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June 20, 2024

U.S. Environmental Protection Agency
EPA Docket Center
Office of Resource Conservation and Recovery Docket
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

via regulations.gov

Re: Docket ID No. EPA-HQ-OLEM-2021-0397

Dear Sir or Madam:

The Hazardous Waste Subcommittee (HWSC) of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) appreciates the opportunity to provide comment on the U.S. Environmental Protection Agency's (EPA) Revisions to Standards for the Open Burning/Open Detonation (OB/OD) of Waste Explosives proposed rule, published in the Federal Register on March 20, 2024 (89 FR 19952). These comments have not been reviewed or adopted by the ASTSWMO Board of Directors. In addition, individual State or Territorial waste programs may also provide comments directly to EPA based on their own State perspectives and experiences.

ASTSWMO is an association representing the waste management and remediation programs of the fifty (50) States, five (5) Territories and the District of Columbia (States). Our membership includes State waste program experts in the management and regulation of solid and hazardous waste.

The current Resource Conservation and Recovery Act (RCRA) regulations prohibit OB/OD of hazardous waste unless there are no safe alternative treatment technologies for the waste. Historically, there have been few technologies capable of safely treating waste explosives; however, recent research indicates the availability of alternative treatment technologies. EPA's proposed rule clarifies the requirements related to evaluating these alternative treatment technologies, including describing when these evaluations should be made, and proposes new procedures for permitting mobile treatment units for waste explosives. The HWSC believes these revisions are necessary and will be particularly beneficial to ensuring alternative treatment technologies are identified and implemented to further reduce the amount of waste explosives treated by OB/OD. The HWSC has the following specific comments on the proposed rulemaking:

De Minimis Exemption

- EPA is proposing an exemption related to the treatment of *de minimis* quantities of waste explosives, in which evaluation of alternative treatment technologies is not required. As written, the proposed exemption is for those generating 15,000 pounds or less of net explosive weight (NEW). The HWSC recommends for clarity that EPA include a definition of NEW in the regulations.

- EPA indicated in preamble language that it was proposing a *de minimis* exemption for quantities of OB/OD that have little likelihood of contamination or potential for exposure, but there is no documentation as to how EPA set the 15,000-pound NEW limit. It does not appear that EPA is making a determination that OB/OD of up to 15,000 pounds of NEW will pose minimal threat to human health and the environment, as there is a proposed regulatory requirement that the owner/operator of an OB/OD facility claiming the exemption would have to demonstrate that the treatment of waste explosives would contribute negligible contamination and potential for exposure. The owner/operator would be required to consider multiple criteria, including the known or anticipated toxicity of the waste explosives, location of OB/OD treatment and potential impact to nearby receptors, and controls in place to identify the potential for contamination. The HWSC has concerns about the subjectivity of these standards, as the lack of specific criteria may make it challenging for regulators and the regulated community to apply them consistently. We recommend that EPA establish clear, objective standards to guide these determinations.
- 40 CFR 264.704(e)(1)(ii) of the exemption requires a facility to demonstrate that treatment by a mobile treatment unit (MTU), an off-site alternative technology, or an on-site alternative technology is not safe and available. However, the proposed language does not connect those references of “safe” and “available” to their meaning in 40 CFR 264.707(b)(1). The HWSC suggests referencing the terms as described in 40 CFR 264.707(b)(1) or including a definition of “safe and available.”
- EPA also sought comment in the preamble (89 FR 19958) regarding other quantity considerations, such as gross/total weight, as opposed to NEW. Several State commenters supported the use of gross/total weight, particularly for smaller devices whose munitions cannot be separated from their packaging for treatment.
- The HWSC and State comments received by the HWSC support EPA’s proposed requirement that the owners/operators of OB/OD units submit a *de minimis* demonstration every 5 years.

Emergency Responses

Some States have requested additional clarification regarding what types of activities would constitute an emergency response exempt from RCRA permitting versus what types of activities would be subject to emergency permitting, including a minimal alternative technology evaluation. Often, States lack expertise in munitions emergency response and rely on the explosive or munitions emergency response specialist in the field to determine whether an activity qualifies as an emergency response exempt from RCRA permitting. Additional guidance and examples would be appreciated to help States verify the conclusion made by the explosives or munitions emergency response specialist is reasonable.

Evaluation and Permitting of Alternative Technologies

The HWSC supports the proposed requirement for facilities to perform an alternative treatment technology analysis as part of the permitting process. Requiring an evaluation of alternative treatment technologies from the facility will ensure that the waste streams currently being treated by OB/OD are being evaluated against new technologies that are developed as part of the ultimate goal of reducing the use of OB/OD for treatment waste explosives in the future.

