Emergency Permits

9527.1992(01)

United States Environmental Protection Agency
Office of Solid Waste and Emergency Response
Washington, D.C. 20460

November 3, 1992

Mark Hansen
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Corporate Office
Environmental Products
& Services, Inc.
P.O. Box 315
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Dear Mr. Hansen:

Thank you for your letter of September 28, 1992 in which you ask about the transportation and disposal of shock sensitive or explosive materials. Specifically, you requested EPA guidance on how to handle materials like picric acid and ethyl ether while removing old laboratory chemicals.

Under EPA's RCRA regulations (40 CFR 270.1(c)(3)), all activities taken in immediate response to a discharge of hazardous waste, or an imminent and substantial threat of discharge of a hazardous waste, are exempt from the RCRA permitting and substantive requirements. Since the chemicals in question would be hazardous by virtue of their reactivity, any actions you take to eliminate the imminent and substantial danger would qualify under this exemption. If the response action involves transportation to a remote site for destruction, then the transportation as well as the destruction would be exempt. However, the transportation is exempt only to the extent necessary to respond to the immediate threat. Hence, we expect the transportation would normally cover a relatively short distance and would occur in special transportation equipment such as bomb trailers.

Should there be any question about the exempt or no-exempt status of removing a certain chemical, the RCRA emergency permit regulations (40 CFR 270.61) can be used for destruction activities. As these regulations provide, an emergency RCRA permit can be issued by an EPA Regional Office or by an

authorized State official via telephone or in writing. These permits may be issued when the Region or State finds that an imminent and substantial endangerment to human health or the environment exists, according to the requirements of 40 CFR 270.61. This permit can address both treatment and storage of hazardous waste. If necessary, transportation can be authorized at the same time the emergency permit is authorized by obtaining a provisional identification number. To reiterate, however, a permit is necessary when the safety official determines that an immediate safety threat exists.

The guidance given above is based on the Federal RCRA program as administered by EPA pursuant to 40 CFR Parts 260-271. In authorized States, EPA has delegated the responsibilities of the hazardous waste program. Although each authorized State program must be consistent with and no less stringent than the Federal program, a State is free to be more stringent (e.g., some States may not offer emergency permits). In the end, you should check with the authorized State where your facility is located to ensure that there are not additional (more stringent) management standards.

I trust that this letter provides you with guidance helpful to your efforts to remove old lab chemicals. If you need additional assistance, please call Chester Oszman of my staff at (202) 260-4499.

Sincerely,

Sylvia K. Lowrance, Director
Office of Solid Waste

cc: Chester Oszman, OSW
Ken Gigliello, OWPE
RCRA Permit Section Chiefs, Regions I-X

bcc: Sonya Sasseville
Jim Michael
Jeff Gaines

OSWFR80011

federal register

Monday
May 19, 1980

Environmental Protection Agency

Hazardous Waste and Consolidated Permit Regulations

attempt to place further restriction on or delay interim status. However, a method is necessary to insure that the Director and applicant know the required information has been submitted.

EPA has revised the proposal at § 122.23(a) to require an applicant to either submit notification and Part A of the application by certified mail or to hand deliver such information to provide assurance to both the applicant and EPA that the information has been sent and received.

One commenter suggested that EPA consider adopting a definite date for termination of all interim status. When a permit application is complete EPA does not have the authority to terminate interim status short of the administrative disposition of the permit application. The time period necessary to take final action on all permits is contingent upon the availability of resources. Therefore a definite date for termination of all interim status cannot be established.

§ 122.24 Contents of Part A of the RCRA permit application.

The comments received on this section are discussed in the preamble to the consolidated application forms, published elsewhere in today's Federal Register.

§ 122.25 Contents of Part B of the RCRA permit application.

The proposed regulation identified six general informational categories for inclusion in Part B of the permit application. These included a master plan for the facility which combined all of the plans required by the section 3004 facility standards. Also included were geological and hydrogeological data, a description of the climate at the site, a list of positions and job descriptions and a listing of the performance bonds and other financial instruments.

