UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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MEMORANDUM

SUBJECT: Determining Whether State Hazardous Waste Requirements are More Stringent or Broader in Scope than the Federal RCRA Program

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The purpose of this memorandum is to update EPA's guidance to the regional offices on determining whether state hazardous waste requirements are more stringent or broader in scope than the federal Resource Conservation and Recovery Act (RCRA) Subtitle C hazardous waste regulations. This question arises when EPA is in the process of authorizing state programs.[1] This question is important because state provisions that EPA determines are more stringent are part of the federally authorized program and are federally enforceable while state provisions that EPA determines are broader in scope are not part of the federally authorized program and thus, are not federally enforceable.

EPA last addressed the issue of how to classify state provisions as either more stringent or broader in scope in a comprehensive manner in memoranda released in 1982 and 1984.[2] This memorandum supersedes the entire 1984 guidance document and Part 2.A. of the 1982 document which is the part that addresses the "more stringent versus broader in scope" issue. This memorandum also supersedes portions of pages 1-9 and 1-10 of the Introduction to State Authorization Training Manual, which addresses how to handle more stringent and broader in scope issues under the prior guidance.[3]

EPA regions determine whether particular state regulations are more stringent or broader in scope when authorizing state programs and state program revisions. These regional authorization rulemakings

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[1] State regulations also may become more stringent or broader in scope when a state simply does not adopt new EPA exclusions or other optional EPA regulatory changes, thus leaving its previously authorized regulations unchanged.
[2] "EPA Enforcement of RCRA-Authorized State Hazardous Waste Laws and Regulations," March 15, 1982. See http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/E9360D6BCE9AD528852567BA00708B78/$file/12046.pdf. "Determining Whether State Hazardous Waste Management Requirements are Broader In Scope or More Stringent than the Federal RCRA Program," May 21, 1984.
[3] See http://www.epa.gov/osw/laws-regs/state/revision/training/final_manual.pdf.

constitute EPA's legally-binding decisions rather than this or any other guidance.[4] However, EPA is updating this guidance in order to assist the regions in implementing a nationally consistent approach.

Background

The RCRA statute, in section 3006, grants EPA the authority to authorize state hazardous waste programs and then to enforce the authorized State requirements. See, e.g., section 3008(a). Once authorized, the state hazardous waste requirements are requirements of RCRA subtitle C, which operate "in lieu of the Federal program." See RCRA section 3006(b).

The RCRA statute further specifies that state programs may contain requirements that are more stringent than the federal regulations. See RCRA section 3009. Although the statute does not address state requirements that are considered broader in scope, states are not precluded from having such requirements. However, for purposes of federal authorization and enforcement, the EPA RCRA hazardous waste regulations distinguish between these two kinds of allowable state requirements. State requirements that are "more stringent," including those that are "more extensive" than the federal requirements, are among the requirements that may be federally authorized and enforced. 40 C.F.R. § 271.1(i)(1). On the other hand, state requirements that provide a "greater scope of coverage" than the federal requirements (commonly referred to as "broader in scope") are "not part of the federally approved program." 40 C.F.R. § 271.1(i)(2). Thus, while RCRA does not preclude states from including requirements that are "broader in scope" in their programs, EPA cannot authorize that part of the program and therefore cannot enforce it.[5]

The 1984 memorandum outlined the following two-part test that Regions generally used as guidance in determining whether state provisions are more stringent or broader in scope:

1. Does imposition of the State requirement increase the size of the regulated community beyond that of the Federal program?
2. Does the requirement in question have a direct counterpart in the Federal regulatory program?

If the answer to Part 1 was "yes," then the state requirement generally was considered broader in scope and the analysis was complete. If the answer was "no," then the region addressed Part 2. If the region found that the additional state regulation had a direct counterpart in the federal regulations, then the state generally was considered more stringent. If the region determined that the state requirement lacked a direct federal counterpart, then the requirement generally was considered broader in scope. In response to developments since 1984, the EPA has decided to retain a two-part test, but is modifying both parts of the test.

EPA is modifying part 1 to clarify that state regulations that cover entities subject to some federal conditional exemptions[6] may be determined to be "more stringent" where the entity is still managing a federally regulated hazardous waste. This modification builds on the approach EPA has taken in various authorization decisions since 1999, authorizing additional state requirements regarding Conditionally

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[4] United States v. Southern Union, 630 F.3d 17, 28-29 (1st Cir. 2010).

