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July 30, 1987

MEMORANDUM

SUBJECT: State Program Advisory #2 -
RCRA Authorization to Regulate Mixed Wastes

FROM: Bruce Weddle, Director
Permits and State Programs Division
Office of Solid Waste

TO: RCRA Branch Chiefs
Regions I-X

The purpose of State Program Advisory (SPA) #2 is fourfold. One, it delineates timeframes by which States must obtain mixed waste authorization. Two, it provides a synopsis of the information needed to demonstrate equivalence with the Federal program in order to obtain mixed waste authorization. Three, it presents information about the availability of interim status for handlers of mixed waste. And four, the SPA presents the Agency's position on inconsistencies as defined by Section 1006 of RCRA.

BACKGROUND

On July 3, 1986, EPA published a notice in the Federal Register (see Attachment 1) announcing that in order to obtain and maintain authorization to administer and enforce a RCRA Subtitle C hazardous waste program, States must apply for authorization to regulate the hazardous components of mixed waste as hazardous waste. Mixes waste is defined as waste that satisfies the definition of radioactive waste subject to the Atomic Energy Act (AEA) and contains hazardous waste that either (1) is listed as hazardous waste in Subpart D of 40 CFR Part 261 or (2) causes the waste to exhibit any of the hazardous waste characteristics identified in Subpart C of 40 CFR Part 261. The hazardous component of mixed waste is regulated by RCRA. Conversely, the radioactive component of mixed waste is regulated by either the Nuclear Regulatory Commission (NRC) or the Department of Energy (DOE).

In addition, DOE issued an interpretative rule on May 1, 1987 to clarify the definition of "byproduct material" as it applied to actual DOE-owned wastes. The final notice stipulated "that only the actual radionuclides in DOE waste streams will be considered byproduct material." Thus, a hazardous waste will always be subject to RCRA regulations even if it is contained in a mixture that includes radionuclides subject to the AEA. Clarification of the implications of the byproduct rule was previously transmitted to the Regions (see Attachment 2).

MIXED WASTE AUTHORIZATION DEADLINES

States which received final authorization prior to publication of the July 3, 1986 PR notice must revise their programs by July 1, 1988 (or July 1, 1989 if a State statutory amendment is required) to regulate the hazardous components of mixed waste. This schedule is established in the "Cluster Rule" (51 FR 33712). Extensions to these dates may be approved by the Regional Administrator (see 40 CFR 271.21(e)(3)).

States initially applying for final authorization after July 3, 1987 must include mixed waste authority in their application for final authorization (see 40 CFR 271.3(f)). In addition, no State can receive HSWA authorization for corrective action (§3004(u)) unless the State can demonstrate that its definition of solid waste does not exclude the hazardous components of mixed waste. This is because the State must be able to apply its corrective action authorities at mixed waste units.

PROGRAM REVISION REQUIREMENTS

Applying for mixed waste authorization is a simple, straight-forward process. The application package should include an Attorney General's Statement, the applicable statutes and rules, and a Program Description.

1. Attorney General Statement

   The Attorney General will need to certify in the statement that the State has the necessary authority to regulate the hazardous components of mixed waste as hazardous waste. Copies of the cited statute(s) and rules should be included in the State's application. See Item I.G., Identification and Listing" in the Model AG Statement in Chapter 3.3 of the State Consolidated RCRA Authorization Manual (SCRAM) for additional guidance.

2. Program Description

The Program Description should address how the RCRA portion of the mixed waste program will be implemented and enforced, and describe available resources and costs (see 40 CFR §261.6). The State must also demonstrate that staff has necessary health physics and other radiological training and has appropriate security clearances, if needed, or that the State agency has access to such people.

If an agency other than the authorized State agency is implementing the RCRA portion of the mixed waste program, then the application should include a Memorandum of Understanding (MOU) between the agency and the authorized hazardous waste agency describing the roles and responsibilities of each (see 40 CFR §271.6(b)).

Lastly, the Program Description should include a brief description of the types and an estimate of the number of mixed waste activities to be regulated by the State (see 40 CFR §271.6(g) and (h)). Chapter 3.2 Program Description, in the SCRAM provides additional guidance.

INTERIM STATUS

In authorized states, mixed waste handlers are not subject to RCRA regulation until the State's program is revised and approved by EPA to include this authority. In the interim, however, any applicable State law applies. Treatment, storage and disposal facilities "in existence" on the date of the State's authorization to regulate mixed waste may qualify for interim status under Section 3005(e)(1)(A)(ii) (providing interim status for newly regulated facilities), if they submit Part A permit application within 6 months of that date. In addition, any such facilities which are land disposal facilities will be subject to loss of interim status, under Section 3005(e)(3), unless these facilities submit their Part B permit application and two required certifications (i.e., groundwater monitoring and financial assurance) within twelve months of the effective date of the State's authorization (i.e., within twelve months of the date facilities are first subject to regulation under RCRA). Note: Federal facilities that handle mixed waste are not required to demonstrate financial assurance.

status qualification requirements under Section 3005(e) as they apply to affected facilities that have not notified in accordance with Section 3010(a) or submitted Part A and/or B permit applications. We anticipate issuing the FR notice early this Fall.

INCONSISTENCIES

Section 1006 of RCRA precludes any solid or hazardous waste regulation by EPA or a State that is "inconsistent" with the requirements of the AEA. If an inconsistency is identified, the inconsistent RCRA requirement would be inapplicable. for example, an inconsistency might occur where compliance with a specific RCRA requirement would violate national security interests. In such instances, the AEA would take precedence and the RCRA requirements would be waived.

The EPA and the Nuclear Regulatory Commission conducted a comparison of existing regulations for hazardous waste management and low-level radioactive waste management under 40 CFR Parts 260-266,268 and 270 and 10 CFR Part 61, respectively, to ascertain the extent of potential inconsistencies. None were identified as a result of that effort. The comparison did indicate that there were differences in regulatory stringency, however. Thus, in issuing permits or otherwise implementing its mixed waste program, States must make every effort to avoid inconsistencies.

If you have any questions please contact Jim Michael, Chief, Implementation Section, State Programs Branch (WH-563B) at FTS/(202) 382-2231 or Betty Shackleford, Mixed Waste Project Manager, State Programs Branch at FTS/(202) 475-9656.

Attachments

cc: Elaine Stanley, OWPE
Federal Facilities Coordinators
Regions I - X
Chris Crundler, Federal Facilities Task Force