

TO: Internet Address: www.epa.gov/edocket

RE: **RCRA Docket #: RCRA-1999-0031**

RCRA Burden Reduction Initiative; Notice of Data Availability

DATE:

RCRA DOCKET:

Please find enclosed the Ohio Environmental Protection Agency's comments on U.S. EPA's proposal to modify the hazardous waste rules to reduce regulatory burden on states, the public, and the regulated community. This proposal was issued October 29, 2003, in the *Federal Register* (Vol. 68, No. 209, pg. 61662).

Ohio EPA requests that these comments be made an official part of the record. If you have any questions or need additional clarification regarding the enclosed comments, please do not hesitate to contact Karen Hale, Division of Hazardous Waste Management, at (614) 644-2917 or karen.hale@epa.state.oh.us

Sincerely,

Christopher Jones
Director

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cc: Michael A. Savage, Chief, DHWM
Dave Sholtis, Assistant Chief, DHWM
Katie Crowell, DDAGW, CO
Jeff Patzke, DDAGW, CO
Karen Hale, DHWM, CO
Ed Tormey, Legal
DHWM CO/DO Managers

Section A. Small Quantity Generator Tanks and Tank Ancillary Equipment Inspection Frequencies

1. U.S. EPA proposes to change the frequency of tank inspections for small quantity generators from daily to weekly. However, U.S. EPA has not provided any data that suggests that the reduced frequency of tank inspections is as protective as the intent of the current standard which as stated in 51 FR 25454, July 14, 1986 is to "...enable the detection of releases or potential releases at the earliest possible time."

We do not believe that the reduced tank inspection frequency should be afforded to small quantity generators unless their tank systems are upgraded to meet additional standards. Currently small quantity generators only have to inspect their tank systems for proper operational controls on operating days. Otherwise, small quantity generators are not required to do any type of additional leak detection, except for the weekly requirement already in place. Also, since small quantity generators are not required to provide secondary containment, the operating day inspections assist in protecting from a release or potential release. We believe, if small quantity generators wish to receive this reduced inspection frequency, then they must comply with the same secondary containment requirements as large quantity generators and would need to install an automated leak detection system that alerts a person designated to respond.

Overall, Ohio EPA does not support changing the frequency of any current tank inspection provided for in the rules unless certain standards are met. We believe that the tank inspection frequency should only be reduced to weekly when the tank system has secondary containment and has an automated leak detection system that notifies response personnel.

Section D. Professional Certification

2. U.S. EPA is proposing, as part of the Burden Reduction Initiative, (1) to allow professionals certified by organizations meeting the requirements of ASTM Standard E1929-98 to perform the same duties/certifications as a Professional Engineer (PE) in limited situations and (2) to modify the professional engineering requirement to "qualified professional engineer" instead of "independent, qualified, registered professional engineer." Ohio EPA does not agree with either of these proposals, with the exception of the removal of "registered" from the professional engineering requirement.

PE Certifications versus Non-PE Certifications

As described, the Burden Reduction Initiative is designed to reduce the burden imposed by the reporting and record keeping requirements of RCRA (67 FR 2518). The term burden, as used here, is the time that a person spends generating and reporting information to U.S. EPA and keeping records (67 FR 2519). Allowing someone other than a PE to perform the RCRA certifications, even in limited situations, does not reduce the time spent or the paperwork involved. Non-PEs would have to review the exact same amount/type of material as that of a PE, thereby not reducing the time spent or the paperwork. Thus, establishing an environmental professional performance standard, in accordance with ASTM E1929-98, would not result in a burden reduction.

Additionally, the certifications required by the rules require engineering skills that a PE would possess. Allowing professionals, certified by organizations meeting the ASTM standard, to perform the certifications could present a conflict with the Practice of Engineering as defined in Ohio Revised Code (ORC) § 4733.01. In the definition of the Practice of Engineering, it states that any professional service, such as consultation, investigation, evaluation, planning, design, or inspection of construction or operation for the purpose of assuring compliance with drawings or specifications that are required to protect the public welfare or to safeguard life, health, or property should be performed by a person that meets the qualifications listed in ORC § 4733.11. These qualifications are the requirements necessary to become a PE in Ohio. (The referenced Ohio law is available online at <http://onlinedocs.andersonpublishing.com/oh/lpExt.dll?f=templates&fn=titlepage.htm>)

For example, the certification of the written assessment for BIF Direct Transfer Equipment must show that the direct transfer equipment is adequately designed and has sufficient structural strength and compatibility with the waste(s) to be transferred to ensure that it will not collapse, rupture, or fail (40 CFR § 266.111). Evaluation of these criteria, specifically such items related to temperature variations, vapor pockets, and other structural integrity considerations, requires a person with conversant knowledge of engineering principles. A similar case can be made for the other regulatory certifications (evaluation of drip pads and drip pad inspections) for which the proposed rule is contemplating the addition of professionals certified by organizations meeting the ASTM standard.

