TWP 96

Charmaine,
my pending file
Bratz

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February 1, 1996

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

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RE: Notice to Comply with RCRA Closure Plan Requirements For Transwestern Pipeline Company

Dear Mr. Virtue:

This letter responds to your letter dated January 22, 1995. As we indicated by letter dated December 21, 1995, the New Mexico Environment Department (NMED) reviewed your legal analysis of October 11, 1995 and determined that closure of Transwestern Pipeline Company's (TPC) surface impoundments in question is required pursuant to the New Mexico Hazardous Waste Act (HWA) and the Resource Conservation and Recovery Act (RCRA). The purpose of this letter is to specifically address some major areas of concern you have raised regarding specific technical and legal analysis for the applicability of RCRA jurisdiction. Further, for the reasons discussed below, we request that TPC reconsider the decision to withdraw its RCRA Part A permit application and closure plan.

In your letters dated October 11, 1995 and January 22, 1996, TPC asserts that the proper regulatory path for cleanup and oversight is through the jurisdiction of the Oil Conservation Division (OCD) because: (1) no "hazardous waste" was disposed at the site or alternatively, the presence of halogenated organic compounds at low concentrations does not give rise to RCRA jurisdiction; (2) information provided to NMED was inaccurate and RCRA closure requirements are "inapplicable" to Natural Gas Compressor Stations and (3) OCD has authority to remediate sufficiently to protect human health and the environment. As discussed below, NMED does not agree with your legal analysis regarding the applicability of HWA or RCRA jurisdiction. The following addresses some major areas of concern regarding this issue:

1. RCRA and HWA jurisdiction is not triggered by review of the levels or presence of hazardous constituents in groundwater. This issue is irrelevant to whether RCRA jurisdiction exists; the presence of such constituents serves to only bolster the conclusion that RCRA corrective action or a closure plan is required. RCRA and the HWA "requires a permit for the 'treatment,' 'storage,' or 'disposal' of 'hazardous waste' as identified or listed in 40 CFR Part 261." 20 NMAC 4.1.900 (40 CFR §270.1(c)). A permit is required for any such waste disposed of after November 19, 1980. Id. The term "disposal" includes the "discharge, deposit ... leaking or placing of any solid or hazardous waste ... into any waters, including groundwaters." 40 CFR §260.10. "Owners and operators of hazardous waste management units must have permits during the active life (including the closure period) of the unit." 40 CFR §270.1. Hazardous waste management units include surface impoundments in which "hazardous waste" is placed. 40 CFR §260.10.

In addition to permitting authority under RCRA, corrective action may be required regardless of the date waste is disposed of for a facility which has a RCRA permit, was required to obtain such permit (but failed to do so) or pursuant to Section 7003 of RCRA where the release of hazardous constituents may present an imminent and substantial endangerment.[1] See e.g. 40 CFR §264.90. Corrective action authority is broader in scope than permitting activities under RCRA and is required as necessary to "protect human health and the environment for all releases for hazardous wastes or constituents from any solid waste management unit at a facility, regardless of the time at which the waste was placed in such unit." See 40 CFR §264.90.

Based upon the facts and data presented to us by TPC, there are several reasons RCRA jurisdiction exists. There is evidence that TPC "disposed" of "hazardous waste" as identified or listed in 40 CFR Part 261 at the site after 1980. This conclusion is based upon objective data provided to NMED staff from TPC as well as information collected during the Preliminary Review (PR) and the Visual Site Inspection (VSI) conducted as part of the RCRA Facility Assessment (RFA). TPC alleges that "there is no information that [commercially pure grade of spent non-halogenated] solvents, or associated wastes, were used stored or disposed of at the Roswell Station." Letter to NMED from TPC dated October 11, 1995. This statement, however, flatly contradicts data supplied by TPC from Daniel B. Stephens & Associates, Inc. as part of the closure plan

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[1]. New Mexico received authorization from EPA for corrective action on January 2, 1996. 61 FR 2450 (January 26, 1996)

that states that "most common solvent used was known by the trade name 'TK-1.' This solvent product contained 100% 1,1,1-TCA. The primary degradation product of 1,1,1-TCA is 1,1-DCA." We are unaware of any legal authority that supports the conclusion that halogenated solvents such as TK-1 do not fall under RCRA as a "hazardous waste" even prior to the adoption of the 1985 solvent rule. See e.g. 50 FR 18378 (April 30, 1985). Further, the date waste was disposed of is irrelevant for corrective action authority. Corrective action authority is not dependent upon the time at which hazardous waste or constituents were disposed of. 40 CFR §264.90.

