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STATE PERMITS ISSUED BEFORE RECEIVING RCRA PHASE II
AUTHORIZATION

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

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MEMORANDUM

SUBJECT: Status of State Permits Issued Before a State
Receives RCRA Phase II Authorization

FROM: Rita M. Lavelle
Assistant Administrator for
Solid Waste and Emergency Response (WH-562-A)

TO: Program Implementation Guidance Addressees

ISSUE

Once a state is authorized for a component of Phase II, what is the status of hazardous waste facility permits which the state issued prior to being authorized for the component? Can they be considered RCRA permits? What is the status of an EPA-issued federal permit in a state authorized for a component of Phase II?

DISCUSSION

Prior to being authorized for a component of Phase II a state may require facilities that treat, store, or dispose of hazardous waste to obtain a state permit. there are no provisions within RCRA or the federal hazardous waste regulations for designating these pre-authorization state permits as RCRA permits. RCRA permits can be issued only by EPA or an authorized state. Authorization requirements ensure that an authorized state will be using procedures substantially equivalent to the federal permitting procedures (state procedures must, of course, meet the requirements of Section 7004(b) of RCRA) and will be requiring compliance with standards providing

substantially the same degree of protection as the federal technical standards (See 40 CFR 123.129).

Before a state is granted Phase II authorization, five situations are possible for a hazardous waste management facility operating in a particular state. In all of these situations RCRA Section 3005(a) applies. That is, owners and operators of facilities that treat, store, or dispose of hazardous waste can legally do so only when they have a RCRA permit. Also, RCRA Section 3005(e) applies, allowing qualified facilities to continue to operate under federal "interim status." When the state receives interim authorization different results occur in each of the five situation as described below.

- 1) A facility has neither a state permit nor a federal RCRA permit (but does have federal interim status)

This situation is very straightforward. The state must eventually issue the facility a state RCRA permit. Of course, before the state could have obtained Phase I interim authorization, it must have had some mechanism in place to apply standards substantially equivalent to federal interim status standards to all of the hazardous waste management facilities within its borders.

- 2) A facility has a state-issued permit but no federal RCRA permit (but does have federal interim status)

This situation is also fairly straightforward; the state must eventually issue a RCRA permit to the facility. The facility can continue to operate lawfully until that time, provided the facility will be subject to state standards substantially equivalent to the federal interim status standards. The timetable for reissuance can be negotiated between the Regional Administrator and the State Director and is to be delineated in the Memorandum of Agreement and discussed in the Program Description. Legally, the state permit cannot be considered a RCRA permit even if the state permit was issued using standards and procedures that were eventually authorized. However, under these circumstances there would be very little reason to reissue the permit in the near future, and the state could plan to reissue the permit at the end of the current permit term or at some other convenient time.

- 3) A facility has a federal RCRA permit but does not have a state permit

In this situation the state can assume responsibility for the administration of the RCRA permit if it has explicit authority allowing it to directly administer and enforce permits issued by the federal government. As an alternative, the state can issue a RCRA permit to the facility. Where the state issues a RCRA permit, EPA should suggest to the federal permittee that the permittee should agree to the termination of the federal permit. The EPA-issued RCRA permit cannot be terminated without the agreement of the permittee unless one of the causes for termination in 40 CFR 122.16 is present.

- 4) A facility has both a federal RCRA permit and a state permit

This situation is a combination of cases (2) and (3), above. The state must eventually issue a state RCRA permit to the facility or can assume responsibility to administer the federal permit if it has the authority to do so. The schedule for reissuance of the state permits to be specified in the Memorandum of Agreement. Since the facility has a federal RCRA permit, the urgency for state reissuance of a state RCRA permit diminishes. This would be especially true if the previous state permit was issued using standards and procedures that were eventually authorized.

- 5) A facility has identical federal RCRA and state permits that were issued jointly

In those situations where both permits are identical and were issued jointly, EPA can propose its intent to consider as RCRA permits the jointly-issued or identical state permits when the Agency announces receipt of the state's complete Phase II application. In this last situation, the RCRA permit can be terminated with the agreement of the permittee (or for one of the causes for termination in 40 CFR 122.16). If the RCRA permit is not terminated, then the facility will operate under two identical permits.

The assumption underlying all of the above scenarios is that any EPA-issued permit continues in full force and effect after Phase II authorization. EPA-issued permits continue in force until terminated either under 40 CFR 122.16 [see 40 CFR 123.6 (b)(1), 123.126 (c)(1) and 124.5(d)] or by the agreement of EPA and the permittee. Permittees with EPA-issued permits thus would be subject to the requirements of 40 CFR Parts 122 and 124 until their EPA-issued permits are terminated. The permit terms and conditions, as well as the applicable requirements of Part 122, would be the "requirement of this subtitle" (Subtitle C) which EPA could enforce under Section 3008 of RCRA.

EPA would prefer not to be administering and enforcing federal permits in authorized states. Thus, it is extremely desirable that EPA and a non-authorized state coordinate their permitting activities so that whenever possible they hold joint hearings and issue identical or nearly identical permits. Then, upon authorization, those state permits can be considered RCRA permits. Alternatively, it would be extremely desirable for those states that are currently making legislative or regulatory changes to incorporate in their legislation (or in their regulations, if their legislative authority is already broad enough to allow it) a provision allowing them to summarily transform federal RCRA permits into state RCRA permits. That is, the state would want to be able, through some very simple procedure, to issue state RCRA permits incorporating all the terms and conditions of the federal permits.

DECISION

All facilities that treat, store, or dispose of hazardous waste can do so legally only under a state or federal RCRA permit, federal interim status, or a state analogue to interim status. The only instance where a state permit that was issued prior to Phase II authorization can constitute a RCRA permit is where the state permit was issued jointly with and is identical to a federal RCRA permit. In such a case, when EPA receives the state's application for Phase II, EPA should announce (as part of the Federal Register notice of receipt of a complete Phase II application) its Intent to consider the identical, jointly-issued state permits to be RCRA permits and take comment on that intention. At the time of joint permit processing, EPA should also announce such an intent if the state is one that may seek Phase II interim authorization.

Except for the above situation where joint identical state and federal permits occurred, all state permits will need to be modified or reissued by the state as RCRA permits once the state is authorized. The schedule for reissuance can be negotiated between the state and the Region and must be delineated in the Memorandum of Agreement and described in the Program Description. In those cases where there are previously-issued federal RCRA permits, the state may possess the authority to assume the administration of those permits, thereby negating the need for issuance of a state RCRA permit. EPA-issued RCRA permits cannot actually be terminated without the agreement of the permittee unless one of the causes for termination in 40 CFR 122.16 is present.