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

APR 24 1989

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Clarification and Possible Modification of
the 90-Day Generator Rule

FROM: Sylvia K. Lowrance, Director *Sylvia K. Lowrance*
Office of Solid Waste

TO: Waste Management Division Directors
Regions I-X

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This memorandum is to inform you of an OSW effort to clarify and examine the "90-day generator rule", 40 CFR Section 262.34, and to request comments on the attached documents: (1) an Advanced Notice of Proposed Rule-Making (ANPRM) of July 14, 1986, regarding generators; and (2) a draft policy statement clarifying the 90-day generator rule.

These documents present the major issues surrounding "90-day generators." In addition, we request that you appoint a representative from the Region to sit on the workgroup which will be forming shortly to deal with these topics. Please submit any comments you have on the documents, and the names of workgroup representatives, to Emily Roth (OS-332) by April 28, 1989. Questions on this request may be addressed to Matthew Straus at FTS-382-4637 or your staff may contact Ms. Roth at FTS-382-4777.

A. Background.

Generators may accumulate hazardous wastes on-site for 90 days or less before shipping the waste off-site (or moving it on-site) to interim status or permitted hazardous waste units provided they comply with the requirements of Section 262.34(a). Section 262.34(a) stipulates that the waste must be held in containers or tanks, and that the interim status requirements for containers and tanks be met (Section 265, Subparts I and J), as well as certain other requirements.

The 90-day generator rule was promulgated in 1980 in response to a concern that the new RCRA waste management requirements would interfere with a facility's manufacturing processes. A



90-day time period was thought to be sufficient for the accumulation of the waste quantities necessary for economical and efficient off-site shipments of waste (45 FR 12730).

Small Quantity Generators (SQG) of between 100-1000 kilograms of hazardous waste in a calendar month were brought in under the rule in March of 1986 (Section 262.34 (d-f)). SQGs may accumulate their wastes for 180 days (or 270 days if the waste must be shipped 200 miles or more) provided the quantity of waste accumulated on-site never exceeds 6000 kilograms.

Many tanks at interim status facilities have been found to leak resulting in the release of contaminants into the environment. The Agency believes that generators' tanks are as susceptible to episodes of failure as tanks at interim status facilities. The belief that leaks from tanks may be a common and widespread occurrence led EPA to publish, on July 14, 1986, an ANPRM (51 FR 25487) that requested comment on the problems posed by 90-day generators.

The ANPRM describes in detail the issues involved and is attached. Comments received in response to the ANPRM have favored retaining the Section 262.34 rules, without change. Comments were received from 118 industries and industry-related associations, six Federal agencies, one university, and two states (Missouri and Virginia). Because the comments on the ANPRM were predominately from the regulated community, we are particularly interested in the view of the various regulating entities, i.e., the States and EPA Regions, regarding problems posed by 90-day accumulators and the adequacy of Section 262.34.

Since the publication of the ANPRM, OSW has decided to initiate an effort to: (1) clarify the applicability of the 90-day accumulator exemption as it presently exists, and (2) evaluate the adequacy of the rule in light of problems which may exist at 90-day accumulator sites. Modification of the rule could be considered as a remedy for the environmental problems revealed by this examination.

B. Clarification of 40 CFR 262.34.

In order to evaluate whether problems exist with the current rule, it is important to understand the rule as it currently exists. We have attached a draft clarification, for your review and comment, that addresses the Agency's current interpretations and policies regarding this rule. The clarification reaffirms EPA's position that generators may treat their waste on-site without a permit under the 90-day generator rule. EPA discussed this policy in the Federal Register of March 24, 1986 (51 FR

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10168). Since that time, one Region and one State have asked EPA to reevaluate this interpretation. The Agency maintains that treatment, with the exception of thermal treatment, is not precluded; and, therefore, is allowed under Section 262.34.

C. Evaluation of 40 CFR 262.34.

The requirements governing the storage of hazardous waste in tanks and containers promulgated in 1980 were deemed adequate for protecting the environment at generator sites. However, based on our experiences over the past several years, the Agency now believes that generators may be subject to the following problems:

- o Corrective Action - Ninety-day generators, because they are non-permitted, non-interim status facilities, are not subject to the corrective action authority of RCRA Sections 3004(u) or 3008(h). Consequently, in response to environmental problems at 90-day generator sites, there is little corrective action authority available under RCRA beyond that of emergency response where imminent and substantial endangerment exists (RCRA Section 7003).
- o Leaky tanks - As mentioned above, EPA believes that 90-day tanks are as susceptible to failure as interim status tanks, which have been shown to suffer a significant rate of tank failure. Tank failure can result in soil and groundwater contamination which could, therefore, be prevalent at generator facilities.
- o CERCLA/RCRA sites - Information on problems at generator-only sites is provided from the CERCLA program. Seventy-one of the 229 sites proposed for listing on the National Priorities List (NPL) in Update 7 are RCRA sites. Fifty-five, or one-quarter of the proposed NPL sites, are current or former generator sites.
- o Compliance Monitoring - Generators are inspected very infrequently, and, therefore, environmental problems which exist or occur, may not be discovered.
- o Treatment - Generators are allowed to treat hazardous waste in their tanks without permits or interim status. The potential for inadvertent release to the environment may be increased during treatment.

