



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

OFFICE OF  
GENERAL COUNSEL

**MEMORANDUM**

**SUBJECT:** Interpretation of Industrial Wastewater Discharge  
Exclusion From the Definition of Solid Waste

**FROM:** *Michael H. Shapiro*  
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Director  
Office of Solid Waste (5301)

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**TO:** Waste Management Division Directors, Regions I-X

This memorandum is to clarify that the Resource Conservation and Recovery Act (RCRA) requirements apply to discharges of leachate into groundwater from leaking waste management units, even when the groundwater provides a direct hydrologic connection to a nearby surface water of the United States. The definition of solid waste in RCRA section 1004(27) excludes certain industrial discharges which are point sources subject to permits under the Clean Water Act (CWA); and EPA has said that CWA jurisdiction (under section 402) extends to point source discharges to groundwater where there is a direct hydrologic connection between the point source and nearby surface waters of the United States. However, discharges of leachate from waste management units to groundwater are not excluded from the definition of solid waste in RCRA section 1004(27), because the exclusion extends only to "traditional," pipe outfall-type point source discharges, and not to discharges upstream of that point. (This memorandum interprets the meaning of "point source discharge" solely for the purposes of RCRA section 1004(27), and not for CWA purposes.)

**Discussion**

RCRA section 1004(27) excludes from the definition of solid waste "solid or dissolved materials in . . . industrial discharges which are point sources subject to permits under

[section 402 of the Clean Water Act]." For the purposes of the RCRA program, EPA has consistently interpreted the language "point sources subject to permits under [section 402 of the Clean Water Act]" to mean point sources that should have a NPDES permit in place, whether in fact they do or not. Under EPA's interpretation of the "subject to" language, a facility that should, but does not, have the proper NPDES permit is in violation of the CWA, not RCRA.

In interpreting and implementing this exclusion, the Agency promulgated a rule at 40 C.F.R. § 261.4(a)(2) that states:

The following materials are not solid wastes for the purpose of this part:

. . . Industrial wastewater discharges that are point source discharges subject to regulation under section 402 of the Clean Water Act, as amended.

EPA's interpretation of the rule's narrow scope is set out in an explanatory "Comment" that also appears in the Code of Federal Regulations following the final rule language:

This exclusion applies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being collected, stored or treated before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment.

40 C.F.R. § 261.4(a)(2) (comment) (emphasis added). This explanatory comment to the rule emphasizes that the exclusion is a modest and narrow one. Moreover, the comment reflects EPA's intent, at the time it promulgated the rule, that the exclusion apply solely to the traditional pipe outfall-type situation (i.e., ultimate release to waters of the United States). As EPA explained in the preamble:

The obvious purpose of the industrial point source discharge exclusion in section 1004(27) was to avoid duplicative regulation of point source discharges under RCRA and the Clean Water Act. Without such a provision, the discharge of wastewater into navigable waters would be "disposal" of solid waste, and potentially subject to regulation under both the Clean Water Act and RCRA Subtitle C. These considerations do not apply to industrial wastewaters prior to discharge since most of the environmental hazards posed by wastewaters in treatment and holding facilities -- primarily groundwater contamination -- cannot be controlled under the Clean Water Act or other EPA statutes.

45 Fed Reg. 33098 (May 19, 1980) (emphasis added).

Thus, EPA based this exclusion on the need to avoid duplicative regulation under two statutes for discharges that occur at the end-of-the-pipe (i.e., discharges directly to surface water). EPA did not intend that the exclusion cover groundwater discharges from treatment processes that occur prior to the "end-of-the-pipe" discharge. Thus, this exclusion only covers a subset of point sources regulated under the CWA.

Therefore, wastewater releases to groundwater from treatment and holding facilities do not come within the meaning of the RCRA exclusion in 40 C.F.R. § 261.4(a)(2), but rather remain within the jurisdiction of RCRA. In addition, such groundwater discharges are subject to CWA jurisdiction, based on EPA's interpretation that discharges from point sources through groundwater where there is a direct hydrologic connection to nearby surface waters of the United States are subject to the prohibition against unpermitted discharges, and thus are subject to the NPDES permitting requirements. See 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990) (storm water permit application regulations); 56 Fed. Reg. 64876, 64892 (Dec. 12, 1991) (Indian water quality standards regulations); 58 Fed. Reg. 7610, 7631 (Feb. 8, 1993) (Region 6 general permit for feedlots).

If you have any questions on this memorandum, please call Kathy Nam of OGC at (202) 260-2737 or Mitch Kidwell of OSW at (202) 260-4805.



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

OFFICE OF  
WATER

**MEMORANDUM**

**SUBJECT:** Moving the NPDES Program to a Watershed Approach

**FROM:** Michael B. Cook, Director  
Office of Wastewater Management

**TO:** Water Management Division Directors, Regions 1-10

I am pleased to transmit to you our report, *Moving the NPDES Program to a Watershed Approach*. As explained during each of the 1994 Regional visits, the purpose of this report is to summarize the status of Regional efforts to implement the NPDES Watershed Strategy and highlight the various approaches used to develop State Assessments, Regional Action Plans, and Internal Strategies. The Report capsulizes the Regional views on issues, needs, and expected benefits with regard to implementing the NPDES Watershed Strategy, and discusses the types of activities Regions believe the Office of Wastewater Management (OWM) should undertake to support Regional implementation of both the Strategy and the broader Watershed Protection Approach.

The Report indicates that Regional programs are making progress in implementing the Strategy since it was finalized in March 1994. Nine of the ten Regions projected that they would submit their Internal Strategies and completed State Assessments and Regional Action Plans for 39 States and Puerto Rico in September. Assessments and Regional Action Plans for the remaining 12 States and the District of Columbia are expected to be completed in FY 95. Each Regional office has established some variation of an internal workgroup to serve as a focus for Regional watershed protection efforts. These workgroups tend to have multi-program representation from both the Water Management Division and Environmental Services Division.

The combined list of Regional issues and needs reflect common themes such as coordinated leadership in the Office of Water (OW), and flexibility in implementing watershed protection efforts. These common issues and needs are having an impact on our activities in OWM, and are being shared with other OW Programs. I expect that they will also be considered in upcoming management discussions.

**We hope that the Report promotes ideas and stimulates discussion across the Regions and States. Please feel free to call me or Jeff Lapa, NPDES Watershed Matrix Manager, at (202) 260-5230 if you have any questions regarding the Report.**

**Attachment**

**cc. Bob Perciasepe  
Bob Wayland  
Jim Elder  
Tudor Davies  
Permits Branch Chiefs, Regions 1-10  
Cynthia Dougherty  
Mike Quigley  
Ramona Trovato  
Jane Ephrimeides**