

HAZARDOUS WASTE FACILITY  
SITE SAFETY COUNCILCommonwealth of Massachusetts  
100 Cambridge St., Room 1405  
Boston, MA 02202  
Tel: 617-727-6930

June 30, 1994

Paula Fitzsimmons  
Waste Management Division  
U.S. EPA Region 1  
JFK Building  
Boston, MA 02201-2211*New Bedford*  
*17.07*  
*63910*

Dear Ms. Fitzsimmons:

This letter summarizes action taken by the Hazardous Waste Facility Site Safety Council with respect to the applicability of Massachusetts General Law Chapter 21D to the incinerator proposed by the U.S. Environmental Protection Agency for New Bedford. In addition, this letter presents the Council's newly adopted policy with respect to site cleanups conducted under CERCLA and M.G.L. Ch.21E.

On May 20, 1994, the Hazardous Waste Facility Site Safety Council considered and voted on the recommendation of its Applicability Committee. First, the Council voted that Ch.21D is not applicable to the New Bedford Harbor remediation and clean-up activities proposed to date, including the incinerator. In this vote, the Council adopted the following views:

- \* CERCLA preempts any on-site clean-up activity (as defined by CERCLA) from the need to apply for or obtain state permits. Careful legal review of CERCLA and the EPA's regulatory interpretations indicate that the 21D siting process is a permit process preempted by CERCLA.
- \* The Council has interpreted 990 CMR 1.02 (2)(e) and (f) as exempting from the jurisdiction of 21D, CERCLA and 21E remediation and clean-up activities that are excused from obtaining a Chapter 21C license. The Council intends to revise its regulations to clarify these exemptions.

In addition, on May 20, the Council voted on the following related to the process by which substantive standards are identified as "Relevant and Appropriate" under CERCLA remediation activities.

- \* The Council believes that the location criteria in 990 CMR 5.04 (2-8) are substantive standards which CERCLA remediation activities are required to follow if identified by the DEP and determined by the EPA to be "Relevant and Appropriate" to a particular CERCLA clean-up.

The Council is requesting to the DEP that in all future remediation and clean-up activities exempt from state permitting under CERCLA, these location criteria be considered by the DEP as potentially "Relevant and Appropriate" and a careful determination be made as to whether or not they are relevant and appropriate to particular remediation activities (in particular, proposed on-site treatment or disposal facilities).

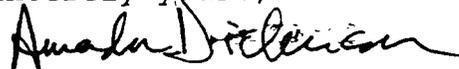
The Council is urging DEP to consider and adhere to the 990 CMR 5.04 location criteria whenever possible in future 21E remediation and clean-up activities exempt from 21C licensing.

- \* With respect to the proposed New Bedford Harbor incinerator, given that the location criteria are substantive standards, they should have been considered initially to be "Relevant and Appropriate". The Council requests that should the Record of Decision be reopened, the location criteria be identified by the DEP and considered by the EPA as "Relevant and Appropriate" state standards. The Council believes that this clean-up remedy involves an on-site treatment/disposal facility similar in technology to a previously proposed off-site commercial facility for which site suitability issues resulted in the termination of the siting process.

As you know, the Council's committee on Applicability has held several meetings to discuss this issue and to develop a recommendation to the Council. The Council conducted its own legal assessment as well as reviewed opinions presented by various interested parties. Summaries of the committee meetings are attached.

Please do not hesitate to contact me if you would like further information about this decision.

Sincerely yours,



Amanda K. Dickerson  
Acting Executive Secretary

attachments

cc:

Gayle Garman, Remedial Project Manager, EPA

TO: HWFSSC

FROM: Applicability Committee

DATE: May 9, 1994

RE: REPORT OF THE APPLICABILITY COMMITTEE REGARDING CERCLA/21E REMEDIATION AND CLEAN-UP ACTIVITIES (INCLUDING THE PROPOSED NEW BEDFORD PCB INCINERATOR), AND CLEAN HARBORS OF NATICK, INC.'S LICENSE RENEWAL

CERCLA/21E REMEDIATION AND CLEAN-UP ACTIVITIES:

