UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
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Memorandum

Date: November 7, 2008

Subject: Clean Water Act and RCRA Regulatory Interface

From: Jeffry Fowley, Office of Regional Counsel, Region I

To: Bill Cass, NEWMOA

Here is an outline of my thoughts for the training session on November 12, 2008 regarding the Clean Water Act and RCRA Regulatory Interface. Please feel free to distribute to federal and state participants in advance of the call.

1. The Clean Water Act and RCRA have different purposes. The Clean Water Act is designed to regulate discharges to surface waters and the sewers whereas RCRA is designed to prevent releases of hazardous wastes to the environment and to ensure through a cradle to grave management and tracking system that hazardous wastes ultimately are properly recycled, or treated and disposed. Thus while there are RCRA statutory and regulatory exemptions designed to ensure against unnecessary overlapping requirements, there also are situations where having one program defer to the other could lead to gaps in regulation and environmental problems. Using both Clean Water Act and RCRA enforcement authority may be appropriate in some situations.

2. The federal RCRA regulations and interpretations set the floor. States may be more stringent, for example, in applying both RCRA and Clean Water Act requirements in situations where at the federal level only Clean Water Act requirements would apply. The usual way that States are more stringent is to write regulations that are worded more stringently than the EPA regulations. However, States also may be more stringent by interpreting more stringently even regulations that are worded the same as the EPA regulations. See Letter from Sylvia Lowrance to Regina Mahoney dated February 11, 1991 (RCRA On Line). In this later situation, a State should make sure that its interpretation is a defensible one under State law (e.g., that the wording of the regulation is

such that it is possible for the EPA to interpret it one way vs. the State to interpret it more stringently), and the State should provide fair notice of its different interpretation to the regulated community, e.g., through written guidance.

3. The federal RCRA statute itself does not exempt activities from RCRA regulation across the board, simply because they are subject to Clean Water Act regulation. Rather, the statute itself has only two specific exemptions: (i) for discharges to surface waters which are subject to NPDES permits under the Clean Water Act (NPDES point source exemption), and (ii) for solid and dissolved materials which are "in" domestic sewage – as occurs when there are discharges to the sewers subject to pretreatment permits under the Clean Water Act (domestic sewage exemption). The EPA has interpreted the first of these exemptions narrowly: "This exclusion applies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being collected, stored or treated before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment." Note to 40 C.F.R. 261.4(a)(2). However, the EPA (Office of Solid Waste) has interpreted the domestic sewage exemption more broadly, to cover, for example, disposal of hazardous waste at a facility's sink if the waste later will enter a municipal sewer and then be "in" domestic sewage. See Letter from Marcia Williams to Beverly Brookshire, dated June 10, 1987 (RCRA On Line). The result is that at the federal level, such wastes (even while being collected in sinks and pipes on site prior to the facility boundary/point of discharge) need not meet RCRA requirements though they must meet Clean Water Act pretreatment requirements.

In contrast, as recorded in a letter from EPA Region I (Marv Rosenstein) to Edward Pickering, dated December 20, 2005, the six New England States all are more stringent. While five of the six States (Vermont, Rhode Island, Massachusetts, Connecticut and Maine) have adopted the domestic sewage exemption, they interpret it more stringently to not apply to hazardous wastes while they are being handled within a generator's site (e.g., at a facility sink), even though the hazardous wastes will later mix with domestic sewage when they enter a municipal sewer line. New Hampshire achieves this same result by not having adopted in full the domestic sewage exemption. A key resulting difference is that it is easier in the six New England States to enforce against persons who simply dump containers of concentrated chemicals down the drain. In these States, such dumping is not allowed by the domestic sewage exemption. {It also is not allowed by the wastewater treatment unit exemption discussed below, since that exemption allows only the discharging of "wastewater" and dumping batches of concentrated chemicals is not considered a discharge of "wastewater" in those States.} Rather, in the six New England States, the dumping of concentrated chemicals down the drain is an illegal disposal of a hazardous waste, whether or not it also results in violations of Clean Water Act pretreatment requirements. State inspectors are not

limited to alleging only pretreatment program violations, which may be more difficult to prove.

