

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Petition of

GSF ENERGY INC.

For a Declaratory Ruling Pursuant to  
Sections 204 and 206 of the State  
Administrative Procedure Act and  
Part 619 of Title 6 of the Official  
Compilation of Codes, Rules and  
Regulations of the State of New York

DECLARATORY  
RULING  
DEC 27-27

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INTRODUCTION

GSF Energy Incorporated (GSF) has petitioned for a Declaratory Ruling, pursuant to Sections 204 and 206 of the State Administrative Procedure Act and 6 NYCRR 619, that the landfill gas condensate generated in the collection and processing of landfill gas at GSF's landfill gas recovery facility at Fresh Kills and burned onsite in a thermal oxidizer is exempt from RCRA hazardous waste permitting requirements based upon the household waste exclusion, 6 NYCRR 371.1(e)(2)(i), or, in the alternative, the natural gas production waste exclusion, 6 NYCRR 371.1(e)(2)(v). It is in the public interest to grant the petition and issue a Declaratory Ruling to inform GSF, the industry and the public of the application of these requirements.

For the purpose of issuing this Declaratory Ruling, the facts set forth in the petition are assumed to be correct. The binding effect of the Ruling will accordingly be limited by its assumed factual predicates. Power Authority of the State of New York v. NYSDEC, 58 N.Y.2d 427 (1983).

## BACKGROUND

GSF, a subsidiary of Air Products and Chemical Products Incorporated, is involved in the recovery and separation of methane from landfills. It operates a landfill gas recovery facility at New York City's Fresh Kills Landfill. Landfill gas, which is produced by natural decomposition of refuse, is extracted from the landfill by collection wells. It is then channelled to the recovery facility where the methane is separated and sold to Brooklyn Union Gas Company. Carbon dioxide and other remaining gases, including heavy hydrocarbons containing organics in condensate, are channelled to a thermal oxidizer where they are burned and destroyed. GSF's contract with the New York City Department of Sanitation, as well as the configuration of the facility itself, assure that hazardous waste will not be received at the facility.

In March 1990, the United States Environmental Protection Agency (EPA) published a revised toxicity characteristic procedure commonly known as the Toxicity Characteristic Leaching Procedure (TCLP). The revised procedure, among other things, adds limits for 25 organic contaminants which, after the effective date of September 25, 1990, requires testing of wastes to determine whether they are subject to Resource Conservation and Recovery Act (RCRA) hazardous waste controls under the federal program. 42 U.S.C. §§6901 *et seq.* Preliminary tests indicate that the gas condensate from the Fresh Kills Landfill gas collection exceed the TCLP limitations for certain of the newly listed organics that did not previously have EP-Toxicity regulatory levels.

GSF requests a Declaratory Ruling that the gas condensate is exempt from RCRA hazardous waste requirements, even if TCLP limits are exceeded, based upon either the household waste exclusion or the natural gas production waste exclusion.

## HOUSEHOLD WASTE EXCLUSION

RCRA classifies wastes as either hazardous or non-hazardous. Hazardous waste is regulated under Subtitle C of that statute which imposes strict cradle-to-grave

management safeguards. Solid wastes not classified as hazardous are regulated under Subtitle D which imposes fewer federal regulatory requirements than Subtitle C, although such solid wastes are subject primarily to State regulation. When enacted in 1976, RCRA did not identify which wastes were to be regulated as hazardous but required EPA to promulgate regulations identifying the characteristics of hazardous waste and listing particular hazardous wastes. 42 U.S.C. §6921. In 1980, EPA issued regulations identifying and listing hazardous wastes. Included in those regulations was the "household waste exclusion", a regulation which exempted household waste from the statutory definition of hazardous waste. 40 CFR §261.4(b)(1). This exclusion was clarified in the 1984 RCRA amendments (P.L. 98-616; The Hazardous and Solid Waste Amendments) and was expanded to include resource recovery facilities which burn non-hazardous commercial or industrial solid waste in addition to household waste. 42 U.S.C. §6921(i).

In 1986, New York applied for and was granted final RCRA authorization to operate a hazardous waste program in lieu of the federal program. New York's solid waste regulations are codified at 6 NYCRR Part 360 and the hazardous waste regulations at 6 NYCRR Parts 370-376. The "household waste exclusion", set out in 40 CFR §261.4(b)(1) and 6 NYCRR §371.1(e)(2), reads in pertinent part as follows:

The following solid wastes are not hazardous wastes:

- (i) household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused. 'Household waste' means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds and day-use recreation areas).

