



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

APR 27 2010

MEMORANDUM

SUBJECT: Transmittal of the National Enforcement Strategy for RCRA Corrective Action

FROM: Cynthia Giles, Assistant Administrator
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Mathy Stanislaus, Assistant Administrator
Office of Solid Waste and Emergency Response

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TO: Regional Administrators, Regions I-X
Compliance/Enforcement Division Directors, Regions I-X
RCRA/Superfund Division Directors, Regions I-X
Regional Counsel, Regions I-X

This memorandum transmits the National Enforcement Strategy for RCRA Corrective Action (NESCA), which is being issued jointly by the Office of Enforcement and Compliance Assurance (OECA) and the Office of Solid Waste and Emergency Response (OSWER). NESCA provides an enforcement strategy to the Regions and authorized States/Territories to assist them in achieving the 2020 Corrective Action Goal of attaining remedy construction at 95 percent of the 3,747 facilities subject to the Resource Conservation and Recovery Act (RCRA) Corrective Action requirements to clean up environmental contamination at RCRA hazardous waste treatment, storage and disposal facilities.

NESCA identifies and highlights a number of enforcement tools that can be used, as appropriate, to achieve the 2020 Corrective Action (CA) Remedy Construction Goal as well as the continuing Environmental Indicator (EI) goals, i.e., human exposures under control and contaminated groundwater under control. It is designed to complement other tools, such as compliance assistance, to help facilities achieve timely and protective cleanups. NESCA will be especially useful in addressing facilities that have not made meaningful or timely progress in achieving remedial objectives for various reasons.

NESCA is the product of a national workgroup consisting of representatives from all ten Regions, the Association of State and Territorial Solid Waste Management Officials (ASTSWMO), and EPA Headquarters offices including OECA, OSWER, and the Office of General Counsel (OGC). NESCA provides a comprehensive enforcement approach to help achieve the 2020 CA Goals, and consists of five components.

NESCA's first component provides direction to the Regions and authorized States for identifying, assessing, and prioritizing those facilities that merit CA enforcement and taking appropriate enforcement actions to move facilities along the remediation process. NESCA identifies a process for the Regions to assess their 2020 facilities and focus on those facilities that merit enforcement consideration in order to achieve timely remedy construction.

The second component of NESCA emphasizes the need for robust communication and coordination between the Regions and States, including the development of communication protocols. The third component provides support to the Regions and States to address special considerations that arise in the enforcement arena, including the importance of enforceable requirements in permits and orders, the use of enforceable "streamlined" orders, dealing with companies having financial difficulties, considerations for the use of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as Superfund), the enforceability of institutional controls, and increasing the transparency of enforcement efforts. The last two components of NESCA address training and other support to our regulatory partners and the development of improved measures to capture both Federal and State enforcement accomplishments in this area.

Importantly, NESCA comports with and furthers the Administrator's priorities, including, the national goals and initiatives of OECA and OSWER. NESCA will focus enforcement attention on sites that are in particular need of a clear schedule so that cleanup at an otherwise "stuck" CA facility is not delayed and the public's exposure to hazardous chemicals from hazardous waste sites will be minimized. NESCA promotes shared EPA and state accountability and implementation. NESCA, which will be available on EPA's Web site, will provide transparency throughout the process. Consistent with OSWER's Community Engagement Initiative, NESCA affirms that community involvement and public participation should be considered at all stages of the CA process. Finally, NESCA is the key RCRA component of EPA's Integrated Cleanup Initiative, through which EPA is working to identify and implement opportunities to integrate and leverage the Agency's cleanup authorities, including RCRA corrective action.

Regions and authorized states/territories should begin implementing NESCA immediately. We encourage Regions and authorized States/Territories to share their experiences implementing NESCA as well as examples of agreements and orders, model language and other information regarding use of NESCA. Regions should also integrate NESCA into their 2020 Corrective Action Strategies and submit the updated strategies to OECA and OSWER by October 29, 2010.

Please direct any questions about NESCA to Peter Neves, neves.peter@epa.gov or 202-564-6072, or Phil Page, page.phil@epa.gov or 202-564-4211, of the OECA staff.

Attachment

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National Enforcement Strategy for Corrective Action

An Enforcement Framework to Help Achieve EPA's 2020 RCRA Corrective Action Goal

I. INTRODUCTION

This document sets forth the United States Environmental Protection Agency's (EPA) National Enforcement Strategy for Corrective Action (NESCA) under the Resource Conservation and Recovery Act (RCRA). Under RCRA the process for cleaning up environmental contamination associated with RCRA hazardous waste treatment, storage, and disposal facilities is known as Corrective Action (CA). EPA and authorized States¹ work within the federal RCRA CA program and equivalent State programs to protect human health and the environment by identifying releases that pose a risk, characterizing the extent of releases, selecting and implementing the appropriate remedy, and providing long-term oversight for final facility-wide remedies.

The goal of NESCA is to promote and communicate nationally consistent enforcement and compliance assurance principles, practices, and tools to help EPA and States ensure that 95% of the facilities that make up the 2020 CA universe of facilities (currently there are 3,747 facilities in this universe) attain CA "remedy construction" of protective cleanups by 2020 (2020 CA Goal). Remedy construction is the term used for the stage at which the physical components of the final RCRA CA remedy for a facility are in place and are functioning correctly. It is analogous with the term "construction complete" which is often used in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) context at Superfund sites. As of April 2010, 33% (approximately 1,200 facilities) of the 2020 CA universe of facilities (2020 CA Universe) have reached the 2020 CA Goal.

Implementing NESCA will help:

- Ensure facility accountability;
- Provide a level playing field among regulated facilities;
- Promote open and consistent communication among EPA, States, regulated facilities, the public, and other stakeholders;
- Promote better use of the range of enforcement and compliance tools available to EPA and States to address enforcement and compliance issues;
- Provide opportunities for consistent and joint EPA/State enforcement activities incorporating shared approaches among the regulators in prioritizing and targeting for enforcement; and
- Provide opportunities for enforcement actions using authorities found in statutes other than RCRA or in combination with RCRA, such as joint RCRA/CERCLA orders.

¹ As of April 2010, 42 State RCRA programs are authorized for RCRA CA. The States that do not have authorized RCRA CA programs are: Alaska, Iowa, Kansas, Maryland, Mississippi, New Jersey, Nebraska, and Pennsylvania. Territories are also eligible for CA authorization; currently Guam is the only such authorized territory. Generally, for purposes of this document, the term States refers to authorized States and Territories.