4. In contrast to the federal RCRA exemptions for discharges to surface waters and discharges to the sewers, there is no federal RCRA exemption for discharges to ground water. Discharges to ground water are not regulated by the Clean Water Act. Such discharges are regulated by the Safe Drinking Water Act, but there is no exemption from RCRA requirements just because discharges might also be regulated by the Safe Drinking Water Act.

Under the minimum federal RCRA requirements, discharges of hazardous wastes are allowed through injection wells. However, all of the New England States are more stringent in not allowing discharges of hazardous wastes through injection wells. Even under the minimum federal requirements, there could not be discharges directly into ground water.

Discharge of hazardous waste into ground water is an illegal disposal under RCRA. Spills of hazardous waste into ground water or onto the ground also can be addressed as illegal disposals, as well as under State and federal cleanup authorities.

5. While the NPDES point source exemption does not apply to the handling of hazardous wastewaters on site prior to discharge, and while the domestic sewage exemption - as interpreted or limited by the six New England states - does not apply to the handling of hazardous wastewaters on site prior to discharge, the wastewater treatment unit exemption may apply. That exemption was adopted by the EPA on November 17, 1980 in order to avoid the need for facilities with Clean Water Act permits to also have to get RCRA permits for the same operations. See 45 Fed. Reg. 76074. However, as interpreted by the EPA, that exemption frees the wastewater treatment units from all RCRA requirements, not just the permit requirement. See Hotline Questions and Answers February 1995. Also, the EPA initially adopted the wastewater treatment unit exemption as a temporary exemption, pending the then planned adoption of RCRA requirements (short of a full permit requirement) for wastewater treatment units. See 45 Fed. Reg. at 76074. However, it has become a long term feature of the federal RCRA program, which the States are allowed – though not required – to follow (unless and until it is changed at the federal level).

6. The reach of the federal wastewater treatment unit exemption is set out in the definition of "wastewater treatment unit" in 40 C.F.R. 260.10. To be exempt from RCRA regulation, a unit must (1) be part of a wastewater treatment facility that is subject to regulation under either section 402 or 307(b) of the Clean Water Act; (2) receive and treat or store an influent wastewater, or generate and accumulate a

wastewater treatment sludge, or treat or store a wastewater treatment sludge; and (3) be a tank or tank system.

7. Applying this exemption to facilities which actually discharge to the surface waters or the sewers is relatively straightforward. Such facilities are subject to regulation under either section 402 or 307(b) of the Clean Water Act, and typically either receive or treat or store influent wastewater, or generate and accumulate sludge, or treat or store sludge. Both treatment tanks and associated storage tanks are within the exemption.

However, containers used to store hazardous wastewaters are not within the exemption, since they are not part of a "tank" or "tank system." Thus in response to an inquiry from the Massachusetts Water Resources Authority, EPA Region I advised that when hazardous wastewater is first stored in containers before being carried to an on site wastewater treatment unit, the generator must count the hazardous wastewater when determining whether it is a large quantity generator, small quantity generator or conditionally exempt small quantity generator, and the generator must then comply with the RCRA requirements applicable to its container storage. Letter from Edward McSweeney to Kevin McManus, dated April 9, 1999. The Region further advised that while a generator may first store hazardous wastewater in containers and then transfer it into the wastewater treatment unit (if allowed by the CWA authority), RCRA requirements apply until such time as the wastewater enters the wastewater treatment unit/tank or tank system. Thus, the Region specifically advised that "the practice of transporting hazardous wastewaters in open buckets [to a wastewater treatment unit] is not allowed by the federal [RCRA] regulations." Id. The Region suggested that if a regulated entity wished to avoid RCRA regulation for its hazardous wastewaters destined for on site wastewater treatment, that it install hard piping, since "[federal] hazardous waste requirements do not apply to wastewaters which are hard-piped from a manufacturing operation to a wastewater treatment system/discharge point, so long as the wastes do not leak prior to discharge or otherwise come in contact with the environment." Id.

