Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of **Environmental Protection**

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HW 93-01

Memorandum

TO: Assistant Commissioners Division Directors Regional Directors Regional Engineers Section Chiefs Office of General Counsel Office of Research and Standards

FROM: Thomas Powers, Deputy Commissioner
Edward Kunce, Deputy Commissioner

DATE: January 20, 1993

SUBJECT: Interim Policy Regarding the Regulatory Status of Soils Contaminated with Waste Oil of Unknown origin and/or Hazardous Constituents

[Waste Oil Provisions Superseded by 310 CMR 30.0252(2)]

1.0 Introduction and Applicability

The Department commonly encounters soils that contain measurable concentrations of petroleum hydrocarbons and/or synthetic chemicals. Contamination of this nature can range from low concentrations of such "urban" contaminants as lubricating oils and lead, to saturation levels of contaminants from a release of a petroleum fuel or chemical product.

The excavation of these materials may be a result of a targeted remedial response action, or may be an (unexpected) incidental element of a construction project in a contaminated area. In either case, decisions must be made concerning the appropriate characterization and classification of the contaminated excavate.

At the present time, some confusion exists concerning the regulatory classification of soils contaminated with oils and/or hazardous materials. Pending the issuance of a more detailed policy in this matter, and in order to insure consistency in all program and regional operations, the following policy shall be utilized on an interim basis.

This policy applies to excavated soils contaminated with petroleum oils and/or hazardous constituents listed in 310 CMR 30.130, and will govern the classification of these soils. This policy is limited to excavated soils that result from actions taken pursuant to M.G.L. c.21E.

The intent of this policy is to provide guidance to the regulated community on the classification and management of contaminated soils generated as a result of a remedial response action, construction project, or other excavation activities.

This policy is, not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the Commonwealth nor does it limit the Department's authority to require the management of a contaminated soil as a hazardous waste pursuant to 310 CMR 30.144 Authority to Further Identify Hazardous Waste. The Department reserves the right to act at variance with these guidelines and change them at any time without public notice.

2.0 Legal Authority

This policy has been formulated by the Massachusetts Department of Environmental Protection under the authority of the Massachusetts Hazardous Waste Management Act, M.G.L. c.21C, and implementing regulations, 310 CMR 30.000, and the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, M.G.L. c.21E and implementing regulations, 310 CMR 40.000.

310 CMR 30.000 prescribes when a waste shall be classified and managed as a hazardous waste. Any petroleum product, when spilled, discarded, abandoned or in any way released to the environment, is considered "waste oil." Waste oil is a listed hazardous waste pursuant to 310 CMR 30.131. Under the provisions of 310 CMR 30.200, there are two types of waste oils: unused waste oil and used waste oil.

Unused waste oil contaminated soils are soils that have been contaminated by a release of a petroleum product that was never used for its intended purpose (e.g., fuels, unused lubricating oils). Unused waste oil is the considered to be the same as "virgin" petroleum. Used waste oil contaminated soils are soils that have been contaminated by a release of a petroleum product that had already been used for its intended purpose (i.e., used lubricating oils): Waste oil contaminated soils are classified as a hazardous waste (MA01) under 310 CMR 30.000.

Given the lack of a known source, it is often difficult, if not impossible, to determine analytically whether the contamination is from a used or unused waste oil. This difficulty is commonly encountered in so-called "urban fills" where highly weathered, indeterminate hydrocarbon mixtures are present. Under the terms of this policy, unless evidence exists to indicate the source of the petroleum contamination is from a used waste oil, unknown petroleum product contaminated soils will be presumed to be unused waste oil contaminated soil.

Soils which have been contaminated with a release of oil (used or unused waste oils) contain a listed hazardous waste, and, therefore, are classified as a hazardous waste pursuant to 310 CMR 30.102 (2) (c) and 310 CMR 30.140(1) (c) (the "mixture rule"), and 30.140(2) (the "derived-from rule"). The Department, in accordance with 310 CMR 30.252(2), may allow the management of unused waste oil contaminated soils in compliance with management and performance standards required under MGL c. 21E and 310 CMR 40.000.

