ENVIRONMENTAL AFFAIRS COMMITTEE

OIL AND GAS ISSUES IN RCRA -- AN ENVIRONMENTAL PERSPECTIVE

By David M. Lennett
National Audubon Society
Litchfield, Maine

Good morning. During the past several years, representatives from the environmental community have devoted substantial resources toward participating in IOGCC sponsored projects aimed at improving state oil and gas exploration and production (E&P) waste programs. That commitment continues today, in the conduct of state reviews, and in the development of revisions to the 1990 IOGCC guidelines and mechanisms for evaluating compliance and program effectiveness. In the course of this interaction with state officials and the regulated community, I think its fair to say that all sides have learned a great deal about the issues of concern to each other, and perhaps are wiser both in terms of appreciating opposing points of view and recognizing potential areas of consensus.

My own RCRA experience is not limited to oil and gas wastes. Perhaps some of you may regard such an experience as a liability rather than an asset. Nevertheless, it may be instructive to examine the RCRA regulation of E&P wastes in a broader context. After all, E&P wastes are one of four so-called special wastes Congress identified in 1980, and special wastes are but one of a variety of solid wastes heretofore unregulated at the federal level.

In addition to E&P wastes, Congress identified three other special wastes in 1980: mining wastes, wastes from the combustion of fossil fuels such as fly ash, and cement kiln dust waste.

Mining waste can be divided into two categories. The first category consists of extraction and beneficiation waste, such as waste from excavating, crushing, grinding, leaching, and solvent extraction operations. The second category is processing waste, such as waste from smelting operations, where the waste bears little resemblance to the mined mineral and the wastes are relatively lower in volume.

In December 1985, EPA published its Report to Congress on the first category of mining wastes, extraction and beneficiation wastes. In June 1986, EPA issued its regulatory determination not to regulate these wastes as hazardous. In 1988, the Court of Appeals upheld this regulatory determination, but in a related case found that Congress intended for the mining waste exemption in Subtitle C of RCRA to be limited to high volume, low hazard wastes, based upon what EPA considered special wastes in 1979 before Congress enacted the mining waste exemption. Accordingly, the Court ordered EPA to identify those wastes not high volume, low hazard, and subject them to Subtitle C regulation where the wastes exhibited a hazardous waste characteristic.

Over the next year and a half, EPA developed volume and hazard criteria, and eventually removed from the mining waste exemption all but 20 of the mineral processing wastes. EPA published a Report to Congress on the remaining 20, and eventually issued a nonhazardous regulatory determination for all of

them. EPA announced it would incorporate 18 of the 20 mineral processing wastes into the nonhazardous regulatory program under development pursuant to Subtitle D of RCRA, and the other two wastes would be regulated under TSCA.

Therefore, at present, low volume or high hazard mining wastes are not exempt from RCRA regulation. Significantly, had Congressman Bevill included E&P wastes in his 1980 special wastes amendment, associated wastes might be in a similar situation as a legal matter. As a policy matter, allow me to ask if all the special waste exemptions were intended to address high volume, low hazard wastes, why should low volume, high hazard mining wastes be regulated as hazardous but not other low volume special wastes?

Perhaps more importantly, there is an effort underway to develop a federal regulatory program for the nonhazardous mining wastes, although this development is long overdue. EPA convened a Policy Dialogue Group including states, industry, and the environmental community in an attempt to identify issues and narrow differences in points of view. Of particular note is that all of the various interest groups support the development of a federal regulatory program for nonhazardous mining wastes, including the Western Governors Association (WGA) representing many of the states here today.

Moreover, at the urging of Chairman Swift of the House Subcommittee on Transportation and Hazardous Materials, industry, the states, and the environmental community met extensively over a two month period about a year ago to determine whether agreement on a package of mining waste RCRA amendments could be reached that would provide for such a federal program. We failed to reach an agreement. The principal stumbling block was over the scope of the program, including whether pit waters and processing fluids should be subject to RCRA regulation. In the E&P waste context, a similar issue might be whether pits containing only produced water used for enhanced recovery should be subject to RCRA regulation.

Yet, there were also important areas of conceptual agreement that are relevant to E&P wastes. They include:

- The principal regulators of mining wastes under a federal program would be the states;
- Federal requirements for mining wastes would provide for sufficient flexibility to take into account site-specific or regional variability; and
- EPA would retain an oversight and enforcement role once the program was underway.

