



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

September 7, 2005

MEMORANDUM

SUBJECT: Determining Equivalency of State RCRA Hazardous Waste Programs

FROM: Matthew Hale, Director
Office of Solid Waste

A handwritten signature in blue ink, appearing to read "Matthew Hale", is written over the printed name and title of the sender.

TO: RCRA Directors, Regions I - X

In recent years, EPA has made several improvements to the RCRA state authorization process. As part of these efforts, EPA formed a workgroup in April 2003, consisting of staff and management from several states, EPA regional offices, the Office of General Counsel, the Office of Enforcement and Compliance Assurance, the Office of Solid Waste, and the Office of Policy, Economics, and Innovation. The workgroup's purpose was to examine potential improvements to the process by which EPA determines whether state hazardous waste programs are equivalent to the federal program. In particular, the workgroup examined whether, and if so how, the authorization process can be flexible enough to consider state approaches that aim to be innovative while differing from EPA's regulations, without compromising environmental protection or violating statutory or regulatory requirements. EPA believes that fostering the implementation of innovative state regulatory approaches will be an important component in the efforts to meet long term national environmental goals, such as the 2020 Vision for corrective action, in an era of constrained resources.

In response to recommendations from the workgroup, this memorandum reaffirms EPA's commitment to employing appropriate flexibility in the review of state programs. The issue of equivalency between the federal and state programs has been the subject of much discussion throughout the history of the RCRA program (see, for example, 61 FR 18822, April 29, 1996). However, the issue of how much a state program can differ from the federal program and still be considered equivalent has not been fully addressed. We believe the discussion of RCRA and the examples provided below will further inform the authorization review and decision making process.

Whether particular state regulations are equivalent to the federal regulations will of course continue to be determined by each EPA Regional Office on a case-by-case basis. These determinations will continue to be made through notice-and-comment or direct-final rulemaking.

Only the conclusion of such a rulemaking would constitute final agency action. However, this memorandum is intended to provide more detailed guidance on some recurring issues, so as to empower the regions to employ flexible approaches without the need for extensive debates and processes.¹ The Office of Enforcement and Compliance Assurance has reviewed this guidance and supports the approaches and procedures in this memorandum.

To ensure that decisions regarding the authorization of state programs under RCRA that involve regulatory flexibility are made in a consistent manner resulting in environmentally equivalent programs, regions should consult with headquarters (HQ) offices in the circumstances specified in Section III of this memorandum, below.

I. Statutory Background

RCRA §3006 provides EPA with the authority to authorize state hazardous waste programs. Once authorized, the state program operates “in lieu of” the federal program (EPA, however, retains enforcement authority even after a state has been authorized). In order to authorize a state program, EPA must find that the state program is “equivalent to” and “consistent with” the federal program and that the state provides for adequate enforcement.² However, the term “equivalent” is not defined in the RCRA statute, nor has it been defined in the federal regulations. Under RCRA §3009 no state may impose any requirement “less stringent” than those in the EPA regulations promulgated under Subtitle C. As with the term “equivalent,” “stringent” is not defined in the RCRA statute or regulations.

Given that Congress chose not to expressly define the key relevant terms in RCRA §3006 and §3009, and that in the context of those sections those terms are subject to more than one interpretation, we believe that the flexible approach described herein is not precluded under the statute. Rather than focusing on whether state and federal requirements match up verbatim, this approach instead focuses on whether the state requirements provide equal environmental results as the federal counterparts.³ Based on the Agency’s experience with RCRA program

¹The flexible approaches discussed in this memorandum may be used by the regions as a part of the standard authorization process. Greater flexibility may be possible in particular cases through such mechanisms as the ECOS Agreement, including through making special federal regulation changes (see 63 FR 24784, May 5, 1998). Authorized states also have the benefit of additional kinds of flexibility in implementing their programs, including being able to add new categories of universal wastes, and being able to grant certain variances and make delisting decisions.

²This memorandum addresses equivalency. Consistency is addressed in 40 CFR §271.4. Adequate enforcement authority is addressed in 40CFR §271.16.

