9498.1994(05)

DETERMINATION ON WHETHER OR NOT A FACILITY QUALIFIED FOR INTERIM STATUS FOR ITS BOILERS UNDER THE BIF RULE

United States Environmental Protection Agency
Washington, D.C. 20460
Office of Solid Waste and Emergency Response

July 14, 1994

Mr. Douglas A. Donnell
Mika, Meyers, Beckett & Jones
Suite 700
200 Ottawa Avenue, N.W.
Grand Rapids, Michigan 49503

Dear Mr. Donnell:

Thank you for your letter of May 9, 1994, expressing your view that the Gage Products Company facility in Alpena, Michigan ("Gage") qualified for interim status for two of its boilers under the boiler and industrial furnace ("BIF") rule. After carefully reviewing the arguments set forth in your letter, we continue to take the view that the Gage facility does not have interim status, for the following reasons.

First, your arguments rest on the premise that EPA "grants" or "denies" interim status under the Resource Conservation and Recovery Act ("RCRA"). You state that it would be "inequitable and unjust to deny Gage interim status" in view of all the facts. However, as we explained in our April 4, 1994, letter to Mr. Richard C. Fortuna, interim status is automatically conferred by statute on qualifying facilities (see RCRA 3005(e) (qualifying facilities "shall be treated as having been issued a permit ....")). EPA expressed its view in that letter as to whether certain facilities, including Gage, had qualified for interim status. EPA did not, and cannot, "deny" interim status to Gage or any other facility, nor can EPA "grant" interim status based on equity or any other consideration.

Second, the information contained in your letter does not change our view that Gage did not qualify for interim status. You point out that Gage submitted its application to the Michigan

Department of Natural Resources ("MDNR") for an Act 348 permit to burn alternative fuels in January 1991, well before the August 21, 1991, BIF rule effective date, and that MDNR's regulations required it to make a final decision on the application within 60 days. Accordingly, you do not believe that Gage's failure to obtain a permit by the BIF effective date should disqualify the facility from obtaining interim status.

In order to qualify for interim status, a facility that has not yet commenced hazardous waste management operations must have "obtained" all required state permits by the effective date of the regulation under which it seeks to obtain interim status (40 CFR 260.10) (definition of "Existing hazardous waste management facility")). Gage did not satisfy this requirement and, therefore, did not qualify for interim status. While MDNR may have had a responsibility to act more quickly than it did, its failure to do so cannot confer interim status on a facility that has not satisfied a clear regulatory prerequisite.

Moreover, EPA cannot accept Gage's assertion that it "had a legal right to obtain [the Act 348] permit" by the BIF effective date. Even if MDNR had a responsibility to issue a decision, EPA cannot assume that it would have granted Gage's application.

Gage also argues that it qualified for interim status based on apparent representations by an MDNR employee and an EPA employee that the Act 348 permit was not required for the facility to obtain interim status. However, the opinions of individual EPA employees on a legal question cannot bind the Agency or dictate the conclusion of a subsequent Agency examination of the question.1 The conclusions contained in our April 4 letter were based on a detailed analysis of MDNR's regulatory scheme for permitting boilers and industrial furnaces burning hazardous waste. MDNR assisted in the analysis and agrees with the interpretation of its regulatory scheme set forth in our letter. We believe the interpretation is correct, regardless of whether an Agency employee earlier expressed a contrary opinion. Again, EPA does not grant or deny interim status, and the equity considerations raised in your letter cannot change EPA's view that, under the proper interpretation of MDNR's regulatory scheme, Gage did not, in fact, qualify for interim status.

Thank you for bringing this matter to our attention.

Sincerely,

Michael H. Shapiro, Director
Office of Solid Waste

1. Because interim status under the BIF rule is implemented in the State of Michigan by EPA, not MDNR, EPA clearly is not bound by the verbal opinions of an MDNR employee.

Attachment

Mika, Meyers, Beckett & Jones, Attorneys at Law
200 Ottawa Avenue, N.W., Suite 700
Grand Rapids, Michigan 49503

May 9, 1994

Mr. Michael Shapiro
Director, Office of Solid Waste
U.S. Environmental Protection Agency
Washington, D.C. 20460

Re: Petition for Administrative Action to Cease Hazardous Waste Burning

Dear Mr. Shapiro: .

I represent Gage Products Company ("Gage") and I am writing this letter in response to your correspondence of April 4, 1994 to Mr. Richard C. Fortuna regarding a Petition for Administrative Action to Cease Hazardous Waste Burning and Notice of Citizen Suits. In your April 4 letter and the enclosed attachment, you indicated that Gage did not qualify for interim status under the BIF rules for the same reasons stated with reference to The LaFarge Cement Plant in Alpena, Michigan. Your discussion of the Gage facility did not address a number of facts which are unique to the Gage facility and distinguish it from the LaFarge Cement Plant in Alpena, Michigan. For this reason, Gage respectfully requests that you reconsider your determination of interim status with respect to the Gage facility in Ferndale, Michigan.

Your discussions pertaining to the LaFarge Cement Plant in Alpena, Michigan focus on the requirement in Rule 802 of the Michigan Hazardous Waste Management Act (Act 64) requiring BIF facilities to obtain either an Act 64 permit or a permit under the state's Air Pollution Control Statute (Act 348) in order to burn hazardous waste. Your letter frames the issue as follows:

> "The key issue regarding this [LaFarge] facility is whether two permits required for BIF's under Michigan's hazardous waste control regulations fall within the `permits and approvals' requirement for obtaining interim

status. The LaFarge facility did not obtain either of these permits for any of the three units in question prior to the effective date of the BIF rule."

