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

DEC 16 1985

MEMORANDUM

SUBJECT: Interpretation of Section 3008(h) of the Solid Waste Disposal Act

FROM: J. Winston Porter, Assistant Administrator
Office of Solid Waste and Emergency Response

Courtney M. Price, Assistant Administrator
Office of Enforcement and Compliance Monitoring

TO: Regional Administrators
Regional Counsels
Regional Waste Management Division Directors
Director, National Enforcement Investigation Center

As part of our effort to support case development activities undertaken by United States Environmental Protection Agency personnel, we are transmitting to you guidance on the use of Section 3008(h), one of the corrective action authorities added to the Solid Waste Disposal Act by the Hazardous and Solid Waste Amendments of 1984. As you are aware, Section 3008(h) allows the Agency to take enforcement action to require corrective action or any other response necessary to protect human health or the environment when a release is identified at an interim status hazardous waste treatment, storage or disposal facility. Because the authority is broad, both with respect to the kinds of environmental problems that can be addressed and the actions that the Agency may compel, we have produced the attached document to provide initial guidance on the interpretation of the terms of the provision and to describe administrative requirements. The document will be revised as case law and Agency policy develop. In addition, the Office of Solid Waste and Emergency Response intends to develop technical guidance on various types of response measures and the circumstances in which they might be appropriate.

In view of the need to issue RCRA permits and to ensure that the substantial number of interim status facilities expected to cease operation in the near future are closed in an environmentally sound manner, we encourage you to use the interim status corrective action authority as appropriate to supplement the closure and permitting processes. Questions or comments on this document or the use of Section 3008(h) authority in general can be addressed to Gene A. Lucero, Director of the Office of Waste Programs Enforcement (FTS 382-4814, WH-527) or Fred Stiehl, Associate Enforcement Counsel for Waste (FTS 382-3050, LE-134S).

Attachment

RCRA SECTION 3008(h)

THE INTERIM STATUS CORRECTIVE ACTION AUTHORITY

DECEMBER 16, 1985

I. INTRODUCTION

The Hazardous and Solid Waste Amendments of 1984 have substantially expanded the scope of the RCRA hazardous waste management program. One of the most significant provisions is the interim status corrective action authority, which allows EPA to take enforcement action to compel response measures when the Agency determines that there is or has been a release of hazardous waste at a RCRA interim status facility. Prior to the 1984 Amendments, EPA could require remedial action at interim status facilities by, inter alia, (1) using RCRA §7003 or CERCLA §106 authorities if an imminent and substantial endangerment may have been presented, or (2) when significant ground-water contamination was detected, calling in Part B of the RCRA permit application and requiring corrective action as a condition of the permit. The Amendments added Section 3008(h) to deal directly with environmental problems by requiring clean-up at facilities that have operated or are operating subject to RCRA interim status requirements.

The purpose of this document is to provide preliminary guidelines on the scope of Section 3008(h) and to summarize appropriate procedures. The document will be revised as case law and Agency policy develop. Other relevant RCRA guidances that may be consulted include:

- Final Revised Guidance on the Use and Issuance of Administrative Orders under Section 7003 of RCRA, Office of Enforcement and Compliance Monitoring and Office of Solid Waste and Emergency Response - September, 1984.
- Issuance of Administrative Orders under Section 3013 of RCRA, Office of Enforcement and Compliance Monitoring and Office of Solid Waste and Emergency Response - September, 1984.
- Draft Guidance on Corrective Action for Continuing Releases, Office of Solid Waste and Emergency Response - February, 1985.
- Final RCRA Ground-Water Monitoring Compliance Order Guidance, Office of Solid Waste and Emergency Response - August, 1985.

- Draft RCRA Ground-Water Monitoring Technical Enforcement Guidance Document, Office of Solid Waste and Emergency Response - August, 1985.
- Draft RCRA Preliminary Assessment/Site Investigation Guidance, Office of Solid Waste and Emergency Response - August, 1985.