This general approach created some confusion because the relationship between the proposed section 3004 regulation and the permit application requirements was not clear. Many commenters believed that they were required to submit all the information included in each category. They suggested that the information needs be limited to the type of facility (e.g. landfill, incinerator). EPA agreed with these comments and restructured the Part B informational requirements. The Part B application requirements now parallel the structure of the section 3004 standards promulgated in Part 264 of this chapter.

Only Subparts B through E of Part 264 have been promulgated to date. This covers requirements which generally apply to all facilities. Subsequent subparts of Part 264 including standards for specific facility types (landfills, incinerators, etc.) will be promulgated later this year. The Part B permit application requirements being promulgated today essentially pertain to information which is common to all hazardous waste facilities as well as the specific plans required of all facilities in Subparts B through E of Part 264. The Part B application requirements will be amended to reflect additional planning requirements and the technical standards (e.g. equipment design, site preparation and design) which will be promulgated in Part 264 later this year.

Section 122.23 of the proposed rules contained provisions for the Director to waive certain application requirements in Part B if the information was not applicable to the facility and was not needed to establish compliance with the section 3004 standards. The Agency received numerous comments on the use of the waiver provision. While the reorganization of the regulation may eliminate the need for this waiver provision, it is not possible to reach a final decision on its use until the full Part 264 standards are promulgated.

§ 122.26 Permits by rule.

The proposed regulation provided for a permit by rule for facilities accepting special wastes, ocean disposal barges and vessels, and certain POTWs. In these instances application for a permit was not required and an actual permit would not be issued. The owner and operator of such a facility would be deemed to have a RCRA permit if certain specific conditions in the regulation were complied with. Many comments were received on this provision.

Comments from industry generally approved of this approach, though some argued that limiting the permit by rule to POTWs was arbitrary and that privately owned treatment works and NPDES industrial surface impoundments should be treated in a similar manner. However some commenters stated that the permit by rule is illegal under RCRA, as section 3005 requires each HWM facility to have a permit. These commenters objected to the permit by rule approach as less environmentally protective than site-specific permits and argued that permit by rule eliminates public notice and public participation and that EPA and the public lose the chance to gain information about such facilities.

Although the scope of the permit by rule provisions has been cut back substantially, EPA continues to believe that such an approach is both legally justified and appropriate in certain cases. The courts have interpreted the Clean Water Act to allow the issuance of "general" or "area" permits covering point sources under that statute. *Natural Resources Defense Council v. Costle*, 568 F.2d. 1369, 1381 (D.C. Cir. 1977). The court recognized that use of such approaches might be the only way to fulfill the legislative intent in a setting of limited resources. Yet the permit provisions of the Clean Water Act against which that case was decided are stronger than those of RCRA, for not only do they affirmatively require every "point source" to have a permit, but unlike RCRA, they underline the implication that source-by-source examination is required by limiting both the time for which a permit application will be acceptable instead of a permit, and the maximum term of the permit once issued. In addition, section 1006 of RCRA directs the Administrator to integrate the administration of that statute "to the maximum extent practicable" with the provisions of other EPA statutes, including the Clean Water Act, the Ocean Dumping Act, and the Safe Drinking Water Act.

Against this background, EPA believes that there can be little question of its ability to issue a permit by rule to facilities where the activities that a RCRA permit would regulate are for the most part already regulated under another EPA permit and the only purely RCRA-related provisions are those that are not site-specific and do not need to be particularized in an individual permit. The choice here is between requiring a duplicate permit proceeding and duplicate paperwork or simply making the missing RCRA provisions applicable through a general regulatory statement. EPA has chosen the latter course.

Despite criticism the permit by rule approach has been retained for POTWs for the reasons discussed above. This provision caused considerable confusion in the proposed regulation. Permit by rule was only to be applicable to the rare situation where a POTW received hazardous waste by rail or truck or by a pipe that did not carry sewage since sewer line influent to a POTW would in most instances be exempted from the RCRA definition of solid waste which includes dissolved or suspended materials in domestic sewage. Many commenters misunderstood this point and argued for extending the permit by rule approach to a wide variety of other operations such as privately owned treatment works and NPDES surface impoundments.

As explained earlier and in the section 3001 preamble, these facilities

do not come under the special Congressional intent applicable to POTWs and there is therefore no reason to exempt them from otherwise applicable RCRA requirements.

