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MEMORANDUM

SUBJECT: Regulatory Interpretation With Respect to Leaks,
Spills, and Illegal Discharges of Listed Wastes
to Surface Waters

FROM: Marcia E. Williams, Director
Office of Solid Waste

TO: David Stringham, Chief
Solid Waste Branch, 5HS-13
Region V

This is in response to your memoranda, dated August 8 and December 24, 1985, in which you request clarification of the mixture rule as it applies to leaks, spills, and illegal discharges of listed wastes to surface waters, resulting in contamination of the sediment. First, let me apologize for taking so long in getting back to you. I hope this delay has not caused you any problems.

In your memoranda, you indicate that the Corps of Engineers in carrying out their responsibilities to maintain the navigability of Astabula Harbor found that the bottom sediments of the harbor were severely contaminated; subsequent investigation suggested that the source of the contaminants is primarily from Fields Brook, a tributary to the harbor. Upon further investigation, it appears that some of the contamination may have occurred as a result of spills or leaks from treatment, storage, and disposal units. Therefore, you surmise by application of the mixture rule, that the contaminated sediments would be hazardous under RCRA and subject to the appropriate management standards. You believe such a reading of the rules was never intended, but rather the contaminated sediments should only be considered hazardous if they exhibit one or more the characteristics of hazardous waste. Unless such an interpretation is taken, you believe that all sediments contained in the industrialized harbors on the Great Lakes (a total of 109) should be managed as listed wastes.

The regulation of contaminated materials depends in large part upon the regulations being applied and upon the source of the contamination. As written, the mixture rule would not cause the sediments in the harbors on the Great Lakes (nor in any other harbors or rivers) to be considered hazardous. More specifically, the mixture rule states that any mixture of a hazardous waste with a solid waste causes the entire mixture to be hazardous. Therefore, in order for the mixture rule to be triggered, wastes must be mixed or somehow combined together. In the example cited in your letter, however, wastes are not being mixed (i.e., we would not normally consider sediments in rivers as wastes). Rather, a waste is being disposed of with a non-waste material. Therefore, the mixture rule is not causing these sediments to be hazardous. However, application of the mixture rule is not dispositive of the issue of whether the mixture of a hazardous waste and another substance is regulated. A part from the mixture rule, the mixture of a hazardous waste and a non-waste material is still subject to Subtitle C control. For example, ground water contaminated with a hazardous waste is currently subject to the appropriate requirements in 40 CFR Parts 264 and 265. In addition, if listed hazardous wastes are being discharged into surface waters, this could constitute disposal requiring regulatory control under Subtitle C of RCRA. The major question to answer is whether the discharge resulted from illegal discharges or from point source discharges subject to regulation under the Clean Water Act.

As you are aware, 40 CFR 261.4(a)(2) specifically exempts industrial wastewater discharges that are point source discharges subject to regulation under Section 402 of the Clean Water Act (CWA), as amended. (This authority covers the addition of any pollutant to water of the United States from any discernible, confined, and discrete conveyance, except discharges of dredged and fill material regulated under Section 404.) The point of the wastewater exclusion is to avoid potentially duplicative regulation of point source discharges under RCRA and CWA. Thus, once wastewater flows from an NPDES discharge point into waters of the United States, that wastewater is exempt from RCRA regulation.^{1/}

1/ This is true even if the discharge could be regulated under §402, but is not. A point source discharge without an NPDES permit would be a violation of the CWA, and should be subject to an enforcement action under the Act.

Therefore, it is important to know the source of the contamination. If, for example, there is evidence to demonstrate that hazardous wastes have been dumped into the surface water in a manner that does not trigger Section 402 of the CWA, this constitutes disposal under RCRA and would be subject to the appropriate regulatory controls (If these hazardous wastes were illegally disposed of, enforcement action should also be undertaken.) If this occurs, that sediment which is contaminated by these discharges would be subject to regulation. On the other hand, if the source of the pollutants is from a point source discharge, then you should assume that hazardous wastes have not been discharged into surface waters. Under this situation, these sediments would be regulated under Subtitle C of RCRA only when they are dredged from the surface waters and only if they exhibit one or more of the hazardous wastes characteristics. Thus, I cannot agree with your suggestion that contaminated sediment should not be categorized as listed wastes, no matter the source of contamination. Such an interpretation could invite abuse by persons who illegally dispose of hazardous wastes.

Please feel free to contact Matthew A. Straus at 8-475-8551 if you have any questions.