- EPA sought comment on the deadline for completing alternative technology evaluations. Some State commenters preferred EPA’s proposal of requiring the evaluation the next time the permit was renewed or modified. However, other State commenters were in favor of the “Alternative Technology Implementation Deadline by Regulation” in Section II.E of the preamble in which EPA would establish a regulatory deadline for implementing the alternative technology.

- EPA also sought comment in Section II.F of the preamble on whether it would be helpful to define the types of thermal treatment units available. The HWSC is supportive of this approach and believes it may help improve consistency in permitting nationwide.
- EPA solicited comment on Minimum Safe Distances in Section II.J of the preamble. While the HWSC supports EPA establishing Minimum Safe Distances, State commenters also indicated the need for the implementing agency to be able to adjust those distances based on site-specific conditions if there is credible information to do so.

Minimum Operating Standards

The HWSC supports the addition of the minimum operating standards for OB/OD units included in the proposed regulations. The minimum operating standards will help ensure uniform operating conditions for OB/OD units, especially those currently operating under interim status. The proposed standards will also allow permitting authorities to easily cite the regulatory requirements when developing site-specific operating conditions for OB/OD units.

Mobile Treatment Units (MTUs)

- While the term “mobile treatment unit” may not be used in current federal RCRA regulations, the term is used broadly in the waste management industry to refer to many types of mobile treatment (e.g., mobile solvent recovery systems, lead recovery units, and polychlorinated biphenyls (PCBs) treatment units, etc.). The HWSC recommends EPA use a more specific term than “mobile treatment unit” to ensure there is sufficient clarity that EPA is only considering permitting mobile treatment units for waste explosives. Two suggested terms are: “Mobile Waste Explosives Treatment Unit (MWETU)” or “Mobile Explosives Treatment Unit (METU).”
- EPA sought information related to Minimum Safe Distances for OB/OD in 40 CFR 265.382, as discussed above. We understand that this standard is not directly applicable to proposed regulatory requirements for MTUs and have identified that the owner/operator of a MTU will be required to submit documentation as to where the unit will be located. However, the HWSC did not identify a reference to specific minimum distance or setback from the property line, etc., for the operation of MTUs. The HWSC encourages EPA to evaluate a Safe Minimum Distance for MTUs in the event of equipment failure during treatment.
- On 89 FR 20000, EPA states that it is necessary for owner/operators of MTUs to maintain an operating record and that routine inspections of the unit would be documented in the operating record. However, MTUs are specifically exempted from the inspection requirements in 40 CFR 264.15. The HWSC recommends the final regulations include a requirement for regular inspections of the MTU. At a minimum, we believe the MTU should be inspected before each use.
- In the rulemaking, EPA is proposing a two-step permitting process: (1) the issuance of a national conditional approval and (2) the issuance of a site-specific RCRA permit. As proposed, both the approval and the permit will be issued by EPA. It is unclear if the States have any role or if EPA will consult with the appropriate State on the site-specific RCRA permit. If EPA finalizes this approach, as co-regulators, we believe the State should be involved to provide input on local concerns, local land-use requirements, and State statutory/regulatory requirements relating to the siting of hazardous waste treatment facilities, etc. We believe this input should be sought before the draft RCRA permit is sent out for public notice/comment.
- While most member States that provided comment expressed support that the issuance of site-specific RCRA permits be issued by EPA for consistency and efficiency, other States expressed concern about this approach and believed the RCRA permit should be delegated to authorized States. Specifically, those

States raised concerns related to their statutory/regulatory language that would require the owner/operator of a hazardous waste treatment, storage, or disposal facility to obtain a permit from the State. Given their statutory/regulatory language, obtaining a permit from EPA would not relieve the owner/operator from also obtaining a RCRA permit from the State.

- EPA also considered and sought comment on either a permit-by-rule approach or a single nationwide permit for MTUs. The HWSC does not support either of these approaches, as we believe it is important to consider site-specific factors when approving the operation of a MTU.
- As proposed, EPA has concluded a MTU is a “facility” and only the owner/operator of the MTU will be permitted. In other words, the owner/operator of the land on which the MTU is operated will not be permitted and will not have any responsibility or liability associated with the treatment activities. As such, there will be no corrective action required for any releases related to the treatment of hazardous waste by MTUs. The HWSC requests EPA provide additional clarification as to how it determined this was protective of human health and the environment. We believe the conclusion may be based on EPA’s language in the preamble and specific regulatory language in 40 CFR 264.1(k)(5)(i) that indicates MTUs must “clean close” after every treatment activity, but for clarity we think this warrants additional discussion in the preamble of the final rule.
- As noted above, it is proposed that EPA will be issuing both the national conditional approval and the RCRA permit. Given neither of these activities is proposed to be delegated to States, we believe this means EPA will be the sole regulatory agency responsible for compliance monitoring and enforcement activities related to MTUs. The HWSC recommends clarifying this in the State Authorization section of the final rule.

