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FEDERAL PERMITS IN STATES WHICH HAVE RECEIVED FINAL AUTHORIZATION

OFFICE OF GENERAL COUNSEL

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MEMORANDUM

SUBJECT: Status of Federal Permits in States Which Have Received RCRA Final Authorization

FROM: Gail B. Cooper
Attorney

TO: Bruce Weddle
Director
Permits and State Programs Division (WH-563)

In August 1982, OSW issued a Program Implementation Guidance memorandum (PIG-82-5) on the status of federal permits after a state receives interim authorization. You have asked us whether the same guidance may legally apply to final authorization. In addition, you requested that we commit to writing the legal advice we gave you orally when PIG-82-5 was being developed.

Background and Conclusion

Under RCRA §3006 and 40 C.F.R. Part 271, a state which has received interim or final authorization operates the RCRA program in lieu of EPA. Among other things, upon approval of a state program, EPA suspends the issuance of Federal permits for those activities included in the authorized state program. 40 C.F.R §§271.1(f) and 271.121(f). The status of existing federal permits after authorization is less clear, however. In 1982, the following question arose: if state RCRA permits comparable to existing federal permits are not issued at the same time the state receives interim authorization,

do existing federal RCRA permits remain in effect? We concluded then that the more persuasive interpretation of RCRA was that federal permits remain in effect until terminated in compliance with 40 C.F.R. Parts 270 and 124. Because the pertinent statutory and regulatory provisions are the same for interim and final authorization, the same conclusion would hold for final authorization.

Discussion

Sections 271.8(b)(6) and 271.126(c)(1) of the RCRA state authorization regulations provide that the Memorandum of Agreement (MOA) between the state and EPA must contain provisions specifying a procedure for transferring the administration of existing federal permits to the state. They further provide that if "a state lacks authority to directly administer permits issued by the Federal government, a procedure may be established to transfer responsibility for these permits." An example of such a procedure is provided in a note to 271.8(b)(6): the state, EPA and the permittee could agree that "the State would issue a permit(s) identical to the outstanding federal permit which would simultaneously be terminated." 1/

This provision clearly provides that EPA-state procedures on the transfer of permits must be established but is silent on whether such transfers must be effective on the date of authorization. This issue was addressed for interim authorization on August 9, 1982 by a Program Implementation Guidance memorandum (PIG-82-5). The memorandum concluded that federal permits remain in effect after Phase II authorization until the state issues a RCRA permit or assumes responsibility for administering the federal permit if it has the authority to do so. According to the memorandum, federal permits do not terminate automatically but must be terminated according to the procedures in 270.43 or by agreement of the permittee and EPA. To avoid the need for EPA administration and enforcement of federal permits in authorized states, the memorandum strongly encouraged the states to issue state RCRA permits or administer federal RCRA permits as soon as possible.

As we indicated to you, it is conceivable that someone could challenge the policy reflected in the memorandum in a permit or enforcement proceeding by arguing that since section

3006 provides that the State carries out the RCRA program "in lieu of the federal program of upon authorization, federal permits terminate automatically upon a state's authorization. Following that interpretation, the state would have to be

1/ Section 124.5(d) provides that EPA does not have to issue a notice of intent to terminate a permit in this situation.

able to assume or administer the Federal permit (or issue its own RCRA permit) at the time it was authorized in order for the facility to continue to have a RCRA permit.

We do not find that argument persuasive. Many states do not have the statutory or regulatory authority to administer federal permits or to issue their own RCRA permits as of the date of authorization. If federal permits automatically expired upon a state's authorization, a facility could be left without any permit (if there were no state permit for that facility) or could continue to operate under a state permit with less stringent requirements than were contained in the federal RCRA permit. Given Congress' general goal of providing for the effective regulation of hazardous waste and the "no less stringent requirement" in Section 3009 in particular 2/, it is difficult to conceive that Congress would have intended that the transfer of authority from EPA to a state result in a decrease in environmental protection. In our view, PIG-82-5 is a reasonable interpretation of our legal authority, designed to assure that authorization of a state program does not cause a facility to lose its permit or allow a facility to benefit from relaxed permit requirements. 2/

The analysis is supported by a case-dealing with the NPDES program under the Clean Water Act (CWA). In Central Hudson Gas and Electric Corporation v. U.S.E.P.A., 587 F.2d 549, 560 2nd Cir. 1978), EPA had issued a NPDES permit which was partially contested. Before the Part 124 adjudicatory hearings began on the contested provisions, the State NPDES program was approved by EPA. The State and EPA arranged for EPA to continue to handle the adjudicatory hearings and any subsequent litigation. The permittee challenged EPA's authority to do so, pointing to

the CWA provision which states that when a state program is

1/ Section 3007 provides that ... "no state or political subdivision may impose any requirements less stringent than those authorized under [subtitle C] respecting the same matter as governed by such regulations..."

2/ EPA does not have the same leeway if the federal permit has not yet been issued. 40 C.F.R. 27.1.1(f) specifically provides that "Upon approval of a State permitting program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program." Thus, even if EPA has already issued a draft permit and held public hearings, it may not proceed to issue a final RCRA permit. This obviously makes it essential for EPA and the state to allocate permitting resources efficiently in the period before a state receives authorization.

approved by EPA, the EPA must "suspend the issuance of permits." 33 U.S.C. §1342(c)(1). EPA argued that the permit had been issued, so that this provision did not govern.

The court deferred to EPA's position that the permit had been "issued" and did not get into the broader issue of what happens to EPA permits after NPDES approval. To that extent, the decision does not address the same legal issues we might confront. However, the court's reasoning is relevant; it concluded that the statutory policy of having states implement the NPDES permit program was outweighed by the Act's primary objective to restore and maintain water quality. The court was persuaded by EPA's argument that the permittee's interpretation would produce duplication, waste, and delay, and disrupt the state program because the state would not be prepared to bear the sudden transfer of the permit. The Court did not wish to discard the transition mechanism EPA and the state had worked out. While there are differences between the CWA and RCRA, the similar statutory goals and problems of transitions from EPA to state regulation make this case a helpful precedent for PIG-82-5.