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OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

AUG 19 1991

MEMORANDUM

TO: James J. Scherer
Regional Administrator

FROM: Don R. Clay, Assistant Administrator
Office of Solid Waste and Emergency Response

SUBJECT: Interim Status under the Boiler and
Industrial Furnace Rule

Thank you for your memoranda of April 16 and May 2, 1991, in which you described your strategy for addressing boilers and industrial furnaces (BIFs) seeking interim status as "existing facilities" under EPA's BIF rule.

I appreciate your concern about BIFs seeking interim status without any history of hazardous waste management, or any documented commitment to such activities. Further, I commend your efforts to ensure that interim status is reserved for those facilities that, under the regulations, are legitimately entitled to such status. At the same time, our decision on whether a specific facility has met the standard should be consistent with our past decisions and with our established regulatory interpretations.

In an attachment to this memorandum, I address the specific points you raised in some detail. In any decision on a particular facility, however, you need to keep in mind what we believe is the general intent of both the statute and our implementing regulations: that facilities with a history of handling hazardous waste at the time the waste becomes subject to regulation, or that have made a substantial commitment to handle the waste in the near future, be allowed to continue their activities under interim status. Where a facility has actually handled hazardous waste before the effective date of the regulation (that is, August 21, 1991, for the BIF rule), the facility is clearly eligible for interim status. Where the waste has not yet been handled by the effective date, we agree that the case becomes more complex, and its resolution depends on the

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ability of a facility to demonstrate a substantial commitment to hazardous waste management within the near future. Criteria for making this decision are discussed in more detail in the attachment to this memorandum. Clearly, these criteria must be applied on a case-by-case basis considering the particular circumstances at each facility.

In your April 16 memorandum, you made an important point: that BIFs seeking interim status may be underestimating the potential costs for corrective action. We agree that the costs could be high and that BIFs may not have adequately taken them into account. I suspect that if the potential liabilities are clearly pointed out to BIF owner/operators, those who have not already made a substantial commitment to managing hazardous waste may have second thoughts about entering the business. Additionally, BIF facilities should clearly understand that gaining interim status, by itself, does not convey the right to burn hazardous waste. It is likely that other federal, state, and local requirements must also be met, and the conferring of interim status does not extinguish any other legal obligations.

I trust that the attached response will assist you in implementing the BIF rule in your region. If you have any questions regarding these criteria, please feel free to contact Devereux Barnes at (202) 475-7276.

Attachment

ATTACHMENT

Clarification of Interim Status Criteria for BIF Facilities

Background

The basic requirements for obtaining interim status were established by section 3005(e) of RCRA, as amended by HSWA, which specifically grants interim status to "any person who is in existence on the effective date of statutory or regulatory changes under this Act that render the facility subject to the requirement to have a permit." In the legislative history accompanying this provision, Congress indicated that "existing facilities" would include types of facilities that were previously exempted from certain RCRA requirements but subsequently became subject to those requirements. (See 50 FR 28723, July 15, 1985.) We have consistently taken this position in the case of new waste identifications (e.g., see the Toxicity Characteristic rule, 55 FR 11798). EPA has also acknowledged on several occasions that non-hazardous waste management facilities that are converting to hazardous waste management but have not yet begun hazardous waste management by the effective date of a regulation could qualify for interim status (see 46 FR 2346).

One of the three basic prerequisites for obtaining interim status pursuant to §3005 of RCRA is for a facility to be "in existence" on the effective date of any statutory or regulatory amendments that render the facility subject to the requirement to have a RCRA permit (§270.70(a)). Two kinds of facilities are deemed to be "in existence": (1) a facility that is "in operation" on the effective date of a regulatory or statutory change that renders a facility subject to the permit requirement (i.e., treating, storing, or disposing of hazardous waste), or (2) a facility that is "under construction" on the effective date of such a change. For a facility to be considered "under construction," §260.10 (under the definition of "existing facility") requires that the facility must have all permits and approvals necessary for physical construction and either: (1) an on-site construction program has begun, or (2) the facility has accepted substantial contractual obligations for such construction, to be completed within a reasonable time.

We understand that several BIFs in Region VIII have already been constructed and may wish to begin hazardous waste operations after the August 21 date. EPA has interpreted the term facilities "under construction" also to include facilities that have completed construction on the relevant date if they can demonstrate the intent to commence hazardous waste operations within a reasonable period of time (i.e., through a trial burn or agreements with suppliers to receive hazardous waste derived fuels), and if the facility meets the other relevant standards for "in existence." The Agency's interpretation of what

constitutes being "under construction" is discussed in detail in the January 9, 1981, Federal Register (46 FR 2344).

1. What State and local approvals or permits are necessary to meet the definition of "existing facility".

One requirement for a facility to be considered "under construction" is that it possess "the Federal, State, and local approvals or permits necessary to begin physical construction." As defined in §260.10 (under the definition of "Federal, State, and local approvals or permits necessary to begin physical construction"), these permits or approvals are those required under hazardous waste control statutes, regulations, or ordinances. Air pollution control permits that must be obtained prior to facility construction or modification under Federal or state laws would not be needed for interim status if the purpose of the legislative provision is to regulate air emissions in general, and not specifically to regulate the treatment, storage, or disposal of hazardous waste, or the siting of a hazardous waste management facility. Similarly, state or local building or zoning permits would be included only if they specifically address hazardous waste management. Of course, the facility remains responsible under state or local law for obtaining relevant building and zoning permits and approvals, even though the failure to obtain them will not prevent a facility from obtaining interim status.

