

9521.1988(03)

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

DEC 9 1988

MEMORANDUM

SUBJECT: Staying HSWA Permit Conditions

FROM: Sylvia K. Lowrance, Director  
Office of Solid Waste (OS-300)

TO: Allyn M. Davis, Director  
Hazardous Waste Management Division, Region VI

This memorandum responds to your request of October 26, 1988 for clarification of certain issues related to the staying of permit conditions. You asked us to address the applicability of §124.16(b)(2) to HSWA/RCRA joint permits. In addition, you asked whether the Region can and should postpone the effective date of the HSWA portion of the permit in each of the following cases:

- a. Where both the HSWA portion and the authorized State RCRA portion of the permit were appealed, the HSWA issue have been resolved, but some time will elapse before the State issues are also resolved and the State portion of the RCRA permit can become effective, and
- b. Where the State portion of the permit is appealed without any appeal of the HSWA conditions.

You explained that your questions arose in the context of appeals of facility permits in authorized States. We address your questions below in that context.

I. Applicability of § 124.16(b)(2).

Section 124.16(b)(2) provides that "[n]o stay of an EPA-issued RCRA, UIC, or NPDES permit shall be granted based on the staying of any State-issued permit except at the discretion of the Regional Administrator and only upon written request from the State Director." In your memorandum, you suggest that §124.16(b)(2) was promulgated before the enactment of HSWA and was not intended to apply to the situation where an authorized State is issuing its authorized portion of a RCRA permit and EPA is issuing the HSWA portion of that permit.

We agree that §124.16(b)(2), along with its requirement for a written request from the State Director, does not apply to joint EPA-State issuance of RCRA permits in authorized States. As you know, under our interpretation of the statute and regulations, only one permit is typically issued to a facility under the authority of Subtitle C. Because most authorized States are not yet authorized for HSWA, however, the permit usually consists of a Federal portion (issued by EPA pursuant to HSWA) and a State portion (issued by the authorized State pursuant to RCRA). The HSWA portion, in and of itself, is only part of the RCRA permit. It would not qualify, therefore, as an "EPA-issued RCRA...permit" under §124.16(b)(2). A different situation exists in unauthorized States, where EPA issues the entire RCRA permit (HSWA and non-HSWA portions). Such a permit would qualify as an "EPA-issued RCRA...permit" under §124.16(b)(2).

## II. Staying of HSWA Permit Conditions.

In your memorandum, you outline situations in which the HSWA portion of a permit might become effective before resolution of an appeal on the State portion. You express concern about declaring the HSWA portion of a permit effective because doing so might cause the facility to lose interim status.

We recognize that problems might arise if facility interim status were to terminate before a permit became fully effective. However, issuance of the HSWA portion of a jointly issued RCRA permit does not terminate the interim status of a facility. Interim status ends when final administrative disposition of the RCRA permit application occurs. Thus, effectiveness of the authorized State's permit decision is a prerequisite for termination of interim status. This will be a matter of State law (e.g., whether the State appeal stays the State permit decision). If permit effectiveness is stayed during an appeal as a matter of State law, facility interim status most likely continues under State law until the entire State portion of the permit goes into effect. We believe that the Region will, in most cases, want to issue the HSWA portion of the permit and begin corrective action as soon as possible. This will not jeopardize a facility's interim status should non-HSWA State portions be appealed. Furthermore, corrective action conditions can become effective when the permit is "issued" (per the language in RCRA section 3004(u)), not necessarily when all permit appeals are completed.

If, for some reason, the Regional Administrator wishes to delay the effective date of the HSWA portion, as your memorandum suggests, the ability to do so depends on the circumstances in each case. We have, therefore, addressed the issue in the context of each scenario you present in your memorandum.

a. Both the HSWA and State RCRA portion of the permit are appealed (under EPA and State procedures respectively).

If the first scenario you describe, both the HSWA portion and the RCRA portion of the permit are appealed and Federal resolution of the HSWA issues occurs before the State appeal is resolved. We believe that, in the course of reissuing the HSWA portion after an appeal, the Regional Administrator has discretion to postpone the effective date of the HSWA portion under the procedures of §124.15(b)(1) and §124.19(f). It should be noted that such a postponement may not be necessary in many cases because we interpret §124.16(a)(2) to mean that uncontested HSWA provisions that are inseverable from stayed State provisions are also stayed.

b. The State portion is appealed and the HSWA portion is not.

Under your second scenario, the State portion of the permit is appealed without any appeal of the HSWA conditions. In this case, the Regional Administrator does not have an opportunity to delay the effective date under either §124.15(b)(2) or §124.19 because the Regional Administrator's final permit decision has been issued and become effective prior to advent of the permit appeal.

This outcome is a function of the nature of the joint RCRA/HSWA permitting process. In the case of an authorized State, where issuance of the full RCRA permit is a combined action, State procedures must be followed to issue the State portion and the procedures of Part 124 must be followed to issue the Federal portion. While there may be a joint proceeding, two separate decisions must be made because the State has no authority to issue the Federal portion or vice versa. These two decisions can occur at the same or different times. In turn, the State portion must be appealed through State procedures and the HSWA portion through the procedures of Part 124. Where there is no appeal of the HSWA portion, no stay of the HSWA portion occurs automatically per §124.16(a)(1) as no appeal is taken under §124.19. Furthermore, the Regional Administrator's issuance of the HSWA portion will already have an effective date specified, per §124.15(b). Hence, the Region will not have the

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opportunity to alter that date once the final HSWA permit decision becomes effective, except via permit modification procedures. However, the effective date of the HSWA provisions could otherwise be delayed automatically under §124.16(a)(2) if they are inseverable from stayed RCRA permit conditions.

I hope this addresses all of your concerns. If you have any questions, please call Barbara Foster at FTS 382-4751.

cc: Michelle Anders  
Fred Chanania