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STATE REGULATION OF FEDERAL AGENCIES FOR PURPOSE OF INTERIM  
AUTHORIZATION

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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MEMORANDUM

SUBJECT: State Regulation of Federal Agencies for  
Purposes of Interim Authorization

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ISSUE

Must States have independent statutory and regulatory control over Federal facilities and Federal agencies in order to qualify for interim authorization?

DISCUSSION

I. Introduction

Some States appear to exclude Federal agencies from their regulated community, thereby not requiring Federal agencies to comply with State requirements placed on generators and transporters of hazardous waste and on owners and operators of hazardous waste management facilities. Generally, the apparent exclusion is not explicit. Rather, Federal agencies are, as a group, not specifically identified in the State's definition of the regulated community.

Approximately 700 Federal installations have notified EPA that they are engaged in hazardous waste activities. Ground-water contamination from two Federal facilities was cited by the U.S. House of Representatives (House of Representatives Report #94-1491, 1976) as part of the hazardous waste management problem which required Federal action through the Resource Conservation and Recovery Act of 1986.

The purpose of this Program Implementation Guidance memorandum is to indicate whether a State must have statutory and regulatory authority for hazardous waste management over Federal agencies in order to qualify for Interim Authorization, pursuant to 40 CFR 123 Subpart F.

## II. Definition of a Federal agency

Federal agency is defined in RCRA §1004 (4) and in 40 CFR 260.10(a)(22). Federal agency means "any department, agency, or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government including any Government Corporation, and the Government Printing Office". As used in this memorandum, "Federal facilities" are any facilities owned or operated by any "Federal agency".

## III. What Federal requirements exist over Federal agencies?

Subtitle F of RCRA establishes Federal responsibilities for solid and hazardous waste management. RCRA §6001 states that each Federal agency shall be subject to, and comply with, the same substantive and procedural requirements for hazardous waste management that are imposed on other persons by Federal, State, and local governments, when that Federal agency is engaged in activities which result, or which may result, in the disposal or management of solid or hazardous waste.

Executive Order 12088 directs Executive agencies to comply with the Solid Waste Disposal Act, as amended by RCRA (42 U.S.C. 6901 et seq). Section 1-302 directs the EPA Administrator or his agent to conduct inspections, as necessary, to monitor compliance by Executive agencies. Section 1-601 establishes that the Administrator or an appropriate State agency can notify an Executive agency of its violation of an applicable pollution control standard, and approve a compliance plan and schedule. This procedure is in

addition to the other applicable statutory enforcement procedures and sanctions.

#### IV. What controls must States have over Federal agencies to qualify for Interim Authorization?

##### A. Universe of Wastes

The Federal regulation at 40 CFR 123.128(a) requires that a State program control a universe of hazardous waste generated, treated, stored, and disposed of in the State which is nearly identical to that which would be controlled by the Federal program under 40 CFR Part 261. The "nearly identical" test is discussed in the RCRA State Interim Authorization Guidance Manual (EPA, 1980, pp. 3.1-1,2). The test for substantial equivalence is based on the generic nature of the waste, not on the nature of ownership (e.g. Federal) of the generating facility or the waste.

##### B. Generators, Transporters and Facilities

The Federal regulation at 40 CFR 123.128(b)(2) requires that a State program regulate all generators located in the State. The regulations at 40 CFR 123.128(b)(3) through (8) require that the State regulate generators in a manner substantially equivalent to the procedural and substantive requirements of 40 CFR 262. Parallel requirements for State programs concerning transporters of hazardous waste are established in 40 CFR 123.128(c). The Federal regulation at 40 CFR 123.128(e) requires that State programs enforce facility standards which are substantially equivalent to 40 CFR 265, and that State law prohibit the operation of facilities not in compliance with such standards. 40 CFR Part 123, Subpart F indicates that States are to exercise regulatory control over all generators, transporters, and owners/operators of facilities managing hazardous wastes.

##### C. State Controls

There is no provision in 40 CFR Part 123, Subpart F that States may exempt from their regulated community those wastes or waste management activities involving Federal agencies. Consequently, in order to be substantially equivalent to the Federal program, a State program must exercise authority over Federal agencies involved in hazardous waste management.

## DECISION

For purposes of interim authorization, a State must demonstrate, through its Attorney General's Statement and Program Description, that it controls Federal agencies in the manner required by 40 CFR §123.128.

When State law and regulations explicitly include Federal agencies in the State's regulated community, the issue is not in controversy, and the Attorney General's demonstration would be straightforward. This would be the case where a State's definition of "person" (i.e., those who are subject to the regulatory requirements for hazardous waste management established in the State Program) explicitly includes Federal agencies.

When Federal agencies are not explicitly included in (or excluded from) the State's regulated community (i.e., State statutes and regulations are silent on whether Federal agencies are regulated), the Attorney General's Statement must explain the basis for the State's assertion of jurisdiction over them. This explanation must be based on the State's overall statutory and regulatory framework. The State Attorney General can cite RCRA §6001 and Executive Order 12088 to demonstrate Congressional and Executive intent that Federal agencies comply with State Program requirements. However, these citations do not independently provide the State with jurisdiction over Federal agencies.

In addition, when Federal agencies are not explicitly included in the regulated community, the State must also indicate in its Program Description that it will regulate Federal agencies in the manner described by 40 CFR §123.128.

If a State Attorney General's Statement indicates that the State cannot control Federal agencies, interim authorization cannot be granted.

In defining their regulated community, States should be encouraged to explicitly include Federal agencies, in order to qualify for final authorization.

Attachment - Executive Order 12088