The first sentence of this exclusion clearly indicates that the exclusion not only applies in the household, but also continues to apply to the household waste as it leaves the household along various solid waste management steps including "treatment," "disposal," "recovery" and "reuse."

However, there are limitations on the household waste exclusion, and they are set forth in the remaining provisions of 6 NYCRR §371.1(e)(2)(i):

A resource recovery facility managing municipal waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous waste for the purpose of regulation, if such facility:

- (a) receives and burns only:
  - (1) household waste (from single and multiple dwellings, hotels, motels, and other residential sources); and
  - (2) solid waste from commercial or industrial sources that does not contain hazardous waste; and
- (b) does not accept hazardous waste and the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in the facility.

The terms of New York's household waste exclusion mirror RCRA statutory provisions added in 1984. RCRA §3001(i), 42 U.S.C. §6921(i). The legislative history for RCRA §3001 indicates that one intent was to encourage resource recovery facilities<sup>1</sup> even though they may manage both household wastes and similar wastes. Commenting on Section 3001(i), the Report of the Senate Committee on Environment and Public Works, which accompanied the proposed legislation, stated:

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<sup>1</sup> The GSF landfill gas recovery facility is a resource recovery facility within the meaning of 6 NYCRR §360-1.2(b)(130):

"Resource recovery facility" means a combination of structures, machinery, or devices, utilized to separate, process, modify, convert, treat, or prepare collected solid waste so that component materials or substances or recoverable resources may be recovered or used as a raw material or energy source. [Emphasis added.]

The reported bill adds a subsection (d) [sic] to section 3001 to clarify the coverage of the household waste exclusion with respect to resource recovery facilities recovering energy through the mass burning of municipal solid waste. This exclusion was promulgated by [EPA] in its hazardous waste management regulations established to exclude waste streams generated by consumers at the household level and by sources whose wastes are sufficiently similar in both quantity and quality to those of households.

Resource recovery facilities often take in such 'household wastes' mixed with other, non-hazardous waste streams from a variety of sources other than 'households,' including small commercial and industrial sources, schools, hotels, municipal buildings, churches, etc. It is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation. New section 3001(d) [sic] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983) (emphasis added). The Conference Committee adopted, without change, the provision proposed by the Senate. H.R. Conf. Rep. No. 1133, 98th Cong., 1st Sess. 79, 106 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News 5649, 5677.

In construing RCRA §3001, the Second Circuit Court of Appeals in Environmental Defense Fund v. Wheelabrator Technologies, Inc., 931 F.2d 211 (2nd Cir., 1991), held that the household waste exclusion, as it pertains to resource recovery facilities, applied not only to the waste received by the resource recovery facility (there a waste-to-energy facility), but to residues resulting from the process, even if the residues of energy recovery (in that case ash) exhibit a RCRA hazardous waste characteristic.

Since the GSF facility is a resource recovery facility for energy recovery (methane gas) and since the State provisions concerning household waste are essentially the same as those in RCRA, it follows that the household waste exclusion applies to the gas condensates that are the residue from GSF's extraction of methane and that are treated in

the facility's thermal oxidizer, provided requirements and procedures are in place to ensure that hazardous waste is not received at the Fresh Kills landfill.<sup>2</sup>

As a resource recovery facility for energy recovery, GSF's facility is a solid waste management facility subject to regulation and permitting under 6 NYCRR Part 360. See 6 NYCRR §360-2.16, entitled "Landfill gas recovery facilities." In addition to the solid waste management facility permit required under Part 360, 6 NYCRR §360-2.16(f)(2) requires that all landfill gas recovery facilities that use combustion must comply with the air pollution regulations, including the permit requirements of 6 NYCRR Parts 201 and 212.

#### SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986

Although not raised by GSF, the applicability of the Superfund Amendments and Reauthorization Act of 1986 (SARA; P.L. 99-499) must also be addressed. SARA §124(b), which requires that the condensate from a methane recovery facility be deemed hazardous waste if it meets any of the characteristics of a hazardous waste, provides:

(b) Regulation Under the Solid Waste Disposal Act. - Unless the Administrator of the Environmental Protection Agency promulgates regulations under subtitle C of the Solid Waste Disposal Act addressing the extraction of wastes from landfills, the owner and operator of equipment used to recover methane from a landfill shall not be deemed to be managing, generating, transporting, treating, storing, or disposing of hazardous or liquid wastes within the meaning of that subtitle. If the aqueous or hydrocarbon phase of the condensate or any other waste material removed from the gas recovered from the landfill meets any of the characteristics identified under section

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<sup>2</sup> Since it has been determined that the collection and processing of landfill gas at GSF's facility qualifies for the household waste exclusion, it is unnecessary to address GSF's claim that the natural gas exclusion is also applicable.

