

9553.1987(12)

LAND DISPOSAL PROHIBITION RULE FOR SOLVENTS

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

AUG 10 1987

Mr. Michael Steinberg, Esq.
Morgan, Lewis, & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Steinberg:

On June 9, 1987, your client, the Safety-Kleen Corporation, requested that the Environmental Protection Agency (EPA) stay a portion of its June 4 correction notice to the initial land disposal prohibition rule for solvents. After careful consideration, I have decided to deny your request. My reasons are as follows:

1. Safety-Kleen had adequate notice that the distillation bottoms it produces while treating solvents would be subject to the treatment requirements established by the prohibition rule. The rule at issue states that if an initial generator's waste contains greater than 1% prohibited solvent, then any residues from treating that waste must be treated to the Resource Conservation and Recovery Act (RCRA) Section 3004(m) treatment level unless the initial waste is exempt from some independent reason, such as being generated by a small quantity generator. We think that a careful reading of the November 7 final rule shows that it includes this requirement. For example, only generators can certify to a disposal facility that the waste is subject to a variance. Treatment facilities, by contrast, must certify that the residues they generate meet the treatment standards (see §§268.7(a)(1) and 268.7(b)(2)). Section 268.40 likewise states that treatment residues must be treated to meet the applicable treatment standard.

The preamble to the final rule confirms that this was the Agency's intent. The Agency stated explicitly that the determination of whether a waste is prohibited must be made by the initial generator, (see 51 Federal Register at 44620). The Agency also provided a series of flow charts illustrating the rule's operation which again indicate without ambiguity that only the initial generator, and not a treatment facility, determines if a waste is prohibited (see 51 Federal Register 40622, 40624). As EPA explained in the preamble to the proposed rule, Safety-Kleen cannot consider itself to be a generator. In that preamble, EPA clearly stated that it does not consider persons who produce distillation bottoms while treating solvents to be generators of hazardous waste.

Finally, EPA explicitly addressed distillation bottoms from spent solvent reclamation in the Background Document to the final rule on capacity determinations. EPA noted that solvent reclamation would produce distillation bottoms, and stated that these distillation bottoms would require treatment to the levels set under Section 3004(m). EPA included the expected volume of distillation bottoms in its estimate of the total volume of solvent wastes requiring treatment.

2. The principle at stake here is an important one. It is that the 1% capacity variance level not become the de facto treatment level (see 51 FR 44, 620). EPA would stay a rule illustrating this principle only under the most compelling circumstances.

I feel it necessary to mention that Safety-Kleen could have participated much more actively in the rulemaking and alerted the Office of Solid Waste about its situation. Your only comment to the Agency's proposed rule was filed long after close of the comment period, and indicated that Safety-Kleen realized it would have to treat its treatment residues before they could be land disposed. Safety-Kleen's participation seems particularly incumbent because the issue of capacity to treat solvent reclamation treatment residues was raised specifically by EPA for public comment (see 51 Federal Register 1724, 1727 (Jan. 14, 1986)).

I regret that Safety-Kleen apparently received incorrect advice from an EPA official regarding the scope of the November 7 rule, but the most reliable indication of what a rule means is the regulatory language itself, and the explanatory preamble. As mentioned earlier, both the preamble and the regulatory language indicate that Safety-Kleen's residues must be treated to the applicable treatment standards.

I have decided to deny your request for these reasons. If the facts are as you state, Safety-Kleen could be eligible for a case-by-case variance under §268.5. The Agency will process any such applications expeditiously. Please contact Rhonda Craig at 382-4800 if you have any questions regarding the case-by-case variances.

Sincerely,

Original Document signed

J. Winston Porter
Assistant Administrator