9441.1993(08)

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

May 6, 1993

Mr. William C. Rankin
Olin Chemicals
P.O. Box 248
Lower River Road
Charleston, Tennessee 37310

Dear Mr. Rankin,

Thank you for your letter dated January 7, 1993, concerning the recycling regulations under the Resource Conservation and Recovery Act (RCRA). Specifically, you requested that EPA headquarters clarify the term "when" as it appears in part of the regulations defining solid waste (40 CFR 261.2(c)(3)) (see footnote 1). It is EPA Headquarters' position that the interpretation regarding §261.2(c) presented in the EPA letter you cited from Robert Dellinger to Ronald Jones (March 27, 1989) is correct; that is, the determination of whether or not a material being reclaimed is a solid waste is made at the point of generation. The following analysis is based on federal regulations, and is provided in order to help clarify this provision.

Under the existing RCRA recycling regulations, the status of a secondary material is based upon 1) the type of material, and 2) the recycling activity involved (January 4, 1985 Federal Register; 50 FR 619). The recycling activity is viewed prospectively; that is, the status of certain secondary materials is determined by knowing how the material is going to be recycled. The term "when" as it is used in §261.2(c) for recycling activities (e.g., "when reclaimed", "when burned", "when placed on the land") is not meant to refer only to the moment in time when that activity occurs, in order to determine the regulatory status of a material (with the exception of speculative accumulation, explained below). As an example, a generator that intends to have his or her characteristic sludges reclaimed at some point in the future, would not be deemed to be managing a solid or hazardous waste, according to Table 1 in

§261.2. Of course, when secondary materials are excluded or exempt based on a claim of recycling, the material will no longer be excluded or exempt if it is accumulated speculatively prior to recycling; also, respondents in enforcement actions who make such a claim (e.g., generator, recycler) must be able to document a claim of legitimate recycling (see §261.2(f)).

In the January 4, 1985 final rule on recycling, EPA acknowledged the risks associated with accumulating hazardous secondary materials prior to reclamation (and chose a more stringent approach as a result; 50 FR 617); however, EPA also noted exceptions to this general rule (see footnote 2). In addition, when EPA promulgated the speculative accumulation provisions in the January 4, 1985 Federal Register, the purpose was to allow EPA to regulate certain secondary materials, intended for recycling, as solid wastes if the person claiming their waste was excluded did not recycle sufficient quantities of these materials within a calendar year. In the following preamble discussion, EPA explained that certain types of secondary materials, that are unregulated based on prospective recycling, can be brought back into Subtitle C regulation if these materials are overaccumulated prior to recycling:

> The [speculative accumulation] provision thus applies to secondary materials not otherwise considered to be wastes when recycled -- namely, to materials that are to be used as ingredients or as commercial product substitutes, to materials that are recycled in a closed-loop production process, to unlisted sludges and byproducts that are to be reclaimed, and to black liquor and spent sulfuric acid being reclaimed. Thus, if one of these materials are overaccumulated, they would be considered to be hazardous wastes and would become subject to regulation ... (emphasis added (50 FR 635).

Under the federal regulations, if characteristic sludges and by-products were regulated as solid wastes prior to reclamation (i.e., from point of generation to actual insertion into the reclamation process), then the speculative accumulation provision would be redundant and unnecessary for these specific materials.

I would like to reiterate that respondents in enforcement actions who claim that a secondary material is excluded from the

definition of solid waste based on recycling must be able to document a claim of legitimate recycling (see §261.2(f). If the Agency believes that particular management practices involving excluded materials are contributing to the waste disposal problem, to the extent that the materials are clearly discarded (in other words, if the material is managed in such a way that it is essentially being disposed of), these materials would be considered to be solid waste.

Finally, please note that under Section 3006 of RCRA (42 U.S.C. Section 6926) individual states can be authorized to administer and enforce their own hazardous waste programs in lieu of the federal program. When states are not authorized to administer their own program, the appropriate EPA Region administers the program and is the appropriate contact for any case-specific determinations. Please also note that under Section 3009 of RCRA (42 U.S.C. Section 6926) states retain authority to promulgate regulatory requirements that are more stringent than federal regulatory requirements.

If you have any additional questions or concerns, please contact me, or Ross Elliott of my staff (202/260-8551). Thank you for your interest in hazardous waste recycling.

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

cc: EPA Regional Waste Management Division Directors, Regions I-IX.

1 "Materials noted with a "*" in column 3 of Table 1 are solid wastes when reclaimed." (emphasis added)

2 "Although accumulating hazardous secondary materials are ordinarily regarded as solid and hazardous wastes, this is not invariably the case ... these materials would not be wastes if they can be recycled in certain designated ways, and if they are not accumulated speculatively before being recycled." (emphasis added) 50 FR 634.