II. DELEGATIONS OF AUTHORITY

On April 16, 1985, the Administrator signed delegations enabling the Regional Administrators, the Assistant Administrator for Solid Waste and Emergency Response and the Assistant Administrator for Enforcement and Compliance Monitoring to exercise Section 3008(h) authority. There are three new delegations, 8-31, 32 and 33. The first enables the Regional Administrator or the Assistant Administrator for Solid Waste and Emergency Response to determine that there is or has been a release of hazardous waste at or from a RCRA interim status facility. The second and third delegate the authority to issue orders and sign consent agreements. The authority to refer civil judicial actions is found in Delegation 8-10.

Because Section 3008(h) is quite broad, both with respect to the types of environmental problems that may be addressed and the actions that EPA may compel, delegation of Section 3008(h) authority is subject to limitations. To issue an administrative order or sign a consent agreement, the Regions must obtain advance concurrence from the Director, Office of Waste Programs Enforcement, Office of Solid Waste and Emergency Response and must notify the Associate Enforcement Counsel for Waste, Office of Enforcement and Compliance Monitoring. Until the Agency as a whole gains experience in using the new authority, this requirement is necessary to ensure that sound precedent is established and national program priorities are addressed. The Office of Waste Programs Enforcement intends to waive advance concurrence, however, for those Regions that demonstrate sufficient experience in using Section 3008(h) as indicated by the number and quality of §3008(h) orders submitted for review in the next six months. Civil judicial actions will be handled in accordance with existing procedures for referrals.

To expedite §3008(h) actions, the Regions should establish procedures for drafting and reviewing orders and referrals and clearly delineate the roles and responsibilities of Regional RCRA enforcement and program personnel (including CERCLA personnel as necessary) and the Office of Regional Counsel in those processes. Draft orders should be sent to the Chief, Compliance and Implementation Branch, RCRA Enforcement Division, Office of Waste Programs Enforcement.

Headquarters is committed to conducting timely review of §3008(h) orders. To avoid the delays associated with discussion and review of rough drafts, we ask that orders be in "near final" form when they are submitted. Generally, the orders will be examined to determine whether (1) the elements of proof are adequately defined and documented, (2) the response to be compelled is practicable and environmentally sound, and (3) the action supports national RCRA program goals. Written comments or concurrence will be provided to the Regions within ten working days of receipt.

III. SCOPE OF SECTION 3008(h)

Section 3008(h) provides:

> " (1) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under Section 3005(e) of this subtitle, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment, or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.
>
> (2) Any order issued under this subsection may include a suspension or revocation of authorization to operate under Section 3005(e) of this subtitle, shall state with reasonable specificity the nature of the required corrective action or other response measure, and shall specify a time for compliance. If any person named in an order fails to comply with the order, the Administrator may assess, and such a person shall be liable to the United States for, a civil penalty in an amount not to exceed $25,000 for each day of noncompliance with the order."

To exercise the interim status corrective action authority, the Agency must first have information that there is or has been a release of hazardous waste to the environment at or from an interim status facility. Second, the corrective action or other response measure, in the judgment of the Agency, must be necessary to protect human health or the environment. Key terms are discussed below in greater detail.

"Whenever on the basis of any information the Administrator determines ..."

The opening clause of Section 3008(h) authorizes the Agency to make the determination that there is or has been a release of hazardous waste into the environment on the basis of 'any information'. Appropriate information can be obtained from a variety of sources, including data from laboratory analyses of soil, air, surface water or ground water samples, observations recorded during inspections, photographs, and facts obtained from facility records.

The reference to a determination by the Administrator should be considered in the context of the term 'any information'. To satisfy any requirement imposed by the statute, an order should contain a specific determination. A civil referral should also be based on a written determination that there is or has been a release.

" ...that there is or has been a release...into the environment..."

The trigger for issuing §3008(h) orders and initiating civil referrals is the existence of information that there is or has been a release, which is a lower threshold than the showing of 'substantial hazard' under RCRA Section 3013 or 'imminent and substantial endangerment' under RCRA Section 7003 or CERCLA Section 106. While the statute does not define the term 'release', the Agency believes that, given the broad remedial purpose of Section 3008(h), the term should encompass at least as much as the definition of release under CERCLA. See 42 U.S.C. §9601(22). Therefore a release is any spilling, leaking, pumping,

pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment. The exemptions described in the CERCLA definition are considered inapplicable or inappropriate for RCRA purposes, however, and are not included in the RCRA definition.