³Note that EPA has determined that some areas of the RCRA program do require a higher degree of similarity. For example, in order to meet the separate statutory requirement of “consistency,” state manifest systems must be very similar to the federal system. See 40 CFR §271.11, 45 FR at 33391. Also, there are minimum RCRA statutory requirements that state programs, as well as the federal program, must meet essentially on a requirement-by-requirement basis. For example, RCRA section 3004(u) specifies corrective action provisions that must be in all

authorization, and based on the workgroup's analysis, we also believe that the flexible approach outlined in this memorandum may help enable EPA and the states to meet long term national environmental goals.

Under this approach, a state requirement may achieve the same effect as a federal requirement but in a different manner. Further, a state need not always track every requirement in the federal regulations with a corresponding state requirement, provided that the related sets of state requirements are equal in effect to the related set of federal requirements with respect to every federal requirement. While a line-by-line review remains necessary to assure there is equal effect, there can be different structure or method for achieving environmental effects.

A further exploration of this approach and its limits, with examples drawn from existing practice, is provided in Section II of this memorandum. Procedures for reviewing state proposals that differ from the federal regulations in structure or approaches are provided in Section III of this memorandum.⁴

II. Equivalency Determinations Based on Environmental Effect

Differences in Approach

As discussed above, among other things, state programs must provide equal protection of health and the environment as the federal regulations. Regions thus have the ability to authorize state regulations that are as stringent as the federal regulations on a detailed requirement-by-requirement (or provision by provision) basis in terms of protecting health and the environment, even though they differ from the federal regulations in the method or approach by which they achieve the intended environmental and human health effect. In this situation, state regulations would have requirements that correspond to each federal requirement, but could be different in approach. As specified in Section III of this memorandum, consultation with HQ will sometimes be appropriate when this kind of flexibility is being employed.

state, as well as federal permits, as necessary to protect human health and the environment, and RCRA section 7004(b) specifies permit public comment procedures that must be followed when issuing state, as well as federal permits. Finally, close tracking of the federal regulations is required with respect to certain basic requirements regarding scope of the program, e.g., state programs "must control all the hazardous wastes controlled under 40 CFR part 261", "must cover all generators covered by 40 CFR part 262," and "must require permits for owners and operators of all hazardous waste management facilities required to obtain a permit under 40 CFR part 270." See 40 CFR §§ 271.9(a), 271.10(a) and 271.13(a). As EPA has noted in the past, in order to be equivalent to the federal program, a state must regulate the same universe of handlers (i.e., generators, transporters and facilities) as EPA.

⁴Of course, states may continue to adopt EPA regulations verbatim or incorporate EPA regulations by reference. Regions should make efforts to consult with states early in the authorization process to determine which method is most appropriate in a given situation.

Examples of this kind of flexibility include the following:

Region I has authorized a Vermont regulation (70 FR 36350, June 23, 2005) that exempts from hazardous waste requirements non-terne plated used oil filters that have been cold drained and crushed (using a mechanical, pneumatic or hydraulic device which effectively removes the oil), in addition to exempting filters that have been hot drained as provided by the federal exemption in 40 CFR 261.4(b)(13). (Review of the federal preamble and consultation with OSW established that EPA had not rejected or addressed an exemption for cold drained/crushed oil filters when adopting its own used oil filter exemption. Rather, it simply had addressed hot draining and not reached a conclusion regarding the cold draining of oil filters). Vermont submitted data showing that the cold draining plus crushing will remove as much if not more oil as would the hot draining allowed by the federal regulations, which makes the Vermont regulation equivalent to the federal regulation. Vermont's proposal was carefully reviewed by Region I, which concurred that the studies show that the proposed cold draining plus crushing will get out at least as much oil as the hot draining (without crushing) allowed in the EPA regulations.

Vermont's used oil filter proposal is a good example of when flexibility is appropriate. In the absence of allowing cold draining by junkyards (which typically cannot do hot draining), they will continue to simply dispose of the used oil filters as solid waste (absent the unusual situation where the used oil is characteristically hazardous). The Vermont exemption will allow junkyards, as well as other persons, to drain the used oil and recycle it under the used oil program and then to recycle the filters as scrap metal. The result is more protective of the environment than requiring that states identically track the federal regulation. However, Vermont's used oil filter proposal also demonstrates the need for careful review of state proposals. Before approving Vermont's proposal, Region I confirmed with EPA HQ that the EPA had not rejected the proposed Vermont approach (during the federal rulemaking).

