

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Petition of

UNITED PETROLEUM ASSOCIATION, INC.

for a Declaratory Ruling

DECLARATORY  
RULING

DEC 19-03

The United Petroleum Association, Inc. ("UPA"), by its attorneys LeBoeuf, Lamb, Leiby & MacRae, have petitioned for a Declaratory Ruling, under §204 of the State Administrative Procedure Act ("SAPA") and 6 NYCRR Part 619, on the applicability of Chapter 942 of the Laws of 1984 [Environmental Conservation Law ("ECL") §19-0304(1)], which takes effect on November 1, 1984, to the burning of waste oil as defined in 6 NYCRR §225-2.2(b)(11). The petition presents two questions for resolution: First, is waste engine oil containing lead greater than 5 parts per million ("ppm") a hazardous waste for purposes of ECL §19-0304? Second, is ECL §19-0304 only applicable to persons who apply for a permit to burn hazardous waste or to all burning of hazardous waste? Given the recent adoption of ECL §19-0304(1), it is in the public interest to grant the instant petition. For the reasons set forth herein, such waste engine oil is a hazardous waste and §19-0304 applies to all persons seeking DEC permission to burn hazardous waste.

The UPA is an association of waste oil haulers and reprocessors. The haulers collect both waste oil from automobile

service stations and waste residual oil and oil tank bottoms in connection with tank cleaning operations. The reprocessors heat and/or physically screen the waste oil to remove some impurities and/or then blend it with new residual oil for ultimate resale as a heating fuel.

The Department of Environmental Conservation ("DEC") promulgated regulations on July 12, 1983, to regulate the burning of waste oil. These regulations are set forth in 6 NYCRR Part 225.2. These rules establish a six-month grace period intended to enable the reprocessors and facilities that burn waste oil to phase in compliance with the regulation. Prior to actual implementation of the regulations, UPA initiated a special proceeding under Article 78 of the Civil Practice Law and Rules seeking to invalidate the controls placed on burning waste oil by this regulation. On July 25, 1984, the Appellate Division of the Supreme Court for the Third Department, found that 6 NYCRR 225-2 had been promulgated in accordance with applicable law. United Petroleum Assoc. v. Williams, 102 A.D.2d 491, 478 N.Y.S.2d 125 (3d Dept.), rev'g. 122 Misc.2d 964, 471 N.Y.S.2d 1007 (Sup. Ct., Albany Co., 1984). The regulations are presently in full force and effect; UPA has noticed its intent to appeal to the Court of Appeals.

Part 225-2 establishes two categories of waste fuel. Waste Fuel A is defined as waste oil, fuel oil or any mixture of the two which contains between 25 and 250 ppm lead, meets the

criteria of Table 2-1 in 6 NYCRR §225-2.4(b) and does not contain chemical wastes. 6 NYCRR 225-2.2(b)(9). Waste Fuel B is any waste oil, fuel oil or mixture of the two which does not meet the criteria in Table 2-1 and/or which contains chemical waste. 6 NYCRR 225-2.3(b)(10). Part 225-2 also prescribes the procedural requirements that must be met in order to receive authorization from DEC to burn waste fuel. Any facility proposing to burn waste fuel must also meet the applicable requirements of 6 NYCRR Parts 360, 361, 364, 365 and 366.<sup>1</sup>

For purposes of ECL §19-0304, hazardous waste has the same meaning as provided in ECL §27-0901(3), except that it does not include a waste designated as a hazardous waste solely because of ignitability. Waste oil is defined in ECL §27-0303(8) as:

used engine lubricating oil and any other oil, including, but not limited to, fuel oil, motor oil, gear oil, cutting oil, transmission fluid, hydraulic fluid, dielectric fluid, oil storage tank residue, animal oil, and vegetable oil, which has been contaminated by physical or chemical impurities, through use or accident, and has not subsequently been rerefined.