The circumstances pertaining to the Gage facility with regard to obtaining air permits appear to be very different than the circumstances pertaining to the LaFarge facility in Alpena, Michigan. Gage believes these factual distinctions are critical to a correct interpretation of Gage's interim status.

In January, 1991, Gage applied to the Michigan Department of Natural Resources ("MDNR") for an air use permit to burn alternate fuels under Act 348 in connection with its two boilers. A copy of that permit application is attached to this letter as Exhibit 1. Under the Act 348 rules, "the Commission shall notify the applicant in writing of approval, conditional approval or denial of an application for a permit to install within 60 days after receipt of the application and information required by Rule 203." (Emphasis added). (Rule 206(1)). Notwithstanding the requirement that the Air Pollution Control Commission act upon this application within 60 days, several months passed without Gage receiving any response from the Commission regarding the permit application.

During the time period between January, 1991 and August 21, 1991, when the BIF rules took effect, Gage was concerned that the absence of an air permit might jeopardize its interim status under the BIF rules. Thus, Gage, through its consultant, Energy and Environmental Technology Company, contacted Steve Blayer in the Waste Management Division of the Michigan Department of Natural Resources to discuss this matter. On July 5, 1991, Energy and Environmental Technology Company sent a letter to Mr. Blayer summarizing a meeting between the parties on July 2,1991 "to clarify interim status criteria regarding waste fuel burning boilers to be installed at Gage Products Company, Ferndale Plant." This letter, attached as Exhibit 2 states:

"As we also discussed, `Existing Facility' criteria for interim status referred to in 49 CFR 260.10 Ex. F. (l)(Ref. Attachment) does not apply to the Air Use Permit to Install. Permits referred to in this definition are only those implicit to the physical construction approval of a process or facility (e.g. physical construction of a TSDF or cement kiln would likely require several levels of State and Federal safety and construction permits)."

(Emphasis in original)

MDNR's position was again confirmed to Gage in an August 14, 1991 memo, attached as Exhibit 3, from Energy and Environmental Technology Company to Sharon Stahl of Gage Products wherein Mr. Andrew Fadanelli stated:

> "I spoke with the EPA Region V representative regarding the BIF regulations. Specifically, Ms. Lorna Sereza, [sic] who handles the BIF regulations, stated that an air permit is not necessary to qualify for interim status. [Emphasis in original]. Therefore, this interpretation agrees with Mr. Steve Blayer, permit engineer of Michigan DNR." (Emphasis added).

Plagued with further delays in receiving a response to its air permit application, and assured by MDNR and EPA that an Act 348 permit was not required to attain interim status, Gage finally revised its air permit application in a letter dated August 29, 1991 (Exhibit 4) asking only for a permit to burn natural gas. Gage felt this change was necessary because Gage had need for additional steam capacity and it simply could not wait any longer for the MDNR to act on its earlier application. (See, also, letter dated February 11, 1992 to EPA, attached as Exhibit 5). MDNR finally issued a permit for natural gas burning on November 25, 1991 (Exhibit 6), but discouraged Gage from immediately pursuing the permit originally sought to burn alternate fuels. EPA confirmed the fact that MDNR urged Gage to delay "pushing" this issue in granting an extension to conduct compliance testing on the boilers (See Exhibits 7 and 8).

As can be seen from the above chronology, Gage applied for and sought an air permit well in advance of the August 21, 1991 deadline for interim status. Thus, even if EPA interprets state regulations as requiring an air permit for the establishment of interim status, Gage satisfied that criteria by doing everything possible to obtain such permit. The MDNR was obligated to act upon Gage's application within 60 days, or by March, 1991, but for reasons beyond Gage's control, delayed processing that application until after the August 21, 1991 deadline. Moreover, although MDNR now takes the position that air permits were required to qualify for interim status, Steve Blayer of MDNR took the opposite position back in 1991 when Gage voiced its concern regarding the delay in MDNR's processing of its air permit application. Region V EPA

shared that opinion and so advised Gage at that time (Exhibit 3). Under these circumstances, it would be grossly inequitable and unjust to deny Gage interim status for failure to obtain an air permit when Gage did everything possible to obtain, and had a legal right to obtain that permit, prior to the August 21, 1991 deadline. Gage should not be penalized because of MDNR's failure to follow its own regulations requiring processing of the application within 60 days. Nor should Gage be penalized for following the advice of MDNR and EPA regarding MDNR's and EPA's interpretation that the air permit was not required to qualify for interim status.

Most of this information was previously provided to Mr. Lorna Jereza at USEPA Region V on March 27, 1992, as is shown by my letter of that date attached as Exhibit 9.

In your April 4, 1994 letter, the discussion regarding Gage Products Company simply makes reference to the fact that the analysis applicable to LaFarge in Alpena, Michigan is also applicable to Gage. Because of the facts stated above, I believe Gage is situated very differently from LaFarge, and should be treated as having had the air permit which, by statute, it was entitled to have received well before the August 21 deadline. Please consider this additional information in reconsidering your decision regarding Gage Products' interim status. If you need additional information, please do not hesitate to contact me at your convenience.

Yours very truly,

Douglas A. Donnell

DAD:jet
Encls.
cc: Mr. Donald Dixon
Ms. Sharon Stahl