Region VI agreed with Oklahoma to pilot an innovative approach to address the operations of a hazardous waste recycler serving multiple customers. Under this approach, the recycler - who provides customers with parts washing units containing solvents, and periodically removes the solvents for treatment/reclamation at permitted facilities - would assume all generator responsibilities at its customers' sites and would manifest the used solvent to its permitted facilities. Under EPA's "continued use" interpretation, the customers would not have been considered to be hazardous waste generators and the material would not have required a manifest when transported to the treatment facility, because the solvents were being used by the recycler to rinse drums before reclamation. The pilot will demonstrate that this approach is more stringent than what EPA's interpretation of the regulations would allow. (Oklahoma is now implementing the program as a pilot through an enforcement agreement with the company. Region VI did not approve this pilot through the authorization process.

Region IX authorized a California regulation (57 FR 32726, July 23, 1992) that requires enhanced groundwater monitoring by TSDFs in the same circumstances as the federal regulations, but based on a different State rationale. Under 40 CFR §264.98(g)(4), a "compliance monitoring program" must be developed by a TSDF whenever there is statistically significant evidence of a release from a regulated unit, in order to determine whether there is a violation of the groundwater protection standards. Under the California regulation, any statistically significant evidence of contamination already constitutes a violation of groundwater protection standards, which results in the TSDF being required to conduct an "evaluation monitoring program," in order to determine how to address the violation. There is thus the same level of monitoring under the California program as there would be under the federal program, even though the State does not have something called a "compliance monitoring program."

There is particular flexibility for states to pursue innovative approaches to implementing the corrective action program, because the federal requirements for permitted facilities in 40 CFR. §264.101 are not extensive, and because EPA explicitly encourages state approaches which result in faster environmentally protective cleanups.

Regions may also authorize state regulations that track the federal regulations on a requirement-by-requirement basis even if the state regulations include language that either clarifies the federal regulations or adopts EPA interpretations of federal regulations.⁵ For example, states can adopt EPA's interpretation that generators may conduct certain kinds of treatment within accumulation containers and tanks. See 51 FR 10168 (March 24, 1986).

Of course, a region must analyze any different state approach on a case-by-case basis and determine that it provides equivalent, if not greater, protection to human health and the environment as the federal approach. State regulations that are less stringent than the corresponding federal regulations in environmental and human health effects cannot be authorized, even if the state regulations address the same environmental concerns as the federal regulations.

Regions should consider whether the alternative regulatory approach proposed by the state was considered and rejected during the federal rulemaking process. For example, a state may be proposing alternative technology that, upon initial review, appears to achieve the same environmental and human health effect and does not give rise to other authorization concerns. However, it may be possible that the specific technology was reviewed and ultimately rejected by EPA. Regions should not authorize state approaches that were specifically rejected by the EPA when adopting a regulation, unless advances in technology or scientific understanding have made the original basis of the rejection obsolete. This, of course, will require in-depth analysis of the

⁵ The regional office should check that the interpretation of the federal regulation being adopted by a state is a currently valid national interpretation. EPA considers such state regulations to be "as stringent" as the federal regulations rather than being more stringent, since only clarifications are being made.

federal rulemaking effort that is the subject of the state proposal. Regions should request the assistance of headquarters when needed to conduct these analyses.

Compensating Requirements

Another way in which flexibility may be employed is to compare federal and state regulations more broadly than just on a requirement-by-requirement basis. It may be possible for a state to show that its regulations are equal in effect to all of the corresponding federal requirements, even though a requirement in a state regulation initially appears to be less stringent than a corresponding requirement in the federal regulations (when viewed in isolation.) The state may achieve the same environmental and human health effect as the federal regulations through compensating language in another related requirement. It also may be possible for a state not to have a counterpart to every line in the federal regulations, if the state has combined requirements. Likewise, approval of a state regulation will not automatically be dismissed simply because it adopts an interpretation regarding a regulatory requirement which is different from the EPA's interpretation. Rather, such differences will require a careful assessment of the regulations to determine whether the state regulation is at least as protective as each of the federal requirements that it replaces. As specified in Section III of this memorandum, consultation with EPA HQ will be appropriate when this kind of flexibility is being employed. Ultimately, in each case a state must demonstrate, and the region must find, that the state requirements are equal in effect to each federal requirement.

