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SITE PREPARATION WORK PERFORMED PRIOR TO ISSUANCE OF PERMIT

United States Environmental Protection Agency
Washington, D.C. 20460
Office of General Counsel

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Robert H. Hunter
Associate General Counsel
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Hunter:

This letter responds to your inquiry of July 24, 1992, to William K. Reilly regarding issues raised under the Resource Conservation and Recovery Act (RCRA) as a result of certain site preparation work performed by the U.S. Army for its proposed chemical stockpile incineration facility at the Anniston Army Depot (ANAD), Alabama.

Our understanding, from your letter and independent inquiry, is that, on July 23, 1990, ANAD applied for a permit under Section 3005 of RCRA, 42 U.S.C. 6925, to construct a hazardous waste incinerator to destroy on-site chemical weapons as part of the Army's chemical agent demilitarization program. This program implements Public Law 99-145, which was enacted by Congress in 1985 and mandates the destruction of most of the U.S. stockpile of chemical weapons. ANAD submitted its permit application to the Alabama Department of Environmental Management (ADEM), which is authorized pursuant to Section 3006 of RCRA, 42 U.S.C. 6926, to carry out the requirements of RCRA within the State. ANAD presently has "interim status" under RCRA, which is available to facilities that have on-going hazardous waste management operations, or that have commenced construction related to such operations, on the date they first become subject to the requirements of RCRA. 42 U.S.C. 6925(e), 40 CFR 270.70. ANAD obtained interim status for two categories of units -- open burning and open detonation grounds, and storage igloos for H-55 rockets, which have been classified as hazardous wastes because they are obsolete.

In early 1990, because of shallow groundwater, the Army decided to perform cut and fill to elevate the site for the proposed incinerator by 25 feet. The Army has indicated that this fill required six to eight months for settling before the site could bear the load of concrete and heavy facility equipment necessary for construction of the incinerator. To avoid delay in the construction schedule, the Army sought approval from ADEM for its cut and fill work prior to receiving its RCRA permit. ADEM informed the Army that, under ADEM's RCRA authorized regulations, the site preparation could proceed prior to the issuance of the RCRA permit.

You asked three questions relating to the ANAD project. We respond to each in turn.

1. Whether EPA or ADEM, under Alabama's EPA-approved RCRA program, is the appropriate authority (1) to issue the permit to the army for constructing the disposal facility, and (2) to allow site preparation work before a permit is issued.

(1) The State of Alabama is authorized to implement the "base" RCRA program, including the issuance of permits to implement base program requirements. This authorization includes the authority to issue permits to hazardous waste incinerators such as the unit the Army seeks to construct at ANAD. The state's authorization does not include the authority to implement certain requirements of the 1984 Hazardous and Solid Waste Amendments (HSWA) to RCRA, including the requirement of Section 3004(u) of RCRA that all RCRA permits must provide for corrective action for releases of hazardous waste or constituents from solid waste management units at the facility. 42 U.S.C. 6924(u). EPA administers the requirements of HSWA in states authorized to implement RCRA's base program until the states are specifically authorized to implement the HSWA requirements, including issuing the portions of permits required to implement the requirements. 42 U.S.C. 6926(c)(4). In states such as Alabama that have not been authorized to implement all of the requirements of HSWA, a RCRA permit is comprised of both the state base portion and the federal HSWA portion. Thus, in the case of ANAD, assuming that ANAD needs a RCRA permit to commence construction of the incinerator and related construction, the permit would be issued jointly by EPA and ADEM. The issue of whether the Army needs a permit to commence construction is discussed in response to question 3, below.

(2) ADEM is the appropriate authority to determine whether site preparation work is allowed. EPA administers only the limited set of requirements created by HSWA for which the state has not yet become authorized. The decision as to whether any given activity at a site is permissible under interim status is part of the base program, which is governed by Alabama's EPA approved regulations, as further explained below in response to question 3.

2. Whether EPA or ADEM gave the Army permission to do the site preparation work.

EPA did not give permission to the Army to do the site preparation work.

