

9433.1986(14)

TEMPORARY AND INFORMAL DELISTINGS AND HSWA EFFECTS ON
BOTH

MAY 27 1986

Mr. J. K. White
President
United Chair
P.O. Box 86
114 Churchill Ave. N.W.
Leeds, Alabama 35094

Dear Mr. White:

I have received your letter dated April 17, 1985, regarding the informal exclusion issued to your Irondale, Alabama facility on May 5, 1982, and withdrawn on March 10, 1986. The issues addressed in your letter are discussed separately below.

- (1) There is an apparent conflict in the Agency's claims that United Chair received an informal delisting, but that the waste generated has always been considered hazardous and must be treated as hazardous.

There is no conflict. A temporary exclusion and an informal exclusion are very different. A temporary exclusion is a change in the regulatory status of certain wastes, from hazardous to non-hazardous. A temporary exclusion could only be granted by the Assistant Administrator for Solid Waste and Emergency Response, pursuant to 40 C.F.R. §260.22(m). In contrast, an informal exclusion was not a regulatory change at all. It was an indication by the Agency that it would not take enforcement action against a petitioner. This enforcement discretion was exercised when it was believed that a temporary exclusion would be granted, but before the petition had been processed and the temporary exclusion granted. (See enclosed memorandum from R. Sarah Compton to the Regions, January 12, 1981.)

In May 1982, a memorandum was sent from Headquarters Enforcement Counsel to our Regional contacts advising them that the Office of Solid Waste had made a preliminary decision on United Chair's petition (see enclosure). The memorandum suggested the use of

enforcement discretion until the delisting was published in the Federal Register. This memorandum reflects only the use of enforcement discretion, i.e., an informal exclusion, not a temporary exclusion. As noted above, a temporary exclusion could only be issued by the Assistant Administrator for Solid Waste and Emergency Response. The Assistant Administrator never acted on United Chair's petition, and thus an temporary exclusion was never granted. Accordingly, your waste is, concurrences has been, a listed hazardous ??????

- (2) United Chair believes that the informal exclusion was the same as a temporary exclusion and that EPA used those terms synonymously to indicate the waste's non-hazardousness.

Despite the regulatory difference between these two types of decisions, the Agency for a period of time, treated informal and temporary exclusions similarly (i.e., all wastes were allowed to be managed as non-hazardous wastes, although Agency discretion had been used with regard to informally excluded wastes). The Agency, however, cannot legally ignore this regulatory distinction.

- (3) United Chair believes that its exclusion was a temporary exclusion which would require EPA to provide notice and opportunity for public comment before affectively withdrawing this decision and further claims that HSWA under 42 U.S.C. §6921(f)(1), (f)(2)(A) requires notice and comment.

As indicated above, there is a clear regulatory definition of a temporary exclusion. If a recommendation to exclude a waste was never signed by the Assistant Administrator for Solid Waste and Emergency Response then the petitioned waste is still a listed hazardous waste. Despite the Agency's choice to exert discretion for a period of time, your waste was never legally an exempted waste, and notice and public comment are not required for the Agency to withdraw an informal decision. It should be noted that notice and an opportunity for public comment is not necessary for issuing and withdrawing enforcement discretion. 42 U.S.C. §6921(f)(1) and (2)(A) indicate that the Agency must provide notice and an opportunity for public comment before granting or denying a petition. The March 10, 1986, action withdraw our decision to exert enforcement discretion. It was not a decision to grant or deny United Chair's petition. It, therefore, was not necessary to provide notice and an opportunity for public comment.

- (4) EPA must make a final decision on United Chair's petition

by November 1986, and must, in the meantime, consider the waste as non-hazardous.

The November 1986 deadline referred to only affects temporary exclusions. The Agency is not required to make a final decision on temporary exclusions by November 8, 1986. The 1984 Amendments state only that if a final decision is not made by that date, the temporary exclusion will cease to be in effect. The agency intends, however, to make a final decision on all temporary exclusions by November 8, 1986. Again, no decision to exclude United Chair's waste was ever signed by the Assistant Administrator and, therefore, a temporary exclusion was never granted. The only statutory requirement imposed on the Agency for petitions for which a temporary exclusion has not been granted is that a decision be proposed in the Federal Register within one year of receipt of a complete petition, and that a final decision be made within two years of receipt of a complete petition, to the maximum extent practicable. We expect to meet these deadlines for your petition.

- (5) Representatives of the Alabama Department of Environmental Management (ADEM) are prepared to testify that EPA representatives had made a decision to approve United Chair's petition and had granted United Chair an informal delisting.

The Agency has never denied granting United Chair a discretionary or informal exclusion. The Agency's Regional Office correctly relayed this information to the ADEM.

- (6) An EPA letter dated September 17, 1985, requested additional data under HSWA indicated that the data be submitted as soon as possible since all exclusions not made final by November 1986 will expire.

As indicated in #2 above, the Agency had tracked both informal and temporary decisions together in its efforts to collect additional information in a timely fashion under HSWA. The Agency, however, is not required by statute to issue a final decision on any informal decisions by November 8, 1986. Nevertheless, we would like to process your petition and issue our final decision by this date.

- (7) HSWA acknowledges that EPA had granted non-published temporary exclusions and that they are valid.

The HSWA reference means only that temporary exclusions were

granted without a prior opportunity for comment and the full consideration of such comments (i.e., temporary exclusions were issued with a request for comment after the effective date of the exclusion).

- (8) United Chair also requests that a final decision be made no later than November 8, 1986.

The Agency expects to issue a final decision by November 8, 1986. Much of our analysis has been completed, and our tentative decision to deny is based on highly variable levels of barium and chromium in the waste and the unacceptable mobility of both barium and chromium exhibited by the population of waste samples tested. United Chair will receive a letter providing the details of this analysis in the near future.

If you have any further questions regarding these issues, please contact Mr. Myles Morse of my staff at (202) 475-8551.

Sincerely,
Original Document signed
J. Winston Porter
Assistant Administrator