EC-G-2002-133

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 14, 1981

MEMORANDUM

SUBJECT: Interim Status under Section 3005(e) of RCRA

FROM: Steffen W. Plehn
Deputy Assistant Administrator
for Solid Waste (WH-562)

Alan W. Eckert
Acting Associate General Counsel
Water & Solid Waste Division (A-131)

R. Sarah Compton
Deputy Assistant Administrator
for Water Enforcement and Permits (EN-335)

Douglas M. MacMillan
Acting Deputy Assistant Administrator
for Hazardous Waste Enforcement (EN-335)

TO: Headquarters and Regional RCRA Enforcement, Program, OGC and ORC Personnel

There appears to be some confusion, both at headquarters and in the Regions, over EPA's role in the acquisition of interim status by hazardous waste management facilities. This confusion has resulted in communications to the public which are at odds with positions EPA has taken in litigation and which could conceivably prejudice future enforcement efforts. The purpose of this memorandum is not to establish any new policy in this area, but rather to clarify the law governing EPA's role in the acquisition of interim status so that we do not overstep or undermine that role in our dealings with the public.

As background, it should be noted that we have already sent thousands of postcards to facilities notifying them that we have received their Section 3010 notification forms and Part A permit applications and further notifying them that, on the basis of this information, they appear to initially qualify for interim status. In a short while, we plan to supplement these postcards with a letter setting forth the conditions for operating during interim status, based upon a more comprehensive review of the contents of the facilities' Part A applications. Notwithstanding these systematic attempts to apprise facilities of their eligibility for interim status, we have gotten and will continue to get independent inquiries from owners and operators, citizens, etc.

asking us whether particular facilities have interim status. This memo primarily concerns itself with our response to such independent inquiries.

A. EPA's Role In The Acquisition of Interim Status

When Congress specified in Section 3005 of RCRA that all hazardous waste management facilities must obtain a permit, it recognized that EPA would not be able to issue permits to all hazardous waste management facilities before the Subtitle C program became effective. Accordingly, Congress provided in Section 3005(e) that a facility meeting certain conditions would be treated as having been issued a permit until final administrative action is taken on its permit application. This statutorily conferred temporary authorization to operate -- commonly referred to as "interim status" -- is conditioned on a facility's meeting the following three requirements:

1. The facility must have been in existence on November 19, 1980.

2. The facility must have complied with the Section 3010(a) notification requirements.

3. The facility must have filed an application for a permit.

An essential feature of "interim status" (and the source of most of the confusion within the Agency) is that, unlike a permit, it is not granted or conferred by EPA. Rather, it is conferred directly by statute. Any facility meeting the above three statutory requirements qualifies for interim status. The only exception is where it can be shown that final administrative disposition of an application has not been made because the applicant has failed to provide necessary information. See Section 3005(e).

This is not to say that EPA plays no part whatsoever in the acquisition of interim status by hazardous waste management facilities. Our role has, however, largely been confined to interpreting the above statutory requirements and counseling facilities on whether those requirements have been met. In this respect, we have performed two important functions. First, we have published regulations which clarify the requirements of Section 3005(e) -- i.e., which define what it means to be a facility "in existance" and explain what is required to be included in the permit application. See, 40 CFR §§122.3, 122.22, 122.23(a), 45 Fed. Reg. 33421, 33433-33434 (May 19, 1980) as amended in 45 Fed. Reg. 76630-76636 (November 19, 1980) and 46 Fed. Reg. 2344-2348 (January 9, 1981). Second, as the Agency vested with the administration of the RCRA program, we have been called upon to apprise hazardous waste management facilities what the various prerequisites to interim status are, how they can be met, and (to some extent at least) whether particular facilities have met those prerequisites.

The last function poses the most potential problems. An EPA pronouncement that a facility has met the statutory prerequisites for interim status is in essence a statement of opinion which reflects our decision not to take enforcement action against the facility. Such a pronouncement does not ultimately dispose of the issue of whether the facility has interim status. Nor does it preclude a private citizen from forcing a judicial resolution of the issue under the RCRA citizen suit provision, Section 7002(a)(1). Such a pronouncement might, however, estop us from subsequently pursuing an enforcement action against the facility for operating without interim status, if the pronouncement is not properly qualified. Similarly, such a pronouncement, if not properly phrased, may incorrectly convey the impression that we are granting interim status to the facility.

B. Recommendations

In accordance with the above, we recommend that you observe the following when giving an opinion on whether a facility has interim status:

1. Avoid conveying the impression that EPA grants interim status. Instead, make it clear that interim status is conferred directly by statute upon compliance with the three statutory prerequisites (as construed by our regulations).

2. When providing our opinion, always make it clear that we are providing just that -- an opinion -- and not some finally binding determination of interim status.

3. Remember that the opinion could conceivably limit our enforcement discretion. Consequently, to the extent our opinion is based on the facility's own characterization of the facts, make it clear that this is the case. Also, to the extent the facility's status is not clear but requires some interpretation of our regulations, consult with headquarters and the Regional Counsel's office to ensure that your interpretation is consistent with the Agency's "official" interpretation. Until further notice, the headquarters contact person for all such questions of interpretation is John Skinner, Director, State Programs and Resource Recovery Division, Office of Solid Waste, (FTS) 755-9107. John will automatically coordinate the response to all such questions with the Office of Enforcement and the Office of General Counsel to ensure that the response is in keeping with the thinking of those two offices. To facilitate their job, the Office of Enforcement requests that copies of any written inquiries be forwarded, as a matter of course, to the Legal Director, Office of Hazardous Waste Enforcement (EN-335)(Headquarters).

4. Be sure that a record is kept of the documents, etc. relied upon in rendering our opinion. Although the Agency is presently of the view that interim status opinions are not reviewable, it is conceivable that a court may find differently. Consequently, we should be prepared to produce a record supporting our opinion.

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