[5] States can enforce these requirements under state law.

[6] For the purposes of this memorandum only, the terms "exclusions" and "exemptions" are used interchangeably and are not meant to indicate any particular distinction between the provisions that are described as one or the other.

Exempt Small Quantity Generators (CESQGs),[7] and is consistent with the recent court decision upholding EPA's approach in authorizing the Rhode Island CESQG regulations. United States v. Southern Union, 630 F.3d 17 (1st Cir. 2010). As determined by the court, 40 C.F.R. § 261.5 "clearly regulates CESQGs, governing how they categorize their waste, where they may store it, and how they may dispose of it." *Id.* at 30. The court rejected Southern Union's argument that the state's regulation of CESQGs is "additional coverage" as that term is used in 40 C.F.R. § 271.1(i). *Id.*

EPA also is modifying part 2 of the test to clarify that state regulations may have federal counterparts that are not necessarily "direct." This modification reflects that EPA's approach to state authorization has evolved over the past two decades. EPA has moved away from suggesting a line-by-line match of state requirements to federal requirements when authorizing state program provisions under RCRA section 3006. Line-by-line matching of requirements is not required by either the RCRA statute or the regulations when making more stringent versus broader in scope determinations. Since 2005, EPA has instead taken a more flexible approach in determining whether state regulations are "equivalent to the federal program." See "Determining Equivalency of State RCRA Hazardous Waste Program," September 7, 2005 ("Equivalency Policy").[8]

Revised Two-Part Test

In determining whether a particular state provision is more stringent or broader in scope, the questions below should be answered sequentially:

(I.) Does imposition of the particular state requirement increase the size of the regulated community or universe of wastes beyond what is covered by the federal program through either directly enforceable (i.e., independent) requirements or certain conditions for exclusion?

(II.) Does the particular state requirement under review have a counterpart in the federal regulatory program?

Each part of the test is described more fully below. Examples of requirements are listed within this memorandum as either broader in scope with the designation of "BIS" or more stringent with a designation of "MS."

I. Does imposition of the particular state requirement increase the size of the regulated community or universe of wastes beyond what is covered by the federal program through either directly enforceable (i.e., independent) requirements or certain conditions for exclusion?

If the answer is yes, then the state requirement is generally considered broader in scope. If the answer is no, then the state requirement satisfies the first part of the test for being classified as more stringent, but should be further assessed to see if it satisfies the second part of the test. The first part of the test focuses

[7] See state authorizations regarding Louisiana, 64 Fed. Reg. 48099 (Sept. 2, 1999); West Virginia, 65 Fed. Reg. 29973 (May 10, 2000); Rhode Island, 67 Fed. Reg. 51765 (August 8, 2002); Florida, 67 Fed. Reg. 53889 (Aug. 20, 2002); Massachusetts, 69 Fed. Reg. 57842, 57856 (March 12, 2004); Connecticut, 69 Fed. Reg. 57842, 57856 (Sept. 28, 2004); New Hampshire, 71 Fed. Reg. 9727, 9732-33 (Feb. 27, 2006); Missouri, 71 Fed. Reg. 25079, 25082 (Apr. 28, 2006); Vermont, 72 Fed. Reg. 12568 (Mar. 16, 2007); and California, 76 Fed. Reg. 62303, 62305 (Oct. 7, 2011).

[8] http://www.epa.gov/osw/laws-regs/state/policy/fe-9-7-05.pdf

on the scope of regulation over entities and wastes and asks whether the particular state requirement increases either the universe of covered entities or the universe of wastes.

If a state requirement regulates wastes or entities that are exempted unconditionally or omitted from hazardous waste regulation at the federal level, then it increases the size of the state's regulatory program beyond that of the federal program and thus is broader in scope than the federal program. Examples of requirements that are broader in scope because they regulate wastes exempted unconditionally by the hazardous waste program at the federal level include:

Example I.1. - BIS. State listing of wastes that are not in the universe of federal hazardous wastes (e.g., PCB wastes exempted from the federal RCRA regulations by 40 C.F.R. § 261.8).

