



DIRECTIVE NUMBER:

TITLE: "Delisting" of Wastes by Authorized States (PIG-81-4)

APPROVAL DATE: 10-31-80

EFFECTIVE DATE: 10-31-80

ORIGINATING OFFICE:

FINAL

DRAFT

STATUS:

REFERENCE (other documents):

PIG-82-4:RSI #4

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(SWCR
9542.04(80))

Key Words: Equivalency, Authorized States, Delisting

Regulation: 40 CFR 271.128 (a); 271.136; 271.22; 260.20; 260.22

Subject: "Delisting" of Wastes by Authorized States (PLG-81-4)

Addressee: Program Implementation Guidance Addressees

Originator: Steffen W. Plehn, Deputy Assist. Administrator for Solid Waste;
 R. Sarah Compton, Deputy Assist. Administrator Water Enforcement

Source Doc: 9542.04(80)

Date: 10-31-80

Summary:

State programs with delisting mechanisms may receive interim authorization if their delisting mechanisms are substantially equivalent to EPA's. To meet the substantially equivalent test, States' delisting methodology must be consistent with their methodology for listing. States' delisting mechanisms must not interfere with the "nearly identical" universe of waste between the States and EPA. Where a State's delisting activities cause its universe to be no longer nearly identical with EPA's, EPA could withdraw that State's interim authorization. The Memorandum of Agreement must make this possibility of withdrawal of authorization clear to the State, and must contain a promise that the State will keep EPA informed of any State delisting activity.

The memo discusses the interaction between the States' delisting mechanism and the Federal program and includes an itemization of the necessary showings persons requesting delisting of waste must make in their petition to EPA.



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

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FIG-81-4

MEMORANDUM

SUBJECT: "Delisting" of Wastes by Authorized States

FROM: Steffen W. Plehn *Steff W Plehn*
Deputy Assistant Administrator
for Solid Waste (WE-562)

R. Sarah Compton
Deputy Assistant Administrator
for Water Enforcement (EN-335)

TO: FIGS Addressees

ISSUE:

Can a State with an authorized hazardous waste management program be allowed to exempt ("delist") hazardous waste from individual sites?

DISCUSSION:

EPA has provided certain standards and procedures for "delisting" waste from a particular generating facility or storage, treatment, or disposal facility at which a hazardous waste is generated (see 40 CFR 260.20 and 260.22, 45 FR 33076, and preamble discussion at 45 FR 33116). Persons seeking such a delisting action may petition the Administrator of EPA for an amendment to the Federal regulations which would provide the exemption. In the petition, the person must show that the waste is fundamentally different than that listed by demonstrating, as appropriate, that the waste does not:

- (1) exhibit the characteristic of ignitability, corrosivity, reactivity, or toxicity,
- (2) meet the criteria for listing the waste as acutely hazardous (i.e., the oral or dermal LD50 or inhalation LC50 specified in 40 CFR 261.11(a)(2), 45 FR 33121) and also does not meet the toxicity criterion,

- (3) contain the hazardous constituent of Appendix VIII of 40 CFR 261 (45 FR 33312) for which it was listed, or, if the waste does contain those constituents, show that consideration of other factors argue against the waste being considered a hazardous waste (see 40 CFR 261.11(a)(3), 45 FR 33121). This decision is based on consideration of any of approximately ten factors and is a discretionary one.

When a State program has been found to be substantially equivalent to the Federal program, it receives interim authorization to operate in lieu of the Federal program; i.e., Federal requirements generally no longer apply, and the "requirements of this subtitle" which are enforced under section 3008 of the Act are those of the State program approved under section 3006. Therefore, action by EPA to delist a waste from a particular generating facility (or storage, treatment, or disposal facility which generates hazardous waste) in a State with interim authorization would not affect the State requirements unless the State took a similar action.

Some concern exists regarding the potential incompatibility inherent in allowing one State to delist, whereas another State may desire not to delist. This problem is not unique to the issue of delisting, since the latter State program may be viewed as a "more stringent" one (because it regulates more wastes) and is acceptable under section 3009 of RCRA. (See the preamble to 40 CFR Part 123, Subparts B and F, 45 FR 33385.)

The question here is whether a State program with interim authorization can provide a delisting mechanism. If so, what shape and form must that mechanism take if EPA is to authorize the State program as "substantially equivalent" to the Federal program?

In the regulations under 40 CFR Part 123, EPA is silent on the issue of State delisting mechanisms. A State without such a mechanism is not precluded from receiving interim authorization. The universe of wastes controlled by such a State would be subject to change only through regulatory or statutory change.

For interim authorization, EPA requires the States to control a universe of hazardous waste generated, treated, stored, and disposed of in the State which is nearly identical to that which would be controlled by the Federal program under 40 CFR Part 261 (see 40 CFR 123.128(a), 45 FR 33481). A State can demonstrate that its program contains a delisting provision which, nevertheless, leaves the State universe nearly identical to EPA's. On the other hand, if the State's delisting mechanism lacked explicit

standards and procedures analogous to those included in EPA's delisting mechanism, it would be difficult for EPA to assure that the State was providing the proper control of wastes.

It is possible that a State, as a result of its delisting, may decrease its universe of wastes such that its coverage is no longer nearly identical to the Federal universe. For example, a question has arisen as to what would happen if an interim authorized State abused its discretion in delisting wastes from individual sites, but EPA, operating the Federal program in one or more States into which those wastes were imported, refused to delist the wastes from those sites. This would clearly be a situation where the State would be subject to withdrawal of EPA's authorization for failure to exercise control over activities required to be regulated (40 CFR 123.136 and 40 CFR 123.14(a)(2)(i)).

DECISION: State programs with delisting mechanisms may receive interim authorization provided those delisting mechanisms are substantially equivalent to EPA's. In order to be considered substantially equivalent, the State must demonstrate that the delisting methodology is consistent with its methodology for listing. The Memorandum of Agreement must contain a provision that the State will keep EPA fully informed of any State delisting activities and should make clear the possibility of withdrawal of authorization in the event that, due to delistings, the State's universe of wastes is no longer nearly identical to EPA's.