In the case of fossil fuel combustion wastes, EPA published its Report to Congress but has not issued a regulatory determination. Meanwhile, during RCRA reauthorization last year, the electric utilities industry circulated various proposals for the development of a federal regulatory program under RCRA. Those proposals contained important deficiencies and were not adopted, but again at least the industry acknowledged a federal program was warranted. EPA has not published a Report to Congress or issued a regulatory determination on cement kiln dust waste, but even if the waste is eventually deemed nonhazardous by EPA, federal regulation of the waste has been discussed in the context of a federal industrial waste program under Subtitle D of RCRA.

Industrial nonhazardous waste represents the largest RCRA waste category by far, approximately 6.5 billion tons per year even excluding the four classes of special wastes. Despite a mandate in the 1984 RCRA amendments to develop a federal program for industrial wastes, little has been accomplished in the last eight years. However, first under the

auspices of the Keystone Center, and then as part of the RCRA reauthorization process, industry, states, and the environmental community discussed the development of a federal RCRA program for these wastes. Interestingly, the industry participants were the primary proponents for holding the discussions in the first instance, because they felt the lack of an industrial waste program may potentially result in an overly expansive Subtitle C universe.

Even the scrap metal industry acknowledged the need for federal requirements governing their waste management practices, and last year reached agreement with the Natural Resources Defense Council (NRDC) on a package of RCRA amendments. The agreement provided for exemptions from regulation based on the risks posed by the wastes, and streamlined permitting or approval mechanisms for low risk facilities. Again, the initiation of discussions was at the industry's behest.

Of course, RCRA was not reauthorized, and all these discussions and agreements may be repeated in the next several years. Interestingly, many of these discussions may occur administratively in addition to or in lieu of legislative deliberations, since program development can probably begin without new statutory authorities already in place.

Still, it is important to recognize that in other RCRA contexts where large amounts of wastes and facilities may be involved, and flexibility in standard setting is extremely important, those factors did not necessarily preclude the development of a federal program that takes these factors into account. Indeed, the mining industry can probably make a better case for needing site-specific or regional flexibility than the oil industry, given the location of their facilities and the engineering involved. Moreover, mining wastes cannot generally be transported significant distances from the production site because of the nature and quantities of wastes involved; there are rarely if ever commercial facilities for exempt mining wastes.

Similarly, the fact that states have programs to regulate potential RCRA wastes should not necessarily preclude the development of a federal program either. WGA states regulate mining wastes, and they believe state programs are pretty good and are improving rapidly due to substantial regulatory improvements undertaken as a result of WGA interactions amongst themselves and with EPA. Nevertheless, WGA acknowledges gaps in some program areas, has indicated potential benefits may be derived from federal assistance in certain technical areas and in the enforcement area "if the 1,200 pound EPA gorilla could be carefully controlled", and believes a federal program is necessary for the purpose of ensuring public credibility in their regulatory programs. States regulate industrial wastes as well, but the gaps in these efforts are even more pronounced than in the mining waste arena.

Finally, small entities would be regulated under these RCRA programs I just discussed, especially the scrap metal program agreed to by the industry. In addition to the scrap metal agreement, the environmental community has been willing in other contexts to work with the regulated community to minimize compliance costs without sacrificing environmental protection. In 1983-84, the Environmental Defense Fund and others negotiated an agreement with the U.S. Chamber of Commerce, dry cleaners, and other small businesses to provide a small quantity generator exemption under Subtitle C of RCRA.

Perhaps one of the most striking features of the E&P waste debate over the past several years is the legitimate concern about the impact of a federal program on small, independent producers. In this regard, one often hears two inconsistent arguments. On the one hand, it is argued that any increase in compliance costs will put a substantial percentage of independents out of business. On the other hand, it is argued a

federal program is unnecessary because of the ongoing regulatory developments at the state level, purportedly supported by the independents, which will substantially increase environmental protection. Both can't be true.

Of course, the environmental community's support for a federal program is based upon more than just parity with other industrial waste generating sectors. It is also based upon the desire to improve state programs as rapidly as possible, and in a manner which ensures a baseline level of protection both temporally and substantively. Moreover, we believe the existence of a federal program can help address the resource shortfalls plaguing many state programs, and bolster state enforcement efforts.

