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

June 4, 1990

MEMORANDUM

SUBJECT: Regulatory Interpretation of Questions Raised in Objection to Region V Review of Clean-Closure Equivalency Petition for Steel/Abrasives, Incorporated OHD 091 831 313

FROM: Sylvia Lowrance, Director Office of Solid Waste (OS-300)

TO: David A. Ulrich, Acting Director Waste Management Division (5H-12)

This responds to your memorandum, of February 21, 1990 in which you requested our response to arguments raised by Steel Abrasives, Inc. of Hamilton, Ohio in objection to the Agency's preliminary denial of its equivalency petition (OHD 091 831 313). As you explained in your memorandum, Steel Abrasives closed a surface impoundment, waste pile, and sluiceway in 1985, while the units were subject to interim status standards. Closure was certified by the Ohio Environmental Protection Agency (OEPA). Steel Abrasives recently submitted a petition to demonstrate equivalency with the closure by removal standards of Part 264. After reviewing the facility's equivalency petition, EPA Region V made a preliminary determination that the 198S closure is not equivalent to 40 CFR Part 264 standards. Steel Abrasives submitted a document entitled "Comments and Request for Hearing in Support of Steel Abrasives, Inc. Equivalency Petition" on February 9, 1990. In that document, Steel Abrasives challenged the Agency's authority to revisit clean closures and objected to the way the regulations were applied to its particular case. In your memorandum, you requested our response to several arguments they raised.

In general, we disagree with the arguments that Steel Abrasives made in its February 9, submission and believe that, the

Agency acted within its authority when it issued a preliminary denial of Steel Abrasive's equivalency demonstration. However, given the specific facts of this situation, we believe that the Region has the flexibility to reconsider its preliminary decision to deny Steel Abrasive's equivalency petition, should it wish to do so. We explain the basis for requiring equivalency determinations, and address Steel Abrasive's arguments below.

BACKGROUND

Section 3005(i) of HSWA requires all landfills, surface impoundments, waste piles, and land treatment units that received waste after July 26, 1982 to comply with the Part 264 Subpart F standards (groundwater monitoring and corrective action) that are "applicable" to new permitted units. The Agency has selected post-closure permits as the mechanism for implementing the Subpart F standards at units that close before obtaining operating permits. Thus, to implement the requirement of Section 3005(i), the Agency, in the Second Codification rule (52 FR 45788, December l, 1987) amended section 270.1(c) to require post-closure permits for the newly subject interim status units.

However, the Agency recognized that Part 264 Subpart F standards are not "applicable" to new permitted units if those units close by removal under sections 264.228, 264.258, or 264.280(e). Therefore, since Section 3005(i) subjects interim status regulated units only to Subpart F standards that are "applicable" to new permitted units, Section 3005(i) does not impose Subpart F standards on interim status units that meet the requirements for closure by removal under Part 264.

Prior to March l9, 1987, the Part 265 regulations governing clean closure differed from the requirements of Part 264. The Agency has since modified those Part 265 closure by removal regulations so they are equivalent to those in Part 264 (see the Conforming Changes rule 52 FR 8704, March l9, 1987) (see footnote 1). However, in the Second Codification rule, the Agency clarified that closure by removal under the previous interim status standards, which were not equivalent to the Part 264 requirements, does not provide an exemption from the requirements of Section 3005(i). At the same time, the Agency devised a procedure by which owners/operators that closed under the previous Part 265 standards can demonstrate that the closure also met the standards for closure

by removal under Part 264, and thus avoid post-closure permitting obligations. This equivalency determination procedure is codified at section 270.1(c)(6). The Agency discussed the rationale behind the equivalency determination both in the preamble of the Second Codification rule and in the preamble of the proposed rule (51 FR 10706, March 28, 1986).

RESPONSE TO STEEL ABRASIVE'S ARGUMENTS

l. Challenge to the Agency's Authority to Revisit Closures

In its February 9 submission, Steel Abrasives challenged the Agency's authority to revisit interim status clean closures and require post-closure permits if it determines that the closure does not satisfy the closure by removal standards of 40 CFR Part 264. It argued that (l) OEPA's 1985 acceptance of the closure should stand and EPA has no right to reopen the case; (2) the adequacy of the closure should be judged by the regulations effective at the time of the closure; and, (3) to take further action, EPA must demonstrate that metals remaining in the area pose a threat to human health and the environment.

We disagree that the Agency lacks authority to revisit OEPA's 1985 acceptance of closure and apply the standards of Part 264. As is discussed above, Section 3005(i) of HSWA expanded the universe of facilities to which the standards of Part 264 Subpart F apply, and the Second Codification rule established that this universe includes interim status facilities that closed by removal but did not satisfy the requirements for closure by removal under Part 264. To implement the mandate of Section 3005(i), the Agency established authority within its regulations at 40 CFR 270.1(c)(5-6) to revisit those clean closures and to require post-closure permits when facilities cannot successfully demonstrate equivalency. This authority was properly established by the Agency through notice and comment rulemaking procedures. Thus, if Steel Abrasives closed under the standards of Part 265 that were in effect prior to the Conforming Changes rule, the regulations provide authority for the Agency to revisit its 1985 closure, and it is not necessary for the Agency to demonstrate a specific threat to human health or the environment in order to do so (see footnote 2).