Examples of state regulations that differ from the federal regulations respecting the same matter, but nevertheless create a set of related state requirements that are equal in effect to every federal requirement respecting the same matter include the following:

Region I authorized a Vermont regulation (64 FR 51702, September 24, 1999) that allows two kinds of "satellite" accumulation. Vermont allows generators to choose between either approach - that is, the federally specified "satellite" accumulation at the point of generation, or to accumulate up to 55 gallons per waste stream at a central storage location. Wastes stored in either kind of accumulation area are subject to all of the standard satellite accumulation provisions and do not trigger the 90 or 180 day clocks. The only difference is that "satellite" waste stored in a central storage area is not stored at or near the point of generation under the control of the operator of the process generating the waste. As compensating features, the Vermont regulations instead require that "satellite" wastes stored in a central storage area be inspected on a daily basis, and be transported there only by trained personnel who place the wastes only in containers labeled to receive each particular waste. This daily inspection requirement achieves the same environmental and human health effect (ensuring close monitoring) as the federal requirement that wastes be stored under the control of the operator of the process generating the waste.

Region I also authorized the Massachusetts satellite accumulation regulation (63 FR 52180, September 30, 1998). It allows more than one 55 gallon container to be stored in

a single satellite area (if each container is for a different waste stream), whereas the federal satellite accumulation regulation allows only a total of 55 gallons to be stored in a single satellite area. Massachusetts achieves the same effect as this requirement by being more stringent in imposing inspection, aisle spacing and separation of incompatible waste requirements in satellite areas. The federal rule restricts satellite areas to 55 gallons because it has no protections against storing multiple containers close together or storing incompatible waste containers together. The federal rule instead allows multiple satellite areas, even in the same room. Massachusetts allows a generator to, in effect, place the multiple satellite areas in the same room into one part of the room, but then subjects the containers to aisle spacing requirements and separation of incompatible wastes requirements, such as would typically be achieved federally by separating the satellite areas. It does not impact who would be a generator or a storage facility. It does not impact accumulation times. Instead of a number of satellite areas in a room each with one drum, the rule allows one carefully protected satellite area in a room with the same number of drums in it. There is a difference in regulatory structure and in detailed requirements, but no difference in environmental and human health effect.

The Vermont and Massachusetts satellite rules show how a regulation that does not match each requirement of the corresponding federal regulations can be equal to each requirement in effect.

Restrictions on Flexibility

Because RCRA §3009 requires a comparison of state and federal requirements “respecting the same matter,” comparisons between unrelated requirements cannot be made. For example, EPA could not find that a state may reduce requirements on owners and operators of TSD facilities for general inspection (40 CFR §264.15) but compensate by having stricter requirements for personnel training (40 CFR §264.16). Inspection and training presumably have different “effects” and a less stringent detailed requirement in one of the two sets of requirements could not be compensated for by additional features in the other set of requirements. Thus, to be consistent with the phrase “respecting the same matter” in RCRA §3009, comparisons would be limited to related requirements. It is ultimately up to each region to determine whether a state’s requirements and a given federal requirement “respecting the same matter” are equal in effect. EPA regions should make these decisions on a case by case basis.⁶

There also will continue to be situations when it will be appropriate for the regions to not authorize state regulations that differ from the federal regulations only within a related area and only in seemingly minor ways. State regulations should not be authorized if they contain even a minor difference that creates or increases an environmental or health risk or creates a legal or

⁶Differences regarding the requirements for TSDF permitting are restricted by the Note following 40 CFR §271.14. However, this Note applies only to the TSDF permitting requirements. Also, even with respect to the TSDF requirements, some differences in approach can be allowed as discussed above at pages 3-6 of this memorandum.

enforceability problem. For example, a region could decline to authorize an alternative state approach based solely on lack of enforceability of the alternative approach.