8. The wastewater treatment unit exemption also does not exempt hazardous wastewaters which leak from a wastewater treatment unit. EPA Region I prevailed in an enforcement action against the Cambridge Plating Company, which unsuccessfully argued that RCRA was not violated when it allowed hazardous wastewaters to drip from a wastewater treatment unit onto a basement floor. {The company also incurred liability under the Massachusetts 21E/State Superfund program when the wastewaters leaked through the basement wall into nearby soil and ground water}.

9. Even with respect to facilities which actually discharge to surface waters or the sewers, some States have chosen to be more stringent with respect to the wastewater treatment unit exemption. Massachusetts and Maine have adopted the exemption to the extent of exempting the units from full RCRA permitting requirements. However, both States have established in their State RCRA regulations, regulatory requirements which must be met by the owners and operators of such units handling hazardous wastes. These requirements apply in addition to any applicable federal and state water act requirements. Also, New Hampshire similarly has adopted the wastewater treatment unit exemption to the extent of exempting the units from full RCRA permitting requirements. However, in New Hampshire, a regulated entity must obtain a limited permit from the State RCRA program in order to handle hazardous waste within a wastewater treatment unit. The limited permit establishes requirements which apply in addition to any applicable federal and state water act requirements.

Even with respect to facilities which actually discharge to surface waters or the sewers, environmental issues have arisen in connection with the use of the exemption that Region I and States have needed to address. For example, use of this exemption can result in the absence of protections against leakage from the tank systems, since the RCRA requirements regarding tank system integrity and secondary containment will not apply. Thus before agreeing that the exemption could apply to all of the pipes throughout an industrial park used to bring wastewaters to a treatment facility, Region I first made sure that all of the pipes were covered by pretreatment permit requirements for proper operation and maintenance, with the entities responsible for all of the various pipes clearly identified.

Also, the use of this exemption means that the tank systems will not be subject to the RCRA AA, BB and CC air emission regulations – which otherwise would apply at permitted facilities, interim status facilities and large quantity generators, in addition to air program regulations. Finally, the use of the federal exemption means that facilities will be allowed to store hazardous wastewater treatment sludges on site with no time limit – since under the federal exemption the sludge holding tanks are exempt from RCRA requirements. States concerned about these issues may address them through more stringent State requirements or interpretations.

10. Another way in which some New England States are more stringent is that they allow the wastewater treatment unit exemption only when a source is in compliance with Clean Water Act requirements, whereas at the federal level the exemption is allowed whenever a source is "subject to" Clean Water Act requirements. Thus in some States, a facility which discharges hazardous wastewater in violation of water effluent limits can be cited for both water act and

RCRA violations, whereas at the federal level the facility would be cited only for Clean Water Act violations.

11. The EPA (Office of Solid Waste) also has interpreted that the federal wastewater treatment unit exemption applies to zero discharge units such as evaporator units, in some circumstances. In a letter dated March 20, 1989 from Sylvia Lowrance to Robert Elliott (Elliott Letter), OSW concluded that the exemption could apply to a zero discharge unit at a facility which used to discharge to the surface waters or sewers and voluntarily switched to a zero discharge unit, if it obtained a Clean Water Act permit covering its zero discharge unit. This was in addition to the exemption applying when a facility had been required by a Clean Water Act regulatory agency to eliminate all water discharges and had been issued a water permit covering a zero discharge unit. In contrast, in a letter dated January 16, 1992 from Sylvia Lowrance to Thomas Cervino (Cervino Letter), OSW concluded that the wastewater treatment unit exemption could not be utilized by a facility that never had discharged to the water. The letter noted that the exemption only applies to units at facilities which are subject to Clean Water Act regulation, and stated that "[t]he key issue is whether the treatment system ever had a discharge to surface water, and thus was ever permitted (or should have been permitted) under NPDES. If there was never a discharge to surface waters, then the exemption criteria is not satisfied." The letter went on to state: "With regard to the question of a 'zero discharge' facility, EPA would like to clarify the difference between a facility that produces no treated wastewater as a direct result of Clean Water Act requirements and units that are not required to obtain NPDES permits because they do not discharge treated effluent. In the first case, the facility would have had a surface water discharge at one time, but has since eliminated the discharge as a result of, or by exceeding, NPDES or pretreatment program requirements. Such facility would qualify for the waste water treatment unit exemption under RCRA. In the second case, the facility never had a surface water discharge and therefore was never subject to NPDES permitting or Clean Water Act requirements …. The RCRA exemption is not available in these cases."