Example I.2. - BIS. A state has a lower concentration level for classifying a waste as a characteristic hazardous waste (e.g., for lead) resulting in greater quantities of wastes being classified as exhibiting the characteristic of toxicity. However, in such circumstances, the state regulation still should be authorized as applied to any wastes that meet or exceed the federal characteristic level, but a note should be added to the Federal Register at the time of authorization, and to any listing of codified provisions, explaining that the provision is not federally authorized as applied to wastes below the federal characteristic level.

An example of a requirement that is broader in scope because it regulates entities not regulated at the federal level is:

Example I.3. - BIS. A state regulates household hazardous waste or collection centers or events handling household hazardous wastes.

In addition, even when the federal regulations cover a waste and an entity overall, if they unconditionally exempt a particular kind of unit or process from regulation, state regulation of that unit or process generally will be considered broader in scope because the state will be providing a greater scope of regulatory coverage. An example of a requirement that is broader in scope because it regulates units or processes not regulated at the federal level is:

Example I.4. - BIS. A state regulates the recycling process itself (other than when the state is tracking the federal requirements specified in 40 C.F.R. § 261.6(d)).

Conditional Exemptions and Exclusions

In contrast, since 1984, EPA has promulgated a large number of conditional exclusions from the definition of solid waste, the definition of hazardous waste, permitting, or other requirements. Questions have arisen regarding situations where states have chosen to not adopt these exclusions and have sought authorization for their resulting state requirements.[9]

EPA is clarifying that additional state regulations covering entities subject to some of the federal conditional exemptions may be considered more stringent (if they also meet the second part of the test) as these state regulations generally are within the scope of the federal program. Entities may be

[9] Other times, states have simply not adopted new EPA exclusions, without submitting a program revision, thus leaving their previously authorized regulations in place. How to address this situation is discussed below – see Example I.5. - BIS regarding CRTs.

regulated through either the imposition of requirements that are directly enforceable or through the imposition of conditions for an exemption from more extensive requirements.[10] Thus, when a state more strictly regulates an entity subject to either type of provision, it generally does not expand the size of the regulated community.

For example, a state that does not recognize the CESQG or small quantity generators (SQG) categories, or that imposes additional requirements on CESQGs or SQGs, is not increasing the size of the regulated community, since these generators are managing wastes that are regulated as hazardous at the federal level.[11] CESQGs and SQGs are subject to regulation under the federal program in 40 CFR § 261.5 and 40 CFR Part 262, respectively. While the requirements imposed on these entities are not as extensive as those for large quantity generators (LQGs), CESQGs and SQGs are regulated entities under the federal program.

The following types of requirements satisfy the first part of the test for considered more stringent:

Example I.1. - MS. Where a state adopts additional requirements regarding SQGs and CESQGs.

Example 1.2. - MS. Similarly, where a state adopts additional requirements regarding LQGs.

In contrast, if a state regulates material that is not considered to be solid or hazardous waste under the federal regulations when certain conditions are met, such as many of the materials that have been conditionally excluded from regulation under 40 C.F.R. § 261.4(a) (materials which are not solid wastes) or (b) (solid wastes which are not hazardous wastes), then the state regulation is broader in scope whenever all federal conditions have been met.

However, in the case of such solid and hazardous waste exclusions, this broader in scope determination should only apply to the state regulation of wastes or entities that would meet <u>all</u> the conditions of the federal regulatory exclusion. Entities or wastes that <u>would not</u> meet all the conditions of a federal regulatory exclusion remain fully regulated under the federal hazardous waste program and state regulation of these entities/wastes are within the scope of the federal program.

Example I.5. – BIS. State regulation of used, broken cathode ray tubes (CRTs) that meet the conditions in the federal exclusion in 40 C.F.R. § 261.4(a)(22). Under the federal exclusion, used, broken CRTs are not a solid waste as long as the CRTs are stored, labeled, transported, and processed as set forth in the regulations cited within the exclusion and not speculatively accumulated. States that do not adopt this exclusion would continue to regulate these materials as a solid and hazardous waste. Therefore, such state regulations would generally be broader in scope with respect to their regulation of CRTs that meet all the federal exclusion conditions. In contrast, when the handling of used, broken CRTs does not meet all the conditions for exclusion under the federal regulations, the CRTs would also be federally regulated hazardous waste and state regulation of such CRTs would be considered within the scope of the federal

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[10] Some regulations are independent requirements that are imposed, applicable and enforceable apart from an exemption while other provisions operate as conditions of an exemption and are prerequisites to obtaining that exemption.

