

New York State Department of Environmental Conservation

Division of Solid and Hazardous Materials, 9th Floor

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Erin M. Crotty
Commissioner

AUG 29 2001

Harold N. Iselin, Esq.
Couch White, LLP
540 Broadway
P.O. Box 22222
Albany, New York 12201-2222

Dear Mr. Iselin:

This responds to your August 14, 2001 letter regarding our August 10, 2001 meeting. We appreciate your efforts to clarify Praxair's concerns about the Department's proposed amendment of 6 NYCRR Part 380 and the remediation of the Praxair site. We believe the meeting was a productive first step toward eliminating incorrect perceptions and focusing on the relevant issues.

In your letter, you set forth your understanding of several points that have been discussed recently. I address each of them here, in the same order as you presented them in your letter.

- We appreciate Praxair's agreement that the rule is not interfering with the Corps' cleanup of the site, and we consider this issue closed.
- You state that the issues raised by the regulation would be mitigated if the Corps attains a cleanup level consistent with the State Health Department's requirements. To clarify, DEC identified the cleanup criteria that would be acceptable to the State (both DEC and DOH) in our February 18, 2000 letter to the Corps. If the remediated site does not meet those concentrations (averaged as specified in that letter), the State Health Department may find it necessary to place restrictions on the use of the site, to protect the health and safety of people who work on and live near the site. This issue is separate from the Department of Environmental Conservation's responsibility to regulate the types of wastes that are accepted for disposal in New York State landfills.

- Your understanding of the effect of the rule on the movement of soil on the site is correct: the proposed amendment only applies to the disposal of this radioactive material. Therefore, a property owner could move contaminated soils as needed for new construction, for example. The express terms are specifically worded to regulate only the disposal of this material [see new §380-1.2(b)]. We pointed this out to Praxair representatives in a meeting on February 13, 2001. It is encouraging to learn that this matter, too, can now be considered closed.

Please note that Section 380-4.1(b) prohibits disposal by land burial unless a variance is obtained. If Praxair sought to permanently dispose of contaminated soils or other materials by burying them on the property, the design, construction, and maintenance of the disposal cell would need to be reviewed and approved by the Department through a variance. We would appreciate the opportunity to assist Praxair in that design and in preparing the request for variance. As an alternative, we would work with Praxair to avoid the need for a variance, by reviewing development plans for the site early in the planning stages.

- We understand Praxair's concerns about the cost of disposing of radioactive waste in facilities designed to accept it. In your letter, you refer to a compromise solution that was proposed by Dr. Dooley in the June 29, 2001 meeting at Praxair. Dr. Dooley referred to the Health Department's threshold concentration of 0.05% by weight for regulating uranium and thorium as source material. He suggested that the wording of the proposed amendment be changed to use that concentration as the threshold above which DEC would regulate the disposal of such material. You correctly noted that there was some discussion of that proposal, but the discussion was interrupted by the fire alarm and could not be completed before the Commissioner and other DEC representatives had to leave. DEC agreed to give some thought to that option; we did not agree to adopting that approach.

After the meeting, DEC and DOH staff reviewed Dr. Dooley's suggestion and, as we said during our meeting with you, we determined that this would not meet the Department's needs to regulate the disposal of this waste. This conclusion is based on several factors. First, Dr. Dooley's suggestion, that Part 380 apply to radioactive material that exceeds the 0.05% source material concentration, is already the case under Part 380. Uranium and thorium exceeding that concentration are regulated source material and are subject to licensing. Disposal of radioactive material subject to licensing has been regulated under Part 380 for years and continues to be (as is the discharge of that material to the air or water of

the State). We made a similar point repeatedly during the discussions of the ROD criteria for the Praxair site: the criteria the Corps selected would have allowed them to leave behind radioactive material that would be subject to licensing and, therefore, regulation under Part 380.

Second, the 0.05% level is not a health-based standard. For total uranium (as would apply at Praxair), it is equivalent to about 340 picocuries per gram (pCi/g), far exceeding the 60 pCi/g that both the State Health Department and the USEPA found to be protective of the public health and safety at Praxair.

Finally, while the Health Department has broad authority to regulate all sources of radiation to protect the public health and safety, the Health Department does not regulate the disposal of solid waste; DOH defers to DEC in matters regarding the disposal of radioactive material in landfills. Therefore, as the regulator of landfills in this State, DEC will set the criteria for disposal of radioactive material in landfills or the environment.

In summary, the 0.05% source material threshold is a separate regulatory matter, and not a substitute for the proposed amendment of Part 380.

This Department is committed to working with Praxair and the Corps to ensure that the site is remediated to a level at which the Department could affirmatively consider a variance request from Praxair, once the Corps has completed its work. When we met with you, we proposed developing a Technical & Administrative Guidance Memorandum (TAGM) on the variance process and the conditions under which a variance could be granted. We are prepared to discuss with you what that would entail, to determine whether it would meet Praxair's concerns.

In general, a request for a variance must demonstrate (1) that compliance with the identified provisions would, on the basis of conditions unique to the landowner's particular situation, tend to impose an unreasonable economic, technological, or safety burden on the landowner or the public; (2) the proposed activity will have no significant adverse impact on the public health and safety and the environment; (3) the potential radiation doses from the disposal will not exceed the radiation dose limits in Part 380 and will be as low as reasonably achievable; and (4) the proposed disposal will be consistent with the provisions of the ECL, and will meet all other provisions of Part 380. The Department would examine all aspects of the disposal, including the way the waste would be placed in the landfill, the total volume of waste, the total amount of radioactive material, comparable waste disposal situations, alternatives, and the impacts to people and the environment under several worst-case scenarios. There would be public notice

Harold N. Iselin, Esq.

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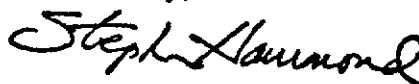
of the variance request and an opportunity for the public comment before the Department made a decision. The landfill, the people living near the landfill, and the affected municipality would be notified of the variance request and invited to comment on it.

We understand the desire to know in advance that a variance would be granted for soils from the Praxair site. However, because variances are based on the particular circumstances and characteristics of the waste load, it is not possible to make such determinations in advance. Furthermore, we believe it would not be to Praxair's advantage, because any generally applicable variance level would have to be a very conservative, low number. We would not recommend that Praxair use such a figure in negotiations with the Corps as it is very unlikely that the Corps would agree to meeting so low a level.

We share Praxair's goal of maximizing the development potential of their site, and we once again offer to work with the Corps and Praxair to achieve that goal. Up to this point, all of our discussions have been speculative – how much residual material will be left on-site? What level would guarantee a variance? We urge Praxair to join us in changing the focus of these discussions to the specifics of Praxair's expansion plans. We have observed that the Corps appears quite responsive to Praxair's priorities for the future use of the site. This month, DEC staff have been on-site with the Corps, confirming the remediation of Building 31, which we understand is being completed to meet Praxair's schedule for moving a contractor into the building this fall. We are confident that frank discussion of Praxair's future development would be positively received by the Corps and that we could all work together to see that the area is remediated to a level that would not impede future development of that portion of the site. Much is already known about the extent of contamination on the site; by focusing on the areas most likely to be used for the expansion, we can identify both RCRA and radiological issues and work to resolve them before construction begins.

You proposed a meeting during the week of September 4. I believe there could be much benefit to a meeting, and I will contact you shortly to discuss a date.

Sincerely,



Stephen Hammond, P.E.

Director

Division of Solid & Hazardous Materials

Enclosure

cc: w/o encl. - G. Litwin, NYSDOH