

OSWER DIRECTIVE #9543.00-1

October 3, 1985

MEMORANDUM

SUBJECT: Applicability of PIG-82-5 and RSI #5 on Joint
Permitting in Phase I Authorized States

FROM: Bruce R. Weddle, Director
Permits and State Programs Division (WH-563-B)

TO: Robert L. Allen, Chief
Waste Management Branch (3HW30)

Thank you for your memorandum of July 15, 1985, in which you asked for clarification on several issues relating to permits jointly-issued by EPA and a State with Phase I interim authorization. This memo addresses your concerns in the same order in which you stated them on page 2 of your memorandum.

1. You asked: What is Headquarters' definition of "nearly identical" permits as used in PIG-82-5?

A nearly identical State permit issued by a State with Phase I authorization would contain, at a minimum, no less stringent State analogues to all of the provisions that the jointly-issued Federal permit would incorporate. A State permit could contain provisions which are more stringent than corresponding Federal provisions and still be considered "nearly identical". State permit provisions that are broader-in-scope than the Federal program are not relevant in determining whether State permits are "identical" or "nearly" identical". (See PIG 84-1 for a discussion of how to determine whether State provisions are broader-in-scope or more stringent.)

2. You asked: Under what circumstances can jointly-issued, nearly identical permits be issued by a Phase I authorized State yet be considered RCRA permits after Final Authorization?

Contrary to the approach described in #5 of PIG-82-5, we concluded that the EPA RCRA permit should not be terminated. While recognizing the State and Federal permits may have been issued jointly, receipt of Phase II or final authorization does not automatically convert the State permit into a RCRA permit.

Rather, the State must have RCRA permitting authority at the time of permit issuance. Thus, were the EPA permit to be terminated prematurely, the facility would lose RCRA authority to operate.

Nevertheless, EPA can use its discretion to avoid duplicate State and Federal efforts to enforce identical permit provisions. This is if the State were adequately enforcing its identical permit, EPA would not plan to devote enforcement resources to that facility.

Subsequent to being granted final authorization, the State could reissue its permit as a RCRA permit or wait until the EPA RCRA permit expires. When the State decides to issue a RCRA permit and the State is not authorized for HSWA provisions, the Region must determine whether and how the facility is affected by the HSWA requirements and either issue a permit for the HSWA provisions or a notice of its restitutional final decision that the facility is not affected by HSWA. At the time of permit reissuance, the HSWA provisions must be considered even though they were not applicable when EPA issued the first permit.

3. You asked: What effect will HSWA have on the provisions of FIG-82-5?

HSWA mandates incorporation of certain requirements and prohibitions in all RCRA permits as of November 8, 1984. Simply, a permit cannot be considered a RCRA permit unless it complies with all the applicable new requirements of HSWA. A State must be specifically authorized for provisions of HSWA to issue a RCRA permit. Thus the policy on joint permitting stated in RSI #5 supersedes the policy of FIG 82-5. (See RCRA Reauthorization Statutory Interpretation #5, July 1, 1985.) In relation to FIG 82-5, you will likely be issuing permits as described by situation #4, rather than situation #5. That is, a facility will be jointly issued a State permit and a Federal RCRA permit. Since the facility has a Federal RCRA permit, the urgency for State reissuance of a State RCRA permit diminishes. Unless there are extenuating circumstances, there is no compelling reason for a State to reissue a State permit to a facility which also has a Federal RCRA permit prior to the expiration of that Federal permit. This would be especially true if the previous State permit was issued using standards and procedures equivalent to EPA's.

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I trust that the above discussion answers your questions and concerns relating to jointly-issued permits prior to a Phase I State receiving final authorization.

cc: Permits Branch
State Programs Branch
RCRA Branch Chief, Region I, II, IV - X