An Evaluation of RCRA

David J. Lennett

Follow this and additional works at: https://scholar.law.colorado.edu/getting-handle-on-hazardous-waste-control

Part of the Administrative Law Commons, Environmental Engineering Commons, Environmental Health and Protection Commons, Environmental Law Commons, Environmental Policy Commons, Jurisdiction Commons, Legislation Commons, Litigation Commons, Natural Resource Economics Commons, Natural Resources and Conservation Commons, Natural Resources Law Commons, Natural Resources Management and Policy Commons, Oil, Gas, and Energy Commons, Oil, Gas, and Mineral Law Commons, Science and Technology Law Commons, and the State and Local Government Law Commons

Citation Information

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.
AN EVALUATION OF RCRA

David J. Lennett
Staff Attorney
Environmental Defense Fund
Washington, DC

GETTING A HANDLE ON HAZARDOUS WASTE CONTROLS

A Short Course Sponsored by the
Natural Resources Law Center
University of Colorado
School of Law

June 9-10, 1986
TESTIMONY OF DAVID J. LENNETT

STAFF ATTORNEY, ENVIRONMENTAL DEFENSE FUND

before the

SENATE SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION

concerning the

IMPLEMENTATION OF THE FEDERAL HAZARDOUS WASTE REGULATORY PROGRAM

UNDER RCRA

February 24, 1986
Good afternoon. My name is David J. Lennett, and I am a staff attorney with the Environmental Defense Fund (EDF). I have been EDF's principal attorney on hazardous waste regulatory matters for six years. In that capacity, I have participated in many administrative and judicial proceedings regarding the implementation of the Resource Conservation and Recovery Act (RCRA). I have also served on the hazardous waste advisory committee for the Office of Technology Assessment, and have testified before this Subcommittee and other committees of the Congress regarding inadequacies in the federal hazardous waste regulatory program. My testimony today will cover a variety of important implementation issues facing the RCRA program, while my colleagues will focus on EPA's recent land disposal ban proposal.

As an introductory note, the Subcommittee is to be commended for its efforts in enacting the 1984 Amendments to RCRA. These amendments are already having a strong and positive effect on hazardous waste management practices in this country. In particular, the use of unlined surface impoundments has substantially declined in the past year. These surface impoundments have contributed to significant environmental contamination, and would have been allowed to continue operating under EPA regulations in effect prior to the passage of the 1984 Amendments.

Significantly, the two provisions of the 1984 Amendments most responsible for the decline in reliance on surface impoundments are statutory directives not heavily dependent on the promulgation of EPA regulations or the exercise of EPA discretion. They are the impoundment retrofit requirements established by Congress effective November 1988, and the loss of interim status provisions effective November 1985. Together, these two provisions have encouraged the
regulated community to reexamine their surface impoundments expeditiously, and in most cases, to put them out of business. The success of these provisions, when juxtaposed with the exercise of EPA discretion described below, argues strongly for greater specificity in RCRA when Congress reauthorizes the law again in the coming years.

CLOSURE

EPA figures indicate that approximately 1000 interim status land disposal facilities were forced to cease operations as of November 8, 1985. The vast majority of these facilities could not certify compliance with either the applicable groundwater monitoring requirements or financial responsibility requirements, or both. Aside from the obvious implication which can and should be drawn from these numbers about the efficacy of state and EPA enforcement efforts, a critical implementation question arises. Specifically, are EPA and the states capable of properly closing all these facilities in a timely and environmentally acceptable manner given existing regulations and current resources and management priorities? Unfortunately, the answer to this question is no, and the end result may be that a significant number of RCRA sites will become Superfund sites and the public will have been poorly served by the RCRA regulatory program.

The failures of EPA in the closure area can be divided into three categories: regulatory loopholes, lack of guidance and training, and insufficient resource commitments. With regard to regulatory loopholes, EPA has failed to modify a surface impoundment closure regulation which allows the owners/operators of certain impoundments to close without cleaning up most of
the contamination caused by the facility. This particular regulation, 40 CFR 265.228(b), merely requires that owners/operators of impoundments receiving characteristic wastes clean up contaminated soil and groundwater meeting the regulatory definition of a hazardous waste. Because the current definition of a hazardous waste is so inadequate, most contaminated soil and groundwater would not be covered under this regulation. As a result, the contamination may be left in place, and no post-closure care is required.

EPA proposed a modification to this regulation in July of 1982, but still has not completed the rulemaking. Considering the number of facilities potentially involved, EPA's lackadaisical attitude toward fixing this regulation is inexcusable. Moreover, new Section 3005(i) of RCRA, as added by Section 243(c) of the 1984 Amendments, explicitly states that interim status surface impoundments that received hazardous waste after July 26, 1982 must be subject to the same groundwater monitoring and cleanup requirements as permitted facilities. Yet EPA failed to fix 40 CFR 265.228(b) in the rulemaking codifying the 1984 Amendments, even though permitted impoundments are subject to much more stringent cleanup requirements at closure.

Compounding the difficulties caused by weak regulations is the almost total lack of guidance available to EPA and state field personnel about how to properly close an interim status land disposal facility. There are many difficult issues which arise with respect to such closures, and EPA Headquarters has managed to develop only three pages of guidance on this subject. As an example of the kind of issues which arise in the closure context, consider the case of a facility with an unlined impoundment which was never monitored in accordance with federal or state regulations. The facility
owner/operator may claim that the facility has not contaminated the underlying soil or groundwater, but considering the design of the facility and the liquid nature of the waste in the impoundment, contamination can be reasonably expected. If the impoundment had been properly monitored for the last four years, there would be some basis for determining whether contamination has occurred. However, because the owner/operator has been allowed to violate the law all this time, valid groundwater monitoring data is just not available. Some of the issues which arise under this scenario are whether the facility owner/operator should be required to properly monitor groundwater prior to or as a condition of closure, how long such monitoring should continue, whether soil sampling should be required in addition to or in lieu of groundwater monitoring, and what constitutes appropriate response actions should sampling reveal contamination of the soil or groundwater. In cases where the impoundment has been operating for many years, substantial contamination may have occurred, requiring difficult judgments about sampling parameters and the location and number of samples to be taken. Unfortunately, this leaking impoundment scenario is not unusual; most of the closing facilities are impoundments, many of which are unlined. Furthermore, many are closing specifically because they were not in compliance with groundwater monitoring requirements. Therefore, the issues just described are not intellectual abstractions but immediate concerns. If they are not properly resolved, the owner/operator of an impoundment may be able to walk away from contamination he is responsible for, and the RCRA program will have failed. EPA's inability to develop appropriate closure guidance is a major reason the substantial possibility of such a failure exists.
The lack of written guidance is especially glaring given the complete lack of training EPA has provided state and federal field personnel. EDF has reviewed dozens of closure plans and has worked closely with these officials as part of this process. Based on our experience, we have found it is not unusual for the least experienced personnel to be assigned responsibility for closure plans. These people have a difficult enough time mastering the RCRA program in general, let alone making policy recommendations on complex closure issues without any guidance to assist them. Although the RCRA program is delegated and decentralized, EPA cannot and should not shirk its responsibilities for ensuring field personnel are properly prepared for the tasks they assume.

Finally, the closure process should be completed in accordance with timetables specified in EPA regulations. These regulations require that owners/operators of facilities ceasing operations as of November 8, 1985 must submit closure plans for approval by November 23, 1985. Within 90 days of the submissions, the Regional Administrator or the authorized state is required to approve, modify or disapprove the plans. If the plans are disapproved, the owners/operators must submit a new plan within 30 days, and the revised plans must be approved or modified by the Regional Administrator or authorized state within 60 days of the second submission. Accordingly, the closure plan approval process for the 1000 facilities should be completed by May 23, 1986. EDF estimates that if twenty percent of the 1000 closing facilities are managed in accordance with EPA regulations, it will be a miracle. These deadlines were routinely ignored by EPA prior to November 8, and the number of facilities closing as of November 8 argue strongly against anticipating
improvement by EPA in this critical area. The reasons for this poor performance are many, but chief among them are the low priority and insufficient resources devoted by EPA to the closure process. EDF urges this Subcommittee to question EPA as to when the closure of the 1000 facilities will be completed given existing resources assigned to closures at the state and federal level. In making this request, it is not EDF's intent to encourage the rapid approval of poorly developed plans, but rather to elevate the closure process as an Agency priority.