3001 of subtitle C of the Solid Waste Disposal Act, the preceding sentence shall not apply and such condensate phase or other waste material shall be deemed a hazardous waste under that subtitle, and shall be regulated accordingly.

The first sentence of this provision states that, in the absence of EPA regulations (which have not been issued), methane recovery facilities are not hazardous waste management facilities. The second, and more germane sentence for purposes of this Ruling, states that the exemption of the methane recovery facility does not also reach the waste (condensate) from the methane recovery facility, and such condensate is deemed to be a characteristic hazardous waste if it exhibits a hazardous waste characteristic.

The exact meaning of SARA §124(b) is unclear, especially in relation to new EPA landfill regulations. On the face of it, this provision, if it applies to solid waste landfills, appears to mean that if the condensate fails the new TCLP test for characteristic hazardous waste, it is a characteristic waste. As a result the condensate could not be recirculated to the landfill and must be treated, stored and disposed of pursuant to the requirements of the hazardous waste program. However, recent EPA final regulations on solid waste landfills appear to allow gas condensate to be returned to a municipal solid waste landfill (MSWLF) without qualification. 40 CFR §258.28 (entitled "Liquids restrictions") states, in pertinent part:

(a) Bulk or noncontainerized liquid waste may not be placed in MSWLF units unless:

(1) The waste is household waste other than septic waste; or

(2) the waste is leachate or gas condensate derived from the MSWLF unit and the MSWLF, or lateral expansion, is designed with a composite liner and leachate collection system....

(Emphasis added). The proposed regulation (53 Fed. Reg. 33313; August 30, 1988), which was proposed almost two years after the adoption of SARA §124(b), discussed gas

condensate as a potential liquids problem (see 53 Fed. Reg. 33339-41) and solicited comments on the option of banning gas condensate recirculation, but did not mention the impact of SARA §124(b). In the final regulation, adopted five years after SARA §124(b), (56 Fed. Reg. 50977; October 9, 1991), EPA received no comments supporting such a ban (see 56 Fed. Reg. 51055-56) and again did not discuss the relationship of this regulation to SARA §124(b). It is thus unclear what the EPA position would be on the relationship of SARA §124(b) and the landfill regulation and, for purposes of this Ruling, whether EPA would allow such recirculation of gas condensate if based on the household hazardous waste exemption.

However, SARA §124(b) is not a codified provision of RCRA Subtitle C, is not explicitly included in the EPA regulations for identifying hazardous waste (40 CFR 261), and is not identified as a provision that states must adopt to maintain consistency with RCRA for their authorized RCRA programs (40 CFR §271.9). Also it is not part of the New York State statutory or regulatory scheme. As a result, it is not part of the current State hazardous waste program and does not control the status of the gas condensate under State law.

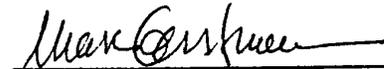
#### STATUS OF TCLP

The petition indicates that the gas condensate might exceed the TCLP limits for certain organics that did not previously have EP-Toxicity regulatory levels. But as with the inapplicability of SARA §124(b) in New York State, the newly listed Toxicity Characteristic parameters are not regulated by the Department of Environmental Conservation (the "Department"), as New York State has not yet adopted the Toxicity Characteristic rules. Thus, the Department can only enforce EP-Toxicity regulatory levels as set forth in 6 NYCRR §371.3.(e), and we cannot speculate on the impact of TCLP on this condensate in a declaratory ruling. Nor can we speculate on what result EPA would reach in deciding whether such gas condensate from a solid waste landfill is still subject to SARA §124(b) and TCLP or is excluded from being a hazardous waste by the household hazardous waste exclusion

**CONCLUSION**

Under New York State law, the gas condensate from GSF Fresh Kills landfill gas recovery facility is entitled to the household waste exclusion which excludes the gas condensate from being a hazardous waste, but the thermal oxidizer for treatment of the gas condensate is subject to regulation under the air and solid waste programs. Whether or not this same result would obtain under federal law must be determined by EPA.

Dated: October 20, 1992



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Deputy Commissioner and General Counsel