



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

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April 27, 2007

John J. Duclos, Administrator
Hazardous Waste Compliance Bureau
Waste Management Division
Department of Environmental Services
29 Hazen Drive
Concord, N.H. 03302-0095

Re: Hazardous Wastes in Product and Raw Material Storage Tanks

Dear Mr. Duclos:

This is in response to your letter dated March 26, 2007 in which you ask various questions about the EPA's interpretation of 40 C.F.R. § 261.4(c), the exemption from regulation of hazardous wastes generated within certain manufacturing units, including product and raw material storage tanks. New Hampshire has adopted this exemption at Env-Wm 401.03(b)(11). This exemption does not apply when hazardous wastes are removed from such units, or when hazardous wastes remain in such units for more than 90 days after the units cease being operated for manufacturing or the storage or transportation of products or raw materials.

In responding to your inquiry, we have reviewed the determinations of your agency, and the decision of the New Hampshire Supreme Court upholding those determinations, with respect to hazardous materials/wastes left at a closed plant by Elementis Chemical, Inc. See State of New Hampshire v. Elementis Chemical, Inc., 152 N.H. 794, 887 A.2d 1133 (2005). We also have reviewed your agency's Letter of Deficiency dated November 3, 2006, regarding hazardous materials/wastes left at a closed portion of a plant by Hitchiner Manufacturing Co. Inc.

The interpretation of 40 C.F.R. § 261.4(c) often is straightforward. For example, if a hazardous material is generated in a manufacturing process unit and left in the unit for more than 90 days after the unit ceases being operated for manufacturing, then the material typically will be classified as a spent material (rather than an unused commercial chemical product). Thus the hazardous material will become subject to hazardous waste regulation whether it is being stored for later disposal or stored in order to be reclaimed and recycled. However, your questions involve the more complicated situations that arise when hazardous unused commercial chemical products are stored in a product or raw material storage tank, originally for the purpose of being used in a manufacturing process, but then are allowed to remain in the storage tanks for more than 90 days after the manufacturing process ceases being operated.

Under the federal RCRA regulations, unused hazardous commercial chemical products are not considered to be solid and hazardous wastes, and thus are exempt from regulation, “when reclaimed.” 40 C.F.R. § 261.2(c)(3) and Table 1. This exemption covers unused commercial chemical products which are being stored by a generator *if they are going to be reclaimed*. In its regulations, New Hampshire similarly exempts from regulation commercial chemical products “when recycled by being reclaimed.” Env-Wm 803.04(b). However, hazardous unused commercial chemical products are not exempt from regulation when they are either being disposed or are being stored before or in lieu of being disposed. Rather, in such circumstances, they are classified as materials being “abandoned” and thus as wastes which are subject to regulation. See 40 C.F.R. § 261.2; Env-Wm 110.01(c)(1) and (152). In other words, hazardous unused commercial chemical products are not exempt from regulation if they are being stored by a generator, unless they are being stored in order to be used as a product or are going to be recycled/reclaimed.

There are situations in which an unused commercial chemical product could first be subject to the 261.4(c) exemption and later be subject to the 261.2(c)(3) exemption. For example, a facility might close a part of its operation and leave a pure unused commercial chemical product in a storage tank for more than 90 days, but with careful management of the tank consistent with the handling of the chemicals as a valuable product, and with concrete plans to recycle all of the material within a definite and reasonable time. In such circumstances, under the federal regulations, the 261.4(c) exemption would no longer apply after the 90 days, but the 261.2(c)(3) exemption would continue to apply.

On the other hand, the EPA Office of Solid Waste recently has pointed out that “those managing unused CCPs that require reclamation should be aware of the potential for these types of materials to be abandoned. Abandoned CCPs are solid wastes (see 40 CFR 261.1.2(i)), and if hazardous, hazardous wastes. For example, if unused CCPs were being stored for a long period of time without any foreseeable means of recovering the product, or if no foreseeable market existed for the recovered product, an overseeing regulatory agency might well conclude that they were abandoned, and thus subject to Subtitle C hazardous waste regulations.” Letter From Matt Hale to Donald Patterson, Jr., dated February 13, 2007.

Where exactly to draw the line is difficult to answer in the abstract. Since New Hampshire has been authorized by EPA to administer the RCRA program, the determination of whether any particular material has been “abandoned” generally should be made by your agency, on a case by case basis. In making such determinations, the State is free either to remain equivalent to the EPA regulations or to be more stringent. The right of the State to be more stringent pursuant to RCRA section 3009 and 40 C.F.R. § 271.1(i) includes not only the right to adopt regulations that are worded more stringently than the EPA regulations, but also the right to interpret regulations that are worded the same as the EPA regulations more stringently than EPA. Regulations sometimes have more than one reasonable interpretation and it is the reasonable interpretation of your agency that should govern (assuming that it is either equivalent to or more stringent than the EPA interpretation).