As described above, there may be environmental problems at 90-day generator sites which are not adequately addressed by Section 262.34. A range of options to deal with these problems will be explored, including requiring permits for subcategories

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of generators, as appropriate, based on factors that might include waste volumes managed, compliance history, or relative hazard posed by the waste. In lieu of requiring a permit, nonpermitted facilities could be subject to new financial responsibility requirements and expanded cleanup and/or closure standards.

In an effort to define the extent of environmental problems at generator sites, OSW will be:

- Obtaining information from the States and Regions regarding problems at 90-day generator sites, and examining current State regulatory practices. States may already be utilizing effective regulatory mechanisms that EPA could choose to adopt.
- Working with OERR to examine case studies of generator facilities proposed for the NPL; i.e., examining what goes wrong at generator sites that causes them to become CERCLA sites.
- Analyzing data from the recent OSW generator survey for information regarding the generator universe. Knowledge of volumes, waste types, and contamination at generator sites should help define the problems.

OSW welcomes your comments on this memorandum and the two attachments, and looks forward to your participation in the decision-making process regarding 90-day generators.

Thank you very much for your assistance and cooperation.

Attachments

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A Clarification of 40 CFR 262.34:
Accumulation Time
"The 90-Day Generator Rule"

Summary:

EPA promulgated regulations in 1980 under the Resource Conservation and Recovery Act (RCRA) that allowed generators of hazardous waste to accumulate wastes on-site in tanks or containers for up to 90 days without complying with the interim status requirements or getting a RCRA permit (45 FR 12724, February 26, 1980; 45 FR 33066, May 19, 1980; 45 FR 76629, November 19, 1980; and 45 FR 86966, December 31, 1980). In 1986, as mandated by the Hazardous and Solid Waste Amendments (HSWA), EPA brought generators of between 100 and 1,000 kg/month under this rule with a 180-day (or 270 days if the waste is shipped 200 miles or more) accumulation time period (51 FR 10146, March 24, 1986). In the eight years since the original rules were promulgated, EPA has interpreted the scope of the generator accumulation regulations a number of times. This notice is intended to clarify some of those interpretations to ensure that all interested parties are aware of the Agency's interpretation concerning the activities that are allowed under the accumulation time provisions in Section 262.34.

I. Overview

Under 40 CFR 262.34(a), generators of hazardous waste may accumulate their waste on-site in tanks or containers for up to 90 days, subject to certain requirements, without being required to comply with the interim status requirements or obtain a RCRA permit.¹ This provision is hereafter referred to as "the 90-day generator rule." In addition, generators of between 100 and 1,000 kg/month of hazardous waste (or "small quantity generators") may accumulate hazardous waste in tanks or containers for up to 180 (or 270) days without being required to obtain a RCRA permit (40 CFR Section 262.34(d-f)). At 90-day generator sites, the waste must be accumulated in tank systems that comply with the technical standards of Part 265, Subpart J, or containers that comply with the technical standards of Part 265, Subpart I, as well as certain emergency response and personnel training provisions. Small Quantity Generators (SQGs) must comply with most of the interim status requirements for

¹ In this clarification notice, all references to "permitted units" apply to both permitted and interim status units, unless otherwise specified.

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containers under Subpart I and the SQG special requirements for tanks under Subpart J (40 CFR Section 265.201).

The 90-day generator rule was originally promulgated as a means of allowing manufacturers to accumulate sufficient quantities of waste for economical on-site or off-site waste management without being subject to the burden of storage permit requirements during the period of accumulation. Ninety days was thought to represent a reasonable time period for manufacturers to accumulate waste before treating or disposing of it in permitted units. This would ensure that complying with the regulations does not interfere with an industry's production processes.

II. Interpretations of the 90-Day Generator Rule

In the eight years since promulgation of this rule, a number of interpretations regarding its scope and applicability have appeared in Federal Register notices and in letters from EPA Headquarters to the Regions, States, and private parties. These interpretations were made in order to clarify the applicability of the rule in particular situations. Several of these interpretations are described below as a means of clarifying the scope of the rule for all interested parties.

A. Generation and Accumulation

"Generator" is defined as any person, by site, whose act or process produces hazardous waste identified or listed in 40 CFR Part 261, or whose act first causes a hazardous waste to become subject to regulation (40 CFR 260.10). A waste may be generated upon removal from a process or waste treatment unit or it may be generated when soil or ground water contaminated with hazardous materials (not regulated hazardous waste) is excavated.