After additional discussion with DEP and the EPA regarding the New Bedford Harbor proposed incinerator and the relationship between 21D and 21E/CERCLA, the Committee has clarified a prior decision, passed at the April 13th Applicability Committee meeting, to recommend that:

- The Council determine that under 990 CMR 1.02 (2) (e) and (f), Chapter 21D is not applicable to CERCLA and 21E remediation and clean-up activities that are excused from obtaining a Chapter 21C license (ie activities that are on-site for the purposes of CERCLA or 21E), and that the Council refer to the Legislation/Regulation Committee the matter of recommending specific regulatory changes to clarify 990 CMR 1.02 (2) (e) and (f).
- The Council inform those individuals who sought a Council determination on the applicability of 21D to the New Bedford incinerator, that 21D is not applicable to the New Bedford Harbor remediation and clean-up activities proposed to date, including the incinerator, for the following reasons:
  - CERCLA preempts any on-site clean-up activity (as defined by CERCLA) from the need to apply for or obtain state permits. Careful legal review of CERCLA and the EPA's regulatory interpretations indicate that the 21D siting process is a permit process preempted by CERCLA.
  - The Council has (by approving the Applicability Committee's recommendation detailed above in the first bullet) interpreted that 990 CMR 1.02 (2) (e) and (f) as exempting CERCLA and 21E remediation and clean-up activities from the jurisdiction of 21D and the Council intends to revise its regulations to clarify these exemptions.
- The Council inform DEP and EPA of the above determinations as well as the following:
  - The Council believes that the location criteria in 990 CMR 5.04 (2) through (8) are substantive standards which CERCLA remediation activities are required to follow if identified by the DEP and determined by the EPA to be "Relevant and Appropriate" to a particular CERCLA cleanup. In all future remediation and clean-up activities exempt from state permitting under CERCLA, the Council asks that these location

criteria be considered by the DEP as potentially "Relevant and Appropriate" and a careful determination be made as to whether or not they are relevant and appropriate to particular remediation activities (in particular, proposed on-site treatment or disposal facilities).

- In the case of future 21E remediation and clean-up activities exempt from 21C licensing, the Council urges DEP to take into consideration and adhere to the location criteria in 990 CMR 5.04 (2) through (8) wherever possible. Although there is no requirement in 21E similar to the CERCLA requirement that all clean-up activities meet "Relevant and Appropriate" state standards in addition to "Applicable" state standards, for the sake of consistency and in recognition of the fact that these criteria are designed to protect against unnecessary environmental risks from the construction and operation of commercial hazardous waste treatment, storage and disposal facilities in unsuitable locations, DEP should, where possible, apply these criteria to the proposed construction and operation of facilities to be utilized to store, treat or dispose of on-site remediation or clean-up wastes.

- In regards to the proposed New Bedford Harbor incinerator, the Council believes that this clean-up remedy involves an on-site treatment/disposal facility similar in technology to a proposed off-site commercial facility previously in the 21D siting process for which site suitability proved to be the most crucial factor leading to the failure of the proposal. Given that the location criteria are substantive standards, these criteria should have been considered in the New Bedford incinerator case to be "Relevant and Appropriate" state standards and the Council asks that these criteria be identified by the DEP and considered by the EPA as "Relevant and Appropriate" state standards if and when the Record of Decision is reopened.

#### CLEAN HARBORS OF NATICK, INC.

The Applicability Committee discussed with Clean Harbors of Natick, Inc. (CHNI), the modifications proposed as part of the upgrade of the Natick facility planned in their Part B renewal application currently under consideration by DEP. Based on the Committee's April 13 discussion, CHNI proposed a change in their renewal application resulting in all wastes at the Natick site being counted towards the facility's licensed storage capacity, including wastes held in in-transit vehicles. Given this change, the major applicability issue raised by the proposed facility upgrades appears to have been addressed and the Committee will be considering at a meeting to be held just prior to the Council meeting on May 20, the following recommendation from Gina McCarthy:

- That the Council determines that 21D is not applicable to the modifications proposed in the letter sent to the Council by CHNI dated March 25, 1994 and revised per correspondence dated April 15, 1994, with the understanding that CHNI must receive the appropriate permit modifications from DEP and any

necessary local permits or approvals.