SMALL QUANTITY GENERATOR REGULATIONS

EDPA will shortly issue final regulations that lower the small quantity generator exemption to 100 kilograms per month, as required by the 1984 RCRA Amendments. However, the regulations EPA intends to issue include a glaring loophole which will return the program to the days of unregulated midnight dumping. The loophole involves the waste tracking system EPA intends to employ for small quantity generators.

Under the EPA scheme, small quantity generators will be required to fill out manifest forms which accompany the waste to the designated facility licensed to manage the waste. The generator retains a copy of the manifest, and upon delivery of the waste to the designated facility, the owner/operator of the facility mails a second copy of the manifest (which he signs to confirm delivery) to the generator. When the generator receives the second manifest in the mail, he knows the waste arrived where it belongs. But what if the second manifest never comes in the mail? This could mean the manifest was lost in the mail, or it could mean the waste was dumped on the side of the
road somewhere. EPA apparently doesn't care what the reason is, because it does not intend to require small quantity generators to notify EPA or an authorized state if the second manifest does not come in the mail. Large quantity generators are required to notify; they must file exception reports within 45 days of the waste shipments if delivery to the facility is not confirmed. These exceptions reports are the only routine method available to regulatory authorities to ascertain whether midnight dumping is occurring under the federal rules. Nevertheless, EPA has determined that filing exception reports is too large a burden to place on these newly regulated generators. How large a burden can this possibly be? It is a requirement that becomes effective only when delivery has not been confirmed, and the exception report itself is not a lengthy document.

Theoretically, EPA might not need exception reports if it intended to inspect small quantity generators frequently enough to determine if generators are receiving second manifest copies from facility owner/operators. The reality is, however, that EPA's regulations allow the generator to destroy manifests after three years, and EPA and the states don't currently inspect large quantity generators every three years. In light of these inspection deficiencies one would expect EPA to retain the exception reporting requirement as minimal protection against midnight dumping. Unfortunately, EPA has once again lost sight of its mission to protect human health and the environment.

OMB INTERFERENCE IN RCRA RULEMAKING
EPA has yielded to illegal OMB efforts to delay the issuance of rules subject to statutory deadlines. EDF recently challenged a glaring example of such activity, where OMB refused to allow EPA to propose the Congressionally mandated permitting standards for underground tanks storing hazardous waste.

Despite a statutory deadline of March 1, 1985, OMB required EPA to submit its notice of proposed rulemaking to OMB for review under Executive Order 12291. EPA submitted the notice of proposed rulemaking to OMB for review on March 1, 1985, the date of the statutory deadline. Even though OMB staff were acutely aware that the statutory deadline had expired, they waited for six weeks before giving EPA staff any formal comments on the proposed regulations. Because OMB staff disagreed with several aspects of EPA’s proposal, they refused to approve it for publication in the Federal Register. OMB notified EPA that it was invoking the extended review provisions of the executive order in order to prohibit EPA from publishing its proposal. Thus, even though the statutory deadline had expired, OMB invoked the executive order to prohibit EPA from taking action required by Congress.

OMB staff refused to clear the proposed regulations in their original form and insisted that EPA make significant changes in them. EPA staff submitted revised regulations to OMB for review on May 10, 1985. OMB still was not satisfied with the revised regulations and they insisted on further changes. Only after EDF and two of its members filed a lawsuit against both EPA and OMB on May 30, 1985 did OMB permit EPA to publish the proposed standards. But OMB first dictated still further changes in the proposed standards before they were published on June 26, 1985.
OMB and EPA completely ignored the procedures established by Executive Order 12291 to prevent OMB review from conflicting with statutory deadlines. Section 8(a)(2) of the executive order provides that such conflicts are to be reported to OMB and a statement is to be published in the Federal Register explaining why the normal review procedures cannot be followed. OMB's own Form 83, "Request for OMB Review," and the agency's Regulatory Docket Worksheets contain a box marked "Statutory or Judicial Deadline," which is checked when a rule is not submitted to OMB for review prior to publication because of a deadline. OMB ignores this procedure entirely, as indicated by the fact that OMB's Regulatory Docket Worksheets treated the tank standards as a "Standard" submission even though EPA had checked the "Statutory or Judicial Deadline" box on Form 83.

In response to EDF's discovery requests, OMB and EPA admitted that they have no formal procedures outlining the circumstances under which OMB review is to be bypassed pursuant to section 8(a)(2) of Executive Order 12291 in order to comply with statutory deadlines. Both OMB and EPA were unable to cite a single instance in which the procedures of section 8(a)(2) were followed. In fact, EDF discovered that OMB apparently has no way of identifying regulations subject to statutory deadlines in their computer tracking system. OMB's annual reports reveal that there have been only five instances — and none since 1983 — in which OMB has even acknowledged that its review of EPA regulations has been affected by a statutory or judicial deadline.
OMB's review of the proposed permitting standards for underground tanks storing hazardous waste illustrates how OMB has abused its review power in an effort to substitute its judgment for EPA's. Prior to submitting the proposed standards to OMB for review, EPA determined that the best regulatory strategy for protecting the environment against leaks in underground storage tanks was to require secondary containment for such tanks. This approach would permit leaks to be discovered before the toxic chemicals are released into the environment. EPA considered varying control requirements for tanks based on site-specific circumstances but it decided that this would be too expensive to implement and would not provide adequate protection for human health and the environment. OMB, however, objected to the "containment philosophy" behind EPA's proposal. OMB does not believe that it is always desirable to prevent leaks of toxic substances from underground tanks. OMB believes that only leaks of hazardous waste that can be demonstrated by risk analysis to harm human health should be contained. Thus OMB insisted that "any place in the preamble [of the proposed tank regulations] where it was stated that the intent of these regulations is 'to prevent releases to the environment'" be changed to "to protect human health and the environment". OMB also insisted that EPA base its standards on risk assessments, and that it consider varying the standards to permit weaker regulations to apply on the basis of site-specific factors. Thus OMB dictated to EPA how to interpret its statutory mandate under RCRA, rejecting EPA's approach.

The government argued in the tanks litigation that OMB does not displace agency decisionmaking because EPA is free to reject OMB's changes. However, unless EPA agrees to accept OMB's changes, OMB can block any regulatory action
by EPA indefinitely. This is the strategy OMB uses to dictate the substance of agency decisions. OMB review is extended indefinitely until the agency agrees to the changes sought by OMB. If the agency resists, the regulations can languish under extended review for months and even years.

It is clear that this is precisely what occurred with the tank standards. OMB extended its review of the tank standards not simply to give it more time to prepare its "advice," but also to ensure that its "advice" was adopted by EPA. OMB refused to complete its review of the standards until it was satisfied that all the changes sought by OMB had been made in EPA's proposal. After EPA submitted a revised proposal on May 10, 1985, OMB insisted on still further changes. On June 4, 1985, OMB staff met with EPA staff to dictate the "fixes needed for clearance." Exhibit SA-13, in EDF v. Thomas, No. 85-1747. OMB staff insisted on approving word-for-word changes in the proposed regulations. A handwritten note informed the Director of EPA's Office of Solid Waste on June 6, 1985, that "OMB has concurred on the revised tank package provided you agree to the following attached changes." Exhibit SA-15, in EDF v. Thomas, No. 85-1747.