EPA's Strategic Plan² identifies the measurable environmental and human health outcomes the public can expect and describes how EPA intends to achieve those results. Pursuant to the Government Performance and Results Act (GPRA), EPA has set CA goals for cleaning up RCRA hazardous waste treatment, storage, and disposal facilities.

Through 2005, the RCRA CA Program's goals focused on achieving two CA Environmental Indicators (EIs): human exposures and migration of contaminated groundwater under control. The human exposures under control EI ensures that people near a facility are not exposed to unacceptable levels of contaminants; the migration of contaminated groundwater under control EI ensures that further groundwater resources are not contaminated. These EIs are interim measures, which reflect current conditions at a facility and are not intended as final remedies. The RCRA Cleanup Baseline for the 2005 goals was set at 1,714 facilities. EPA and States successfully achieved these EI goals at most of the targeted facilities. For the 2006 to 2008 goals, EPA expanded its focus beyond the EIs to include final remedy goals (i.e., final remedy decisions and remedy constructions). The baseline for 2006 to 2008 was expanded to 1,968 facilities.

NESCA identifies and highlights enforcement tools which may be appropriate to achieve the 2020 CA Goal as well as the continuing EI goals. It is designed to complement other tools, such as compliance assistance to help facilities achieve and remain in compliance with RCRA CA requirements. NESCA should be especially useful in dealing with facilities "stuck" in the CA process, that is, facilities that have made no meaningful progress for three years in achieving remedial objectives. NESCA may also be useful in dealing with financially marginal or bankrupt facilities. The costs of completing remedy construction generally will be significantly greater than the costs for a facility to achieve its EI goals and, accordingly, stronger and more holistic enforcement efforts by regulators may be needed to achieve the 2020 CA Goal. Implementation of NESCA should not hinder CA at a facility or disrupt EPA or State CA oversight. Rather, implementation of NESCA should complement any ongoing CA and help move the process closer to the 2020 CA Goal.

NESCA is a component of EPA's Integrated Cleanup Initiative (ICI). Under ICI, EPA is working to identify and implement opportunities to integrate and leverage EPA's land cleanup authorities, including RCRA CA, to accelerate cleanups, address a greater number of contaminated sites, and get sites into productive use while protecting human health and the environment.

II. COMPONENTS OF NESCA

To provide a comprehensive enforcement approach, NESCA identifies five components that are essential to success in achieving the 2020 CA Goal.

- Identify and prioritize facilities for CA enforcement and take appropriate enforcement actions to move facilities along the remediation process. NESCA identifies a process for Regions to assess their 2020 CA Universe and focus on those "stuck" facilities that merit enforcement consideration in order to achieve timely remedy construction. Although the

² See <http://www.epa.gov/ocfo/plan/plan.htm>.

prioritization process is designed for Regions that do not have such a process, States also may use it to help inform their decisions about where to apply their resources for their portion of the 2020 CA Universe.

- Emphasize the need for robust communication and coordination between Regions and States. As noted above, NESCA is designed to complement and supplement the efforts of Regional and State RCRA CA programs as well as the communication and coordination between those programs to identify and address CA problems at facilities in order to jointly achieve the 2020 CA Goal.
- Provide ongoing support to Regions and States to address special considerations that arise in the enforcement arena. This section of the document addresses some of the issues already identified, such as the importance of enforceable requirements in permits and orders, the use of enforceable “streamlined” orders, dealing with companies having financial difficulties, considerations for the use of CERCLA, the enforceability of institutional controls, and increasing the transparency of enforcement efforts. As additional issues are encountered, we plan to supplement this effort.
- Provide training and other desired support to our regulatory partners.
- Develop improved measures to capture both federal and State enforcement accomplishments in this area.

III. RELEVANT RCRA AUTHORITIES

A. Statutory Authorities

The RCRA program is implemented primarily by authorized States. Currently, 42 States are authorized for RCRA CA. Although authority to require CA at interim status facilities under RCRA section 3008(h) is not part of a State’s authorized program, many States have analogous authorities to implement CA activities at non-permitted facilities. Depending on a State’s relationship with a Region, a State often assumes the lead in implementing CA at non-permitted facilities.

In the absence of an authorized State program, or in certain situations for a non-permitted facility, Regions implement the RCRA CA program. Regions also may implement parts of the authorized State program as a result of work sharing agreements with their States. Moreover, under RCRA, EPA retains enforcement authority even in authorized States (e.g., RCRA sections 3007, 3008(a), 3008(h), 3013, and 7003) and is responsible for oversight of, and assistance to, State programs. The relevant RCRA statutory authorities for implementing NESCA are RCRA sections:

- 3003(u) and (v) – CA Permits;
- 3007 – Information Gathering and Inspections;
- 3008(a) – Compliance Orders;
- 3008(h) – Interim Status CA Orders;
- 3013 – Monitoring, Analysis, and Testing Orders; and
- 7003 – Imminent Hazard Orders.

Appendix A contains brief descriptions of these statutory authorities and their use to date. It highlights some of the key aspects of the authorities, but is not a thorough examination of them. Using CERCLA and analogous State enforcement authorities to achieve the 2020 CA Goal may also be appropriate. (See Section VI for a discussion on the use of CERCLA authorities.)

B. Regulatory Authorities

The 1984 Hazardous and Solid Waste Amendments (HSWA) to RCRA expanded EPA's authority to address cleanup at treatment, storage, and disposal facilities. RCRA sections 3004(u) and (v) provided new CA authority at permitted facilities, while RCRA section 3008(h) provided authority to issue CA orders at interim status facilities. EPA codified the CA authority of RCRA sections 3004(u) and (v) (40 C.F.R. §§ 264.90(a)(2), 264.101, 270.60(b), and 270.60(c)) in two final rules published on July 15, 1985 (50 Fed. Reg. 28702) and December 1, 1987 (52 Fed. Reg. 45785), respectively. EPA then proposed detailed substantive and procedural requirements to implement the CA program on July 27, 1990 (55 Fed. Reg. 30798). Although the Agency promulgated a few elements of the July 1990 proposal on February 16, 1993 (58 Fed. Reg. 8658)³, the remainder of that proposal was not made final.

On May 1, 1996, EPA published an Advance Notice of Proposed Rulemaking (ANPR) (61 Fed. Reg. 19432). That ANPR provided guidance on areas of the CA program that were not addressed by the 1990 proposal, and replaced the 1990 proposal as the primary guidance for much of the CA program.⁴ For several reasons, EPA later withdrew most provisions of the 1990 proposed rule in an October 7, 1999 Federal Register notice (64 Fed. Reg. 54604).⁵ As a result, EPA and States implement the CA program primarily through guidance. The May 1996 ANPR remains the primary guidance document for the CA program.

