Looking at the Big Picture

The RCRA "Functional" Equivalency Policy and the Policy on More Stringent Versus Broader in Scope.

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The Two Policies

The RCRA “Equivalency” policy (2005) and the policy regarding Determining Whether State Hazardous Waste Requirements are More Stringent or Broader in Scope (2014) both promote looking at the big picture rather than focusing only on line by line comparisons between federal and state regulations. They will be discussed in turn. Both policies are posted on the EPA State Authorization website.

Functional Equivalency

The Equivalency policy – aka the “Functional” Equivalency policy - suggests that, rather than focusing on whether state and federal requirements match up verbatim, one should instead focus on whether the state requirements provide equal environmental results as the federal counterparts. This policy is used to determine whether state requirements are at least equivalent to the federal requirements rather than being less stringent.

Functional Equivalency

State hazardous waste requirements must be "equivalent" to the federal requirements, which means that they must be at least as stringent as the federal hazardous waste requirements. See RCRA sections 3006 and 3009. It is not sufficient that state programs be as stringent as the federal program on balance/ overall; rather, each state requirement must be at least as stringent as the corresponding federal requirement, so as to not leave holes in environmental protection. RCRA 3009.

Functional Equivalency

As explained in the Equivalency policy, however, state requirements may be as stringent as corresponding federal requirements even though the state is following a different approach, if the state requirements provide equal (or greater) human health and environmental protection. In other words, a state requirement may be “equivalent” to a federal requirement if it is “functionally equivalent.”

Three Different Kinds of Flexibility

Three different kinds of flexibility are promoted by the Equivalency policy: (1) allowing state requirements that track each federal requirement but are different in approach;

(2) allowing state requirements which do not track every federal requirement where the state has closely related requirements which provide equal or greater environmental results as to each federal requirement that is being replaced; and

(3) Allowing state requirements which clarify the federal regulations, or adopt well established EPA interpretations of the federal regulations in regulatory form rather than relying on guidance.

First Kind of Flexibility

The policy built on approaches that already were being employed in Region I and some other Regions. An example of the first kind of flexibility (noted in the policy) is that Region I authorized (at 70 FR 36350 – in 2005) a Vermont regulation that exempts from hazardous waste requirements non-terne plated used oil filters that have been cold drained and crushed (using a specified kind of device that effectively removes the oil), in addition to exempting filters that have been hot drained as provided in the federal exemption in 40 CFR 261.4(b)(13).

First Kind of Flexibility – Cont.

The Vermont regulation tracked the federal regulation, but took a different approach in allowing cold draining as well as hot draining of the filters. The Vermont regulation was determined to be at least as stringent as the federal regulation because Vermont specified cold draining methods which the state demonstrated would be at least as effective as hot draining in removing oil.

Second Kind of Flexibility

An example of the second kind of flexibility (noted in the policy) is that Region I (at 64 FR 51702 –in 1999) authorized a Vermont regulation that allows two kinds of “satellite” accumulation. That is, companies in Vermont may elect to accumulate up to 55 gallons of hazardous waste per waste-stream at a central storage location, rather than at the points of initial generation, without triggering the 90 (or 180) day deadlines for shipping the hazardous waste off-site.

Second Kind of Flexibility – Cont.

The Vermont regulations do not track the federal requirements requiring storing satellite waste only at or near the point of generation under the control of the operator of the process generating the waste. However, Vermont compensates for this by requiring that any satellite wastes in central storage areas be inspected on a daily basis (this is more stringent than the federal weekly inspection requirement for container storage areas). The daily inspection requirement achieves the same environmental effect of ensuring close monitoring of the waste as the federal requirement that wastes be stored at or close to the point of initial generation under the control of the operator of the process generating the waste.

Third Kind of Flexibility

An example of the third kind of flexibility (noted in the policy) is that a number of States have been allowed by Region I to adopt regulations that allow generators to conduct non-thermal treatment within accumulation containers and tanks. These state regulations expressly allow (and regulate and restrict) such treatment whereas the federal regulations only expressly allow "accumulation" of hazardous waste in containers and tanks. However, these state regulations track the EPA's interpretation that generator treatment is allowed – as part of accumulation - stated in 51 FR 10168 (March 24, 1986) and in numerous subsequent guidance documents.

Benefits of Flexibility

Functional Equivalence, appropriately employed, can increase environmental protection. For example, the Vermont allowance of cold draining used oil filters enabled the State to promote recycling of filters from non-working cars in junkyards, where hot draining would not have been possible. Also, the Vermont allowance of “satellite” accumulation in central storage areas, by encouraging companies to immediately move wastes off factory floors to more heavily regulated areas, encouraged a higher level of environmental protection. Finally, putting the generator treatment in containers and tanks requirements into regulatory form enables States to more readily enforce the applicable requirements, rather than having to rely on trying to enforce interpretations set forth only in guidance.