The term 'environment' is also broad. The legislative history for Section 3008(h), which discusses use of the authority to respond to releases to various environmental media, makes it clear that Section 3008(h) is not limited to a particular medium. H. Rep. No. 1133, 98th Cong., 2d Sess. 111-112 (1984). The Agency will use Section 3008(h) to address releases to surface waters, groundwater, land surface or subsurface strata and air.

It is not necessary to have actual sampling data to show a release. An inspector may find other evidence that a release has occurred, such as a broken dike at a surface impoundment. Less obvious indications of release might also be adequate to make the determination. For example, the Agency could have sufficient information on the contents of a land disposal unit, the design and operating characteristics of the unit, and the hydrogeology of the area in which the unit is located to conclude that there has been a release to groundwater.

In addition to on-site information gathering undertaken specifically to support a §3008(h) action, other sources that may provide information on releases include:

- Inspection Reports.
- RCRA Part A and Part B permit applications.
- Responses to RCRA §3007 information requests.
- Information obtained through RCRA §3013 orders.
- Notifications required by CERCLA §103.
- Information-gathering activities conducted under CERCLA §104.
- Informants' tips or citizens' complaints corroborated by supporting information.

A determination that there is or has been a release does not require that specific amounts of hazardous waste or hazardous constituents be found in the environment. Quantities or concentrations of hazardous wastes or hazardous constituents should be considered when ordering interim or complete corrective actions, however, because response actions compelled by the Agency must be necessary to protect human health or the environment.

"...of hazardous waste..."

In contrast to many Subtitle C provisions, the language of Section 3008(h) refers to "hazardous waste" rather than "hazardous waste identified or listed under Subtitle C". The Agency believes that the omission of a reference to wastes listed or identified at 40 CFR Part 261 was deliberate, and Congress did not intend to limit Section 3008(h) only to materials meeting the regulatory definition of hazardous waste. The Conference Report specifically endorses the use of corrective action orders to respond to releases of hazardous constituents. H. Rep. No. 1133, 98th Cong., 2d Sess. 111 (1984). The legislative history also indicates that the new authority should be at least as broad as the corrective action authority in the federal RCRA permit program. Id. at 111-112. Those regulations address both hazardous waste and hazardous constituents. Moreover, Section 3004(u), the 'Continuing Releases' provision requiring clean-up of releases from any solid waste management unit at a treatment, storage or disposal facility seeking a RCRA permit, applies to releases of hazardous constituents as well as releases of listed and characteristic wastes. H. Rep. No. 198, 98th Cong., 1st Sess. 60 (1983). Therefore, Section 3008(h) may also be used to compel response measures for releases of hazardous constituents from hazardous or solid waste.

"Hazardous constituents" are the substances listed in Appendix VIII to 40 CFR Part 261. H. Rep. No. 198, 98th Cong., 1st Sess. 60-61 (1983). According to the legislative history for Section 3004(u), which is read in conjunction with Section 3008(h), the term also includes Appendix VIII hazardous constituents released from solid waste and hazardous constituents that are reaction by-products. S. Rep. No. 284, 98th Cong., 1st Sess. 32 (1983). It should be noted that the legislative history for the new underground storage tank provisions states that Section 3008 is not applicable to underground storage tanks regulated under Subtitle I. Such releases may be addressed by Section 7002 and Section 7003 authorities, however. H. Rep. No. 1133, 98th Cong., 2d Sess. 127 (1984). Section 3008(h) remains applicable to releases from underground tanks containing hazardous or solid waste subject to Subtitle C provisions.

"...from a facility..."

For interim status corrective action purposes, EPA intends to employ the definition of 'facility' adopted by the Agency in the corrective action program for releases from permitted facilities. The preamble to the permitting requirements for land disposal facilities indicates that the term 'facility' refers to ..."the broadest extent of EPA's area jurisdiction under Section 3004 of RCRA...[meaning] the entire site that is under the control of the owner or operator engaged in hazardous waste management." 47 FR 32288-89 (July 26, 1982). See also the Final Codification Rule. 50 FR 28712 (July 15, 1985). Therefore, the definition of facility encompasses all contiguous property under the owner or operator's control.