The remaining uses of permit by rule are for 1) barges or other vessels for ocean disposal of hazardous wastes with a permit under the Marine Protection, Research and Sanctuaries Act and 2) underground injection of hazardous wastes with a permit under the UIC program of the Safe Drinking Water Act. Both of these situations meet the criteria for permit by rule described previously. In both of these cases the owner or operator is deemed to have a RCRA permit if he or she has a valid permit under the other program, is in compliance with that permit and also complies with the RCRA manifest, recordkeeping and reporting requirements. Shoreside facilities related to ocean disposal activities and surface storage and treatment prior to underground injection are not covered by permits under these other statutes and the RCRA site-specific permit requirements apply to the handling of hazardous waste at such installations.

Owners and operators of facilities with a permit by rule are not required to submit a RCRA permit application. However if an owner or operator of an existing underground injection well does not have a UIC permit he or she must comply with the RCRA notification and permit application requirements in order to qualify for interim status.

Control of UIC Wells Injecting Hazardous Wastes. The RCRA hazardous waste permit program regulates the treatment, storage, and disposal of hazardous wastes. The UIC permit program, governed by Subpart C of this Part and Part 123, governs State programs regulating injection wells, including those which dispose of hazardous wastes by underground injection. The two programs therefore potentially overlap, and could result in duplicative regulation of the same practices. In order to avoid this, in the proposed consolidated permit regulations EPA sought to set clear jurisdictional boundaries for the two programs so that each would regulate the practices it was specifically designed to control, and duplication could be eliminated. In the main, these jurisdictional boundaries are retained in these final regulations, and are discussed below.

In general, UIC permits will be required for the well itself, while RCRA permits will be required for associated above-ground facilities which require permits under this Subpart—for example, those which store hazardous wastes prior to injection. A number of commenters objected to this scheme, and recommended that the UIC program control all facilities associated with a UIC well, even if such facilities might meet RCRA permitting requirements. EPA rejected this approach for two reasons. First, there is no doubt that EPA has authority to regulate surface storage facilities under RCRA; it is less clear that such authority exists under the SDWA. Even if authority is present under the SDWA, the UIC provisions of that statute are ill-suited to control risks associated with surface facilities, including possible explosions, leakage of hazardous waste into the atmosphere, or spills.

The final regulations depart from the proposal in that all UIC wells injecting hazardous waste will for an interim period be subject to regulation under RCRA. RCRA interim status standards have been revised so that they can be applied to wells. Thus, existing UIC hazardous waste wells must notify under RCRA section 3010 and file a Part A application form. Such wells will qualify for interim status, and will be subject to interim status standards like any other HWM facility. Except as noted below (in the discussion of new § 122.30, "Interim RCRA Permits for Class I Wells"), RCRA permits will not be issued for UIC wells injecting hazardous wastes. When UIC programs become effective, all such wells will either be issued UIC permits (in which case they will qualify for the RCRA permit by rule, § 122.28), or they will be required to shut down (see, for example, § 122.36).

There are several reasons why it is necessary to require UIC wells to obtain interim status and comply with RCRA interim status standards during this period. Perhaps most important is that, under section 3005 of RCRA, these facilities will not be allowed to receive hazardous wastes unless they have interim status, a RCRA permit, or a UIC permit which in turn would qualify them for a RCRA permit by rule. Mechanisms for issuing the UIC permits will not be in place for some time. Thus, the only practical alternative is for UIC wells to qualify for interim status.

Moreover, under the SDWA, substantive regulations do not become enforceable until they are incorporated into a UIC program adopted by a State or promulgated by EPA. States are allowed 270 days after the promulgation of UIC regulations to submit a program, and the Administrator may extend this period by as much as another 270 days. If the program submitted is unacceptable, EPA must promulgate one. This could take considerable additional time, resulting in delays of perhaps as much as two years after issuance of UIC program regulations before effective regulation of injection wells begins. EPA sees no reason why wells cannot be regulated during this period under interim status standards. These standards are simple, basic, and will provide some measure of control. The requirement that an application be submitted will also enable EPA to develop early a complete inventory of injection wells disposing of hazardous wastes, forming a basis for prompt and effective regulation of the facilities when UIC programs are in place.

