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

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OFFICE OF  
SOLID WASTE AND EMERGENCY  
RESPONSE

**MEMORANDUM**

**SUBJECT:** National Policy for Hazardous Waste Delistings

**FROM:** *Elizabeth A. Cotsworth*  
Elizabeth A. Cotsworth, Acting Director  
Office of Solid Waste

TO: Regional RCRA Senior Policy Advisors

As you know, the Administrator redelegated the delisting program to the Regional Administrators on October 25, 1995. I understand that the redelegation has proceeded smoothly and am very pleased with this result. You and your staff should be congratulated for this successful transition. Delisting was and will continue to be an evolving program as substantive technical and policy issues continued to develop. While working jointly with the Regions on a number of issues, we found it is important to have and maintain an appropriate level of national consistency among the Regional delisting programs.

The purpose of this memorandum is to transmit to you a national policy for the hazardous waste delisting program. It covers two important elements. First, the policy contains a "conditional delisting" element, designed to ensure that delisted wastes are managed in a manner consistent with the risk evaluation that supports the delisting decision. Second, the policy provides a delisting "reopener" element, designed to provide the Agency with a mechanism for immediate response to new information or data indicating conditions exist that may alter the Agency's position on the approval of a delisting. I recommend the application of each of these elements of this national policy to ensure the EPA delisting program remains safe and effective in protecting human health and the environment and at the same time achieves the goal of allowing the exit of certain wastes from the hazardous waste management system. The principles of this policy have been discussed among the Regional delisting coordinators during a series of monthly conference calls.

Background

In considering whether to exclude a particular solid waste from the list of hazardous wastes contained in 40 CFR 261.31 and 261.32, the Agency has historically considered disposal in an unlined landfill or surface impoundment to be representative of the reasonable worst-case

management scenarios for such waste. The Agency believes that it is appropriate to consider the worst-case management scenario because it is extremely difficult to project all potential management scenarios that can occur once the waste is delisted. Thus, the Agency generally has only modeled the risks related to these two disposal practices. The generic risk assessment model currently used (i.e., EPACML) or the model delisting may soon adopt (i.e., EPACMTP) are designed only to predict groundwater impacts for these two disposal scenarios (i.e., an unlined landfill and an unlined surface impoundment). These two models, as adapted to delisting, cannot predict risks resulted from exposures to wastes that are managed in other non-disposal scenarios, including uses constituting disposal and other recycling practices.

However, the Agency has generally not restricted how a delisted waste could subsequently be managed, provided it was managed in accordance with the applicable state's nonhazardous waste management requirements. Therefore, generators could decide to manage their waste in another, perhaps riskier, manner, and so the potential exposure from another and different management practice could pose greater environmental risks than the exposure scenarios modeled. For unconditionally delisted wastes, there is typically no legal impediment to these changes in management.

#### Conditional Delisting Policy

To reduce the uncertainty caused by the potential unrestricted use or management to delisted waste, it is important that new delistings apply only to wastes managed in the type of unit (e.g., "a landfill") modeled in the delisting risk assessment. For example, if the delisting determination modeled risks associated with disposal in landfills, the delisting would specify that the waste is delisted conditioned on disposal solely in a landfill. If the generator places the waste anywhere other than a landfill, the waste is a "hazardous waste" subject to RCRA Subtitle C regulation, unless otherwise exempted from regulation (i.e., 40CFR 266.20). The regulations in 40 CFR 266.20, which apply to recyclable materials (i.e., hazardous waste) used in a manner constituting disposal, impose certain requirements on such uses.

In the Agency's view, a conditionally delisted waste would exit the hazardous waste management system at the point it meets the established delisting levels, and would remain outside of the hazardous waste management system so long as the delisted waste generator complies with the conditions placed on the disposal of the delisted waste. The Regions should consider including appropriate mechanisms in conditional delistings that would help ensure that the waste was being managed in accordance with the conditions. For example, the Regions may consider adding a condition that the generator keep records, such as those they keep for business purposes, as to where they sent the waste.

