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United States Environmental Protection Agency
Washington, D.C. 20460
Office of Solid Waste and Emergency Response

February 23, 1993

Mr. N.G. Kaul, P.E.
Director, Division of Hazardous Substances Regulation
New York State Department of Environmental Conservation
50 Wolf Road
Albany, New York 12233

Dear Mr. Kaul,

Thank you for your letter dated November 9, 1992, concerning the definition of solid waste under the Resource Conservation and Recovery Act (RCRA). In your letter, you raised two specific issues involving certain secondary materials: 1) clarification of the definition of commercial chemical products that are not found on the U- or P-lists in 40 CFR 261.33, and 2) the status of these non-listed commercial chemical products when recycled. I hope that this response will help clarify the federal regulations regarding these issues.

In addition, you may already be aware that the Director of the Office of Solid Waste (OSW) has recently formed a Definition of Solid Waste Task Force to re-evaluate the definition of solid waste. The Task Force is soliciting input from ASTSWMO, individual states, industry, and others on implementation issues such as the one raised in your letter. Overall, the Task Force is looking at ways to reduce the complexity of our current definition of solid waste, reduce disincentives for safe recycling and innovative technology development, and address concerns regarding the use of recycled hazardous waste in products. I understand that some of your staff have already met with the Task Force (prior to your letter being sent). Again, this response to your questions is based on the current federal regulations.

Definition of Non-Listed Commercial Chemical Products

Presently, the Agency interprets "non-listed commercial chemical products" under RCRA to include all types of unused

commercial products that exhibit a characteristic of hazardous waste, whether or not these products would commonly be considered chemicals (e.g., unused circuit boards, batteries, etc). Of course, these determinations are not always straightforward regarding certain types of commercial products, such as machinery, electronics, and other items containing various components, only some of which cause the overall item to exhibit a hazardous waste characteristic. We would expect these determinations to be site-specific.

Recycling Non-Listed Commercial Chemical Products

You stated that you were uncertain as to what types of "recycling" would qualify a non-listed commercial chemical product for the solid waste exemption in §261.2(c)(3), which is further clarified in the April 11, 1985 Federal Register (50 FR 14219). As you know, EPA defines "recycling" as including use/reuse, and reclamation (see 40 CFR 261.2(c)(4),(5), and (7)). Reclamation is further defined to be either regeneration, or the recovery of a usable product. With regard to the use/reuse provisions, any type of secondary material recycled in this manner would not be a solid waste, provided that the applicable conditions listed in §261.2(e) are met, and that the recycling is legitimate (see §261.2(f)).

With regard to the reclamation of non-listed commercial chemical products, their status is the same as that for listed commercial chemical products, as we stated in the April 11, 1985 Federal Register. This has been the Agency's position since publication of that clarification, and has remained unchanged. However, we do recognize that the universe of non-listed commercial chemical products could present some recycling activities which require careful analysis to verify that the recycling is legitimate; the burden of proof, however, remains with the person claiming that a material is not a solid waste (§261.2(f)).

You provided an example of off-specification paint, produced by a manufacturer and never used; we would define this material as a non-listed commercial chemical product. You then described this paint as being reclaimed to recover the solvent, resulting in a stillbottom containing the pigments and associated metals. We would view the off-specification paint, to be reclaimed, as excluded from the definition of solid waste. Although the reclamation process is recovering a usable product from the paint (i.e., solvent), and is not regenerating the paint to make new paint, this activity is

nevertheless reclamation and therefore the off-specification paint is not a solid waste. Of course, the residual stillbottoms generated during reclamation, if characteristically hazardous, would be subject to Subtitle C requirements at the point of generation (i.e., when removed from the distillation unit), assuming they are to be discarded.

Finally, I would like to emphasize that if a person is claiming that a material is excluded or otherwise exempt because it is going to be recycled, the burden of proof rests with that person to show that the recycling activity is legitimate. For example, if a reclamation process recovers only a minimal amount of material, of questionable value, while the remaining residue is discarded, this would appear to be more like regulated waste treatment than recycling. If non-listed commercial chemical products, exhibiting a hazardous waste characteristic, are being processed in order to treat them (and not to recover a usable product or to regenerate them), then the material is not excluded from the definition of solid waste under §261.2(c)(3).

If you have any other comments or questions, please call me, or you or your staff could talk with Ross Elliott of my staff at (202) 260-8551. Thank you very much.

Sincerely,
Sylvia K. Lowrance, Director
Office of Solid Waste