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Mr. Mark Chalmers
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re: Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Off-Site Rule Unacceptability Final Determination, White Mesa Mill, Air Quality Approval Order DAQE-AN0112050018-11, Groundwater Discharge Permit No. UGW370004, Radioactive Materials License No. UT1900479

Dear Mr. Chalmers:

This letter is in response to Energy Fuels Resources' ("Energy Fuels") request that I reconsider the decision issued by the Resource Conservation and Recovery Act/Oil Pollution Act Enforcement Branch, Region 8 ("Enforcement Branch") on March 3, 2022, finding ongoing violations of Subpart W at the White Mesa Mill dating back to June 2020, and reaffirming its business decision not to allow the facility to accept CERCLA waste until the facility returns to physical compliance ("Determination of Unacceptability").[1]

Procedural Background

On December 2, 20021, the Enforcement Branch issued to Energy Fuels an Initial CERCLA Off-Site Rule Unacceptability Notice based on its determination that conditions existed at the Energy Fuels White Mesa Mill facility that rendered the facility unacceptable for the receipt of off-site wastes generated as a result of removal or remedial activities under CERLA ("Unacceptability Notice").[2] The Unacceptability Notice relied on Utah Department of Environmental Quality's Compliance Advisory, dated October 27, 2021, noting that solids observed above the liquid surface of the Cell 4b impoundment indicated a failure to maintain liquid levels in the non-conventional impoundment in accordance with 40 C.F.R. § 61.252(b). The Unacceptability Notice explained that its determination of unacceptability became effective immediately pursuant to 40 C.F.R. § 300.440(d)(9) and provided Energy Fuels the opportunity to respond and/or

[1] *Administrative Record for the CERCLA Off-Site Rule Unacceptability Determination for the White Mesa Mill*, compiled as of June 2, 2022 ("AR") 63.
[2] AR. 53.

request an informal conference in accordance with 40 C.F.R. § 300.440(d)(4). Energy Fuels submitted responses on December 11 and December 31, 2021, and timely requested an informal conference with the Enforcement Branch, which took place on January 6, 2022.[3]

On March 3, 2022, the Enforcement Branch issued its Final Determination of Unacceptability finding ongoing violations of Subpart W dating back to June 2020, and reaffirming its business decision not to allow the facility to accept CERCLA waste until the facility returns to physical compliance.[4] In that Determination of Unacceptability, however, the Enforcement Branch reversed its "egregious" violation finding under 40 C.F.R. § 300.440(d)(4), but did not stay the effective date. In accordance with 40 C.F.R. § 330.440(d)(7), Energy Fuels timely requested reconsideration of the March 3, 2022 Determination of Unacceptability by the EPA Regional Administrator for Region 8.

In accordance with 40 C.F.R. § 330.440(d)(7), I conducted a conference with the parties on April 14, 2022.[5] Energy Fuels and the Enforcement Branch provided post-conference submissions on April 29, 2022, and Energy Fuels provided a final submission on May 13, 2022.

Record

In reaching this decision, I relied on the following record: materials in the Administrative Record, compiled as of June 2, 2022; statements made by the participants during the reconsideration conference held on April 14, 2022, as reflected in the transcript finalized on April 28, 2022; the post-conference submissions of Energy Fuels and the Enforcement Branch on April 29, 2022, and Energy Fuels on May 13, 2022. I understand these items are included in the Administrative Record for this decision.

Analysis

The Clean Air Act National Emission Standards for Hazardous Air Pollutants ("NESHAP"), 42 U.S.C. § 7412, specifically the National Emission Standards for Radon Emissions From Operating Mill Tailings at 40 C.F.R. Part 61, Subpart W ("Subpart W") require that an owner or operator of a non-conventional impound in operation must ensure that:

> …the liquid level in the impoundment shall be maintained so that solid materials in the impoundment are not visible above the liquid surface…Should inspection reveal that solid materials in the impoundment are visible above the liquid surface, the owner or operator must correct the situation within seven days, or other such time as specified by the Administrator.[6]

The standard for non-conventional impoundments requires a facility owner or operator to ensure

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[3] AR. 54, 56.

[4] AR. 63.

[5] *Transcript, Conference with the Regional Administrator, Energy Fuels' Request for Reconsideration CERCLA OSR Unacceptability Determination – White Mesa Mill*, April 14, 2022 ("Tr").

