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HSWA AUTHORIZATION ISSUES-JOINT PERMITTING

SUBJECT: RCRA Reauthorization and Joint Permitting in
Authorized States:
RCRA Reauthorization Statutory Interpretation #5

FROM: Jack W. McGraw
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TO: Addressees

Section 3006(g) of the Hazardous and Solid Waste Amendments of 1984 (HSWA or the Amendments) provides that hazardous waste requirements and prohibitions promulgated pursuant to the Amendments are applicable in authorized States at the same time they are applicable in unauthorized States. HSWA also mandates incorporation of many of these requirements in all Resource Conservation and Recovery Act (RCRA) permits as of November 8, 1984, in both authorized and unauthorized States. In addition, 3005(c)(3) of the Amendments provides EPA with the authority to incorporate into permits any requirement necessary to protect human health and the environment, even if EPA must go beyond the specific requirements or prohibitions found in the statute or regulations.

A permit cannot be considered a RCRA permit unless it contains all the applicable new requirements of the Amendments. A State must be specifically authorized for provisions of HSWA to issue a RCRA permit. Section 3006(c) of HSWA provides EPA with the authority to issue permits for the new requirements and prohibitions until a State is authorized to do so. That section provides that in an authorized State the Administrator "shall have the authority in such State to issue or deny permits or those portions of permits affected by the requirements and prohibitions established by the Hazardous and Solid Waste Amendments of 1984. The Administrator shall coordinate with States the procedures for issuing such permits." This guidance discusses the implementation of the joint permitting process through which this coordination will occur.1 Our intent in addressing this issue is to continue the permitting process, in cooperation with the

States in as efficient and expeditious a manner as possible.

1 Note that there are also requirements of the HSWA which are self-implementing. They take effect regardless of whether a permit is being issued; for example, the ban on disposal of hazardous wastes in salt domes (Section 3004(b)).

JOINT PROCESSING: FORMAT AND TIMING OF THE RCRA PERMIT

The joint permit may be issued in two ways. There can be one complete permit with Signatures of both the State Director and the Regional Administrator (RA) on the same document. The other alternative is to issue two incomplete permits, one signed by EPA and one signed by the State. In either situation signatures by EPA and the State are necessary to provide the facility with the authority to operate under a RCRA permit.

If a single complete permit is issued, it is especially important to have a clear identification of which provisions stem from Federal authorities and which stem from State authorities. This identification will clarify enforcement responsibilities and will enable an interested party to determine the appropriate authority to approach when appealing a given permit condition.

Where incomplete permits are issued simultaneously, only those conditions stemming from one authority would be attached to the respective signature. EPA would issue the portion addressing only those HSWA provisions for which the State has not yet received interim or final HSWA authorization. The authorized State would address all other RCRA and State conditions and requirements. The two parts together (whether one document with two portions or two portions put together) would address all the conditions required in a RCRA permit. (See Draft permit section on page 7 for a discussion of how these conditions should be addressed.) This is generally the preferable options as it clearly separates the State and Federal requirements yet it provides the facility with a complete RCRA permit. However, the decision whether to issue one complete or two incomplete permits is ultimately left to the Regions and States; legally, there is no reason to prefer one over the other.

It is EPA policy that State and Federal portions of the

RCRA permit be issued simultaneously. However, prior to the date of enactment of the HSWA, States with Phase II or final authorization were processing permit applications toward final determinations. Many of these permits have already been issued as draft permits. States with Phase II or final authorization that issued draft permits prior to April 8, 1985, (the date the RCRA Implementation Policy was signed announcing that joint permits must be issued simultaneously) should proceed as planned to take final action during fiscal year 1985 on these draft permits. The State permits will fulfill State law but they will not be RCRA permits.

