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PERMITTING ISSUES (DUPONT EDGEMORE FACILITY) - GUIDANCE

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

JUL 1 1988

MEMORANDUM

SUBJECT: Guidance on Permitting Issues Related to the Dupont Edgemore Facility

FROM: Bruce R. Weddle, Director
Permits and State Programs Division

TO: Robert E. Greaves, Chief
Waste Management Branch
Region III

This is in response to your memo of June 6, 1988, in which you requested guidance from Headquarters on several permitting issues related to the Dupont Edgemoor facility in Delaware. You explained in your memo that the facility was granted a construction and operation storage permit by the State and a HSWA permit by EPA. The State permit expires on September 30, 1980; the HSWA permit on March 1, 1989. You also explained that the facility never built the storage unit for which the permit was requested and no longer wishes to do so. You raised several issues about the status of the permit in light of the above. Each issue you asked is addressed individually below. Please note that, for clarity, we have reframed a few of the issues.

1. As the unit was never built, is the State portion of the permit effective?

The question of whether construction is necessary for the State portion of the permit to become effective is one of State law. Under the Federal regulations, construction is not required for the permit to become effective. A final permit decision becomes effective 30 days after the Regional Administrator issues notice of the decision unless: (1) a later effective date is specified in the decision; (2) review

is requested; or (3) no comments requested a change in the draft permit, in which case the permit shall become immediately effective (see §124.15(b)). Thus, if the State law is similar to the Federal, construction is not required for the permit to become effective.

2. If the State portion of the permit has not been effectuated, (that is, construction of the unit has not taken place), can the corrective action portion of the permit be enforced?

Section 3004(u) of HSWA specifically states that "permits issued under section 3005 shall contain schedules of compliance for ...corrective action ..." Since the full RCRA permit (State and Federal portions) in this case has been issued, the statutory requirement for corrective action has been triggered. Therefore, the corrective action portion of the permit can and should be enforced even if construction under the State portion has not occurred.

3. Is revocation of the permit a State, Federal, or combined action?

Revocation and reissuance of the full RCRA permit is a combined action because issuance is a combined action. To revoke and reissue the State portion, State procedures must be followed; to revoke and reissue the Federal portion, the procedures of Part 124 must be followed. It should be noted that this does not preclude a joint proceeding; however, two separate decisions must be made. Most important, the State has no authority to revoke and reissue the Federal portion or vice versa.

4. If it is possible to separate the State portion from the corrective action portion during revocation of the permit, can the corrective action portion of the permit be enforced separately if the State portion is revoked?

Yes. If the State portion is revoked or terminated, or if it expires, there is no effect on the HSWA portion of the permit. Once the permit is issued, the HSWA portion can continue on its own.

5. What can be done, if anything, to extend the terms of the

corrective action portion of the permit beyond March 1, 1989?

We believe there are three ways to extend the terms of the corrective action portion of the permit beyond March 1, 1989.

A. Permit Modification. Under section 270.41, the Agency can modify a permit if cause exists under paragraph (a) or (b) of that section. The Agency could use this authority to extend the expiration date of the corrective action portion of the permit by means of a permit modification. There is no requirement under the regulations that the permittee agree to the extension. Using this approach the permit life could be extended until September 29, 1995 since section 270.50(b) limits such an extension of the original permit life to a total of 10 years.

Modification of the permit under section 270.41(1)(2) to increase the permit term is allowed if the Agency receives information that was (1) not available at the time of permit issuance and (2) would have justified the application of different permit conditions at the time. To determine whether these grounds can be satisfied, we suggest that you investigate (1) whether the facility RFA, when completed, will result in new information about releases at the facility that would have justified a longer term for corrective action; and (2) whether Dupont's subsequent decision not to operate is new information that would have justified a different term for the corrective action portion of the permit because of the change in the expected duration of Dupont's active interest in the site.

B. Revocation and Reissuance. Section 270.41 provides for revocation and reissuance of permits. Under section 270.41(a)(2), the causes for revocation and reissuance are the same as those for permit modification discussed above; however, the permittee must agree to the revocation and reissuance. Section 270.41 also provides that if a permit is revoked and reissued, it is reissued for a new term. Thus, the permit term could be extended for a period of up to 10 years from the date of reissuance.

C. Continuation of Permit. If the Agency does not take action under A or B above, the permit will expire. There are two ways to continue the HSWA permit at expiration. First, if the facility submits a timely application for a new HSWA

permit, the existing permit conditions continue in force under section 270.51(a) until a new permit is issued. Second, if, at the time of expiration, the facility is not in compliance with the terms of the permit, then the Agency can invoke section 270.51(c)(3) of the regulations, which allows the Regional Administrator to issue a new permit under Part 124 with appropriate conditions. Of course, this procedure requires the Agency to demonstrate that the facility is out of compliance with its permit. In this case, the Agency could demonstrate non-compliance if, for example, the facility failed to complete the RFA required by the HSWA portion of the permit.

6. If the permit expires and the Region is therefore unable to enforce the corrective action portion of the permit, is Section 3013 the proper enforcement vehicle to address corrective action?

Section 3013 allows the Agency to require monitoring, testing, analysis, and reporting, and therefore this section can be used to require such activities to investigate the need for corrective action. However, the Agency cannot compel corrective action under that section. Either section 3008(a) or 7003 would be an appropriate enforcement authority to carry out corrective action. Note that under section 7003, the Region would have to demonstrate that there is imminent and substantial endangerment. In summary, the most effective response is to pursue permit modification, revocation and reissuance, or continuation as discussed above, prior to the time that the HSWA permit expires. Otherwise, EPA's ability to pursue any needed corrective action at the facility is a potentially more complex process.

I hope this answers your questions regarding the Dupont Edgemoor facility. If you have questions, please contact Frank McAlister at 382-2223.

cc: Matt Hale
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RCRA Branch Chiefs, Regions I-X