



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
1 Congress Street, Suite 1100
BOSTON, MA 02114-2023

September 18, 2000

David A. Nash, Director
Waste Management Bureau
Engineering and Enforcement Division
Department of Environmental Protection
79 Elm Street
Hartford, CT 06106-5127

Re: Algonquin Gas Transmission Company, Cromwell, Connecticut

Dear David:

This is in response to your letter dated August 2, 1999 regarding the absence of secondary containment around an ancillary pipe in which hazardous waste is generated, at the Cromwell, Connecticut facility of the Algonquin Gas Transmission Company. Your letter notes the company's claim that the ancillary pipe is exempt from RCRA requirements due to its regulation under the Pipeline Safety Act. You referred this matter to EPA to determine whether there is such an exemption.

Enclosed please find a Memorandum from our legal counsel determining that the ancillary pipe is not exempt from RCRA requirements. As your letter suggests, this matter has been referred to our RCRA Enforcement Office for followup.

Thank you for your inquiry and for notifying us about this situation. Please feel free to contact me if I can be of any further assistance.

Sincerely,

A handwritten signature in black ink that reads "Edward K. McSweeney".

Edward K McSweeney
Associate Director for Waste Policy

cc: Ken Rota, EPA RCRA Enforcement
Gary Gosbee, Hazardous Waste Program Unit



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1 Congress Street, Suite 1100
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Memorandum

Date: September 18, 2000

Subj: Applicability of RCRA to Hazardous Waste Generated at an Interstate Gas Transmission Pipeline Facility

From: Jeffrey Fowley, Associate Regional Counsel for RCRA, EPA Region I

To: Ken Rota, Chief, RCRA Enforcement Unit, EPA Region I
(cc: David Nash, CT DEP; Kevin McSweeney and Gary Gosbee, EPA Region I)

The Algonquin Gas Transmission Company ("Algonquin") operates an interstate gas transmission pipeline that traverses Connecticut and other states. This includes a facility in Cromwell, Connecticut which has notified as a large quantity generator of hazardous waste. Condensate is generated within the main pipeline in association with pipeline compressors at that facility. This condensate first collects within the main pipeline, just upstream of the compressors. This condensate is periodically removed from the main pipeline by opening a valve, allowing the condensate to pass through an ancillary underground pipe into a storage tank. Following storage in that tank, the condensate is removed for off-site disposal. Because of its ignitability and high benzene level, the condensate has been classified as both a D001 and a D018 hazardous waste.

The pipeline facilities including the ancillary pipe are operated under the Pipeline Safety Act, 49 U.S.C. § 60101 et seq. (the "PSA") and United States Department of Transportation ("DOT") regulations promulgated at 49 C.F.R. part 192 pursuant to the PSA. These regulations do not include any requirements for secondary containment. However, secondary containment is required to be installed around storage tank ancillary equipment (such as the ancillary pipe), pursuant to the RCRA regulation at 40 CFR § 265.193(f). That regulation is incorporated by reference for large quantity generators by Section 22a-449(c)-102(a)(1) and (2)(B) of the Connecticut State Hazardous Waste Management Regulations. That same regulation also applies to large quantity generators pursuant to the incorporation by reference in 40 CFR § 262.34(a) (1)(ii) of the federal hazardous waste regulations. As documented by the CT DEP during a 1995 inspection, there is no secondary containment around the ancillary pipe, in apparent violation of that regulation.

In a legal memorandum submitted to the CT DEP dated June 6, 1997, entitled "U.S. Department of Transportation Exclusive Jurisdiction over Natural Gas Pipeline Safety

and Environmental Protection” (“Algonquin Legal Memorandum”), Algonquin argues that the ancillary pipe is exempt from the RCRA secondary containment requirement for the following reasons. First, the state hazardous waste regulations are preempted by 49 U.S.C. § 60104(c) of the PSA which provides that a “state authority may not adopt or continue in force safety standards for interstate pipeline facilities.” Second, the federal hazardous waste regulations also are rendered inapplicable by the PSA because Congress indicated in 1968 (when it enacted the provisions currently codified as the PSA) that the PSA should be the sole federal statute governing interstate pipeline “safety” (which Algonquin asserts includes environmental protection) and since “[t]here is no indication that Congress intended to modify the PSA’s role as the sole statutory authority for the regulation of pipeline safety by its [subsequent] enactment of RCRA.” Algonquin Legal Memorandum at 8. Algonquin asserts that RCRA requirements only begin to apply when the condensate is removed from the pipeline facilities in order to be disposed.