The permit program, as amended by Section 3004(u), requires corrective action for releases of hazardous waste and hazardous constituents from solid waste management units at a facility. EPA interprets 'solid waste management unit'

to include any discernable unit used for waste management. See 50 FR 28712 (July 15, 1985). Since the legislative history describes the interim status corrective action authority as a "supplement" to permitting authority and indicates that the interim status authority should be at least as broad as the permit authority, Section 3008(h) clearly authorizes EPA to require corrective action for any release of hazardous waste from discernable waste management units. The Agency's authority to use Section 3008(h) to address releases from solid waste management units as well as hazardous waste management units is discussed in the Final Codification Rule. 50 FR 28716 (July 15, 1985).

The language of Section 3008(h), however, suggests that Congress did not intend to limit EPA's authority to releases from discernable units. Unlike Section 3004(u), Section 3008(h) broadly authorizes corrective action for any release from a "facility". It does not require the Agency to find that a release originated in a discernable waste management "unit".

The legislative history supports this interpretation. Prior to enactment of Section 3008(h), the RCRA regulations required corrective action for releases to groundwater from permitted 'regulated units' (surface impoundments, waste piles, landfills and land treatment areas that received Subtitle C hazardous waste after a specified date). 40 CFR 264.100 and 40 CFR 264.90. Congress criticized this approach as too slow and too limited, however, and created the interim status corrective action authority to "deal directly with an ongoing environmental problem at interim status facilities." H. Rep. No. 1133, 98th Cong., 2d Sess. 110-112 (1984). Moreover, Congress clearly did not intend the authority to be limited to the scope of the existing permit program. For instance, the legislative history lists several examples of releases outside the regulatory program for which a §3008(h) action is appropriate, including

releases from waste management units not required to undertake corrective action or otherwise exempt from RCRA regulations and releases, such as air emissions, to environmental media other than groundwater. Id. at 112.

The text of the statute, the broad remedial purpose, and the clear intent to authorize action beyond the scope of the permit regulations support the position that Section 3008(h) authorizes EPA to address all types of releases of hazardous waste within a facility. As discussed previously, the term 'hazardous waste' encompasses 'hazardous constituents' from both hazardous and solid waste.

Section 3008(h) will also be used to address releases that have migrated from the facility. New Section 3004(v), which provides that EPA may issue orders requiring corrective action for releases that have crossed the facility boundary if the permission of the owner of the affected property can be obtained, supports the Agency's interpretation that such releases are subject to action under Section 3008(h). See also the Final Codification Rule. 50 FR 28716 (July 15, 1985).

In a §3008(h) order or judicial referral, Agency personnel should describe hazardous and solid waste management units within the boundary of the facility and hazardous and solid wastes (and associated hazardous constituents) managed by the facility in addition to information indicating that a release has occurred. Since Section 3008(h) unequivocally authorizes EPA to address releases from units, the order or complaint should establish some link between the hazardous constituents in a release and the hazardous or solid wastes in waste management units where possible. For example, the findings of fact might state that the facility treats, stores or disposes of certain listed Subtitle C wastes, that those wastes were listed because they contain the hazardous constituents cited in Appendix VII to 40 CFR Part 261 and that some or all of those constituents have been found in the environment, thereby indicating a release.

"...authorized to operate under Section 3005(e)..."

This clause encompasses several classes of hazardous waste treatment, storage and disposal facilities. First, facilities that have met each requirement for obtaining interim status in a timely manner are subject to Section 3008(h). With respect to those facilities brought into the hazardous waste management system when the Phase I RCRA rules went into effect, to establish interim status EPA must demonstrate that: (1) the facility was in existence on November 19, 1980, and; (2) the owner or operator complied with the requirements of Section 3010(a), regarding notification of hazardous waste activity, and; (3) the owner or operator submitted a Part A application in accordance with 40 CFR 270.10. As to those facilities in existence on the date of regulatory or statutory changes that render the facility subject to the requirement to obtain a permit under Section 3005, to establish interim status the Agency must demonstrate (1) that the facility was in existence on the appropriate date and (2) submitted a Part A permit application in accordance with the requirements of 40 CFR 270.10. If a statutory or regulatory change requires notification under Section 3010, EPA must also establish that the facility submitted the notification.

