MEMORANDUM

SUBJECT: Non-Delegability of Section RCRA 3004(t) and Authorization Status of Several "Non-Checklist" Authorities

FROM: Richard LaShier, Chief
Regional Coordination and Implementation Section

TO: RCRA Authorization Section Chiefs
Regions I - X

The Permits and State Programs Division (PSPD), Office of Solid Waste and the Office of the General Counsel (OGC) have reexamined the requirement for States to adopt and become authorized for counterparts to certain provisions in RCRA §3004(t) - Third Party Direct Action Against Financial Responsibility Insurers or Guarantors. RCRA §§3004(t)(2) and (3) create a Federal cause of action for any person with a claim arising from conduct for which financial assurances are required under RCRA. This action may be asserted directly against the guarantor of the assurances if 1) the owner of operator of the facility is in bankruptcy or other similar proceedings under Federal law, or 2) the person with the claim is not likely to obtain jurisdiction over the facility owner/operator in either Federal or State court. This presents a unique case for RCRA authorization. Unlike any of the other provisions of the 1984 amendments, this cause of action needs no implementation by any regulatory agency at either the Federal or State level. There are no oversight, enforcement or other authorization responsibilities for EPA to transfer to States through program delegation. Therefore, since there appears to be no legal or policy reasons to require States to adopt State law analogs to §3004(t), EPA need not consider this provision when it determines whether a State's RCRA program is equivalent to or no less stringent than the Federal RCRA program. Indeed, the cause of action created by §3004(t) is always available in Federal court and, therefore, we believe is not delegable to States. States are welcome to create parallel causes of action viable in State courts, but to the extent that States do so, the State cause of action cannot limit the availability of the Federal action.

In the event that States create parallel causes of action, we note that there may be a question whether a Federal court could construe the §3004(t) action as being applicable to State regulations that extend financial assurance requirements to "more stringent" or "broader in scope" State provisions. We believe that EPA could interpret §3004(t) to extend to any more stringent State law requirements for financial responsibility that are a part of a State's authorized program but not to those requirements deemed broader in scope. For instance, extending the requirements to additional types of conduct (site restoration in addition to closure) would probably be considered broader in scope, while provisions that enlarge the dollar amounts of financial responsibility would generally be more stringent.

We realize that six States are currently "authorized" for this provision. Several more States have included this provision in their pending HSWA I revision applications. The Regions should review these provisions and publish a Federal Register notice explaining that this provision is not delegable to the States and that EPA cannot authorize States for it. This is because authorized provisions of State law must operate in lieu of the Federal counterpart, and in this situation, State law cannot have this effect. For the six States supposedly "authorized" for this provision, the Region should either publish a distinct Federal Register notice clarifying the non-delegability of RCRA §3004(t), or include the clarification in a subsequent authorization notice affecting that State, if one is anticipated to be published within a reasonable time.

The Section 3004(t) provision is one of several authorities that has been implemented directly by statute, not by specific implementation regulations. Because federal regulations were not promulgated for these authorities, there are no checklists in the State Authorization Manual (SAM) based on them. However, their status as authorizable and required elements of States' RCRA programs is reflected in the SAM Appendix G-2 (which identifies authorizable requirements by their cluster), and in the Model Attorney General's Statement.

PSPD and OGC staff have recently reviewed each of the statutory or "non-checklisted" provisions. This review has led us to conclude that 4 of the 7 provisions are authorizable and mandatory (although a subpart of one provision is optional); two are authorizable and optional; and one (the direct action provision of §3004(t)) is not authorizable. The attachment summarizes the status of the 7 non-checklisted authorities, and briefly explains the basis for their status. Note that we have made changes to the Surface Impoundment Requirements, deleting one requirement that is now covered by a regulation, and designating another requirement as optional. The SAM materials and models are being revised to reflect these changes.

Please call Karen Morley in the State and Regional Programs Branch, (202) 260-4180, if you have any questions.

Attachment

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STATUTORY (NONCHECKLISTED) PROVISIONS
June 15, 1992

These provisions are listed at beginning of SAM Appendix G-2; they are also included in Model AGS and indexed after model revision AGS in SAM, Appendix E, p. 47.

STATES MUST ADOPT AND BE AUTHORIZED FOR:

Mixed Waste - Non-HSWA III - AGS §I G

- Guidance in SAM

Availability of Information - §3006(f) - Non-HSWA I
AGS §XIX A (1)-(5)

- Guidance in SCRAM/SAM
- Checklist attached to above guidance
- We will revisit this guidance in the future

Sharing of Information with the Agency for Toxic Substances and Disease Registry - §3019(b) - HSWA I - AGS §XVIII B

- Landfill or surface impoundment permit application is to be shared with the ATSDR

Surface Impoundment Requirements - §3005(j) - HSWA I
AGS §XVI I

- There are two parts to this provision although the AGS certification at §XVI I (1) covers both:

§3005(j)(1): Existing surface impoundments subject to Subtitle C prior to November 8, 1984, must comply with new unit requirements by November 8, 1988 or stop hazardous waste activity; and,

§3005(j)(6): Surface impoundments regulated for the first time by a listing or characteristic promulgated after November 8, 1984, must comply with new unit requirements or stop hazardous waste activity by 4 years after the date of promulgation of the new listing or characteristic.

- **NOTE: The requirement in §3005(j)(11) regarding the disposal of waste prohibited from land disposal under §3004 is being deleted from this list and from the AGS.** This requirement is covered in 40 CFR §268.4 and the

various LDR checklists certified in the AGS at §XXI, e.g. Checklists 34, 39, 50, etc.

- The following provision, previously covered in AGS §XVI I (3), is now renumbered §XVI I (2), and is designated optional:

§3005(j)(2)-(9) **Optional**: Variance under §3005(j) (2)-(9) and (13)

- We are working on model language and guidance for these provisions

OPTIONAL PROVISIONS:

Criminal Penalties for Waste Fuel and Used Oil Fuel Requirement Violations - §§3006(h), 3008(d), and 3014
HSWA I - AGS §XX B

- Optional for now
- Haven't promulgated any requirement for §3014 yet and will address it in that regulation

Exceptions to the Burning and Blending of Hazardous Wastes - §§3004(q)(2)(A) and 3004(r)(2) & (3) HSWA I - AGS §XII B

- §261.6(a)(3)(ix) embodies §3004(q)(2)(A) already

NON-DELEGABLE PROVISION:

Third Party Direct Action Against Financial Responsibility Insurers or Guarantors - §3004(t) - HSWA I - AGS §XV D

- Provides for a Federal cause of action; if States don't adopt it, the cause of action will remain in Federal court
- No implementation or enforcement by either agency
- Believe Congress did not intend this to be part of the authorization process
- States that are currently "authorized" for this provision will have to be "deauthorized" in a future FR notice
    - o Similar to a technical correction

o See the language regarding this provision in the Tentative Determination FR notice for California, May 1, 1992, 57 FR 18828