**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION 1
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BOSTON, MASSACHUSETTS 02203-0001

**MEMORANDUM**

**DATE:** July 10, 1998

**SUBJ:** EPA Region I RCRA Program's Comments on R.I. DEM's Draft "Guidance on the Use of Evaporators in Electroplating and Metal Finishing Operations."

**FROM:** Edward K. McSweeney, Associate Director of Waste Policy

**TO:** Robert Mendoza, Director, Rhode Island State Unit

Below are the EPA Region I RCRA Program's comments on the R.I. DEM's Draft "Guidance on the Use of Evaporators in Electroplating and Metal Finishing Operations." These comments have been coordinated between the Office of Ecosystem Protection, the Office of Environmental Stewardship and the Office of Regional Counsel.

We appreciate the extensive effort made by the State in developing this policy, and support the development of appropriate mechanisms for avoiding full RCRA permitting in appropriate cases. At the same time, we believe that any regulatory interpretations must be done carefully to ensure that important public health protection requirements remain in place. With these principles in mind, we have the following comments.

1. Paragraph 6 of the State's Draft Policy provides that evaporator units, which are part of tanks, and which are permitted under the Clean Water Act, do not need to obtain RCRA permits. Based on discussions between our staffs, we understand that the State contemplates that NPDES or pretreatment permits will be issued to sources which will eliminate or limit their water discharges and will be using evaporators in lieu of having water discharges. The evaporators will of course have air emissions. The Draft Policy further provides in Note 3, however, that evaporator units approved as part of a wastewater discharge permit will be exempt from the RCRA air regulations for generator tanks (and containers) set out in 40 CFR part 265, subpart CC.

The Region opposes the use of the wastewater treatment exclusion to totally exempt evaporators from RCRA generator requirements such as the CC rule. Exempting evaporators with air emissions from the RCRA air rules, because the evaporators have water permits, does not make environmental sense. It is true that the EPA has exempted certain sources which discharge to the water pursuant to Clean Water Act requirements, from RCRA generator requirements including the CC rule. See 40 CFR § 261.5(c)(2). The NRDC and EDF have petitioned the EPA to close this "loophole," however, even as to sources which actually discharge

to the water. Totally exempting evaporators, which do not even discharge to the water, from RCRA requirements, would move the Rhode Island program in the opposite direction from what the EPA is now considering in response to the petition from these national environmental groups.

It is also true that under the federal RCRA regulations, the wastewater treatment exclusion has been applied not only to sources actually discharging to the water but also to sources which have ceased water discharges as a "direct result" of Clean Water Act requirements. See 53 Fed. Reg. 34080 - 34081 (Sept. 2, 1988). What Rhode Island is contemplating, however, is issuing water permits to evaporators as a more cost effective control mechanism in lieu of RCRA permitting. While we do not question the legitimacy of the effort, we don't think it can be fairly said that the water permits for evaporators will be issued as a "direct result" of Clean Water Act requirements. Thus the current Draft Policy is less stringent than federally required insofar as it creates a total exemption from RCRA requirements for evaporators with water permits.

The federal exemption from RCRA permitting which could be applied to evaporators, which are part of tanks, is the generator treatment in accumulation tanks and containers exemption set out at 51 Fed. Reg. 10168 (March 24, 1986). This is a partial exemption which would exempt the evaporators from the RCRA permitting requirement (during the period of allowed generator storage) while keeping in place the RCRA generator requirements including the "CC" rule.

As an authorized State, Rhode Island may issue interpretations of its hazardous waste regulations, provided that its program remains "equivalent" and no less stringent than the federal RCRA program. Rhode Island needs to revise paragraph 6 of its Draft Policy to make it equivalent and no less stringent, in one of two ways.

First, the State could drop its plan to utilize water permits in place of RCRA permits for evaporators, and instead adopt the federal treatment in accumulation tanks and containers partial exemption. This would involve deleting paragraph 6 and revising paragraph 7. We understand, however, that the State may not want to go this route, in part because it wants to maintain permits controls and oversight on evaporators, through the water program.

Thus, as a second alternative, we agree that the State may interpret its regulations to exempt evaporators from RCRA permits, if they are covered by water permits, as set out in paragraph 6. However, the State must then make clear that it is creating only a partial exemption, from RCRA permitting requirements, and that sources using evaporators remain subject to RCRA generator requirements. By doing this, the State will

impose requirements "equivalent" to those in the federal RCRA program, although in a different manner.

To make this change, the State needs to add language such as the following at the end of paragraph 6, following the statements that the evaporators will be exempt from RCRA permitting: "However, the influent wastewater must be handled as a hazardous waste and the source must be operated in compliance with RCRA generator requirements including Rule 5.00 of the Rhode Island Rules and Regulations for Hazardous Waste Management and the regulations regarding air emissions from tanks in 40 CFR part 265, subpart CC." Footnote 3 of the Draft Policy also needs to be deleted or changed.