[6] 40 C.F.R. § 61.252(b).

that solid uranium byproduct or tailings are maintained in a saturated condition.[7] Energy Fuels acknowledges that liquid levels in Cell 4b of the White Mesa Mill, a non-conventional impoundment, were drawn down in 2020 and 2021, exposing the bottom of the impoundment.[8] However, Energy Fuels asserts that it relied, in good faith, on a 2019 letter from EPA's Office of Radiation and Indoor AIR (ORIA) ("2019 Interpretation").[9] Energy Fuels interpreted the ORIA letter to exempt crystals, regardless of their location in the impoundment, from the definition of 'solid material' that must remain covered by liquid.[10] While EPA disputes Energy Fuels' interpretation of the 2019 Interpretation, EPA acknowledged the "imprecise language in the 2019 letter that may have introduced uncertainties regarding the Agency's intent."[11] Accordingly, on March 3, 2022, ORIA issued a "Clarification of its previous 'Regulatory Interpretation of the Term 'Solid Material' in 'National Emission Standards for Radon Emissions from Operating Mill Tailings,' 40 CFR Part 61, Subpart W (40 CFR 61.252(b))" ("clarification letter").[12] In the clarification letter, ORIA provided that:

- All liquid and solid material in Cell 4B constitutes byproduct material.
- Solid byproduct material is not "solid material" subject to §61.252(b) only to the extent that it forms along the steeply sloped sides of the impoundment, i.e., the freeboard area.
- Solid byproduct material that is present on the more extensive bottom of the impoundment is "solid material" subject to §61.252(b) that must be kept covered such that it is not visible above the liquid level.

Energy Fuels acknowledges that, as of March 3, 2022, it had clear guidance regarding what compliance means with respect to these provisions.[13] The question before EPA following the initial conference was whether or not the information provided during the informal conference or written comments was sufficient to show that the facility was operating in physical compliance with respect to the relevant violations cited in the initial notice of unacceptability.[14] Energy Fuels did not present evidence that Cell 4b was in compliance as of the March 3, 2022 Determination of Unacceptability.

The determination of whether a unit is operating in compliance, or has returned to physical compliance, and the acceptability determination, focuses on *present* compliance.[15] Therefore, the question before me is, similarly, whether Energy Fuels is currently in physical compliance with

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[7] 82 Fed. Reg. 5142, 5144 (Jan. 17, 2017).

[8] Tr. 12:29-30.

[9] Tr. 12:20-26.

[10] Tr. 13:20-22.

[11] AR. 64 at 3.

[12] AR. 64.

[13] Tr. 8:5-7, 13-14; 14:5-7.

[14] 40 C.F.R. § 300.440(d)(6).

[15] 58 Fed. Reg. 49200-01, 49207 (Sept. 22, 1993).

the relevant Subpart W requirements. In that regard, Energy Fuels does not dispute that Cell 4b is not currently in compliance, but represents it is working with the state of Utah to submit a plan to bring Cell 4b into physical compliance.[16]

Therefore, I am modifying EPA's March 3, 2022 Determination of Unacceptability as follows:

As of March 3, 2022, the White Mesa Mill was not in compliance with the Subpart W regulations because it failed to maintain liquid levels in Cell 4b in accordance with 40 C.F.R. § 62.252(b).

With respect to the scope of this determination of unacceptability, EPA regulations at 40 C.F.R. § 300.440(b)(1)(i) provide that a "facility will be deemed in compliance for the purpose of this rule if there are *no relevant violations at or affecting the unit or units receiving CERCLA waste*..." The regulations at 40 C.F.R. § 300.440(b)(1)(ii) define "relevant violations" to include "significant deviations from regulations, compliance order provisions, or permit conditions..." It is reasonable to conclude that failure to maintain liquid levels in a unit receiving CERCLA waste is a significant deviation from 40 C.F.R. § 61.252(b) and is, therefore, a relevant violation, which supports a facility-wide determination of unacceptability. However, EPA also has discretion to make a different determination regarding the scope of an unacceptability determination where a receiving unit is out of physical compliance, as described in the preamble to the Final Rule[17] and EPA's OSR training reference.[18] Therefore, in light of the circumstances that led to the determination of unacceptability, and because Energy Fuels is currently taking steps to bring Cell 4b into compliance, I am revising EPA's Determination of Unacceptability to apply to Cell 4b only, once the Enforcement Branch makes a verification of continued acceptability with respect to the other units previously determined to be acceptable.

This decision is effective immediately because more than 60 days have passed since the March 3, 2022 clarification letter and the March 3, 2022 Determination of Unacceptability. Therefore, the delayed effective date provided for in 40 C.F.R. § 300.440(5) to allow a facility to demonstrate compliance is moot, because Cell 4b remains out of physical compliance at this time.

KATHLEEN BECKER

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Date: 2022.07.18 14:25:08 -06'00'

KC Becker
Regional Administrator

cc: Michael Zody
Suzanne Bohan
Kenneth C Schefski

[16] Tr. 14:5-7.

[17] 58 Fed. Reg. 49200-01, 49208 (Sept. 22, 1993).

[18] AR. 3 at 27, 42-43, 50.