In the case of wastes generated in process units, the waste becomes subject to regulation when it is removed from the unit, or 90 days after the unit is taken out of service if the waste remains in an inactive unit (see 40 CFR Section 261.4(c)). After removal from the process unit, waste may be managed in an exempt unit (e.g., a wastewater treatment unit), a satellite accumulation unit, an accumulation unit subject to the 90-day rule, or in a permitted or interim status unit.

Waste generated at treatment, storage, and disposal facilities (TSDFs) may be stored under the 90-day rule as discussed in a Federal Register notice of December 31, 1980 (45 FR 86969). The residues from wastes managed in accumulation

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units, i.e., unpermitted units, are already subject to Section 262.34, and therefore, cannot be stored for an additional 90 days upon removal from the unit. In other words, residue removed from a 90-day treatment unit remains subject to the 90-day accumulation time limit of the original waste placed in the unit, i.e., a new 90-day limit does not begin for the residue when it is removed from a 90-day unit.

1. Can TSDFs utilize the 90-day rule for hazardous waste they generate on-site?

Yes.

The RCRA program originally addressed only manufacturers and producers to utilize the 90-day generator provision for wastes they were accumulating for off-site shipment. However, the Federal Register notice of December 31, 1980 (45 FR 86969) clarified that owners and operators of permitted or interim status facilities could accumulate the wastes they generated under accumulation time provisions of Section 262.34.

2. Are transporters considered generators when they mix wastes of different DOT descriptions?

No.

Transporters who mix wastes of different DOT descriptions are not considered generators of the waste, however, they must comply with 40 CFR Part 262, "Standards Applicable to Generators of Hazardous Waste" (Section 263.10(c)). The transporter does take on some of the responsibilities and duties of a generator when wastes are mixed while in his custody, including making sure the wastes remain properly manifested in the manner required by Parts 262-263. When transporters combine similar wastes, this act does not "generate" a new waste. It might, however, necessitate a new manifest or an amendment to the manifest when the act of mixing wastes changes the accuracy of the information on the manifest, by altering the container types and/or volumes contained or by changing the chemical or physical nature of the waste, so that the DOT proper shipping name on the original manifest is no longer accurate. If a new manifest is necessary, previous manifests must be attached to, and conveyed with, the new manifest.

3. Are transporters eligible for the Section 262.34 accumulation time provision when they mix wastes?

No.

Because transporters receive the waste from another party, they are not the generator and are not eligible for the 262.34 provision (45 FR 86968, December 31, 1980). Also, allowing transporters to utilize the accumulation exemption would conflict with the language and intent of the rule regarding accumulation by generators "on-site."

Allowing transporters to store for 90 days would conflict with explicit provisions of 40 CFR Part 263. Section 263.12 stipulates a transfer facility storage time limit of ten days or less. Storage periods of greater than 10 days will require the facility to apply for a permit or interim status.

4. When does the accumulation time period begin, and when does it end?

The 90-day accumulation time period begins on the day that the first drop of hazardous waste is placed in an accumulation unit. Within 90 days, the waste, which includes that first drop into the container or tank, must be either shipped off-site to a permitted, or interim status TSDF, or transferred to a permitted unit on-site.² Because the entire tank must be emptied every 90 days, flow-through tanks directly connected to a process do not qualify as a 90-day tank unless they are completely emptied every 90 days. In this way, it is ensured that none of the waste is held longer than 90 days. The only exceptions to this involve "satellite accumulation," Section 262.34(c) and process units described below in questions A.6 and A.7.

² While the waste must generally be moved from an accumulation unit to a permitted unit within 90 days, EPA notes that placement in a unit covered by interim status, or placement in an exempt unit (e.g., wastewater treatment unit, recycling device, etc.) is also acceptable. We use the term "permitted" unit here for convenience. As discussed below, however, placement in another accumulation unit does not stop the 90 day clock.

5. How are wastes contained in inactive units affected by the accumulation time provision?

In most cases, hazardous waste is not accumulated and the accumulation time period does not begin until the waste is removed from the unit in which it was produced. However, under Section 261.4(c), when a process unit becomes inactive, it may contain the waste for 90 days before the Section 262.34 accumulation time period begins. In other words, when a production unit containing hazardous waste or hazardous waste residue is shut down or is not being used and is not reactivated or started up again within 90 days, it becomes subject to Part 262, including 262.34. Therefore, it is possible for a production unit containing hazardous waste to be shut down, remain shut down for 90 days, and then hold the hazardous waste as an accumulation unit for an additional 90 days (if the unit meets the relevant requirements of Part 265, Subpart J). However, within the 90-day accumulation time period, if the unit were not cleaned out, emptied, or removed and the waste sent to an on-site or off-site permitted TSD unit, the accumulation unit would become a storage unit subject to Parts 264 and 265.

