Meeting Resource Conservation and Recovery Act (RCRA) Obligations

By Lisa Alexander and Jeff Chormann

This month, we're going to talk about sites that may have obligations under both M.G.L. chapter 21E and the US Environmental Protection Agency's Resource Conservation and Recovery Act (RCRA). For those who may not already know this, the Bureau of Waste Site Cleanup (BWSC) has inherited a number of these facilities from the Bureau of Waste Prevention (BWP). The coordinator for this program is Jeff Chormann, now in BWSC.

Since 1982, and pursuant to M.G.L. c 21C and the Massachusetts Hazardous Waste Management Act at 310 CMR 30.000 (RCRA), MassDEP has required a Hazardous Waste License for the Treatment, Storage (greater than 90 days) and Disposal of Hazardous Waste (HW). Under 21C, Treatment, Storage, and Disposal Facilities (TSDFs) were required to notify MassDEP and apply for a Hazardous Waste License. Upon notification, TSDFs were given an "interim status" which allowed them to continue operations until the Hazardous Waste License was issued. Many facilities, however, chose to cease their hazardous waste activities before receiving a license. In 1984, the US EPA enacted RCRA Corrective Action amendments to address releases of contaminants at those facilities subject to "interim status." There are approximately 75 facilities in MA subject to State and EPA RCRA Corrective Action requirements. It is important to note here that for RCRA purposes, the evaluation has to be *facility-wide*, not limited to specific *release* areas.

In 2008, MassDEP adopted regulations at 310 CMR 30.099(13). These and other regulations authorize MassDEP to implement the federal RCRA Corrective Action Program – not only releases from the old HW units (e.g., HW lagoons, HW storage areas), but also any releases of oil and/or hazardous material across the entire facility.

Adoption of the RCRA authorization regulations allowed the sites or facilities being cleaned up under 310 CMR 40.0000, the MCP, to also satisfy the RCRA HW Corrective Action program, *provided* they meet the additional RCRA requirements below. Facilities must:

- Continue to comply with response actions in accordance with M.G.L. c. 21E and 310 CMR 40.0000;
- Provide an opportunity for the public to comment on the MCP Phase III in accordance with 310 and upon the completion of corrective action with the submittal of an RAO Statement;
- Continue to comply with any closure or post-closure requirements in accordance with 310 CMR 30.580 and 30.590;
- Continue to comply with financial responsibility requirements in accordance with 310 CMR 30.900; and,
- Pay all applicable fees.

In 2012 the RCRA Corrective Action program transitioned from the Bureau of Waste Prevention to the Bureau of Waste Site Cleanup. Sites formerly undergoing corrective action under the oversight of RCRA staff (and considered "adequately regulated" under the MCP) are proceeding under the MCP. With a few exceptions, these sites will follow the standard BWSC 21E program/MCP approach, including oversight by a Licensed Site Professional (LSP). This will allow for most RCRA Corrective Action sites to be cleaned up in a manner that is both more efficient and familiar to consultants, the public and facility owners.

The "adequately regulated" designation in the BWSC database means the owner/operator is fulfilling their 21E obligations through a different, equivalent, regulatory program, such as under RCRA. There are approximately 25 State-lead RCRA sites that are, or will be, transitioned into 21E.

It can get complicated when the RCRA obligations aren't obvious to the current facility owners. There are approximately 45 additional sites that are potentially subject to US EPA RCRA Corrective Action, but where work under RCRA has not begun – and thus they do not have the "Adequately Regulated" Status. Some of these are large facilities with many RTNs, but none of the work is being done with RCRA in mind, or done under the oversight of the state Hazardous Waste Program or the US EPA. Nevertheless, if a facility owner now wants to clean up the site and sell it free and clear of EPA and DEP obligations, they must meet both the MCP and extra RCRA obligations. They may have achieved an RAO under 21E for specific releases, but under RCRA, they may discover there are still some outstanding RCRA facility-wide requirements.

