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United States Government **Department of Energy**

memorandum

DATE: February 4, 1998

REPLY TO
ATTN OF: Office of Environmental Policy and Assistance:Coalgate:6-6075

SUBJECT: Draft Senate (Lott) RCRA Bill – *Environmental Restoration, Improvement, and Cleanup Acceleration Act of 1998*

TO: Ted Pulliam, GC-71

Per your request, EH-41 has reviewed the subject draft bill. In general, we agree with the basic tenets of the draft bill – that a statutory change to clarify the authority of the Environmental Protection Agency (EPA) to establish a distinct hazardous remediation waste regulatory program may be appropriate. However, we are concerned the draft bill, if adopted in its current form, would create confusion among regulators and the regulated community. As a result, the desired results of more efficient and accelerated remediation would potentially seriously curtailed. Details of EH-41's concerns are provided in the attachment.

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Office of Environmental Policy & Assistance

Attachment

OFFICE OF ENVIRONMENTAL POLICY AND ASSISTANCE (EH-41)
COMMENTS ON DRAFT SENATE BILL TO ADOPT THE
ENVIRONMENTAL RESTORATION, IMPROVEMENT, AND CLEANUP ACCELERATION ACT OF 1998
AMENDING THE SOLID WASTE DISPOSAL ACT

General Comments

1. The tenets of the Draft Bill are consistent with the consolidated Departmental response to the proposed EPA rule regarding *Requirements for Management of Hazardous Contaminated Media* (HWIR-Media) [61 FR 18780, April 29, 1996]. In that response, DOE encouraged EPA to adopt a regulatory system for remediation wastes having, among other things, the following attributes [[DOE Comments in response to HWIR-Media proposal (submitted to EPA on August 28, 1996), p. 2]:

   - All remediation wastes, including media, debris and sludges, would be managed under a site-specific remediation management plan (RMP).

   - All remediation wastes managed under a RMP would be exempt from RCRA Subtitle C.

- RMPs would be required to be developed and submitted for approval to responsible regulatory agencies in accordance with an approved program (subject to appropriate public participation requirements) and guidance to be published by EPA.

   However, EH-413 has concerns about certain aspects of the Draft Bill which arise primarily from the Bill=s establishment of a self-contained remediation waste program within the statute.

   EH-413 agrees that the considerable differences between as-generated process hazardous wastes and hazardous remediation wastes warrant distinct regulatory programs, with greater flexibility in the program for remediation wastes in order to encourage, rather than obstruct, remedial efforts. EH-413 believes that a distinct regulatory program for the management of hazardous remediation wastes would improve the efficiency of the site remediation process by eliminating some of the currently applicable hazardous waste requirements that impose unnecessary costs or delays, and that often limit the range of clean-up options [DOE comments in response to HWIR-Media proposal (submitted on August 28, 1996), p. 1].

   Accordantly, EH-413 agrees that statutory changes to clarify the authority of EPA to establish a distinct hazardous remediation waste regulatory program are appropriate. Notwithstanding, EH-413 is concerned that certain provisions of the Draft Bill aimed at creating a self-contained program within the statute for managing hazardous remediation wastes may be unnecessary, and may be inconsistent with other existing statutory and regulatory provisions. As a result, if adopted as proposed, the Draft Bill could create confusion among regulators and the regulated community who must integrate the new program with such existing programs. Details of EH-413=s concerns in this regard are stated in the *specific* comments provided below.

2. EH-413 recognizes that the Draft Bill does not deal directly with the reauthorization of RCRA. However, since issues of remediation waste management have also been raised in the context of RCRA reauthorization, EH-41 suggests that the scope of the Draft Bill could be expanded to include a RCRA reauthorization issue of interest to DOE, even though it is unrelated to remediation waste management. Specifically, EH-41 suggests that the scope of the Draft Bill be expanded to include a revision of the statutory definition of solid waste in RCRA section 1004(27) to read as follows:

> (27) The term Asolid waste@ means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended (86 Stat. 880), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923), or naturally-occurring or accelerator-produced radioactive materials which are isotopes that would be byproduct material if their origin had been a production or utilization facility as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

Specific Comments

Sec. 2(a), amending Section 1004 of the Solid Waste Disposal Act to add definitions of the following terms: Compliance Authority; Nonprogram State; Program State; Recipient State; Remedial Action Plan; and Remediation Waste.

