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

April 4, 1994

Mr. Richard C. Fortuna
Executive Director
Hazardous Waste Treatment Council
915 15th Street, N.W., Fifth Floor
Washington, D.C. 20005

Dear Mr. Fortuna:

This letter responds to the Petition for Administrative Action to Cease Hazardous Waste Burning and Notice of Citizen Suits, which the Hazardous Waste Treatment Council (HWTC) and several citizens groups submitted to the Administrator of the U.S. EPA on January 31, l994. In this letter, I will refer to your January 31 document as "the Notice."

The Notice you submitted asks the Administrator to halt the burning of hazardous wastes (or where hazardous wastes are not being burned, to disallow any burning of hazardous waste until a permit is issued) at the following hazardous waste combustion facilities: LaFarge Cement Plant in Alpena, Michigan; National Cement Company in Lebec, California; River Cement in Festus, Missouri; BoxCrow Cement Plant in Midlothian, Texas; Gage Products Company in Ferndale, Michigan; Holnam Cement Plant in Ada, Oklahoma; ESSROC Cement Plant in Speed, Indiana; and Marine Shale in Morgan City, Louisiana. These facilities all assert that they obtained interim status under section 3005(e) of the Resource Conservation and Recovery Act ("RCRA") upon EPA's promulgation of the Boiler and Industrial Furnace ("BIF") rule, which became effective on August 21, 1991. The basis for your request was your belief that these facilities either did not qualify for interim status, or should be required to cease waste combustion due to non-compliance with the BIF standards.

I appreciate your concerns regarding the operation of all BIF facilities and their compliance with the applicable regulations.

EPA has vigorously enforced the BIF requirements and will continue to do so. We welcome public input into the implementation of the BIF regulations, including notification by the public of possible violations by interim status BIF facilities and any other facilities.

With respect to the facility-specific interim status issues raised in the Notice, it is important to note that EPA does not "approve" or "deny" interim status. Interim status is a statutory right that is conveyed by RCRA to facilities that satisfy the interim status criteria. The promulgation of a regulation that expands the universe of facilities subject to RCRA regulation, such as the BIF rule, provides an opportunity for existing facilities to gain interim status. Unlike an Agency decision to deny a permit, EPA's interpretations on whether potentially affected facilities have qualified for interim status simply express the Agency's view, based on a review of the information before it, as to whether the facilities have met the interim status criteria. These interpretations are potentially subject to revision based on new information or analysis. This letter presents EPA's interpretation regarding whether the specific facilities qualified for interim status, based on the information before EPA when it rendered initial interpretations for these facilities, the information provided in the Notice, information submitted by some of the facilities since EPA received the Notice, and additional information gathered by EPA.

The criteria a facility must meet in order to qualify for interim status under the BIF rule, or any other rule that first subjects a facility to the hazardous waste rules, are set out in 40 CFR 270.70(a), 260.10, and 266.103(a). One of the criteria is that the facility must be an existing hazardous waste management facility on the effective date of the rule that subjects it to hazardous waste regulation. The regulations specify that if the facility has not managed hazardous waste by this effective date, it must have "commenced construction" in order to qualify as "existing" (40 CFR §270.70(a)). In order to demonstrate that it has "commenced construction" a facility must have obtained the Federal, State, and local approvals and permits necessary to begin physical construction. These approvals and permits are those required under Federal, State, and local hazardous waste control statutes, regulations or ordinances (see 40 CFR 260.10)

This "approvals and permits" requirement was discussed in an EPA preamble (46 FR 2344, January 9, 1981) and an August 19, 1991, guidance memorandum from Don Clay, Assistant Administrator, Office of Solid Waste and Emergency Response, to James Scherer, Regional Administrator, Region VIII. Both discussions explained that, for example, permits required to begin physical construction of a facility under a state's air statutes or regulations, are not a requirement for obtaining interim status, unless the statutes or regulations specifically regulate the management of hazardous waste.

For six of the eight subject facilities, EPA used the guidance contained in the August 19, 1991 memorandum and other regulatory and policy directives to evaluate the interim status issues. (The two remaining facilities, River Cement and National Cement, are addressed separately below.) In cases where the interim status determination turned on whether a state permit was required under a state hazardous waste statute or regulation, EPA consulted with the relevant state agency. Where the state law was open to interpretation, EPA gave substantial weight to reasonable interpretations by the state.

