

9528.1982(02)

FACILITY CHANGES DURING INTERIM STATUS

July 20, 1982

Honorable Barbara A. Mikulski
House of Representatives
Washington, D.C. 20515

Dear Ms. Mikulski:

Administrator Anne Gorsuch appreciates your June 22 letter requesting clarification of the requirements under the Resource Conservation and Recovery Act (RCRA) for expansion of existing hazardous waste management facilities. The Administrator has asked me to reply.

Specifically, you asked for an interpretation of the provisions of 40 CFR §122.23(c)(5). That section provides that "In no event shall changes be made to an HWM facility during interim status which amount to reconstruction of the facility. Reconstruction occurs when the capital investment in the changes exceeds fifty percent of the capital cost of a comparable entirely new HWM facility" (emphasis added).

Your questions and our responses are:

1. Question: If a State-owned site is expanding, would the cost computations for a comparable new facility assume no land-purchase cost since a comparable new facility would also presumably be built on a State-owned site?

Response: The cost computations for a comparable entirely new HWM facility would include the fair market value of the land necessary for such a facility, whether or not the expanding site is State-owned. Land has value whether or not it is State-owned. Therefore, EPA would use the fair market value of necessary land in its cost computations.

2. Question: If a site is expanded, would construction of off-site access to a freeway concurrent with the expansion be included in the capital costs of expansion?

Response: No. Off-site access to a freeway is not part of the hazardous waste management (HWM) facility, as defined in 40 CFR §122.3 of the regulations. A HWM facility means all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of "hazardous waste . . ." (emphasis added). Off-site access roads would not be included, therefore, in the capital cost of the changes to the facility.

3. Question: If a site is expanded more than once, would the cumulative costs of expansions since November 19, 1981, be used for a determination of what constitutes a reconstruction under 40 CFR §122.23(c)(5)?

Response: Yes. The cumulative costs of capital investments in the changes since November 19, 1981, are used to determine what constitutes a reconstruction. Any other interpretation would allow facilities to spread out the costs of expansion over several different changes at different times, defeating the purpose of this regulation.

4. Question: If a site is to be considered for expansion, what criteria will be applied by EPA in determining the relationship of the capital costs of a comparable facility on the following matters: acquisition of land, acquisition of construction materials, transportation of materials and structuring of the site, construction of groundwater monitoring and control features, and construction of access to the site?

Response: The capital cost of a "comparable entirely new HWM facility" is the cost in today's dollars of building a hypothetical facility comparable to the facility which qualified for interim status in both area and capacity, but using current state-of-the-art technology.

Acquisition of land: The fair market value of necessary land would be included in the cost of a comparable entirely new facility.

Acquisition of construction materials: The fair market value would be included.

Transportation of materials: These costs would be

included in the cost of acquiring construction materials.

Structuring of the site: The construction costs would be included.

Construction of groundwater monitoring and control features: The costs of such features would be included.

Construction of access to the site: These costs would not be included in the cost of a comparable facility, for the reasons stated in the Response to Question 2.

5. Question: If a site is to be considered for expansion, what criteria will be applied by EPA in determining the relationship of the capital costs of a comparable facility in the relocation of adjacent communities including selling of homes and adjacent properties; moving expenses for both residents and community institutions, and repurchase of new homes?

Response: The calculation of costs for a comparable, entirely new facility would not include the cost of relocating the residents of adjacent communities. As explained before, "facility" means the land, etc., used for treating, storing, or disposing of hazardous waste. Adjacent communities are not part of an HWM facility.

6. Question: Under the provisions of 40 CFR §122.23(c)(5), what alternatives must be considered for purposes of establishing that no alternatives to the proposed expansion exist? Must any of the following be considered: incineration; shipment to other facilities in the region or the nation; recycling programs to promote at-source recovery; some combination of these or other alternatives?

Response: EPA may approve requests for increasing the design capacity of existing facilities because of a lack of available treatment, storage, or disposal capacity at other hazardous waste management facilities. This determination is made by the EPA Regions on a case-by-case basis. The Agency would consider all of the above-mentioned factors in evaluating the technical feasibility and cost constraints of

the alternatives available within the time that the capacity is needed. EPA would explore issues such as: How far are similar volumes of waste shipped? Would the additional cost of shipment to an alternative facility be so great that it would not be practical or reasonable to do so? Does the waste require specially designed vehicles, e.g., is the waste extremely flammable or dangerous? Would at-source recovery be feasible and practical within the time that the additional capacity is needed? Is incineration or alternate treatment at other facilities technically or economically feasible?

You have also requested information on any applications for the expansion of existing hazardous waste sites which are pending, or have been approved or rejected by EPA, under the provisions of 40 CFR §122.23(c). As mentioned earlier, these decisions are made at the Regional level. We are collecting this information from our Regional Offices and will forward the results to you.

In addition, you have requested information on any lawsuits brought under the provisions of §122.23(c). There have been no lawsuits challenging the use of §122.23(c) in specific circumstances. There has been a generic challenge to the provisions of §122.23(c). In *NRDC v. EPA*, No. 80-1607 and consolidated cases (D.C. Cir., filed June 2, 1980), several industry associations and other groups challenged this provision as too restrictive. EPA entered into a settlement agreement in which the Agency promised to propose some changes to §122.23. EPA recently reopened settlement discussions on §122.23(c) with the petitioners and, to date, has not issued a proposal.

We appreciate your interest in these matters, and I hope this information will be helpful to you.

Sincerely yours,

Rita M. Lavelle
Assistant Administrator