EPA will then assign a high priority to these facilities, so that the Federal portion of the permit can be issued as soon as possible, or a rapid determination can be made that a Federal portion is unnecessary. For all other permits, i.e., those permits which have not reached the draft stage by April 8, 985, or pre-April 8, 1985, draft permits which are not issued as final permits in fiscal year 1985, States and EPA must plan on simultaneous issuance of the State and Federal portions of the RCRA permit.

A new facility is not allowed to begin construction unless both the State and Federal portions of the permit have been issued, providing the facility with a RCRA permit. If a new facility received only the State's portion of the permit, it may not begin construction since that portion does not, in itself, constitute a RCRA permit. For facilities that want to expand, it the expansion is such that the facility would require a RCRA permit (i.e., it is not an expansion allowable under interim status), then the facility also must receive both the State and Federal portions of the permit prior to expanding.

PROCEDURAL ASPECTS OF ISSUING STATE AND FEDERAL PERMIT PORTIONS

Most RCRA permits will be issued simultaneously by EPA and the States. Procedures to be followed for simultaneous issuance are discussed in the "Implementation Analysis" section. This section discusses those instances, described above, where the State and Federal portions of the permit are not issued simultaneously.

The procedures for issuing a joint RCRA permit in these

cases will vary depending upon whether the State has issued a draft or final permit. Where the final State permit has been issued prior to the issuance of the EPA permit, the expiration date will coincide with that established for the original State permit. There are two possible permitting situations:

1. State issued draft permit prior to April 8, 1985, and EPA issues draft permit prior to final State permit; State issues final permit before EPA issues final permit.

Where a State has already issued its draft permit, EPA will make this permit a high priority for action. EPA will determine whether and how the facility is affected by the HSWA requirements since the State is not authorized to make a determination about the applicability of the Amendments. When EPA makes this determination, it will either:

- issue a draft permit containing appropriate conditions addressing HSWA, or

- where EPA finds that the facility is not affected by HSWA, issue a notice explaining our tentative decision. This means that no corrective action will be necessary, no other HSWA requirements apply, and no additional requirements to protect human health and the environment are necessary.

EPA will follow the procedures in 40 CFR Part 124 in issuing the draft permit or notice of our tentative decision that the facility is not affected by HSWA.

EPA's Fact Sheet or Statement of Basis should explain the relationship between the EPA action (draft permit or tentative determination that a HSWA permit is unnecessary) and the previously-issued draft State permit. It should explain that EPA's final determination will be made simultaneously with issuance of the final State permit or that EPA's final action will occur after the State issues its final permit. In the latter event, the notice should explain that the facility will have a RCRA permit only when final permit actions have been taken both EPA and the State. The State may wish to send a letter to the facility to inform the owner/operator that she/he does not have a RCRA permit until EPA covers the new HSWA requirements in an EPA permit or determines that an EPA

permit to address HSWA is unnecessary.

If EPA determines that a permit is necessary to impose HSWA requirements, and that the draft HSWA permit would affect the draft State permit, the State is strongly encourage to redraft and, if appropriate, renotice its permit at the same time EPA drafts and notices its permit. In some cases there could be a direct conflict between the two permits. If States have the authority to remove permit conditions that conflict with HSWA requirements, removal of such conditions before the permit is issued would avoid the later issuance of two conflicting permits and the need to explain that the HSWA permit supersedes any conflicting State requirements.

In other cases decisions made by EPA concerning HSWA requirements may affect the State portion of the permit even though they do not conflict with the State approach. For example, as a result of EPA technical requirements, it may be necessary to revise the closure plan. It would be preferable for the State to revise the closure plan in its permit, making it unnecessary for both the State and EPA permits to cover the same areas. However, if the State is unwilling or unable to modify its draft permit, both the State's final permit and EPA's draft and final permits must indicate that HSWA requirements in the EPA portion of the permit supersede any inconsistent or less stringent State permit requirement. A Fact Sheet for the final EPA permit must specifically identify the conflicting State provisions which are superseded in order to avoid ambiguity about whether the State or Federal permit condition in a particular area is the operative requirement.