It is important to recognize that the requirement relating to approvals and permits refers to approvals or permits necessary to begin physical construction. Since the Region VIII BIFs have already been constructed, the requirement should be read to apply to approvals for any physical modification needed to receive hazardous waste. Of course, if the physical modification has already been completed, the need for preconstruction permits would not arise as an issue (unless it could be argued that the construction took place illegally in the absence of a necessary permit).

2. What constitutes a "substantial loss due to a contractual obligation"?

To be considered "in existence," a facility not already handling hazardous waste and not yet under construction must have "entered into contractual obligations -- which cannot be canceled or modified without substantial loss -- for physical construction of the facility to be completed within a reasonable period of time." As one way of demonstrating substantial loss, EPA has in the past used cancellation contract clauses. Thus, EPA has interpreted "substantial loss" as being at least 10 percent of the total project cost for physical construction. Physical construction means fabrication, erection, installation, or modification of a facility. The term does not refer to all costs

that may be associated with a construction project; for example, options to purchase, contracts for feasibility, or engineering or design studies would not constitute an eligible contractual obligation. (See 46 FR 2346, January 9, 1981.) In the case of BIFs that have not burned hazardous wastes before, the total project cost for physical construction refers to the modifications necessary for the BIF to manage hazardous waste. Although the 1981 preamble does not specifically address when meeting the 10 percent threshold would not be sufficient, we believe that if the loss to the facility of canceling the construction were minimal, the loss could not be considered substantial, even though it exceeded 10 percent. For example, if the total cost of kiln modification were \$5,000, a 10 percent loss (\$500) would not be viewed as substantial. In contrast, for a project that would exceed \$250,000, we believe that 10 percent would represent a substantial amount.

Of course, contract cancellation clauses with higher percentages, or other approaches to a demonstration of substantial loss, could be considered by the Regions as well. In that regard, we note the unique circumstances presented by the BIF rule for cement kilns that will be modified to burn hazardous waste. Even though the contractual cost of installing such modifications can be relatively low, the Regions can take into account other economic factors and actions showing substantial loss insofar as they provide evidence of a bona fide substantial commitment to managing hazardous waste in the near future.

You should also note that the "substantial loss" criterion must be met only at facilities where construction (i.e., facility modifications to receive hazardous waste) has not begun. Where physical construction is underway or completed, a facility is not required to show "substantial loss," but rather objective indications of a bona fide intent to manage hazardous waste.

3. What constitutes a "reasonable time to complete construction"?

The regulations do not define the term "reasonable time to complete construction," nor do they define a "reasonable time" to begin management of hazardous waste, in the case of an already constructed facility. To determine what is a reasonable time, Regions must make a case-by-case decision. Generally, if a facility is undergoing a continuous process to initiate or complete construction activities, and arrangements are in place to ensure that such construction can be carried out on a schedule that is typical of similar construction activities, then completion of construction should be considered to be within a "reasonable time." The same rule of thumb applies to the definition of a "reasonable time" to begin management of hazardous waste.

4. Effect of a state moratorium.

In your memorandum of April 16, 1991, you discuss the possible effect of the Utah moratorium on the ability of cement kilns in the state to qualify for interim status. Since the Utah moratorium only prohibits the burning of hazardous wastes in cement kilns, it is still possible for a facility to meet the fundamental criteria for gaining interim status. Of course, gaining interim status does not affect the legal status or applicability of Utah's moratorium. In contrast, there could be other situations where a moratorium could prevent a facility from meeting one of the "in existence" criteria. For example, if the facility were unable to obtain a required approval for construction due to a moratorium on hazardous waste preconstruction permitting, interim status would be precluded.

5. Section 3010 notification requirements for BIFS.

It is likely that very few BIFs were required to submit a section 3010 notification on May 22, 1991. One reason is that this notification requirement only applied to facilities actually handling hazardous waste fuel on February 21, 1991. (See 45 FR 76631, November 19, 1980.) This section 3010(a) notification is intended to be a "snapshot" of hazardous waste management practices at the time a rule is promulgated. Therefore, if a facility is "under construction" a Section 3010 notice is not required. (See H.R. Rep. No. 198, 98th Cong., 1st Session, 40 (1983).) Another possibility is that the facility might have already submitted a notification previously either for the burning of hazardous waste fuel under §266.35, or for some other hazardous waste activity, in which case the BIF is not required to renotify.

6. Pre-Compliance certification.

The BIF rule does not require facilities to submit a pre-compliance certification by August 21, 1991, to attain interim status. Once a facility meets the statutory and regulatory requirements, interim status follows automatically. However, if a facility fails to submit such a certification (or if the facility fails to comply with subsequent interim status compliance schedule requirements), it loses its ability to manage hazardous waste in the BIF unit, unless and until it receives a Part B permit.