C. Application to Federal Facilities

The RCRA statutory and regulatory authorities discussed above apply equally to federal facilities. The Federal Facilities Compliance Act (FFCA) of 1992 amended RCRA section 6001 to provide a clear waiver of sovereign immunity for EPA and State enforcement at federal facilities. Under FFCA, federal facilities are subject to State hazardous waste laws and requirements to the same extent as any non-federal facility. As such, all federal facilities are not only subject to injunctive relief, but also to penalties for failing to comply to the same extent and in the same manner as any person under RCRA. Federal facilities represent 5% (203 out of 3,747) of the facilities in the 2020 CA Universe. Unique factors and challenges in selecting and

³ These provisions included regulations governing Corrective Action Management Units and Temporary Units, and a definition of "facility" for CA purposes.

⁴ See *Use of the Corrective Action Advance Notice of Proposed Rulemaking as Guidance* (Jan. 17, 1997).

⁵ As stated in the summary of the October 1999 Federal Register notice:

We plan to withdraw most of the proposed rule because we have determined that such regulations are not necessary to carry out the Agency's duties under sections 3004(u) and (v). Additionally, attempting to promulgate a comprehensive set of RCRA regulations at this time could unnecessarily disrupt the 33 State programs already authorized to carry out the Corrective Action Program in lieu of EPA, as well as the additional State programs currently undergoing review for authorization. This decision will end uncertainty related to this rulemaking for State regulators and owners and operators of hazardous waste management facilities.

implementing cleanups often exist at federal facilities due to large facility size, large number of solid waste management units, involvement with multiple cleanup programs, and defense and national security demands.

IV. REGIONAL ASSESSMENT, TARGETING AND PRIORITIZATION TO HELP ACHIEVE THE 2020 CA GOAL

This section provides a framework for Regions to use in assessing and prioritizing EPA-lead facilities in the 2020 CA Universe that may be appropriate targets for CA enforcement. Regions and States should decide on an enforcement lead for those facilities that warrant an enforcement action. In authorized States, with the exception of EPA-lead CA facilities under a federal permit or federal CA order, it is generally expected that the State will be the enforcement lead for all CA enforcement activities within that State. Although this section is intended for EPA-lead facilities, States may find it to be a helpful guide for their assessment and prioritization efforts.

A. Assess Facilities

Each Region should assess the current status of its EPA-lead 2020 CA Universe to identify those facilities that are “stuck” in the CA pipeline. Each Region should meet with its States to coordinate these assessments.

B. Prioritize for Appropriate Enforcement Follow-Up

To establish potential enforcement targets, Regions are encouraged to categorize and prioritize their facilities pursuant to the scheme set forth below. Within each of these categories, Regions are encouraged to focus attention on identifying and addressing disproportionate impacts on minority, low-income, tribal and other vulnerable populations. Appendix B identifies a variety of mapping tools that Regions, States, and communities can use to view and gather information to identify Environmental Justice (EJ)⁶ concerns and issues. There is currently no national requirement to use any specific tool for priority setting or reporting. Regions should identify in their RCRA CA 2020 Strategies (see section C below) what EJ tools they plan to use to address EJ concerns in their prioritization.

1. Focus and prioritize work on facilities not under a permit or order. For facilities which are not under a federal CA order or alternate mechanism, such as a State cleanup order, Regions should consider issuing an appropriate order to ensure compliance with the 2020 CA Goal. Depending on the size of this category of facilities, Regions may need to further refine this category. Three categories that merit significant consideration are: (1) those facilities where there has been insufficient movement through the remediation pipeline (e.g., where a facility has not moved beyond interim measures or forward in the RCRA Facility Investigation (RFI)/Corrective Measures Study (CMS) process over a three-year

⁶ Environmental Justice (EJ) is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

period); (2) those facilities designated as high risk; and (3) federal facilities, given their size and complexity.

2. Focus on facilities under a federal CA order that are out of compliance with the order. For facilities not in compliance with an order, initiate enforcement proceedings (e.g., enforcement of stipulated penalties) to enforce the requirements of the order or its attached documents, such as workplans or compliance schedules. Similarly, where a State has requested Regional assistance for a facility out of compliance with a State order, EPA should focus on such facilities to determine whether a federal enforcement action is warranted.

3. Focus on facilities under State or federal permit that are out of compliance with the permit. Regions should focus on facilities out of compliance with a federal permit. Similarly, where a State has requested Regional assistance, EPA should focus on facilities out of compliance with a State permit. For those facilities out of compliance with their permit, Regions should initiate enforcement proceedings to enforce the requirements of the permit, including attached documents such as workplans or compliance schedules.

4. Focus on facilities where federal permits are being renewed or modified. Regional enforcement personnel should work with permitting personnel to ensure that the permit contains clear schedules and clear enforcement processes to help achieve remedy construction in a timely manner.

Other factors that may be relevant when prioritizing facilities for enforcement include:

- The nature and extent of the facility's contamination risk;
- The financial condition of the company to complete both short-term and long-term CA, the cost estimate for the CA activities, and the financial assurance mechanisms and coverage;
- The number of units at the facility;
- Whether the facility is included in a priority sector (e.g., wood treaters, plating operations, and mineral processing);
- Whether property transfer or redevelopment actions at the facility are anticipated;
- The lack of enforceable requirements in the facility's existing permit or order; and
- Any concerns associated with permitting of the facility.

C. Update the Enforcement Component of Regional RCRA CA 2020 Strategies

After assessing the Region's EPA-lead 2020 CA Universe and evaluating these facilities using the above prioritization scheme, Regions should develop or update the enforcement component of their existing Regional RCRA CA 2020 Strategy. Each Region (in consultation with States) should develop its Strategy to meet the needs of its portion of the 2020 CA Universe

and identify an appropriate number (e.g., 5-10) of facilities per year to target for enforcement.⁷ Regions should submit their updated RCRA CA 2020 Strategy to the Office of Resource Conservation and Recovery (ORCR) and the Office of Site Remediation Enforcement (OSRE) by October 29, 2010. Regions are also encouraged to develop facility-specific enforcement and site management plans, which highlight the need for close coordination and communication among EPA program personnel, regional attorneys, and State counterparts.