While other RCRA violations at Algonquin’s Cromwell facility were resolved by the CT DEP through the issuance of a consent order, the DEP decided not to assert jurisdiction over the ancillary pipe under State law. Rather, by letter dated August 2, 1999, the DEP referred this matter to EPA Region I to resolve whether the EPA has jurisdiction over the ancillary piping “and for followup as you may deem appropriate.” The matter was subsequently assigned to me.

For the reasons explained below, it is clear that the EPA does have jurisdiction over the ancillary pipe under RCRA. Indeed, while the EPA’s authority is even clearer, I believe that the State also could assert jurisdiction over the pipe because it is administering the federal RCRA program which is applicable to the pipe.

1. The Ancillary Pipe is Subject to RCRA Requirements

The general rule enunciated by the U.S. Supreme Court is that “when two [federal] statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” Morton v. Mancari, 417 U.S. 535, 551 (1974). “The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible.” Posadas v. National City Bank of New York, 296 U.S. 497, 503 (1936). Applying this rule here, it seems clear that both the PSA and RCRA should be determined to be applicable to the ancillary pipe. There is no conflict between the lack of a requirement in the PSA for secondary containment and the RCRA requirement for secondary containment. Algonquin has presented no evidence that installing secondary containment will interfere with safe operations or compliance with DOT standards. Thus there is no obstacle to giving both acts effect.

Algonquin argues that we should instead follow the rule that “a specific statute [PSA] will not be controlled or nullified by a general one [RCRA], regardless of the priority of enactment.” Algonquin Legal Memorandum at 8. See Radzanower v. Touche Ross &

Co., 426 U.S. 148, 153 (1976). But this rule only applies when courts are forced to choose which of two contradictory statutes to enforce. “[I]f the statutes do not contradict one another no choice need be made.... At most, ... two statutes may result in promulgation of two sets of guidelines.... Such regulatory overlap is not the same as a situation where two statutes provide mutually exclusive results Chemical Manufacturers Association v. EPA, 673 F.2d 507, 512 (D.C. Cir. 1982).

The courts consistently have rejected claims similar to Algonquin’s. In Chemical Manufacturers Association, *supra*, RCRA subtitle D (governing non-hazardous solid wastes) was determined to be applicable to mining wastes notwithstanding that the wastes also were regulated under the Surface Mining Control and Reclamation Act. The court rejected the same arguments now being made by Algonquin that RCRA regulation should be precluded because there was a more specific statute governing the wastes with regulations that already took environmental concerns into account. *See id.* at 510, 512. Similarly, in Legal Environmental Assistance Foundation, Inc. v. Hodel, 586 F.Supp. 1163 (E.D. Tenn. 1984), mixed radioactive and hazardous wastes from a Department of Energy facility were determined to be subject to RCRA hazardous waste regulation (subtitle C) notwithstanding that the Atomic Energy Act grants the authority to regulate such wastes to the DOE.

Algonquin argues that we should follow the case of State of California v. Kleppe, 604 F.2d 1187 (9th Cir. 1979), in which the court determined that EPA Clean Air Act regulation over certain outer-continental shelf activities was precluded by a more specific statute administered by the Department of the Interior. That statute, however, expressly granted to the Department of the Interior the authority to prescribe regulations “for compliance with ...the Clean Air Act.” *Id.* at 1190. In contrast, there is nothing in the PSA that grants the Department of Transportation the authority to set RCRA requirements in place of EPA. Indeed, Algonquin has not pointed to any DOT regulation or policy document which claims the authority to regulate in place of EPA.

The legislative history of the PSA falls well short of establishing the kind of clear Congressional intent that would be necessary to preclude regulation under RCRA. Algonquin points to a committee report indicating Congressional recognition that safety standards for gas pipelines are highly complicated, and thus should be set by the DOT only after consultation with an expert committee. Algonquin Legal Memorandum at 9. This does not establish, however, that the Congress intended to preclude the EPA from applying its own expertise to regulate the discrete area of hazardous waste. The EPA is not seeking to set the overall safety standards for the pipes, and is not asserting any jurisdiction over the main transmission pipe. Algonquin also points to a statement from the Federal Power Commission submitted to the Congress acknowledging that with respect to pipe safety regulations, the PSA gives the DOT rather than the FPC the final say. Algonquin Legal Memorandum at 10. This statement about FPC vs. DOT regulation has nothing to do with whether the EPA may regulate hazardous waste.