Please refer to the attached memo from Dan Hassenfeld dated 4/29/94 discussing the CHNI modifications. This memo outlines the modifications proposed and the facts considered by the Applicability Committee relative to the CHNI renewal, including most importantly:

- the new waste codes requested for storage and handling have the same characteristics as those already stored at the facility;

- although the physical capacity of the facility is increased with the reconfiguration of the interior, the construction of the loading dock, and the addition of a rolloff container, the increased physical capacity as proposed is part of an effort to upgrade the facility to facilitate the safe receiving, storage, handling, and shipping of wastes at the site; and the modifications as proposed will not result in an increase in the overall licensed hazardous waste storage capacity for the facility; and

- the total amount of waste on the site (including waste in in-transit vehicles, waste in outgoing or incoming vehicles, waste being held temporarily on the loading dock, waste in the rolloff container, and waste in staging and storage areas in the interior of the facility) cannot exceed the current licensed storage capacity of 92,400 gallons.



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4/13/94 Applicability Committee called to order by Jim Gagnon at 10:10AM.

Minutes of 1/6/94 approved with one amendment that it read 990 CMR instead of 910 CMR.

Proposed New Bedford Harbor Incinerator

Gina McCarthy gave a summary report to the Applicability Committee recommending that the committee advise the Council that: 21D is not applicable to the proposed EPA New Bedford incinerator; the EPA be informed that the location standards in 990 CMR are substantive standards which should be considered as potential ARAR's under CERCLA and which should have been identified as ARAR's in the New Bedford Incinerator case. Also Ms. McCarthy recommends that the Leg/Reg Subcommittee be directed to draft language clarifying the regulatory exemptions so that remediation and cleanup activities that are excused from the need to obtain a 21C license would clearly not be subject to 21D and 990 CMR.

Rich Lehan of DEP spoke in opposition to the recommendation stating that DEP did not consider the 21D location criteria as "relevant and appropriate" in the case of the New Bedford Harbor incinerator and DEP still maintains that opinion.

Discussion followed.

Doug Forbes moved that the Committee recommend to the Council that:

- 1) 21D does not apply to the New Bedford Harbor cleanup.
- 2) Inform EPA that the locational criteria in 990 CMR should have been considered as an ARAR in the New Bedford Harbor cleanup, and should be considered in future CERCLA on-site cleanups.
- 3) Decide that 21D not apply to 21E cleanups.
- 4) The Council urge DEP to consider locational criteria in 990 CMR in 21E cleanups.

Nancy Galkowski seconded the motion.

The motion carried three to one, with DEP dissenting.

Clean Harbors of Natick Inc., Part B Renewal

The Committee proceeded to the next item on the agenda, the Clean Harbors of Natick, Inc. (CHNI) Part B Renewal.

Ms. McCarthy informed the Committee that the MOU between the Council and DEP, outlining the process for Council review of permit modification applications for existing facilities, had been signed. The CHNI Part B renewal application was called to the Council's attention under the terms of the MOU.

Paul Ahearn of CHNI discussed with the Committee CHNI's application for renewal of its existing RCRA Part B license currently under review by DEP, specifying the modifications planned to upgrade the facility which were detailed in correspondence to the Council distributed at the meeting.

After much discussion Ms. McCarthy cautioned that the Applicability of MGL Ch.21D to CHNI's proposed "in-transit" truck to truck transfer activities, where the volume of waste carried by "in-transit" vehicles stopping at CHI is not counted towards the facility's licensed hazardous waste storage capacity of 92,400 gallons, was a very difficult question to address and would require much discussion with DEP.

Ms. McCarthy asked Mr. Ahearn if he wanted the Council to decide on the application of 21D to the modifications proposed in the application except the in-transit issue. Mr. Ahearn told her he will discuss it with Steve Posner and get back to the Council.

Meeting adjourned at 12:30 PM.



