

ASTSWMO POSITION PAPER

POST-CLOSURE CARE BEYOND 30 YEARS AT RCRA SUBTITLE D FACILITIES

Background

Regulations promulgated approximately twenty years ago by individual States under the authority of Subtitle D of the Resource Conservation and Recovery Act (RCRA) include provisions regarding the post-closure care of municipal solid waste (MSW) landfills. The Subtitle D regulations establish a 30-year post-closure care period as the default requirement (See 40 CFR § 258.61).

RCRA and the State regulations include provisions allowing the 30-year period to be extended or shortened. The 30-year period may be extended if the Director of an approved State program “determines that the lengthened period is necessary to protect human health and the environment.” The 30-year period may be shortened by the State Director if the “owner or operator demonstrates that the reduced period is sufficient to protect human health and the environment.”

After completion of the established post-closure care period, the owner or operator is required to certify that the post-closure period was performed in accordance with the approved State regulations, applicable plans, or post-closure plan. Similar provisions are found in individual State regulations promulgated under authority of Subtitle C of RCRA.

However, neither RCRA Subtitle D nor a number of the States’ regulations contain a detailed process or specific criteria and provisions for evaluating whether the post-closure care period may be either shortened or extended. States’ are seeking to develop a clear and concise guidance regarding the criteria and provisions for shortening or lengthening the post-closure care period. While recognizing the individual States’ authority, we are also seeking input from EPA on several policy issues listed below. We wish to be cognizant of EPA’s positions while considering and developing our guidance.

U.S. EPA tailored a specific process of approval of State MSW landfill programs under 40 CFR Part 239 distinct from the Subtitle C program. The Subtitle D approach recognizes the State agency’s primary role and responsibility to enforce State specific regulations and affords State flexibility through U.S. EPA’s determination of program adequacy. U.S. EPA expressly acknowledges that a determination of adequacy does not preclude a State from adopting or enforcing more stringent or extensive requirements or a broader scope of coverage than those required under 40 CFR Part 239.

Subtitle D Facilities around the country are now coming up on the end of the initial 30-year post-closure period. Many States have established review standards or are anticipating the review of certifications of completion of post-closure period and the State Director's determination of whether an extension of the post-closure period is warranted. The 40 CFR § 258.61 criteria requires a State Director's determination that an extension of the period is necessary to protect human health and the environment. Approved States understand that the technical review and basis of that determination, as well as the process of legally extending the post-closure period must be based upon the individual State's statutes, regulations, and technical considerations.

2011 ASTSWMO Subtitle C and Subtitle D Post-Closure Care Survey

A workgroup composed of members from the ASTSWMO Hazardous Waste and Materials Management Subcommittees has been evaluating post-closure care requirements in relation to the end of the Subtitle C and Subtitle D initial 30-year post-closure period. The workgroup conducted a survey of ASTSWMO members and presented the results at the 2011 ASTSWMO Annual Meeting. While the survey illustrates the expected variety of State specific mechanisms, processes, and authorities, there is much in common in what States take into consideration in making the necessary determination. The results of the survey will facilitate benchmarking among States on this important issue. The results can be found at http://astswmo.org/Files/Policies_and_Publications/Cross-program/2013_04-Post-Closure_Care_Period_Survey_Results.pdf.

Under the flexibility afforded under Subtitle D, States are able to tailor the length of the extension specific to the facility using State authority to establish requirements beyond the scope of the Subtitle D post-closure period requirements. Some States that elect not to extend the Subtitle D post-closure period are using various State authorities to consider various forms of land use restrictions, establishing other forms of extended responsibility, and accommodating economic redevelopment of landfill property.

Issue

Because there is a level of uncertainty regarding a U.S. EPA approach to benchmarking post-closure periods, States have and may continue to have different approaches to addressing post-closure periods.

There is uncertainty among many States regarding a preferred approach to adjusting post-closure periods. Some of the national level policy questions that ASTSWMO is seeking feedback on from EPA include: Does the U.S. EPA have their own experience regarding the shortening or extension of the post-closure period for a MSW landfill? What considerations, processes and procedures has or would the U.S. EPA make regarding changing the post-closure care period? How would the U.S. EPA address financial assurance requirements for an extended post-closure care period?

What standards does the U.S. EPA use to extend or shorten the post-closure care period? If these standards were challenged under a citizen suit, what criteria and standards has or would the U.S. EPA anticipate using in the process of the citizen suit? Has the U.S. EPA ever encountered this situation?

What approaches and mechanisms does the U.S. EPA use to exit a facility from post-closure care, if any? What authorities would the U.S. EPA use to address environmental issues associated with a facility after terminating post-closure care?

While it is understood that the U.S. EPA is limited to 40 CFR § 258 while the States may have additional State authorities, it may be helpful for States to understand U.S. EPA's approach to issues associated with the end of, and following the termination of, the 30-year post-closure care period.

Position

States with approved Subtitle D MSW landfill programs have a primary and distinctive role allowing State flexibility and broader scope of program under State authority. Individual States are addressing or anticipating the issues associated with the end of the 30-year post-closure care period consistent with 40 CFR § 258.61.

The ASTSWMO Board of Directors recommends that the U.S. EPA develop guidance on the review and consideration of the extension or reduction of the 30-year post-closure care period for Subtitle D MSW landfills. The ASTSWMO Board offers the assistance of the Materials Management Subcommittee to the U.S. EPA in the development of this guidance.

Approved by the ASTSWMO Board of Directors on July 17, 2013 in Portland, OR