As you know, on January 23, 1986, the Court ruled in EDF's favor, declaring that OMB has no authority to delay promulgation of RCRA rules beyond statutory deadlines (copy of opinion attached). However, the government has moved the Court to reconsider this aspect of the opinion. Significantly, EPA has already missed RCRA deadlines for promulgating improved hazardous waste export controls (due November 8, 1985), listing additional wastes (due February 8, 1986), regulations minimizing the disposal of containerized liquids in landfills (due February 8, 1986), and guidelines for federal
procurement of recycled paper products (due May 8, 1985). Prior to the Court ruling, EPA indicated these rules would follow the same OMB review procedures as the tank standards. EDF urges this Subcommittee to explore with EPA whether these rules (in proposed and final form) will be submitted to OMB for Executive Order 12291 review. Ironically, the government has argued in the tanks case that EPA is free to ignore the OMB review process if it chooses to do so. Therefore even in the absence of the court opinion, EPA is capable of discharging its responsibilities in accordance with Congressional intent, should it choose to do so.

DELISTING

EPA is processing delisting petitions submitted by the regulated community, which if granted, would remove the waste streams covered by the petitions from the jurisdiction of the federal hazardous waste regulatory program. Once delisted, these wastes may be managed as any solid waste, like municipal garbage. Therefore, it is imperative that these delisting petitions be carefully evaluated and uncertainties be resolved against the granting of the petitions.

Nevertheless, EPA has proposed a series of delistings recently where the petitioner submitted either no groundwater monitoring data for the units to be delisted, or the data was invalid because the monitoring system or sampling procedures at the facility were inadequate. The lack of monitoring data was a result of four years of noncompliance with federal and state groundwater monitoring regulations. By considering these delisting petitions, EPA is rewarding the very persons who have been operating in violation of the law.
Ironically, EPA has stated it will consider evidence of groundwater contamination as grounds for denying a delisting petition. EPA recognizes that actual monitoring data acts as a verification of the theoretical modeling on which the petitions would otherwise be based. Companies which have been monitoring as the law requires may thus have their petitions denied if monitoring data indicates contamination caused by the units to be delisted. On the other hand, companies which have violated the law do not have this problem. There is no evidence of contamination at their facilities because they never looked for it, despite federal regulations to the contrary. In short, EPA’s delisting policy prefers ignorance over data, and violators over compliers.

To complete this cycle of irrational policymaking, in several instances EPA and state enforcement personnel chose not to require delisting petitioners to install groundwater monitoring systems even though they were required to by federal and state regulations. The reason was that these companies had filed a delisting petition, even though it hadn’t been processed or approved yet. Therefore, simply by filing a petition, these companies were able to violate the law, and now EPA Headquarters intends to reward them for their efforts.

GROUNDWATER MONITORING REQUIREMENTS

In recent months, EPA has failed to take action to modify its groundwater monitoring regulations despite a Congressional mandate to do so, and has issued guidance to federal and state permit writers which is contrary to the intent of Congress. Both these actions resulted in a weakening of the
groundwater monitoring requirements.

Existing federal regulations require that the owner/operator of a permitted facility locate the background monitoring well so that it is not affected by leakage from a "regulated unit", defined as a hazardous waste land disposal unit receiving waste after July 26, 1982. Conversely, the background well may be contaminated by leakage from a non-regulated unit, which includes any hazardous waste unit which stopped receiving waste prior to July 26, 1982, and any solid waste unit. Should the background well become contaminated with leakage from a non-regulated unit, it can camouflage leakage from the unit the regulations are intended to monitor. This happens because the presence of contamination at the monitored unit is determined by comparing contaminant levels in the background well with levels in downgradient wells. If the contaminant levels in the background well are already high, levels of contamination in the downgradient wells will not appear significantly elevated above background, and will not trigger an appropriate response action.

Section 3004(u) of RCRA now requires persons with RCRA permits to address releases into groundwater from any solid or hazardous unit at the facility as a condition of receiving the permit. These releases include the kind of leakage that could contaminate background monitoring wells for regulated units. As Congress recognized when it enacted Section 3004(u), this new cleanup requirement would require a change in EPA's groundwater monitoring requirements. As the Senate Report states:

To assure corrective action is taken in response to releases of hazardous wastes or constituents from an inactive unit at a facility seeking or having received a RCRA permit, the
Administrator will need to revise groundwater monitoring requirements to detect possible releases from all inactive units from which a release could occur at a facility. It will be necessary to determine background water quality at a point unaffected by any waste management activities at the facility.

Despite the enactment of Section 3004(u) over fifteen months ago, EPA has not made the necessary modification to its regulations. On November 7, 1985, EDF petitioned EPA to make this modification, but we have still not received a reply from the Agency.

In contrast, the Agency has taken swift action to weaken its groundwater monitoring requirements. Permit applicants are required to monitor groundwater for a list of approximately 375 contaminants (called the Appendix VIII list of hazardous constituents) if interim status groundwater monitoring has indicated the facility has contaminated groundwater at the time the application is filed. If contamination is not detected until after the permit is issued, Appendix VIII monitoring is required when contamination is detected. During a subsequent monitoring stage, known as compliance monitoring, Appendix VIII scans are required at least on an annual basis.

Without formally changing these regulations, the Agency has issued two documents intended to sharply reduce the number of substances that must be monitored at these points in time. The justification for this action given by EPA is that many of the Appendix VIII constituents are either too difficult or impossible to analyze. The list of substances covered by the guidance eliminates over one fourth of the Appendix VIII list, yet the list was not subject to any outside peer review (including the Science Advisory Board), or public notice and comment before the guidance was issued. Now that the
guidance is already in use, EPA is soliciting public comment.

There are many troubling aspects to the Appendix VIII action. Several are procedural in nature. The Agency has, in effect, drastically modified important hazardous waste regulations without providing for any public input. While the guidance was being prepared, EDF was denied copies of the list of chemicals to be covered by the guidance upon repeated requests. Moreover, a little over a year ago, EPA had begun a rulemaking intended to address some of the problems with Appendix VIII. Instead of completing this rulemaking, or proposing another rule for comment, EPA chose an approach which prevented public involvement until the relevant documents were already in use by the Agency. How can this approach can be squared with Agency pronouncements about the need for effective public participation in the RCRA program and EPA's so-called "open door policy"?

Another troubling aspect of EPA's guidance concerns the substances themselves that were covered by the guidance, and the reasons EPA used for not requiring their analysis. As Dr. Silbergeld can detail, if you wish, the guidance is technically flawed, which is not surprising considering the technical basis for it was essentially prepared in three days. The consequence of these flaws is that less comprehensive groundwater monitoring data will be available in the coming years than there otherwise should be.

Finally, and perhaps most significantly, to justify a weakening of the permitting standards, EPA relies to a large degree on new Section 3005(c)(3) of RCRA, or the omnibus provision of the 1984 Amendments. Ironically, this provision was intended to authorize EPA to issue permits with more stringent
terms and conditions than required by EPA regulations. But as the attached memorandum reveals, EPA has turned the provision on its head by relying upon it for the opposite result, in blatant disregard of Congressional intent. The precedent of using Section 3005(c)(3) in this manner, and the potential for abuse of this authority by federal and state permit writers, is deserving of special attention from this Subcommittee. In light of this omnibus interpretation and the land disposal ban proposal, one must question whether EPA views its mission as implementing the laws as enacted by Congress, or implementing policies it believes are appropriate irrespective of the laws enacted by the Congress.

Thank you for the opportunity to testify today. I would be happy to answer any questions you may have.
MEMORANDUM

This matter comes before the court on the parties' cross-motions for summary judgment. Plaintiffs' motion has appended to it various public documents as well as documents under seal regarding deliberations between defendants. Defendants' motion, originally filed in July of 1985, was supplemented in December of 1985. This court has allowed groups representing the electric utilities industry to file a single amici curiae brief.