2. State has issued both the draft and final permit before EPA issues its draft permit.

In issuing its portion of the permit in this situation, EPA should proceed as described above, by making a determination about the applicability of the Amendments and issuing either a draft permit or a notice of our tentative decision that the facility is not affected by HSWA.

Where the State does not open its permit, the State is encouraged to issue a notice in conjunction with EPA's final

permit which announces that when the State permit was issued it was not a RCRA permit, the State permit does not address the HSWA provisions, and that the State did not reopen its permit. In addition, the State may wish to send a letter to the facility as described above.

The EPA Fact Sheet should explain the relationship between the EPA action and the final State permit. EPA should explain that once EPA makes its final decision, the combination of the State and Federal permits (or decision that a Federal permit is not necessary) will meet the requirements for a RCRA permit.

In the situation described previously--where the State permit conflicts or overlaps with the HSWA requirements EPA is imposing--the State is strongly encouraged to modify its permit. If, however, the State is unwilling or unable to reopen its permit (e.g., there is no "cause for modification" under the State regulations to cover the type of change that would be necessary), EPA should proceed to issue its permit, making sure that the EPA permit states that the HSWA requirements supersede any inconsistent or less stringent State permit requirements. As explained before, the Fact Sheet for the RCRA permit must specifically identify whether the State or Federal permit condition in a particular area is the operative requirement. In any of these permitting situations, if a State believes it must follow additional procedures in order to meet the requirements of State law it should do so.

JOINT PERMIT IMPLEMENTATION

The joint permitting relationship must be defined by the Regions and authorized States. The Regions and States will need to:

establish procedures for coordinating the joint permitting process;

establish procedures and schedules to obtain additional information from permit applicants.

notify those facilities who have already submitted applications about the new requirements and their need to address them.

Authorization Memoranda of Agreement (MOA's) need to be amended or other agreements executed to define EPA and State roles in the permit process.

As stated earlier, the Amendments specifically provide that the States may participate in implementing the new provisions. An authorized State would participate in applying the HSWA requirements to the same extent that an unauthorized or Phase I State may currently participate in the Federal permit process. The States can take the lead on the technical review of the application, preparation of the draft and final permit, preparation of the public notice, review of public comments and preparation of the response to comments; but the joint role must be clearly understood. The State is assisting in processing the Federal HSWA portion of the permit, but EPA has the ultimate decision-making authority for those aspects of RCRA permitting for which the State has yet to be authorized.

IMPLEMENTATION ANALYSIS

This section discusses the major steps in the permit process and how each would be affected under joint permitting. The Regions may wish to consider additional changes to MOA's to address the following discussion in greater detail.

1. Permit Application Request - Where possible, there should be one application request issued jointly by EPA and the State. The request should make clear which requirements are State and which are Federal. Duplicates of the same application should be sent to both EPA and the State. Requiring only one application makes it easier for the applicant since she/he need not separate the State and Federal requirements in the application. EPA must receive a copy of the State portion in order to consider whether any additional requirements are necessary to protect public health and the environment, pursuant to 3005(c). The State maintains the overall lead in the process, with EPA responsible for the provisions which stem from Federal requirements for which the State is not authorized.

Where an authorized State has requested a permit application before HSWA, that request will retain its validity for the State's program. However, where information is needed

to address the new requirements, EPA must request the additional information if the State does not have the authority to demand such information.

The applicant should be given time to comply with the request for the new HSWA information if necessary; the amount of time granted is subject to the Region's discretion as negotiated with the State. Where the new request creates a burden for the permit applicant, additional time should clearly be granted. The additional time should be granted only to accommodate the new burden; the State's original time frame for receipt of information from the applicant will apply to the original application request.

