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

MAR 05 2018

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

NOW THE
OFFICE OF LAND AND
EMERGENCY MANAGEMENT

Mr. Rodney Huerter
Veolia North America
4760 World Houston Parkway, Suite 100
Houston, Texas 77032

Dear Mr. Huerter:

Thank you for your letter of August 22, 2017, requesting a clarification of the definition of "owner or operator" as set forth in 40 CFR 270.2. Specifically, you ask whether that definition of "owner or operator" creates a separate classification that is different from the terms "owner" or "operator" defined at section 260.10, or whether the definition merely refers to "owners" or "operators" as used in § 260.10.

Section 260.10 defines "operator" as "the person responsible for the overall operation of a facility," and "owner" as "the person who owns a facility or part of a facility." In section 270.2, the term "owner or operator" is defined to mean "the owner or operator of any facility or activity subject to regulation under RCRA." EPA confirms that the Agency generally interprets the concept of what constitutes either an "owner" or an "operator" to be the same under either the definition in § 270.2 or § 260.10. For example, EPA considers that the kinds of property interests that would support a conclusion that an individual or entity is appropriately considered to be an "owner" under § 260.10, would also support the same conclusion under § 270.2.

Note, however, that while EPA generally interprets the concepts of "owner" and "operator" to be the same in the §§ 260.10 and 270.2 definitions, EPA does not consider the definitions, taken as a whole, to be identical.

Thank you for your inquiry. If you have any questions, please contact Jeff Gaines of my staff at (703) 308-8655, or gaines.jeff@epa.gov.

Sincerely,

Barnes Johnson

Barnes Johnson, Director
Office of Resource Conservation and Recovery

Internet Address (URL) ● http://www.epa.gov
Recycled/Recyclable ● Printed with Vegetable Oil Based Inks on 100% Postconsumer, Process Chlorine Free Recycled Paper

August 22, 2017

VIA E-MAIL

Barnes Johnson
Director
Office of Resource Conservation and Recovery
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code: 5301P
Washington, D.C. 20460
johnson.barnes@Epa.gov

Re: Definition of "Owner or Operator," 40 C.F.R. § 270.2

Dear Mr. Johnson:

I write to request a clarification from the Agency regarding the definition of "owner or operator" set forth in 40 C.F.R. § 270.2 (the "***Definition***").[1] Specifically, does the Definition: **1)** create a classification that is different from the terms "owner" or "operator" that are defined under section 260.10; *or* **2)** as appears to be the case, merely refer to "owners" or "operators," as defined under section 260.10, who must apply for RCRA permits in order to be authorized to conduct "treating, storing, or disposing of hazardous waste" or the activities addressed in Subpart F of 40 CFR Part 270 (i.e., the specified activities that require "Special Forms of Permits")?

There are a number of factors that appear to support the second option over the first option. First, various Federal Register preambles appear to suggest that the Definition merely refers to owners and operators, as defined under section 260.10. The preamble for the original Consolidated Permit Regulations states, in part: "Frequently terms are defined **in reference to other terms which are also defined.**" 45 FR 33290, 33294/3 (May 19, 1980) (unless otherwise noted, all emphasis in quotations is added).[2] The preamble discusses the Definition and states: "The requirements of a RCRA permit bind

---

[1] "Owner or operator means the **owner** or **operator** of any facility or activity subject to regulation under RCRA." The phrase "facility or activity" is a separately defined term under section 270.2.

[2] This portion of the preamble addresses definitions that were originally promulgated as 40 C.F.R. § 122.3, which were later reorganized under a new section, section 270.2. *See* 48 FR 14146, 14152/2 (Apr. 1, 1983).

Veolia North America
4760 World Houston Parkway, Suite 100, Houston, Texas 77032
(832) 300-5700

both the 'owner' and the 'operator' of the permitted facility . . . ." *Id.* at 33295/2. The Agency's use of separate quotation marks around the terms "owner" and "operator" in the explanation of the Definition appears to suggest that formatting is intended to reference those as separately defined terms (and that occurs in section 260.10).

The same preamble states: "The reasons for this approach are explained in the preamble to the regulations implementing section 3004 of RCRA." *Id.* at 33295/3. The referenced preamble discussion addressing RCRA § 3004 states, in relevant part: "EPA has also changed its usage of the [originally proposed] term 'owner/operator' to 'owner or operator' to indicate when EPA will be satisfied by **compliance by either party**." 45 FR 33154, 33,170/1 (May 19, 1980). The provisions of RCRA §3004 are implemented in the regulations set forth in 40 CFR Parts 264 and 265.

It is significant that the definitions in section 260.10 apply to "parts 260 through 273," while the definitions in section 270.2 ***only*** apply to "parts 270, 271 and 124." If the Definition was intended to create classifications of owners and operators that are different from the terms defined in section 260.10, it would be odd for the Agency to explain the Definition by reference to parts 264 and 265, where the definitions of section 270.2 do not apply and the phrase "owner or operator" means "owner" or "operator" as defined in section 260.10. *See also* 46 FR 11126, 11151/1 (Feb. 5, 1981) (noting certain definitions under section 122.3 were modified to "conform with" section 260.10). In light of the use of "owner" and "operator" within the language of the Definition ("Owner or operator means the ***owner*** or ***operator*** of . . .") and the other information addressed in this letter, the Definition reasonably appears to be an example of a "term[ ] . . . **defined in reference to other terms which are also defined**," with those other terms —i.e., "owner" and "operator" — being defined in section 260.10.

