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United States Environmental Protection Agency  
Washington, D.C. 20460  
Office of Solid Waste and Emergency Response

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Ms. Elizabeth M. Powell  
Moore & Van Allen  
One Hannover Square  
Suite 1700  
Post Office Box 26507  
Raleigh, North Carolina

Dear Ms. Powell:

I am writing in answer to your letter of May 4, 1989, in which you raised several questions concerning the applicability of RCRA to certain situations involving remediation of contamination at a facility. The following response addresses the questions which you have posed:

I. "Is 40 CFR §265.1(c)(11)(iii) applicable to remediation at the facility to require compliance with Part 265 and Parts 122-124, where no treatment, storage, or disposal activities are 'continued or initiated' in such remediation?"

Section 265.1 defines the applicability of "interim status" regulations to facilities which treat, store or dispose of hazardous wastes. Section 265.1(c)(11)(i) provides an exemption from this requirement for "...a person engaged in treatment or containment activities during immediate response...to (A) A discharge of hazardous waste; (B) An imminent and substantial threat of a discharge of a hazardous waste; or (C) A discharge of a material which, when discharged, becomes a hazardous waste."

This exemption from certain interim status requirements is intended to allow owner/operators to respond to a hazardous waste spill or discharge in a timely manner, without having to comply with procedural and/or technical requirements that could inhibit such response measures, and which may otherwise be inappropriate for such immediate or emergency-type situations. An essentially

identical provision is found in the Part 264 regulations (Section 264.1(g)(2)).

An exception to this exemption is found in Section 265.1(c)(11)(iii). This is intended to limit the scope of the exception only to those hazardous waste management activities directly associated with an immediate response to a discharge. (See 53 FR 34085, September 2, 1988). Thus, for example, an owner/operator responding to a discharge might excavate soil contaminated with the spilled hazardous waste and store it temporarily in containers prior to the removal of the material off-site. The container storage area would not be subject to technical interim status standards.

However, if treatment or containment activity were to be continued or initiated after the immediate response is complete, the person performing these activities can no longer take advantage of the Section 265.1(c)(11)(i) exemption and must comply with Part 265 requirements governing treatment, storage, or disposal activities.

It should be understood that Section 265.1(c)(11) applies only to situations involving an immediate response to discharges for hazardous wastes. To the extent that such an immediate response action has not occurred and is not occurring at the facility in question, none of the provisions of this subsection would apply.

II. "Is the presence of soil and groundwater contamination at a facility, standing alone, a sufficient basis upon which a state agency can make a finding that disposal of hazardous waste took place at that facility, thereby resulting in a characterization of that facility as a 'disposal facility' subject to RCRA operational and permitting requirements relevant for TSD facilities?"

II. Past releases of hazardous waste which have occurred any time after November 19, 1980 may constitute "disposal" as defined by RCRA Section 1004. Thus, such releases could constitute a violation of RCRA (disposal of hazardous waste without a permit under RCRA 3005 or 3006) which could be actionable under RCRA Section 3008(a). Since the situation you described might involve the disposal of hazardous wastes, and since RCRA Section 3005 requires that a person obtain a Subtitle C permit for the treatment, storage, or disposal of hazardous waste, in some cases

it may be appropriate to require the owner/operator to obtain a permit for the facility in order to impose Part 264 standards for the disposal unit (i.e., a landfill). Since the facility you describe is no longer an operating facility, the State might decide that a post-closure permit would likely be the appropriate permit mechanism when a permit is required.

III. "Does EPA Office of Solid Waste policy require an entity to prepare, submit and receive approval for a Part B permit and/or post closure permit, where the facility is no longer operational, shows no intention to be operational, and where the present property owner has made clear its intention to voluntarily remediate the soil and groundwater contamination at the property to the specifications of the state agency?"

III. As explained above, the requirement to obtain a RCRA permit for a facility, based on the facts you have presented, is within the authority of EPA or a State, if the State has been authorized for RCRA. The decision as to whether and when this authority may be exercised is at the discretion of the implementing agency; in the case of an authorized State, such decisions would be made according to State program policy.

Finally, it is important to keep in mind that the discussion found in this response contains EPA's interpretations of Federal regulations; authorized States may rely upon State interpretations of State regulatory provisions which may differ from those of the EPA.

I hope that this response has adequately addressed your inquiry. Should you require any further assistance, please contact David Fagan at (202) 382-4497.

Sincerely,  
Sylvia K. Lowrance, Director  
Office of Solid Waste