Among other requirements UIC wells with interim status will be required to comply with the manifest system under 40 CFR Part 265, Subpart E when they receive hazardous wastes. Failure to impose manifest requirements on these facilities would create major obstacles to carrying out one of the primary functions of the manifest system: to track the movement of hazardous wastes from generation to disposal.

When a final UIC permit is issued to a UIC hazardous waste injection well, the well will become subject to the general RCRA permit by rule. Thus, they will not be required to obtain individual HWM facility permits. Sections 122.36 and 122.45 identify the requirements for UIC permits for these facilities. Many of the requirements of analogous RCRA regulations are incorporated in their entirety. Others are modified so as to fit wells, or are not applicable to wells. The resulting regulatory scheme provides, in EPA's view, a degree of control which is equivalent to that which would be obtained if the facilities were required to obtain individual permits under RCRA. A more detailed discussion of this issue may be found elsewhere in the preamble to § 122.36 and in the preamble to § 122.45. Thus, nothing would be gained by dual permitting, and a permit by rule carries out the purposes of § 1006(b) of RCRA, which obligates EPA to "avoid duplication, to the maximum extent practical, with the appropriate provisions of * * * the Safe Drinking Water Act" * * *.

§ 122.27 Emergency permits.

Several comments were received on the proposed emergency authorization provision. In general, commenters supported EPA's proposal. Some commenters stated that the 90-day limit for such authorization was too short while another commenter stated this action should not be limited to permitted facilities. Another commenter stated that this provision was unnecessary as

EPA had available to it immediate relief through court action.

EPA continues to believe this provision is fully justified under the statute. Though section 7003 does authorize a court to grant emergency relief, that requirement is independent of permitting authority under section 3005 and is probably better adapted to forbidding certain acts than to permitting disposal. The right of the government to take summary administrative action in response to an emergency is well recognized in other regulatory fields and in the law generally. As the preamble to Part 124 explains, RCRA specifies no explicit requirements for issuing a permit. EPA believes that reading the general RCRA language to allow summary action in a limited and urgent category of cases is the interpretation that best carries out the overall intent of the legislation to protect public health and the environment.

This provision has been extended to include facilities that do not have a permit; however EPA continues to be conservative in defining the scope of this exemption to prevent the possibility of abuse, particularly while the program is still so new, and to restrict the number of cases in which regulatory action will be taken without an opportunity for public comment.

§ 122.28 Additional conditions applicable to all RCRA permits.

Numerous comments were received on the proposed RCRA permit conditions (proposed § 122.24). Many of the comments were in fact comments on the cross-references to the RCRA section 3004 regulations. These comments were received after the close of the comment period for that particular regulation and are not germane to Part 122 Subpart B. To the extent those comments were made during the comment period for the section 3004 regulation, they were considered as part of the rulemaking for that regulation.

Commenters interpreted the proposed permit conditions, § 122.24(e), to mean that an entire facility must be constructed or modified before any given part of that facility could be operated, or that an entire facility must be closed while part of the facility is being modified. EPA's intent was that only those portions of a facility affected by modifications would be covered by this requirement. The regulations have been revised so that this intent is explicit (final § 122.28(c)). The provision also allows for phased construction and operation of a facility over time, if the existing parts can operate alone and in compliance with the permit requirements.

Several commenters objected to the requirement that an engineer registered in the State in which the facility is located certify that the facility has been constructed or modified in compliance with the permit. Some commenters argued that this requirement is too restrictive for Federal facilities. Other commenters argued this requirement is not necessary as most States have reciprocity agreements for registered engineers. EPA agrees that requiring an engineer to be registered in the State in which the facility is located is overly restrictive and the regulation has been changed. Certification by a "registered professional engineer" is still required because a certain level of expertise is required to certify compliance with permits.

Numerous commenters stated that a time limit should be placed on the Director to inspect a completed facility. Suggestions of 10 days and 30 days were offered. Most commenters expressed concern that the Director could unduly delay start-up of a facility by not acting promptly in this regard. EPA has restructured the regulation to help alleviate this problem. If the Director does not notify the applicant of his or her intent to inspect within 15 days of the receipt of certification, he or she waives the right to prior inspection, and authorization to commence operations is automatically granted.