1. **p. 2, lines 1 - 12** -- EH-413 suggests that the proposed statutory definitions for Acompliance authority,@ Anonprogram State,@ and Aprogram State@ be removed. These terms are only useful to support the State authorization process applicable only to remediation waste management which the Draft Bill proposes as new RCRA section 3006(i). As proposed, the new State authorization process for remediation waste is intended to be more streamlined than the existing process for State authorization under RCRA Subtitle C. However, EH-413 believes that the same end could be achieved without creating new terminology.

2. **p. 2, lines 13 - 15** -- EH-413 suggests that the term Arecipient State@ not be defined in the statutory language. There are wastes other than remediation wastes that are often transferred among States. When such transfers are described and discussed, terms such as Aoriginating State@ and Arecipient State@ are often used. The usage of these terms is easily understandable in the context of each discussion. EH-413 sees no need to unnecessarily create a term of art for remediation wastes that could confuse or complicate the discussions related to wastes other than remediation wastes.

3. **p. 2, line 25 - p. 3, line 4** --

a. The proposed definition of Aremediation waste@ appears to be inconsistent with the existing regulatory definition of Aremediation waste@ contained in 40 CFR 260.10. Section 260.10 defines remediation waste as:

> . . . all solid and hazardous wastes, and all media (including groundwater, surface water, soils, and sediments) and debris, which contain listed hazardous wastes or which themselves exhibit a hazardous characteristic, that are managed for the purpose of implementing corrective action requirements under 264.101 and RCRA section 3008(h). For a given facility, remediation wastes may originate only from within the facility boundary, but may include waste managed in implementing RCRA section 3004(v) and 3008(h) for releases beyond the facility boundary.

In comparison, under the definition proposed by the Draft Bill, remediation waste would not include non-hazardous solid wastes, whereas the existing definition includes non-hazardous solid wastes. Also, under the proposed definition, remediation wastes would be limited to materials Agenerated during remediation,@ with the term Aremediation@ not being defined, whereas the existing definition includes materials managed for the purpose of implementing corrective action requirements under 40 CFR 264.101 and RCRA section 3008(h).

EH-413 believes that if the Draft Bill is to contain a new definition of remediation waste, the new definition should be structured with due consideration to the following:

- Whether the new definition should supersede the existing regulatory definition of remediation waste.
- Whether the scope of activities to which the definition applies are clearly delineated (i.e., the activities that constitute Aremediation@ should be delineated).
- Whether non-hazardous solid wastes generated during corrective action should be included within the scope of remediation waste.

b. The proposed definition requires that remediation waste be Athe subject of a remedial action plan.@ Since some investigation-derived wastes could be generated before a remedial action plan has been approved, this definition seems to dictate that many investigation-derived wastes would remain subject to RCRA Subtitle C because of the timing of their generation. EH-413 suggests that consideration be given to how investigation-derived wastes could be incorporated into the scope of remediation wastes that qualify for management outside the RCRA Subtitle C hazardous waste management program.

c. The proposed definition of Aremediation waste@ is difficult to understand because it is presented in two tiers. The first tier requires remediation waste to be a Amaterial,@ which may be an environmental medium containing a solid waste or debris, a solid waste disposed of or released into the environment before any applicable LDR treatment standard was effective, or a solid waste treated to meet all applicable LDR treatment standards. The second tier requires that the Amaterial@ be generated during

remediation, be the subject of a RAP, and be either hazardous waste, or formerly hazardous waste that is still subject to LDR treatment standards for underlying hazardous constituents (i.e., be decharacterized waste). EH-41 suggests that if the Draft Bill retains a new definition of remediation waste, such definition should avoid using two tiers.

