INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
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March 31, 2006

Mr. David R. Case
Executive Director
Environmental Technology Council
734 15th Street, N.W. Suite 750
Washington, DC 20005

Dear Mr. Case:

Re: Hazardous Waste Recycling

This is in response to your letter of March 13, 2006 regarding the recycling activities of Pollution Control Industries (PCI), specifically in relation to the unit described as the Solids Distillation System (SDS). I appreciate the opportunity to respond to your concerns. You are correct in your understanding that PCI claims a recycling exemption from hazardous waste permitting requirements for the SDS.

The stated purpose of your letter is to inquire whether PCI has demonstrated to the Indiana Department of Environmental Management (IDEM) or the United States Environmental Protection Agency (EPA), Region 5, that the SDS meets the sham recycling criteria established by the EPA. This type of demonstration is commonly known as a legitimate recycling determination. The issue is whether the activity is considered recycling or some form of treatment being called recycling in order to evade environmental regulation.

From a regulatory perspective, this agency considers the SDS unit to be no different than any other reclamation unit. The unit is designed to process solids for the purpose of recovering the petroleum hydrocarbon component. The recovered petroleum hydrocarbon is currently sold as a degreasing agent.

Two waste streams are generated in this process, a still bottom and a carbon char. Presently these waste streams are being managed and disposed of as listed hazardous waste. PCI is investigating possible uses of the carbon char in a manner that it would qualify for the reuse exclusions found at 40 CFR 261.2(e). When, and if, they find a use that they consider legitimate, IDEM will review their proposal for regulatory legitimacy, as is the usual practice.

As you indicated in your letter, the legitimate recycling criteria guidance has been available since 1985. This guidance was reorganized and rewritten for clarity and was proposed as a rule on October 28, 2003. This rule has never been finalized.

You make the statement that PCI is required to demonstrate to the regulatory agencies that the SDS meets the sham recycling criteria in order to qualify for the recycling exclusion. In the preamble to the proposed rulemaking EPA stated that "if the criteria were finalized as rule, it would continue to be used in the same way as current guidance is used. That is, we would expect the regulated community to continue to evaluate their recycling operations and reach their own conclusions. Such conclusions would of course be subject to review by EPA or the authorized state." (68 FR 61583)

IDEM has used the existing guidance in the spirit intended for this guidance since 1985. This spirit is expressed by EPA in the 2003 proposed rule preamble as follows: "a legitimacy determination involves evaluating site-specific information to determine whether or not a secondary material being recycled, is in effect being used as a commodity rather than a waste." The memorandum also explained that "each recycling scenario is likely to require case-specific evaluation." The memorandum further explained that "depending on case-specific facts and circumstances, certain criteria may weigh more heavily than others in making legitimacy determinations."

EPA also stated that "not all legitimate recycling will conform to each of the four criteria, and that some subjective evaluation and balancing will be required. Where more specific regulatory criteria or requirements have been established in regulations, affected parties should look to those regulatory provisions in addition to the generic criteria proposed in today's rule." (68 FR 61582) The State of Indiana has adopted more specific criteria for recycling scenarios involving use of secondary materials as manufacturing ingredients (329 IAC 3.1-6-5). Indiana regulation does not have legitimacy criteria in the rules for reclaim and reuse scenarios.

PCI met with IDEM hazardous waste program staff prior to the construction of the SDS unit. IDEM stressed that the unit could only be used to recover materials that were legitimately reused either as a manufacturing ingredient or directly as a product. If the unit was used to produce fuels or merely for treatment, the unit would require a hazardous waste treatment permit.

PCI is aware that the unit must be used to process only materials that contain recoverable quantities of petroleum hydrocarbon. IDEM compliance inspectors monitor incoming materials as a routine part of PCI's regular inspections. EPA Region 5 staff has also evaluated the SDS unit during joint inspections with IDEM. To this date we have not observed any activities indicative of sham recycling.

Your letter poses a number of very specific questions. The language of the letter implies that the answers are simple and straightforward. Unfortunately, this is not the case. From the time that the legitimate recycling guidance first made its debut in 1985, the criteria have been intensely debated. Even if the general idea of the criteria is accepted there is little consensus among government regulators on the application of the criteria. The criteria are by their nature subjective and will remain so even if they are finalized as rule. In their current form as guidance it is even more problematic to enforce these concepts in the fashion reflected in your letter.

I appreciate your questions and will further consider them as IDEM continues to monitor PCI's recycling activities. Should IDEM suspect a sham application, staff will use their best judgment under relevant laws, rules, and guidance. Regarding your question on the use of the carbon char as a replacement for coke, I have no information that would lead me to believe this is being contemplated. PCI recently informally indicated they were looking at an entirely different use for the char in the steel industry. If they pursue the reuse they are considering, IDEM will evaluate their proposal.

You have asked IDEM to confirm that all "materials" received by PCI for processing in the SDS are manifested and stored as hazardous waste under RCRA. This request is not consistent with regulatory requirements. The hazardous waste rules contain exemptions for certain types of materials being reclaimed. For example, characteristic sludges, characteristic by-products and commercial chemical products that are reclaimed are not solid waste, therefore can not be regulated as hazardous waste (40 CFR 261.2). PCI may also receive conditionally-exempt small quantity generator hazardous waste, household hazardous waste, and non-hazardous solid waste without a manifest. IDEM has not observed any regulated hazardous waste arriving at the facility without a manifest. For those wastes not regulated as hazardous waste, inspectors still look for compliance with solid waste rules, segregation of incompatibles, permit conditions and other applicable requirements.

If you have any questions or would like to discuss further, please contact Dave Berrey in our Office of Land Quality at 317-308-3341 or toll free at 800-451-6027. Mr. Berrey serves as IDEM's primary contact on issues related to the legitimate recycling of hazardous waste. For issues related to hazardous waste permitting, please contact Thomas Linson in our Office of Land Quality at 317-232-3292 or tlinson@idem.IN.gov.

Sincerely,

Thomas W. Easterly
Commissioner

cc: Stephen Johnson, Administrator, U.S. EPA
Thomas Skinner, Administrator, U.S. EPA Region 5
Margaret Guerriero, Director, Waste, Pesticides and Toxics Division
Matt Hale, Director, Office of Solid Waste