Second, Section 3008(h) applies to facilities that treat, store, or dispose of hazardous waste, but have not actually obtained interim status because the owner or operator did not fully comply with the requirements to submit a Section 3010 notification and/or a Part A. Such facilities have been allowed to operate in accordance with a formal enforcement action or an Interim Status Compliance Letter requiring compliance with Part 265 standards. Furthermore, the owners or operators are not relieved of the duty to apply for and obtain a final RCRA permit. See e.g., the notice of implementation and enforcement policy for loss of interim status under Section 3005(e), 50 FR 38947-48 (September 25, 1985).

The Agency believes that Congress intended the interim status corrective action authority to apply to such facilities. The legislative history for Section 3008(h) supports this position by making it clear that the authority can be used to address releases from units that do not have interim status, such as wastewater treatment tanks. H. Rep. No. 1133, 98th Cong., 2d Sess. 112 (1984).

Third, EPA considers Section 3008(h) to be applicable not only to owners or operators of facilities in the above two categories but also to units or facilities at which active operations have ceased and interim status has been terminated pursuant to 40 CFR Part 124 or Sections 3005(c) and 3005(e)(2) of RCRA. Section 3008(h) specifically provides that the interim status corrective action orders may include a suspension or revocation of the authority to operate under interim status, as well as any other response necessary to protect human health or the environment. Consequently, a corrective measures program can be imposed under Section 3008(h), even if a facility's interim status has been taken away as a result of an interim status corrective action order. The Agency also believes that Section 3008(h) can be used to compel responses to releases at facilities that lost interim status prior to a §3008(h) action. This approach is consistent with Congressional intent to assure that significant environmental problems are addressed at facilities that treat, store or dispose of hazardous waste but do not have a final RCRA operating or post-closure permit. H. Rep. No. 1133, 98th Cong., 2d Sess. 110-112 (1984).

Where a State is authorized to administer the RCRA program, the requirements for obtaining the State's equivalent to interim status may differ from those of the federal program. In authorized States that do not duplicate the federal procedures, hazardous waste treatment, storage and disposal facilities that have not been granted or denied a final RCRA permit are generally considered interim status facilities. Land disposal facilities that were issued State permits

after November 8, 1984 but have not yet received the federal portion of the permit applicable to continuing releases under Section 3004(u) are treated for purposes of this guidance in the same manner as interim status facilities. Similarly, hazardous waste underground injection wells that did not receive a UIC permit prior to that date will also be treated in the same manner as interim status facilities. See the notice of implementation and enforcement policy for loss of interim status under Section 3005(e). 50 FR 38947 (September 25, 1985).

"...Corrective action or such other response measure as he deems necessary to protect human health or the environment ..."

Prior to the Hazardous and Solid Waste Amendments of 1984, the term "corrective action", in the RCRA regulatory context, referred to removal or treatment in place of Appendix VIII hazardous constituents in groundwater. 40 CFR 264.100. Section 3008(h) is not restricted to remedial action for ground-water contamination, however. The statutory language and the legislative history indicate that a wide range of responses to releases to all media from waste management activities may be compelled. Financial assurance for any response measure may also be required.

The authority can be used to require implementation of one or more stages of a clean-up program, such as:

- Containment, stabilization or removal of the source of contamination,
- Studies to characterize the nature and extent of contamination and to assess exposure and health and environmental effects,
- Identification and evaluation of remedies,
- Design and construction of the chosen remedy,
- Implementation of the remedy, and
- Monitoring to determine the effectiveness of the remedy.

