumed during the burning; the net costs or savings resulting from a burn; and evidence (correspondence or other records) which tends to show that a company's purpose in conducting a burn was to dispose of, rather than recycle, the waste in question.

Significantly, the guidance memo directs EPA enforcement personnel to focus their enforcement efforts on hazardous waste-derived fuel blenders who supply non-industrial users. Since non-industrial boilers (i.e., residential, commercial, and institutional boilers) ordinarily are relatively inferior with respect to burning efficiency, temperature, and residence times, and suffer from a lack of emission controls and frequent maintenance, enforcement efforts will be directed toward fuels destined for use in those types of boilers. EPA does not intend to require these facilities immediately to obtain incinerator permits but will seek an end to their practices first through negotiation and then through enforcement action. The Agency's investigative activities in determining whether blended fuels contain low fuel value hazardous wastes will focus particularly on the chlorinated solvents listed in 40 C.F.R. §§ 261.31, 261.33 of the RCRA regulations.

The guidance memo also includes general rules concerning the obligations of generators, fuel blenders, distributors, and ultimate users to determine whether their waste-derived fuels can be recycled legitimately. (See generally 40 C.F.R. § 261.6.) Generators of listed wastes and sludges are subject to Part 262 of the RCRA regulations when they send their wastes to fuel blenders or users whether or not the wastes can be recycled legitimately. Generators of non-sludge, unlisted wastes who claim to be within the recycling exemption because their wastes will be burned for energy recovery usually must be capable of showing that their wastes have value as fuels. Waste-derived fuel blenders must ensure that low energy value hazardous wastes are not blended into fuels. Blenders who receive listed hazardous wastes and sludges are subject to regulation as storage facilities and must comply with the appropriate Part 264 and Part 265 standards. Waste-derived fuels that cannot be legitimately recycled are subject to the hazardous waste regulations through the time they are burned. The current conditional regulatory exemption for burning hazardous wastes or waste-derived fuels for energy recovery purposes will eventually be altered dramatically as a result of EPA's forthcoming redefinition of solid waste and regulation of recycling activities. Congress is considering action on this issue (see story below).

B&D has obtained a copy of the guidance memorandum.

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