6. How does "Satellite Accumulation" affect the accumulation time?

The "satellite storage provisions," 40 CFR Section 262.34(c), allow the accumulation of limited quantities of waste before beginning the 90-day accumulation time period. A generator may accumulate as much as 55 gallons of hazardous waste, or one quart of acutely hazardous waste, in containers at or near any point of generation where wastes initially accumulate and which is under the control of the operator of the process generating the waste (49 FR 49568, December 20, 1984). Waste may be accumulated in the satellite area until the quantity limits are reached.

No storage time limit applies to the waste held in the satellite accumulation unit so long as the volume limits are not exceeded. On the day that the quantity limits are reached (i.e., 55 gallons of hazardous waste or one quart of acutely hazardous waste), the date must be recorded on the container, and within three days of that date the container must be moved to a 90-day accumulation unit area or to a permitted or interim status unit. For wastes placed in an accumulation unit or moved to an accumulation area, the 90-day accumulation time period begins when the waste is placed in the accumulation unit or area.

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7. Is a facility with only one satellite accumulation area, i.e., a single generation point, eligible for the satellite accumulation provision (Section 262.34(c))?

Yes.

A small facility with only one point of generation may accumulate waste under Section 262.34(c). The "satellite" accumulation area must be at or near the point of generation, and must comply with the Section 262.34(c) requirements (49 FR 49569, December 20, 1984; and 51 FR 10161, 10162, March 24, 1986). When a quantity of waste in excess of that allowed is reached, the waste must be either removed from the site, i.e., shipped to a permitted or interim status unit, or removed to an accumulation storage area subject to 262.34(a) within three days.

8. May hazardous wastes be accumulated under Section 262.34 prior to on-site management?

Yes.

Generators may accumulate hazardous waste pursuant to Section 262.34 and, subsequently, manage that same waste in an on-site, permitted unit (45 FR 76624, November 19, 1980). The Agency's original intention in promulgating Section 262.34 was to provide a buffer period for accumulation of a sufficient quantity of waste before subsequent shipment of the wastes off-site for treatment, storage, or disposal. However, the time needed to accumulate wastes for economical shipment off-site and the time needed to accumulate waste for efficient on-site management are similar. Therefore, because it is not the intention of the Agency to discourage on-site management of hazardous waste in favor of off-site shipments, generators may accumulate wastes they generate under the 90-day rule and subsequently manage the wastes on-site in permitted or interim status units.

B. Treatment at 90-Day Generator Facilities

EPA noted the policy in the Federal Register of March 24, 1986 (51 FR 10168) of allowing generators to treat their wastes in 90-day accumulation units. Under Section 262.34, all tanks containing hazardous wastes are subject to requirements of Part

265, Subpart J.³ The Subpart J standards apply to both treatment and storage tanks. At 90-day accumulator units, any risk posed by treatment tanks, such as spillage, overflows, etc., is addressed by the standards of Subpart J for interim status facilities which include secondary containment (Section 265.193). Risks posed by ignitable, reactive, and incompatible wastes (during either storage or treatment) are controlled by the general requirements of Sections 265.198 and 265.199.

Storage and treatment in containers must be conducted in accordance with the interim status requirements for containers, Part 265, Subpart I. The standards apply to both treatment and storage containers. Section 265.173(a) specifies that containers be kept closed during storage. No particular provision is made for treatment, beyond the exemption (from permitting and interim status) for the addition of absorbent materials provided in Section 1(c)(13). Therefore, treatment is allowed in containers, under Section 262.34, but is limited to those treatments which can be conducted in accordance with the Subpart I requirements.

1. May 90-day generators who are accumulating hazardous waste according to Section 262.34 conduct treatment in their accumulation tanks and still be exempt from permitting?

Yes, with one exception.

EPA noted on March 24, 1986 (in promulgating new rules for generators of 100-1,000 kg/mo under Section 262.34(d)-(f)) that, with the one exception noted below, conducting treatment in an accumulation tank does not change the generator's regulatory status (51 FR 10168). The rationale behind this decision is that large generators are subject to the tank standards that apply at interim status facilities, Part 265, Subpart J. Those standards do not distinguish between requirements applicable to treatment tanks and storage tanks.⁴ Because the regulations allow for storage in 90-day tanks without a permit, the Agency has interpreted the rules to allow treatment in such tanks.

³ Special requirements under Subpart J apply to small quantity generators. EPA believes these requirements are sufficient to protect human health and the environment from the storage and treatment of hazardous waste in tanks at SQG facilities.

⁴ Small quantity generators are subject to the special requirements of Part 265, Subpart J for storage or treatment in tanks (Section 265.201).

