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EXCLUSION OF WASTE GENERATED AT INDIVIDUAL FACILITIES (DELISTING)

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

May 25, 1982

PIG-82-4

MEMORANDUM

SUBJECT: State and EPA Interaction Regarding Exclusion of Wastes Generated at Individual Facilities ("Delisting")

FROM: Rita M. Lavelle
Assistant Administrator (WH-562-A)

TO: Program Implementation Guidance Addressees

ISSUE:

What are the roles of EPA and the State with respect to exclusions granted to individual facilities ("delisting") in States with Interim Authorization?

DISCUSSION:

Previously issued Program Implementation Guidance (number 81-4) indicated that State programs which provide for the delisting of waste from individual facilities could receive Interim Authorization (IA) where the States' procedures were substantially equivalent to the Federal program. That Guidance also indicated that the Memorandum of Agreement (MOA) between the Regional Office and the authorized State must provide that the State will keep EPA fully informed of any State delisting activities. The MOA is also to clearly indicate that if delisting action causes the State program to no longer be substantially equivalent to EPA's, the Agency may begin proceedings to withdraw the State's authorization (40 CFR 123.136).

The purpose of this memorandum is to provide guidance regarding State/Federal delisting activities in States with Interim Authorization. More specifically, this Guidance will describe delisting assistance which EPA will provide, define the roles and responsibilities of the various State and EPA offices in delisting, and discuss coordination among these offices.

A. Authorized State's Role in Conducting Delisting Activities

Except as provided below, IA States which have the (State) legal authority to delist are solely responsible for the delisting of wastes in their States for purposes of State regulation. As resources allow, EPA will provide assistance to the States on request.

Federal delisting in an IA State would have no effect on the State's own regulatory control program and, therefore, could be a duplication of effort without any benefit. Thus, if the Office of Solid Waste (OSW) receives a delisting petition pertaining to a facility in a State with Interim Authorization, OSW will contact the petitioner and inform him that the State, rather than EPA, manages the hazardous waste program in the State and that Federal delisting may be unnecessary. It should be noted that, while the effect of Federal delisting is to exclude the facility's waste from Federal regulatory control, the State's regulatory control is not affected by the Federal delisting. (Thus, a waste delisted by EPA could still be a hazardous waste for State purposes when managed within the State.)

However, EPA delisting in IA States will be conducted if: (1) the facility's waste may be managed in a way which would bring the waste under Federal jurisdiction (e.g., the waste is transported across State boundaries) or (2) if the facility owner/operator specifically requests EPA to process his petition (e.g., the facility may want the option of shipping the wastes out-of-state in the future). Before OSW initiates processing of the petition, the appropriate Regional Office will be informed of the upcoming action; the Regional Office will be expected to then inform the State. The appropriate Regional office will also be informed of OSW's decision on whether to grant or deny the petition

before OSW informs the petitioner; the Regional Office should then inform the State.

B. EPA Role in IA States' Delisting Programs

Generally, EPA's role is one of oversight to provide that the State's program continues to be substantially equivalent to the Federal program. In some States an expanded EPA role may exist by virtue of special provisions in the MOA.

As discussed in previous Guidance (number 81-4), the MOA is to provide that the State will keep EPA fully informed of any State delisting activities. This will provide EPA with the opportunity to review State delistings. EPA's review function is especially relevant where categorization of a waste is not clearly defined. In order to facilitate this review function, this Guidance clearly defines responsibilities of the various offices. Where appropriate, the Regions should consider amending existing MOA's to define specific responsibilities.

C. State and EPA Responsibilities

State Responsibilities

1. Authorized States should promptly notify the Regional Office of all "delisting" petitions received.

2. Authorized States must submit copies of all petitions, supplements to these petitions and decisions made (e.g., memoranda and letters imparting the State's position to the petitioner) to the Regional Office on a semi-annual (or more frequent, if desired) basis.

Regional Office Responsibilities

3. When the Regional Office receives notice from OSW of receipt of a Federal delisting petition (see item 6 below) it is expected to immediately inform the State and clearly offer and make arrangements for the State to comment on the petition before the Office of Solid Waste makes a determination to grant (temporarily or finally) or deny the petition. In particular, the State should be offered the opportunity to comment early on any deficiency of information in the petition

to assist the Office of Solid Waste in requesting additional information from the petitioner which is necessary in many cases.

Because EPA's delisting process is a rulemaking procedure (resulting in an amendment to 40 CFR Part 261, if a delisting petition is granted), we cannot offer a State a participatory role in delisting determinations. However, because a State has a genuine interest in assuring that EPA's delisting determinations are made on accurate and complete information and because a State may have or know about information relevant to a petition, OSW, through the Regional Office, should assure that the States (both IA and other States) have a timely opportunity to comment on petitions received and being processed by OSW. State comments forwarded to OSW by the Regional Office will be maintained in the docket (along with all other comments) and be available for public inspection and copying during normal business hours.

4. The Regional Office will advise the State of the Agency's comments on the State delisting actions. As resources allow, OSW will be available to support the Regional Offices (at their request) in the review of and comment on State delisting actions.

5. Pursuant to 40 CFR 123.136, the Regional Administrator may begin proceedings to withdraw authorization of the State's hazardous waste program if the Regional Administrator determines that the State's delistings have rendered its program less than substantially equivalent to the Federal program.

Office of Solid Waste Responsibilities

6. On receipt of a delisting package from a petitioner, OSW will notify the appropriate Regional Office, which in turn, will be expected to notify and solicit State input and relay it to OSW (see item 3, above).

7. On receipt of a State delisting package (e.g., petitions, supplements to petitions and a State's decisions on petitions) from the Region (see item 4, above), OSW will review the package and notify the Regional Office by memorandum of its agreement or disagreement (including pertinent reasons) with the State's decisions.

In their MOA's, some IA States have provided for prior

EPA concurrence with the State delisting decision. In these instances, OSW will continue to evaluate petitions submitted to EPA but will work closely with the Region and State in order to reach a joint decision on whether or not to grant the delisting. Thus, if OSW receives a petition from a facility in a State which requires Federal concurrence with the State's delisting decision, OSW will contact the petitioner and inform him that the State manages the hazardous waste program in that State and that Federal delisting is unnecessary, except as noted above. OSW will then proceed to evaluate the petition, since the State will ultimately be seeking EPA concurrence on the State delisting decision. However, this evaluation will not culminate in the usual Federal Register rulemaking.

DECISION:

Where the State has IA and operates a delisting program, the State is the agency responsible for conducting the delisting of waste within the State for purposes of the State program. Where petitioners may manage wastes so as to bring the wastes under Federal jurisdiction, or if petitioners specifically request EPA to act on their petitions, OSW will continue to evaluate and reach decisions on the petitions. In such cases OSW will keep the Region informed; the Region, in turn, will keep the State informed and offer the State the opportunity to comment on the petition to EPA. In addition, in those States which require prior EPA concurrence with the State's delisting decision before a particular facility's waste is delisted, OSW will work with the Region and State in order to reach a decision on whether or not to grant the delisting.