[11] EPA is clarifying in this memorandum that the 1984 memorandum is incorrect in citing as an example of a requirement that increases the size of the regulated community: "a lesser amount of waste exempted from regulation under the small quantity generation exemption." Note that the CESQG provisions were promulgated after the memo was written (56 FR 10146, March 24, 1986) but are similar to the small quantity generator provisions to which the memo referred.

program. EPA would be able to enforce the authorized state regulations where at least one of the conditions for the federal exclusion for used, broken CRTs is not met.

Further, if a state adopts a federal solid or hazardous waste exclusion, but adds additional conditions that must be met for the state exclusion to apply, those additional conditions would be considered outside the scope of the federal program and would not be part of the federally authorized program, although the entity would still be subject to federal enforcement regarding the part of the state regulations which track the federal conditions. For example, if a state adopts the CRT exclusion, but adds additional management standards as conditions for the exclusion, those additional management standards would be considered outside the scope of the federal program. However, as discussed above, if not all of the federal exclusion conditions are met, used, broken CRTs would be federally regulated as a hazardous waste and would be within the scope of the federal program.

When a state chooses not to adopt a federal exclusion, it is not required to submit a program revision application to EPA – since it is not revising its program. However, the regions should consider working with such a state, when otherwise reviewing applications for authorized program revisions, to include determinations in the Federal Register notice regarding the effect of the state not adopting particular federal exclusions. This would provide the clearest possible notice regarding which state regulations remain in the authorized program and, thus are subject to federal enforcement – in other words, those that are more stringent.

To summarize, the general principle with regard to exclusions under Part I of the test is that when the federal regulations contain an unconditional exclusion for a particular material or entity, state regulation of the excluded material or entity should be considered broader in scope. However, when there is a conditional federal exclusion, state regulation of the material or entity may still be considered within the scope of the federal program, depending on the application of the second part of the two-part test.

To assist in making the exclusion-specific determinations, Appendix A (attached) is a table that lists current federal exclusions together with a classification of whether a material or entity subject to a particular exclusion generally remains within the federal universe or is outside the scope of the federal program when the terms or conditions of the exclusion are met.

II. Does the particular state requirement under review have a counterpart in the federal regulatory program?

Assuming that a state requirement has satisfied the first part of the test, the region should then look to the second part of the test to determine whether the state requirement has a counterpart in the federal program.

If the additional state requirement does not have a counterpart, the requirement should be classified as broader in scope. EPA is continuing to make the policy decision that the regions should not authorize these state hazardous waste requirements. Even though state requirements lacking federal counterparts may apply to entities that also are subject to federal RCRA regulation, these additional requirements generally involve matters that EPA believes should be left to state-only administration and enforcement.

If an additional state requirement has a counterpart in the federal regulatory program, it should be classified as more stringent. For a state regulation to have a counterpart in the federal regulations, it is

sufficient if the state and federal provisions relate to the same general subject matter. It is not necessary that the state requirement have a "direct" counterpart in the federal program in order for the state requirement to be classified as more stringent. In addition, the requirements need not be identical and need not achieve identical results. Factors that Regions should consider in determining whether a state regulation has a counterpart include whether the state and federal requirements are designed for the same purpose and to achieve similar results, whether the state requirements support or enhance the implementation of a federal requirement, and whether the state requirements supplement federal regulations. A region need not determine that all factors are present when determining there is an adequate counterpart between the state and federal provisions.

Note that if a state adopts provisions designed to provide different but equivalent environmental protection, then the Region should review the provisions in accordance with the EPA's 2005 Equivalency Policy to determine if they are equivalent to federal requirements. The Equivalency Policy discusses how state provisions might differ from their federal counterparts while maintaining equivalency, which is a requirement for authorization. It also acknowledges that there could be some variation between state and federal provisions that does not compromise equivalency.[12] However, if the state adopts provisions that are different from the federal requirements and does not assert that they are equivalent, then the Region should review those provisions in accordance with this memorandum to determine if they are more stringent or broader in scope.

