

SITE MITIGATION PROGRAM
MANAGEMENT MEMO

MANAGEMENT MEMO: EO-94-015-MM (Supersedes OPP 92-2/EO-92-001-PP)

TITLE: Interpretation of the Petroleum Exclusion (Health and Safety Code section 25317)

AFFECTED PROGRAMS: Site Mitigation
Permitting
Surveillance and Enforcement
Office of Legal Counsel

PURPOSE:

This memo supersedes and rescinds the prior Department of Toxic Substances Control Program Policy and Procedure concerning the Departmental Interpretation of the Petroleum Exclusion (OPP 92-2/EO-92-001-PP) dated July 10, 1992. This memo implements the California Court of Appeal's ruling in KFC Western, Inc. v. Meghriq (1994) 23 Cal.App. 4th 1167. The KFC Western decision does not impact the Department of Toxic Substances Control's (Department's) continuing authority to regulate petroleum-contamination which is a hazardous waste under the Hazardous Waste Control Law (HWCL), Chapter 6.5, (commencing with section 25100), Division 20 of the Health and Safety Code.

BACKGROUND:

The Department has the authority to respond to and enforce the cleanup of hazardous substance releases pursuant to the Hazardous Substance Account Act (HSA Act), Chapter 6.8 (commencing with section 25300), Division 20 of the Health and Safety Code. The HSA Act contains a "petroleum exclusion" which provides that the term "hazardous substance" does not include "[p]etroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance" (Health and Safety Code section 25317.)

Previously, the Department applied an interpretation of the exclusion which was more stringent than the federal Environmental Protection Agency's interpretation of a similarly worded exclusion under the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. section 9601 et seq. The Department's more stringent interpretation provided that although unrefined petroleum and crude oil were excluded

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from regulation, once petroleum and crude oil were refined, the refined petroleum was subject to state regulation if it was a specifically listed hazardous substance or if it contained specifically listed hazardous substances.

In March of 1994, the California Court of Appeal for the Second Appellate District reviewed and expressly rejected the Department's interpretation in KFC Western. The Court held that the petroleum exclusion set forth in Health and Safety Code section 25317 applies to refined petroleum products such as gasoline. Thus, like CERCLA, the HSA Act excludes regulation of refined petroleum. This means that the Department no longer has the authority to respond to or enforce the cleanup of releases of refined petroleum products, except in the situations where the Department is able to assert its authority under Chapter 6.5, or in situations where the release may be subject to regulation as discussed below.

ACTION:

Henceforth, the Department will apply the "petroleum exclusion" in Chapter 6.8, Division 20 of the Health and Safety Code in a manner which is consistent with the decision in KFC Western.

Releases Excluded From Regulation

Petroleum, crude oil and fractions of crude oil are not hazardous substances for purposes of Chapter 6.8. Because they are not hazardous substances the Department does not have the authority under Chapter 6.8 to regulate sites contaminated solely with petroleum, crude oil or fractions of crude oil unless the material is specifically listed or designated as a hazardous substance under Health and Safety Code sections 25316 (a) - (f). Crude oil fractions include, but are not limited to, gasoline, jet fuel, diesel fuel, asphalt and other refined petroleum products. These crude oil fractions are excluded from Chapter 6.8 even if they contain listed hazardous substances such as toluene, benzene, or PNA/PAHs, which are indigenous to the petroleum. Crude oil fractions are also excluded from Chapter 6.8 if they contain hazardous substances which are normally mixed with or added to the petroleum or crude oil fractions during the refining process. The exclusion also applies to crude oil fractions which contain indigenous hazardous substances, the concentrations of which may have increased during the refining process.

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Releases Subject to Regulation

Hazardous substances which are added to petroleum, crude oil, or crude oil fractions after the refining process, or hazardous substances which increase in concentration solely as a result of contamination of the petroleum during use, are not part of the petroleum, crude oil or crude oil fractions and thus are not excluded from regulation by the petroleum exclusion contained in the HSA Act. The Department will continue to regulate petroleum, crude oil, or crude oil fractions which have been contaminated by use. This means that petroleum products which contain hazardous substances which have been added to or mixed with the product during or after use are subject to regulation. In addition, materials, such as waste oil, which contain hazardous substances such as heavy metals as a result of use, are subject to regulation under the HSA Act.

If a hazardous substance release and a petroleum product release are so commingled that, as a practical matter, they cannot be separated, then the entire release would come under the HSA Act's jurisdiction.

Finally, it is again emphasized that the Department has the authority under the RWCL, Chapter 6.5 of the Health and Safety Code, to regulate petroleum-contaminated sites if there are listed or characteristic hazardous wastes present at the site.