Comments on Specific Proposed Regulatory Language

- 40 CFR 264.1(k) – The proposed language in 40 CFR 264.1(k)(4) references that the owner/operator of a MTU must comply with 40 CFR 274.71(c). We believe this is a typographical error and should read 40 CFR 264.71(c).
- 40 CFR 264.704(e)(4) and 265.704(e)(4) – The proposed language in paragraph (4) seems vague. The HWSC recommends adding the following underlined language so that the sentence states “...the owner/operator must notify the Department within five days of identifying any such condition.”
- 40 CFR 264.706(e), 265.706(e), 264.712, and 265.712 – The proposed language requires the submission of waste analyses electronically and the maintenance of electronic records on-site. Some States are required by State law to accept paper submissions. Additionally, while electronic recordkeeping is becoming more prevalent, owners/operators may choose to maintain hard copy physical records in some States. The electronic recordkeeping requirement proposed in this rulemaking is inconsistent with other recordkeeping requirements in Parts 264 and 265 that do not require an electronic format and thus, the HWSC recommends removing the words “electronic” and “electronically” from these sections. If EPA maintains the references to electronic recordkeeping, we ask that EPA clarify if there are any State authorization impacts if States modify this language to allow paper submission in accordance with State law.
- 40 CFR 264.707(b) and 265.707(b) – The heading of this section is “Criteria and contents of alterative technology evaluation.” We believe this is a typographical error and “alterative” should be “alternative.”
- 40 CFR 264.707(c)(1)(iv) – Several State commenters indicated that a Class 2 permit modification associated with an OB/OD unit may be too conservative to require an initial alternative technology evaluation. The commenters suggest further scrutiny of actions which could trigger Class 2 permit modifications and whether those actions would be significant enough to require the effort of the alternative technology evaluation to accompany them.

- 40 CFR 264.708(b)(1) and 265.708(b)(1) – The HWSC requests EPA provide additional detail on what “air pollution statuses” may require restriction of OB/OD operations. State commenters have interpreted the language to apply to transient conditions that may change daily, as opposed to longer term air pollution statuses, such as an area’s attainment status with respect to National Ambient Air Quality Standards. Additional clarification would ensure consistency nationwide.
- 40 CFR 264.708(b)(3) and 265.708(b)(3) – Will EPA be providing information related to the acceptable noise and ground vibration control levels that could be required in the permit, as it applies to public exposure? Additionally, are there standard methods that are generally accepted to assess these hazards? If this information can be added to the regulations, it would improve consistency nationwide and expedite drafting permit conditions.
- 40 CFR 264.708(b)(11) and 265.708(b)(11) – Given the difficulty of destroying PFAS, their pervasive nature, and EPA’s recent actions regarding PFAS, we believe PFAS contaminated waste should be included in the list of prohibited wastes for OB/OD.
- 40 CFR 264.710(a)(2) and (3) and 265.710(a)(2) and (3) – The proposed language refers to “approved RCRA stormwater monitoring plan” and “approved RCRA surface water monitoring plan.” The HWSC suggests removing the term “RCRA” in the proposed language, as these plans may be developed and approved in accordance with State or federal water programs, as opposed to the RCRA program.
- 40 CFR 264.710(a)(4) and 265.710(a)(4) – Several State commenters indicated they believe soil sampling and analysis on a monthly basis is excessive. Comments received by the HWSC recommended either (1) reducing the frequency to quarterly, with provisions to decrease sampling frequency if quarterly data shows no concerns or (2) removing the word “monthly” from paragraph (4) since paragraph (a) indicates permitting agencies have the ability to specify the monitoring frequency in permit conditions depending on site-specific situations.
- 40 CFR 264.710(a)(5) and 265.710(a)(5) – The HWSC recommends EPA address monitoring frequency for air monitoring. Is continuous monitoring required during OB/OD operations or is air monitoring required at some other frequency?
- 40 CFR 264.710(a) and 265.710(a) – With regard to soil, surface water, and air monitoring, the HWSC received a comment from a State regarding facilities with OB/OD units co-located on active ranges. Specifically, the comment raised the concern about the difficulty of discerning whether contamination is coming from OB/OD units regulated under RCRA and those which are deposited as a result of intended use of materials.
- 40 CFR 264.711 and 265.711 – The HWSC recommends marking these sections as “Reserved” to ensure clarity. Otherwise, it appears that a section of the proposed regulations is missing.
- 40 CFR 264.714 and 265.714 – Clarification is requested on the closure requirements for *de minimis* operations. The HWSC believes that the closure requirements apply to *de minimis* operations and that such operations are only exempt from the alternative technology evaluation required in 40 CFR 264.707. However, additional clarification is appreciated.
- 40 CFR 270.42(l) – The HWSC has two comments regarding the proposed regulatory language in this section. First, it appears there may be a typographical error in the proposed language, as the proposed language includes reference to “Class I” permit modifications using a Roman numeral. However, the permit modifications currently addressed in 40 CFR 270.42(a) and Appendix I to 40 CFR 270.42(a) use the term “Class 1” using the number 1. Additionally, the HWSC identified that EPA intends to consider all permit modifications for MTUs as Class I permit modifications requiring prior written approval. However, no justification was provided to support this approach. The HWSC requests additional clarification as to how EPA determined all permit modifications could be considered Class I with prior written approval modifications.

