

PPC 9528.1986(10)

APPLIED INTERIM STATUS QUALIFICATION REQUIREMENTS TO  
HAZARDOUS WASTE FUEL STORAGE FACILITIES

OFFICE OF GENERAL COUNSEL

NOV 13 1986

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Dear Karen and Dick:

This letter is in response to your request of September 25, 1986 for a written interpretation of the interim status qualification requirements as they apply to hazardous waste fuel (HWF) storage facilities. Specifically, you have asked whether in order to qualify for interim status an HWF storage facility must 1) submit a 3010(a) notification by January 29, 1986 even where the facility does not begin hazardous waste activities until after that date or 2) begin actual storage of hazardous waste fuels by May 29, 1986, the effective date of the HWF regulations. As discussed below, we believe that the answers to both questions is "no".

Under RCRA Section 3005(e)(1), a facility may qualify for interim status if it 1) is in existence on November 19, 1980 or on the effective date of regulatory changes which render the facility subject to the requirement to have a RCRA permit, 2) is in compliance with applicable 3010(a) notification requirements, and 3) submits Part A of the two-part RCRA permit application. Section 3010(a) of RCRA, as amended in 1984, requires the owner or operator of any facility which produces, burns, or markets hazardous waste fuel to file a notification of hazardous waste activity by February 8, 1986. On November 29, 1985, EPA issued final rules regulating hazardous waste fuels. The requirements for HWF storage facilities became effective on May 29, 1986.

Your first question concerns the application of the 3010(a) notification requirement to facilities which begin hazardous waste fuel storage activity after January 29, 1986, which is 60 days after the promulgation of the HWF regulations. The November 29,

1985 HWF rule did not distinguish between the statutory 3010(a) notification requirement and regulatory notice requirements. Nor did the rule explicitly address HWF storage facilities which begin operation after the promulgation of the HWF regulations. Both of these issues require clarification in order to answer your question.

First, the November 29 HWF rule implies that the applicable date for HWF storage notification under the statute is January 29, 1986. This is incorrect. The applicable date for HWF storage notification under 3010 is February 8, 1986, and this date is unaffected by the November 29 rule. The notification requirement under Section 3010(a) of RCRA for HWF facilities is self-implementing. See H.R. Rep. No. 198, 98th Cong., 1st Sess. 40 (1983). Under that provision, all facilities which produce, burn or market hazardous waste fuel must submit a notification of their hazardous waste activity by the date 15 months after the enactment of HSWA, i.e. February 8, 1986. Although the HWF regulations promulgated in November, 1985 contain several notification requirements, those notices are in addition to, not in replacement of, the February 8 notification requirement under Section 3010(a). However, a notification under the rule, by January 29, would satisfy the 3010(a) requirement to notify by February 8.

Second, under Section 3010(a), the February 8 notification requirement is not applicable to any facility for which the Administrator waives this requirement. The November 29, 1985 HWF rule does not require 3010(a) notification from any facility not in existence on that date and was intended to waive the statutory notification requirement for all such facilities.

Because HWF storage facilities not in existence on November 29, 1985 were exempted from the 3010(a) notification under the November 29, 1985 HWF rule, no 3010(a) notification requirement is applicable to facilities which came into existence after November 29, 1985. Thus, to answer your specific question, an HWF storage facility which begins storage of hazardous waste fuel after January 29, 1986 was not required to submit a notification of hazardous waste activity in order to qualify to interim status on May 29, 1986.

Your second question concerns the interpretation of the requirement that a facility be "in existence" on the date of a regulatory change subjecting it to the RCRA permit requirement in order to qualify for interim status. This question was not addressed in the November 29, 1985 HWF rule, and in fact, is not directly addressed in any of the RCRA regulations. The federal RCRA regulations do define "existing facility", but only with respect to facilities "in existence" on November 19, 1980. See 40 CFR 260.10. Moreover, the "existing facility" definition does not specifically address the situation of a facility which

-3-

intends to handle hazardous waste but for which no physical construction is necessary.

However, as we indicated to you in our earlier conversations, we believe that the question of whether storage facilities intending to convert to hazardous waste fuel storage are "in existence" on May 29, 1986 should be resolved by analogy to the "existing facility" regulations. In order to be an "existing facility" for the purposes of qualifying for interim status prior to 1984, a facility had to be "in operation" or under construction on November 19, 1980. A facility is "in operation" if it is actually managing hazardous waste. Thus by analogy, a facility is "in existence" on the effective date of a regulatory change which subjects it to the RCRA permit requirement if it is actually managing hazardous waste on the effective date of the regulations.

A facility could also qualify for interim status as an "existing facility" if it "commenced construction" by November 19, 1980. Under 40 CFR 260.10, "commenced construction" is further defined to mean a facility which has obtained all necessary preconstruction permits and either 1) has begun continuous onsite construction or 2) has entered into construction contracts that cannot be cancelled without substantial loss. Although not directly addressed by the regulation, EPA has interpreted "commenced construction" to also include facilities which have obtained all necessary preconstruction permits and completed construction prior to November 19, 1980. 46 FR 2344 (Jan. 9, 1981). Thus a facility converting to hazardous waste storage would be "in existence" on November 19, 1980 if by that date the owner or operator has obtained any necessary preconstruction permits required for modification of the facility and can objectively demonstrate an intent to handle hazardous waste within a reasonable time. *Id.* We believe that this interpretation is equally applicable to facilities intending to convert to hazardous waste management on the effective date of regulatory changes which would subject it to the permit requirement. Thus a storage facility may be "in existence" for the purposes of qualifying for interim status if by May 29, 1986 it was actually storing hazardous waste fuel, under physical construction as a HWF storage facility, or is converting to hazardous waste fuel storage.

If I can be of further assistance to you on these issues, please do not hesitate to call.

Sincerely,

Original Document signed

Mark A. Greenwood  
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