Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

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Telephone Number:

In Reference to:
PLR-113047-98 - CC:DOM:P&SI:5

Date:
OCT 14 1998

Legend

LP =

State A =

GP =

City B =

LLC =

City C =

Corp A =

State D =

Corp B =

LLC#2 =

b =

c =

d =

e =

f =

g =

h =

Dear

This is in response to a letter dated June 18, 1998, submitted on behalf of LP by its authorized representative. The letter requests rulings that landfill gas produced and sold by LP will qualify for the credit under § 29 of the Internal Revenue Code.

LP is a State A limited partnership. The general partner of LP is GP a State A corporation. LP is a calendar year taxpayer that keeps its books and records and files its Federal income tax return on the accrual method of accounting. LP is under the audit jurisdiction of the City B office of the Internal Revenue Service.

Through decomposition of biomass materials contained in a landfill, a landfill generates gas comprised principally of methane and carbon dioxide (landfill gas). LP purchased two landfill gas-related agreements from LLC for the purpose of collecting and selling landfill gas at a closed landfill site in City C. LLC was unable to complete the financial terms of the agreements that had been awarded to it on b and c.

The first agreement is a Landfill Gas Operating and Collection System Agreement (the "Collection Agreement") purchased from LLC on d. The Collection Agreement is with Corp A, a State D corporation (the "Landfill Owner"). The Collection Agreement obligates LP to construct and operate an active landfill gas collection system (the "Collection System") in exchange for all of the Landfill Owner's rights, title, and interest in and to the landfill gas.

The second agreement is a Contractor Agreement with Corp B for the construction of a landfill gas collection system (the "Collection System"). Subsequent to the purchase from LLC on e, LP completed the construction begun by LLC, and started an active landfill gas collection system at the City C Landfill. If LP had canceled the Contractor Agreement for any reason before the job was completed, LP would have been subject to a cancellation fee of ten percent of the contract price.

The City C Landfill is owned by Corp A and is producing sufficient quantities of landfill gas to permit the collection and subsequent sale of the landfill gas. Engineering reports have been completed that calculate the volume of landfill gas production. Those reports indicate that commercial production of landfill gas will be recoverable for 20 years. Corp A will not be compensated for the sale of landfill gas since Corp A does not have an ownership interest in either

the Collection System or the landfill gas. Corp A will be paid a fixed price per month for a process site lease. The process site is located at the City C Landfill and will be used by LP or LP's gas purchaser, for processing landfill gas.

All of the rights, title, and interests in the Collection System are owned by LP, including the network of gas wells drilled by Corp A in 1994 and 1995. The Collection System was placed in service and producing gas on f.

The Collection System consists of the 57 landfill recovery wells, all interconnecting wellhead pipe, laterals and mains, valves, wellheads, monitoring devices, condensate knockout and pumps, extraction related gas blower, gas flow meter and landfill gas flare (the "Facility"). The Facility was placed in service and producing landfill gas from the City C Landfill biomass prior to June 30, 1998, and there was a binding contract in place for the construction prior to December 31, 1996.

The Collection Agreement has a primary term of 20 years and thereafter until sufficient quantities of landfill gas are no longer generated to permit the sale of landfill gas. The landfill was closed in 1996 due to the expiration of state permits when the landfill was filled to capacity. As required by the State D Department of Natural Resources, Corp A must continue to maintain and operate the Collection System for 30 years after closure of the City C Landfill in order to monitor the landfill for environmental emissions of landfill gas.

LP has entered into a Landfill Gas Facility Operating Agreement ("Operating Agreement") with Corp B. Corp B is an unrelated party within the meaning of § 29(d)(7) of the Code. Pursuant to the Operating Agreement, Corp B will operate the Collection System for LP on a day-to-day basis and maintain the Collection System in an "as built new condition" for LP. The contract price charged by Corp B is based on services required and is competitively priced. The Operating Agreement is for a term of one year, and will be re-negotiated each year. LP will be invoiced monthly by Corp B for operation and maintenance of the Collection System. By agreement, Corp B has no interest in the production of landfill gas.

LP has entered into a one-year Gas Sale Agreement with LLC#2, a landfill gas purchaser that is an unrelated third party within the meaning of § 29(d)(7) of the Code. Pursuant to the Gas Sale Agreement, LP will sell and LLC#2 will purchase landfill gas. Under the Gas Sale Agreement, the landfill gas will be delivered by LP to LLC#2 at the valve in the discharge piping from the gas blower which when opened can divert the landfill gas from the landfill flare to LLC#2 (the "Delivery Point") for a term of one year. LLC#2 will pay LP monthly for the landfill gas based on the total monthly MMBtus metered and purchased at the Delivery Point. The price will vary from month to month with a minimum price of $g per MMBtu delivered, and a maximum price of h percent of the spot market price for natural gas delivered in the City C Landfill area. LLC#2 will compress and process the landfill gas, construct an underground pipeline and sell the processed 500 BTU fuel to an industrial user near the landfill. The Gas Sale

Agreement will be re-negotiated each year.

