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HSWA EFFECT ON STATE DELISTING DECISIONS

MEMORANDUM

SUBJECT: RCRA Reauthorization Statutory interpretation # 4:  
Effect of Hazardous and Solid Waste Amendments of  
1984 on State Delisting Decisions

FROM: Jack W. McGraw  
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TO: RSI Addressees

ISSUE: What effect do the delisting provisions of the  
Hazardous and Solid Waste Amendments of 1984 have  
on State delisting decisions?

SUMMARY

Since November 8, 1984, EPA has administered to all RCRA delisting programs, and will continue to do so until a State is authorized for delisting under the new provisions of the Hazardous and Solid Waste Amendments of 1984 (HSWA or the Amendments). To receive authorization, a State must conform its delisting program to the Federal program and apply to the Agency for authorization. Any temporary exclusion granted by a State before November 8, 1984, must be reevaluated using the new delisting criteria and procedures. If a final decision to grant or deny a petition has not been made by November 8, 1986, the temporary exclusion will cease to be in effect for purposes of RCRA.

DISCUSSION

Before enacting of the Amendments, EPA's evaluation of exclusion (delisting) petitions addressed only those factors considered by the Agency in listing the waste as hazardous. The regulations also allowed the Agency to grant a temporary exclusion without prior notice and comment if there was substantial likelihood that an exclusion would be finally

granted. In addition, once EPA authorized a State program, EPA suspended the administration and enforcement within the State of those parts of the Federal program for which the State was authorized. Consequently, any authorized State that had a delisting program could make delisting decision without prior EPA review of each decision. Any delisting decision made by the State still was subject to EPA oversight, however, to ensure that the State program did not become less stringent than EPA's. (Any delisting decision made by the State was in effect only while the waste remained under State control.)

### HSWA Effect On State Delisting Decision

The Hazardous and Solid Waste Amendments of 1984 modified both the substantive standard and the procedures to be used in evaluating delisting petitions. The Amendments require the Administrator, when evaluating delisting petitions 1/ to:

- consider factors (including additional constituents) other than those for which the waste was listed if there is a reasonable basis to believe that such additional factors could cause the waste to be hazardous waste; and
- provide notice and an opportunity for comment before granting or denying a petition.

Furthermore, the Amendments require the Administrator to re-evaluate all temporary exclusions granted before the date of enactment (i.e., before November 8, 1984); if a final decision to grant or deny a petition has not been promulgated within 24 months (i.e., by November 8, 1986), the temporary exclusion will cease to be in effect.

Under Section 228 of the HSWA, any requirements, including the delisting requirements, imposed pursuant to the Amendments are effective in authorized States at the same time they are effective in other States. Therefore, until the States are authorized for these requirements, EPA is responsible for administering these provisions. Based on this provision:

- any further RCRA delisting decisions made by States (once authorized) will have to be based on the new delisting criteria and procedures noted above;

1/ In evaluating a petition, the Agency does not consider the evaluation to be completed until a final decision is published in the Federal Register.

- any state delisting decision made on or after November 8, 1984, and before authorization under the new standard would not qualify as a RCRA delisting decision; and
- any temporary exclusion 2/ that was granted by the State before November 8, 1984, must be reevaluated by the State (if they have been authorized under the new delisting criteria) or by EPA. If a final decision to grant or deny a petition has not been made within 24 months of that date, the temporary exclusion will cease to be in effect.

Finally, any final exclusions that were granted by the State before November 8, 1984, are not affected by the Amendments (i.e., no additional action is required by the State or by EPA). The States, however, are encouraged by EPA to reevaluate those decisions if the other factors were not considered by the State.

The effect of the Amendments on the States is summarized on the attached table.

Attachment

2/ Temporary exclusions are any delisting decisions which are not considered the final delisting action under the regulations of the issuing authority. For example, EPA issued a number of temporary exclusions, pursuant to 40 CFR §260.22(m). That provision explicitly states that these decisions are made "before making a final decision." Similarly, several States have mechanisms for removing a waste from regulation before promulgating a final decision, such as delistings patterned on the Federal temporary exclusion. All such exclusions are temporary.

A final exclusion is an Agency determination done in accordance with the issuing authority's regulations; e.g., with notice and comment after which no further review of the petition is contemplated. EPA issues final exclusions pursuant to 40 CFR §260.20, which requires publication of a tentative decision in

the Federal Register, receipt and evaluation of public comments, and publications of a final decision in the Federal Register. Decisions not to prosecute petitioners because it was believed that a delisting later would be issued do not qualify as final exclusions.

## ATTACHMENT

### SUMMARY: EFFECT OF AMENDMENTS ON STATE DELISTING

- FINAL EXCLUSIONS
  - States do not need to reevaluate decisions made before November 8, 1984.
  - States must use new delisting criteria for decisions made after November 8, 1984.
  - States must provide an opportunity for comment before making a final decision.
  
- TEMPORARY EXCLUSIONS
  - EPA will need to act on previous State temporary exclusions, unless, within 24 months of November 8, 1984, the state:
    - a) modifies its regulations;
    - b) requests and becomes authorized by EPA for delisting; and
    - c) acts on previous temporary exclusions.
  - If the State (as described above) or EPA does not make a decision within 24 months of November 8, 1984, the waste is hazardous again.
  - States must use new delisting criteria for decisions made after November 8, 1984.
  - States must provide an opportunity for comment before making a temporary decision.