DEC 27.04

September 24, 1980

D. E. Miller, Manager
Environmental Compliance
General Electric Company
Silicone Products Division
Waterford, New York 12188

Dear Mr. Miller:

This letter is our response to your July 10, 1980 request for a declaratory ruling regarding the applicability of 6 NYCRR Part 364 to transportation of a form of sulfuric acid from your facilities at the above address.

For the reasons discussed below, Part 364 does apply to the stated activity.

We understand the circumstances of this case to be as follows:

As a consequence of General Electric's ("GE") industrial operations at Waterford, New York, a quantity of spent sulfuric acid is generated on a regular basis. By virtue of the use to which the acid is put in those operations it is, in its spent state, below grade and contains impurities all of which make it unusable in GE's operations.

The spent acid is disposed of by GE in the following manner: pursuant to contract GE ships the spent acid by common carrier to a facility operated by Allied Chemical in the State of Delaware where it is treated, processed, or converted (removal of impurities and enhancement of acidity) up to commercial grade and shipped back to GE at Waterford for operational use.

At the outset it should be noted that the shipment of comparable industrial wastes under comparable arrangements have long and consistently been subject to this Department's administration of the 6 NYCRR Part 364 program.

If the spent sulfuric acid is an industrial waste, its shipment away from the GE Waterford facility, and to either a waste disposal area or waste receiving station, is governed

by ECL §27-0301, and 6 NYCRR Part 364, and a permit under those provisions is required: "No person shall engage in ... removing or disposing of solid or liquid wastes from ... waste producing operations of industrial ... establishments without a permit pursuant to this section." ECL §27-0301.1, emphasis added. (If a permit is required and the waste is to be transported by a common carrier, either the generator or the common carrier must obtain the permit.)

In this regard it should also be noted that among the places where a Part 364 permittee can take industrial waste is, as noted above, a "waste receiving station" which is defined in 6 NYCRR §364.1(g) as: "a designated location where collected wastes are introduced into a waste treatment system or facility employing mechanical, chemical, biological or thermal processes."

It is understood and should be emphasized that the federal Resource Conservation and Recovery Act of 1976 and companion New York legislation (Environmental Conservation Law Article 27, titles 3 and 9) represent clear legislative intent to heighten the regulation of industrial waste, and especially its hazardous elements. Some regulations under each of those statutes have been promulgated and more are anticipated before the end of the year.

The Department is currently actively evaluating these proposed changes. One of the aspects that the agency is reviewing is the place in the regulatory scheme of so-called recyclable by-products. Although this Declaratory Ruling must be based upon the present state of the law in New York and must be consistent with proper prior actions of the Department, the review now underway may lead to a new policy, which would ultimately be reflected in revised regulations, in the future. We aim to complete this evalution by the end of the year.

Under these circumstances, to require GE to apply for one-year permits at this time would be premature. Instead, this agency has determined that GE is authorized to continue the shipping of spent sulfuric acid to Allied Chemical, as described previously herein, in reliance upon the Part 364 permit which GE now has. You should be advised, however, that if at any time during this review, the Department decides to continue in effect its current policy in this regard, then GE will be required to procure the normal annual Part 364 permit.

With respect to the request contained in your letter of July 10, 1980, GE is governed by the current law, as follows.

In 6 NYCRR §364.1(e), industrial process waste products are defined, and exemplified, as follows: "liquid, solid or semi-solid wastes generated by industrial ... operations which wastes include but are not limited to ... spent chemicals and acids."

In 6 NYCRR §360.1(c)(14) industrial waste is defined, and exemplified, as follows: "wastes in liquid, semisolid or solid form that result from industrial ... processes ..., which wastes include but are not limited to ... spent chemicals and acids."

As noted above, we are constrained to frame this declaratory ruling in terms of presently applicable provisions of New York State law and we have quoted above those which are definitive and dispositive of this case -- the sulfuric acid:

(a) is a "spent acid" derived from "waste-producing operations of an industrial ... establishment", which GE cannot further use in its then-existing state within that establishment;

(b) is "removed" from GE's Waterford premises;

(c) is transported to a facility which employs a "waste treatment system", i.e.., a "waste receiving station."

Under these circumstances, and upon this state of the law, a Part 364 permit is required.

The Memorandum of Law accompanying your request for declaratory ruling, fails to take any of the foregoing quoted provisions of presently applicable law into account and instead, asserts arguments based on interpretations of: (1) ECL Article 27, title 9; (2) a proposed revision to 6 NYCRR Part 364; and (3) the federal Resource Conservation and Recovery Act of 1976 ("RCRA") and companion regulations of USEPA.

Reliance upon those sources is, at this time, misplaced:

(1) ECL Article 27, title 9 deals exclusively with hazardous wastes and the result reached above in no way depends on a determination of whether the spent sulfuric acid is a hazardous waste.

(2) The proposed Part 364 is undergoing revision in the light of public comment received during recent hearings

and it is impossible to say at this time whether the provisions relied upon in the Memorandum will remain unchanged.

(3) The provisions of RCRA, to be implemented through EPA regulations, are not binding on states until interim or final authorization to administer the relevant RCRA programs is sought by and conferred upon them, which has to date occurred with no state. Moreover, the key provisions of RCRA in this context relate to the hazardous waste manifest system and the responsibilities of generators, transporters, and treatment, storage or disposal facilities thereunder.

The New York State Part 364 program discussed above is not coextensive with the manifest system (many wastes the transport of which requires a Part 364 permit will not be subject to the manifest system) and is intended to serve different purposes than the manifest system (e.g., insuring that transporters deliver to approved sites).

Very truly yours,

Richard A. Persico
General Counsel/Deputy Commissioner

bc: John Greenthal
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