

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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June 7, 2024

Sasha Lucas-Gerhard
Program Implementation and
Information Division
Office of Resource Conservation
and Recovery via regulations.gov

Re: Comments on EPA's Proposed Revisions to Standards for the Open
Burning/Open Detonation of Waste Explosives Rule
(Docket ID No. **EPA-HQ-OLEM-2021-0397**)

Dear Sasha Lucas-Gerhard:

The New York State Department of Environmental Conservation (NYSDEC) is submitting the following comments for consideration regarding the United States Environmental Protection Agency's (EPA) Revisions to Standards for the Open Burning/Open Detonation (OB/OD) of Waste Explosives Rule. NYSDEC would like to thank EPA for the opportunity to comment on this rule.

NYSDEC is supportive of the overall concept of EPA's proposed rule to improve management and disposal of waste explosives and increase the use of alternative technologies to treat waste explosives; however, NYSDEC has questions and concerns about implementation of the proposed rule as currently written and submits the following comments:

1. De Minimis Exemption from Alternative Technology Evaluation

NYSDEC does not support this exemption as written but is not opposed to a de minimis exemption from the requirement to conduct a full alternative technology evaluation if EPA can provide additional information and regulatory clarity about the de minimis criteria and evaluation process. In addition, NYSDEC is primarily concerned about the following in relation to this exemption:

- a. There is no definition in the proposed regulations for the term "net explosive weight (NEW)." EPA should define this term within the regulations so there is no question about the meaning of this term.
- b. NYSDEC is concerned about the lack of documentation provided by EPA to show how the 15,000 lb. annual NEW maximum limit could potentially correlate to a finding of "de minimis." There is no method provided to show how this number was calculated. Additional information is necessary to justify the proposed annual NEW maximum limit to ensure

that the amount of waste exempted from regulation is not significant and does not pose an unreasonable risk to the environment.

- c. There are no specific standards for demonstrating that an activity would have negligible impact to human health and the environment and, therefore, qualify as “de minimis.” Exemptions that lack specific standards may be more difficult for regulators and the regulated community to use and implement. The lack of specific standards could also make the exemption more susceptible to legal challenges and misuse. NYSDEC requests that EPA provide more information about the types of standards that could be used to show that a proposed activity would be classified as “de minimis.” For example, would an OB/OD activity qualify as “de minimis” if the deposition of contaminants to soils from a proposed OB/OD activity was calculated to be below the numeric levels provided in the hazardous waste land disposal restrictions or would the calculated deposition of hazardous constituents need to be some factor of magnitude less than land disposal restriction limits because the exemption could be used for multiple years? Are there other relevant environmental standards that could be relied upon to show that impacts from deposition of contaminants would be negligible, such as soil cleanup objectives used by state remediation programs? NYSDEC believes that it could be appropriate to determine that an OB/OD activity would have a negligible impact if it could be shown to the EPA Director’s satisfaction that deposition of contaminants from such an activity over the following five years would not exceed unrestricted soil cleanup objectives. NYSDEC also believes that 40 CFR 264.704(e)(5) should state that the EPA Director may request additional information or sampling and analysis from the owner/operator to determine if the OB/OD activities at the site still meet the “de minimis” criteria. NYSDEC also believes that it would be prudent to explicitly require soil sampling and analysis as a part of each approval of the “de minimis” exemption. Adding this requirement to the exemption would establish baseline conditions at the site during the first approval of the exemption and provide for confirmatory sampling during each exemption renewal period that the OB/OD activities at the site are negligible.
- d. Subparagraph 40 CFR § 264.704(e)(1)(ii) of the exemption requires a facility to demonstrate that treatment by a mobile treatment unit, an off-site alternative technology or an on-site alternative technology is not safe and available but does not connect those references of “safe” and “available” to their meaning in § 264.707(b)(1). NYSDEC recommends that the terms “safe” and “available” be added to the definitions section at 40 CFR § 264.705 or that 40 CFR § 264.704(e)(1)(ii) be revised to read as follows: “(ii) A demonstration that treatment by an MTU, treatment off-

site by an alternative technology, and treatment by an existing on-site alternative technology, if applicable, are not safe and available, as defined in § 264.707(b)(1).”