In any event, any doubt which may have existed about whether the Congress intended the PSA to be the sole statutory authority governing environmental protection in connection with interstate gas pipelines has been resolved by the Congress when enacting and amending RCRA. The RCRA statute extensively addresses the extent to which RCRA regulations apply to matters also regulated by other federal statutes. See 42 U.S.C. §§ 6903 (27), 6905, 6921(b)(2)(A), 6921(b)(3). In particular, the Congress determined in 1980 amendments that, pending further study, RCRA regulations would not apply to, “drilling fluids, produced waters and other wastes associated with the exploration, development or production of ... natural gas.” 42 U.S.C. § 6921(b)(2)(A) (emphasis added). These wastes were made subject only to other existing regulatory programs. Id.¹ However, the Congress did not similarly exempt from RCRA regulation hazardous wastes (like Algonquin’s wastes) generated in connection with the transportation of natural gas. See House Conference Report No. 96-1444, section 7(1), (October 1, 1980) (distinguishing between wastes from exploration, development and production operations being exempted and wastes from transportation and manufacturing operations not being exempted). Thus the EPA has interpreted RCRA as covering “wastes generated by the [natural gas] transportation process ... because they are not intrinsically connected with [exempt] primary field operations.” RCRA/Superfund Hotline Monthly Summary, February 1989, item 2.

As pointed out in Chemical Manufacturers Association, supra, “Congress knows how to repeal [regulatory] authority unambiguously.” Id. at 513, n. 33. In the absence of Congress unambiguously creating an exemption, there is simply no basis for assuming the existence of an exemption. Where Congress has granted the natural gas industry a limited exemption, there is especially no basis for saying that Congress actually meant to grant a different, broader exemption.

It is not unusual for RCRA to impose requirements on facilities which go beyond those imposed by other federal statutes addressing safety. For example, RCRA requirements for storage of chemicals go beyond those imposed under OSHA. Additional regulation when a substance becomes a waste arises from Congress’ concern that market incentives operate less effectively to ensure careful management of wastes than they do for management of products. Additional regulation under RCRA also reflects Congress’ command that EPA’s hazardous waste regulations must include what is “necessary to protect human health and the environment,” see, e.g., 42 U.S.C. § 6923, in contrast to different standards set by Congress under other statutes. E.g., the PSA standard that protection of the environment must be “considered” by DOT along with other factors, when issuing regulations. 49 U.S.C. § 60102(b).

¹ This exemption has continued since the EPA determined after doing the study required by Congress not to seek to regulate in this area.

2. The RCRA Requirements Which Apply to the Ancillary Pipe Include EPA Authorized State Regulations as well as EPA HSWA Regulations

The federal RCRA program in Connecticut currently consists of two parts. First, the EPA has authorized the State to administer the RCRA program and has authorized particular State regulations as part of that program. These State regulations apply to sources in Connecticut "in lieu of" federal RCRA regulations, pursuant to 42 U.S.C. § 6926(b). These state regulations include large quantity generator requirements including the secondary containment requirements at issue here. In its authorized program the State regulates all "base program" wastes including ignitable (D001) waste such as Algonquin's condensate.

In addition, the EPA directly implements in Connecticut more recent RCRA requirements adopted pursuant to the Hazardous and Solid Waste Amendments of 1984 ("HSWA"). Pursuant to 42 U.S.C. § 6926(g), EPA regulations adopted pursuant to HSWA apply directly to Connecticut sources until the State is authorized to carry out particular HSWA provisions. The State of Connecticut has not yet been authorized to carry out the Toxicity Characteristics Rule ("TC Rule"), promulgated at 55 Fed. Reg. 11798 (March 29, 1990). Thus the EPA directly administers the TC Rule in Connecticut. Among other things, the TC Rule specifies that a solid waste will be a hazardous waste (and thus be subject to hazardous waste regulations) when it fails the Toxicity Characteristics Leaching Procedure ("TCLP") test for benzene. Algonquin's condensate has been classified as "characteristic" for benzene (D018). It first became subject to this additional waste code as a result of the TC Rule. The condensate is thus subject to direct EPA regulation under the TC Rule in addition to the base program State regulations. See 55 Fed. Reg. at 11847-11849.