Examples of state proposals for flexibility that have not been approved include the following:

Region I advised a state that it would not authorize a state regulation which proposed to substitute the federal secondary containment requirement for indoor tank storage by large quantity generators with an "impervious surface" requirement, even though the proposed regulation was part of state regulations which generally are more stringent than the federal requirements with respect to underground tank storage and outdoor tank storage. Region I determined that allowing less stringency regarding indoor tank storage would create an increased environmental risk of uncontrolled release events.

Region IX advised a state that it would not authorize state regulations which differed from the federal financial assurance regulations by (i) not providing for a Notary Public signature and seal for a trust agreement, (ii) not requiring a certifying letter from the Chief Financial Officer in the case of liability coverage, and (iii) not including a requirement that the Certificate of Insurance form be consistent with the state regulations at the time that the form was signed. These differences would have created legal problems which could have made it difficult to obtain adequate funds if problems occurred.

III. Procedures for Reviewing State Proposals

We recommend that regions coordinate with states which wish to seek the kinds of flexibility envisioned in this memorandum as follows. First, states should continue to submit checklists comparing their state regulations to the federal regulations on a requirement-by-requirement basis. It is important to distinguish between requirement-by-requirement (or provision by provision) tracking (which, as explained above, is not always required) and requirement-by-requirement review (which will continue to be necessary). A requirement-by-requirement review is necessary to ensure regional reviewers understand both the similarities and the differences between the state and federal regulations, in order to then be able to make a determination about whether the state regulations are at least as stringent as the federal regulations when looked at more broadly. A requirement-by-requirement review also will enable regional reviewers to identify those circumstances where even a minor departure from the federal regulations creates a significant environmental or legal problem.

To facilitate this review, regions should also request an identification by the state of where and how the state regulations differ in approach and an explanation from the state regarding why the state regulations that differ in approach should be considered equivalent to and at least as stringent as the federal regulations (i.e. equal in effect). Identifying differences in approach that still match each federal requirement with a corresponding state requirement can be done by simply noting this on the regulatory checklist. When compensating features are used to meet a requirement, however, the state should discuss these in an attachment to the checklist,

including identifying the federal requirement for which there is no exactly matching state requirement and identifying the compensating state requirement or requirements. The state should also identify any special issues affecting the regulations under review (e.g. enforcement issues, unresolved regulatory interpretations, etc.) We recommend that states and regions work together as early as possible during the development of state regulations, preferably before a state promulgates its regulations, to raise issues that might arise in the subsequent federal authorization process.

Regions and states should consider both the advantages and disadvantages of employing flexibility in determining equivalency. On the one hand, a more flexible approach may likely increase the state and federal resources needed for preparing and reviewing authorization applications because of the analysis needed to compare differing state and federal requirements. Moreover, ensuring that state programs are comparable to one another can simplify compliance and enhance enforcement, and should be considered. Therefore, EPA encourages states to not unnecessarily depart from closely tracking the federal regulations. Many states and regions have had success in adopting and authorizing state regulations which incorporate the federal regulations by reference or which track the federal regulations verbatim or with just a few more stringent state changes.⁷ On the other hand, the EPA also wants to encourage alternative state approaches that can result in better environmental protection, sometimes at less cost. EPA thus believes that additional flexibility should be available for those states and regions that wish to adopt and authorize more tailored approaches to RCRA requirements in appropriate cases.

Regions should review any state proposals, including seeking any necessary modifications or further documentation (e.g., Attorney's General Statement interpretations). Based on this review, each region should: (1) decide that the state proposal is acceptable and does not need to undergo HQ review, (2) decide that the state proposal is not acceptable, or (3) decide that the state proposal appears to be acceptable but is of the type that should undergo HQ review. (See next section for the procedures to be followed if a region decides to seek headquarters consultation regarding a state flexibility proposal). If a region decides that a state proposal is acceptable, the differences between the federal and state regulations should be described in the Federal Register Notice, along with the region's justification for authorizing the state provisions. Also, to help ensure effective enforcement, if a state regulation is authorized which does not track a particular requirement in a federal regulation, the Federal Register Notice should describe what state provision or provisions will take the place of any federal requirements that were not directly addressed. The notice should also make clear that such compensating state provisions are equivalent to, or more stringent than the federal regulation, not broader in scope, and thus will be federally enforceable. If a region decides not to approve a state proposal, the reasons for this decision should be documented and provided to the state.

