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

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

October 24, 1996

Mr Peter H. Weiner
Heller, Ehrman, White, and McAuliffe
333 Bush St.
San Francisco, California 94104-2878

Dear Mr Weiner:

Thank you for your letter of March 12, 1996 regarding the regulatory status under the Resource Conservation and Recovery Act (RCRA) of spent copper etchants managed by Heritage Environmental Services, Inc. ("Heritage"). You raised an important question, and we appreciate your interest in this matter. I hope the following discussion addresses your concerns.

As we understand it, Heritage receives spent etchants from the manufacturers of printed wire boards. At its facility in Indiana, Heritage then uses the etchants to produce tri-basic copper chloride (TBCC), an animal micronutrient. A residue generated in the TBCC manufacturing process is then treated by adding additional chemicals to produce "fresh" alkaline etchant. Heritage argues that they are using the spent etchant as an ingredient in an industrial process to make a product (i.e, TBCC). This kind of use would exclude the etchant from the definition of solid waste as long as no reclamation occurred (see 40 CFR 261.2(e)(1)(I), adopted verbatim by the State of Indiana at 329 IAC 3.1). The Indiana Department of Environmental Management (IDEM) has determined that the spent etchant at Heritage's facility is indeed being used as an ingredient in an industrial process, and that this use meets the terms of the regulatory exclusion.

As stated in your letter, you believe that Indiana was incorrect in its interpretation, and you asked the Environmental

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Protection Agency (EPA) to request that the state revise its determination. Your belief is based upon the Agency's preamble discussion of this regulation at 50 FR 614, 619 (codified at 40 CFR 261.1(c)(5)(I)). In that discussion, EPA stated that "when distinct components of the material are recovered as separate end products (i.e., recovering lead from scrap metal in smelting operations), the secondary material is not being used, but rather reclaimed and thus, would not be excluded under this provision". Since Heritage is producing separate products at its plant (i.e., TBCC and "new" etchant), you have argued that reclamation is occurring which would disqualify the entire process from exclusion under 40 CFR 261.2(e)(1)(I).

At issue in this case are two operations. In the first operation, a spent material is used as an ingredient to make a product (TBCC), resulting in a residue. The second operation uses the residue from the first to make another product (fresh etchant), but the second operation may involve reclamation (although the IDEM has not made a formal determination on this point). If we assume reclamation occurs in the second operation, the question is whether a facility would be barred from claiming the use-as-ingredient exclusion because of the subsequent reclamation. The answer to this question depends on whether the operations are considered to be one industrial "process" (in which case the reclamation would presumably disqualify the facility from claiming the exclusion) or two sequential "processes" (in which case the reclamation in a subsequent process would not generally nullify the exclusion).

RCRA regulations, preambles, and past interpretations do not define how many (or how few) operations may be included in an industrial process. In EPA's experience, situations at different facilities vary so much that it is not possible to develop a general rule about whether operations should be considered one process or multiple processes. The Agency believes that any such rule would inevitably be too inflexible to address the many different types of industrial operations being conducted throughout the country. For this reason, we have historically left the determination of this question to States authorized to administer and enforce the RCRA program under section 3006, or to EPA Regions where the State is not authorized. A uniform national interpretation would not be adequate to address the large variety of circumstances prevailing at different industrial facilities.

States and Regions are more competent to evaluate the site-specific factors that must necessarily enter into this kind of decision.

We have consulted with Region V after their meeting on June 25, 1996 with representatives from Phibrotech, the Illinois Environmental Protection Agency, and the IDEM. The Region and the States would like to thank Messrs. Jack Benheim and Tom Moran for taking the time to further discuss these issues with them. As you are aware, most of the issues discussed during the meeting had been evaluated before, but the discussions served to underscore the complexity of these regulatory determinations, particularly with respect to the Heritage operation. Follow-up discussions between Region V and the IDEM indicate that the IDEM remains committed to its original ruling on the Heritage process.

Based on our discussions with Region V and the State of Indiana, and a review of existing policy, we believe that Indiana's interpretation of 40 CFR 261.2(e)(1)(I) is not inconsistent with the language of this provision. For this reason, we will not request the State to revise its determination.

As you may be aware, EPA is currently engaged in an effort to change the RCRA regulations governing hazardous waste recycling. This effort has three goals. First, we want to clarify and simplify these regulations to make them more "user-friendly" for all concerned, while still fully protecting human health and the environment. We also want to remove disincentives that may lead industries to dispose of their wastes rather than reusing them. As part of this effort, we plan to reexamine and possibly change the current regulatory distinctions between "reuse" and "reclamation". The Agency hopes to propose these regulatory revisions in early 1997.

Thank you again for the time and attention you have devoted to this matter. These are important environmental issues, and we appreciate your concern. If you have any questions, please call me at 703-308-8895.

Sincerely yours,

Elizabeth A. Cotsworth, Deputy Director
Office of Solid Waste