2. Completeness Determination - Ideally, the completeness determination should be a joint decision. Since there is only one application, one determination will facilitate the process for the applicant. If one Agency finds the application to be incomplete prior to the other Agency's determination, it can issue a Notice of Deficiency (NOD) or commence an enforcement action, where appropriate. However, the draft permit cannot be issued until both the State and Federal draft permits have been prepared. If one portion of the application is not complete, another completeness determination will be made for that portion only after the date on which the newly requested information becomes due. If both portions of the application are incomplete, a joint completeness determination will be made once the newly requested information is received. In either situation, it is only at that later date that an owner/operator would be subject to enforcement action for an incomplete application based on an NOD for the newly-requested information.

3. Application Deficiencies - Where possible, a joint NOD should be issued with the appropriate enforcing authority issuing the appropriate portion of the NOD. Where deficiencies occur in both the State and Federal portions of the application, the applicant should receive notice simultaneously from both parties to facilitate the applicant's response. Either two NOD's should be issued at the same time, or one document can be issued signed by both parties, so long as it explicitly states which requirements stem from which enforcing authority. If, however, the deficiency relates only to a State provision, the State will issue the NOD with a statement explaining that only the State portion is deficient. Where necessary, separate

NOD's for State and Federal deficiencies can be issued at different times.

4. Draft Permit - The draft permit (or intent to deny) will be issued simultaneously by EPA and the State (unless the State draft permit was issued prior to April 8, 1985). The joint draft permit would be physically similar to any other draft permit except that it would contain two parts, specifically identifying which provisions stem from State authorities and which from Federal authorities. As discussed earlier, the two parts may be issued as either one or two draft permits as determined by the Region and the State.

The Fact Sheet or Statement of Basis should be jointly written (as should the public notice) and should include separate discussions of Federal and State issues. An authorized State can enforce its approved analogue to the generally applicable requirements of 40 CFR 270.30. As a result, the State's parallel provisions to 40 CFR 270.30 will be applicable to both the State and Federal portions of the permit. The Fact Sheet or Statement of Basis should contain an explanation of these requirements.

Where possible, permit writers should avoid putting conflicting requirements into joint permits. This could occur, for example, if a State authorized for the pre-HSWA single liner requirement includes such requirements in its portion of the permit, while EPA includes the HSWA double liner requirement in its portion. Where possible, the State should agree not to include those requirements which re inconsistent or less stringent. There may be situations, however, where a State only has legal authority for single liners and has no discretion to do otherwise. Therefore, where less stringent requirements cannot be eliminated, the Fact Sheet (or Statement of Basis) should state that the more stringent requirements always take precedence and should include a summary of the operative permit conditions. In this way, the facility and the public will know what requirements must be fulfilled and confusion from permits which contain conflicting requirements will be minimized.

5. Permit Procedures and Public Participation - Public participation activities should be conducted jointly. The EPA Region should follow the State's hearing procedures and requirements (adhering to the State's processing deadlines)

even where those requirements are more stringent than EPA's. EPA would serve as the hearing officer for purposes of the Federal provisions of the permit.

To the extent that the State desires and EPA resources allow, the Regions should participate in other aspects of the State's public involvement process. However, EPA is not bound to participate in procedures which re not part of the State's authorized program. State imposed requirements which are beyond the scope of coverage of the Federally approved program are not enforceable by EPA, nor is EPA bound by them.2 Requirements for environmental impact statements (EIS's) and siting boards are specific examples of State requirements which are "broader in scope" than the Federal program and, therefore, although they may be needed as a matter of State law, EPA need not participate with respect to EPA's portion of the permit.

6. Final Decision - As with the draft permit, the EPA and State final permits will be issued simultaneously (except where the State draft permit was issued prior to April 8, 1985, and the final permit was issued before the end of fiscal year 1985). The formate of the final permit will be the same as the draft permit. (See discussion on pages 7-8).

2 PIG 84-1, from Lee M. Thomas, May 21, 1984.

7. Appeals - The States will handle appeals relating to State provisions and EPA will handle appeals of the Federal provisions. Each party should notify the other when any appeal action is initiated.