⁷In many highly technical areas (e.g., LDR requirements), states may opt to simply adopt the EPA regulations exactly, rather than the states having to do their own separate technical analyses. Alternative state approaches have mostly been proposed with respect to generator, recycling and corrective action requirements.

HQ Consultation Procedure for State Flexibility Requests

To ensure the decisions regarding the authorization of state programs under RCRA that involve regulatory flexibility are made in a consistent manner resulting in environmentally equivalent programs, regions should consult with headquarters ("HQ") offices before approving authorization packages that: 1) include the omission of one or more federally enforceable requirements (or the use of state provisions that are less stringent than any corresponding federal requirement) in exchange for compensating additional requirements or 2) involve major changes to key elements of a federally enforceable requirement when the region believes that the differences raise a nationally significant issue. Such consultation is not necessary, however, for authorization packages raising issues that previously have been determined to be equivalent as reflected in the "file of flexibility decisions" to be maintained by OSW (see #10 below). (Of course, regions can continue to seek HQ consultation for any authorization issues that arise regardless of the type of issue.)

The procedure to be used to address such authorization decisions is:

1. Regions receiving authorization packages raising issues involving significant deviations (as described above) should contact HQ offices to obtain their review and consultation. We recommend that the consultation be initiated by regions as early in the state regulation development process as practicable.
2. HQ offices that should be involved in the discussions include OSW, OECA, and OGC. (Note: The region should send the package to the OSW primary contact person (to be designated pursuant to item 3 below) who will be responsible for getting the package to the other HQ offices.) In addition, the region seeking consultation should send a copy of the authorization package to the other regions. If any other region has any comments or information they wish to share as part of the consultation process, they should send them to the OSW primary contact person and the region seeking consultation within two weeks of receiving the package. Any comments submitted from the region should, at a minimum, be sent from the appropriate Division Director and reflect the views of regional management.
3. Each office and region should designate a primary contact and two back-up contacts for the development of a standing contact list.
4. Requests for HQ review should be made by email, using the standing contact list.
5. The request should include a brief statement of the flexibility being sought by the state and the necessary background materials, including:
 - A. a copy of the state provisions in question;
 - B. an identification of where and how the state regulations differ;
 - C. an explanation of why the state program is equivalent to the federal program as required by section 3006 and why the state requirement that differs in approach is

- at least as stringent as the federal regulations as required by section 3009 (including when applicable a discussion of what compensating feature(s) make the state requirements at least as stringent in approach);
- D. an explanation (to the extent such information is reasonably available) of the extent to which the proposed state approach was considered previously by EPA (e.g. during, or subsequent to, the development of the relevant federal requirement);
 - E. an identification of any special issues affecting the regulations under review (e.g. enforcement issues, unresolved regulatory interpretations, etc.); and
 - F. an identification of why the state and region believe adopting the alternative state approach provides equal or better environmental protection than will be achieved by the existing requirements.

We encourage the regions to work closely with the states in developing these supporting materials. We also suggest that the regions provide the arguments as succinctly as possible.

- 6. As the lead office responsible for state authorization, OSW will be responsible for coordinating the HQ office reviews.
- 7. HQ's review will normally occur at the Office Director level.
- 8. HQ offices at the Office Director level will act on requests within 30 days of receipt of the request and all supporting documents. If necessary, a meeting will be scheduled within the 30 day period, to include the Office Director for the OSW, the appropriate OD for OECA, and the appropriate Associate Counsel for OGC. If there are unresolved issues, they will be elevated to the Deputy AA or AA level. (Note: OSW will inform the region that the authorization package is being elevated for review.) HQ offices will complete their review and consultation at the Deputy AA or AA level within an additional 45 days.
- 9. Following the completion of the consultations and feedback from HQ, a final decision on whether to approve the state provision(s) will be made by the region. The process established by this memorandum is not intended to affect the delegation of decision-making on authorization of state hazardous waste programs.
- 10. OSW will compile a file of flexibility decisions that will be placed on the RCRA State Authorization webpage. As noted above, consultation on issues that have previously been raised to HQ and determined to be environmentally equivalent is not necessary.

cc: Regional Counsels, Regions I - X
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