

oil is subject to the RCRA used oil management standards. However, for those used oils subject to the RCRA used oil management standards, the presence of PCBs is not one of the criteria for determining whether a used oil fuel meets the used oil fuel specification.

However, used oil that contains PCB concentrations of 2 ppm or greater, but less than 50 ppm, and is burned for energy recovery is also subject to requirements under the TSCA PCB regulations, specifically 40 CFR 761.20(e). These TSCA requirements incorporate by reference certain RCRA Part 279 "off-specification" used oil requirements. (See the discussion below for an explanation of the regulation of PCB-containing used oil that is burned for energy recovery.)

RCRA Requirements

The RCRA used oil specification criteria are set forth at 40 CFR 279.11. The specification criteria establish which used oil fuels may be burned in nonindustrial burners without regulation under RCRA. The used oil fuel specification sets maximum allowable limits for arsenic, cadmium, chromium, lead, and total halogens, as well as a minimum flash point. Although the PCB regulations promulgated pursuant to TSCA are referenced in a note to Table 1 in § 279.11, the presence of PCBs in used oil is not one of the criteria for determining whether used oil that is to be burned for energy recovery meets the fuel specification for purposes of RCRA regulation.

Used oil that is to be burned for energy recovery and that meets the RCRA fuel specifications of § 279.11 ("on-specification" used oil) is not regulated under the authority of Part 279 provided that: (1) Certain conditions for used oil fuel marketers are met, and (2) the used oil is not mixed or contaminated with hazardous waste. (Applicable on-specification used oil fuel marketer requirements can be found at §§ 279.72, 279.73, and 279.74(b).) This is the case, notwithstanding that a used oil fuel may contain PCBs. Although the RCRA regulations do not identify the presence of PCBs in used oil as relevant to the determination of whether the used oil is on- or off-specification, the presence of PCBs in used oil is relevant for determining the applicability of the TSCA regulations for the burning of used oil.

TSCA Requirements

The TSCA rules (specifically, 40 CFR 761.20(e)(2)) establish a presumption

that detectable quantities of PCBs are present in used oils to be burned for energy recovery. The presumption can be overcome if a marketer determines through testing or other specified procedures that the used oil fuel does not contain quantifiable levels (2 ppm) of PCBs. TSCA rules found at 40 CFR 761.20(a) also prohibit burning for energy recovery of used oil that contains (or contained prior to dilution) PCBs at concentrations of 50 ppm and greater. In addition, §§ 761.1(b)(5) prohibits dilution to attain PCB concentrations either below 50 ppm or below 2 ppm. (However, see decontamination provisions at 40 CFR 761.79(a)(3) and 761.79(b).)

The TSCA regulations establish requirements for the marketing and burning for energy recovery of used oils containing detectable quantities of PCBs at concentrations of 2 ppm or greater, but less than 50 ppm (40 CFR 761.20(e)). Some of these requirements are incorporations by reference of Part 279 requirements for the marketing and burning for energy recovery of off-specification used oil. Therefore, by operation of the TSCA rules, used oil that is on-specification under the RCRA rules may nevertheless be subject to certain requirements specified in the RCRA rules for off-specification used oil.

Specifically, for used oil burners, the TSCA rules reference some of the RCRA off-specification burner requirements of Part 279 Subpart G, including restrictions on burning, notification requirements, tracking requirements, certification requirements and record keeping requirements. (See 40 CFR 761.20(e)(3)–(4)). For used oil marketers, the TSCA rules, with limited exceptions, restrict marketing to qualified incinerators, to marketers who market off-specification used oils, and to off-specification burners as defined in the RCRA Part 279 regulations (See 40 CFR 761.20(e)(1)). The TSCA rules also reference the RCRA regulatory provisions for marketers in Part 279 Subpart H, including record retention, notification, tracking, and certification. The fact that the TSCA rules incorporate by reference these RCRA standards does not by itself mean that PCB-containing used oil is regulated under RCRA authority or that such used oil is off-specification as defined by Part 279.

B. Mixtures of CESQG Waste and Used Oil

Today's rule harmonizes the applicability of 40 CFR Part 261 and Part 279 to mixtures of conditionally exempt small quantity generator (CESQG) waste and used oil that are to

be recycled. Specifically, the rule makes clear that mixtures of CESQG waste and used oil that are to be recycled are regulated as used oil under the used oil management standards.

Notwithstanding EPA's regulatory intent, the CESQG provision, 40 CFR 261.5(j), that references the applicability of the used oil management standards to mixtures of CESQG waste and used oil that are to be recycled, appears to limit the applicability of the used oil management standards to mixtures that are to be recycled by burning for energy recovery. Section 261.5(j), therefore, incorrectly suggests that mixtures of CESQG wastes and used oil that are to be recycled in a manner other than by burning for energy recovery, such as by re-refining, would not be subject to the used oil management standards. Indeed, because CESQG wastes are not regulated as hazardous wastes, § 261.5(j) would suggest that such mixtures that are re-refined would not be subject to regulation under RCRA Subtitle C or the used oil management standards.

The used oil management standards, however, apply to used oil to be recycled irrespective of what form of recycling is to be employed. By its terms, the presumption in 40 CFR 279.10(a) that used oil is to be recycled (such that used oil is presumptively subject to the used oil management standards, unless it is disposed or sent for disposal), encompasses any type of recycling. The recycling presumption does not, for instance, condition the applicability of the used oil management standards on whether used oil is recycled by burning for energy recovery or by re-refining. Since Part 279 applies to used oil that is to be recycled without regard to how the used oil is to be recycled, Part 279 also applies to mixtures of used oil and CESQG wastes that are to be recycled irrespective of how that mixture is to be recycled.

The apparent limitation contained in § 261.5(j), which would limit the applicability of the used oil management standards to mixtures to be burned for energy recovery, is an artifact of the pre-1992 used oil regulations at 40 CFR Part 266, which only regulated the burning of used oil. When the expanded used oil management standards were promulgated on September 10, 1992, the Agency inadvertently failed to amend § 261.5(j) to reflect the broader scope of the new Part 279. Indeed, the corresponding provision in Part 279 that addresses mixtures of CESQG wastes and used oil to be recycled, § 279.10(b)(3), does not contain the apparent limitation found in § 261.5(j) that would limit the