For example, a §3008(h) order might require that the owner or operator conduct a study to characterize the nature and extent of contamination, then select a remedy and submit a corrective action plan to EPA. The Agency and the owner or operator would then confer on the plan and amend the order to reflect any modifications. H. Rep. No. 1133, 98th Cong., 2d Sess., 111 (1984). Because a study on the nature and extent of contamination and the selection and design of a remedy may require a significant amount of time, Section 3008(h) should be employed to require interim measures as necessary to protect human health and the environment prior to completion of the study and selection of a remedy. Examples of interim remedies that could be compelled include removal of the waste or containment of the source of the contamination by lining a unit or erecting dikes. In some instances, preliminary pumping and treating of affected groundwater may be appropriate.

While the information needed to make a determination that there is or has been a release is minimal, more information may be needed to justify a specific interim or full remedy. The Administrator can require "corrective action or such other response measures as he deems necessary to protect human health or the environment." To show that a response may be necessary to protect human health or the environment, the present or potential threat posed by the release should be described. The Agency may consider a variety of factors, including the quantity of hazardous waste; the nature and concentration of hazardous constituents or other hazardous properties exhibited by the waste; the facility's waste management practices; potential exposure pathways; transport and environmental fate of hazardous constituents; humans or environmental receptors that might be exposed; the effects of exposure, and; any other appropriate factors. To compel corrective action investigations or studies, only a general threat to human health or the environment needs to be identified.

IV. ADMINISTRATIVE ACTIONS

Under Section 3008(h), the Agency can issue administrative orders or commence a civil judicial action. The decision to pursue an administrative or judicial remedy must be made on a case-by-case basis since each approach has advantages and disadvantages. An administrative order, for instance, can usually be issued quickly, while preparation for a judicial action may be more time-consuming and must be referred to the Department of Justice. On the other hand, a judicial order or consent decree can be enforced readily since the court already has jurisdiction of the matter.

EPA may issue a §3008(h) administrative order to require corrective action or any response necessary to protect human health or the environment. The order may include a suspension or revocation of authorization to operate. If any person named in the order fails to comply with the order, the Agency may impose a civil penalty not to exceed $25,000 for each day of noncompliance.

Notice to States

Section 3008(h) does not require that States be given notice of an impending action. To ensure that the Agency is fully informed of relevant facts and, in view of the Federal/State relationship, consultation with the State should usually precede an EPA action. To avoid misunderstandings, reasonable notice should be given to the State when an action is taken. The notice should include the location and a description of the facility, the names and addresses of the owners and operators, the conditions requiring a response and a description of the action that EPA will require.

Elements of Orders

Because it is the focal point in all proceedings subsequent to its issuance, the initial order must be as complete as possible. Failure to develop an adequate document may have adverse consequences if the Agency seeks judicial enforcement. All §3008(h) orders should contain the following general elements:

- A statement of the statutory basis for the order.
- Factual allegations showing that there is or has been (1) a release (2) of hazardous waste or hazardous constituents (3) into the environment (4) at or from an interim status facility. Facts indicating that the response is necessary to protect human health or the environment should also be presented.
- A determination, based on the factual allegations, that there is or has been a release of hazardous waste or hazardous constituents to the environment from an interim status facility.
- An order that clearly identifies the tasks to be performed, and a schedule of compliance accompanied by appropriate reporting and approval requirements.
- A statement informing the respondent that he has a right to request a hearing within 30 days of issuance concerning any material fact in the order or the terms of the order.
- A notice of opportunity for an informal settlement conference. It is the Agency's policy to encourage settlement of §3008(h) actions through informal discussions. The respondent should be cautioned, however, that a request for a conference does not affect the 30 day period for requesting a hearing.
- A statement that EPA may assess penalties not to exceed $25,000 per day of non-compliance with the order.

It may be appropriate to include a provision for stipulated penalties in orders on consent. Such a provision, however, should be drafted to make it clear that the stipulated penalty is not EPA's sole remedy and that Agency has not waived its statutory authority to assess penalties under Section 3008(h)(2). It is recommended that the Regions pursue judicial referrals to impose penalties for noncompliance with a §3008(h) administrative order rather than issuing a subsequent order for penalties.