2. Second, TPC consistently confuses the issue of RCRA jurisdiction with alleged "low concentrations" of halogenated organic compounds at the site. TPC's statement that "the presence of halogenated organic compounds at low concentrations does not rise to RCRA jurisdiction" and represent a "tiny fraction" of the total concentration of all regulated compounds" is legally and technically unsubstantiated. As previously stated, the applicability of RCRA jurisdiction is not dependent upon whether "low concentrations" of such wastes exist. Hazardous substances such as "toluene" fall within RCRA because they contain high levels of toxicity even at low concentrations. See e.g. US v. Northeastern Pharmaceutical & Chemical co., 25 ERC 1385 (8th Cir. 1986). Even the proposed Hazardous Waste Identification Rule (HWIR) would not support TPC under these circumstances. [2] There also appears to be a misunderstanding about the issue of total petroleum hydrocarbons (TPH) and RCRA jurisdiction. RCRA regulates "BTEX" (benzene, toluene, ethylbenzene, and xylenes) constituents as well as other specific constituents that TPC repeatedly refers to as representing "100%" of the regulated compounds at this site. Under the mixture rule, hazardous wastes that are mixed with solid wastes fall under RCRA jurisdiction. (citations omitted). As a technical matter, data supplied to NMED staff from previous sampling investigations, although lacking analysis for complete Appendix IX parameters and inadequate QA/QC in many cases, shows that 1,1,1-TCA and 1,1 DCA to be 3 and 22.4 times the WQCC groundwater standards respectively. Further, several individual constituents detected in the groundwater such as benzene and toluene are 1300 and 20 times the drinking water standard under

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[2]. The proposed HWIR is extremely controversial and has been rejected in numerous states, including the National Association of Attorneys General. Even if the rule was promulgated, it is not binding in New Mexico.

which RCRA regulates. These are not "low concentrations" as asserted by TPC.

3. TPC's legal analysis that RCRA closure requirements are inapplicable to Natural Gas Compressor Stations is unfounded. RCRA jurisdiction is not dependent upon whether the Roswell Station is a "RCRA waste generator." Whether or not the Roswell Station is a RCRA generator or "conditionally exempt small quantity generator" is irrelevant to the issue here. Neither a RCRA waste generator nor a "conditionally exempt small quantity generator" can dispose of hazardous waste on-site without a permit. 40 CFR Part 270 and 40 CFR §262.11. Generators of hazardous waste are required to ship such wastes off-site unless they obtain a disposal permit. Id. NMED is unclear as to meaning of your statements regarding the inapplicability of waste characterization requirements. The fact a facility disposed of hazardous waste without a permit and backfilled the surface impoundments in question would not exempt the facility from subtitle C requirements. [3]

4. In your letter dated January 22, 1996, you indicate that there is "no citation to different standards or explanation as to why clean up required by NMED under the HWA differs from groundwater cleanup addressed by OCD." As a legal and technical matter, RCRA closure requirements under the HWA differ significantly from cleanup required by OCD under the WQCC standards. The primary difference between the two is statutory. A person that disposes of "hazardous waste" is required by law to abide by closure or corrective action requirements set forth under the HWA and RCRA. NMSA 1978, §74-4-10. 20 NMAC 4.1.900. NMED is the agency in New Mexico responsible for assuring that the requirements of the HWA are fulfilled. NMED's authorization from EPA for its Hazardous Waste program mandates this and there is no legal authority to vary from these requirements. As a technical matter, the RCRA closure or corrective action process differs from groundwater cleanups under the WQCC. The major technical differences are as follows: (1) RCRA applies to all environmental media while WQCC applies

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[3]. The hazardous wastes at issue here are not subject to RCRA's Bevill exclusion. "The [Bevill] exclusion does not, however, apply to solid wastes, such as spent solvents ... that are not uniquely associated with these operations. ... [such] wastes are hazardous and must be managed in conformance with Subtitle C of these regulations." 45 FR 76619. Spent solvents are specifically described as an example of a waste "not uniquely associated with exploration, development or production activities." See EPA interpretation of Bevill exclusion, attached hereto.

only to groundwater and water contaminants in the vadose zone; (2) RCRA regulates a larger number of constituents than WQCC; and (3) the standards utilized by RCRA fully encompass WQCC standards as well as federally promulgated standards and risk-based standards (whichever is most protective of human health and the environment). The decision processes are outlined in 20 NMAC 6.2 and 20 NMAC 4.1.

For these reasons, we request that TPC reconsider the decision to withdraw its RCRA permit application and closure plan. NMED staff has spent considerable time reviewing the plan and has discussed these regulatory issues with EPA. NMED determined to approve TPC's plan, with modifications, and was scheduled to provide public notice of the plan this week pursuant to 40 CFR §265.112. Therefore, please let us know as soon as possible, and no later than February 19, 1996 whether you intend to comply with the applicable regulatory requirements for closure. Hopefully, this matter may be resolved expeditiously and without the need for further delay. If you have any questions, do not hesitate to call me at (505) 827-0127.

Sincerely,

SUSAN MCMICHAEL
Assistant General Counsel

Enclosures

cc: Mark Weidler
Ed Kelley
Joe Hulscher
Lou Soldano
Rodger Anderson