12. EPA Region I policy has been to follow the interpretations set out in the Elliott and Cervino Letters, while urging the Region I States to consider being more stringent by not exempting from all RCRA requirements even those zero discharge units at facilities which used to discharge to the water. For facilities not allowed to be exempted under the interpretation of the federal regulations set out in the Cervino Letter, Region I gives each State the choice of either requiring a full RCRA permit or imposing requirements on the zero discharge/evaporator units at least equivalent to the federal requirements for generator treatment in containers and tanks. States which choose to be more stringent by not allowing the

wastewater treatment unit exemption even at facilities which used to discharge to the water also have these same two choices.

Evaporator units have air emissions, and a key difference between allowing the full wastewater treatment unit exemption and operating under the rules for generator treatment in containers and tanks is that the RCRA AA, BB and CC air emission rules apply to large quantity generators doing treatment in containers and tanks. In contrast, use of the wastewater treatment unit exemption for evaporator units has the effect of using water permits to exempt facilities from otherwise applicable RCRA air emission controls, even though the water permits do not (and presumably could not) impose any alternative air emission controls.

Currently within Region I, Connecticut is more stringent in not allowing evaporator treatment at facilities with no discharges to the water, without a full RCRA permit. Maine and New Hampshire also appear to be more stringent, in that they require limited RCRA permits for evaporator treatment (both at facilities which used to discharge and which never have discharged to the water). Vermont also is more stringent in generally banning the evaporation of hazardous waste, though I understand that the State might consider allowing an evaporator which put only water vapor into the air under its regulations allowing generator treatment in containers and tanks. Massachusetts generally is more stringent in not allowing even generator treatment in containers and tanks without a permit, but has been open to granting waivers from the RCRA permit requirement for facilities operating evaporator units provided that they meet the minimum federal requirements for generator treatment in containers and tanks. This results in Massachusetts being equivalent to the minimum federal requirements, as interpreted by EPA Region I.

13. Notwithstanding the restriction still imposed by the federal requirements as interpreted in the Cervino Letter, and notwithstanding the various more stringent State requirements that apply in New England, inspectors still sometimes run into situations where facilities claim that they are exempt from RCRA requirements because they have obtained water permits. In particular, some facilities have obtained water permits in an attempt to avoid RCRA requirements even though they never have discharged to the water, and thus should not be allowed to avoid RCRA requirements under the Cervino Letter interpretation.

I suggest addressing these situations as follows. First, a facility may simply have a "precautionary permit" – common in the pretreatment program – which states that the facility is not authorized to discharge to the water and requires that the facility give notice if it ever wants to start discharging. These permits are legitimate efforts by POTWs to ensure against unwanted discharges, but can be interpreted as not being intended to exempt a facility from RCRA requirements. Rather, the

whole point of such permits is to say that the facilities are not to undertake activities subject to the Clean Water Act. Thus it can be interpreted that facilities with such permits are not "subject to" the Clean Water Act so as to exempt them from the requirements of RCRA.

Second, there may be water permits which appear to have been issued solely to allow sources to escape from RCRA requirements. Region I examined one such permit that stated that a facility was "authorized to operate" an evaporator in "full compliance with the rules and regulations of the POTW," but upon checking we discovered that the POTW had no rules and regulations applicable to evaporators. In such circumstances, it could be determined that legitimate substantive regulation was not occurring under the Clean Water Act, and thus the facility was not exempt from RCRA.

Of course, the best way for a State to address such issues is to write its regulations to make clear what is and is not allowed in the case of zero discharge units/evaporators. Some New England States already have worded their regulations more clearly or stringently than the federal regulations, and I am happy to work with all of the States on any further clarifications or other revisions that may be necessary.

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I would be happy to answer any questions about this memorandum. I can be reached at tel: 617-918-1094, or email: fowley.jeff@epa.gov. EPA Region I also has a program of issuing more formal regulatory interpretations at the request of States or regulated entities. These generally are coordinated by the Hazardous Waste program unit chief. Stuart Gray currently is acting in that position.

cc: Stuart Gray