Releases from liability and covenants not to sue may be sought by parties negotiating §3008(h) orders. These provisions terminate or seriously impair the Federal Government's right of action against a party. In general, the interim CERCLA Settlement Policy (December 5, 1984) may be followed. Releases generally will not be appropriate, however, where the extent of contamination, the reliability of the remedy or long-term operation and maintenance requirements are uncertain. If provided, they should be narrowly drawn. In addition, EPA personnel should exercise particular care in drafting such provisions to ensure that they do not restrict the operation and enforcement of the on-going RCRA regulatory program. Moreover, the order should also contain a provision reserving the Agency's right to take additional action under RCRA and other laws. For example, EPA should reserve the right to expend and recover funds under CERCLA; to bring imminent and substantial endangerment actions under RCRA §7003 and CERCLA §106; to assess penalties for violations of and require compliance with RCRA requirements under §3008(a); to address releases other than those identified in the order; to require further action as necessary to respond to the releases addressed in the order, and; to take action against nonparties if appropriate.

Hearing Requirement

To issue a unilateral §3008(h) order, EPA must comply with the requirements of Section 3008(b) with respect to an opportunity for a hearing. 130 Cong. Rec. S9175 (daily ed. July 25, 1984). Although procedures for §3008(a) administrative actions have been established by regulation (See 40 CFR Part 22), those regulations are not legally applicable to §3008(h) actions. Hearing procedures for §3008(h) actions are under development. Until formal guidance is available, a Region that intends to issue a unilateral order should contact the Office of Waste Programs Enforcement, Office of Solid Waste and Emergency Response.

Development and Preservation of the Administrative Record

§3008(h) orders might be reviewed in administrative or judicial proceedings. Therefore, it is essential that information required by the statute and all other relevant information or documents obtained by the Agency be compiled in an administrative record, preserved and readily retrievable. The EPA official initiating the action should maintain a file that contains the following:

- EPA investigative records, such as inspection reports, sampling and analytical data, copies of business records, photographs, etc.;
- Reports and internal Agency documents used in generating or supporting the enforcement action, including expert witness statements;
- Copies of all documents filed with the Regional Hearing Clerk or the Presiding Officer;
- Copies of all relevant correspondence between EPA and the respondent;
- Written records of conferences and telephone conversations between EPA and the respondents, and;
- Copies of all correspondence between EPA and State or other federal agencies pertaining to the enforcement action.

V. CIVIL JUDICIAL ACTIONS

Under Section 3008(h), EPA may initiate civil judicial action to compel appropriate relief, including a temporary or permanent injunction, or to enforce a §3008(h) administrative order. As noted previously, the decision to pursue administrative or judicial remedies will be made on a case-by-case basis. Generally, however, a civil judicial action may be preferable to issuance of an administrative order in the following types of situations:

- A person is not likely to comply with an order or has failed to comply with a §3008(h) order.
- A person's conduct must be stopped immediately to prevent irreparable injury, loss or damage to human health or the environment.
- Long-term, complex and costly response measures will be required. (Because compliance problems are more likely to arise during implementation of these actions than while carrying out a simple, short-term action, it may be better to have the matter already before the court for ease of enforcement.)

Other factors that could be considered include the value of a favorable decision as precedent and the need to deter noncompliance by other potential targets for EPA enforcement action under Section 3008(h).

A request to file a civil judicial action must be referred by the Assistant Administrator for Enforcement and Compliance Monitoring to the Department of of Justice. The procedures that Agency personnel should follow to develop a referral and support litigation are described in the RCRA/CERCLA Case Management Handbook (August, 1984) and the RCRA Compliance/Enforcement Guidance Manual (September, 1984).

VI. USE OF SECTION 3008(h) IN RELATION TO PERMITTING, CLOSURE AND OTHER AUTHORITIES

RCRA Permits

The pre-HSWA regulations applicable to corrective action at permitted facilities deal only with a remedial program for treatment in place or removal of groundwater contaminated by a release from a 'regulated unit'. (Prior to HSWA, the term 'regulated unit' meant a surface impoundment, landfill, land treatment unit or waste pile that operated after January 26, 1983. Enactment of new Section 3005(i), which provides that the Part 264 groundwater monitoring, unsaturated zone monitoring and corrective action requirements are applicable at the time of permitting to landfills, surface impoundments, waste piles and land treatment units that received Subtitle C hazardous wastes after July 26, 1982, necessitated a corresponding change in the definition of regulated unit). Enactment of Section 3004(u) enlarged the universe of units subject to corrective action at RCRA facilities by requiring that a facility seeking a RCRA permit address all releases of hazardous waste and hazardous constituents at any hazardous or solid waste management unit.