I. Background

In November of 1984, Congress enacted the Hazardous and Solid Waste Amendments of 1984 ("1984 Amendments"), Pub. L. 98-616 (Nov. 8, 1984), which amended the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6924. RCRA is a comprehensive statute designed to regulate the management of hazardous and
solid wastes. One of the new amendments, Section 3004(w) of RCRA, 42 U.S.C. § 6924(w), provides that "(n)ot later than March 1, 1985, the (Environmental Protection Agency or "EPA") Administrator shall promulgate final permitting standards under this section for underground tanks that cannot be entered for inspection."

This deadline was not met. Plaintiffs contend that EPA's ability to promulgate the regulations was further prevented by the unlawful interference of the Office of Management and Budget ("OMB"). Plaintiffs, Environmental Defense Fund Inc. ("EDF") and two individuals brought suit in this court on May 30, 1985. Plaintiffs seek an order that EPA must promulgate the regulations by April 25, 1986. Plaintiffs also seek injunctive relief against OMB to prevent similar interference in the future.

Defendants EPA and OMB want until June 30, 1986 to promulgate the regulations. Further, they contend that this court has no jurisdiction to grant injunctive relief against OMB of this kind. The electric utilities groups, Edison Electric et al., agree with defendants.

II. Jurisdiction

Both parties agree that RCRA gives this court jurisdiction to order the Administrator of EPA to perform nondiscretionary duties and allows this court to set a date by which EPA must promulgate the hazardous waste tank regulations. 42 U.S.C. § 6972(a)(2). The only real dispute is by which deadline EPA can
reasonably be ordered to promulgate final standards.

Jurisdiction to grant injunctive relief against OMB is the more controversial aspect of this suit. At the crux of this disagreement is the lawfulness of OMB's activity pursuant to the Congressional deadline and pursuant to Executive Order 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981), 3 C.F.R. 127 (1982) ("EO 12291").

EO 12291 directs executive agencies to submit all proposed and final rules to OMB for pre-publication review to determine if they are consistent with certain criteria (e.g., the regulations must be based on adequate information, the potential benefits must outweigh the potential costs, the net benefits to society must be maximized, and the alternative involving the least net cost to society must be chosen). Also, the order states that "major rules" are submitted to OMB for review 60 days before publication of proposed rules and 30 days prior to publication of final rules. All other rules are submitted to OMB for review 10 days before publication of proposed rules and 10 days prior to publication of final rules. OMB is deemed to have concluded its review after expiration of these time periods unless it notifies the agency that it has extended its review pursuant to Section 3(f). This extension may be indefinite.

OMB's authority is qualified by the rule. Section 8(a)(2) of EO 12291 exempts regulations "for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statute or by judicial order." Further,
"(n)othing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law." Sec. 3(f)(3).

The executive order also limits OMB's authority by authorizing OMB to exercise its review only "to the extent permitted by law." Secs. 2, 3(a), & 6(a).

Plaintiffs contend that OMB's interference with the promulgation of the EPA regulations unlawfully delayed their promulgation, in violation of both the RCRA amendments and the Administrative Procedure Act ("APA"), 5 U.S.C. 706. Plaintiffs argue that under 28 U.S.C. § 1331 and § 1361, this court may exercise inherent equitable powers to grant injunctive relief preventing further OMB interference.

Defendants respond that ordering OMB to refrain from reviewing any proposed regulations under RCRA whenever such review would delay promulgation of the regulation beyond a statutory deadline is an unjustifiable and inappropriate use of this court's power. As defendants see it, neither the RCRA nor the APA gives this court jurisdiction over OMB in this matter. Further, there is no jurisdiction to enforce any constraints found within the Executive Order itself.

There is no doubt that this court has jurisdiction over both plaintiffs' RCRA and APA claims against the Administrator of EPA. 42 U.S.C. 6972(a)(2) and 5 U.S.C. 702. In compelling EPA to perform non-discretionary duties, however, it is also appropriate to fashion equitable relief to ensure that such duties are performed without the interference of other officials acting
outside the scope of their authority in contravention of federal law. Though injunctive relief is not appropriate in these circumstances, as discussed below, there can be no doubt that an executive agency or agencies can be enjoined by this court from failing to execute laws enacted by Congress.

III. Discussion

While the merits of relief against EPA and relief against OMB can be discussed separately, first a discussion of what exactly caused the delay in promulgating the regulations is in order. From the documents released by OMB and EPA under seal, an interesting picture of OMB involvement in the promulgation process emerges.

Congress set March 1, 1985, as the deadline for promulgating the regulations. OMB commenced its review of the proposed permitting standards on March 4, 1985. Since these were not "major rules" under the meaning of EO 12291, EPA anticipated that OMB would complete its review within 10 days. On March 15, 1985, EPA staff briefed OMB staff on the proposed regulations. OMB refused to clear the regulations and on March 25, 1985, notified EPA that it was extending its review of the proposed regulations. OMB apparently wanted EPA to gather additional information prior to promulgating the regulations even though it would delay the process. By April 10, 1985, EPA had still not received any formal comments from OMB.

By April 12, 1985, it was clear that OMB had serious
differences with EPA over what regulations to propose. At a meeting of April 16, 1985 between OMB and EPA staff members, OMB sought significant changes in the proposed regulations in four areas. The idea, apparently, was to shift the goal of the regulations away from EPA's philosophy of containing all leaks of waste disposals to OMB's philosophy of preventing only leaks of waste that can be demonstrated by risk analysis to threaten harm to human health.

Internal disagreement within OMB further delayed OMB's consideration of the regulations. Some OMB staff members apparently felt that OMB should not be dictating substantive policy decisions to EPA while others felt the precedent being set an important one for OMB review of other RCRA regulations.

After this suit was filed on May 30, 1985, OMB continued to seek specific changes in EPA's proposed regulations as well as changes not previously discussed. After various negotiations regarding the substance of the regulations, OMB completed its review and cleared the proposed regulations on June 12, 1985. The EPA Administrator signed them June 14, 1985 and the proposed regulations were published in the Federal Register on June 26, 1985, 50 Fed. Reg. 26444, after OMB approved some last-minute stylistic changes made by EPA staff.

A. The Final Date for Promulgating the Regulations

The parties agree and this court finds that the Administrator of EPA has failed to comply with his non-
discretionary duties under § 3004(w) of the RCRA. There is disagreement, however, about when the final regulations should be ordered promulgated. Plaintiffs contend that a reasonable time is April 25, 1986 while defendants prefer a deadline of one year from the date the regulations were proposed (i.e. June 30, 1986).

Defendants justify their time-table in an affidavit filed by John H. Skinner, Director of EPA's Office of Solid Waste ("OSW"). Public comments were received on the proposed regulations during a two-month period in the summer of 1985. EPA's technical staff evaluated these comments from September through November 1985. After completing a risk assessment, EPA will develop final draft rules by the end of February 1986. By mid-April, 1986, an EPA work group will comment on the final draft and OSW will complete a revised draft in light of these comments. By the end of May, 1986, OSW will prepare the final rulemaking package for senior level review within EPA (known as "Red Border" review) and for OMB review. The time for doing this will be streamlined and the two agencies review will be done concurrently. The regulations will then become final by June 30, 1986.

Plaintiffs argue that one year is unnecessarily long. EPA has not received as many public comments as was anticipated. EPA's prior and current promulgation schedules are in the neighborhood of nine months, not one year (e.g., the schedule now being followed for comparable small generator rules). As

Promulgation of regulations 16 months after a Congressional deadline is highly irresponsible. Congress was aware of the complexity of these hazardous waste regulations and yet decided that quick promulgation was of paramount importance. Now that the damage is done, however, this court must fashion an equitable remedy that best achieves the Congressional purpose. This court has previously felt bound to accept a proposed schedule by EPA where EPA demonstrates through affidavit that it is "proceeding in good faith," Illinois v. Gorsuch, 12 ERC 1597, 1598 (D.D.C. 1979), rather than mandate flat guidelines of its own. NRDC v. Train, 510 F.2d 697, 712-13 (D.C. Cir. 1975). After reviewing the proposed schedule set forth by EPA in this case, it appears that the June 30, 1986 deadline is reasonable. This date is only two months later than the date sought by plaintiffs. Therefore, it is ordered that the regulations be promulgated by that time. Failure to do so would be capricious and would merit stronger equitable treatment.
3. OMB's Interference with the Promulgation Process

From the discussion above, it seems clear that OMB did contribute to the delay in the promulgation of the regulations by insisting on certain substantive changes. The released documents show that EPA was ready to announce proposed regulations in the Federal Register as early as March 31, 1985, but due to OMB it did not happen until three months later.