Sec. 2(b), amending Section 3001 of the Solid Waste Disposal Act by adding subsection (j), which would: (1) exclude remediation wastes subject to a remedial action plan (RAP) from regulation under RCRA Subtitle C, except as provided by Section 3001(j); (2) allocate administrative authority regarding RAPs between EPA and an authorized State; (3) establish minimum requirements for remediation waste management under an RAP; (4) define remediation waste as hazardous waste, RAPs as hazardous waste permits, and transportation tracking mechanisms as hazardous waste manifests for purposes of enforcement; (5) give EPA, authorized States and citizens the same enforcement authority with respect to remediation waste as they have with respect to hazardous waste; and (6) allow, but does not require, EPA to promulgate implementing regulations.

1. **p. 4, line 9 - p. 5, line 12** --

   a. EH-413 generally supports a clear statement of the division of authority between EPA and States regarding implementation of a remediation waste management program. However, it is not clear how the Draft Bill's establishment of an entirely new State authorization process applicable to remediation waste management, separate from the existing authorization process, would expedite or streamline the State's obtaining required authorization.

   b. There appears to be an inconsistency between the definition of Aprogram State@ and the use of the term Aprogram State@ in proposed section 3001(j)(1)(A)(ii). On page 5, lines 4 through 12 indicate that Aunless the Administrator has transferred compliance authority to a program State under subparagraph (C), the administrator shall exercise compliance authority with respect to a remedial action plan that governs the management of remediation waste in the program State.@ EH-413 notes that according to the definition of Aprogram State,@ unless EPA has transferred compliance authority to a State, the State is not a program State. Therefore, the quoted sentence uses the term Aprogram State@ incorrectly. Further, EH-413 questions whether inclusion of section 3001(j)(1)(A)(ii), which seems to deal with nonprogram States, is appropriate considering that according to its title, section 3001(j)(1)(A) concerns itself with program States. Inconsistencies of this nature might be avoided by not creating definitions for new terms when doing so can be avoided.

   c. EH-413 questions the distinction between the provisions of proposed sections 3001(j)(1)(A)(ii) and 3001(j)(1)(B), which both seem to deal with EPA compliance authority in a nonprogram State. Furthermore, if both sections actually deal with the same situation, as appears to be the case, there appears to be an inconsistency between the two sections. The former section mandates that EPA exercise compliance authority with respect to a remedial action plan if EPA has not transferred compliance authority to the State, while the latter seems to give EPA discretion to exercise compliance authority or not with respect to a remedial action plan in a Anonprogram State,@ which is essentially a State to which compliance authority has not been

transferred. Either a distinction between the two sections should be clearly drawn, or one of the two should be eliminated.

d. To the extent that Acompliance authority@ includes Aenforcement,@ this section has the potential to create confusion considering that a separate section 3001(j)(4) deals exclusively with enforcement issues.

2. **p. 7, lines 6 -7** -- EH-413 notes that the cited lines refer to Aremediation waste that is subject to a remedial action plan.@ Since the Draft Bill proposes to define remediation waste as including only material that is subject to a remedial action plan, the quoted phrase is redundant. However, it illustrates that common usage of the term Aremediation waste@ is broader than the proposed definition, which would make misunderstandings about the scope of the proposed definition more likely to occur.

3. **p. 8, lines 13 - 15** -- It should be recognized that there can be risks to both human health and the environment. Therefore, EH-413 suggests revising the proposed text to read as follows: A(iii) the principal risks to human health and ecological resources, if any, associated with the manner in which the remediation waste will be managed.@

4. **p. 9, line 20 - p. 10, line 2** -- Proposed section 3001(j)(3)(E) states that a remedial action plan must either impose hazardous waste manifesting requirements on transfers of remediation wastes, or Aspecify destinations to which remediation waste will be transported and provide tracking and recording mechanisms for the transport.@ EH-413 suggests that the requirement for specifying destinations for remediation waste in the remedial action plan would unduly restrict the ability of the generator to modify arrangements for off-site remediation waste management facilities, since a prior revision to the remedial action plan would be necessary. Also, it is unclear why the destinations for remediation waste must be specified, since no input by the receiving State is required in making the decision about the type of tracking and recording mechanism that will be required. Under such circumstances, it should be enough to require specification of the type of tracking and recording mechanism to be used.