Furthermore, the proposed rule states that a PE must certify that an existing drip pad assessment (40 CFR § 264.571) meets the requirements of the drip pad design and operating requirements of 40 CFR § 264.573. The proposed rule reaffirms that this RCRA certification is an inherently engineering activity and must be certified by a

PE. Therefore, an assessment for a drip pad proving that it meets the design and operating requirements of 40 CFR § 264.573 should also be certified by a PE and not by a professional certified by an organization meeting the ASTM standard, as proposed in this rule.

Allowing someone who does not possess the engineering educational background and professional registration of a PE to evaluate the proposed assessments has not been justified and is not appropriate. However, Ohio EPA does believe that certifications which do not constitute the Practice of Engineering may be performed by someone other than a PE.

Changing Independent, Qualified, Registered PE to Qualified PE

Ohio EPA believes that the requirement for a PE to be independent should be retained in the RCRA rules. If the term is retained, Ohio EPA will be able to maintain a higher degree of confidence that the certifications will be done with impartiality.

A similar issue regarding whether to retain the term "independent" for PEs certifying closure was proposed by U.S. EPA in a *Federal Register* back on March 19, 1985 (50 FR 11074). After receiving public comment on the issue, U.S. EPA issued the corresponding final rule on May 2, 1986. The term "independent" was retained. U.S. EPA stated that because certification of final closure is the final step in the closure process and triggers the release of the owner or operator from financial responsibility requirements for closure and third party liability coverage requirements, U.S. EPA believed that the certification should be made by a person who is least subject to conscious or subconscious pressures to certify to the adequacy of a closure that in fact is not in accordance with the approved closure plan.

It was also stated in the May 2, 1986 *Federal Register* that U.S. EPA's position was consistent with other types of certification programs which require certifications to be made by independent parties. Examples include the Securities and Exchange Commission's requirement that all publicly traded companies provide independent audits of financial information and the Clean Water Act's requirement that grants be accompanied by independent audits. Ohio EPA agrees with U.S. EPA's position back in 1986 and believes that the RCRA requirement for a PE to be independent should not change.

However, Ohio EPA agrees that the term "registered" appears to be redundant and could be removed from the RCRA requirement for a PE. According to ORC § 4733.01 a professional engineer is defined as a person registered as a professional

engineer under ORC Chapter 4733. Therefore, Ohio EPA believes the certification requirements should be fulfilled by an independent, qualified PE.

Section F. Ground Water Monitoring Requirements

3. U.S. EPA proposes to change the frequency of reporting on the effectiveness of ground water corrective action from semi-annual to annual. We believe that the change is appropriate because annual reporting, combined with other forms of regulatory oversight, will provide adequate information to ensure compliance. Also, the reporting will be consistent with the frequency requirements under detection and compliance monitoring.
4. U.S. EPA proposes to change 40 CFR 264.99(g) from requiring annual Appendix IX sampling of all ground water monitoring wells to allowing, on a case-by-case basis, sampling of only a subset of the wells. We support this change because we believe there are instances where the area of potential ground water contamination is sufficiently known and it is not necessary to sample wells outside of the area for Appendix IX constituents. A further benefit is that the rule retains the authority to require sampling of all wells when it is warranted.

Although U.S. EPA has not proposed it, we also would support changing the rule to allow, on a case-by-case basis, annual sampling of a sub-set of Appendix IX constituents. This is because we believe there are instances where the waste stream has been defined to the extent that sampling for some Appendix IX constituents is not necessary.

5. We support U.S. EPA's proposal to clarify an inconsistency between 40 CFR 264.98(d) and 40 CFR 264.97(g)(2) in the sampling procedures for detection monitoring. We agree that the flexibility afforded in 40 CFR 264.97(g)(2) to allow alternate sampling procedures should be extended to detection monitoring under 40 CFR 264.98(d).
6. U.S. EPA proposes to change 40 CFR 264.100(g) to allow more flexibility in the time frame within which the facility owner/operator is required to resample if a new constituent on the Appendix IX list shows up in the ground water. We support the change away from a mandated one month to a different time frame if approved by the overseeing agency. We believe that the change is reasonable, provided that agencies do not implement in a way that allows the time frame to extend to the next

semi-annual sampling event.