Soil that is contaminated by oil and/or hazardous materials, and which does not otherwise meet the definition of a hazardous waste under 310 CMR 30.000, may still be regulated by the Department under the authority of M.G.L. c.21E and 310 CMR 40.000, St. 1987, c.584, M.G.L. c.21A, ss. 2 and 8 and c.111, s. 150A, and implementing regulations, 310 CMR 19.000, and all other applicable state, federal, or local regulations.

3.0 Petroleum Contaminated Soils

In determining whether contaminated soil contains used or unused waste oil, due diligence shall be employed in attempting to ascertain the source of waste oil. "Due diligence" shall consist of a search of all available site information, manifests, storage records and vouchers which is the standard articulated by the U.S. Environmental Protection Agency for use at CERCLA sites to determine the source of contamination (53 FR 51444, December 21, 1988).

The generator shall maintain documentation supporting the due diligence determination, and shall send to the receiving facility a certification of the due diligence determination. The documentation shall comply with 310 CMR 30.007 Accurate and Complete Record Keeping and contain the certification required by 310 CMR 30.009 Certification. Based on the due diligence determination:

- In those cases where the source of the waste oil can be reasonably determined (i.e. leaking tank, drum, process), and where said source is or was reasonably known to be a used waste oil, as defined in 310 CMR 30.010, the contaminated soil shall be classified and managed as a used waste oil, as specified in 310 CMR 30.200;

- In all other cases, the petroleum contaminated soil shall be classified and managed as an unused waste oil as defined in 310 CMR 30.010, in accordance with 310 CMR 30.252(2) and the receiving facility's permit.

For the purpose of interpreting 310 CMR 30.252(2), which allows unused waste oil contaminated soils to be managed under M.G.L. c.21E and 310 CMR 40.000, the application of the provisions of Department policy #WSC-94-400 (which superseded #WSC-400-89), "Interim Remediation Waste Management Policy for Petroleum Contaminated Soils," including the bill of lading requirements, shall be considered a suitable "case by case approval by the Department." Any unused waste oil contaminated soils not managed in compliance with the terms of Policy #WSC-94-400 must be managed as a hazardous waste incompliance with the requirements of 310 CMR 30.000.

4.0 Soils Contaminated by Hazardous Constituents

Soil that is contaminated by oil and/or hazardous materials is classified as "hazardous waste" if it meets specific "listing" or "characteristic" criteria defined in 310 CMR 30.000. The mere presence of a "hazardous waste constituent" as defined in 310 CMR 30.160 in soil does not mean that the soil is categorically classified as a "hazardous waste".

310 CMR 30.120 Characteristics of Hazardous Waste identifies and defines the characteristics which distinguish hazardous waste from other waste. Any contaminated soil which exhibits one or more such characteristics is a characteristic hazardous waste subject to the requirements of 310 CMR 30.000.

In determining whether a contaminated soil is a hazardous waste due to the presence of a listed hazardous waste, as defined in 310 CMR 30.130, due diligence shall be employed in attempting to determine if the "hazardous waste constituents" in the soil originated from a "listed hazardous waste."[1]

The generator shall maintain documentation supporting the due diligence determination, and shall send to the receiving facility a certification of the due diligence determination. The documentation shall comply with 310 CMR 30.007 Accurate and Complete Record Keeping and contain the certification required by 310 CMR 30.009 Certification. Based on the due diligence determination:

- In those cases where the source of the "hazardous constituents" can be reasonably determined (i.e. tank, drum, process), and where said source is or was reasonably known to be a listed hazardous waste under 310 CMR 30.130, the soil shall be classified and managed as a "listed hazardous waste", as specified in 310 CMR 30.000.

- In all other cases and if the soil is not a characteristic hazardous waste -as defined in. 310 CMR 30:120 Characteristics of Hazardous waste, the soil shall be managed in accordance with the receiving facility's permit; the requirements of M.G.L.c. 21E and 310 CMR 40.000; 310 CMR 19.000 and any other applicable federal, state, and local regulations.

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[1] "To determine whether a waste is a listed (hazardous] waste under RCRA [or 310 CMR 30.000], it is often necessary to know' the source. However, at many CERCLA for 21E] sites no information exits on the source of the waste for hazardous constituents] nor are references available citing the date of disposal. The lead agency for generator] should use available site information [e.g. history, usage, manufacturing process], manifests, storage records,, and vouchers in an effort to ascertain the source of these contaminants." (Added Language] Federal Register 53 FR 51444 should be consulted for a more complete discussion.