This is substantially congruent with the definition of waste oil set forth in 6 NYCRR 225-2.2(b)(11), except that ECL

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<sup>1</sup>Any facility which manages waste oil is exempt from 6 NYCRR Part 360 if the provisions of §360.1(f)(3) are satisfied. Exempt facilities include combustion units that recover energy from waste oil, other than listed hazardous wastes and sludges, if the facility complies with Part 201 of Title 6 and if the facility manages waste oil which is a characteristic hazardous waste it possesses a valid EPA identification number. In addition, storage of under 80,000 gallons at an energy recovery facility is exempt if the requirements of 6 NYCRR §360.1(f)(3)(iv) are met.

Article 27 adds the criteria that the oil has been contaminated by physical or chemical impurities through use or by accident. ECL §27-0903 requires that the Commissioner of Environmental Conservation ("Commissioner") promulgate regulations which list hazardous waste and identify hazardous waste by characteristic. In accordance with the mandate of ECL §27-0903, the Commissioner promulgated 6 NYCRR Part 366. Section 366.3(a)(1) provides that any solid waste which is defined in 6 NYCRR §366.1(c) and is not excluded from regulation under §366.1(g)(2) is a hazardous waste if it exhibits any of the characteristics identified in §366.3. Under §366.3(a) and §366.3(e)(1) a solid waste is a hazardous waste if, inter alia, it has a concentration of lead equal to or greater than 5 milligrams per liter using the test method for EP toxicity as set forth in §366.5(b).<sup>2</sup>

Under these provisions of Part 366, waste engine oil which exhibits the characteristic of EP toxicity for lead equal to or in excess of 5 ppm constitutes a hazardous waste. Waste oil may also be hazardous if it contains listed hazardous waste as set forth in 6 NYCRR 366.4 or if exhibits any of the other characteristics of hazardous waste set forth in 6 NYCRR 366.3. The nature of the EP toxicity test and the peculiar physical characteristics of the various samples of waste engine oil

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<sup>2</sup>For purposes of this ruling, parts per million is the equivalent of milligrams per liter.

necessitates that each sample of waste engine oil must be tested to provide a definitive determination of whether the specific volume of waste oil in question is a hazardous waste.

The definition of hazardous waste set forth in ECL §72-2702(1)(c) is consistent with this determination that waste oil which contains 5 ppm lead can be classified as a hazardous or non-hazardous waste depending on whether or not it exhibits the characteristic of EP toxicity for lead greater than 5 ppm. In ECL §71-2702(1)(c), waste oil constitutes a hazardous waste for purposes of enforcement of ECL Article 27 if it fails "one or more of the characteristic tests listed in the regulations promulgated pursuant to §27-0903 ... or which contain any waste identified or listed in regulations...."

Pursuant to ECL §19-0304(1), any person applying for a permit to burn hazardous waste is subject to its provisions. This, of course, includes any person subject to permitting requirements set forth in 6 NYCRR 201. Since ECL §19-0304(1) encompasses "all burning of hazardous waste" the activities governed by the statute are all inclusive. Any person subject to permitting requirements who intends to burn hazardous waste is subject to the provisions of ECL §19-0304.

ECL §19-0304(2) states that the Commissioner has discretion in determining to require a trial burn for such activities. Whether or not DEC will require a person applying for a permit to burn hazardous waste to prepare a trial burn plan and comply with

the remaining relevant provisions of ECL §19-0304, is to be the subject of rule-making which DEC contemplates initiating in the future. At the present time, DEC does not intend to exercise its discretion to require trial burns for Waste Fuel A as defined in 6 NYCRR Part 225-2. In accordance with SAPA and DEC's rule-making procedures, DEC will solicit comments from the regulated parties and the public on any proposed action to carry out the mandate of ECL §19-0304. DEC will consider all comments in formulating the final regulations.

This ruling in no way affects the terms or interpretation of any enforcement orders entered into between DEC and any regulated parties. Clarification of such orders, if necessary, may be obtained through the appropriate DEC administrative enforcement unit.

For the foregoing reasons, waste engine oil which exhibits the characteristic of EP toxicity equal to or greater than 5 ppm lead concentration constitutes a hazardous waste. ECL §19-0304 is applicable to all persons intending to burn hazardous waste.

DATED: Albany, New York  
October 24, 1984



NICHOLAS A. ROBINSON  
Deputy Commissioner/General Counsel