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SURFACE IMPOUNDMENTS VIS-A-VIS NPDES-PERMITTED DISCHARGE POINTS

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

DEC 29 1986

MEMORANDUM

SUBJECT: Request for Guidance on RCRA Regulation of Impoundments
in Various Relationships to NPDES Permitted Discharges

FROM: Marcia Williams, Director
Office of Solid Waste

TO: James Scarbrough, Chief
Residuals Management Branch, Region IV

This memorandum is intended to provide further guidance regarding issues which have been raised by Region IV on the regulatory status of surface impoundments as they are related to NPDES permitted discharge points. This guidance follows up on Bruce Weddle's memo to you of May 2, 1986.

The scenarios you present are complex, and require the application of multiple regulatory definitions and standards from both RCRA and the Clean Water Act (CWA). The Office of General Counsel some time ago developed an analysis of the applicable principles, definitions, and legal interpretations which are relevant to the issues you have raised. This analysis is attached for background purposes. The following discussion responds more directly to the scenarios you presented as we understand them.

In your memorandum of March 20, 1986, you state ("item one") that you plan to regulate water bodies into which wastes are discharged as RCRA TSDFs if they are wholly within the property boundary and are upgradient of a NPDES permitted discharge point. Diagram 1 illustrates our understanding of the situation. In this scenario we assume the NPDES discharge point to be at location A in the diagram. We further assume that the unit in question is a "surface impoundment" in which hazardous wastes were managed, and that the unit was not created by impounding water from a "water of the U.S." In this case, the unit would be subject to all applicable RCRA Subtitle C regulations.

However, if the impoundment was actually created by impounding the larger body of water (see Diagram 2), the regulatory status of the impoundment is less straightforward. Whether such an impoundment is subject to RCRA depends largely

on whether it is determined to be a "water of the U.S." As explained in the attached background paper, the determination of whether such an impoundment is or is not a water of the U.S. is essentially a case by case decision which is made by the Regional Water Division. If the impoundment is found to be a water of the U.S., it is not subject to regulation under RCRA. If the impoundment is not a water of the U.S., it would be subject to regulation under RCRA Subtitle C.

In Item Two of your memorandum, you describe several scenarios in which the "pond" in question (which we interpret to be an impoundment) is located downgradient of one or more NPDES permitted discharge points. Under the CWA, a discharge is defined as "any addition of a pollutant or combination of pollutants to the waters of the U.S." (see 40 CFR §122.2). Therefore, any pond located downgradient of a NPDES permitted discharge point is, by definition, a water of the U.S. The exact location of the point of discharge is obviously a key factor in any determination of the regulatory status of such surface impoundments.

Your memorandum also suggested that the exclusion from RCRA for discharges subject to NPDES permits applies only to the discharge point closest to the facility boundary. This is not the case. Nor is it true, as implied in the memo, that an owner/operator would be able to direct a change in a NPDES permit to position a discharge point upgradient of a TSDF and thereby avoid regulation of the TSDF under RCRA. Permit conditions are established by the relevant EPA program office. Where complexities regarding program jurisdiction arise, EPA will resolve the issues internally. A judgement by an owner/operator regarding which programmatic jurisdiction offers more favorable regulatory status for the facility should not influence which regulations and/or standards, in fact, apply.

The case by case decisions which are necessary to determine the status of impoundments closely related to waters of the U.S. must be made in close cooperation with the Water Division and the Office of the Regional Counsel. The Office of General Counsel's discussion provides a useful overview of the issues involved.

If you have any questions concerning this memorandum, please call Michele Anders, FTS 382-4534.

Attachments