A certain degree of deference must be given to the authority of the President to control and supervise executive policymaking. *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1982) (regarding whether oral communications between EPA and the White House must be docketed on the rule-making record when EPA revises Clean Air Act provisions). Yet, the use of EO 12291 to create delays and to impose substantive changes raises some constitutional concerns. Congress enacts environmental legislation after years of study and deliberation, and then delegates to the expert judgment of the EPA Administrator the authority to issue regulations carrying out the aims of the law. Under EO 12291, if used improperly, OMB could withhold approval until the acceptance of certain content in the promulgation of any new EPA regulation, thereby encroaching upon the independence and expertise of EPA. Further, unsuccessful executive lobbying on Capitol Hill can still be pursued administratively by delaying the enactment of regulations beyond the date of a statutory deadline. This is incompatible with the will of Congress and cannot be sustained as a valid exercise of the President's
Article II powers.

Such concerns were noted by Congress when EO 12291 was passed. In order to ensure the legality of the operation of EO 12291, James C. Miller III, now the director but then the administrator of OMB's Office of Information and Regulatory Affairs ("OIRA"), appeared before a congressional committee and stressed the importance of construing narrowly the authority granted to OMB. Mr. Miller testified:

President Reagan's Executive order imposes on the agencies only "to the extent permitted by law" and only to the extent that its terms would not "conflict with deadlines imposed by statute or by judicial order." The limited application of (EO 12291) is a crucial point, one that insures (its) legality and the legality of actions pursuant to (it). ... If a statute or a court order establishes a date for a rulemaking action, the Executive Order 12291 cannot delay that action.


The Justice Department has also emphasized that EO 12291 must be construed narrowly to survive legal challenge.

(I)t is clear that the President's exercise of supervisory powers must conform to legislation enacted by Congress. In issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress.

U.S. Department of Justice, Office of Legal Counsel Opinion on EO 12291, February 13, 1981.

This court has previously found that in certain egregious situations, statutory delay caused by OMB review is in contravention to applicable law under Section 8(a)(2) of EO 12291
and therefore that no further OMB review could occur. NRDC v. Ruckelshaus, 14 ELR 20817, 20818 (D.D.C. 1984). In Ruckelshaus, however, by the time the court order issued, EPA was six years passed the deadline set by Congress. In the case at bar, enjoining OMB from interacting at all with EPA simply because OMB might cause delay past the new judicial deadline is premature and an unwarranted intrusion into discretionary executive consultations.

There is, however, some credence in plaintiffs' fear that the regulations due June 30, 1986, may still be delayed by OMB. While defendants claim that OMB review of the final regulations in May of 1986 will be concurrent with EPA senior level review, such concurrent review of the proposed regulations in the spring of 1985 resulted in considerable delay. Concurrent review does not eliminate delay, since any changes sought by OMB must then be reviewed by senior level EPA officials. This court declares therefore that further review by OMB which creates any delay in meeting the June 30, 1986 deadline is unreasonable and unacceptable. EPA is obligated to promulgate the regulations by that date and may not use the excuse of OMB review to refrain from doing so.

Plaintiffs also protest that OMB routinely reviews other EPA regulations subject to statutory deadlines even if such review will delay promulgation beyond the deadline. Unless this court declares that OMB has no authority to delay promulgation of all EPA regulations beyond statutory deadlines, OMB will continue to

11
do so both for the Section 3004(w) standards and for other RCRA regulations subject to statutory deadlines in the 1984 amendments. Through answers to interrogatories, plaintiffs show that EPA submitted 169 regulations to OMB which were subject to statutory or judicial deadlines, and on 86 occasions OMB extended its review beyond the time periods outlined in EO 12291. OMB's propensity to extend review has become so great that EPA keeps a running record of the number of its rulemaking actions under extended review by OMB and the resulting delays. The average delay per regulation is 91 days; total delays were more than 311 weeks. Apparently Section 8(a)(2) of EO 12291 is simply ignored.

Congress clearly is concerned with OMB's use of EO 12291 with regard to the deadlines set within the 1984 Amendments. The House Committee report that accompanied the 1984 Amendments states:

The Committee is extremely concerned that EPA has not been able to comply with past statutory mandates and timetables, not just for RCRA, but for virtually all its programs... . The Administrator's ability to meet this deadline (for publishing a schedule for land disposal ban decisions) as with all other deadlines in this bill, shall not be impaired in any way whatsoever by Executive Order 12291.


The Hazardous and Solid Waste Amendments of 1984 added at least 44 new deadlines to RCRA, 29 of which must be satisfied within the next 20 months.
This court declares that OMB has no authority to use its regulatory review under EO 12291 to delay promulgation of EPA regulations arising from the 1984 Amendments of the RCRA beyond the date of a statutory deadline. Thus, if a deadline already has expired, OMB has no authority to delay regulations subject to the deadline in order to review them under the executive order. If the deadline is about to expire, OMB may review the regulations only until the time at which OMB review will result in the deadline being missed. From its tracking system, EPA can determine when further delay due to OMB review will result in a deadline being missed.

While this may be an intrusion into the degree of flexibility the executive agencies have in taking their time about promulgating these regulations, this is simply a judicial recognition of law as passed by Congress and of the method for dealing with deadlines laid down by the President himself. Such a recognition is not new. See NRDC v. Gorsuch, 17 ERC 2013, 2016 (D.D.C. 1982). Indeed, OMB itself admits that it cannot prevent an agency from complying with statutory requirements. Yet declaratory relief is necessary to ensure compliance with the clearly expressed will of Congress. This is not an inappropriate interference with the interaction of executive agencies; all such interaction may continue absent a "conflict with deadlines imposed by statute or by judicial order." Sec. 8, EO 12291.

An appropriate Order accompanies this Memorandum.

UNITED STATES DISTRICT JUDGE
This matter comes before the court on the parties' cross-motions for summary judgment. After consideration of the motions, the oppositions thereto, the amici curiae brief, and the entire record herein, it is, by the court, this 28th day of January, 1986,

ORDERED that defendants' motion for leave to file a response to plaintiffs' December 23, 1985 submission is granted; and it is further

ORDERED that plaintiffs' motion for summary judgment is granted in part and denied in part, and defendants' motion for summary judgment (as supplemented) is granted in part and denied in part; and it is further

DETERMINED AND DECLARED that defendant Environmental Protection Agency has failed to perform its mandatory duty under Section 3004(w) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6924(w); and it is further

ORDERED that no later than June 30, 1986, defendant
Environmental Protection Agency shall promulgate final permitting standards for underground tanks pursuant to Section 3004(w) of RCRA; and it is further

DETERMINED AND DECLARED that defendant Office of Management and Budget has no authority to delay the promulgation of final permitting standards for underground tanks pursuant to Section 3004(w) of RCRA by withholding approval of the standards past June 30, 1986; and it is further

DETERMINED AND DECLARED that defendant Office of Management and Budget has no authority to delay the promulgation of EPA regulations arising from the Hazardous and Solid Waste Amendments of 1984 of the RCRA, Pub. L. 98-616 (Nov. 8, 1984), by withholding approval past statutory or judicial deadlines.

