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OFFICE OF THE STATE COMPTROLLER

July 3, 2003

Ms. Erin M. Crotty
Commissioner
Department of Environmental Conservation
625 Broadway
Albany, New York 12233-7010

Re: Report 2002-F-35

Dear Ms. Crotty:

Pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law, we have reviewed the actions taken by officials of the Department of Environmental Conservation as of February 5, 2003 to implement the recommendations contained in our audit report *Selected Operating Practices Related to the Remediation of Inactive Hazardous Waste Disposal Sites* (Report 99-S-33) issued on February 7, 2001. That audit examined the status of the inactive hazardous waste disposal sites that had been or are on the State's Inactive Hazardous Waste Disposal Site Registry, whether sites are used after they have been remediated, and if the deed-restriction institutional control is properly used.

Background

The Department of Environment Conservation's (Department) Division of Environmental Remediation manages the Inactive Hazardous Waste Disposal Site Remedial Program (Program) [also known as the State Superfund Program]. The Program's mission is to conduct or oversee the investigation and remediation of sites that pose a significant threat to public health or the environment due to contamination by consequential amounts of hazardous wastes. The State Superfund Program was started in 1979 to identify and characterize suspected inactive hazardous waste disposal sites. Responsible parties, the Federal government and New York State have made financial commitments of approximately \$5.16 billion to the State Superfund Program as of March 31, 2002. Responsible parties had spent or had committed to spend an estimated \$3.24 billion (63 percent), the Federal government contributed \$632 million (12 percent), and the State committed \$1.29 billion (25 percent). The State's share includes 1986 Environmental Quality Bond Act (EQBA) funds, as well as other State funds contributed prior to and after the passage of the 1986 EQBA.

The EQBA provided \$1.1 billion for State-funded remedial activities at State Superfund sites. Funds from the 1986 EQBA were fully committed during the State fiscal year ended March 31,

2001. As of March 31, 2001, approximately 800 sites were either cleaned up or had all remedial activities fully funded. However, the State also identified approximately 800 other sites that require or may require remediation.

The Governor has submitted legislation that, among other provisions, would continue financing of the remedial programs. The proposal recommends financing remedial programs on an annual pay-as-you-go basis with 50 percent of the funding provided by the State's General Fund and 50 percent from existing and new special revenue sources provided by business and industry. It would pool all existing and proposed industry revenues into a new dedicated fund called the Remedial Program Transfer Fund (RPTF). Each State fiscal year, the General Fund would contribute an amount equal to the projected revenues to be deposited or transferred into the RPTF. All remedial programs would then be paid from the RPTF. This proposal, however, had not been approved at the time of our review.

Summary Conclusions

In our prior audit, we found that the Department needs to develop additional performance measures to assess the efficiency and effectiveness of its Program efforts. Also, State regulations indicate that the Program's goal is to restore a site to "pre-disposal conditions, to the extent feasible and authorized by law." However, we found that the Department generally did not evaluate what remediation efforts are necessary to bring sites to pre-disposal conditions. When a site is evaluated, Department officials select a remedial action method that they determine will protect the public health and environment. Also, the Department's annual report to the Governor and Legislature does not indicate if the contamination remaining on individual sites exceeded the minimum standards to protect the public health and environment. We also found that the Department needs to develop a database for all sites that require deed restrictions and to periodically ensure that the deed restrictions ordered were appropriately filed and recorded.

In our follow-up review, we found that the Department has made some progress in implementing the recommendations contained in our audit report, but more work is needed. The Department has several measurements that evaluate performance to some extent, but it needs more, such as those to establish performance standards to assess the efficiency of remediation efforts. The follow-up review found no evidence that the Department's current protocols and processes address clean-up to pre-disposal conditions. This standard is clearly stated in the Department's regulations as the primary goal of site remediation; yet it remains unanswered by the Department's current clean-up protocols. However, the failure to recognize the standard does not take away from its relevance. The Department's remedial investigation/feasibility study phases includes studies of soil and water conditions near the contaminated sites to establish the boundaries of the contaminated sites. This information can give the Department an approximation of likely conditions of the site prior to contamination. However, the Department does not present pre-disposal conditions as a clean-up option when developing remediation alternatives. Further, the Department's annual report to the Governor and Legislature does not indicate whether remediated sites were cleaned to pre-disposal conditions or Department of Health and environmental standards, or whether the sites contained residual contamination. While the Department has made progress in developing a database to track remediated projects that require institutional controls, including deed restrictions, the database is incomplete because it does not include all of the sites that have institutional controls.

The Department has established a system to verify that deed restrictions are filed with a County Clerk when sites are reclassified, but the new system depends on landlords self-reporting that the required deed restrictions have been properly recorded.

Summary of Status of Prior Audit Recommendations

Of the nine prior audit recommendations, Department officials have partially implemented four recommendations, have not implemented four recommendations, and one recommendation is not applicable.

Recommendation 1

Develop additional performance measures that can be used to determine whether the Department's resources (financial and human) are being used in an effective and efficient manner that supports the Program's mission (and legal obligation).

Status - Partially Implemented

Agency Action - The Department reports numerous statistics that show how effectively the Program is working, such as the annual number of started and completed Remedial Investigation/Feasibility Studies, Remedial Design Projects, and Remedial Action Projects. In addition, for each project the Department establishes estimated completion dates for each phase. However, the Department has not developed any additional performance measures to evaluate its efficiency. For example, the Department has not developed standards to determine how long it should take to complete each project phase depending on the type of site contaminated. Department officials state that each inactive hazardous waste site is unique; therefore, it is not appropriate to apply generic standards to each project phase.