5. **p. 10, lines 12 - 20** -- Proposed Section 3001(j)(3)(F)(i)(I) requires that the RAP specify that any third party who manages remediation waste be provided written notice of RAP requirements before or at the time when remediation waste is transferred to the third party.
EH-413 suggests that this provision specify the party responsible for providing the written notice (e.g., responsible regulatory agency or generator).

6. **p. 10, line 3 - p. 11, line 6** -- Proposed Section 3001(j)((3)(F)(i)(II)(aa) requires that if a remedial action plan provides for transfer of remediation waste to a facility operated by a third party, the facility must be Apermitted, licensed, registered, or otherwise authorized by the State to manage remediation waste.@ EH-413 believes the State referred to in this requirement should be specified as the State in which the receiving facility is located rather than the State in which the remediation waste is generated, if the transfer is an interstate transfer.

Sec. 2(c), amending section 3008 of the Solid Waste Disposal Act by adding subsection (i), which would prohibit violation of RCRA Subtitle C for the purpose of creating a remediation waste, establish penalties for violating RCRA Subtitle C for the purpose of creating remediation waste, and give the responsible regulatory authority discretion to

designate solid waste released into the environment as remediation waste under specified circumstances.

1. **p. 15, line 24 - p. 17, line 4** -- EH-41 questions whether the proposed section 3008(i) is necessary to discourage improper behavior by generators. The proposed section would prohibit violations of RCRA Subtitle C Afor the purpose of creating a remediation waste eligible for regulation under section 3001(j),@ and establish penalties for such violations that are not significantly different from existing penalties for ordinary violations. As such, the proposed section would create an offense requiring specific intent, which is difficult to prove. Meanwhile, ordinary violations of RCRA subtitle C can be proven relatively easily based solely on actions or failures to act.

2. **p. 16, line 13 - p. 17, line 4** --

    a. The proposed subsection 3008(i)(3)(A) would allow EPA or an authorized State to Adeem a solid waste release into the environment to be a remediation waste if -- (A) remedial activity with respect to the solid waste is undertaken with the use of predominately Federal or State funds.@ EH-41 notes that the term Asolid waste@ here includes both hazardous and non-hazardous solid waste. Also, virtually all remedial activities of solid waste at DOE sites would meet the criterion. An evaluation should be made of whether this result is desirable.

    b. The proposed subsections 3008(i)(3)(B) and (C) would allow EPA or an authorized State to Adeem a solid waste release into the environment to be a remediation waste if -- . . . (B) the remedial activity is undertaken by a person that, under section 107(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607(b)), is not liable with respect to the solid waste; or (C) the remedial activity involves a de minimis release of hazardous waste.@ EH-41 suggests that consideration be given to expanding the discretion provided by one of these two subsections, or to adding an additional circumstance in which discretion could be exercised to deem solid waste to be remediation waste. Specifically, EH-41 suggests that the responsible regulatory agency have discretion to designate as remediation wastes, solid wastes generated or managed in the context of site investigations, treatability studies, or other activities conducted prior to issuance of a CERCLA Record of Decision or other CERCLA decision document. Also, EH-41 supports giving the responsible regulatory agency authority to designate quantities of waste generated for the purpose of treatability studies as remediation waste, if doing so would facilitate the treatability studies.

Sec. 2(e), amending section 3006 of the Solid Waste Disposal Act by adding subsection (i), which establishes the requirements for authorization of State remediation waste management programs.

1. **p. 18, line 23 - p. 29, line 21** -- EH-41 generally supports adoption of statutory changes that would streamline the process whereby States could be authorized to implement a remediation waste management program. As stated in the above comments on Sections 2(a) and 2(b) of the Draft Bill, however, it is not clear what benefit would be realized by adopting a self-contained statutory State authorization program solely for remediation waste management.