Another commenter stated that EPA had not provided a standard to be applied by the Director to determine whether operation should begin. The regulation now provides that the Director shall authorize commencement of operation if he or she finds the facility is in compliance with the conditions of the permit.

Several commenters also objected to the proposed requirement (§ 122.24(b)) which allowed the Director to establish permit requirements as necessary to protect human health and the environment. Commenters thought this provision allowed the Director too much discretion and would lead to imposition of conditions unrelated to RCRA. EPA agrees that this provision is unnecessary and has deleted it. However, as the preamble to the section 3004 regulations explains, in many cases the permit writer will have to exercise considerable discretion to adapt the requirements of general regulatory provisions to a specific permit. See also § 122.8 and accompanying preamble.

Several State agencies commented that in order to reduce paperwork permits should incorporate specific permit conditions by referencing appropriate sections of Federal regulations rather than list each condition in its entirety. The regulations accommodate this (see § 122.7).

§ 122.30 Interim RCRA permits for UIC wells.

There is an additional respect in which these regulations must be harmonized with those for UIC permits. RCRA prohibits the disposal of hazardous wastes except in a RCRA-permitted facility. This prohibition will take effect this fall, when the second phase of RCRA regulations, including technical standards for HWM facilities, is published. UIC Class I and Class IV wells with interim status may continue to operate. New UIC Class I wells and Class IV wells will be prohibited by RCRA from accepting hazardous waste for disposal because only existing facilities qualify for interim status (under section 3005(e) of RCRA). (See § 122.32 for a discussion of how injection wells are classified under UIC.) If these wells are permitted under UIC, they will be covered by a RCRA permit by rule (§ 122.26). However, many States may require as much as a year after the RCRA prohibition takes effect to develop and submit a UIC program. Until then, there will be no UIC program and therefore no authority to permit new Class I wells (or Class IV wells, if EPA decides to allow them to be permitted). Thus, EPA could inadvertently create a moratorium on the construction of new Class I wells which could last two or more years. Because these wells are, in some cases, the preferred method of disposal of hazardous waste, EPA believes this result is undesirable.

Accordingly, EPA intends to issue standards under RCRA § 3004 which would allow EPA or approved States to issue RCRA permits to new hazardous waste injection wells. Such standards would be patterned closely on 40 CFR Part 146, so that wells would not be subject to possible new or inconsistent construction and operation requirements as their RCRA permits expire and they come under regulation under the UIC program.

The actual issuance of the permits involved can be done either by EPA Regional Administrators or by the States. At their option, States may assume, under section 3006 of RCRA and 40 CFR Part 123, permitting authority for Class I wells during the period after the RCRA permit requirement goes into effect, but prior to approval or promulgation of a UIC program in the State. Accordingly, States may apply to EPA for approval to issue permits under RCRA to Class I wells, as part of their applications either

for interim or final authorization. The technical standards for such permits will be issued this fall at the same time as the other RCRA technical standards, and will be closely modeled upon 40 CFR Part 146, the technical standards for UIC permits. Because EPA continues to view the UIC program as the most effective vehicle for regulation of underground injection, the permits will be limited in duration to not more than two years. At the end of the two year period, either the State will have an approved UIC program or EPA will have promulgated one under the SDWA.

The Regional Administrator will have authority to issue RCRA permits to UIC facilities under the same conditions in the event that the State Director does not seek authority to issue them. EPA does not anticipate that it will be asked to issue such permits except in a very few cases. The total number of Class I UIC wells is small—about 400—and has grown at a slow rate.

Class IV wells are continuing to be studied in connection with the request for comments on Class IV UIC wells (see preamble discussion of §§ 122.36 and 122.45). EPA will announce treatment of these wells this fall at the completion of consideration of comments.

Proposed § 122.25(a), Health Care Facility Permits. The provisions for special permits for health care facilities have been deleted. The section 3001 regulations do not include infectious waste at present and the section 3004 regulation does not have specific standards for the treatment, storage or disposal of infectious waste. If future versions of these regulations cover infectious waste the permit requirements can be revised if necessary.