EPA's policy of not considering site-specific factors when applying the fate and transport models remains unchanged. Therefore, at this time. Regions should not conditionally delist a waste based on consideration of protective site-specific hydrogeologic conditions (e.g., underlying clay) or specific landfill designs (e.g., liners, or covers). We would not be

comfortable at this time delisting a waste based on consideration of site-specific hydrogeologic conditions and specific landfill designs that would not be delisted based on a less site-specific analysis. While the Agency may consider a site-specific approach in the future, the Agency is not currently in a position to commit the necessary time and resources such site specific modeling evaluations would require and has not determined that this is an appropriate policy direction to take.

Nevertheless, the Agency realizes that for a relatively small number of petitioned wastes that are not (or will not be) managed under a scenario our generic delisting models can assess, Regions may have to consider site-specific circumstances or consider adding specific conditions, on a case-by-case basis. These cases are likely to raise issues of national significance, therefore, the Region should consult with the Office of Solid Waste.

#### Delisting Reopener Policy

In light of a recent experience that required the Agency to repeal an existing delisting, we recommend that the Regions include in future delistings, a provision that establishes a mechanism to review the delisting when additional data become available indicating the initial delisting decision was inappropriate or wrong. This is particularly important if the additional data shows that the delisted waste is not behaving in the disposal site as was predicted by the delisting risk assessment model. Therefore, Regions should include the following or similar language in future delisting decisions, unless there are clear rationales not to:

- (a) If, anytime after disposal of the delisted waste, [insert facility name] possesses or is otherwise made aware of any environmental data (including but not limited to leachate data or groundwater monitoring data) or any other data relevant to the delisted waste indicating that any constituent identified in Condition (x) is at a level in the environment (such as in the leachate or in the ground water) higher than the delisting level established in Condition (x), then [insert facility name] must report such data, in writing, to the Regional Administrator within 10 days of first possessing or being made aware of that data.
- (b) Based on the information described in paragraph (a) and any other information received from any source, the Regional Administrator will make a preliminary determination as to whether the reported information requires Agency action to protect human health or the environment. Further action may include suspending, or revoking the exclusion, or other appropriate response necessary to protect human health and the environment.
- (c) If the Regional Administrator determines that the reported information does require Agency action, the Regional Administrator will notify the facility in writing of the actions the Regional Administrator believes are necessary to protect human health and the environment. The notice shall include a statement of the

proposed action and a statement providing the facility with an opportunity to present information as to why the proposed Agency action is not necessary or to suggest an alternative action. The facility shall have 10 days from the date of the Regional Administrator's notice to present such information.

- (d) Following the receipt of information from the facility described in paragraph (c) or (if no information is presented under paragraph (c)) the initial receipt of information described in paragraph (a), the Regional Administrator will issue a final written determination describing the Agency actions that are necessary to protect human health or the environment. Any required action described in the Regional Administrator's determination shall become effective immediately, unless the Regional Administrator provides otherwise.

This language is intended to provide the Agency with a mechanism to review and act expeditiously on information that a previously granted delisting may be causing a threat to human health or the environment that was unknown at the time the Agency acted initially. Use of this language will provide you the ability to reopen, revoke, or otherwise suspend the delisting in a timely manner. Please share this national policy with the states within your Region that are authorized to administer their own delisting programs

This memorandum provides guidance to EPA personnel. The guidance is designed to communicate national policy regarding the RCRA delisting program. The memorandum does not, however, substitute for EPA's statutes or regulations, nor is it a regulation itself. Thus, it cannot impose legally-binding requirements on EPA, States, or the regulated community, and may not apply to a particular situation based upon the circumstances. EPA may change this guidance in the future, as appropriate.

If you have any question regarding this policy, please feel free to contact David Bussard, Director, Hazardous Waste Identification Division, at (703) 308-8887 or have your staff contact Rick Brandes, Chief, Waste Identification Branch, at (703) 308-8890.

cc: Regional Counsels David Nielsen. OECA