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POTENTIAL LIABILITY OF DISPOSAL FACILITIES WHEN DISPOSING OF
CONTAMINATED DEBRIS

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

October 4, 1993

Mr. Doug MacMillan, Director
National Solid Waste Management Association
Suite 100, 1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036

Dear Mr. MacMillan:

This responds to a question raised in your letter of May 16, 1993, regarding the potential liability of disposal facilities for disposing of contaminated debris that they believe to be within the scope of the May 8, 1993 extension, but in fact is not (e.g., because the generator failed to file the required report, or failed to make a good faith effort to locate treatment capacity). This issue is not unique to the debris extension; it can arise under a variety of RCRA requirements (e.g., testing and recordkeeping) that are to be carried out by the generator. In such cases, it has consistently been EPA's position that the disposal facility remains responsible for ensuring that restricted wastes are not disposed except in full compliance with all applicable treatment standards. See 51 Fed. Reg. 40597 (Nov. 7, 1986). A rule of strict liability applies under RCRA, so that a disposal facility can be liable for improper disposal of untreated waste even if it does so in the good faith belief that the treatment standard does not apply. As noted above, this is no different from the regime under which disposal facilities operate generally as to other RCRA requirements.

Disposal facilities should use their own judgment on how best to minimize their risk of liability in such situations: obvious possibilities include requiring a copy of the national case-by-case report filed by the generator with EPA. In addition, as EPA has previously noted, generators and disposers may enter into indemnification agreements to allocate liability between them in the event that prohibited wastes are land disposed (see 51 Fed.

Reg. 40597). Finally, I note that while good faith efforts to comply are not a defense to liability, they may be considered in the assessment of penalties under EPA's 1990 civil penalty policy.

If you have further questions, please feel free to contact Les Otte at (703) 308-8480 of this office.

Sincerely,
Jeff Denit
Acting Director
Office of Solid Waste

cc: Matthew Straus, WMD; Mike Taimi, WMD; Les Otte, ALDRS;
George Wyeth, OGC; Jim Thompson, OWPE