LP is not related to Corp A, Corp B or LLC #2 and is independently seeking business opportunities associated with energy recovery from landfill gas.

Section 29(a) of the Code (originally designated as section 44D by the Crude Oil Windfall Profit Tax Act of 1980 (COWPTA)) allows a credit against tax for qualified fuels sold by the taxpayer to an unrelated person during the tax year, the production of which attributable to the taxpayer. The credit for the tax year is an amount equal to $3.00 (adjusted for inflation) multiplied by the barrel-of-oil equivalent of qualified fuels sold.

Section 29(c)(1)(B)(ii) of the Code provides that the term "qualified fuels" includes gas produced from biomass. Under § 29(c)(3), the term "biomass" means any organic material other than (A) oil and natural gas (or any product thereof), and (B) coal (including lignite) or any product thereof.

The COWPTA Conference Report generally defines biomass as any organic substance other than oil, natural gas, or coal, or a product of oil, natural gas, or coal. Biomass includes waste, sewage, sludge, grain, wood, oceanic and terrestrial crops and crop residues, and waste products that have a market value. Also, the definition of biomass does not exclude waste material, such as municipal and industrial waste, that include processed products of oil, natural gas or coal such as used plastic containers and asphalt shingles. H.R. Conf. Rep. No. 817, 96th Cong., 2nd Sess. 132 (1980), 1980-3 C.B. 245, 292.

Section 29(d)(1) of the Code provides that sales of qualified fuels shall be taken into account only if the production is within the United States (within the meaning of Section 638(1), or a possession of the United States (within the meaning of Section 638(2)).

Section 29(d)(3) of the Code provides that where more than one person has an interest in a property or facility, except to the extent provided in regulations prescribed by the Secretary, production from the property or facility (as the case may be) shall be allocated among such persons in proportion to their respective interests in the gross sales from the property or facility.

Section 29(d)(5) of the Code defines the term "barrel-of-oil" equivalent with respect to any fuel as the amount of fuel which has a Btu content of 5.8 million, with certain exceptions not applicable here. Section 29(d)(6) defines barrel to mean 42 United States gallons.

Section 29(d)(7) of the Code treats persons as related to each other if they would be treated as a single employer under the regulations of § 52(b). In the case of a corporation that is a member of an affiliated group of corporations filing a consolidated return, the corporation will be treated as selling qualified fuels to an unrelated person if such fuels are sold to the person by another member of the group.

Sections 29(f)(1)(B) and (f)(2) of the Code provide that Section 29 applies with respect to qualified fuels which are produced in a facility placed in service after December 31, 1979, and before January 1, 1993, and which are sold before January 1, 2003.

Section 29(g)(1) of the Code modifies § 29(f) to extend the § 29 credit for certain qualified fuels that are produced in facilities placed in service before July 1, 1998, pursuant to a binding written contract in effect before January 1, 1997. For qualified fuels produced in these facilities, the credit is available for fuels sold before January 1, 2008.

The landfill gas produced from biomass by LP's Facility satisfies the definition of a qualified fuel under § 29(c)(1)(B)(ii) of the Code. LP's Facility has been producing and selling landfill gas since f, and thus will satisfy the statutory placed in service date of July 1, 1998. The production of the landfill gas will be attributable to LP. All of the Landfill gas produced from the biomass and sold to LLC#2 will be sold to a party unrelated to LP or GP.

Based solely on the foregoing facts, representations, and discussion of law, we rule that:

(1) The Landfill gas produced and sold by LP is a non-conventional fuel as described in § 29(c)(1)(B)(ii) of the Code and thus qualifies for the credit for non-conventional fuels provided for under § 29.

(2) All production of the Landfill gas is attributable to LP within the meaning of § 29(a)(2)(B) of the Code, and the sale to LLC#2 entitles LP to the credit provided for in § 29(a).

(3) Under the circumstances described above, the § 29 credits will be available to LP through 2007.

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. In accordance with a power of attorney filed with the request for rulings, a copy of this letter is being sent to your authorized representative.

Sincerely yours,

Harold E. Burghart

HAROLD E. BURGHART
Assistant to the Chief
Branch 6
Office of the Assistant Chief
Counsel(Passthroughs and
Special Industries)