Based on our analysis, EPA believes that the following facilities never qualified for interim status: Gage Products Company in Ferndale, Michigan; ESSROC Cement Plant in Speed, Indiana; and Marine Shale in Morgan City, Louisiana. Marine Shale is the only facility in this group that is currently burning hazardous waste. In addition, for the LaFarge Cement plant in Alpena, Michigan, we believe the three kiln units you identified in your notice did not qualify for interim status, although the facility does have interim status for two other kilns that have been burning hazardous wastes for a number of years.

EPA believes that the Holnam Cement Plant in Ada, Oklahoma does have interim status. For the BoxCrow Cement Plant in Midlothian, Texas, the Notice raises difficult questions as to the interpretation of a complex state regulatory scheme. EPA is consulting with the state of Texas to clarify the interpretation of the State permit regulations. EPA will respond to this portion of the Notice shortly. Neither of these facilities is currently burning hazardous waste.

In the case of River Cement facility in Festus, Missouri, EPA

evaluated whether the owner/operator complied with the BIF rule compliance schedule cited in 40 CFR §260.103(e). The Agency found substantial compliance with these provisions; therefore the facility may continue to burn hazardous waste under interim status.

With respect to National Cement in Lebec, California, EPA's Region IX office issued a final decision to deny the RCRA permit for this facility on March 31, 1994. The denial was based on the fact that the landowner did not sign the certification required by the RCRA regulations (see footnote 1). This decision, scheduled to take effect on April 30, 1994, will automatically terminate interim status, to the extent the facility obtained it. 40 CFR Section 270.73(a). Note that the facility may elect to appeal the decision under the Agency's administrative appeal process in 40 CFR Part 124. Because EPA has issued a decision to deny National Cement's permit application and terminate its operations on virtually the same grounds identified in the Notice for terminating interim status operations, EPA does not believe that any additional action is necessary at this point with respect to the National Cement facility.

The Agency has notified each of these companies of the determinations contained in this letter. Please see the attachment for additional discussion on each facility. If you wish to discuss this matter further, please contact the appropriate EPA Regional Office.

Sincerely,
Michael Shapiro, Director
Office of Solid Waste

1 As you are aware, on February 24, 1994, National Cement supplied EPA with a certification signed by the landowner, Tejon Ranch. However, the certification signed by Tejon Ranch is different from what is required by the regulations.

Attachment

EPA Response to "Petition for Administrative Action to Cease Hazardous Waste Burning and Notice of Citizen Suits"

A. FACILITIES IN EPA REGION 5

LaFarge Cement Plant, Alpena, Michigan

The Notice asserts that three units at the LaFarge Cement Plant do not have interim status because the facility did not obtain all permits and approvals necessary for physical construction. Further, it claims that the construction undertaken by the facility in order to qualify for interim status was done in violation of Michigan air permit requirements, and was dismantled pursuant to a consent judgement. Two units at the facility have burned hazardous waste for a number of years, and the Notice does not question their qualification for interim status.

The key issue regarding this facility is whether two permits required for BIFs 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. To be considered "in existence" and thus qualify for interim status, a facility that requires "construction" to manage hazardous waste must obtain any hazardous waste permits that would be necessary for construction.

EPA believes that these permits are construction permits required under a hazardous waste regulation. Because LaFarge did not obtain either permit, EPA believes the facility did not obtain interim status for the three units in question. In reaching this conclusion, EPA consulted extensively with the Michigan Department of Natural Resources ("MDNR") to clarify certain aspects of its interpretation of State permit requirements. EPA has concluded that MDNR's interpretation of its own regulatory scheme is reasonable and EPA has given it considerable weight. The Agency has no knowledge of hazardous waste being burned in these units.

Essentially, MDNR Rule 299.9802(3)(a) ("Rule 802"),

promulgated pursuant to the state's hazardous waste control statute (Act 64), requires BIF facilities to obtain either an Act 64 permit or a permit under the state's air statute (Act 348) in order to burn hazardous waste. Virtually all facilities comply with this provision by obtaining Act 348 permits, and LaFarge has obtained Act 348 permits for its kilns with interim status that are currently burning hazardous waste. The requirement in Rule 802 to obtain the air permit encompasses the requirement to obtain a permit to install as well as a permit to operate, since facilities typically operate for extended periods of time under permits to install. For facilities that choose to comply with Rule 802 by obtaining permits under the hazardous waste statute, the hazardous waste permit provisions similarly require facilities to obtain permits prior to construction. Consequently, under MDNR's hazardous waste control Rule 802, a facility must obtain a permit prior to commencing construction. This analysis is documented in correspondence between EPA and MDNR.