Examples of additional state requirements that have counterparts in the federal regulations and should generally be classified as more stringent include the following:

Example II.1. - MS. In addition to the federal requirement in 40 C.F.R. § 265.174 that facilities conduct weekly inspections of container storage areas, some states also require that the facility record the results in an inspection log. EPA believes that this additional requirement is related to the federal inspection requirement in that both are related to gathering information to be used to ensure the inspected materials are handled properly, and thus the state requirement has a counterpart in the federal regulations. Additional state reporting and recordkeeping requirements that support the implementation of underlying federal requirements should also be classified as more stringent.

Example II.2. - MS. Additional state permit application information requirements that supplement similar federal application requirements should be classified as more stringent.

Example II.3. - MS. Some states add to the federal 40 C.F.R. part 265, subpart I requirements applicable to generators the requirement to have secondary containment in container management areas. The federal regulations require measures to prevent releases from containers such as storage in non-leaking containers, using containers compatible with the wastes and keeping the containers closed. A requirement of secondary containment is designed to further carry out the purpose of these federal regulations in preventing releases of hazardous waste to the environment. Such state requirements relate to the specific subject matter in the federal regulatory program's containment requirements and should be classified as a more stringent requirement.

Example II.4. - MS. Additional hazardous waste management conditions for CESQGs. Some states require CESQGs to meet additional conditions such as storage in containers, time limits on storage, and

[12] Equivalency Policy at 3.

manifesting that are not imposed on CESQGs as exemption conditions by the federal regulations. CESQGs are federally regulated through provisions that ensure their hazardous wastes are properly recycled, treated and disposed (e.g., the 40 C.F.R. § 261.5 requirements to conduct waste determinations and to send hazardous wastes only to particular kinds of facilities). Additional state conditions are designed to achieve this same purpose: ensuring that the hazardous wastes generated from these facilities are properly recycled, treated, and disposed. The additional state regulations also generally match federal requirements for large or small quantity generators – with the states applying similar requirements to waste accumulation that involves a lesser quantity threshold. Such state regulations have counterparts in the federal regulatory program and should generally be classified as more stringent requirements.[13]

Example II.5. - MS. Requirements to monitor for additional constituents beyond those specified in the groundwater monitoring provisions found in 40 C.F.R. § 264.98. Monitoring for various constituents is required by the federal regulation, and when a state requires monitoring for additional constituents this is designed to achieve the same purpose of assessing the extent of releases. Such state regulations have a counterpart in the federal regulations (except when the state monitoring requirements apply only to wastes regulated by the state but not the federal program).

Additional state requirements that have more direct (e.g., line-by-line) counterparts in the federal regulations also should continue to be classified as more stringent. Examples of such state requirements are:

Example II.6. - MS. Fewer financial assurance options for facility closure.

Example II.7. - MS. Requirement for submittal of an annual rather than a biennial report for generators.

Example II.8. - MS. Expiration of permits after five years instead of ten years.

On the other hand, there are state requirements that have no counterpart in the federal program. Examples of such state requirements are:

Example II.1. - BIS. State registration and permitting fee requirements for generators or treatment, storage, and disposal facilities.

Example II.2. - BIS. Controls on traffic outside a hazardous waste facility or specification of transport routes to the facility.

Example II.3. - BIS. A requirement for the preparation of an environmental impact statement or the approval of a siting board as part of the RCRA permit issuance process.

Example II.4. - BIS. Licensing of hazardous waste transporters.

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[13] As discussed in this memorandum, CESQGs are never fully exempt from RCRA regulation and therefore, additional state conditions operate as additional requirements on these entities. In contrast, additional state conditions on solid and hazardous waste exclusions, where the material is not part of the regulated program if the federal conditions are met, would be outside the authorized program, as discussed above on page 6 immediately following Example I.5.

Conclusion

This guidance document is intended to assist the regions in carrying out important authorization and enforcement work. As the regions implement this guidance, they should continue to consult with ORCR and OECA when nationally significant issues arise, or when it is unclear to a region whether a particular provision should be classified as more stringent or broader in scope.

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