Steel Abrasives also suggested that, even if the Agency has authority to revisit clean closures, it should not exercise that

authority. Steel Abrasives argued that reopening the case and requiring further action from a facility that attempted to clean close would set a bad precedent for EPA and the regulated community. However, we believe that the Agency has the obligation to revisit clean closures and make a case-by-case determination whether the standards of Part 264 have been met. In doing so, the Agency does not seek to discourage clean closures, but to carry out the mandate of Section 3005(i) of HSWA, that is, to subject those facilities that have not met the Part 264 standards for closure by removal, to post-closure permitting requirements and, thereby, to the standards of Part 264 Subpart F.

2. Challenge to the Regulations as they Apply to Steel Abrasives.

In addition to challenging the Agency's authority to revisit clean closures, Steel Abrasives objected to certain procedures followed by the Agency in applying the regulations to it.

First, Steel Abrasives objected that the Agency has no legal right to use internal guidance as regulations. It argued that the Agency must decide whether the closure met the applicable Part 264 requirements, and not rely upon internal policy memoranda or guidance to change the rules.

We agree with Steel Abrasives that the Agency cannot use internal guidance as regulations, but note that the Agency established its authority and procedures for equivalency determinations through notice and comment rulemaking procedures. The Agency can use guidance to help implement regulations that have been properly promulgated. When using this guidance to implement its regulations, the Agency does consider comment on the regulatory interpretations provided by the guidance as well as the application of the guidance in that particular case.

Steel Abrasives next argued that averaging the lead and cadmium levels in the entire closure area, thus leaving hot spots in place is allowable, because of the protective slag covering the area, and because the local groundwater does not appear to have been impacted. Thus, it argues, the closure performance standard has been met.

Steel Abrasives is correct in that it must demonstrate that

its closure meets the specific performance standards for closure by removal under Part 264, or be subject to post-closure permitting requirements. It is also correct in citing groundwater that is free of contamination as an element of demonstrating clean closure. However, it should also demonstrate that the groundwater will remain free of contamination in the future because, to meet the performance standards of Part 264, Steel Abrasives should demonstrate that any hazardous constituent left in the soils will not cause an unacceptable risk to human health and the environment in the future, and will not impact any environmental media in excess of Agency recommended limits or factors (see 52 FR 8704 at 8706). In addition, since no further monitoring or management is required at a clean closed unit, and there are no limitations on future uses of the property, this demonstration should be made assuming direct contact with the soil. In this case, the fact that slag is currently covering the area and, thereby, limiting exposure is not relevant to a demonstration of clean closure because the slag could be removed in the future, and direct contact could occur.

Generally, the owner or operator should remove "hot spots" of contamination (i.e., areas of contamination above Agency limits) in order to demonstrate clean closure. This practice is recommended in the 1987 "Surface Impoundment Clean Closure Guidance Manual." However, this is not a requirement specified per se in regulations and, as is discussed above, the recommendations in, and applicability of, guidance must be assessed in each case. The Region may wish to evaluate the number and size of the "hot spots" remaining in the soil, the degree to which they may exceed established "clean closure" levels, and other site-specific factors in determining whether the performance standard for clean closure has been met for these particular units.

As you know, the Agency is in the process of establishing soil lead levels based on a biokinetic uptake model. Since the model is not yet available, OSW has issued interim guidance on establishing soil lead cleanup levels at RCRA facilities, which provides the Region some flexibility in making this decision (see Memorandum from Sylvia Lowrance to David Ullrich, May 7, 1990). However, as was discussed above, EPA must accept and respond to comment on the guidance and its applicability in individual cases.

Finally, Steel Abrasives objected to EPA's submittal of

preliminary denial and request for information during the public comment period. They claim that by doing so, the Agency unfairly prejudged the issue and biased the public.

We agree with Steel Abrasives that as a general rule, we should wait for the comment period to close before issuing a preliminary decision. However, we do not agree that, in this case, the Agency prejudged the issue. The Agency had before the equivalency petition submitted by Steel Abrasives and, based on that information, made a, preliminary determination. Further, the Agency's final decision will be made after the close of the comment period and should take into account any comments that were submitted during that time.

I hope the above responds to your questions. If you have any further questions, please contact Barbara Foster (FTS 382-4696).

1. It should be noted that the current Part 264 standards for closure by removal are unchanged from the standards that were in place for permitted facilities at the time that Steel Abrasives closed.

2. It should be noted that the opportunity for Steel Abrasives to file a legal challenge to the regulatory provisions promulgated in the Second Codification rule has passed. That rule was promulgated on December l, 1987, and Section 7006 of RCRA, which provides for appeal of regulations, requires that an appeal be filed within 90 days of promulgation. However, the Agency's authority to require equivalency demonstrations was, in fact, challenged (see American Iron and Steel Institute v. US EPA, 886 F.2d 390 (D.C. Cir. 1989) cert. petition pending on other issues). Petitioners in that suit challenged several provisions of the Second Codification rule, including the Agency's authority under Section 3005(i) to impose a retroactive post-closure burden on facilities that lawfully closed under interim status provisions. The court in that case upheld the Agency's authority.