UNITED STATES DISTRICT JUDGE
MEMORANDUM

FEB 11 1986

SUBJECT: Flexible Application of Part 264 Regulations Requiring Appendix VIII Analyses

FROM: Lisa K. Friedman
Associate General Counsel
Solid Waste and Emergency
Response Division (LE-132S)

TO: Marcia Williams
Director
Office of Solid Waste (WH-562)

EPA's regulations under the Resource Conservation and Recovery Act (RCRA) require owners and operators of some land-based hazardous waste facilities to analyze ground water for each of the 375 hazardous constituents listed in Appendix VIII to 40 C.F.R. Part 261. For a number of reasons this analysis has proven to be very difficult. The Agency is preparing guidance recommending that permit writers use the waiver provision in 40 C.F.R. §270.14(a) to reduce the number of constituents for analysis in permit applications. You have asked whether there are any arguments for similar flexibility under the Part 264 regulations that govern facilities after they obtain permits.

QUESTION

Do the regulations in Subpart F of 40 C.F.R. Part 264 require analysis of each hazardous constituent in Appendix VIII at all land-based facilities?

ANSWER

No, the Part 264 regulations do not require Appendix VIII analyses for all land-based facilities. There is a strong
argument that the corrective action monitoring program under §264.100 does not require a full Appendix VIII analysis. Moreover, although the detection and compliance monitoring programs require full Appendix VIII analyses, there is a strong argument that EPA may waive testing requirements for those constituents for which analysis is impossible. We can also make arguments for waiving additional constituents for which analysis is difficult and time-consuming. Waivers based on either impossibility or delay would require strong factual records.

DISCUSSION

A. Background

The Part 264 regulations for land disposal facilities that EPA promulgated in 1982 establish a progressive sequence of ground-water monitoring requirements. At specified points in the sequence, facility owners and operators must analyze ground water for all constituents in Appendix VIII. An owner or operator that has not found ground-water contamination prior to permit issuance must begin by sampling for indicator parameters under a detection monitoring program. If the owner or operator observes an increase in indicator parameters, he must immediately analyze for all Appendix VIII constituents present in ground water. 40 C.F.R. §264.98(h)(2). The Regional Administrator must set ground-water protection standards based on the constituents found in this analysis. 40 C.F.R. §264.92, 264.93, 264.99(a). Owners and operators must also begin compliance monitoring, which requires quarterly sampling for all constituents for which the Regional Administrator has set ground-water protection standards. A separate provision in the compliance monitoring program also requires the owner or operator to sample each well annually for all constituents on the Appendix VIII list. 40 C.F.R. §264.99(f). If the level of a constituent exceeds a ground-water protection standard, the owner or operator must undertake corrective action. 40 C.F.R. §264.100. Corrective action requires a ground-water monitoring program "as effective as" the compliance monitoring program in determining compliance with the ground-water protection standards. 40 C.F.R. §264.100(d).

Appendix VIII is a comprehensive list of hazardous chemicals that EPA compiled in 1980 and used primarily as an aid to identifying substances for listing as hazardous
wastes. When EPA incorporated Appendix VIII into its groundwater monitoring program for land-based facilities in 1982, it acknowledged that it could not identify methods for analyzing nine of these constituents in groundwater. Subsequent attempts to implement the regulations showed that many more constituents were difficult or impossible to analyze. In 1984 EPA proposed to eliminate 22 constituents from the analytical requirements. 49 Fed. Reg. 38786 (October 1, 1984).

EPA experts recently decided that further changes are needed, and the Agency plans to issue a new proposal. In the interim, the Office of Solid Waste plans to issue new guidance recommending that permit writers exercise discretion in applying Appendix VIII requirements in permit applications.

The draft guidance identifies a variety of analytical problems. For example, some constituents may disassociate in water without leaving any significant analyzable components. Analysis is virtually impossible under such circumstances, and the draft guidance recommends that permit writers waive data requirements for those constituents at all facilities. For many other constituents, analysis is conceptually possible, but very time-consuming. Analysts would have to perform site-specific experiments adapting known test methods or experimenting with surrogate test standards to try to produce acceptable results. The guidance recommends that, in these cases, permit writers should determine whether the need to obtain data warrants a delay in issuing permits. In still other cases, Appendix VIII listings are ambiguous or identify large categories of chemicals. Resolving the ambiguities or analyzing for all members of a category would also cause delays. Consequently, the guidance recommends analyzing for specific chemicals chosen to represent the large or ambiguous categories.

B. Arguments for Flexible Application of the Part 264 Regulations

1. Facilities monitoring ground water under the corrective action requirements

If an owner or operator of a land-based hazardous waste unit discovers groundwater contamination prior to permit issuance, the permit application rules require him to submit analyses for all Appendix VIII constituents as part of his

1/ This list has been amended several times to add constituents, particularly in conjunction with waste listing actions.
permit application. 40 C.F.R. §270.14(c)(4). If the contamination exceeds ground-water protection standards, the permit must require the owner or operator to conduct corrective action monitoring under §264.100, rather than detection monitoring under §264.98. See 40 C.F.R. §270.14(c)(8). EPA currently expects that it will discover ground-water contamination at a large number facilities with land-based units prior to permit issuance. Consequently, many permitted facilities will have to meet only the final "corrective action" stage of the Part 264 monitoring sequence.

The corrective action monitoring regulations do not explicitly require full Appendix VIII monitoring. Rather, they provide that ground-water monitoring during corrective action "may be based on the requirements for compliance monitoring under §264.99 and must be as effective as that program in determining compliance with the ground-water protection standard under §264.92 and in determining the success of a corrective action program under paragraph (e) of [§264.100]." 40 C.F.R. §264.100(d). Neither §264.92 nor §264.100(e) requires Appendix VIII monitoring. As noted above, the compliance monitoring requirements in §264.99 do require an annual scan for all Appendix VIII constituents. See §264.99(f). This Appendix VIII scan, however, is not directed at measuring compliance with the ground-water protection standards; rather, it is designed to show whether the standards should be revised to include additional constituents. (Completely separate requirements in §264.99 require quarterly monitoring of constituents included in the ground-water protection standards.) Since the Appendix VIII scan does not serve the goal of measuring compliance with the ground-water monitoring requirements, §264.100 does not appear to require it.

Physical differences between compliance monitoring and corrective action confirm what the rule appears to say. As a practical matter, there is less need to require an Appendix VIII scan under corrective action monitoring. Since corrective action will remove the entire plume of contamination in most cases, it is not always necessary to identify all constituents in the plume. Consequently, we believe that the better reading of the corrective action monitoring requirement in §264.100(d) is that it does not require owners and operators to meet the compliance monitoring program's requirement for an Appendix VIII scan. Instead, it requires them to test only for those constituents included in their ground-water protection standards. 2/ Thus, for the large

2/ If a Region believes that circumstances at a specific facility make it necessary to test for constituents not included in the ground-water protection standard, EPA probably has authority under new Section 3005(c)(3) of RCRA and 40 C.F.R. §270.32(b)(2) to require such testing as a permit condition. These provisions are discussed in more detail in the next section of the text.
number of facilities that will obtain RCRA permits requiring corrective action, Part 264 will not require full Appendix VIII analysis.

2. Facilities monitoring ground water under detection or compliance monitoring programs

a. Permit conditions

Where EPA does not discover ground-water contamination at a land-based facility prior to permit issuance, the permit must establish a detection monitoring program. Under detection monitoring, the owner or operator must analyze for all Appendix VIII constituents if he detects an increase in any indicator parameter. 40 C.F.R. §264.98(h)(2). During any subsequent compliance monitoring stage, the owner or operator must perform an annual Appendix VIII scan. 3/ These two ground-water monitoring provisions clearly require complete Appendix VIII analyses. However, other provisions in RCRA and EPA's permitting regulations may authorize EPA to waive these requirements for individual constituents if it finds that full analysis would be either impossible or so time-consuming that it severely conflicts with other statutory goals.