* * * DRAFT - do not quote or cite - March 21, 1989 * * *

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The one exception is that thermal treatment is not allowed in 90-day accumulation tanks without a permit, under the provisions of Section 262.34. The Agency has developed specific standards for devices employing thermal treatment (i.e., Part 265, Subparts O Incinerators and P Thermal Treatment and Part 266, Subpart D, Hazardous Waste Burned for Energy Recovery). Hence, whether such processes are conducted in a tank is irrelevant, because the process still must meet the relevant standards, which include permitting.

2. May wastes be treated in multiple treatment tanks, i.e., tanks in succession, and still be managed under the 90-day rule?

Yes.

Hazardous waste may be treated in multiple treatment tank processes under Section 262.34 as long as the entire period of time the waste is managed under the 90-day rule does not exceed 90 days. For example, certain hazardous waste treatment processes may involve the movement of wastes through several hazardous waste treatment tanks over a period of time. In this case, accumulation and treatment may be two distinct activities. Nonetheless, the 90-day time period begins when the first drop of waste is deposited in the tank. The waste cannot remain in the accumulation units longer than 90 days, regardless of whether treatment is conducted or multiple treatment tanks are used.

If the waste remains hazardous as it moves through the treatment process, the 90-day period applies to the entire wastestream. In other words, as a waste moves from tank to tank, the 90 day time period will not begin again each time the waste enters a new treatment tank. The 90-day clock stops only if the tank in question is a permitted or exempt treatment unit.

As a result of certain processes, the waste may become non-hazardous during treatment. Listed wastes may be identified as non-hazardous through the delisting process, and characteristic wastes are no longer hazardous when they cease to exhibit a characteristic (261.3(d)). If a waste is no longer a hazardous waste, then the 90-day rule no longer applies.

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3. May Mobile Treatment Units (MTUs) be utilized at 90-day accumulator sites?

Yes.

MTUs may be used to treat hazardous waste at 90-day generator facilities, as well as small quantity generator facilities, without interim status or a permit, provided the MTU is a tank or a container and the generator otherwise complies with the requirements of Section 262.34.

EPA has proposed permitting procedures for MTUs and final regulations are expected in the near future. In the preamble to the proposed rule (52 FR 20914, June 3, 1987), EPA states that "nothing in Section 262.34 prohibits a generator from using an MTU without a permit, provided of course that the unit is a tank and that the generator otherwise complies with Section 262.34."

C. Clean-Up of Releases at Generator Facilities

Ninety-day generators are subject under Section 262.34 to limited requirements to establish procedures to respond to releases or other emergencies which threaten the environment. These provisions call for treating, storing, and disposing of recovered waste, contaminated soil, and surface water. This requirement is for response to emergencies only and is not as broad as the corrective action authority of RCRA Sections 3004(u) and 3008(h). In addition, generators are required to address any releases of hazardous waste that pose an imminent and substantial threat to human health and the environment under the "imminent hazard" provisions of RCRA Section 7003.

1. Do the corrective action requirements of RCRA Sections 3004(u) or 3008(h) apply to generators as defined under 40 CFR Section 262.34?

No.

The corrective action authorities of Subtitle C of RCRA apply only to facilities that have RCRA permits for the treatment, storage, or disposal of hazardous waste, and to facilities that have, have had, or should have obtained interim status. Facilities at which hazardous wastes are merely generated or accumulated for short time periods, in particular 90 days, are exempt from permitting and interim status requirements, and thus are not subject to RCRA Subtitle C corrective action.

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However, if a large quantity generator exceeds the 90-day accumulation time limit (or a generator of 100-1,000 kg/month exceeds the 6,000 kg accumulation volume limit or the 180 (or 270) day accumulation time limit), the accumulation unit becomes a storage unit and the owner or operator must submit a permit application for that unit and is subject to the requirements of Parts 264, 265, 268, and 270 and the corrective action authorities of RCRA 3004(u) and RCRA 3008(h), respectively.

Specifically, if a generator unit was in operation on or after November 19, 1980 and the generator ever exceeded his accumulation time limit without applying for a time extension from the Regional Administrator, the corrective action requirements of RCRA 3008(h) are applicable until the facility receives a RCRA permit. Thereafter, the corrective action requirements of RCRA 3004(u) may be applied.

2. **What requirements apply to releases of hazardous waste from accumulation (or satellite) storage areas?**

Large quantity generators, under Section 262.34(a)(4), must comply with Part 265, Subpart D, pertaining to the contingency plan and emergency procedures. Specifically, §265.56 requires response to emergency situations, including the proper management "... of recovered waste, contaminated soil or surface water, or any other material that results from a release ... at the facility" (Section 265.56 (g)).

Generators of 100-1000 kilograms per month must respond to spills and "... clean up the hazardous waste and any contaminated materials or soil" (Section 262.34(d)(5)(iv)(B)).