V. COMMUNICATION AND COORDINATION AMONG FEDERAL AND STATE REGULATORS

This strategy encourages EPA and States to continue to work in partnership to achieve the overarching 2020 CA Goal and emphasizes the need for close communication and coordination between EPA and States to help meet this goal. NESCA recognizes that Regions and States have developed a working relationship and that some have established specific agreements for communication in implementing RCRA CA programs over the years. However, some have not established such agreements, and establishing them should be beneficial, particularly in establishing timeframes to move a facility through the CA process. In addition, as the push to reach the 2020 CA Goal intensifies, there may be unique and limited occasions when both Regions and States need to enhance their normal communication efforts, especially if both are working with a facility to meet its 2020 CA Goal.

These enhanced coordination and communication efforts can be highlighted in a *communication protocol* agreed to by all regulators (EPA, States, and/or Tribes) at the beginning of the enforcement process. The communication protocol would be designed to facilitate effective communication and coordination related to a specific facility or to a group of facilities, as needed and appropriate. If programs other than RCRA are involved, then the principles of communication and coordination among all associated programs should apply to these other programs. Regions and States should discuss the status of facilities and decide on an enforcement lead for those facilities that warrant an enforcement action. Such a communication protocol, whether it is in an email agreed to by all regulators or a more formal work agreement, can provide a common sense approach to establishing open and honest lines of communication, as well as a viable framework for communication and collaboration in more complex CA situations. For example, a communication protocol can highlight the need for regularly scheduled conference calls and documentation through email exchanges, as well as more formal communications via letters, reports, data representations, graphs, charts, photographs, etc. Moreover, the dialogue between the regulators resulting from enhanced communication could highlight several reasons why supplemental enforcement actions by non-lead agencies could benefit the lead regulator, such as leveraging resources including the use of alternative or additional remediation statutes, work sharing, and addressing complex cases with a team approach.

Establishing a communication protocol helps prevent confusion on the part of the regulated facility, but also helps prevent undercutting the authority or policies, rules, regulations, or guidance of the lead agency at other facilities and in other cases by the precedents

⁷ This is merely a recommended number and may be different depending on the resource concerns of a Region. It is not a GPRA or ACS commitment.

which may be set. It can also establish mechanisms to address issues between Regions and States. Although this may appear to be “process heavy,” by establishing good communications up front, technical, legal, or perhaps financial issues that may affect the remediation process can be resolved sooner than if a protocol was not established.

A communication protocol can enhance the combined effort of the regulators to ensure CA enforcement activities are appropriately flexible and tailored to facility-specific conditions and utilized at the request of, or in consultation with, the primary program implementer. For example, if a facility conducting RCRA CA under a State issued post-closure permit refuses to complete a RFI or CMS workplan in a timely and appropriate manner, the State may request EPA to commence an enforcement action to compel the facility to perform the required task. In this scenario, where the program implementers have reached agreement in advance, it may be envisioned that enforcement involvement would be limited to compelling the submittal of the required plan. Upon submittal of the information, the State could continue to be the lead program for review, oversight, and approval of CA activities at the facility.

Conversely, in a different situation, where a facility not under a permit or order requires long-term CA enforcement oversight, a State that does not have the resources to issue an order or a permit may request Regional assistance. A communications protocol could be established between the requesting State and Region to identify the CA oversight responsibilities pursuant to an appropriate enforcement mechanism (e.g., a RCRA section 3008(h) order) until the State has the resources to issue a permit for the facility. Unlike the previous example where Regional support is more defined and limited, this is a scenario that could require Regional involvement in the remediation process lasting several years. Effective and enhanced communications as established by a communication protocol between the regulators would be essential to ensure that Regional-lead activities are consistent with State requirements so as to facilitate the smooth transition of oversight back to the State.

In a State not authorized for CA, it is expected that the Regional CA program would be substituted for the State in the example descriptions. It is also generally expected that the Regional CA program will coordinate with the State program in accordance with established CA communication protocols in effect for that Region and State. NESCA also encourages Regional enforcement programs to evaluate cleanup activities during inspections, as well as base program compliance.⁸ In specific situations such as the examples noted above, facility specific communication protocols may be needed to assist in moving a facility along and these may temporarily supplant the Regional and State coordination efforts regarding that facility. Again, a communication protocol can help establish the lines of communication and enable the process to move forward when disagreements or challenges arise.

It is also important to establish communication protocols with other programs that may be involved at a facility (e.g., CERCLA or a State brownfields program) and with other agencies or departments that may have an interest in the facility (e.g., Department of Defense or an economic development agency). Such protocols can describe a form of joint oversight or simply enhance coordination for the duration of the federal order. In addition, EPA and States may

⁸ See, e.g., *RCRA Compliance Monitoring Strategy* (Jan. 2010), at 5, which is expected to be available in the near future at <http://www.epa.gov/compliance/monitoring/programs/rcra/hazwaste.html>.

decide to issue a joint CA enforcement order and a communication protocol can help ensure that the on-going administration of the joint order is conducted in a smooth and productive manner.

VI. SPECIAL ENFORCEMENT CONSIDERATIONS

A. Importance of Enforceable Requirements and Clear Process for Pursuing Enforcement

When considering enforcement at facilities under a permit or order, regulators should review the document to determine if enforceable requirements and deadlines are clearly identified and included. If the facility has not met certain deadlines or other requirements, then the enforcement lead should identify the missed deadlines or other requirements, notify the facility and request action to meet the requirements. Within a reasonable time, if no action has been taken to meet the requirements, the regulators should begin proceedings to enforce the actions required. While not required, notifying facilities and allowing them reasonable time to come into compliance alerts the facilities that any pattern of missed deadlines is unacceptable and more stringent enforcement actions may ensue. However, if there is a continuing pattern of missed deadlines by the facility or if the violations result in increased risk or harm, then the lead regulator may need to take direct enforcement action without prior notification to the facility.

A variety of enforcement tools are available to EPA and State regulators to help achieve the goal of final remedy construction at the 2020 CA Universe. In January 2001, EPA issued a guidance document, “Guidance on Enforcement Approaches for Expediting RCRA Corrective Action,” to assist in achieving EI goals, and the principles and concepts identified in it can also be used to help achieve the 2020 RCRA CA Goal.⁹ Regional and State project managers are encouraged to use these various enforcement approaches to provide clear and enforceable CA requirements, which provide incentives for compliance with CA permit or order obligations.