Recommendation 2

Continue the remediation process for the sites classified as 2 and 2a.

Status - Partially Implemented

Agency Action - The Department tries to have the party who is responsible for the site contamination pay for the remediation. Responsible parties have paid more than half of the overall remediation costs. When responsible parties either cannot be found, or cannot pay the cost, the Department uses State Superfund monies. It allocates funds to each phase of each project. As of March 31, 2001, all State funding was fully committed and no additional State funding sources were available. The Department is financing remediation efforts to the extent that such funding is available. As a result, when the work is completed on one funded project phase, but there are additional phases to complete, the remediation efforts for the project are placed on hold until the funding is available. Also, the Department cannot begin remediation efforts on newly identified inactive hazardous waste sites unless there are available funds to do so. Accordingly, Department officials state they have implemented this

recommendation because they do everything they can to remediate sites classified as 2 and 2a with the funding that is available.

Recommendation 3

Develop a database to accumulate information and report on whether inactive hazardous waste disposal sites were cleaned to pre-disposal conditions, whether they were cleaned to Department health and environmental standards, or whether remediated sites contain residual contamination above Department standards.

Status - Not Implemented

Agency Action - The Department's State Registry is one of its databases of inactive hazardous waste sites. The Department sends the State Registry to the Governor, the Legislature, and local government officials. Department officials state that they clearly report the success of remediation efforts on the State Registry and this database is appropriate and sufficient. However, these database reports are in summary form and do not provide the type of information called for in our recommendation. Fully remediated sites that are protective to public health and the environment are removed (delisted) from the State Registry, while other sites that may have residual contamination are classified as either Class 4 sites (inactive hazardous waste sites that have completed remedial actions but require continued monitoring) or Class 5 sites (inactive hazardous wastes sites that have completed remedial actions and do not need continued monitoring). Class 4 and Class 5 sites are defined as having completed the remedial action phase, but there is residual contamination at these sites. The Department does not highlight the extent of the problems in the reports. Department officials maintain that the legislation sets up what should be included in this report.

The Department is also supposed to prepare an Annual Report (the State's Remedial Plan) for the Governor and the Legislature for each State fiscal year (ended March 31st) by the following July 1st. This report shows the status of the Inactive Hazardous Waste Remediation Program along with selected program statistics. As of February 5, 2003, the Department had not published the Annual Report for the State fiscal year ended March 31, 2002. The Annual Report is more than seven months late. Therefore, the information is not disseminated timely to the required oversight bodies.

Recommendation 4

Implement the process to identify pre-disposal conditions at inactive hazardous waste disposal sites so this cleanup option can be considered.

Status - Not Implemented

Agency Action - The Department disagreed with this recommendation because the remedial investigation/feasibility study phases include studies of soil and water conditions near the contaminated sites to establish the boundaries of the contaminated sites. This information

can give the Department an approximation of site conditions prior to contamination. However, the Department's protocols have not changed to specifically identify pre-disposal conditions, which is the goal of the program for specific sites as stated in the regulations.

Recommendation 5

Document the decision-making process of selecting a remediation option other than restoring the site to pre-disposal conditions.

Status - Not Implemented

Agency Action - Program regulations state that the goal of the Program for a specific site "is to restore that site to pre-disposal conditions, to the extent feasible and authorized by law." When this alternative is not selected, the project records should indicate why. While the Department generally recognizes full removal of inactive hazardous wastes as an option, we found that it has not changed its procedures to specifically consider pre-disposal conditions as an option.

Recommendation 6

Recommendation deleted because it is no longer applicable based on information received in response to the draft report.

Status - Not Applicable

Recommendation 7

Disclose in the Annual Report to the Legislature all sites where the remedial action taken did not meet the Department's standards.

Status - Not Implemented

Agency Action - Section 27-1305 of the New York State Environmental Conservation Law requires that the Department maintain a list of inactive hazardous waste disposal sites in New York State and prepare an Annual Report and submit it to the Governor and the Legislature. However, this report does not specifically indicate whether sites were cleaned to pre-disposal conditions, Department of Health and environmental standards, or whether the remediated sites contained residual contamination above Department standards.

Recommendation 8

Develop and maintain a database identifying all sites that require a deed restriction.

Status - Partially Implemented

Agency Action – The Department’s Bureau of Hazardous Site Control developed a database to track institutional controls when inactive hazardous waste disposal sites are reclassified. Department officials told us that they also reviewed project records for sites reclassified prior to 2001 to identify and note in the database the sites that required institutional controls. However, they admitted that they have not yet identified all of the sites from prior years that require institutional controls.

Recommendation 9

Periodically review cases where deed restrictions were ordered to ensure that the property deed restrictions actually were recorded.

Status - Partially Implemented

Agency Action - Under the Department's revised policy, if a deed restriction is required, a responsible party must furnish documentation to show the deed was filed and recorded at the appropriate County Clerk's office before a site can be reclassified. However, for some projects, the Department relies on notarized certifications from landowners that deed restrictions are filed in property records held by local government officials. To strengthen procedures, the Department should ask the landowner to cite the actual book and page where the deed restriction is recorded. Adding this information would expedite Department and public identification of appropriate deed restrictions.

Major contributors to this report were Gerald Tysiak, Roger C. Mazula and Kenneth Ring.

We would appreciate your response to this report within 30 days, indicating any actions planned or taken to address any unresolved matters discussed in this report. We also thank the management and staff of the Department of Environmental Conservation for the courtesies and cooperation extended to our auditors during this review.

Very truly yours,

Carmen Maldonado
Audit Director

cc: Deidre A. Taylor
Henry Hamilton