

PPC 9541.1986(05)

RCRA 3001(f)(2)(b) AND STATES' EXCLUSION OF WASTES
FROM REGULATION AS HAZARDOUS

31 OCT 86

MEMORANDUM

SUBJECT: RCRA Section 3001(f)(2)(b) and States' Exclusion
of Wastes from Regulation as Hazardous

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

TO: Hazardous Waste Division Directors
Regions I-X

Since November 8, 1984, EPA has administered all RCRA delisting programs and will continue to do so until States become authorized for delisting under the new provisions of the Hazardous and Solid Waste Amendments of 1984 (HSWA). A State is not required to have a delisting mechanism, and may be authorized under RCRA without one. To receive authorization, a State must conform its delisting program, if any, to the Federal program and apply to the Agency for authorization.

Effective November 8, 1986, temporary exclusions automatically expire. Any temporary exclusion granted by a State before November 8, 1984, should be re-evaluated either by EPA or a State that has been authorized to conduct delisting pursuant to HSWA. If a final decision to grant or deny a petition has not been made by November 8, 1986, the temporary exclusion will cease to be in effect for purposes of RCRA Section 3001(f)(2)(B).

Temporary Exclusions

Temporary exclusions are delisting decisions which exclude a waste from regulation as hazardous, but are not the final delisting action under the regulations of the issuing authority. For example, EPA issued a number of temporary exclusions pursuant to 40 CFR 260.22(m). That provision explicitly stated that these decisions are made "before making a final decision". Similarly, several States have mechanisms for removing a waste from regulation before promulgating a final decision, such as delistings patterned on the Federal temporary exclusion.

These temporary exclusions should be distinguished from grants of enforcement discretion, where a State did not remove a waste from regulation, but stated only that it would not initiate an enforcement action against a person treating this waste as non-hazardous. Enforcement discretion, sometimes called informal exclusions, are not temporary exclusions (nor are they final exclusions).

Final Exclusions

A final exclusion is an agency determination done in accordance with the issuing authority's regulations e.g., with notice and comment after which no further review of the petition is contemplated. EPA issues final exclusions pursuant to 40 CFR 260.20 and 260.22, which requires publication of a tentative decision in the Federal Register, receipt and evaluation of public comments, and publication of a final decision in the Federal Register. States issue final exclusions in accordance with their State legal authorities.

Any final exclusions that were granted by authorized States before November 8, 1984, are not affected by HSWA (i.e., no additional action is required by the State or by EPA). EPA encourages the States to re-evaluate those decisions if all factors (including additional constituents) which would cause the waste to be hazardous were not considered by the State.

Actions Required

On November 8, 1986, all temporary exclusions will cease to be in effect for purposes of RCRA if a final exclusion has not been granted. States and Regions should plan to verify that the handlers of these previously excluded wastes are complying with applicable requirements after November 8, 1986. To this end, the Regions and States should begin to evaluate all State delistings to:

- (1) determine the type of State exclusion (temporary or final) that was granted before November 8, 1984;
- (2) determine whether a final exclusion has been granted or denied by EPA; and
- (3) take appropriate action to ensure full compliance with RCRA (e.g., prior to 11/8/86, you should send handlers

written notification of their regulatory responsibilities.

From a practical standpoint, the expiration of a temporary exclusion will have greatest immediate impact on those who manage their waste in land disposal units. These units may be immediately subject to ground-water monitoring requirements and, on November 8, 1987, may be subject to the "loss of interim status" requirements of Section 3005(e)(3), depending on whether other hazardous waste management activity is occurring at the facility.

Currently, there are no States authorized for the HSWA delisting authority. Even if a State were to receive the required authorization before November 8, 1986, it is highly unlikely that adequate time exists to collect and evaluate the additional information from petitioners so as to avoid termination of the temporary exclusion.

A "Reference Guide to Delisting Petitions" is compiled at EPA Headquarters and distributed weekly to the Regional delisting contacts. In turn, the Guide is distributed to the States. This reference can be used to determine if EPA is reviewing a particular petition and the status of EPA's review.

Please feel free to contact the delisting staff of the Waste Identification Branch of the Regional liaisons of the State Programs Branch here in the Office of Solid Waste if you have any questions regarding State delistings.

cc: Matt Straus, OSW
Truett DeGeare, OSW