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Dear Ms. Cundall:

Thank you for your letter dated August 26, 1998 regarding classification of spent ferric chloride material used in waste water treatment under the Resource Conservation and Recovery Act (RCRA) hazardous waste management regulations. From your letter we understand that the spent ferric chloride material is generated by an etching process, and that the material exhibits the hazardous waste characteristics of corrosivity and toxicity (for metals). The spent material is sent to another facility to be used as a substitute for commercially available products used in waste water conditioning. You asked whether the spent material, when used in this manner, would be excluded from the definition of solid waste under the effective substitute provision of 40 CFR 261.2(e)(1)(ii). You further stated that the spent etchant does not contain toxic levels of metals that interfere with the material's waste water conditioning capabilities.

In general, to meet the 40 CFR 261.2(e)(1)(i) exclusion a material must be determined to be legitimately used as an effective substitute. This is a case-by-case determination that must be made taking into account the characteristics of the material and the specifics of the particular use situation. To assist you in assessing your situation I have enclosed a memorandum which includes an attachment that discusses the factors that should be considered when making such a determination. (April 26, 1989 memorandum from Sylvia K. Lowrance, Director, Office of Solid Waste to Hazardous Waste Management Division Directors, Regions I - X)

To allow for review of the factors discussed in the enclosed memorandum and to take into account the specifics of a particular situation, such determinations are most appropriately reviewed by the authorized state agency or Environmental Protection Agency (EPA) regional office that implements the hazardous waste regulatory program

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where the activity is to take place. You indicated that you have received an interpretation from the appropriate state regulatory agency. If the state is authorized to implement the RCRA regulatory program, you should confirm this interpretation with the state, providing any information necessary for state officials to review your determination.

Please note that for purposes of assessing whether a particular use of a secondary material is in fact use of a legitimate effective substitute under 40 CFR 261.2(e)(1)(i), a determination that additional toxic constituents in the material do not interfere with its effectiveness is not the only deciding factor. Specifically, in your case, the fact that additional metals in the spent material do not interfere with its water conditioning capability would not necessarily indicate that the material is legitimately used as an effective substitute. For the use of such a material to be considered legitimate use as an effective substitute, factors to be evaluated would also include whether the spent material contains hazardous constituents not found in the analogous raw material/product (or at higher levels), whether the hazardous constituents are necessary to the product or are just "along for the ride," and the other factors discussed in the enclosed memorandum. Also note that under 40 CFR 261.2(e), materials used as effective substitutes may not be: 1) used in a manner constituting disposal, or used to produce products that are applied to the land; 2) burned for energy recovery, used to produce a fuel, or contained in fuels; or 3) accumulated speculatively. (40 CFR 261.2(e)(2))

This discussion reflects only the federal regulations. In general, states are authorized by EPA to implement the RCRA hazardous waste program. An authorized state's hazardous waste regulations are applicable within the state in lieu of the federal regulations, and states' regulations may be more stringent than the federal regulations. Thus, it is important that you confirm your determination with the appropriate state agency, or if the state is not authorized to implement this part of the hazardous waste program, the appropriate EPA regional office.

Thank you for your interest in the RCRA hazardous waste management program. If you have any further questions, please contact Mitch Kidwell, of my staff, at (703) 308-8644.

Sincerely,

Elizabeth Cotsworth, Acting Director
Office of Solid Waste

Enclosure

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