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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON D C. 20460

September 14, 1995

Mr. Donald S. Berry  
Goodwin, Procter, and Hoar  
Counselors at Law  
Exchange Place  
Boston, MA 02109-2881

Dear Mr. Berry:

I am pleased to respond to your August 8, 1995 letter, which requested confirmation that the Environmental Protection Agency's manifest discrepancy requirements would not apply to certain shipments of waste initiated by one of your clients.

As related to me in your letter, your client's manufacturing process generates a waste which exhibits the characteristic of corrosivity. The client ships these wastes to permitted treatment facilities under manifests which indicate the corrosive characteristic of the hazardous waste. However, in some instances, the receiving treatment facility finds that the pH of the waste has changed, such that it no longer exhibits the RCRA corrosivity characteristic. According to your letter, one or more of these treatment facilities has responded to these circumstances by initiating the "manifest discrepancy" procedures described in 40 CFR sections 264.72 and 265.72 (for interim status facilities), or in corresponding State regulations. Your letter asks whether these facts were intended to be covered by the manifest discrepancy requirements.

With respect to the requirements of the Federal regulations, our view is that these facts need not give rise to the filing of a discrepancy report. Manifest discrepancies are defined in sections 264.72(a) and 265.72(a) as differences between the quantity or type of hazardous waste designated on the manifest and the quantity of type of hazardous waste a facility actually receives. When there is any variation in piece count in a batch shipment, or a variation of more than 10% by weight in a bulk shipment, the Federal regulations classify the variation as a significant

RO 11918

discrepancy, which must be reconciled with the generator within 15 days of receipt of the waste, or failing that, reported to EPA or the authorized State. See 40 CFR sections 264.72(b) and 265.72(b).

We believe that the manifest discrepancy regulation was intended to cover those situations where there is in fact a quantity of hazardous waste that is unaccounted for at the time of receipt. Under the facts described in your letter, there is not really a deviation in the waste quantity; rather, the quantity of waste identified on the manifest is in fact received, but at the time of receipt, does not exhibit the hazardous characteristic. Thus, the issue is really one of waste characterization, and not an issue of accountability for the waste quantities shipped and received. So, our view is that the manifest discrepancy requirements should not extend to these facts.

While we believe that this is the better view of the Federal manifest discrepancy requirements, we also acknowledge that it is a close issue. The regulation itself does not specifically exclude those situations where the waste is subsequently shown not to be hazardous, and in those cases where the treatment facility does handle the situation as a discrepancy, it would seem that the "discrepancy" would be easily reconciled by a phone call or other communication with your client. In addition, if an authorized State were to interpret these facts to require discrepancy resolution or reporting under its corresponding regulation, then the treatment facility would be required to comply with the more stringent interpretation of the State. Under RCRA section 3009, it is permissible for authorized States to administer more stringent programs.

I do wish to emphasize that your client would appear to be in compliance with the manifest requirements when it designates the wastes as corrosive and ships it to the treatment, facility under the hazardous waste manifest. The manifest was not intended to act as a certification that all shipped materials are indeed hazardous wastes. The regulations allow a generator to characterize its waste based on process knowledge, and it is understood that generators may at times characterize their wastes conservatively, rather than incur the costs of testing every batch or stream.

If you have additional questions about the manifest discrepancy requirements, please contact Richard LaShier on

202-260-4669.

Sincerely,

Michael J. Petruska, Chief  
Regulatory Development Branch

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Attachment  
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GOODWIN, PROCTER & HOAR  
COUNSELLORS AT LAW  
EXCHANGE PLACE  
BOSTON, MASSACHUSETTS 02109-2881

August 8, 1995

Mr. Michael J. Petruska  
U.S. Environmental Protection Agency  
Regulatory Development Branch  
401 M Street, S.W.  
Washington, DC 20460

Re: Application of Hazardous Waste Manifest Discrepancy  
Requirements to Certain Waste Shipments

Dear Mr. Petruska:

This letter is submitted to seek confirmation that EPA would consider the hazardous waste manifest discrepancy requirements set forth at 40 C.F.R. §§264.72 and 265.72 not to apply to certain shipments of waste generated by our client as described below.

As you and I recently discussed, this firm represents a company whose manufacturing process generates wastes exhibiting the characteristic of corrosivity. These wastes do not exhibit any other hazardous waste characteristic and do not constitute listed hazardous wastes. The wastes are shipped from the generating facility to licensed hazardous waste treatment facilities located in a number of states, and the manifests for the wastes are properly completed to indicate that the wastes are corrosive. In some cases, by the time the wastes reach the treatment facility, their pH has changed and they no longer exhibit the corrosivity characteristic. As a result, the treatment facility concludes that there is a difference between the type of waste designated on the manifest and the type of waste actually received, and the facility then submits a discrepancy report under the aforementioned regulations or the parallel state regulations.

Sections 264.72 and 265.72 refer to discrepancies between

RO 11918

the quantity or type of hazardous waste designated and the quantity or type of hazardous waste received. Based on or discussion, it is my understanding that EPA would consider these provisions to be inapplicable where the waste shipments, as described above, no longer constitute hazardous waste. As result, the filing of a discrepancy report would not be appropriate, and the treatment facility receives the waste either could sign and return the manifest to indicate receipt of the shipment could take no action with respect to the manifest. It is also my understanding that EPA consider our client's designation of the above-described wastes as corrosive to constitute compliance with the manifest requirements for hazardous waste generators as set forth at 40 C.F.R. §§262.20-262.23 because such designation is accurate at the time the waste is shipped from the site of generation.

I would appreciate it if you could provide me with written confirmation that the foregoing is EPA's position on this issue and that no further recordkeeping or reporting is required in such a situation. Please call me at 617-570-1344 if you have any questions regarding this matter. Thank you very much for your assistance.

Very truly yours,

Donald S. Berry, P.C.