EPA and States may consider streamlining an order to help achieve the final remedy construction goal for the 2020 CA Universe. Modified or streamlined orders have been used for many years to successfully facilitate CA progress, but generally would not be appropriate in addressing a situation at a facility that has not been making sufficient progress. While providing flexibility to the facility in meeting CA requirements, streamlined orders should still provide for protection of human health and the environment through inclusion of clear and enforceable CA requirements. Streamlined orders can be enforced, as more traditional orders are enforced, by providing penalties (e.g., stipulated penalties) for missed deadlines or submission of inadequate deliverables.

⁹ *Guidance on Enforcement Approaches for Expediting RCRA Corrective Action* (Jan. 2, 2001) at 6, <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/exp-correct-mem.pdf>.

Streamlining merely means reducing some aspect of the remediation or administrative process identified in an enforceable order while still protecting human health and the environment as do more traditional orders. Options for streamlining an order may include:

- Reducing EPA or State oversight, if the facility has a history of complying in a timely and acceptable manner with the provisions of an order or permit;
- Using previously submitted data that is still accurate and does not need to be re-measured or re-calculated;
- Abbreviating statements of facts and conclusions of law; and
- Shortening work and implementation time frames.

EPA and States should carefully evaluate any CA enforcement approach being contemplated, to ensure that it is appropriate, given the specific characteristics of the facility.

Other efforts to move facilities along the remediation pipeline through a streamlined process could also involve grouping units at a facility and consolidating settlements. Below are some examples of options for moving a facility through the CA pipeline.

- Determine whether one RCRA section 3013 order requiring investigation could be used for a group of similar types of units that released similar constituents at a facility. This investigation of a group of similar units can determine whether a facility-wide technical approach is feasible.
- Consider the use of a global settlement to handle similar cleanup issues at a variety of facilities owned or operated by a single entity. To avoid multiple enforcement actions by multiple regulating authorities, the common owner or operator may prefer to enter into a global settlement and address all of the CA issues in a single document. Global settlements require a high level of communication and coordination among the regulators who should consult and agree to a plan that avoids duplication of efforts. However, they also bring efficiencies to both the enforcement process as well as to the regulated facilities.
- Consider the use of facility “Master Plans”¹⁰ incorporated into orders, providing both enforceable deadlines and flexibility to “fast-track” or “slow-track” CA at various areas of the facility. Such flexibility can facilitate CA final remedy construction, as well as the redevelopment and beneficial reuse of the facility. Orders can require a facility to submit a Master Plan, with enforceable deadlines, every quarter along with its quarterly progress report. EPA or the State would then decide whether to accept any new proposed deadlines, alleviating the problem of old or “stale” deadlines. The Master Plan keeps deadlines fresh, reasonable, and enforceable without requiring staff to constantly modify

¹⁰ A “Facility Master Plan” is a planning document (usually a one-page spreadsheet) for facility-wide CA that lists each specific CA goal and the interim steps required to achieve each goal. Each interim step has a completion deadline. It supplements the typical RFI or Corrective Measures Implementation workplan. However, unlike a RFI or CMI workplan, the Facility Master Plan is submitted on a regular basis (usually quarterly). The deadlines in the Master Plan are enforceable through the Consent Order, and may carry stipulated penalties if missed. The company can propose new deadlines in the next Master Plan submittal if needed, but EPA has the option to reject those new deadlines if missed deadlines are becoming a problem.

the order. Moreover, the Master Plan should include stipulated penalties for important deadlines, adding further incentives to move a facility through the CA pipeline. Master Plans may not be appropriate for facilities that repeatedly miss deadlines.

Clearly establishing enforceable deadlines and then taking identified and appropriate enforcement action (e.g., assessing and collecting stipulated penalties for negotiated orders and statutory penalties for unilateral orders) is critical in ensuring accountability and in moving toward remediation goals. While some regulators have had success in using alternative approaches, regulators should assess the effectiveness of such voluntary agreements or “Facility Lead Agreements” by evaluating the actual progress being made toward achieving the 2020 CA Goal. If cleanup at facilities under these agreements is not moving forward at a reasonable rate as determined by the regulator, Regions and States should address those facilities with an appropriate enforceable document.

B. Addressing Financially Marginal and Bankrupt Facilities

In many cases, the ability to pay for CA is the key factor that determines whether a facility can make adequate cleanup progress and whether it can, ultimately, meet its CA goals and objectives. Financial assurance (FA) has been an OECA National Initiative for the past several years.¹¹ Since 2006, EPA has worked closely with States to ensure compliance with RCRA CA FA obligations as part of a national enforcement initiative for financial responsibility. EPA and States, with contractor assistance, conducted 334 preliminary RCRA CA facility financial assessments in 2006-2008. Results showed costs associated with facility cleanup averaged \$5 million per facility. FA remains an important component in EPA’s CA enforcement program for the future, as it is necessary to ensure that funds are available to complete cleanup responsibilities. Owners/operators of permitted facilities are required by RCRA section 3004(u) to secure FA for CA regardless of the financial status of the company. Adequate financial responsibility has two primary elements: a sound FA mechanism and an accurate cost estimate.

C. Financial Assurance and CA Requirements

1. Ensure that Permits and Orders Contain Financial Assurance Requirements

Regions and States should always review permits and orders to ensure inclusion of enforceable FA language. If a permit or order does not contain FA, then the regulators should ensure inclusion, at a minimum when a permit or order is being modified to impose the Corrective Measures Implementation (CMI) requirements or when a new permit or order is being issued that imposes such requirements. If FA is required prior to remedy selection, cost estimates should be as accurate as practicable.¹²

¹¹ For the most recent OECA National Program Guidance, see *National Program Manager (NPM) Guidance* (Apr. 23, 2009), http://www.epa.gov/ocfo/npmguidance/oeca/2010/fy2010_final_guidance.pdf.

¹² See *Interim Guidance on Financially Responsibility for Facilities Subject to RCRA Corrective Action* (Sept. 30, 2003), <http://www.epa.gov/compliance/resources/policies/cleanup/rcra/interim-fin-assur-cor-act.pdf>.

a. Focus on Facilities Utilizing Financial Test and Corporate Guarantee

EPA's FA enforcement initiative results show that the self-assurance mechanisms of the Financial Test and Corporate Guarantee were used as FA in almost half of the facilities reviewed, accounting for over 60% of the value of FA obligations. Regions and States should continue to review Financial Test and Corporate Guarantee submissions. To assist in this effort, OECA provided Regions and States with an in-depth, step-by-step, webinar training to assist with their review of a facility's financial submissions for the Financial Test. Additional webinars are planned for the future.

b. Enforce When Necessary

If the Financial Test or Corporate Guarantee submission is not compliant, the regulator should correct the problem using whatever enforcement mechanism is appropriate for the facts (e.g., notice of violation, penalties, administrative or judicial case). The regulator should notify the company if its submission is missing information or if it appears the company is no longer capable of meeting the requirements of the Financial Test or Corporate Guarantee. If the permit or order does not already provide a mechanism to obtain financial information, EPA should issue a RCRA section 3007 information request or a State should use equivalent authority if more information is needed to determine compliance.