The RCRA requirements pertaining to spills apply to all releases of hazardous waste (i.e., from accumulation units, satellite units, from moving or handling waste, loading onto vehicles, etc.). In response to spills or leaks from hazardous waste storage units, the contamination (waste or contaminated debris) must be cleaned-up or disposed of. (See e.g., 45 FR 78532, November 25, 1980; 48 FR 2508, January 19, 1983; and 50 FR 28712-28713, July 15, 1985.) If the release is not cleaned up in a timely manner, the release is considered disposal and is subject to all Part 264, 265, 268, and 270 requirements for hazardous waste disposal facilities.

Furthermore, the Administrator may order "such action as may be necessary" upon evidence that an "imminent and substantial endangerment to health or the environment" has occurred due to the "past or present handling, treatment, or storage of hazardous waste" under Section 7003(a) of RCRA.

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D. Closure of 90-Day Generator Accumulation Units

Under 40 CFR 262.34, 90-day generators must close their accumulation units in accordance with the closure performance standards of §265.111 and the standards for disposal or decontamination of equipment, structures, and soils under §265.114. Section 265.111 specifically requires these generators to close their units in a manner that "minimizes the need for further maintenance, and controls, minimizes or eliminates, to the extent necessary to protect human health and the environment, post-closure escape of hazardous waste, hazardous constituents, leachate, contaminated run-off, or hazardous waste decomposition products to the ground or surface waters or to the atmosphere."

There are no specific closure requirements for small quantity generators under 262.34; however, small quantity generators must comply with the tank closure requirement specific to them, Section 265.201. Under Section 265.201(d), SQGs must "remove all hazardous waste from tanks, discharge control equipment, and discharge confinement structures."

Ninety-day generators that operate tank system accumulation units must also meet certain additional closure requirements. Tank system accumulation units must be closed in compliance with §§265.111, 265.114, and 265.197(a) and (b), which call for the removal or decontamination at closure of all waste residues, contaminated containment system components, contaminated soils, and structures and equipment contaminated with waste.

Furthermore, if the generator demonstrates that all contaminated soils at the tank system accumulation unit cannot be practicably removed or decontaminated at closure; then, the generator must close the tank system and perform post-closure care in accordance with the closure and post-closure requirements that apply to landfills (see §265.310). Such a tank system is then considered to be a landfill and the generator must comply with all of the requirements for landfills specified in Subparts G and H of Part 265. Owners and operators of hazardous waste management units must have post-closure care permits during the post-closure care period for any units that received waste after July 26, 1982 or certified closure after January 26, 1983 (see §270.1(c)).

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1. Must generators prepare closure plans and obtain financial assurance for closure for their accumulation units?

No.

Generators, both 90-day and SQG, are not required to prepare either closure plans or contingent closure plans for their accumulation units. Financial assurance coverage for closure also is not required. However, when completing closure 90-day generators must comply with the closure performance standard of 265.111 and the requirements for removing or decontaminating contaminated soil, structures, and equipment of 265.114.

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ENVIRONMENTAL PROTECTION
AGENCY

40 CFR Part 262

(SWH-FRL-3028-9(a))

Hazardous Waste Management
System; Standards Applicable to
Generators of Hazardous WasteAGENCY: Environmental Protection
Agency (EPA).ACTION: Advance Notice of Proposed
Rulemaking (ANPRM).

SUMMARY: EPA published regulations in 1980 under the Resource Conservation and Recovery Act (RCRA) that allowed hazardous waste generators to accumulate hazardous waste on-site in tanks or containers for up to 90 days without obtaining a permit or meeting financial responsibility requirements. As a result of new information and public comment on EPA's June 28, 1985 tank proposal [50 FR 28444], EPA is reconsidering the application of this exemption to accumulation in tanks, and possibly containers, and is requesting data and comment with respect to a range of options for modifying the exemption.

DATE: Comments will be accepted on this notice until October 14, 1986.

ADDRESSES: The public must submit an original and two copies of their comments to: EPA, RCRA Docket (S-212), 401 M Street, SW, Washington, DC. Communications should be identified by the docket number "F-86-NDAA-FFFFF". The RCRA docket is located at: EPA, RCRA docket-Sub-basement, 401 M Street, Washington, DC 20460. The docket is opened from 9:30-3:30 Monday through Friday, except for Federal holidays. The public must make an appointment to review docket materials. Call Mia Zmud at 475-6327 or Kate Blow at 382-4675 to make an appointment. The public may copy a maximum of 50 pages from any one regulatory docket at not cost. Additional copies cost \$.20/page.

FOR FURTHER INFORMATION CONTACT: Robert Axelrad, (202) 382-4837, Office of Solid Waste (WH562B), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460, or the RCRA/Superfund Hotline, (800) 424-9346 (in Washington, DC, 382-3000).