EPA's knowledge of communications between ADEM and the Army on this issue is based on (i) a June 26, 1992 letter from General Walter L. Busbee to Congressman Glen Browder stating that the Army obtained approval from ADEM for the site preparation work; (ii) an August 29, 1990 letter from Ronald M. Grant of the Army to ADEM seeking written confirmation of a conversation relating to site preparation work; (iii) a September 10, 1990 response from Nathan Hartman at ADEM confirming Mr. Grant's summary of the conversation; and (iv) a letter from Leigh Pegues of ADEM to Congressman Michael L. Synar discussing the issue. These documents were attached to your July 24, 1992 letter to Mr. Reilly. EPA has no independent knowledge of communications relating to the site preparation work and believes that these documents speak for themselves.

3. Whether the army's undertaking the cut and fill site preparation work without a permit was consistent with RCRA and implementing federal regulations.

First, it should be noted that, within the scope of the base program, it is Alabama's regulations, not EPA's, that govern the hazardous waste management program within the state. Once approved, the state's program operates "in lieu of the Federal program. . . ." 42 U.S.C. 6926(b). Thus, with the exception of HSWA requirements, Alabama's regulations determine the requirements of RCRA within the state. However, in order for it to maintain its authorization, Alabama's regulations must be equivalent to and no less stringent than EPA's regulations. *Id.* We have not examined the Alabama regulations. The following analysis is based on EPA's RCRA regulations.

The Army's undertaking the cut and fill work was not consistent with EPA's RCRA regulations. Changes to interim status facilities that involve the addition of processes or capacity must conform with the provisions of 40 CFR 270.72 (or the state equivalent in an authorized state). The addition of the incinerator to the ANAD facility would be the "addition of a process" and, under section 270.72(a)(3), would require agency approval based on a showing that the addition was necessary to prevent a threat to human health and the environment because of an emergency situation, or that the addition was necessary to comply with a federal, state, or local requirement.

Under EPA's regulations, a "hazardous waste management unit" is defined to include the "contiguous area of land on or in which hazardous waste is placed," 40 CFR 260.10, and "physical construction" includes "movement of earth," 40 CFR 270.2. Therefore, the elevation of the land which will serve as the foundation for the incinerator would be considered part of the construction of the incinerator. To our knowledge, the Army did not make either of the showings required under section 270.72(a)(3) or receive approval for a change during interim status. Absent such approval, the Army should not have performed the cut and fill work prior to the issuance of the RCRA permit.

In addition, a facility normally cannot make a change under interim status that would result in "reconstruction" of the facility, which is defined as a change for which the capital investment exceeds 50% of the capital cost of a comparable entirely new hazardous waste management facility. Section 270.72(b). Given the high projected cost of the ANAD incinerator, it is possible that the construction of the incinerator would amount to reconstruction. While reconstruction can be approved in certain limited situations, section 270.72(b)(7), to our knowledge ANAD has not made any of the showings that would be required for such approval.

The Army's undertaking the cut and fill activity is understandable, since ADEM apparently advised that such activity was permissible under its regulations. ADEM (and the Army as well) appears to have viewed the issue as a "pre-construction" issue, rather than as an interim status issue. RCRA's "pre construction ban" requires "each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste. . . to have a permit. . . ." 42

U.S.C. 6925(a) (emphasis added). EPA's implementing regulations provide that "no person shall begin physical construction of a new [hazardous waste management] facility without. . . having received a finally effective RCRA permit." 40 U.S.C. 270.10(f)(1) (emphasis added). These provisions apply to "new facilities." A facility in interim status is not "new," and the construction of new units at such a facility is governed by the interim status regulations, not by the "pre-construction" provisions. Because ANAD has interim status, the scope of permissible changes ANAD may effect at the facility is regulated by the interim status regulations, as described above.

If you have any questions about this matter please call me (260-7697) or Brian Grant on my staff (260-6512).

Sincerely,
Lisa K. Friedman
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Solid Waste and Emergency
Response Division (LE-132S)