Restrictions on Flexibility

While encouraging flexibility, the Equivalency policy also contains restrictions on the amount of flexibility that should be allowed, in order to prevent abuses. For example, the policy points out that under RCRA 3009, states may not reduce a requirement in exchange for increasing some unrelated other requirement.

Example of Un-allowed Flexibility

An example of a state proposal for flexibility that has not been approved is that Region I advised a state that it would not authorize a state regulation which proposed to replace the federal secondary containment requirement for indoor tank storage by large quantity generators with an impervious surface requirement, even though the proposed regulation was part of state regulations which generally are more stringent than the federal requirements with respect to underground tank storage and outdoor tank storage.

Example of Un-allowed Flexibility Cont.

Region I determined that allowing less stringency regarding indoor tank storage would create an increased environmental risk of uncontrolled release events. Rather than being functionally equivalent, the proposed state regulations contained a “hole.”

Caution

Functional Equivalence is not a way to make authorization faster and easier. Doing a proper functional equivalence analysis involves hard work. A line by line comparison of the federal and state regulations must still be done, to fully understand the situation, even though there may ultimately be some flexibility in allowing state departures from tracking the federal requirements line by line. The use of functional equivalence is justified, however, when the extra work results in better environmental results.

Uses of Functional Equivalency Since the Issuance of the Policy

Since the issuance of the policy, Region I and some other Regions have continued to utilize the functional equivalence approach. For example, in 2008 (at 73 FR 5753), Region I authorized the Massachusetts corrective action program. Massachusetts utilizes privately licensed personnel to oversee site cleanups, often in place of using state permits or orders. In addition to using the privately licensed personnel at RCRA corrective action sites, however, Massachusetts agreed to conduct state audits and public comment periods at every RCRA site to ensure that all RCRA requirements have been met.

Uses of Functional Equivalency Cont.

Region I determined that state oversight through audits, with public comment procedures, is equivalent to the state doing oversight though issuance of a permit or order. Using the privately licensed personnel also supplements state resources, allowing the State program to cover many more sites, and for cleanups to proceed faster.

Uses of Functional Equivalence Cont.

In addition, in 2015 (at 75 FR 21650), Region I authorized Vermont regulations requiring hazardous waste evaporators at generators to meet strict regulatory requirements exceeding even the generator treatment in containers and tanks requirements. At the federal level, many hazardous waste evaporators have been exempted from most RCRA requirements under the wastewater treatment unit exemption. Thus the Vermont approach is more environmentally protective than the general approach at the federal level.

Uses of Functional Equivalence Cont.

However, Vermont does not require evaporators at generators to obtain full RCRA permits, viewing this as excessive. Region I determined that Vermont's approach is at least equivalent to the federal approach, notwithstanding a federal note to guidance indicating that at the federal level evaporators are thermal treatment units which must obtain permits in those circumstances when there are not operated under the wastewater treatment unit exemption.

Uses of Functional Equivalence Cont.

Looking at the big picture, it seems clear that Vermont's approach of tightly regulating all evaporators is at least as protective as the federal approach of generally exempting evaporators, even if there is a federal interpretation that some evaporators must obtain permits at the federal level.

Functional Equivalence – Final Thought

Thus functional equivalence has been used to promote better environmental results. National policy promotes this approach. In your instructor's opinion, however, the promise of functional equivalence has yet to be fully realized. To date, it has been underutilized. For example, many states continue to allow generator treatment in containers and tanks pursuant only to guidance. It would be better for enforcement for them to adopt regulations and seek authorization so as to have requirements that are clearly binding.

More Stringent vs. Broader in Scope

The policy on More Stringent vs. Broader in Scope (MS-BIS) follows a similar approach to the Equivalency policy in recognizing that state requirements do not always need to match up to federal requirements line by line. The difference is that the Equivalency policy is used to determine whether equally protective requirements are equivalent rather than less stringent, whereas the MS – BIS policy is used to determine whether more protective requirements are more stringent or broader in scope.

More Stringent vs. Broader in Scope

Determining whether a state regulation is more stringent or broader in scope is important because more stringent provisions are federally authorized and thus may be federally enforced whereas broader in scope provisions are not federally authorized and thus may not be federally enforced. 40 C.F.R. 271.1(i). Broader in scope provisions are allowed under RCRA but the administration and enforcement of such provisions is left solely to the States.