In addition, it is critical that any water permits issued for evaporators make clear that they are not exempting the evaporators from RCRA generator requirements, but rather that these hazardous waste requirements must be complied with (as part of the federally enforceable RCRA program) in addition to complying with the terms of the permits. For water pretreatment permits to be issued by POTWs, the State should ensure that this occurs by issuing guidance and through oversight.

Finally, footnote 3 of the Draft Guidance states that the "CC" rules do not apply to small quantity generators. This is true with respect to the minimum federal requirements. However, in its regulations, Rhode Island has chosen to be more stringent in not making any distinction between large and small quantity generators. Thus, currently the "CC" rules do apply to small quantity generators in Rhode Island, and the statement in footnote 3 is inaccurate.

The State may of course change its regulations to provide that certain requirements (e.g., the "CC" rule and/or the requirement for secondary containment around tanks) only apply to large quantity generators. But unless and until such a regulation change is made, we think the Draft Guidance should be revised to be accurate. If the State proposes to make such a regulation change, we would not object to the State exercising enforcement discretion while the change was being adopted.

2. Paragraph 1 of the State's Draft Policy provides that some evaporation systems such as "vacuum evaporators" can meet the definition of a "totally enclosed treatment facility" and are thus exempt from RCRA permitting. While we agree that any system which meets the definition of a "totally enclosed treatment facility" may be exempted from RCRA permitting on that basis, we think that as currently written paragraph 1 is potentially confusing. We think it should be revised to make clear that evaporators will generally not fall within this exemption. Also, "vacuum evaporators" is not a widely used or understood term.

The type of "zero discharge system" that this Region believes can fall within the totally enclosed treatment facility exemption is described in our Memorandum dated January 13, 1997 on the Cellini Purification System (copy enclosed). As discussed in that Memorandum, totally enclosed treatment facilities must be constructed and operated so as to prevent air emissions, including having no vented emissions and preventing fugitive emissions (e.g., by operating under nearly a full vacuum). Evaporators typically have air emissions and thus are not totally enclosed treatment facilities.

The environmental reason why the totally enclosed treatment facility exemption is interpreted narrowly is that when it applies, sources are exempted from the sampling and other requirements of the "CC" rule. If sources are going to be allowed not to sample, one wants to be very sure that the system is preventing emissions.

We suggest that the first sentence of paragraph 1 of the Draft Guidance be replaced by the following sentences: "Evaporators generally will not meet the totally enclosed treatment facility exemption. Evaporator systems that treat hazardous waste and that have air emissions (including vented, treated or fugitive emissions) are not totally enclosed treatment systems. However, if a system is used which meets all of the requirements for a totally enclosed treatment facility, the system is not required to have a hazardous waste treatment permit from the Rhode Island Department of Environmental Management (RIDEM)."

3. Paragraph 5 of the State's Draft Policy provides that evaporators used to concentrate hazardous wastes for recycling on site, or for off-site precious metals recycling, do not need to have RCRA permits. This correctly tracks the federal exemption from RCRA permitting for recycling. However, generators engaged in recycling (other than precious metals recycling) still need to comply with the full RCRA generator requirements, except when the recycling falls within the closed-loop recycling exemption in 40 CFR § 261.4(a)(8).

The Draft Policy correctly states that precious metals recycling is subject to the requirements specified in 40 CFR § 266.70. The State should add that generators engaged in on-site recycling which is not precious metals recycling, and which is not closed-loop recycling as defined in 40 CFR § 261.4(a)(8), must comply with RCRA generator requirements including Rule 5.00 of the Rhode Island Rules and Regulations for Hazardous Waste Management, and the "CC" rule.

We also have an editorial suggestion. To achieve further clarity, we suggest that the State rewrite the last full sentence on page 2 to read as follows: "RI DEM considers any situation where the generator does not receive a significant monetary gain,

after accounting for all costs, to not be within the precious metal recovery exemption. For example, while plating baths often qualify for this exemption, rinse waters rarely do."

4. Paragraph 7 of the State's Draft Policy provides that RCRA permits will be required for evaporators when the various exemptions (as discussed above) do not apply and when the evaporators are used "to concentrate hazardous waste for the sole purpose of volume reduction for off site treatment or disposal." The words "for the sole purpose of volume reduction for off site treatment or disposal" should be deleted. The RCRA treatment permit requirement is not limited in that way. Deleting the "sole purpose" language in paragraph 7 will make it clear that evaporators being used even in part to concentrate hazardous waste are covered by RCRA requirements. Similarly, the word "solely" should be deleted from the last paragraph of the Draft Policy's introductory paragraphs (at the top of page 2).

As paragraph 4 of the Draft Policy points out, for an evaporator to be considered part of a manufacturing process, as opposed to a RCRA regulated process, its "sole purpose" must be to concentrate an in-process material for direct return to a plating tank. The use of the term "sole purpose" in both paragraphs 4 and 7 seems contradictory; rather the Draft Policy should make it clear that RCRA applies unless the sole purpose of an evaporator is other than waste handling.

5. In the Draft Policy, footnote one, we suggest that the State refer to its definition of hazardous waste in Rule 3.25, to clarify what it means when it says that residues from evaporators must be managed as hazardous wastes when they meet the "criteria" of a hazardous waste.