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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
Office of Solid Waste and Emergency Response

VARIANCES FROM CLASSIFICATION AS A SOLID WASTE
UNDER 40 CFR 260-31(B) FOR SPENT CATALYSTS

November 15, 1994

MEMORANDUM

SUBJECT: Variances from Classification as a Solid Waste
under 40 CFR 260-31(b) for Spent Catalysts

FROM: Michael H. Shapiro, Director
Office of Solid Waste (5301)

TO: Allyn M. Davis, Director
Hazardous Waste Management Division (6H)
U.S. EPA Region VI

This memorandum responds to your September 1, 1994 letter requesting my office to evaluate the appropriateness of a variance from the definition of solid waste granted by the Texas Natural Resource Conservation Commission (TNRCC). TNRCC granted the variance pursuant to a provision in the Texas Administrative Code which closely tracks a variance provision in the federal regulations (40 CFR 260.31(b)).

Following is a general discussion of how we believe the federal regulation was intended to be interpreted. Because I have not reviewed all of the information that TNRCC evaluated, including possible case-specific considerations, this memorandum is intended as general guidance on the variance criteria, rather than a specific opinion about the Texas decision.

This variance applies to secondary materials that are reclaimed and then reused within the original primary production process in which they were generated. EPA promulgated the variance on January 4, 1985 (50 FR 662) to address those situations that are very similar to "closed-loop" recycling but are not excluded under 40 CFR 261.2(e)(1) because the secondary materials are reclaimed

before they are reused in the production process.

As the preamble to this rule states, the Regional Administrator (or the authorized state) is to decide whether the reclamation operation is an essential part of the primary production process. The preamble then discusses the criteria which bear on that decision (50 FR 654-5). If a variance is granted, the facility receiving the variance is not subject to any RCRA requirements, including those for incinerators.

The preamble also states that there are some conditions an applicant must meet before he is eligible for the variance (50 FR 654). First, the material must be returned as feedstock to the original primary production process. In addition, the material must be "reused" when returned to the original process, meaning that the material must contribute directly to the production process as an ingredient, reactant, or an alternative feedstock. While a catalyst is not used in a production process as an ingredient or reactant, it is generally considered to contribute directly to the production process by facilitating chemical reactions. Therefore, we would consider the reuse of a reclaimed spent catalyst to be "reuse" for the purposes of this variance, assuming the catalyst is actually reused in the original primary production process rather than an ancillary process) for its original purpose.

Another condition of eligibility is that the reclamation and reuse must be conducted by the same "person" as defined in 40 CFR 260.10, i.e., a single corporation or other legal entity (50 FR 655). If the spent catalyst is reclaimed by a legal entity other than the generator (e.g., a third-party recycler), it would not meet this condition.

In addition to the conditions for eligibility, the preamble to the January 4, 1985 rule also discusses criteria which the Regional Administrator (or the State) can consider and weigh as appropriate. These criteria are not discussed at length, but I will briefly state what we believe are some factors which should generally be weighed and which seem especially relevant to spent catalyst regeneration.

One consideration is the extent to which the material is handled before reclamation to minimize loss (see 40 CFR 260.31(b)(3)). In most cases, this would include an examination of

how the material is handled at the generating facility as well as the reclaiming facility. Another consideration is the time period between generating the material and reclaiming it, and between reclaiming it and returning it to the original process (see 40 CFR 260.31(b)(4)). This consideration would include an evaluation of the time elapsed between generating the material and transporting it to the reclaimer, as well as the time elapsed between receipt of the regenerated material by the generator and its actual reuse in the original production process.

Another factor which should be examined is the location of the reclamation process in relation to the production process (see 40 CFR 260.31(b)(5)). Although the reclaiming facility does not have to be located at the same site as the generating facility, it should be in reasonably close proximity. I realize that this factor is necessarily subject to subjective interpretation, but a distance of halfway across the United States would normally mitigate against the regeneration being considered a form of closed-loop recycling.

You should note that the preamble states that "the Regional Administrator can rely on any or all of these criteria, and can weigh them as he deems appropriate" (50 FR 654). Because the criteria include "other relevant factors" (40 CFR 260.31(b)(8)), TNRCC is accorded much flexibility in granting such variances. However, insofar as TNRCC based its decision on the criteria promulgated by the Agency, this memorandum should provide guidance on how EPA intended these criteria to be evaluated.

I hope that the considerations discussed above will prove useful in evaluating applications for variances under the State counterparts of 40 CFR 260.31(b). If you have further questions on this issue, please call Mitch Kidwell of my staff at (202) 260-8551.