

KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT
BUREAU OF WASTE MANAGEMENT POLICY 97-03
related to
CRITERIA FOR DETERMINING WHEN A PERSON IS AN OPERATOR
OF A HAZARDOUS WASTE TSD FACILITY

December 12, 1997

Background

Kansas hazardous waste statutes require persons acting as owners and/or operators of a hazardous waste treatment, storage or disposal facility to hold a permit issued by KDHE. Occasionally, persons permitted as the operator of a hazardous waste facility will enter into an agreement with another party to perform some of the functions at the facility. If the person holding the permit delegates or assigns critical functions to the non-permitted party without maintaining operational control, that party may be actually operating the facility without a permit.

This policy statement is designed to provide guidance to the regulated community in assessing whether a person is acting as an operator of a hazardous waste facility. [NOTE: Any reference to permittee in this guidance document includes those facilities that have been issued a permit and also those operating under interim status.]

Definitions

The Kansas Hazardous Waste Act, K.S.A. 65-3430, *et seq.*, does not define the term "operator." K.A.R. 28-31-2, a regulation adopted under the Kansas Hazardous Waste Act, has incorporated by reference a federal regulation defining the term "operator." The federal regulation, 40 C.F.R. 260.10, defines "operator" as **"the person responsible for the overall operation of a facility."**

In the absence of clear statutory or regulatory definitions, courts often look to what the common, every day meaning of a word is. Merriam-Webster Collegiate Dictionary, Tenth Edition, defines "operator" as **"one that operates"** and "operate" is defined as **"to perform a function: exert power or influence."** None of the definitions give adequate guidance to determine when a person is functioning as an "operator" rather than an "independent contractor." In addition to the lack of a clear definition, the many different forms of hazardous waste facilities prevent development of a one-size fits all approach to this issue. For that reason, every situation must be viewed in light of the individual circumstances involved. The following criteria should be applied to the individual situation in determining whether a person meets the definition of an "operator" under the applicable hazardous waste statutes and regulations. No single criteria should be viewed as conclusive on the determination of whether a person is an operator. There must be a balancing of all factors involved in order to make an appropriate determination.

Criteria

- 1) **The terms of the agreement or contract between the person holding the permit and the party being delegated or assigned responsibility for some of the facility's functions.** The terms of the agreement must be evaluated on the basis of the actual practices between the parties. The best practice is for the agreement to expressly state what responsibilities the permittee retains and what responsibilities are being delegated or assigned to the other party. The agreement should state that the permittee retains operational control over the permitted facility functions.
- 2) **Performance of daily, weekly or other inspections required as a condition of a permit or by statute or regulation.** The person holding the permit retains the ultimate responsibility for ensuring compliance with all environmental statutes, regulations and permit conditions. KDHE has issued the permit to a specific person based on that person's application and supporting information provided as a part of the permitting process. It is imperative that the permittee directly participate in all on-site inspections by any administrative agency personnel.
- 3) **Access to the permitted facility.** The permittee must retain unrestricted authority to enter the permitted facility at any time.
- 4) **Reviewing, maintaining and signing of all paperwork or other documentation required by statute, regulation or as a permit condition.** For the same reasons cited under criterion 2, the permittee must retain responsibility for reviewing and signing all required documentation. This type of documentation or paperwork would include, but not be limited to, hazardous waste manifests and exception reports, and hazardous waste bills of lading. The permittee may delegate the responsibility for signing the daily operating record, tank car checklists, scale reports, rail car tracking for unloading, sample analyses, tank inventory reports, outbound and daily receiving reports, inspection reports, etc. The permittee must be able to provide documentation that he has verified all documents associated with delegated signing authority.
- 5) **Managerial and operational decision making.** The permittee must retain unrestricted authority for making the ultimate decisions in all managerial or operational decisions that could impact the compliance status of the permitted facility. This decision making power must not be delegated or assigned to a non-permittee.
- 6) **Day to day involvement in facility operations.** The permittee must be responsible for supervising the daily operations of the party being delegated or assigned facility functions. The particular amount of time spent by the permittee's representative in overseeing or supervising the non-permitted party's activities must ensure the permittee is aware of all of the critical functions conducted at the permitted facility.
- 7) **Control or supervision of employees involved in the facility's operation.** The permittee must retain the authority to be able to direct and control any employees of the non-permitted party in a timely manner to resolve any problems that could affect the compliance status of the facility. Although it would be acceptable to require the permittee to direct the concerns to a supervisor of the non-permitted party's employee, the method for doing so must allow for a timely response and correction of the problems involved. In satisfying this criterion, the permittee's direction and control shall be considered secondary to that of the non-permitted party, which maintains the primary authority over its work force.

8) **Training of employees in safety and compliance matters.** The permitted party, as stated above, retains the ultimate authority and responsibility for safety and compliance efforts at the permitted facility. The permittee should ensure that all employees working in the permitted hazardous waste management unit have received all required training.

9) **Ownership of the equipment at the facility.** The permittee must retain ownership of all regulated machinery and equipment necessary to operate the hazardous waste management unit(s). For the purposes of this guidance document ownership includes the leasing of machinery and equipment.

Conclusion

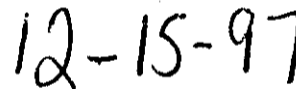
The above criteria are designed for general application to a variety of hazardous waste facilities. Individual facilities may require development of additional criteria to determine who is the actual "operator" of the facility and therefore should be named as the permittee. KDHE has developed this guidance to assist members of the regulated community to make informed decisions where the permittee desires to assign or delegate facility functions to a non-permitted party.

Before entering into any agreement to delegate or assign facility functions to a non-permitted party, the permittee should provide Bureau of Waste Management Permits Section staff with the name of the contractor, the terms of the agreement between the parties and any other relevant information concerning the criteria discussed above.

Members of the regulated community should refer any questions to the Permits Section of the Bureau of Waste Management, KDHE, Building 740, Forbes Field, Topeka, Kansas 66620, phone number (785) 296-1601.



William L. Bider
Director, Bureau of Waste Management



Date