Proposed § 122.25(b), Experimental Permits. As proposed, RCRA permits were normally to be issued for the designed life of the facility and experimental special permits were to be issued for up to one year with a one year maximum extension. Because EPA will now issue RCRA permits only for up to ten years, and permits can be limited to one year if necessary, the experimental permits section has been deleted.

Proposed § 122.27, Reporting requirements. Comments suggested that the reporting requirements under this section be reviewed to determine if less stringent requirements would suffice. EPA has done this and has reduced the requirements to the minimum it now estimates are necessary to carry out the RCRA program in an adequate and responsible way. Since the program has not started yet, any estimate of the reporting needs is likely to require revision in the light of experience, and EPA will re-examine these requirements once the program has a sufficient degree of operating history behind it. All RCRA reporting requirements for permitting agencies are now contained in § 122.18.

Subpart C—Additional Requirements for UIC Program

These regulations in part establish program requirements for State Underground Injection Control programs under the Safe Drinking Water Act. However, not all the regulations called for under section 1421 of that Act appear in these consolidated permit regulations. The technical requirements for State UIC programs will appear separately as Part 146. The Agency expects to publish Part 146 regulations within a month.

The SDWA requires any State listed under section 1422 of that Act to submit a UIC program for approval within 270 days after "promulgation of any regulation under section 1421 . . . ." The Administrator may grant a 270 day extension. EPA believes, however, that it would be inappropriate for States to be subject to a statutory deadline for preparing and submitting programs when many of the necessary requirements for the programs have not yet been issued. The statute does not specify when "promulgation" takes place. Accordingly, to avoid confusion, EPA is fixing the date of "promulgation" of Part 122, 123, and 124, to the extent that they establish UIC program requirements, to the effective date of the 40 CFR Part 146 regulations. This effective date will be 30 days after the publication in the Federal Register of regulations under Part 146.

§ 122.31 Purpose and scope of Subpart C.

This is intended to be an introductory or "roadmap" section corresponding to sections which have been added to Subparts A, B, and D. One goal of this section is to clarify the connection between the proposed process for "identification" and the regulatory requirements designed to protect underground sources of drinking water (USDWs). The section now emphasizes the fact that USDWs are to be protected regardless of whether they have been accurately mapped or otherwise identified. Mapping or otherwise identifying USDWs will aid the Director in fulfilling this requirement.

The Director may also identify "exempted aquifers" using criteria in Part 146. Such aquifers are those which would otherwise qualify as "underground sources of drinking water" to be protected, but which have no real potential to be used as drinking water sources. Exempted aquifers are treated as exempt only if they have been affirmatively identified as "exempted aquifers" by the Director in the UIC program for the State.

This section also contains a list of "specific inclusions" and "specific exclusions" parallel to similar lists in the other Subparts of Part 122. These lists are designed to give readers a quick indication of whether their facilities come within the scope of the UIC program. These inclusions and exclusions are not exhaustive, but illustrative. The language of the regulations must be applied to determine whether the program applies to a particular activity.

Septic tanks or cesspools used to dispose of hazardous wastes have been specifically included within the definition of an injection well. In House Report No. 93-1185 (page 31) Congress specifically expressed its intentions that EPA include underground injection systems "other than individual residential waste disposal systems" when they are used to inject contaminants, including hazardous waste.

Several commenters questioned whether EPA should impose the same monitoring, reporting, construction and operating requirements for injection wells sited in areas without any USDW to be protected as it does in areas with one or more USDW. One commenter questioned EPA's legal authority to control wells located outside State territorial waters. Several additional commenters asked EPA to clarify the scope of coverage. EPA agrees that the UIC program is a State program and is not applicable to injection wells located outside State territorial waters (i.e., to injection wells at platforms located on the outer continental shelf). A specific provision to this effect has been added to § 122.31(d).

Section 122.43 has been added to allow the Director discretion in reducing regulatory requirements under certain circumstances.

In the proposal, EPA exempted drilling muds and cement from the program, because the Agency did not impose requirements prior to operation. Since preconstruction permits are now required, this exemption has been deleted. When UIC permits are issued, they should routinely authorize emplacement of these materials.

§ 122.32 Classification of injection wells.

In response to several comments the definition of Class I wells (other than hazardous waste wells) has been limited