The permit regulations in Part 270 provide for two types of permit conditions. Section 270.32(b)(2) specifies that each permit must contain conditions necessary to ensure compliance with the Act and applicable regulations, but gives the permit writer freedom to incorporate regulations directly or draft "other conditions based on" the regulations. A newer provision more broadly authorizes permit writers to impose conditions establishing "terms and conditions as the Administrator or State Director determines necessary to protect human health and the environment." 40 C.F.R. §270.32 (b)(2). This provision is based on the new "omnibus" authority

3/ Compliance monitoring may, in fact, be relatively rare. Most facilities that discover increases in indicator parameters will find contamination exceeding at least one ground-water protection standard, and, consequently, move directly to the corrective action phase of the monitoring sequence. It is reasonable to assume that only a relatively small number of facilities will find contamination that exceeds background but does not exceed any ground-water protection standard. Only these facilities will operate under compliance monitoring.
for permit conditions added to Section 3005(c)(3) of RCRA by the 1984 amendments.4/

We believe that the Agency can argue persuasively for waivers where analysis is impossible. Administrative law generally recognizes exceptions to statutory requirements where compliance is impossible. See, e.g., Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979). The same principles almost certainly apply to regulatory requirements. Since this authority exists as a matter of general administrative law, waiving analysis for "impossible" constituents is surely a permissible use of the authority to craft permit conditions. EPA would have authority to waive impossible regulatory requirements without specific regulations authorizing permit conditions that depart from the regulations. Of course, EPA permit writers would have to ensure that they had an appropriate factual record supporting any claim of impossibility.

The "impossibility" argument, however, does not apply to all of the Appendix VIII constituents for which the short-term guidance recommends flexibility. As we explained above in the background section, for many constituents analysis is theoretically possible, but difficult and time-consuming. Requiring an owner or operator to analyze for many difficult constituents increases the amount of time need to complete each analysis. At some point, delay may begin to interfere with other statutory objectives. The number of laboratories qualified to analyze ground water

4/ The legislative history of the new "omnibus" provision does not explicitly authorize waivers of existing regulatory requirements. However, the legislative history at one point suggests that EPA may use this "omnibus" authority when it has decided that it wants to change a rule, but has not yet completed the rulemaking process. S. Rep. No. 98-284, 98th Cong., 1st Sess. at 31 (1983). Since regulatory changes may either relax or tighten rules, this legislative history offers some support for the use of omnibus conditions to waive Appendix VIII monitoring requirements before EPA promulgates regulations that reduce those requirements.

EPA cannot, however, easily assume that Section 3005(c) gives it authority to waive substantive requirements. Other portions of the legislative history suggest that Congress primarily intended to authorize conditions that go beyond existing rules. EPA cited some of these statements in the preamble to new §270.32(b)(2). See 50 Fed. Reg. 28722 (July 15, 1985). While we still believe that nothing in the statute or the legislative history expressly prohibits conditions that waive regulatory requirements, it is important to emphasize that the use of this authority in such a manner will require a particularly strong factual record to show that a waiver serves the purpose of protecting human health and the environment.
for hazardous constituents is limited. The same laboratories that perform Appendix VIII analyses for Part 264 requirements must also perform Appendix VIII analyses for permit applications and more general analyses to support corrective action for ground-water releases under Superfund and the new RCRA cleanup authorities in Sections 3004(u) and 3008(h).

A permit writer might be able to find that insisting that a permitted facility analyze for each constituent would consume an unacceptable share of these finite laboratory resources, slowing down a large number of cleanups. Delays in cleanups could exacerbate threats to human health and the environment by allowing more hazardous constituents to escape and migrate farther. Under these circumstances, EPA could argue that either §270.32(b)(1) or §270.32(b)(2) would authorize waivers for difficult constituents. Factual support, including information on topics such as laboratory capacity and the speed at which constituents migrate, would be essential. The facts would have to show that waivers were needed to protect health and the environment or to ensure compliance with RCRA's permitting and corrective action requirements.

For all waivers it would be prudent to include a "reopener" clause in the permit that would require the owner or operator to revisit the issue once EPA completes its revisions to the ground-water monitoring regulations. The clause should require the owner or operator to perform additional analyses if EPA's final rules require testing for previously waived constituents. To impose these requirements, EPA could argue that it had authority to require a permit modification to respond to new information on the analytical potential for these constituents developed during the rulemaking. See 40 C.F.R. §270.41(a).

b. Compliance schedules

The permitting regulations also provide that, "where appropriate", a permit may include a schedule leading to compliance with regulatory requirements. 40 C.F.R. §270.33(a). Providing additional time through a schedule could reduce demands on the laboratory resources needed for all types of ground-water analyses. This could expedite the issuance of permits and corrective action.

The compliance schedule option, however, has at least two limitations. First, §270.33 requires continued progress toward compliance. At a minimum, schedules must require owners and operators to submit progress reports every year. The preamble to the regulation emphasizes the importance of continued progress, explaining that EPA believed interim milestones were necessary to ensure compliance because the regulations did not set final compliance dates. 45 Fed. Reg. 33309 (May 19, 1980). Consequently, it might be difficult to defend a schedule
that required additional analysis only after EPA completed its review of the technical problems and promulgated revisions to the Appendix VIII monitoring requirements. Schedules which require owners and operators to continue to try to develop reasonably accurate methods would be easier to defend.

Moreover, schedules might not be "appropriate," within the meaning of the regulation, where compliance is physically impossible. The emphasis on continued progress implies that compliance should be at least conceptually possible. Appendix VIII constituents for which analysis is virtually impossible might be more appropriately handled as permit conditions under §270.32.

In conclusion, we want to emphasize again that neither the permit condition nor the compliance schedule provisions expressly provide for waivers or modifications to existing regulatory requirements. Although we can argue that they contain such authority, success will probably depend heavily on a showing that the Agency has a compelling need to provide relief. Under either of these provisions, EPA would need to provide strong technical support showing that compliance is impossible or would cause unacceptable delays.
RCRA HAZARDOUS WASTE TANK STANDARDS BRIEFING

FOR THE

OFFICE OF MANAGEMENT AND BUDGET (OMB)

MARCH 15, 1985
Tank Types

ABT  (Above Ground)

UGT  (Under-ground)

IGT  (In-ground)

Secondary Containment

Vault

(Double-walled)

("Donut")
HAZARDOUS WASTES MANAGED - 1981

<table>
<thead>
<tr>
<th>Type</th>
<th>Quantity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Surface Impoundments</td>
<td>35.8 billion gallons</td>
</tr>
<tr>
<td>Tanks (Storage and Treatment)</td>
<td>13.8</td>
</tr>
<tr>
<td>Injection Wells</td>
<td>8.6</td>
</tr>
<tr>
<td>Landfills</td>
<td>0.81</td>
</tr>
<tr>
<td>Incinerator</td>
<td>0.45</td>
</tr>
<tr>
<td>Waste Pile</td>
<td>0.39</td>
</tr>
<tr>
<td>Storage Containers (Drums)</td>
<td>0.16</td>
</tr>
<tr>
<td>Land Treatment</td>
<td>0.10</td>
</tr>
<tr>
<td>Other</td>
<td>10.89</td>
</tr>
</tbody>
</table>
HAZARDOUS WASTE FACILITIES WITH TANKS

<table>
<thead>
<tr>
<th></th>
<th>Storage &amp; Treatment (Permitted) Facilities</th>
<th>&lt;90 Day Accumulation (Generator) Facilities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Facilities</td>
<td>1700</td>
<td>2100</td>
</tr>
<tr>
<td>Number of Tanks</td>
<td>9100</td>
<td>6400</td>
</tr>
<tr>
<td>Average Tanks per Facility</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>Range of Tanks per Facility</td>
<td>1-56</td>
<td>1-85</td>
</tr>
<tr>
<td>Location</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Aboveground</td>
<td>71%</td>
<td>74%</td>
</tr>
<tr>
<td>In-ground</td>
<td>17%</td>
<td>8%</td>
</tr>
<tr>
<td>Underground</td>
<td>12%</td>
<td>18%</td>
</tr>
</tbody>
</table>