Case Examples

The following examples have been provided to assist program staff in determining whether a particular petroleum release is excluded from regulation under the HSA Act. Although these examples are based on federal court decisions interpreting CERCLA, the same reasoning can be applied in determining whether a particular petroleum release is within the HSA Act's jurisdiction.

--The Department has no authority under Chapter 6.8 to regulate releases of refined and unrefined gasoline which contain components and additives which are designated hazardous substances that were added during the refining process. (See, Wilshire Westwood Assoc. v. Atlantic Richfield (1989) 881 F.2d 801.)

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--The Department has no authority under Chapter 6.8 to regulate releases of petroleum fuels, heating oil, kerosene, aviation gasoline, jet fuel or diesel fuel which are unused products and have not been contaminated through use. (See, Zoufal v. Amoco Oil Co. 1993 U.S. Dist. Lexis 4920; Equitable Life Assurance Society v. Greyhound 1990 U.S. Dist. Lexis 762; Bunger v. Hartman (1992) 797 F.Supp. 968.)

--The Department has authority under Chapter 6.8 to regulate releases of waste oil containing aged gasoline, trichloroethylene, and 1,1,1 trichloroethane which comes from an oil re-refining process whereby waste oil from the automotive industry is processed to produce a product equivalent to virgin lube oil. (See, Lockhart Chemical Co. v. Moreco Energy 1192 U.S. Dist. Lexis 19404.)

--The Department has authority under Chapter 6.8 to regulate crude oil tank bottoms. Tank bottoms are not "petroleum", in that they are water and sedimentary solids which settle out of crude oil and create a layer of waste at the bottom of tanks which accumulates naturally before the crude oil reaches the refinery. ~~The court noted that the tank bottoms are intended for waste discard rather than for reuse.~~ (See, Cose v. Getty Oil Co. (1993) 4 F.3d 700.)

--The Department has authority under Chapter 6.8 to regulate releases of the sludge (consisting of petroleum residue, sand, rust, chromium, nickel and lead) from leaded gas storage tanks, diesel oil tanks and unleaded gas tanks. Rust which collects in tanks during storage constitutes contamination through use. The Department can also regulate releases of the waste oil resulting from rinsing and cleaning oil storage tanks, because nickel and chromium oxides scraped from the tank interiors and added to the waste oil during the cleaning process constitute contamination by use. (See, U.S. v. Western Processing Co., Inc. (1991) 761 F. Supp. 713.)

--The Department has authority under Chapter 6.8 to regulate a release of an oil/water emulsion that averages 5% oil (containing lead, cadmium, chromium and other metals); used as a coolant for machinery in a manufacturing process. The lead, cadmium, chromium,

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copper aluminum and zinc occurred in increased concentrations in the waste oil as a result of use. (See, New York City v. Exxon Corp. (1990) 744 F.Supp. 474.)

--The Department has authority under Chapter 6.8 to regulate releases of petroleum where hazardous substances in the petroleum are found at concentration levels which exceed the concentration levels of the hazardous substances attributable to the refining process. (See, Washington v. Time Oil Co. (1988) 687 F.Supp. 529.)

--The Department has authority under Chapter 6.8 to regulate releases from underground storage tanks containing gasoline, diesel and waste oil where soil samples reveal elevated levels of zinc, lead and thallium beyond those concentrations found in unadulterated petroleum products. (See, Mid Valley Bank v. Time Oil Co. (1991) 764 F. Supp. 1377.)

--The Department has authority under Chapter 6.8 to regulate releases of fuel oil mixed with creosote leaked from a wood treating processing plant. (See, U.S. v. Antreco (1994) 846 F.Supp. 1578.)

Future Release Sites

The Department should not undertake work on any new sites which are excluded by the petroleum exclusion. The Regional Water Quality Control Boards (RWQCB) and the State Water Resources Control Board (SWRCB) have jurisdiction to order cleanup at sites where contamination, including refined petroleum, threatens water quality. At any new site where the Department does not have jurisdiction under Chapter 6.8 because of the petroleum exclusion, the Department should determine whether it has authority to regulate the site under Chapter 6.5. In the absence of Chapter 6.5 authority, the site should be referred pursuant to the August 1, 1990, Memorandum of Understanding (MOU) between the Department and the SWRCB or any other applicable agreement between the Department and that agency.

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At Department of Defense sites, the SWRCB's regulatory authority is to be utilized for the remediation of petroleum-contamination. The Department shall continue to be the designated lead responsible for providing general oversight and coordination.

The Department is reviewing existing sites on which it is currently working and will make a determination as to whether these sites should be referred to the appropriate RWQCB.

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