

OSWER Policy Directive No. 9484.00-5-a

Second Corrected Version; Supercedes All Other Copies

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

OCT 15 88

MEMORANDUM

SUBJECT: Surface Impoundment Retrofitting and Time Allowed  
for Closure

FROM: Marcia E. Williams, Director  
Office of Solid Waste (WH-563)

TO: Waste Management Division Directors, Regions I - X

Introduction

This memorandum is distributed in anticipation of the November 8, 1988 deadline prescribed by Section 3005(j) of the Hazardous and Solid Waste Amendments of 1984. The memorandum clarifies the relationship between retrofitting and closure requirements for surface impoundments. It supplements the guidance document dated July 8, 1986, entitled Interim Status Surface Impoundments Retrofitting Variances (OSWER Policy Directive No. 9894.00-1B).

November 8, 1988 Requirement

Under §3005(j), surface impoundments that were in existence on November 8, 1984 and eligible for the authorization to operate under interim status must meet the minimum technological requirements (MTRs) of §3004(o)(1)(A) by November 8, 1988. These MTRs for double liners and leachate collection systems must be met unless an exemption was requested under §3005(j)\* and has been

\* An exemption may also be granted under §3004(o)(2) (§264.221(c)). There are no specific deadlines applicable to EPA review and approval of §3004(o)(2) exemption requests. However, if a §3004(o)(2) exemption request is not approved by November 8, 1988, then the unit in question must be retrofitted or cease receipt of hazardous waste by November 8, 1988.

approved by EPA.\*\* For the exemption in Sections 3005(j)(2), (j)(3) and (j)(4), the statute establishes an application deadline of November 8, 1986 and a deadline of November 3, 1987 for EPA approval. Section (j)(13) does not specifically outline application deadlines or procedural requirements. However, EPA believes it is appropriate to require deadlines and procedures for (j)(13) equivalent to the other §3005(j) exemptions.

If the owner/operator of a surface impoundment without an approved exemption does not retrofit as required under §3005(j) by November 8, 1988, the unit must cease accepting hazardous waste. Surface impoundments required to cease receipt of hazardous wastes on November 8, 1988 will not be required to certify closure of the unit by that date. However, the closure process must proceed expeditiously after November 8, 1988 and must be consistent with applicable closure regulations in Part 264 or Part 265. These rules are discussed in greater detail in later sections of this memorandum.

Information on permit requirements at interim status surface impoundments was provided in the RCRA Reauthorization Statutory Interpretation (RSI) #1, issued on November 9, 1984, "Immediate Permit Requirements". This document directed that all RCRA permits issued after the enactment of HSWA must include the condition that surface impoundments in existence on November 8, 1984 are to be retrofitted by November 8, 1988, unless an exemption was requested and approved by the permitting agency by the §3005(j)(5) deadlines. This requirement should be addressed in the HSWA portion of the permit, when the permit is issued by EPA where a state program is not authorized under HSWA.

RCRA permits that fail to require compliance with §3005(j), however, may not be used as shields against the implementation of this provision, unless the permit was issued before November 8, 1984. That is, the owner/operator of a surface impoundment permitted after November 8, 1984 cannot claim that the §3005(j) requirements do not apply to that surface impoundment; the HSWA requirements will take precedence over any permit conditions. The proposed Codification Rule, published March 28, 1986 (51 FR 10706), will clarify the fact that a permit cannot be used as a shield from requirements that go into effect by statute. This proposal is expected to be published imminently as a final rule.

\*\* The retrofit deadline may vary per §3005(j)(6) which pertains to surface impoundments that become subject to §3005(j)(1) after November 8, 1984 due to the listing of additional hazardous wastes.

The surface impoundment retrofit requirements are not affected by the recent decision of the D.C. Circuit Court of Appeals in *United Technologies Corporation v. EPA*, which remanded EPA's codification rule for MTRs under §3004(o). Section 3004(o) requires permits to impose MTRs on new, replacement, and expansion surface impoundments and landfills. The court held that this requirement applies only to new, replacement, and expansion units at facilities that submitted permit applications after the enactment of the 1984 amendments. Section 3005(j), however, addresses existing surface impoundments, which are generally a different set of units. Moreover, §3005(j) establishes its own separate set of applicability requirements based on the physical existence of the surface impoundments rather than the submittal of a permit application. Consequently, EPA does not believe that the applicability requirements in §3004(o) apply to §3005(j). However, the statutory language of §3005(j) imposes retrofitting requirements on all surface impoundments qualifying for interim status on November 9, 1984. Surface impoundments permitted prior to November 9, 1984 did not qualify for interim status on that date, and therefore are not subject to §3005(j).