Yes, state programs are improving, and much of the credit for the improvement can be traced to the efforts of the IOGCC. But further improvements can and must be made, as indicated by the state program reviews and the myriad of trip visits and slide shows prepared by EPA and others. In addition, there are substantial gaps and inadequacies in the current guidelines used as the basis for state reviews, state programs need not pursue the recommendations of the state review teams, and the pace of program reviews is approximately four per year.

One conclusion reached in all the state reviews conducted thus far is the programs are substantially under funded when resources are compared to duties and responsibilities. It is a fact of life that when Legislatures and others are looking for funds to balance state budgets, programs without federal underpinnings are inviting targets. Accordingly, funds allocated for abandoned site cleanups or hiring inspectors are periodically raided. Moreover, a strong case can be made that the absence of a federal program, at least in some areas of E&P waste management, wastes scarce state resources. For example, is it not a waste of resources for each state to develop new programs governing NORM?

Sometimes in the heat of the E&P waste debate, it is possible to hear a consensus that state enforcement efforts must be improved. At one Senate hearing, after observing slides of problem E&P waste sites, a representative of a major company blamed the problems on the small operators, the small operators blamed it on some bad apples in the industry, but all agreed improving enforcement was a priority. Typically, damage cases are explained as violations of rules.

In our view improving enforcement alone justifies a federal presence in E&P waste management, but not necessarily because EPA is expected to file thousands of enforcement actions. Rather, the "threat" of federal enforcement made real with the filing of some high profile cases, coupled with potentially substantial civil and/or criminal penalties, will motivate some to improve their behavior. In addition, federal citizen suit authority will empower those on the receiving end of improper practices to take action. Citizens suits are used sparingly because of the level of effort required, but when they are used, the impact is often felt substantially beyond the particular defendant in the case. The tool is proven and effective in the approximately 20 years it has existed at the federal level, and it already applies to E&P waste operators discharging to surface waters.

Significantly, even with federal enforcement authorities available, we fully expect states will pursue the vast majority of enforcement cases. That's how it should be. But state officials committed to effective enforcement will find the mere existence of those authorities will encourage greater compliance, and perhaps reduce resistance once violations are detected. Those officials not interested in pursuing effective enforcement will find themselves part of the checks and balances process so highly regarded, and rightly so, in this country.

In closing, let me reiterate to all concerned the continuing commitment of the environmental

community to work with any interested parties on the development of a federal program for E&P wastes. Some of the elements that we believe belong in such a program are:

- Management standards which prevent environmental degradation while still providing for flexibility to take into account variations in hydrogeologic conditions;
- Mechanisms for discouraging the land disposal of wastes containing significant concentrations of toxic constituents where source reduction, recycling, and treatment are viable alternatives;
- Information gathering, data assessment, and standard-setting for NORM;
- A process for identifying, assessing, and remediating those abandoned sites posing a significant risk to human health or the environment; and
- Unencumbered federal and citizen suit enforcement authorities.

Thank you for this opportunity to share some of the environmental community's views regarding E&P waste management.

RECENT DEVELOPMENTS IN THE CLEAN WATER ACT SECTION 404 REGULATORY PROGRAM

By Tom Kelsch
Environmental Protection Agency
Wetlands Divisions
Washington, D.C.

Introduction

Since the late 1970's and the 1980's the Nation has become increasingly aware of the vital role wetlands play in providing habitat, protecting us from flooding and maintaining surface water quality. This public awakening came at the same time that the Fish and Wildlife Service's National Wetlands Inventory published reports indicating that less than one half of the wetlands that existed when the Europeans came to the United States remain. The reports also indicated that the United States was continuing to lose approximately 450,000 acres of our wetlands per year. Although recent data updating the status and trends of wetland losses for the 1980's indicate that the rate of loss has decreased, the Fish and Wildlife Service estimates indicate that approximately 290,000 acres of wetlands are still lost each year.

Any loss in the natural functions provided by wetlands is not just felt in the environment; we simultaneously sustain, as a loss to our national economy, a decline in the income that could have been derived from the fisheries, recreation and other critical services performed by wetland systems. Clearly wetlands merit protection. However, in the U.S., where over 75 percent of our remaining wetlands are on