More Stringent vs. Broader in Scope

The guidance employs the long-standing EPA two part test to determine whether state requirements are more stringent or broader in scope. Under the first part of the test, the EPA Region determines whether or not a state requirement increases the size of the regulatory community (or universe of hazardous wastes). If it does, then the state requirement is broader in scope. If it does not, then the state requirement is potentially more stringent, depending upon whether it meets the second test.

More Stringent vs. Broader in Scope

Under the second part of the test, the EPA Region determines whether the state requirement has a counterpart in the federal RCRA program. If it does not, then the state requirement is broader in scope. If it does, then the state requirement is more stringent (assuming it has also passed the first part of the test).

More Stringent vs. Broader in Scope

While retaining both tests, the guidance clarified both tests to make them more consistent with developments in the RCRA program over the years, including the Equivalency policy and a court decision supporting EPA authorizing additional state CESQG (now VSQG) requirements. The effect of revising the two tests has been to allow for more extensive EPA authorization and enforcement, while appropriately maintaining state only areas subject only to state administration and enforcement.

More Stringent vs. Broader in Scope

The first part of the test was revised to make clear that when there are conditional federal exemptions, the federal conditions are a kind of regulation. Thus, for example, additional state requirements for VSQGs (and SQGs and LQGs) generally are more stringent rather than broader in scope.

More Stringent vs. Broader in Scope

In contrast, when there are unconditional federal exemptions from RCRA (e.g., for PCB wastes regulated under TSCA), state regulations of such wastes remain broader in scope.

More Stringent vs. Broader in Scope

In addition, many of the federal conditional exemptions under RCRA are different from the conditional exemptions for VSQGs, SQGs and LQGs in that they specify that if the minimum federal conditions are met, then the material being handled is considered product – like/not discarded, and thus not a federal hazardous waste.

More Stringent vs. Broader in Scope

When a state further regulates a material that has met such federal exemption conditions, it is regulating as a hazardous waste something that the EPA has determined is not a hazardous waste. Thus the policy makes clear that such additional state regulations are broader in scope.

More Stringent vs. Broader in Scope

This continued restriction was necessary in order to conform to the RCRA statute. Under RCRA section 3008, EPA's enforcement authority is limited to "any requirement of this subchapter," i.e., any requirement relating to federal hazardous waste. Thus EPA can not authorize and enforce requirements relating to state-only hazardous wastes. However, there is nothing in the statute restricting EPA from authorizing and enforcing state requirements relating to federal hazardous wastes more broadly.

More Stringent vs. Broader in Scope

The second part of the test also was revised to make clear that a state requirement does not need to have a “direct” counterpart in the federal regulations in order to be authorized. Many state regulations – even those that are more extensive than the federal regulations – support the federal RCRA program and thus are appropriately viewed as more stringent rather than broader in scope.

More Stringent vs. Broader in Scope

Regarding the second part of the test, however, EPA made the policy judgment that it would continue not to authorize and enforce state requirements which have no counterparts in the federal program. Examples are state fee requirements and state permitting requirements for transporters. These are areas which EPA continues to believe should best to left to state-only administration and enforcement.

More Stringent vs. Broader in Scope

But the revised second part of the test allows the EPA to authorize and thus bring federal enforcement cases in situations that are sensible. For example, under prior guidance, it had been suggested that EPA could not authorize additional state record-keeping and reporting requirements, since they lacked "direct" federal counterparts, even though such state requirements were designed to support related federally mandated requirements.

More Stringent vs. Broader in Scope

Under the updated policy, EPA may now authorize such things as state requirements to keep inspection logs for container area inspections, which support the underlying federal requirement that there be container area inspections. This avoids EPA being limited to bringing only half of an enforcement case!

More Stringent vs. Broader in Scope

The more extensive federal authorization and enforcement now allowed by the MS-BIS policy also is a necessary supplement to the greater flexibility offered to the States by the Equivalency policy. Certainly, if the EPA is going to allow states to have different kinds of requirements that sometimes will replace exact matches to federal requirements, then the EPA needs to be able to authorize and enforce different state requirements, not just those that directly match the federal requirements.

Conclusion

The Equivalency Policy and the MS-BIS policy thus work together to promote flexibility in state authorization and federal enforcement.

Conclusion Cont.

The instructor will now be happy to try to answer questions. Regional and state personnel who have further questions may later contact the instructor (for his personal positions) by email: jfowley@verizon.net, or by phone 339-440-3855. However, to obtain readings of ongoing current EPA policy, people should contact the relevant regions or the state authorization contacts at EPA HQ.