#### Closure Requirements

As stated earlier, surface impoundments that have not been retrofitted or have not received a waiver must cease to receive hazardous waste by November 8, 1988, and they must begin closure, because §§264/265.113 trigger closure after final receipt of hazardous waste. However, §§264/265.113, are currently the subject of litigation. Existing requirements regarding timing of closure will be affected by any settlement agreement associated with this litigation. Further, regardless of the success of on-going settlement negotiations, EPA believes that adjustments to §§264/265.113 requirements are desirable. We are currently drafting a proposed regulatory amendment that would allow the continued receipt of non-hazardous waste at units that no longer receive hazardous wastes in certain circumstances that assure the continued protection of human health and the environment. A notice of proposed rulemaking is anticipated for January 1988. Until specific regulation changes are finalized, however, current requirements remain in full force.\*\*\* We will provide additional guidance, early in 1988, on how these proposed changes will affect the closure requirements, timeframes, and priorities for closure activities prompted by the November 1988 deadline.

\*\*\* Some states still may not have changed their program requirements to conform to the May 2, 1986 rulemaking. As a result, there may still be existing, less stringent requirements on a temporary basis. However, these requirements will not affect the retrofitting deadline. In no case can applicable state law authorize the continued receipt of hazardous waste at surface impoundments subject to the statutory deadline.

Under current regulations, a facility owner/operator without an approved closure plan who intends to close an interim status surface impoundment must submit a closure plan to the Regional Administrator by no later than June 13, 1988 (180 days before the "expected date" of closure - which is December 8, 1988 - as required by §265.112(d)(1) and (2)).

An owner/operator with an approved closure plan who intends to close a permitted or an interim status surface impoundment must notify the Regional Administrator 60 days prior to the time closure is expected to begin, as required by §§264/265.112(d)(1) and (2)). Since closure must begin no later than December 8, 1988, notification must occur by October 10, 1988.

#### Closure Activities

For facilities with approved closure plans, the activities presented in the approved closure plan must begin within 30 days after the final volume of hazardous waste is received (§§264/265.112(d)(2)). The one-year extension period that may be allowable for owner/operators (§§264/265.112(d)(2)) does not apply to surface impoundments which must close. These impoundments are barred by statute from further receipt of hazardous wastes. Additionally, under §264/265.113(a) within 90 days after receipt of the final volume of hazardous waste, the owner/operator must treat, remove from the surface impoundment, or dispose of on-site all hazardous wastes in accordance with the approved closure plan. For interim status facilities without an approved closure plan, these actions must occur within 90 days after the last receipt of hazardous waste or approval of the closure plan, whichever is later (§265.113(a)).

Under §264/265.113(b), facilities with approved closure plans must complete closure activities within 180 days after receipt of the final volume of hazardous wastes. For interim status facilities without approved closure plans, the deadline is 180 days from the last receipt of hazardous waste or the approval of the closure plan, whichever is later.

Sections 264/265.112(e) allow for the removal of hazardous wastes prior to notification of partial or final closure. In the case of interim status facilities, the removal of hazardous wastes, or any other closure activities, may be conducted prior to the approval of the closure plan if the activities are consistent with the closure requirements (51 FR 16430, May 2, 1986). The activities would be included and reviewed in the closure plan. The activities conducted prior to approval would only be considered unacceptable if they are inconsistent with the closure regulations.

While the unit or facility is undergoing closure, it may continue to receive non-hazardous wastes, provided that such receipt does not delay or impair the effectiveness of the closure activities.

#### Extension of Closure Period

Under §§264/265.113 (a) and (b), the Regional Administrator may approve a closure period longer than the 90/180 days prescribed in the regulations if the owner/operator can demonstrate that certain specified circumstances are met. Specifically, in the case of interim status surface impoundments undergoing closure as a consequence of the §3005(j) requirements, the Regional Administrator could approve a longer closure period if the owner/operator demonstrates that the closure activities will of necessity take longer than 180 days to complete. This might be the case, for example, if owner/operators treat hazardous wastes during closure or clean close, and if such activities would require more than 180 days.

#### Closure Priorities

As stated earlier, interim status surface impoundments which have not retrofitted or received an approved exemption from the §3005(j) requirement, or received a waiver under §264.221(c), shall cease the acceptance of hazardous wastes no later than November 8, 1988. Closure of these units should proceed expeditiously thereafter. Regional priorities for the approval of closure plans for these facilities should be established within the context of the facility management planning process. In setting priorities, you should take into consideration that impoundments which fail to meet the §3005(j) requirements are likely to allow for the escape of hazardous constituents into the environment.

Please contact Sharon Frey at FTS 475-6725, if you have any questions.

cc: J. Winston Porter  
Jack McGraw  
RCRA Branch Chiefs, Regions I-X  
Regional Counsel, Regions I-X