

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460**

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Mr. Gary D. Myers, President
The Fertilizer Institute
501 Second Street, N.E.
Washington, D.C. 20002

Dear Mr. Myers:

Thank you for your letter of May 9, 1997 to Administrator Browner requesting that the Environmental Protection Agency (EPA) reexamine the scope of its regulatory interpretation of the "use constituting disposal" rule as it applies to zinc micronutrients in fertilizers. Specifically, you raised concern that the Agency's current interpretation poses an unnecessary disincentive on the use of zinc-containing secondary materials as ingredients in fertilizers.

We appreciate the concerns of your members regarding the Agency's interpretation of the "use constituting disposal" rule. While recycling is clearly one of the goals of RCRA, the Agency must ensure that all recycling is conducted in a manner that is environmentally sound and protective of human health and the environment. The Agency believes that one of the most significant protections provided under RCRA is to safeguard against placement of hazardous wastes on the land. To the extent that you believe that the Agency's regulatory interpretation on use constituting disposal is unduly burdensome to manufacturers and consumers of zinc-containing waste-derived fertilizers, your industry will have an opportunity to provide additional data to the Agency in the context of the redefinition of solid waste rulemaking. As you may know, EPA is working on possible regulatory changes to the existing definition of solid waste to provide, in part, greater incentives for environmentally sound recycling. I encourage your industry to participate actively in the definition of solid waste rulemaking effort to address the issues that you raised.

Provided below is a review of our current rules regarding the recycling of secondary materials and use constituting disposal. Under the existing regulations, the Agency examines both the nature of the secondary material and the recycling activity involved to determine whether a secondary material is a RCRA solid waste when recycled. 50 Fed. Reg. 614, 619 (1985). The zinc oxide dust captured from pollution control equipment would be a solid waste as generated, unless specifically exempt under the regulations. Secondary materials are not solid waste when they are 1) used or reused as an ingredient in an industrial process to make a product, provided that the material is not

first reclaimed; 2) used or reused as an effective substitute for commercial products ; or 3) returned to the original process from which they are generated without first being reclaimed or land disposed. 40 C.F.R. §261.2(e)(1). Nonetheless, the regulations further provide that even if the recycling involves use, reuse, or return to the original process, secondary materials used in a manner constituting disposal, or used to produce a product that is applied to the land are solid wastes. 40 C.F.R. §261.2(e)(2).

Zinc oxide dust to be used as an ingredient in fertilizer would, therefore, be regulated as a RCRA solid waste because it is being used to produce a product that is applied to the land, i.e., a use constituting disposal. 40 C.F.R. §261.2(c)(1). The waste-derived fertilizer, itself, however, would not be regulated as a hazardous waste, provided that the fertilizer is produced for the general public's use using waste meeting the K061 waste description. For fertilizers made with other hazardous wastes, the fertilizer would not be regulated as a hazardous waste provided that it meets the applicable land disposal treatment standard before being placed on the land. 40 C.F.R. §266.20(b). During the rulemaking promulgating this exception to meeting the treatment standards for K061-derived fertilizers, the Agency did not receive comment from individuals seeking similar requirements for other secondary materials.

The manufacturing or recycling unit itself remains exempt from regulation. The transportation and storage of the zinc oxide dust prior to its use to produce a product to be applied to the land would be subject to the hazardous waste regulations. The Agency has chosen to regulate secondary materials to be used in this manner, because the storage and transportation of these materials is like all other hazardous wastes prior to land disposal and, in EPA's view, require similar controls.

In your May 9, 1997 letter, you also expressed concern that the Agency's regulatory interpretation of the AUSE constituting disposal@ rule would not regulate the zinc oxide dust as a hazardous waste when it is used to produce animal feed supplements, but would regulate the zinc oxide dust when it is used as an ingredient in fertilizer. As stated above, the Agency's regulatory determination on the status of a secondary material depends on both the nature of the material and the recycling activity involved. Even though the nature of the zinc oxide dust is the same, the recycling activity involved is different. In one instance the waste-derived product is not generally applied to the land (i.e., animal feed supplement), whereas in the other the waste-derived product is applied to the land (i.e., commercial fertilizer). One of the primary goals of the RCRA regulations for recycling is to insure protective handling for any hazardous wastes destined for land placement.

Thank you for your interest in recycling issues. If you would like case-specific determinations on the status of secondary materials being recycled, please contact the appropriate authorized state regulatory agency or EPA Regional Office. If you have any questions or would like additional information, please contact Jeff Hannapel at (703) 308-8826.

Sincerely,

Elizabeth A. Cotsworth, Acting Director
Office of Solid Waste