2. Financially Marginal Companies Need Extra Effort

a. Monitor the Financial Health of Companies

Regions and States should monitor the financial health of the facilities with CA obligations by keeping track of bond ratings, changes in ownership, and other ownership and management practices. If a company utilizing the Financial Test or Corporate Guarantee is no longer able to satisfy the Financial Test or Corporate Guarantee criteria, regulators should require the facility to switch to a more liquid instrument (e.g., letter of credit, performance or surety bond, or trust). In those instances where the company is still satisfying the Financial Test or Corporate Guarantee but has become financially unstable, regulators should consider whether to require the facility to switch to a more liquid instrument. Further, as cost estimates are updated, regulators should require the facility to reassess and reassure the regulator that the amount of the FA instrument is enough to cover the amount of the existing financial liability.

b. Question Facility Assertions of Inability to Pay

In drafting permits or orders, companies often assert that they are not able to provide funds for both CA and FA. It is important to assess whether this assertion is true. EPA has a CA Ability to Pay Model (CABL) which can be used in situations where a party claims it is not able to pay for both the CA and the costs associated with FA.

c. Negotiate a Payment Schedule

If a company legitimately cannot pay both the cost of the CA and the FA, a schedule can be negotiated laying out an enforceable payment schedule allowing parties to procure FA over a period of time. Where such arrangements are negotiated, more frequent submissions documenting the company's financial health should be required so that the regulator can closely monitor the situation. If the entity becomes more solvent, more FA can be secured over a shorter period of time. If its financial health worsens, the schedule can be renegotiated.

3. Bankruptcy and Financial Assurance

a. Change Instruments, if Possible, Before Bankruptcy

No matter how flexible Regions and States are in working to bring facilities into compliance with FA requirements, some companies will end up in bankruptcy. If Regions or States are monitoring a company and there are discussions of bankruptcy (sometimes highlighted in the news media), there are several things that can be done. First, the regulators need to know what the permit or order requires with respect to FA and information about the existing FA mechanism, if any. If there is FA, know where the instrument is located. Sometimes a Region or a State will have a central location where these instruments are kept. This is a recommended practice. However, if there is no central location, it is important to locate the instrument. Once the instrument is located, the Region or State should determine the triggers and procedures for calling in the funds. If the company is using the Financial Test or the Corporate Guarantee, then the Region or State should consider requiring that the company replace its existing FA mechanism with a liquid FA instrument – preferably, a letter of credit, a surety bond or fully-funded trust fund – in place before the bankruptcy filing. If the company is using a liquid instrument, Regions and States should call in the funds prior to the bankruptcy filing if the regulated entity has failed to fulfill its CA obligations pursuant to the applicable permit or order. For post-bankruptcy attempts to call in a FA instrument, regulators may need to seek relief from the automatic stay imposed by the bankruptcy court.

b. File a Protective Proof of Claim

Once a company has filed for bankruptcy, it is advisable to include CA obligations in a proof of claim filed with the bankruptcy court. Regulators generally take the position that such injunctive obligations do not fall within the Bankruptcy Code's definition of a "claim" and are thus not dischargeable in bankruptcy.¹³ Nevertheless, EPA and States often file "protective" proofs of claim with respect to bankrupt entities' ongoing injunctive obligations to perform closure, CA, or other response activities at applicable facilities.

¹³ See, e.g., *U.S. v. Apex Oil Co.*, 579 F.3d 734, 736-37 (7th Cir. 2009) (noting, in the context of a RCRA section 7003 suit, that asking for an injunction to comply with an order under RCRA section 7003 does not authorize monetary relief even if compliance with injunction would cost money).

C. Use of CERCLA or Equivalent State Tools to Facilitate RCRA CA

As part of NESCA, Regions and States are strongly encouraged to consider using CERCLA enforcement authorities or the State equivalent (where possible) to help further the 2020 CA Goal. Although traditional RCRA permits and CA orders may fully address CA issues at typical facilities, CERCLA can be a useful enforcement supplement in many cases. Various CERCLA tools, including information gathering, settlement authorities, and cost recovery provisions, can, in appropriate cases, support RCRA CA and enhance and speed the cleanup process.

EPA has long recognized the close relationship of cleanups conducted under RCRA and CERCLA. Guidance documents point to the goal of achieving comparable, equally protective remedies at facilities, whether addressed under RCRA or CERCLA.¹⁴ EPA has long maintained that both RCRA and CERCLA authorities can be used to respond to a site.¹⁵

EPA has on numerous occasions considered criteria that help inform when or whether a facility that could be addressed under CERCLA should, in fact be addressed under RCRA, or vice-versa. Under the RCRA deferral policy,¹⁶ for example, EPA deferred many former CERCLA National Priorities List sites to RCRA. In doing so, EPA outlined a number of criteria which may also be useful to consider when assessing whether use of CERCLA would be appropriate at a RCRA CA facility. The reasons for deferring sites – or not doing so – highlight many of the circumstances in which CERCLA may provide advantages not necessarily available under RCRA. These criteria include:

- the inability or unwillingness of the owner/operator to pay for cleanup;
- the inadequacies of the financial responsibility guarantees to pay cleanup costs; and
- EPA or State priorities for addressing the sites under RCRA.¹⁷

Regions and States should recognize it is not necessary to defer a RCRA CA facility to CERCLA or analogous State authorities in order to effectively utilize these tools in advancing CA. For example, a targeted (and limited) CERCLA or analogous State action such as information gathering or a removal action may be used in concert with on-going RCRA actions where appropriate.

¹⁴ See, e.g., *Coordination Between RCRA Corrective Action and Closure and CERCLA Site Activities* (Sept. 24, 1996), http://www.epa.gov/epawaste/hazard/correctiveaction/resources/guidance/gen_ca/coordmem.pdf, and *Use of CERCLA § 106 to Address Endangerments That May Also Be Addressed Under Other Environmental Statutes*, (Jan. 18, 2001), <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/ise-crossmedia.pdf>.

