

PPC 9523.1991(01)

EPA AUTHORITY TO CONSIDER PERMIT APPLICANT HISTORY OF COMPLIANCE  
WITH RCRA

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

MAR 13 1991

Honorable Glenn English  
House of Representatives  
Washington, D.C. 20515

Dear Mr. English:

Thank you for your letter of February 4, 1991, regarding the Environmental Protection Agency's (EPA's) authority to consider a permit applicant's history of compliance with the Resource Conservation and Recovery Act (RCRA).

As Mr. Robert Layton stated in his January 15, 1991, letter to you, RCRA section 3005(c) requires that EPA (or the state) shall issue a permit to a hazardous waste treatment, storage, or disposal facility once the EPA determines that the facility is in compliance with the requirements of sections 3004 and 3005 of RCRA. Neither section 3004 nor 3005 explicitly requires a permit applicant to have complied with RCRA in the past, or requires EPA to deny a permit if past noncompliance has occurred. However, the statute provides a broad "omnibus" authority that the EPA may use to address a facility's compliance history when developing permit conditions or making permit decisions. The scope of this omnibus authority and our implementation of this provision are described below.

Section 3005(c)(3) provides that permits issued under that section shall contain whatever terms and conditions EPA determines are necessary to protect human health and the environment. When issuing a permit, EPA may invoke this omnibus authority to address past noncompliance in two ways. First, EPA may include permit conditions that specifically address areas in which the facility has a history of noncompliance if EPA determines that such conditions are necessary to protect human health and the environment. In addition, in perhaps a more extreme and unusual case, some instances of serious past noncompliance could conceivably lead EPA to conclude that noncompliance in the future is inevitable. If EPA cannot draft conditions to ensure protection of human health and the environment in this type of case, then EPA may invoke its omnibus

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authority to deny the permit (see the enclosed page from the Federal Register notice). It is important to note that the omnibus provision is invoked on a case by case basis, and only where EPA believes that the usual permitting conditions will not provide adequate human health and environmental protection.

Furthermore, EPA need not rely completely on the potential for permit denial to encourage compliance with RCRA prior to permit issuance. Section 3008 of RCRA authorizes EPA to take enforcement actions against facilities prior to permit issuance, including those already operating under interim status. Thus, even though previous violations of the interim status standards of Part 265 may not ultimately prevent the issuance of a permit, a facility owner or operator is still subject to civil and criminal penalties for those violations (including penalties for each day of non-compliance).

After issuing a permit, EPA has several mechanisms in place to address noncompliance. The regulations at 40 CFR 270.43(a) allow EPA either to terminate a permit or to deny its renewal if the owner or operator fails to comply with any term of the permit or if the facility's operation endangers human health or the environment. In addition, EPA may invoke enforcement authority under RCRA section 3008 to remedy noncompliance at a permitted facility.

In light of the above statutory and regulatory authorities, it does not appear necessary to modify the regulations at this time. If you have any further questions on this matter, please have your staff contact Devereaux Barnes at (202) 475-7267.

We appreciate your interest in the safe and effective management of hazardous waste.

Sincerely yours,

Original Document signed

Don R. Clay  
Assistant Administrator

Enclosure