I recently joined Jeff Chormann, our BWSC/RCRA Site Coordinator and several EPA officials to talk about coordinating efforts to ensure affected 21E sites are aware of and take the opportunity to address RCRA requirements through a single process. There are a number of sites where EPA is directly involved, ensuring work is progressing, and on which they are reporting to us. There are others sites for which EPA is seeking information about where the sites are in the MCP process whether the assessment(s) are facility-wide, and whether any audits have been performed.

During the discussion it was clear that while there are certain definitions that differ slightly between the two agencies, there are ways that they are generally equivalent in scope, allowing many facilities to meet both their MCP and EPA/RCRA obligations, depending on the 21E work that had been done. Below, we'll outline the key similarities. However, there are also a couple of important differences and they are worth knowing.

Differences:
The first key difference already noted above is that RCRA requires "facility-wide" assessments and closures, not limited assessment of discrete releases. Nevertheless, the assessment work at some sites (or multiple assessments) may meet the requirement, providing that *any* area of the designated facility impacted by oil and/or hazardous material is fully assessed.

The second major difference is that RCRA sites require public notifications about the final remedy selection and a 30-day public comment period. This obligation can be met in several ways. For some sites, the Notice of Activity and Use Limitation may serve as such a notice. In other cases (e.g., where a site is under EPA oversight), EPA will post the notice. If a site was a 21E Public Involvement Plan participation site, there may also be sufficient documentation showing the public was kept apprised of decisions made along the way with sufficient opportunity to comment, particularly if a public notice was published for completion of the Phase III, Remedy Selection. But in other cases, for example, a Class A-2 Response Action Outcome Statement that qualifies as facility-wide RAO, may need a public notice and a 30 day comment period before the site may close out its RCRA obligations.

Similarities:
There are four key milestones that EPA reviews that parallel certain MCP requirements.

EPA's first RCRA milestone is ensuring that human health exposures are under control. Under 21E, this might be demonstrated following an Immediate Response Action (IRA) assessment or closure, demonstrating the site demonstrates no Imminent Hazard for human health. If an IRA was not required, then it might be met at the conclusion of Phase I or Phase II when a Risk Characterization can

demonstrate that the site has met a condition of “No Significant Risk” as far as human health is concerned.

The next EPA/RCRA milestone is ensuring that groundwater migration is under control. Again, this might involve the implementation of an IRA for groundwater if appropriate, or, it might be determined during the Phase II Site Characterization, demonstrating that there is no condition of Substantial Release Migration. It might also be met when a site achieves Remedy Operation Status or Monitored Natural Attenuation that demonstrates that groundwater migration is not ongoing. This will depend on the site, but again, it requires a “facility-wide” assessment and documentation sufficient to meet the RCRA requirement. Once this milestone is met and the site meets the RCRA requirements, any later change in groundwater movement will not re-open the RCRA requirements; the site will remain under 21E requirements.

The third EPA/RCRA milestone is remedy selection. This is essentially equivalent to 21E/MCP completion of Phase III, Remedial Implementation Plan selection and requires that an adequate facility-wide assessment is completed *and* that the remedy selection applies to any risks/remediation for the whole facility. This is another point where a public notice of the selected remedy, with a 30-day public comment period, comes into play in order to meet the EPA RCRA requirements.

And finally, the fourth EPA/RCRA milestone is remedy construction completion. Again, public notice and a 30 day comment period are required. This milestone may be met upon completion of Phase IV Remedy Implementation Plan, or it may be when a site goes into Monitored Natural Attenuation or ROS or any RAO with or without an AUL.

The final step before corrective action at a site can be considered complete, and which may be taken by either EPA or BWSC, requires an audit of the facility’s submittals to determine if the assessments fit the EPA/RCRA facility-wide requirements, and to determine whether the various milestones are met. These audits may be conducted at the various milestones, or at RAO. If you have any questions about your client’s facility, or about this program, please contact Jeffrey.Chormann@state.ma.us.