EPA notes that the August 19, 1991, Don Clay memorandum indicated that "air pollution control permits" are not prerequisites for obtaining interim status "if the purpose of the legislative provision is to regulate air emissions in general, and not specifically to regulate hazardous waste...." EPA clarifies that this sentence was not intended to limit the inquiry to legislative, as opposed to regulatory, intent. The intent of this portion of the memorandum was to reiterate that permits required under other regulatory schemes are not generally prerequisites for obtaining interim status, unless the scheme specifically regulates hazardous waste management. The inquiry required for an interim status determination is whether the permits in question are an official part of the state's scheme for regulating hazardous waste management.

Gage Products Company, Ferndale, Michigan

The Notice asserts that the Gage Products facility did not have interim status because the facility did not obtain all permits and approvals necessary for physical construction. This facility is subject to the same Michigan permit requirements as the LaFarge Cement Plant, and raises virtually the same issues. For the same reasons discussed úor the LaFarge facility above, EPA believes that Gage Products Company does not have interim status.

ESSROC Cement Plant, Speed Indiana

ESSROC withdrew its Part A permit application form on January 27, 1993 (see attached letter). To EPA's knowledge the facility had not burned hazardous waste. Under EPA's long standing "protective filer" policy, it is the Agency's view that the facility never obtained interim status. EPA has informed the company that a RCRA permit must be obtained before waste may be burned at the facility.

B. FACILITIES IN EPA REGION 6

Marine Shale Processors, Morgan City, Louisiana

The Notice asserts that the MSP facility lacks interim status. EPA agrees with this conclusion. On June 14, 1990, the United States filed a multimedia civil judicial enforcement action against Marine Shale of St. Mary Parish, Louisiana pursuant to the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act. Marine Shale is the largest burner of hazardous waste in the country. The United States has alleged that Marine Shale is a "sham" recycler that has been improperly operating without a RCRA permit or interim status and is violating RCRA by placing hazardous waste on the ground that exceeds EPA's treatment standards. The U.S.'s Complaint also alleges that Marine Shale violated the company's Clean Water Act National Point Source Discharge Elimination System permit.

On August 2, 1993, District Court Judge DuPlantier granted the state of Louisiana's motion to intervene as a co-plaintiff in this case. The Court also permitted the U.S. to add new claims under the Comprehensive Environmental Response, Compensation and Liability Act and the Clean Air Act against Marine Shale as well as add additional RCRA claims against the intervenors, Recycling Park, Inc. and Southern Wood Piedmont. A trial of the RCRA, Clean Air Act and Clean Water Act claims is scheduled to begin on April 18, 1994 in New Orleans, Louisiana.

On January 31, 1994, Region 6 proposed to deny Marine Shale Processors, Inc.'s application for a boiler or industrial furnace ("BIF") permit. EPA will accept public comments on the proposed denial until July 1, 1994. After receipt of public comments EPA will issue a decision in this matter addressing any comments received from the public. This decision will become final within

30 days, subject to the Agency's appeal process.

Holnam Cement Plant, Ada, Oklahoma

The Notice asserts that the Holnam Cement Plant facility does not have interim status because it did not have the necessary construction permits. Further, the Notice suggests that interim status should be terminated because the facility failed to submit a complete Part B portion of the RCRA permit application.

The Notice claims that Holnam needed a state construction permit and a state recycling permit in order to gain interim status. This assertion is based on an August 28, 1991, letter from the Oklahoma State Department of Health to Holnam. However, this letter states that an exclusion from the construction permit requirements (found in 1-2014.2 of the Oklahoma Controlled Industrial Waste Disposal Act) applies to units used exclusively in the recycling process. Under state law, any facility which receives off-site shipments of hazardous waste to be recycled or processed for recycling, through any process conducted at the facility including fuel blending or burning, is an off-site recycling facility. These facilities require only an operations permit for the recycling units (see Rules 310:270-11-1 (a)(1) and 310:270-19-1, and attached October 22, 1992, letter from the Oklahoma Department of Health to D. Shandy). Therefore, since neither of these two permits are required for construction at the Holnam facility, they are not necessary to obtain interim status.

Based on this analysis of applicable state regulations and interpretive letters, EPA believes that the permits identified in the Notice are not construction permits required under state hazardous waste management regulations and are not necessary in order to qualify for interim status. However, the Agency is concerned about the facility's commitment to complete construction within a reasonable time, which is a requirement for Holnam to obtain interim status. We will continue to monitor the facility's progress and demonstration of intent to complete construction within a reasonable time. If the company does not in the near future objectively demonstrate this intent, this will raise questions as to whether the facility satisfied the interim status requirement to have contractual obligations for physical construction to be completed in a reasonable time.

