MEMORANDUM

SUBJECT: States' Adoption of Rules Involving HSWA Effective Dates

FROM: Michael Flynn, Acting Chief
State and Regional Programs Branch, OSW

Stephen G. Pressman, Acting Assistant
General Counsel for RCRA
Office of General Counsel

TO: RCRA State Programs Branch Chiefs
RCRA Branch Chiefs, Office of Regional Counsel
Regions I - X

Region IV raised a question regarding the impact on the authorization equivalency determination of a State law that adopts an effective date for a HSWA listing provision that appears to provide facilities with a later State compliance date to fulfill the interim status requirements. This question generally arises in the context of the general requirement that persons who become newly regulated as a result of a new HSWA listing or characteristic must notify EPA (or the State) of their hazardous waste management activities within 90 days and submit their Part A permit application within 6 months after their wastes become regulated in order to obtain interim status. Since a State's listing or characteristic rule is generally promulgated after the Federal rule, the State's rule will usually have a later effective date. Thus the State's Part A submission/compliance deadline could be later than the Federal deadline, unless the State specifically adopted the Federal effective date or Federal compliance deadline.

Region IV was concerned that a State's later effective date/Part A submission date could allow facilities that had failed to qualify for interim status by the Federal deadline to apply for and receive interim status under State law once the State received authorization. The Region, therefore, believed it was essential for the State to adopt or preserve the Federal date in its State law in order to obtain authorization. As a result of discussions with other Regional representatives, other Regions are also requiring their States to revise their regulations to adopt the Federal effective date or Part A submission deadline in order to gain authorization.

Our position is that a later State effective date/submission deadline for its counterpart to a HSWA listing or characteristic has no effect on whether a facility qualifies for RCRA interim status. A facility must qualify for RCRA interim status by the Federal deadline, which because of HSWA, becomes the compliance date for facilities in all States simultaneously. State law cannot undo or extend the Federal deadline, or for that matter, any Federal HSWA compliance date. A facility that misses the Federal deadline but submits a Part A before the State deadline has already missed its RCRA deadline for qualifying for interim status. In fact,

RCRA §3009 would invalidate the State's compliance date to the extent it could be construed to have this effect.

Of course, the appearance of a later compliance date (albeit invalid for federal law purposes) in the State's code can generate confusion for the regulated community. This, in turn, might enable facilities to raise the issue of confusion about when to qualiify for interim status as a defense in enforcement actions. The preferred outcome (if the State is willing) would be the State's making the changes to its rule to reference the Federal compliance date. **The State is not legally required to do so to satisfy authorization standards,** however, since the State's later compliance date is invalid, and should not therefore be a "stopper."[1] We believe that requiring a State to make regulatory changes in this instance would be unnecessary, would make the authorization process unduly burdensome, and would create tension in the Federal/State relationship. Instead of requiring State regulatory changes, we suggest that EPA announce that the later State compliance date has no effect on qualifying for interim status under RCRA in the FR notice granting authorization for the State revisions (this interpretation follows from RCRA §3009, as well as 40 C.F.R. 271.1(j) and 271.25, which together preclude a State from enacting laws that would extend a HSWA compliance date that has already taken effect under Federal law).

The State could insert language in its Attorney General's Statement and/or MOA to acknowledge that the later State compliance dates do not apply to HSWA listings (a State would only have to insert this language into the AGS or MOA once). Finally, EPA may interpret the State law as invalid to the extent that it could otherwise extend a HSWA compliance date.

If you have any questions about this memo, please contact Karen Morley of OSW at 202-260-4180 or Tina Kaneen of OGC at 202-260-7713.

cc: RCRA State Programs Section Chiefs, Regions I - X
Patricia Herbert, Region IV
Devereaux Barnes, OSW
Susan Bromm, OWPE

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[1] One way for a State to preserve the Federal effective date without promulgating a retroactive requirement would be to use language such as:

> As of _____, any facility which failed to qualify for federal interim status for any waste code promulgated pursuant to HSWA or who lost interim status for failing to certify under HSWA for any newly promulgated waste code, is also denied interim status under State law (rule).

The future date the State cites should be the date of authorization or the date the State adopts the new regulation.