¹⁵ See 53 Fed. Reg. 30005, 30007 (Aug. 9, 1988).

¹⁶ The RCRA deferral policy is outlined in a series of National Priorities List rulemakings. See, e.g., 49 Fed. Reg. 40320 (Oct. 15, 1984); 50 Fed. Reg. 14115 (Apr. 10, 1985); and 53 Fed. Reg. 30002 (Aug. 9, 1988)

¹⁷ See 50 Fed. Reg. 14115 (Apr. 10, 1985).

1. Advantages of CERCLA

a. Procedural

CERCLA contains a number of potential advantages when bringing enforcement actions to require cleanups. EPA has identified some of the specific procedural advantages of using CERCLA at facilities that might otherwise be addressed under RCRA.¹⁸ In some cases, CERCLA provides for higher penalties than RCRA as well as the availability of punitive damages. CERCLA's express statutory provisions addressing pre-enforcement review provide the ability to avoid disputes over the timing and scope of judicial review when bringing an enforcement action.

b. Information Gathering

CERCLA information gathering authority, CERCLA section 104(e), is not limited to information gathering regarding "hazardous wastes" but includes "hazardous substances, pollutants or contaminants," which may authorize information requests in settings where RCRA authority is less clear. For example, under CERCLA section 104(e), EPA could require submittal of information about a particular pollutant or contaminant even if it is unclear whether it is a solid or hazardous waste subject to RCRA. In addition, CERCLA section 104(e) includes an express ability to ask information about a party's ability to pay for or perform a cleanup, which may be useful in many circumstances.

c. Responsible Parties

The parties available to conduct a cleanup may also vary depending upon whether RCRA or CERCLA is used. In most circumstances, RCRA CA is undertaken by the owner or operator of the facility under a CA order or agreement or as a requirement of the facility permit. Both RCRA (e.g., RCRA section 7003) and CERCLA section 107 identify a set of liable parties who can be held responsible for a cleanup. These categories extend beyond the owner and operator of the facility. While there is some overlap between the two provisions, they are not wholly identical and in a given situation, the use of CERCLA section 107 may be preferable. Where the current owner or operator is unable to pay for or conduct the cleanup, it may be appropriate to consider use of CERCLA authorities in order to require that other responsible parties participate in the cleanup, such as owners and operators at the time of disposal or persons that arrange for the disposal of hazardous substances.

d. Cost Recovery Agreements

CERCLA's cost recovery provisions, and the ability to establish Superfund special accounts, provide extremely useful tools that may be used to help achieve the 2020 CA Goal. Although EPA does not routinely seek to recover costs incurred in overseeing or otherwise implementing RCRA CA, courts have on many occasions approved the use of CERCLA cost

¹⁸ See *Guidance on the Use of RCRA 7003* (Oct. 1997), <http://www.epa.gov/compliance/resources/policies/cleanup/rcra/971020.pdf>.

recovery authorities to recover costs incurred in complying with RCRA obligations.¹⁹ Particularly where Regions are utilizing CERCLA resources to obtain cleanup, Regions should ensure that all costs are appropriately tracked for cost recovery.

Under CERCLA section 122(b)(3), funds recovered under an agreement with a potentially responsible party may be placed into a Superfund special account to carry out the purposes of that agreement (i.e., to conduct or finance site-specific response actions).²⁰ For example, funds from an agreement to collect payment on an insurance performance bond could potentially be placed in a special account to fund investigatory CERCLA work necessary to implement work originally ordered under a RCRA CA permit or order at a RCRA facility.

RCRA staff may wish to become familiar with the available guidance and procedures on establishing and using Superfund special accounts.²¹ If a case arises, where the Region believes a special account could be established to retain funds necessary to conduct response actions in order to meet the obligations under a CA permit or order, the Region should consult with OSRE's Special Account Team to ensure the special account establishment and use complies with CERCLA and EPA policy, and the agreement contains the appropriate language.²²

e. Use of the Fund

An obvious consideration in triggering CERCLA is the potential availability of the Trust Fund to conduct response actions when the responsible parties are unable or unwilling to perform a cleanup. In order to support its enforcement actions at Superfund sites, EPA typically ensures that it can fund an action when issuing an order to require a removal or remedial action.²³ On the other hand, use of CERCLA enforcement authority does not represent a determination that Trust Fund money will be used if the enforcement is not successful. As with all demands on the Trust Fund, it is necessary to consider the availability of funds and other priorities within the Superfund program. In addition, respondents to a unilateral CERCLA section 106 order can, in some circumstances, assert a claim against the Trust Fund, therefore the risk to the Trust Fund should be considered prior to issuance of a unilateral order.

2. Experience to Date

Several Regions and States have initiated a number of projects that already demonstrate the benefits of applying CERCLA provisions to further RCRA CA (see Appendix C). In some

¹⁹ See, e.g., *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049 (D. Az. 1984); *Union Carbide v. Thiokol Corp.*, 890 F. Supp. 1035 (S.D. Ga. 1994) (costs of RCRA facility assessment and investigation can be recovered under CERCLA); and *United States v. E.I. DuPont de Nemours & Co.*, 341 F. Supp. 2d 215 (W.D.N.Y. 2004) (costs of oversight of a RCRA order may be recovered under CERCLA).

²⁰ These site-specific special accounts are sub-accounts within the Superfund Trust Fund.

²¹ See, e.g., *Management of Special Accounts* (Aug. 4, 2005); *Special Accounts: Guidance on Key Decision Points in Using Special Account Funds* (Sept. 28, 2001); and *Charter for Superfund Special Accounts Senior Management Committee* (Mar. 2009).

²² OSRE's Special Accounts Team contacts are listed on the EPA Intranet at <http://intranet.epa.gov/oeca/osre/workgroup/sa/index.html>.

²³ See, e.g., *Negotiation and Enforcement Strategies to Achieve Timely Settlement and Implementation of Remedial Design/Remedial Action at Superfund Sites* (June 17, 1999) at 10 (enforcement team to inform responsible parties that "Fund monies will be available to conduct site remediation in the event of non-compliance with the order).

cases, a Region may wish to modify existing delegations, or establish protocols for CERCLA and RCRA managers to cooperate on the use of CERCLA tools at RCRA CA facilities. Use of CERCLA information gathering tools to aid CA is already being conducted routinely in some Regions. Delegation of CERCLA section 104(e) authorities to EPA RCRA enforcement programs in particular should be considered.