Second, a number of Agency guidance documents and manuals appear to indicate that the Definition merely refers to "owner" or "operator," as defined under section 260.10. The RCRA regulations that address the Part A permit application are all set forth in 40 C.F.R. Part 270 (specifically, sections 270.1, 270.10, 270.13, and 270.70), and the Definition applies only to "parts 270, 271 and 124." Thus, it would be logical for the Agency to cite the Definition in its instructions for the RCRA Part A permit application forms, if the Definition was intended to create a classification of owner or operator that is different from the section 260.10 definitions. But, the instructions for those forms do ***not*** cite the Definition, they cite the definitions of "owner" and "operator" that are set forth in section 260.10. That is demonstrated by the four excerpted Part A permit application instruction documents that Veolia Water North America Operating Services, LLC ("***Veolia***") uploaded as supporting files for its FOIA Online Request No. EPA-HQ-2017-001749 (which include instruction documents from 1980, 1999, 2005 and 2015). That is also demonstrated by the instructions in the January 1990 *Application for a Hazardous*

Waste Permit - Part A, EPA Form 8700-23, which is included in the Agency's response to FOIA Online Request No. EPA-HQ-2017-008428.

In an email to EPA employee Jeff Gaines dated 19 January 2017, I provided additional supporting documents associated with Request No. EPA-HQ-2017-001749. Those included the March 1988 and October 1993 revisions of the Agency's RCRA Inspection Manual, and the September 2004 revision of the Agency's Catalog of Hazardous and Solid Waste Publications (which references the October 1993 revision of the RCRA Inspection Manual). Each Inspection Manual: 1) states the document is for use by Agency "inspection personnel in conducting field inspections of RCRA-regulated facilities under U.S. EPA or State program authorities," and 2) includes checklists related to facilities operating under RCRA permits issued under part 270. But, the Inspection Manuals do not cite the Definition, they cite the definitions of "owner" and "operator" that are set forth in section 260.10.

Additionally, in April 1980, the Agency published a background document that explains various definitions set forth in 40 CFR Part 260 (the "***Part 260 Background Document***"). The document addresses the originally proposed definition of "owner/operator" and in relevant part states: "there are a few standards with which only the owner can comply . . . . [and in] the final rules, responsibility for complying with these standards has been assigned to the owner . . . . [but responsibility] for complying with most of the final standards has been assigned to the 'owner or operator.'"[3] The document confirms that the originally proposed term was separated into the definitions of "owner" and "operator" that remain in section 260.10. There does not appear to be a corresponding discussion of the definition of "owner or operator" in the Agency's RCRA permit-related background documents.[4] As noted above, the Agency's explanation of the Definition in the Federal Register includes the use of "owner" and "operator" with separate sets of quotation marks around each term.

Third, the Agency is not able to locate any policy or guidance documents that indicate the Definition creates a classification of owner and operator that is different from the definition of those terms in section 260.10. The Agency confirms this in its response to FOIA Online Request No. EPA-HQ-2017-001749, dated 25 January 2017.[5]

---

[3] Background Document: 40 CFR Part 260; Definitions and Provisions for Confidentiality (Apr. 29, 1980), at 63.

[4] *See, e.g.*, Background Document, Hazardous Waste Management System: General; Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; and Hazardous Waste Permit Program (40 CFR 260, 264, and 122); Permitting of Land Disposal Facilities: Overview (July 1981).

[5] Veolia included excerpts from the Part 260 Background Document and excerpts from the Part A instruction documents from 1980, 1999, 2005 and 2015 as supporting files to the FOIA Online request.

Fourth, different meanings for "owner or operator" under part 270 would create an interpretation gap between the requirements of RCRA §§ 3004 and 3005. For example, the permit regulations under Part 270: **1)** "establish provisions for . . . Standards for HWM facilities," including requirements related to interim status facilities regulated under part 265, *see* section 270.1(a)(1)–(2); and **2)** implement the standards of "parts 264, 266, and 267" into issued RCRA operating permits, *see* section 270.1(a)(3). Notably, there are **817 occurrences** of "owner or operator" in part 265; **1,096 occurrences** in part 264; **79 occurrences** in part 266, and **147 occurrences** in part 267 —and, in each of those parts, that phrase means "owner" or "operator" as those terms are defined under section 260.10. So, a different meaning under part 270 would create a gap, but RCRA §§ 3004 and 3005 are intended to work together as parts of an integrated statutory scheme. *See, e.g.*, *In re Consolidated Land Disposal Regulation Litigation*, 938 F.2d 1386, 1389 (D.C. Cir. 1991); *see also* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 86 (2006) (unanimous opinion) ("Generally, 'identical words used in different parts of the same statute are ... presumed to have the same meaning'").

An additional consideration is that the phrase "owner ***and*** operator," instead of the section 270.2 defined term "owner ***or*** operator," is used in at least fourteen different regulations under part 270. In section 270.1 (the "purpose and scope" regulations under part 270), there are eleven references to "owner and operator" or "owners and operators" before the ***only*** use of "owner or operator" in that regulation. And, phrase "owner or operator" in that section is not used in connection with a regulatory requirement, it is used in connection with a permissible alternative to obtaining a permit, *see* section 270.1(c)(7) ("an owner or operator may obtain").

We respectfully request the Agency's clarification of the Definition, as set forth in the opening paragraph of this letter. Please do not hesitate to contact me if you have any questions, or would like for me to provide additional information (email: Rodney.Huerter@veolia.com; office phone: 832-300-5719).

Sincerely,

Rodney G. Huerter
VP & Senior Counsel

cc: Jeffrey Gaines, U.S. EPA, Gaines.jeff@Epa.gov
Richard Huggins, U.S. EPA, Huggins.richard@Epa.gov