SUPPLEMENTARY INFORMATION

I. Background

In regulations promulgated in 1980 establishing a federal program for management of hazardous wastes, EPA adopted special requirements in 40 CFR 262.34 which, if met by generators of

hazardous waste, would allow them to accumulate the waste on-site in tanks or containers without having to obtain a RCRA permit as a storage or treatment facility. The basis for the special 90-day accumulation rule was that generation of hazardous waste necessarily requires some accumulation of that waste prior to taking it to a hazardous waste management facility, and that ninety days would provide sufficient time for such accumulation to occur in all reasonable situations. By allowing short-term accumulation without a permit, the exemption reflected the congressional intent that the RCRA program not interfere with manufacturing processes. See, e.g., H.R. Rep. No. 1491, 94th Cong., 2d Sess. 28 (1976).

Recognizing that holding hazardous waste for even a short period entails many of the same risks of human health and the environment as long-term storage, the Agency imposed specific requirements for short-term accumulation in tanks and containers. The requirements were designed to ensure that short-term accumulation of hazardous wastes would be done in a manner that would ensure protection of human health and the environment. See 40 CFR 262.34; 45 FR 33068, 33143 (May 19, 1980).

Since promulgation of the 1980 regulation, however, new concerns have been raised regarding the risks that accumulation tanks may be posing to human health and the environment. These concerns are based in part on information indicating that a significant number of tanks currently operating under interim status may be leaking (see 50 FR 28484 (June 28, 1985)). EPA believes that the potential for release resulting from failure of these tanks systems is probably the same for 90-day tanks; in fact, the amount of waste released may be greater if undetected for long periods of time due to the high throughput of wastes at 90-day storage facilities.

While EPA has today issued additional standards to upgrade the existing technical requirements for tanks, e.g. secondary containment, these requirements neither address existing contamination at the generator's site nor the possibility of cleanup of future contamination. Unless the generator is engaged in other, regulated hazardous waste management activities at the facility that would require him to obtain a permit, he would not be subject to the corrective action requirements of RCRA section 3004(u). This is because section 3004(u) requirements are applicable only to permitted units, and the 90-day accumulation tanks are exempt from the permitting requirement. In addition,

section 3008(h) administrative orders, which are available against facilities that have or need interim status, are not available for these accumulation tanks if there are no other regulated units at the facility site with interim status, because § 262.34 exempts 90-day tanks from interim status.

On the other hand, if 90-day tanks were to be treated as interim status or permitted tanks, corrective action requirements would be applicable regardless of the existence of other waste management activities at the facility. Because many generators do not conduct other permitted waste management activities, EPA is concerned that the risks posed by leaking accumulation tanks may not be properly addressed under the current regulatory scheme. Perhaps more importantly, corrective action problems for the facility as a whole are not addressed if there is no permitting involved. Similarly, the Agency is concerned that the potential for releases from 90-day containers may be akin to that from such interim status or permitted units, and that if there are not other regulated units at the facility, these container releases will go unaddressed because of the unavailability of sections 3004(u) and 3008(h).

II. Formulation of New Policy—Factors

In light of these concerns, the Agency is currently examining the § 262.34 exemption.¹ It must be emphasized that EPA is not abandoning the basic tenet of the exemption—that there is a distinction between production activities and waste management, and therefore that a regulatory distinction recognizing this difference is both necessary and appropriate. EPA continues to believe that it is inappropriate to regulate generators' production activities under Subtitle C; there must be waste management activity in order to trigger Subtitle C controls. At the same time, it may be inappropriate to define the distinction between these two activities in terms of a 90-day (or any other time) period. The 90-day period was based on evidence showing that most wastes are removed from the site of generation within 90 days and that, for most industries, this limit would not be disruptive. However, there is also evidence that many types of waste management activities occur during the 90-day period.

¹ Note that the 180/270-day exemption for small quantity generators is not affected because it is required by statute (RCRA 3001(d)). See also 51 FR 10146, 10161 (March 24, 1986).

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Consideration of a number of factors is necessary to find a balance between the goal of noninterference with production processes and the goal of protecting public health and environment from improper waste management activities. The first factor for consideration is the risk presented by the exemption. As discussed above, the risk may be quite similar to that presented by interim status/permitted tanks (or containers). In addition, the risk presented by the facility as a whole may go unaddressed without application of the corrective action provisions that would be triggered by the permitting process.