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MINUTES OF APPLICABILITY COMMITTEE MEETING, JANUARY 6, 1994, held at 10:00 AM, 100 Cambridge St., 17th floor, Boston, MA

Jim Gagnon, Chair of the Applicability committee called the meeting to order at 10:10 AM. The following Council members attended: Jim Gagnon, Nancy Galkowski, Jamie Katz, Steve Dreeszen (DEP), Barbara Kessner-Landau (Econ.Affairs), Jim Baecker (DEM), Doug Forbes (DPS), Mark Siegenthaler (EOCD). Council staff Gina McCarthy, Dan Hassenfeld, Amanda Dickerson, and Nicole Bruno attended. Other DEP reps. were Richard Lehan and Paul Craffey. Members of the public who attended were: Ray Miyares, David Hammond (both from Hands Across the River), and Charlie Lord. Minutes from the 11/22/93 meeting were tabled until the next meeting.

The purpose of this meeting was to review the analysis dated December 29, 1993, entitled Chapter 21D Jurisdiction over New Bedford Harbor Remedial Action, prepared by the Council's legal counsel Dan Hassenfeld. Ms. McCarthy explained that after the day's meeting, there would be time for people to comment, and that the Committee would meet later to develop a recommendation for the full Council.

The representatives from Hands Across the River provided an update on discussions in New Bedford. The mediated group is meeting every other Wednesday, and will address technical issues and alternatives to the incinerator during the rest of January and February.

Mr. Hassenfeld began with a summary of EPA's efforts over this project, and of the Council's past difficulty in resolving questions of jurisdiction over cleanup activities. He stressed that this discussion concerns the proposed incinerator, and not the entire realm of remediation activities being planned.

The thrust of Mr. Hassenfeld's analysis was based on CERCLA's preemption authority, the applicability of 21D to the incineration proposal, and the definition and identification of "Applicable or Relevant and Appropriate Requirements" (ARARs). While the issue of applicability of 21D in the context of several of the 910 CMR regulatory exemptions can be debated (and there are appropriate arguments either way), he believes the issue of CERCLA preemption is of primary importance. CERCLA preempts on-site removal or remediation activities from the need to acquire state permits;

therefore, the first pertinent issue to address is the federal definition of "on-site". Mr. Hassenfeld stated that the federal definition includes the "areal" extent of contamination (and suitable areas in very close proximity) and that the incinerator location would be considered on-site under CERCLA.

The second question to address is whether or not any provisions in CH.21D or its regulations constitute ARARs. ARARs must be substantive requirements- either based on specific health or risks, or performance or design requirements, or location requirements. Of all the requirements in 21D, the Location standards most closely fit the EPA 's interpretation of ARARs. Early EPA/DEP documents pertaining to the New Bedford Harbor cleanup raised the issue of 21D as an ARAR; however, only DEP's location standards in regulations under Ch.21C were listed as ARARs. Also, Mr. Hassenfeld discussed the ability for the EPA to waive provisions it considers ARAR's, and the fact that for various reasons, if our criteria were determined an ARAR, EPA could have taken steps to waive them.

Although a number of questions were raised and discussed during the presentation, the Committee believed it appropriate to accept comments on Dan's analysis until early February, and then set a committee meeting to discuss two or three weeks later.



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Minutes of November 22, 1993 Applicability Meeting.  
Meeting held at 2:00PM, 100 Cambridge St., 17th fl., Conf. Rm. A,  
Boston, MA

Jim Gagnon, Chair of the Applicability committee called meeting to order at 2:00 PM. Members in attendance were as follows: Doug Forbes, DPS; Steve Dreeszen, DEP; Nancy Galkowski, Public Member; Jamie Katz, Public Member; Mark Siegenthaler, EOCD; Dan Hassenfeld, Council's attorney. Other Council members in attendance - Suzanne Condon, DPH; Leo Roy, EOE; Tim Davis, DPU; Connie Ozawa, Public Member; and Jim Baecker, DEM. Staff present: Regina McCarthy, Daniel Hassenfeld, Amanda Dickerson, Nicole Bruno.

Interested parties in attendance were as follows: Claudia Kirk, Concerned Parents of Fairhaven; David Hammond, Hands Across the River; Ray Miyares, legal counsel for Hands Across the River, Neal Balboni, Downwind Coalition, Paula Fitzsimmons, EPA; Gayle Garmon, EPA; Nelson Medieros representing Rep. Tony Cabral, Rep. William Straus; Richard Lehan, DEP; Paul Craffey, DEP; Helen Waldorf, DEP; Madeline Snow, DEP.