In addition to increasing the number and kinds of units subject to corrective action, EPA will use the Section 3004(u) authority to address releases to air, land and surface waters as well as to groundwater. Furthermore, Section 3004(v) allows EPA to require corrective action beyond the facility boundary where necessary to protect human health and the environment unless the facility owner or operator is unable to obtain permission from the owner of the affected property.

Permitting can be a lengthy process. Therefore, the interim status corrective action authority should be used to address significant environmental problems prior to issuance of the permit. With respect to 'regulated units', which cannot be permitted until the facility is in compliance with Part 270 requirements to assess ground-water contamination and develop a corrective action plan if necessary, Section 3008(h) may be particularly useful for compelling activities not addressed by the Part 265 and Part 270 regulations. For instance, interim corrective action measures could be required prior to permit issuance. For releases from solid waste management units and hazardous waste management units other than 'regulated units', Section 3008(h) may be used to compel interim measures, studies to characterize the nature and extent of contamination and the threat posed by the release, selection of remedy and design, construction and implementation of the remedy.

If an interim status facility is seeking an operating permit or will be required to obtain a post-closure permit, any §3008(h) action at that facility should be designed to meet the needs of the permitting process to the extent possible. If all necessary steps in a corrective measures program will not be completed prior to issuance of a permit, compliance schedules in the order should be developed so that they can be readily incorporated in the permit.

RCRA Closures

EPA believes that the interim status corrective action authority will be useful in assuring environmentally sound closures of RCRA hazardous waste management units. Section 3008(h) may be used to supplement the interim status closure regulations. Approval of a closure plan does not limit the Agency's ability to use Section 3008(h), as well as other applicable corrective action authorities, to deal with releases of hazardous waste or hazardous constituents. In view of the number of interim status closures anticipated as a result of new statutory and regulatory requirements, the Regions are encouraged to employ the interim status corrective action authority to assure that RCRA hazardous waste management units are closed in a manner that properly protects human health and the environment.

Other Enforcement Authorities

Because of the broad scope of Section 3008(h) and the variety of activities that can be compelled, the interim status corrective action authority may be employed in conjunction with other enforcement authorities, although it may be appropriate to issue separate,concurrent orders due to differing hearing requirements. For example, where a violation is associated with a release of hazardous waste or hazardous constituents, a Section 3008(a) action should be used to require compliance with the regulation and assess penalties while a Section 3008(h) action could be employed to compel response actions that go beyond regulatory requirements. Section 3013, which allows the Agency to compel owners or operators of treatment, storage or disposal facilities to conduct certain types of studies, may be used when the presence of hazardous waste may present a substantial threat but EPA does not have sufficient information to make a determination that there is or has been a release.

With regard to imminent and substantial endangerment actions, the legislative history makes it clear that enactment of Section 3008(h) does not alter the Agency's interpretation of Section 7003. H. Rep. No. 1133, 98th Cong., 2d Sess. 111 (1984). RCRA §7003 or CERCLA §106 actions are appropriate if conditions at an interim status facility may present an imminent and substantial endangerment and the Agency needs to move quickly to address the problem. The 'imminent hazard' provisions of RCRA and CERCLA may be especially helpful if the Agency wishes to take action against responsible parties other than or in addition to the current owner or operator.

VII. RESERVATION

The policies and procedures set forth herein and the internal office procedures adopted pursuant hereto are intended solely for the guidance of United States Environmental Protection Agency personnel. These policies and procedures are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States. The Agency reserves the right to take any action alleged to be at variance with these policies and procedures or that is not in compliance with internal office procedures that may be adopted pursuant to these materials.