A second factor to consider is the extent to which generators' production processes would be disrupted if the Agency were to address these risks by requiring permits, or imposing other requirements, for all types of storage, including temporary accumulation. In assessing the potential impact on generators, though, the Agency also would consider the mitigating effect that other regulatory provisions may have. For example, § 262.34(c) provides that a generator may accumulate, without a permit or interim status, up to 55 gallons of hazardous waste (or one quart of acutely hazardous waste) in containers at satellite areas where wastes are initially generated, prior to being removed to a central accumulation or storage area. Under this rule, a generator may accumulate up to 55 gallons of containerized hazardous waste for an indefinite period of time at these initial accumulation areas. If this provision is left in place, generators presumably could continue with necessary accumulation activity in satellite areas and thus may have time to accumulate economical shipments of hazardous waste.

However, because of the relatively minimal standards applicable to satellite containers and because there is no time limit on storage of unlimited amounts of waste, EPA is concerned that retaining the satellite provision in the event the 90-day rule was eliminated, might encourage generators to rely more extensively on the satellite provision. This, in turn, would result in increased use of container storage. Therefore, it may be appropriate to modify the satellite provision as well. EPA requests comment on this issue. In addition, since EPA has very little information on releases from containers, we request comment and data on any release incidences from satellite containers, as well as on the number of satellite containers/areas per facility.

Another rule that may provide adequate protection against interference with generator production activities is

EPA's revised definition of solid waste (40 CFR Part 261; 50 FR 814 (January 4, 1985)). In defining what materials are solid and hazardous wastes, EPA carefully considered the distinction between production and waste management activities. For example, when secondary materials (*i.e.*, spent materials, sludges, by-products and scrap metal) are used as a feedstock in a manufacturing operation or are directly used as substitutes for commercial products, EPA deems the materials to be functioning as raw materials, not wastes. Also, when secondary materials are returned to the original primary production process (from which they are generated) without first being reclaimed ("closed loop" production processes), the recycling activity does not constitute waste management. EPA already has expanded this "closed loop" exemption to tanks under certain conditions in the final tank rule published today. (See section IV.A.2.; see also 50 FR at 619-20.)

III. Possible Approaches to Modifying Exemption

The Agency is considering a full range of possible approaches in light of the factors outlined above. We invite comment on the following options and also invite additional, alternative suggestions. We also invite comment on the appropriateness of the factors themselves. The current options are:

1. Abandon the 90-day accumulation exemption for tanks, or tanks and containers, and regulate all accumulation tanks/containers as storage or treatment facilities requiring permits, possibly using a streamlined procedure and/or imposing lesser substantive requirements.
2. Redefine the scope of the exemption. The concepts used in EPA's solid waste rulemaking, described above, could be applied to limit the exemption to accumulation activities clearly linked to the production process. For example, unless the accumulated materials are returned to the original primary production process, they would be regulated as waste material.
3. Abandon the exemption with the possibility of exemptions on a case-by-case basis. EPA has taken this approach in § 260.31, where applicants for the exemption would be required to submit certain information.
4. Retain the exemption but allow EPA to remove its coverage from certain units, requiring them to be permitted. Recommendations on which units should be subject to permitting are requested.
5. Retain the exemption as it now exists.

Alternative or additional measures might also include a requirement to self-

certify compliance with certain provisions (rather than requiring active Agency assessment by requiring, for example, a permit); the use of volume or other types of cutoffs rather than a time cutoff; the use of a shorter than 90-day period; the imposition of closure requirements including notification and corrective action; and the imposition of most requirements only on in- or below-ground units, with the exemption remaining for above-ground units (because of the visibility of any leak in above-ground units). Commenters are also requested to suggest criteria for the Agency to apply in making case-by-case determinations under Options 3 or 4 and in narrowing the scope of the exemption under Option 2.

Finally, EPA is soliciting any data that could be relevant in deciding whether to modify the 90-day accumulator exemption. For example, the Agency would like information responsive to any of the following questions:

1. How many 90-day accumulation tanks and containers exist with no other regulated hazardous waste management units at the facility? How many 90-day tanks or containers exist where there are other regulated units at the facility?
2. Which industries are the primary users of 90-day accumulator tanks? Of 90-day accumulator containers?
3. How many 90-day tanks or containers are typically located at a facility? Are they typically located at one or a few locations or spread throughout the plant? Does the pattern vary by industry?
4. What are the sizes of the 90-day tanks and containers and how do they compare to the size of interim status or permitted tanks or containers? How does their throughput compare? Does it vary by industry?
5. What would be the incremental cost of any of the options identified above, or any alternative option suggested by a commenter?
6. What is the actual or anticipated (*e.g.*, modeled) rate, amount, and volume of releases from 90-day accumulation tanks or containers and how does this compare to releases from interim status/permitted tanks or containers? Are there any data or other evidence to suggest that 90-day containers may pose a lower risk to human health or the environment than 90-day tanks?
7. Are there any data or other evidence on the rate, amount, and volume of releases from satellite accumulation containers? Are there any data on the number of satellite areas/containers per facility?

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Lee M. Thomas,
Administrator.

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