

9441.1989(30)

United States Environmental Protection Agency  
Washington, D.C. 20460  
Office of Solid Waste and Emergency Response

June 19, 1989

Mr. Thomas C. Jorling  
Commissioner  
Department of Environmental  
Conservation  
State of New York  
Albany, New York 12233-1010

Dear Mr. Jorling:

I am writing in response to your letter of May 5, 1989, in which you ask numerous questions concerning the regulatory status, under the Resource Conservation and Recovery Act (RCRA), of environmental media (ground water, soil, and sediment) contaminated with RCRA-listed hazardous waste.

As you point out in your letter, it is correct that the Agency's "contained-in" interpretation is that contaminated environmental media must be managed as if they were hazardous wastes until they no longer contain the listed waste, or are delisted. This leads to the critical question of when an environmental medium contaminated by listed hazardous waste ceases to be a listed hazardous waste. In your letter, you discuss three possible answers (based on previous EPA positions and documents) which you believe address this question, and request the Agency to clarify its interpretation. Each of these is discussed below.

The first possible answer you cite would be that the contaminated media would be a hazardous waste unless and until it is delisted, based on the "mixture" and "derived-from" rules. As you correctly state in your letter, a waste that meets a listing description due to the application of either of these rules remains a listed hazardous waste until it is delisted. However, these two rules do not pertain to contaminated environmental media. Under our regulations, contaminated media are not considered solid wastes in the sense of being abandoned, recycled, or inherently waste-like as

those terms are defined in the regulations. Therefore, contaminated environmental media cannot be considered a hazardous waste via the "mixture" rule (i.e., to have a hazardous waste mixture, a hazardous waste must be mixed with a solid waste per 40 CFR 261.3(a)(2)(iv)). Similarly, the "derived-from" rule does not apply to contaminated media. Our basis for stating that contaminated environmental media must be managed as hazardous wastes is that they "contain" listed hazardous waste. These environmental media must be managed as hazardous waste because, and only as long as, they "contain" a listed hazardous waste, (i.e., until decontaminated).

The second possibility you mention is that environmental media contaminated with a RCRA listed waste no longer have to be managed as a hazardous waste if the hazardous constituents are completely removed by treatment. This is consistent with the Agency's "contained-in" interpretation and represents the Agency's current policy.

The third possibility you discuss comes from Sylvia Lowrance's January 24, 1989, memorandum that you cited in your letter. This memorandum indicates that OSW has not issued any definitive guidance as to when, or at what levels, environmental media contaminated with listed hazardous waste are no longer considered to contain that hazardous waste. It also states that until such definitive guidance is issued, the Regions may determine these levels on a case-specific basis. Where this determination involves an authorized State, such as New York, our policy is that the State may also make such a determination.

Related to such a determination, you ask whether a risk assessment approach that addressed the public health and environmental impacts of hazardous constituents remaining in treatment residuals would be acceptable. This approach would be acceptable for contaminated media, but would not be acceptable for "derived-from" wastes under our current rules. Additionally, consistent with the statute, you could substitute more stringent standards or criteria for contaminated environmental media than those recommended by the Federal EPA if you determined it to be appropriate.

The Agency is currently involved in a rulemaking effort directed at setting de minimis levels for hazardous constituents

below which eligible listed wastes, treatment residuals from those wastes, and environmental media contaminated with those listed wastes would no longer have to be managed as hazardous wastes. The approach being contemplated in the De Minimis program would be similar to that used in the proposed RCRA Clean Closure Guidance in terms of the exposure scenario (direct ingestion), the management scenario (not in a waste management unit), and the levels (primarily health-based).

Your final question related to whether the "remove and decontaminate" procedure set forth in the March 19, 1987 Federal Register preamble to the conforming regulations on closing surface impoundments applies when making complete removal determinations for soil. These procedures do apply when one chooses to clean close a hazardous waste surface impoundment by removing the waste. The preamble language states that the Agency interprets the term "remove" and "decontaminate" to mean removal of all wastes, liners, and/or leachate (including ground water) that pose a substantial present or potential threat to human health or the environment (52 FR 8796). Further discussion of these requirements is provided in a clarification notice published on March 28, 1988, (53 FR 1144) and in OSWER Policy Directive # 9476.00-18 on demonstrating equivalence of Part 265 clean closure with Part 264 requirements (copy enclosed).

I hope that this response will be helpful to you in establishing and implementing New York's hazardous waste policies on related issues. Should you have additional questions, please contact Bob Dellinger, Chief of the Waste Characterization Branch at (202) 475-8551.

Sincerely yours,  
Jonathan Z. Cannon  
Acting Assistant Administrator