Regarding Part B of Holnam's permit application, the Notice points to deficiencies in the application cited by Oklahoma Department of Environmental Quality in a Notice of Deficiency issued to the Holnam facility on August 23, 1993. The state required the facility to revise the application to address the cited deficiencies. Such notices of deficiency are a standard step in the early permitting process and do not in themselves affect a facility's interim status. Of course, if deficiencies continue to exist in subsequent permit applications, the permit may be denied and/or the facility's interim status may be terminated.

BoxCrow Cement Plant, Midlothian, Texas

The Notice asserts that the BoxCrow Cement Plant does not have interim status because the facility did not obtain all permits and approvals necessary for physical construction by the effective date of the BIF rule. The Notice raises difficult questions as to the interpretation of a complex state regulatory scheme. EPA is consulting with the state of Texas to clarify the interpretation of the state permit regulations. EPA will respond to this portion of the petition shortly. The Agency has no knowledge of hazardous waste being burned at this facility.

C. FACILITY IN EPA REGION 7

River Cement Co., Festus, Missouri

The Notice asserts that River Cement failed to comply with the interim status compliance schedule and should therefore cease burning hazardous waste pursuant to 40 CFR 266.103(e). The Notice also states that EPA's River Cement files contain only an unsigned, draft COP that Region 7 never reviewed or approved, and alleges QA/QC deficiencies with respect to certain emissions test data.

EPA has determined that because River Cement substantially complied with all mandatory COC-related compliance schedules, an order to cease burning and close pursuant to 40 CFR § 260.103(e) is not appropriate. While EPA Region 7 filed an administrative complaint against River Cement on September 27, 1993 (In re: River Cement, Docket No. 07-93-H-0029) alleging, among other things, two potential COC deficiencies, as described below, EPA does not consider the deficiencies sufficient to shut the facility down under 40 CFR §266.103(e).

In Count III of the complaint, Region 7 alleged that River Cement failed to include certain dioxin and furan emissions test results in its COC. The missing results, however, related to a proposed operating mode that River Cement never used, and River Cement had provided Region 7 with the underlying dioxin test data in a separate mailing prior to submitting the COC. No penalty was proposed for this deficiency, which has been corrected.

Count IV alleged that River Cement failed to establish operating limits for its electrostatic precipitators (ESPs). This failure was based on a misunderstanding resulting from good faith discussions with EPA personnel concerning the use of opacity testing as an alternative monitoring method. Region 7 determined that, under site conditions, the opacity monitoring provides results which approximate the required ESP testing and is generally protective of health and the environment. The Region will, therefore, allow the facility to continue operating using the opacity monitoring until the required ESP monitoring equipment is installed. The compliance order in EPA's administrative complaint requires this equipment to be installed. Again, no penalty was proposed.

The statement in the Notice that EPA's files lack a valid COP is inaccurate. The regional files in fact contain a valid final River Cement COP. Finally, the QA/QC deficiencies cited the Notice relate primarily to data submitted to support a state air permit application and not the BIF COC. The Region ultimately determined that the BIF portion of River Cement's data contained no significant deficiencies.

D. FACILITY IN EPA REGION 9

National Cement Company, Lebec, California

The Notice contends that, because the Part A permit application form was not signed by the landowner, Tejon Ranchcorp, the facility did not qualify for interim status.

Under EPA regulations, the owner of land that is leased to another party operating a hazardous waste management facility on the land is an "owner" of the facility. ("Owner" means person who owns a facility or part of a facility; "facility" includes "all

contiguous land, and structures... used for treating, storing, or disposing of hazardous waste" see 40 CFR Section 260.10). Consequently, the landowner is required to sign and certify the facility's permit application (40 CFR Section 270.10(b), 270.11(d)).

With respect to National Cement in Lebec, California, EPA's Region 9 office issued a final decision to deny the RCRA permit for this facility on March 31, 1994. The denial was based on the fact that the landowner did not sign the certification required by the RCRA regulations. This decision, scheduled to take effect on April 30, 1994, will automatically terminate interim status, to the extent the facility obtained it. 40 CFR Section 270.73(a). Because EPA is in the last stages of finalizing its denial of National Cement's permit application, and terminating its operations, on virtually the same grounds identified in the Notice for terminating interim status operations, EPA does not believe that any additional action is necessary at this point with respect to the National Cement facility.