- e. NYSDEC requests that EPA provide more clarification about what a facility would need to provide to show that an alternative technology is not safe and available for the purposes of the demonstration to qualify for the de minimis exemption. How will that demonstration compare to the alternative technology evaluation that needs to be performed for facilities that use OB/OD for their waste explosives in terms of the documentation and effort put into the evaluation? As a part of this demonstration that alternative technology is not safe and available, would EPA be satisfied by a simple statement or certification that the facility is not aware of any alternative technology to treat their waste or does EPA expect facilities to provide some of the same information required for alternative technology evaluations in 40 CFR § 264.707? If the latter, the scope of information required should be clarified in the regulations.

2. Minimum Safe Distances for Treatment of Waste Explosives

- a. OB/OD units: Given that EPA’s conversations with the Department of Defense yielded the conclusion that the current minimum safe distances provided in 40 CFR § 265.382 are under-protective in some cases and overprotective in other cases. NYSDEC would like EPA to update their current minimum safe distance standard to standards that will be equally protective to those used by the Department of Defense (DESR 6055.09), even if a different methodology is used, as under-protective minimum distances are a clear threat to human health and the environment.
- b. Mobile Treatment: NYSDEC is concerned about where the mobile treatment units will be allowed operate and proximity to public areas. For example, would these units be able to be operated on the facility boundary near public roads or walkways? Did EPA evaluate if a minimum safe distance or setback from the site property line for operation of a mobile treatment unit is necessary to ensure protection of human health and the environment in the event of a unit failure during treatment? Or will EPA make this determination during its evaluation of location-specific permits? If EPA evaluated a minimum safe distance or setback from the site property line for operation of MTUs to ensure protection of human health and the environment, NYSDEC suggests providing that information with justification for public review. If EPA has not done that evaluation with respect to MTUs, NYSDEC suggests that minimum setback distances be established in each national conditional approval based on the type and amount of waste explosives treated in the MTU and risks associated with the treatment and disposal technology that the MTU employs. This would allow regulators to ensure that permits for these

units are adequately protective of human health and the environment while maintaining flexibility to establish setbacks for each MTU based on the technology that will be used and the wastes that they would be approved to treat. In addition, NYSDEC believes it would be reasonable as part of the location-specific permit to expressly require that MTUs comply with 40 CFR 264.14 security measures if the MTU will be operating near the site property line and/or public roads and walkways to isolate the MTU operating area from unauthorized access by the public.

3. Mobile Treatment Units (MTUs) for Waste Explosives

a. Definition of the Term Mobile Treatment Unit

- i. While NYSDEC is supportive of a definition for mobile treatment units that treat explosive wastes, NYSDEC requests that EPA reconsider use of the term “mobile treatment unit” to refer only to mobile units that treat waste explosives. “Mobile treatment unit” is a term that is commonly used by regulators and the regulated community to refer to many different types of treatment units (e.g., mobile solvent recovery units, lead recovery units, polychlorinated biphenyls (PCBs) treatment units, etc.). Additionally, NYSDEC has permit exemptions in its regulations for certain mobile treatment units and would not want any confusion to arise between those exemptions and the regulations for mobile treatment units that are used to treat explosive wastes when the OB/OD Rule becomes effective. NYSDEC believes a term like “mobile explosives treatment unit (METU),” “mobile explosive waste treatment unit (MEWTU),” or a similar more specific term would be more appropriate for this definition.
- ii. If an owner or operator of an MTU operates over 180 days at a single site or does not meet the closure requirements in 40 CFR § 264.1(k)(5) at a site, the facility would not meet the definition of a mobile treatment unit. Does this mean that the facility becomes an illegal treatment, storage, and disposal facility if it fails to meet either of those criteria? If not, how would units that fail to meet the definition of an MTU after obtaining a permit be regulated? The regulatory implications of failure to meet the definition of MTU should be clarified in the regulations.

