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

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

AUG 31 1987

MEMORANDUM

SUBJECT: Use of RCRA Section 3008(a) and 3013 Authorities in the Corrective Action Process and Off-Site Disposal Requirements of Section 121 of SARA

FROM: Gene Lucero, Director
Office of Waste Programs Enforcement

TO: Jeff Zelikson, Director
Toxics and Waste Management Division, Region IX

In response to your July 13, 1987 memorandum to J. Winston Porter, your July 29, 1987 memorandum to Michael Kilpatrick, and discussions held with your staff during the Region IX Regional Implementation Review, I am writing this memorandum to address questions regarding the use of RCRA's §3008(a) and 3013 authorities to address corrective action at hazardous waste management facilities in general and, in particular, to meet off-site disposal requirements in §121 of SARA.

The initiation of enforcement actions under §3008(a) is predicated on a violation of applicable regulatory or statutory requirements of Subtitle C of RCRA. Therefore, an action taken under §3008(a) not based on a violation of the applicable requirements, would not be enforceable under the statutory provisions of RCRA. The use of this authority at an interim status facility is usually based on a violation of 40 CFR Part 265. Under the broad label of corrective action, this includes the characterization of the rate and extent of migration of hazardous waste constituents (i.e., those identified in Appendix VII of 40 CFR Part 261) in the uppermost aquifer. It follows that failure by the facility to conduct this limited assessment could be addressed using §3008(a) authorities. Additionally this assessment is limited to units at a facility which have received hazardous waste after November 19, 1980. It does not include other units managing solid waste at the facility.

At RCRA permitted facilities, actions taken under the authority of §3008(a) can only be used to enforce requirements or conditions established in the permit which are based on regulatory requirements of 40 CFR Part 264. This authority most certainly cannot be used to add new conditions to existing RCRA permits or to circumvent the legitimate procedures established to modify permits (40 CFR Part 124) whether that modification is necessary as a result of new information which comes to light or deficiencies in the original permit. If a permit is written with specific yet open-ended conditions (i.e., requiring the facility to notify EPA once a new release is identified and to initiate predetermined corrective action investigations), then it may be possible to use a §3008(a) order when the facility fails to comply with those conditions. However if the conditions were never stipulated in the original permit, §3008(a) cannot be used since there is nothing to be in violation of.

Section 3013 authority is limited to "monitoring, testing, analysis and reporting", similiar to that envisioned in the RFA and RFI phases of an overall corrective action program. No corrective measure study or implementation is contemplated or authorized under this authority. In addition, this authority requires a substantially higher endangerment threshold than that prescribed for §3008(h). Specifically, §3013 requires the release to present "a substantial threat to human health or the environment" whereas §3008(h) only requires "information that there is or has been a release" requiring some response necessary to protect human health or the environment.

When Congress reauthorized CERCLA in 1986, it inserted a key provision in §121 relating to off-site disposal of Superfund wastes. This provision was meant to ensure that as EPA cleaned up waste from one site and removed that waste to another facility for treatment, storage or disposal, the Agency did not contribute to the creation of another site which would need remediation at a later date. Your discussion that §3008(a) could be used to bring a commercial land disposal facility into compliance with off-site disposal requirements, ignores the critical point that §3008(a) is predicated on a violation of a permit requirement, a statutory requirement, a regulatory requirement, or another order. Therefore, if one insists on using §3008(a) to meet the off-site disposal requirements, full physical compliance with the specified "relief" is necessary to bring the facility into compliance with the off-site disposal requirements. Using permit conditions or §3008(h) orders allows for orderly corrective action investigation, study and implementation phases, through enforceable schedules, and is acceptable for purposes of meeting the off-site disposal requirements. An order under §3013 can also bring a facility into compliance with off-site requirements, if the facility only needs to perform an RFA or RFI study.

Finally, you have raised a concern over the use of scarce RCRA resources to simply "cite a new authority; not to change any of the conditions", (i.e., the issue of form over substance). The objective of the off-site disposal capacity initiative is to ensure that there is ample commercial waste management capacity to handle Superfund clean-up wastes. When enforcement authorities are misused at interim status or permitted facilities to address corrective action beyond the scope of the authority or to make modifications, amendments or additions to permits, the status of that facility under the off-site disposal requirements or even the validity of part or all of the RCRA permit is called into question. A third party, such as a competitor bidding on a Superfund contract or a local group of concerned citizens, could challenge that facility's eligibility under §121 of SARA or that facility's right to even operate with a deficient or illegally modified permit. We can not be penny-wise now with our resources, only to find out that we have ended up pound-foolish later when we have to go back and rewrite orders and permits while environmentally acceptable facilities languish, unavailable for use.

I trust that you realize the seriousness with which we view these issues. We need well regulated and well operated facilites to manage both the routinely generated waste from our industries and waste from the clean-up of sites under the Superfund program.

cc: Phil Bobel