9432.1989(02)

IN-EXISTENCE AND UNDER CONSTRUCTION - DEFINITIONS

MAY 16 1989

Mr. John R. Jacus
Bradley, Campbell & Carney
1717 Washington Avenue
Golden, Colorado 80401-1994

Dear Mr. Jacus:

This letter responds to your request of March 28, 1989 for clarification of the definitions of "in existence" and "under construction." You explained that you want to evaluate the business risks associated with proceeding too install an industrial boiler to burn hazardous waste prior to the effective date of the final rule governing the burning of hazardous waste in boilers and industrial furnaces. You further expressed your desire to be "grandfathered" under existing RCRA regulations and not subject to new regulations, and your belief that being "in existence" on or before the effective date of the new regulations would allow you to do so. You cited previous Agency interpretations of "in existence" and "under construction" in the Federal Register notices of January 9, 1985 (46 FR 2344) and May 19, 1980 (45 FR 33324) and asked three specific questions related to those interpretations. I have addressed your specific questions below. However, in order to help you make an informed decision, I must first clarify the effect of the new regulations on existing boilers and furnaces burning hazardous waste.

Currently, the burning of hazardous waste in boilers and industrial furnaces is not regulated. When the proposed regulations of May 6, 1987 become final, all boilers and industrial furnaces not specifically excluded will become subject to those regulations. Thus, non-excluded boilers and industrial furnaces will be required to obtain a RCRA permit before they may continue to burn hazardous waste. However, as is true for other operations that become newly subject to RCRA permit requirements, the regulations allow for existing facilities to obtain "interim status" if they satisfy certain requirements (see §270.70). This allows continued operation

while the permit application is reviewed by the Agency. During the period that the facility has interim status, it must comply with the appropriate standards in 40 CFR Part 265. Once a final RCRA permit is issued, it will impose standards pursuant to 40 CFR Part 264.

One of the threshold requirements to be eligible to obtain interim status, discussed in the regulations at 40 CFR 270.10(e), is that the facility be "in existence" on the date it becomes subject to the regulations. Thus, the preamble discussions in the proposed rule of May 6, 1987 on "in existence" or "existing hazardous waste management units" relate to the opportunity to obtain interim status, not, as your letter suggests, to an opportunity to avoid new regulations. The following discussion answers your questions as they relate to a newly regulated facility's ability to obtain interim status where EPA is administering the RCRA program. Authorized states may have equivalent or more stringent regulations governing qualification for interim status. Please also note that if a boiler or industrial furnace is currently operating at a multi-unit facility that itself already has interim status, 40 CFR §270.72 is applicable.

1. Under current Agency policy, is 10% of the total project cost the threshold for determing whether a potential loss due to contract cancellation is "substantial"?

Yes. As EPA stated in the preamble of the May 19, 1980 regulation, if the amount an owner or operator must pay to cancel construction agreements exceeds 10% of the "total project cost," the loss would be deemed "substantial" within the meaning of the regulatory definition of "in existence" (40 CFR §260.10). The Agency reiterated that policy in the January 9 preamble, and has not changed it since that time. It should be noted, as was discussed in the January 9 preamble, "total project cost" refers to the total cost incurred for physical construction of the project, and not all costs that might be associated with the project.

2. What constitutes a "continuous physical, on-site program of construction"?

As was discussed in the May 19, 1980 preamble, the Agency believes that owners and operators who have commenced facility

construction in good faith prior to the date they became subject to regulations should be classified as existing. The preamble also explained that a continuous on-site, physical construction program means physical site preparation, and does not mean design, non-physical, or non-site specific preparatory activities. The scenario you describe in your letter, where foundation work has started, and no substantial delays between curing of the foundation and actual equipment installation are built into the schedule, describes, on its face, a continuous, on-site, physical construction program. However, it should be noted that the decision as to whether a good faith construction project has commenced is based on the facts of each case and will be made by the Agency or the authorized State at the time the facility applies for interim status.

3. Does the term "all necessary Federal, State, and local pre-construction approvals and permits" include county building or construction permits?

No. The Agency discussed this issue in the January 19, 1981 preamble. There, the Agency stated that the permits and approvals required under paragraph (a) of the definition of "existing facility" (40 CFR 260.10) are those required under Federal, State, or local "hazardous waste control laws or regulations." This preamble clarifies that the permits required are limited to those issued under any law intended to control the management of hazardous waste, including any laws designed to regulate the treatment, storage, or disposal or hazardous wastes or the siting of hazardous waste management facilities. County building or construction permits would be included only if they satisfy this condition, which usually they do not. As the Agency also noted in the January 19 preamble, although the Federal regulations do not require the facility to obtain such local permits to have "commenced construction," the facility remains responsible under State or local law for obtaining such permits before actually beginning construction.

I hope this answers the questions you raised. If you have any further questions on this matter, please contact Barbara Foster at (202) 382-4751.

Sincerely,

Joseph Carra, Director
Permits and State Programs
Division