- b. Manifesting requirements – In the proposed 40 CFR § 264.1(k)(4) there appears to be a typo. NYSDEC believes that § 274.71(c) in this section is referring to the manifesting requirements in § 264.71(c).
- c. Inspections by Unit Operators – On page 20000 of the preamble EPA states that the operating record is important because it will be used, in

part, to document inspections of the unit and associated equipment. However, the requirements of § 264.1(k) do not appear to require MTU permit owners and operators to perform regular inspections of the treatment unit or require inspections of the unit prior to or after use. MTU's are specifically exempted from the inspection requirements in § 264.15 and it doesn't appear that there are any other requirements that will impose those types of inspections. NYSDEC believes that, at a minimum, MTUs should be required to conduct inspections of the treatment unit before use.

- d. Inspections by Regulators – It is not clearly stated how MTUs would be inspected by regulators. Typically, permitted hazardous waste facilities are inspected by states once or twice per year. It isn't clear if EPA would be the sole regulatory agency that would be inspecting these units or if states would also have the authority to inspect these units. It also isn't clear if the schedule required in the location-specific permits would be publicly available or provided to state regulators for these purposes if state inspectors were expected to carry out these inspections.
- e. Nationwide Permitting Framework – NYSDEC is supportive of a nationwide two-part framework for permitting of these units. While NYSDEC agrees that these permits may be more consistent if EPA maintained sole permitting authority for both the nationwide conditional approval and the location-specific permit for MTUs, NYSDEC does have some concerns about how EPA will address state-specific concerns when issuing location-specific permits. NYSDEC is particularly concerned about potential conflicts with state siting laws. State siting laws may preclude MTUs from operating in New York without a state permit and approval issued by the state siting board. This would create a need for statutory changes by state legislatures and that regulatory uncertainty may delay widespread adoption and operation of these units. For this reason, it may be prudent for EPA to maintain authority to issue the nationwide conditional approval and provide the states with the authority to issue location-specific permits for MTUs. To foster nationwide consistency EPA could provide model permits for location-specific MTU permits for state use. This would provide a common permitting framework for states to use and minimize inconsistencies in state-issued permit

NYSDEC is not supportive of the permit-by-rule approach, as that provides little environmental oversight of units that are managing potentially dangerous waste. NYSDEC is also not supportive of the option of a single RCRA permit covering all activities for an MTU nationwide, as that approach does not take important site-specific concerns into account. It is important that site-specific factors, such as proximity to sensitive

receptors (e.g., schools, hospitals, drinking water supplies, etc.), be considered when approving areas where these units will be allowed to operate.

- f. Operating Records – In addition to keeping a copy of the operating records with the MTU, NYSDEC believes that there should be a requirement to also keep a copy of the MTU's operating records in electronic format. Given the reactive nature of the waste being treated by these units, the relatively small size of an MTU compared to a typical permitted hazardous waste facility, and the requirement to keep the physical copy of the operating record with the MTU, NYSDEC believes there is a higher chance of the physical operating record being destroyed during an emergency (e.g., explosion or fire).
- g. Treatment of Wastes from Off-site – Page 20001 of the rule preamble states that MTUs would not be able to treat wastes from off-site, but there are limited circumstances where NYSDEC believes it could be beneficial for MTUs to treat wastes that are not generated at the site where the MTU would operate. For example, if an MTU received a location-specific permit to operate at a municipal household hazardous waste collection facility to facilitate the disposal of items like flares and fireworks, it is NYSDEC's belief that it would be appropriate to allow the MTU to treat similar wastes from very small quantity generators that were also collected at the household hazardous waste facility.

NYSDEC appreciates the opportunity to comment on EPA's Proposed Revisions to Standards for the Open Burning/Open Detonation of Waste Explosives Rule and your consideration of the suggestions outlined in this letter. Please direct questions or follow up regarding these comments to the Hazardous Waste Compliance and Technical Support section by email (hwregs@dec.ny.gov) or by telephone (518-402-8652).

Sincerely,



Daniel J. Evans, P.E.
Director, Bureau of Hazardous Waste and Radiation Management