**NOTES:**
- Generators using tanks to accumulate hazardous waste for less than 90 days are more numerous than other S/T facilities with tanks.
- Accumulation facilities, on average, have fewer tanks than other facilities.
<table>
<thead>
<tr>
<th>Accumulation Tanks</th>
<th>Permitted Tanks</th>
</tr>
</thead>
<tbody>
<tr>
<td>25%</td>
<td>5,000</td>
</tr>
<tr>
<td>50%</td>
<td>18,000</td>
</tr>
<tr>
<td>75%</td>
<td>70,000</td>
</tr>
<tr>
<td>90%</td>
<td>225,000</td>
</tr>
</tbody>
</table>

PER TANK -- ANNUAL THROUGHPUT (gallons)
<table>
<thead>
<tr>
<th>PERCENTILE</th>
<th>ABOVE GROUND</th>
<th>ABOVE &amp; BELOW GROUND</th>
<th>IN-GROUND OPEN-TOP</th>
<th>UNDERGROUND</th>
<th>90 DAY ACCUMULATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>25%</td>
<td>1,875 gal.</td>
<td>1,200 gal.</td>
<td>850 gal.</td>
<td>1,675 gal.</td>
<td>1,300 gal.</td>
</tr>
<tr>
<td>50%</td>
<td>6,000 gal.</td>
<td>2,600 gal.</td>
<td>2,500 gal.</td>
<td>3,600 gal.</td>
<td>4,000 gal.</td>
</tr>
<tr>
<td>75%</td>
<td>20,000 gal.</td>
<td>20,000 gal.</td>
<td>7,500 gal.</td>
<td>8,000 gal.</td>
<td>8,000 gal.</td>
</tr>
<tr>
<td>90%</td>
<td>210,000 gal.</td>
<td>30,000 gal.</td>
<td>31,000 gal.</td>
<td>10,000 gal.</td>
<td>15,000 gal.</td>
</tr>
</tbody>
</table>

**NOTES:**
- Above ground tanks are the largest and have the widest variation in size.
- Underground tanks are the smallest and have the least variation.
- Underground and 90 day accumulation tanks are very similar in size distribution.
# TANK CONSTRUCTION MATERIAL

(\% of all tanks)

<table>
<thead>
<tr>
<th>Material</th>
<th>Above Ground</th>
<th>Above &amp; Below Ground</th>
<th>In-Ground Open-Top</th>
<th>Underground</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carbon steel</td>
<td>76%</td>
<td>26%</td>
<td>8%</td>
<td>63%</td>
</tr>
<tr>
<td>Stainless steel</td>
<td>8%</td>
<td>5%</td>
<td>29%</td>
<td>10%</td>
</tr>
<tr>
<td>Concrete</td>
<td>2%</td>
<td>60%</td>
<td>59%</td>
<td>11%</td>
</tr>
<tr>
<td>Fiberglass</td>
<td>10%</td>
<td>7%</td>
<td>1%</td>
<td>9%</td>
</tr>
</tbody>
</table>

**Notes:**

- Current shell thickness requirements in regulations only work for steel tanks.
- Above and underground tanks are most often made of steel.
- Above and below ground, and in-ground open-top tanks are most often made of concrete.
- Fiberglass tanks are a small portion of the total universe.
## TANK AGE

<table>
<thead>
<tr>
<th></th>
<th>ABOVE GROUND</th>
<th>ABOVE &amp; BELOW GROUND</th>
<th>IN-GROUND OPEN-TOP</th>
<th>UNDERGROUND</th>
</tr>
</thead>
<tbody>
<tr>
<td>25%</td>
<td>3 yrs.</td>
<td>3 yrs.</td>
<td>5 yrs.</td>
<td>4 yrs.</td>
</tr>
<tr>
<td>50%</td>
<td>7 yrs.</td>
<td>8 yrs.</td>
<td>12 yrs.</td>
<td>8 yrs.</td>
</tr>
<tr>
<td>75%</td>
<td>14 yrs.</td>
<td>17 yrs.</td>
<td>20 yrs.</td>
<td>14 yrs.</td>
</tr>
<tr>
<td>90%</td>
<td>25 yrs.</td>
<td>25 yrs.</td>
<td>27 yrs.</td>
<td>24 yrs.</td>
</tr>
</tbody>
</table>

**NOTES:**
- Age distribution across different tank types is quite similar.
- Most existing tanks in have been in service 7 or more years.
- Many existing tanks are very old.
- Heightened concern about UGT's >5 years old.
<table>
<thead>
<tr>
<th>TYPE OF WASTE</th>
<th>ABOVE GROUND</th>
<th>ABOVE &amp; BELOW GROUND</th>
<th>IN-GROUND OPEN-TOP</th>
<th>UNDERGROUND</th>
</tr>
</thead>
<tbody>
<tr>
<td>ignitable</td>
<td>41%</td>
<td>20%</td>
<td>13%</td>
<td>44%</td>
</tr>
<tr>
<td>corrosive</td>
<td>42%</td>
<td>45%</td>
<td>19%</td>
<td>33%</td>
</tr>
<tr>
<td>reactive</td>
<td>16%</td>
<td>14%</td>
<td>47%</td>
<td>9%</td>
</tr>
<tr>
<td>e.p. toxic</td>
<td>25%</td>
<td>30%</td>
<td>37%</td>
<td>22%</td>
</tr>
<tr>
<td>toxic</td>
<td>38%</td>
<td>42%</td>
<td>18%</td>
<td>27%</td>
</tr>
<tr>
<td>acutely haz</td>
<td>8%</td>
<td>7%</td>
<td>4%</td>
<td>10%</td>
</tr>
</tbody>
</table>

NOTES:
- Underground tanks have a high percentage of ignitable wastes because of fire codes.
- In-ground open-top tanks store mostly reactive wastes that may present air emission problems.
- Above ground tanks and above and below ground tanks store corrosive wastes which can reduce effective tank life.
- Among the tank types, underground tanks are used most often to store acutely hazardous wastes.
TANKS: EXISTING HAZARDOUS WASTE CONTAINMENT

<table>
<thead>
<tr>
<th></th>
<th>ABOVE GROUND</th>
<th>ABOVE &amp; BELOW GROUND</th>
<th>IN-GROUND OPEN-TOP</th>
<th>UNDERGROUND</th>
</tr>
</thead>
<tbody>
<tr>
<td>secondary containment for tank</td>
<td>76%</td>
<td>38%</td>
<td>36%</td>
<td>14%</td>
</tr>
<tr>
<td>secondary containment for piping and equipment</td>
<td>58%</td>
<td>44%</td>
<td>23%</td>
<td>29%</td>
</tr>
<tr>
<td>liners</td>
<td>17%</td>
<td>21%</td>
<td>14%</td>
<td>22%</td>
</tr>
<tr>
<td>can be entered for inspection for leaks</td>
<td>86%</td>
<td>97%</td>
<td>97%</td>
<td>61%</td>
</tr>
</tbody>
</table>

NOTES:
- EPA-sponsored survey did not distinguish between full and partial containment. Therefore, complete tank containment is probably not as prevalent as shown above.
- Secondary containment is used least for under-ground tanks; most for above ground tanks.
- Secondary containment for equipment is even less prevalent than for tanks.
SUPPLEMENTAL SOURCE MATERIALS

Delisting

1. Methodology for delisting landfilled inorganic wastes:

2. Methodology for delisting landfilled organic wastes:

3. Methodology for delisting land treated wastes:

Small Generator Requirements


Revised Tank Standards


Codification of HSWA Requirements

Federal facilities policy - 51 Fed. Reg. 7722, 23 (March 5, 1986)