- 40 CFR 270.61 – The proposed regulation allows for the issuance of an emergency permit with a duration not to exceed 90 days, but also allows for a one-time permit renewal only to be used for waste explosives and munitions. This renewal allows the State to extend the emergency permit for up to another 90 days (for a total of 180 days). The proposed regulations also allow the emergency permit to be extended for a time period not to exceed a total of one year if there is a need to accommodate procurement and operation of an alternative technology for treatment. The HWSC generally supports this approach and supports limiting emergency permit renewals in order to discourage facilities from pursuing emergency permits as a viable option of standard waste treatment that does not meet the standards for issuance of an emergency permit. However, State comments received indicated the need for additional flexibility if an emergency permit needs to be renewed past the 180-day limit under unusual circumstances beyond the need to accommodate procurement and operation of an alternative technology. State commenters supported renewal beyond 180 days if a satisfactory demonstration was made regarding the specific need and including additional public participation requirements in those instances.
- 40 CFR 270.61(b)(7) – The HWSC suggests that the proposed language could be clarified to: “accommodate procurement and operation of a selected alternative treatment technology” to ensure renewals are only granted once there is a selected alternative technology and it is intended to be installed/operated at the facility.

Other Comments

- The HWSC noted that it does not appear the proposed regulations address risk assessments for OB/OD operations in Subpart Y or for the selection of an alternative technology to be used in lieu of OB/OD. The HWSC suggests requiring a human health and ecological risk assessment as part of initial or renewal applications for OB/OD activities, as well as a component for evaluating the use of alternative technologies. These risk assessments ensure that when OB/OD treatment is required that the environmental load placed on the surrounding area will not threaten human health or the environment. The risk assessments are used to guide throughput conditions included in the permit and restrict the type of explosive waste to be treated using OB/OD units. It also ensures that environmental impact is considered when evaluating alternative treatment technologies.
- While not specifically proposed in regulatory language, the HWSC received a State comment indicating the proposed regulations do not address the ash generated by OB/OD activities. It is suggested language be added to the final regulations to require ash generated from OB/OD activities be removed at a specific frequency, placed in proper containers for temporary on-site storage, characterized in accordance with 40 CFR 262.11, and properly managed in accordance with that waste characterization.
- A State commenter requested discussion in the preamble regarding forbidden explosives as defined in 40 CFR 261.23(a)(8) that may not actually be capable of detonation or explosive reaction. Even though they are not capable of detonation or explosion, they still meet the U.S Department of Transportation (DOT) definition of a forbidden explosive and thus carry the D003 RCRA hazardous waste code. Specifically, the State commenter requested that EPA include preamble discussion indicating that these forbidden explosives not capable of detonation or explosion be prohibited from being treated by OB/OD. The HWSC believes this preamble clarification could be included related to the proposed definition of “waste explosives” given the definition requires these materials to both carry the D003 waste code and be capable of detonation or explosion. Forbidden explosives not capable of detonation or explosion would not meet the proposed definition of “waste explosives” and thus treatment by OB/OD would not be allowable given the proposed definition of OB/OD unit is defined as any unit for the open burning or open detonation of waste explosives.

Thank you for your consideration of the HWSC's comments. If you have any questions, please contact me at melissa.ferree@delaware.gov or 302-739-9403.

Sincerely,

A handwritten signature in black ink, appearing to read 'Melissa Ferree', with a stylized flourish at the end.

Melissa Ferree (DE), Chair
ASTSWMO Hazardous Waste Subcommittee