

From: John Austin [austin4102000@yahoo.com]
Sent: Monday, February 12, 2007 2:12 PM
To: Salahuddin Qazi (DNREC)
Subject: Comment on Independent Report
 Qazi Salahuddin, Ph.D.
 Program Manager
 DNREC-SIRB,
 391 Lukens Drive
 New Castle, Delaware 19720

Dear Sir:

From reading the Independent Report, I find that a key determination seems to have been left unanswered. Has there been "Active Management" since the K178 hazardous waste listing was effective? If yes, then only removal and treatment is allowed.

http://www.awm.delaware.gov/NR/rdonlyres/B0B689C3-D419-4B32-9C49-165B0B59F099/0/IronRich_IS_FinalReport.PDF

Section 6.4 Regulatory, page 33, concludes:

*Several concerns were expressed during the hearings regarding the consolidation of the IRM pile in the summer of 2002. A question was posed asking if the consolidation of the IRM constitutes IRM being "actively managed," thereby classifying the IRM as hazardous waste. Neither DuPont nor DNREC adequately addressed this issue during the hearings or in subsequent responses and communications. **The term "actively managed," as it relates to the IRM, has not been effectively defined or explained by DNREC. (Emphasis added.)***

This critical step would determine if the disposal in place remedy is legally available. If "active management" has occurred, then the only remedy available is treatment and off-site disposal in a Subtitle C Hazardous Waste facility. This decision would trump all remedy selection and it must be answered fully before proceeding with any other analysis.

The "Final Remediation Investigation/Risk Assessment Report at page 5 states:

*The IM occurred from April to June of 2002. * * **

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*Monthly inspection, conducted as part of the Interim Measure, documented that Spring and Summer precipitation events generated some erosion of the Iron Rich material beyond the limits of the existing silt fence. This condition necessitated **reconsolidation of a finite volume of Iron Rich** and replacement of the perimeter silt fence. This work was conducted between November 10th and December 8th, 2003, and included: a reapplication of the polymer coating, **removal of Iron Rich from the drainage conveyances**, and replacement of the silt fence in the drainage conveyances. The Iron Rich that eroded beyond the footprint of the pile was **placed back onto the pile** prior to coating with polymer and a new reinforced silt fence was installed around the entire perimeter of the pile. (Emphasis added)*

Any active management after May 20, 2002 would make Iron Rich pile material hazardous waste K178. 40 CFR 268.36

Thus, work May 20 through June 2002, and November 10 through December 8, 2003 are when "active management" could have occurred. **DID IT???** To answer, RCRA guidance is of some help.

EPA's RCRA Online contains two policy letters with regard to "Active Management."

<http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/44381a0a9e977bbd8525670f006beeb6!OpenDocument>.

Remediation involving hazardous waste treatment triggers permitting. Whether in-situ stabilization is treatment is a site-specific determination. The regulatory status of the movement of wastes within an area of contamination (AOC) is discussed. A unit (e.g., surface impoundment) inactive prior to the effective date of applicable RCRA rules is not subject to Subtitle C unless the waste is actively managed. A one-time removal of waste is not active management. Waste removed from a unit is subject to all relevant regulations. Inactive units may be solid waste management units (SWMUs) subject to 3004(u), 3008(h), and/ or 7003 corrective action authorities.

<http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/99b317d0b59190a88525670f006bdc7e!OpenDocument>

Hazardous waste removed from disposal units and placed in different land based units during remediation activities must meet land disposal restrictions (LDR) treatment standards for all applicable waste codes. Discussion of active management (SEE ALSO: 264, Subpart S).

EPA's long-standing policy under RCRA subtitle C is that wastes generated in a unit are subject to regulation if actively managed (not just when the sludges are removed from the unit) (see 45 FR 72024; 55 FR 39409; 55 FR 46380). Any treatment, storage, or disposal of wastes (i.e., active management) after the effective date of the rule could subject the unit and wastes to Subtitle C requirements.

RCRA can be draconian at times, but wastes must be either hazardous wastes under regulation or not. Units must be permitted units or not.

Past documents state wastes were reconsolidated, removed from drainage conveyances, and placed back on the pile. The very words used to describe the remediation work imply that active management as has occurred. Waste that had flowed off the pile could have been pushed

back on the pile, but “was placed back on the pile.” Waste was moved from one unit (the conveyances) and placed in another (the pile). Once these wastes were picked up, and disposed of on the pile they were being “actively managed.” The act of placement on the land is “active management.” They could and should have been sent for offsite hazardous waste treatment and disposal. Placing more K178 waste on the larger pile after the effective date makes the whole pile K178 hazardous waste in need of hazardous waste treatment and disposal in a hazardous waste landfill.

Form the available documents, I believe someone made a multi-million dollar error for which RCRA has no “Mulligan.”

We look forward to reading DNREC’s determination with regard to this question.

Thank you,

John Austin

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