Chairman Jim Gagnon explained that the Council had received a letter signed by six Massachusetts legislators requesting a determination on the applicability of 21D to the proposed PCB incinerator in New Bedford. Mr. Gagnon discussed the intent of the Applicability Committee to provide the Committee members with pertinent information from the various participants in attendance to assist the committee in the formulation of a recommendation to the full Council on the applicability of 21D to the proposed incinerator.

Ms. McCarthy noted that handouts were received today from EPA, Hands Across the River, and DEP, copies of which would be mailed to all in attendance. The EPA representatives were asked to provide information on the site history and to highlight the Record of Decision's remediation plan.

Gayle Garmon, EPA's project manager, gave a presentation summarizing the site background and outlined community participation activities conducted as part of the New Bedford remediation. Using overhead projections, she identified the area

of contamination locating the hotspots and proposed incineration site, and answered questions from committee members. Paula Fitzsimmons of EPA briefly addressed the issue of CERCLA preemption and outlined the EPA's letter submitted to the committee.

Jamie Katz, public Member of the SSC, asked the EPA for a more detailed map of the clean up site. He raised the issue of the differences between the regulatory definitions of "site" in Ch. 21D and CERCLA. Discussion followed.

Jim Gagnon summarized the EPA's position that the incinerator location is in very close proximity to the area of contamination and therefore meets the definition of "on site". He also questioned EPA officials about the facilitated forum being established among the interested parties to discuss remediation alternatives at the New Bedford harbor site, including the hot spots.

Representative Bill Straus representing the towns of Fairhaven, Mattapoisett, Marion, Rochester and Lakeville (communities east of the superfund site) addressed the Council. He referred to the initial letter from several legislators in which the applicability of Ch. 21D was raised. He focused the committee's attention on two issues before the Council; the first being the meaning of "on site" within Ch. 21D, and the second being the limitation of federal preemption under CERCLA as it applies to the construction and operation of the incinerator (ie., preemption of the need for local and state permits for on site remediation activities).

Rep. Straus presented to the Council copies of two decisions, the draft and final versions of a stipulation negotiated by the EPA and City of New Bedford as part of a recent EPA lawsuit against the City of New Bedford. Representative Straus called attention in particular to language in the stipulations referring to the location of the proposed incinerator as "in very close" vs. "in close" proximity to the CERCLA site. Discussion followed. Rep. Straus told the committee that he is willing to work with staff and Council to identify some guarantees that 21D might provide to the site and area communities which would otherwise not be offered by the EPA.

Dan Hassenfeld asked Rep. Straus about specific language in Judge Young's decision which appears to identify the proposed incinerator location as part of the CERCLA site. Rep. Straus further explained his interpretation of the decision. Discussion followed.

Ray Miyares representing "Hands Across the River" a citizen's organization that has developed in response to the incinerator proposal, addressed the Council. He explained his six page letter submitted as a handout today. Mr. Miyares commented that "Hands Across the River" does not want to delay clean up of the Acushnet River "Hot Spots" but is concerned with what happens after the material is dredged. Mr. Miyares focused on the question of the applicability of Ch. 21D to action taken after the material is

dredged. Discussion followed.

Richard Lehan of DEP's Office of General Counsel addressed Katz's legal questions and outlined DEP's interpretation of 21D's jurisdiction in CERCLA and 21E cleanups as outlined in his memo presented to the committee. Discussion followed.

Various individuals in attendance addressed the Committee members and presented their concerns with incineration at this location given population density and the proximity to sensitive receptors. Amanda Dickerson summarized the Council's chronology of considering pertinent applicability/jurisdiction issues since 1984 when the New Bedford harbor issue was first raised.

Chairman Gagnon and committee proposed that the next meeting of the Applicability Committee be held during the week of Dec. 22., and that Council attorney Dan Hassenfeld provide a written legal analysis of pertinent legal issues.

Meeting adjourned at 4:30PM.