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

September 5, 1990

Richard G. Stoll
Freedman, Levy, Kroll & Simonds
Washington Square
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5366

Dear Mr. Stoll:

This is in response to your request for confirmation that certain activities do not require a hazardous waste management permit under the Resource Conservation and Recovery Act ("RCRA"). Specifically, you have asked whether movement of hazardous waste that does not constitute "land disposal" would nonetheless require a hazardous waste disposal permit. It would not.

Section 3005 of RCRA prohibits the operation of a hazardous waste treatment, storage or disposal facility without a permit. EPA has interpreted the term "disposal" for purposes of RCRA Subtitle C regulation to have the same meaning as the term "land disposal" as defined under Section 3004(k). 53 Fed. Reg. 51444 (December 21, 1988) (defining "treatment", "storage" and "disposal" under Subtitle C of RCRA); 55 Fed. Reg. 8759, 8760 (March 8, 1990). Moreover, EPA has interpreted "land disposal" under Section 3004(k) to include movement of hazardous waste into a unit, but not movement within the unit. 55 Fed. Reg. 8759, 8760 (March 8, 1990). As a, result, movement of hazardous waste within a land disposal unit --- for instance, the transfer of waste from one part of a hazardous waste disposal unit to another part of that unit --- would not constitute "disposal" under Section 3005 and thus would not require a permit. See 55 Fed. Reg. 8760 (March 8, 1990) (earthmoving operations within a land disposal unit would not be subject to Subtitle C disposal requirements or permitting).

Note, however, that if such transfer were associated with land treatment activities, the unit may be subject to permit requirements as a hazardous waste treatment facility. In addition, the movement of waste within a unit would generally constitute "disposal" as defined under Section 1004(3) and thus be subject to Section 7003 authorities.

If you have further questions about this issue please feel free to contact me or Carrie Wehling of my staff.

Sincerely,

Lisa K. Friedman
Associate General Counsel
Solid Waste and Emergency
Response Division (LE-132S)

LAW OFFICES
FREEDMAN, LEVY, KROLL & SIMONDS

July 10, 1990

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Dear Lisa:

I am seeking your confirmation that certain types of hazardous waste movement will not trigger the need for a disposal permit under RCRA. If you agree with my analysis and conclusions, I ask that you please send me a letter stating this.

EPA has recently explained in some detail how to determine whether various types of activities constitute "placement" for purposes of triggering land disposal restrictions (LDRs) under RCRA. EPA's interpretations may be found in (1) OSWER Directive 9347.3-05FS, July 1989, also known as "Superfund LDR Guide #5;" (2) the proposed NCP preamble of December 21, 1988, particularly at 53 Fed. Reg. 51444, and (3) the final NCP preamble of March 8, 1990, particularly at 55 Fed. Reg. 8758-60.

In these documents, the concept of "placement" within or outside an "Area of contamination" (AOC) is pivotal. Essentially, EPA has stated that the act of moving hazardous wastes within a single AOC will not be considered "placement" that triggers LDRs (unless such movement also includes placing the waste in a separate unit such as incinerator or tank within the AOC).

While these documents deal with placement in the LDR context, they do not generally address the equally important issue of whether certain activity triggers the need for a permit under RCRA. Based upon my review of the statute, EPA regulations, and various EPA preamble statements, I have the following conclusion: any moving of hazardous waste not placement for purposes of triggering LDRs similarly trigger the need for a RCRA disposal permit. My analysis follows.

First, RCRA §1004(3) defines "disposal" quite broadly, and goes well beyond active "placement" to include passive leaking, leaching, etc. The statutory requirement to obtain a permit,

however, is not triggered merely by any such disposal. Rather RCRA §3005(a) requires only that disposal facilities have permits. See first sentence of §3005(a).

The statute does not define the term "disposal facility." EPA's regulations, however, have defined this term consistently since 1980:

> Disposal facility means a facility or part of a facility at which hazardous waste is intentionally placed into or on any land or water, and at which waste will remain after closure.

40 CFR 260.10 (emphasis added).

Even at this early stage of the analysis, one can detect the basis for my conclusion. "Placement" of waste is a key to the definition of a disposal facility, and a disposal facility is necessary to trigger the requirement for a disposal permit.

Recent EPA discussions provide strong support for this conclusion. In the final "first third" LDR preamble, EPA made the following statement in responding to a comment:

> Thus, only facilities where hazardous waste is intentionally placed into land or water after November 19, 1980 require a RCRA disposal permit.

53 Fed. Reg. 31149, cols. 1-2, August 17, 1988 (emphasis added).

This statement may still beg the question whether EPA defines "placed" (or "placement") in the same way for both LDR-triggering and disposal permit-triggering purposes. In the final NCP preamble of March 8, 1990, however, EPA moves clearly in this direction:

> Under RCRA section 1004(3), the term "disposal" is very broadly defined and includes any "discharge, deposit, injection, dumping, spilling, leaking, or placing" of waste into or any land or water. Thus, "disposal" (in a statutory, rather than the regulatory subtitle C meaning of the term) would include virtually any movement of waste, whether within a unit or across a unit boundary. In fact, the RCRA definition of "disposal" has been interpreted by numerous courts to include passive leaking, whore no active management is involved (see, e.g., U.S. v. Waste Industries. Inc. 734 F.2d.159 (4th Cir. 1984)). However, Congress did not use the term "disposal" as its trigger for the RCRA land disposal restrictions, but instead specifically defined the new, and more narrow, term "land disposal" in section 3004(k). The broader "disposal" language continues to be applicable to RCRA provisions other than those in subtitle C. such as section 7003.

55 Fed. Reg. 8759, emphasis added.

In this passage, EPA makes quite clear that the broad definition of disposal in RCRA §1004(3) not only is inapplicable to LDRs but also is inapplicable throughout the entirety of Subtitle C. Instead, EPA relies on the term "placement" as it appears in RCRA §3004(k) to define disposal for all purposes throughout Subtitle C. 55 Fed. Reg. 8759, col. 2.

If there were any further doubt about the linkage of the concept of "placement" in the LDR context and the concept of "placed" in the permit context, EPA appears to have resolved it in an example in the same preamble. After noting that certain movement of wastes within a unit would not be placement that triggers LDRs, EPA says that the requirement to obtain a RCRA permit would similarly not apply. 55 Fed. Reg. 8759-60.

I submit that all this points to only one logical conclusion: when one appropriately determines that a particular act is not placement for LDR purposes, such act will therefore not trigger the need for a disposal permit under RCRA.

I ask that you please confirm in writing the validity of my conclusion. I look forward to hearing from you.

Very truly yours,

Richard G. Stoll

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