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United States Environmental Protection Agency
Washington, D.C. 20460
Office of Solid Waste and Emergency Response

September 27, 1991

Robert H. Scarberry
Chemical Waste Management
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Washington, D.C. 20036

Dear Bob:

In your letter of July 9, 1991, you request clarification of the RCRA definition of "designated facility" with respect to the treatability study exclusion, which was published on July 19, 1988 (53 FR 27290). You also ask the Agency to reconsider whether this exclusion is a HSWA requirement.

On January 23, 1990, EPA clarified the definition of "designated facility" (see 55 FR 2342). This amendment to the definition in §260.10 clarifies that EPA's regulations allow waste shipments from a state where a waste is subject to the hazardous waste regulations as a result of a listing determination to a facility in a state where the waste is not yet regulated as hazardous. In this situation, the designated facility might not need to be permitted or under interim status, provided that the receiving facility is allowed by the receiving state to accept such waste.

In your letter, you describe a situation similar to the one addressed in the January, 1990 clarification notice, regarding "the transportation and management of treatability study samples. In your example, a treatability sample is transported from a state which regulates the treatability sample as a hazardous waste (because it does not have the exclusion), to a state that has adopted the exclusion, and therefore does not regulate the sample as a hazardous waste. You ask whether the hazardous waste manifest, which is required in the originating state, can specify a treatability study facility as the "designated facility" even

though it does not have a permit or interim status. Furthermore the facilities which perform the treatability studies in some cases do not have permits or interim status.

As an initial matter, you should be aware that the interpretation of the definition of "designated facility" in an authorized state is a matter of state law. An authorized state may interpret the provisions of this regulation in a more stringent manner. Therefore, any interpretation of the term expressed in this letter reflects only EPA's interpretation of the definition of "designated facility" and should be confirmed with the appropriate state agency in the authorized state.

The primary reason for the January 23, 1990 amendments was to state clearly that EPA interprets the manifest requirement and the designated facility definition as not prohibiting the shipment of hazardous wastes from states where the waste is hazardous to authorized states where the wastes is not hazardous. The clarifying amendment to the definition of "designated facility" was to address one specific scenario to which this interpretation applies. By adding the clarifying language regarding newly listed wastes, EPA did not intend to preclude the interstate waste shipment of wastes in similar situations. EPA believes that the shipment of treatability samples is directly analogous to the shipment of newly regulated wastes. In both cases, protection of human health and the environment is somewhat assured by the threat of potential future liability for the generator and the receiving facility arising out of management of the wastes and by federal and state standards that apply to the receiving facility. EPA noted that Subtitle D standards would apply to facilities receiving newly listed wastes; facilities conducting treatability studies would have to comply with §261.4(f). Finally, it is plainly apparent that this interpretation is consistent with the purposes of the treatability exemption. If you choose to follow this interpretation, the generator should arrange for the designated facility owner or operator to sign and return the manifest to the generator, and for out of state transporters to sign and forward the manifest to the designated facility. Although the receiving state may not require the completion of the manifest loop, the originating state would likely require the return of the manifest.

You suggest that an alternative approach to address the interstate shipment problem would be to determine that the

treatability study exclusion is a HSWA provision. In the course of the rulemaking, the Agency determined that the exclusion was not a "requirement or prohibition" pursuant to HSWA. We believe that any reexamination of this matter would result in the sane conclusion. Furthermore, a HSWA designation would not be a panacea for the transportation of samples since even a HSWA exclusion would not supersede an existing, more stringent state requirement, and therefore would have no practical effect in states where the treatability exclusion has not yet been adopted.

If you have any further questions regarding this clarification of the term "designated facility," please call Wayne Roepe of my staff at (202) 260-2245.

Sincerely,
Sylvia K. Lowrance
Director
Office of Solid Waste