In some situations, it will be appropriate to determine that when a company leaves an unused commercial chemical product in a product or raw material storage tank for more than 90 days, the material has been "abandoned" and thus has become subject to regulation. In such circumstances, the federal 261.2(c)(3) exemption would not apply once the 261.4(c) exemption no longer applies.

For example, in your agency's action against the Elementis Company, you were correct in determining that hazardous materials left behind at a closed plant had been "abandoned" and thus were hazardous wastes. Even if some of the materials were unused commercial chemical products capable of being recycled, it was proper to consider them as "abandoned" when they were simply left at a closed plant (without careful monitoring), with no company plans to either use them as a product or recycle them.

Further, in your agency's Notice of Deficiency issued to the Hitchiner Manufacturing Co., Inc., you also were correct in starting with the assumption that when the company left hazardous unused commercial chemical products in tanks in a closed portion of the plant, these commercial chemical products had been "abandoned." Under both the federal and your State regulations, the burden of proof is on the company to document any claim that materials are exempt from regulation. 40 C.F.R. § 261.2(f); Env-Wm 803.05. It is reasonable to ask a company which has closed a portion of its plant to document that it has not "abandoned" materials left in that portion of the plant.

If a company leaves commercial chemical products in a closed portion of a plant and is unable to show that it has plans for either using the materials as a product (e.g., elsewhere in its plant), or recycling them, then your agency could make a final determination that the chemicals have been "abandoned." Moreover, if a company develops plans for recycling the commercial chemical products (or using them as a product) only after an inspection, it may be appropriate for your agency to determine that the company still was in violation and subject to penalties during any period of time when it had "abandoned" the commercial chemical products by storing them without yet having any plans for either use or recycling.

The answers to your specific questions regarding the federal regulations are as follows (though again we emphasize that the State is free to take a more stringent interpretation):

1. Hazardous unused commercial chemical products which remain in a product or raw material storage tank for more than 90 days after the process that the tank supplied ceases operation do not automatically become regulated as hazardous waste on the 91st day, but do become regulated on the 91st day whenever they have been "abandoned."
2. 3. Cleanout residues from product or raw material storage tanks which have held unused commercial chemical products sometimes may be considered part of the unused commercial chemical products. If the residues are uncontaminated or if any contamination occurred inadvertently during storage and not as a result of use in a process, and if the residues are sent for recycling, then they may be considered to be unused (if off-spec) commercial chemical products exempt from regulation. However, if such materials are contaminated to the point that they

cannot be recycled, they are subject to regulation. Also, cleanout residues which are mixtures of unused commercial chemical products and other substances used in cleaning are subject to regulation. Such regulation should apply from the time that the cleaning occurs. So long as unused commercial chemical products remain in storage, however, we would not distinguish between the mass of the material and the potential residues along the side or bottom of the tank. Rather, we would classify the material as a whole as either being an exempt unused commercial chemical product heading for use or recycling or a commercial chemical product that was subject to regulation because it had been abandoned.

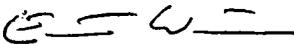
4. If a tank is used to store a hazardous commercial chemical product and the material is then "abandoned," the commercial chemical product typically will then be a listed waste. However, the EPA does not automatically assume that all chemicals stored as products later become hazardous wastes. Rather, as soon as a commercial chemical product is "abandoned" (e.g., stored before or in lieu of being disposed), it is the responsibility of the generator to determine if it is a hazardous waste. 40 C.F.R. § 262.11.

5. If 100% of the raw material left in a tank is a viable commercial chemical product, it would not automatically become a hazardous waste 91 days after the process that the tank supplied ceased operation, but would become subject to regulation on the 91st day if the material was "abandoned."

6. Pursuant to 40 C.F.R. § 261.2(f) (and Env-Wm 803.05), the burden of proof is placed on the company to prove that a material is not a solid waste. However, it is helpful for an agency to assemble as much evidence as possible that material in a tank has in fact been "abandoned" and thus is a solid waste. Material that has been "abandoned" is of course subject to regulation whether or not it is leaking.

Thank you for your inquiries. Please feel free to contact me or Jeffry Fowley in our Office of Regional Counsel should you have any further questions.

Sincerely,



Ernest Waterman, Chief
Hazardous Waste Unit

cc: Jeffry Fowley, EPA - ORC
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