Both the EPA regulations applicable under HSWA and the State base program regulations require the same secondary containment. See page 1 of this Memorandum. The EPA regulations clearly are not preempted by the PSA for the reasons discussed above in section 1 of this Memorandum. Thus Algonquin must comply with the secondary containment requirement whether or not the State regulations also apply.

In the current circumstances, however, I believe that the State regulations also do apply. While Congress indicated in 1968 in adopting 49 U.S.C. § 60104(c) that "safety" regulations based on "State authority" would be preempted by the PSA, it later established in RCRA a program involving federally authorized environmental regulations. There is no indication that the 1968 Congress intended to preempt such federally authorized environmental regulations; indeed, since RCRA subtitle C had not yet been adopted, the specific issue of whether the PSA preempts regulations adopted under RCRA was of course not addressed. In contrast, when adopting and amending RCRA, the Congress subsequently and more specifically addressed the interface between RCRA and other federal statutes. As explained above in part 1 of this Memorandum, the clear intent of Congress was that there be only a limited exemption for the natural gas industry

from RCRA requirements, with no exemption for wastes generated during the transportation of natural gas. The clear intent of Congress also is that the States be authorized to carry out the federal RCRA subtitle C program. *See, e.g.*, 42 U.S.C. § 6902(a)(7). Authorized State regulations must at a minimum be “equivalent” to the federal RCRA regulations, i.e., the federal RCRA regulations serve as a “floor.” 42 U.S.C. § 6926(b). It would defeat Congress’ overall intent to read the PSA as preempting federal RCRA requirements whenever the EPA approves a State to carry out the RCRA requirements. If the PSA was interpreted as preempting federally authorized State regulations, this would leave gaps in RCRA’s coverage and result in applicable State regulations being less stringent than RCRA’s federally required floor.

In Legal Environmental Assistance Foundation, Inc. v. Hodel, *supra*, the court determined that State RCRA regulations were applicable to the defendant Department of Energy’s facility notwithstanding DOE’s argument that such State regulations were preempted by 42 U.S.C. § 2018 of the Atomic Energy Act. *See id.* at 1166. I believe that a court would similarly find that State RCRA regulations are not preempted by the PSA.²

When referring this matter to the EPA, the CT DEP indicated that it had accepted Algonquin’s argument that Connecticut’s regulations are preempted. No formal or binding determination was made, however, and the State is free to rethink its position in light of the reasoning set forth above. However, since the EPA’s jurisdiction here is even clearer than the State’s, I recommend that the EPA retain the lead on this matter and take what action is appropriate.

3. The Absence of Secondary Containment is in Violation of RCRA Requirements

Algonquin argues that even if the State and federal RCRA regulations are not preempted by the PSA, the ancillary pipe is exempt from the RCRA secondary containment requirement by virtue of 40 CFR § 261.4(c). Algonquin Legal Memorandum at 10 - 11. That provision states (in relevant part) that hazardous waste generated in a “product or raw material pipeline” is not subject to regulation “until it exits the unit in which it was generated.”

Algonquin argues that the hazardous waste condensate is not “generated” until it enters the storage tank (after going through the ancillary pipe) since “actual separation” of the condensate from the natural gas does not occur until the natural gas is vented from the separation tank. Algonquin Legal Memorandum at 10 - 11. What Algonquin apparently is referring to is that since the condensate enters the ancillary pipe and storage tank under pressure, gas contained within the condensate subsequently is emitted.

² In its Legal Memorandum, Algonquin cites several cases which hold that State safety regulations are preempted by the PSA. However, none of these cases suggests that federally authorized environmental regulations would be preempted.

But the condensate initially accumulates in the main transmission pipe. This is the RCRA exempt unit. When the condensate exits this unit, it becomes subject to RCRA regulation under the terms of 40 CFR § 261.4(c). The fact that additional gas is subsequently emitted from the condensate no more exempts it from RCRA regulation than the fact that emissions occur from solvents exempts them from RCRA regulation. The ancillary pipe is included within the definition of "ancillary equipment" to a hazardous waste storage tank and is regulated under 40 CFR § 265.193(f). See 40 CFR § 260.10, 6th definition.

Finally, the CT DEP has suggested that in light of the alternative design and operating practices employed by Algonquin, it might qualify for a variance from the secondary containment requirement pursuant to 40 CFR § 265.193(g)(1). Unless and until Algonquin applies for and obtains such a variance, however, it is in violation of the requirement.