D. Addressing Institutional Controls and Long-term Stewardship Activities

A key component of CA cleanups is ensuring institutional controls (ICs) are effective and enforceable and long-term stewardship (LTS) requirements are met. ICs are non-engineered instruments, such as administrative and legal tools, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a CA cleanup. The term “long-term stewardship” describes the range of activities needed at a facility, typically after construction completion, to operate and maintain the remedy. Both of these concepts, and their associated challenges, need to be fully analyzed and included in the facility’s selected remedy and in any corresponding enforcement documents.

The long-term protectiveness of the remedies EPA and States put in place are critical to achieving human health and environmental goals. EPA has provided guidance on ensuring the use of effective and reliable ICs at RCRA facilities²⁴ and has recognized the role of ICs as part of final remedies for completion of CA activities at RCRA facilities.²⁵ Both guidance documents highlight the need for robust and enforceable ICs as part of remedies that require them and will be useful references for most CA cleanups. Other IC and long-term stewardship policy, guidance, and tools may serve as useful references for CA facilities as well.²⁶ Additionally, model enforcement provisions can be used for crafting IC specific language in RCRA permits or orders. For example, the IC provisions in the model CERCLA remedial design/remedial action consent decree may provide language examples for requiring specific types of ICs (e.g., restrictive covenants) and planning activities (e.g., IC Implementation and Assurance Plans) for parties at RCRA facilities.²⁷

E. Transparency and Appropriate Community Involvement

NESCA helps ensure transparency by keeping the public informed about enforceable commitments made by facility owners and operators while enhancing the CA process. Both RCRA and CERCLA have statutory public participation requirements, which EPA has substantial experience in applying. OSWER’s recently announced Community Engagement Initiative will serve as the catalyst for reviewing and building upon EPA’s current practices in this area. In conjunction with this effort, OECA encourages the use of the EPA Web site for posting appropriate enforcement documents and information regarding the status of enforcement efforts.

²⁴ http://www.epa.gov/epawaste/hazard/correctiveaction/resources/guidance/ics/ic_memo.pdf.

²⁵ http://www.epa.gov/waste/hazard/correctiveaction/resources/guidance/gen_ca/compfedr.pdf.

²⁶ Generally, EPA IC policy, guidance, and training materials (both cross-program and CERCLA specific) can be found on the EPA IC web page at <http://www.epa.gov/superfund/policy/ic/index.htm>.

²⁷ See <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rdra-ic-mod-09-mem.pdf>.

Community involvement and public participation should be part of the entire RCRA CA process, including establishing ICs and long-term stewardship obligations. EPA has long recognized the need as well as the benefits of keeping the public informed and involved in remediation decisions and has incorporated public participation into its CA regulations.²⁸ Public participation can be a significant factor in ensuring that facilities are moving through the CA pipeline in a timely way. Given the lack of detailed regulations governing CA, EPA has specified that program implementers and facility owner/operators should develop public participation strategies on a facility-specific basis, consistent with existing public participation requirements and the program goal of full, fair, and equitable public participation. At a minimum, information regarding CA activities (e.g., RFI and CMS reports) should be available to the public and the public should be given an opportunity to review and comment on proposed CA remedies.

VII. CAPACITY BUILDING

EPA Headquarters plans to develop training for Regions and States to implement NESCA. For example, EPA Headquarters has begun to work with Regions and ASTSWMO to develop training to address how enforcement and permitting programs can work together to ensure cleanup objectives are met. Workshops and webinars likely will be developed to foster better coordination and communication between enforcement and permitting personnel.

EPA plans to provide training on FA topics, including analysis of various FA mechanisms and cost estimation. Initial training on evaluating Financial Test submissions was provided in April of 2010 and there are plans to provide this training in the future.

VIII. MEASURING PROGRESS AND RESULTS

To truly account for the impact of the overall enforcement strategy on attaining the RCRA 2020 CA Goal, EPA and States need to be able to measure their combined enforcement efforts, as the overall "encouragement" and "deterrent" effect of these combined efforts should produce results among problematic and "stuck" facilities. OECA and OSWER, in consultation with States, are in the process of exploring new approaches for measures to better track accomplishments related to CA enforcement activities. EPA's current measures, which can be found in Appendix D, should be used until new measures are in place.

OECA's Integrated Compliance Information System (ICIS) does not currently include the environmental benefits for State CA enforcement actions. In addition, ICIS does not distinguish between RCRA orders under RCRA sections 3008(a), 3008(h), 3013, and 7003 that are used to address CA and those used to address other RCRA requirements (e.g., violation of generator requirements). EPA plans to make necessary changes to the Case Initiation/Conclusion Data Sheets and ICIS to distinguish CA-related enforcement actions from other types of RCRA enforcement actions. Starting in Fiscal Year 2011, EPA plans to track, under both ICIS and RCRAInfo, CA enforcement actions under RCRA sections 3008(a), 3008(h), 3013, and 7003; and CERCLA section 106(a).

²⁸ See, e.g., 40 C.F.R. Part 124.

IX. FUTURE DIRECTION FOR NESCA

EPA intends to keep information regarding the use and application of NESCA updated on a regular and timely basis on the NESCA page of EPA's Web site.²⁹ Regions and States are encouraged to provide examples of success stories, enforcement documents, model language, and any other information regarding the use of NESCA in achieving the 2020 CA Goal so that the NESCA page of EPA's Web site is current and helpful.

Additional guidance, model documents, or model language for various situations, may be developed to help implement NESCA. As Regions and States gain experience in using the NESCA tools, they should be able to identify situations where the development of guidance, model documents, or model language, would be helpful. Region and State assistance in drafting the language for such documents is essential.

The development of NESCA benefitted greatly from State involvement, and EPA plans to continue working closely with States and ASTSWMO on both national and State specific issues. OSRE has established an internal structure to help facilitate the development and implementation of NESCA. EPA, including Headquarters and Regions, and ASTSWMO plans to meet regularly via conference calls to implement NESCA.

After 18 months of NESCA implementation, EPA and its State partners plan to assess the contribution of NESCA in achieving progress toward the 2020 CA Goal. Successes as well as limitations in the use of the tools and concepts identified in this Strategy should be noted and communicated for the benefit of others and for the assistance in assessing NESCA. Necessary modifications to NESCA will be made and additional tools and guidance documents may be developed as a result of this assessment.

²⁹ See <http://www.epa.gov/compliance/cleanup/>.

APPENDIX A

Relevant RCRA Authorities

This Appendix focuses on RCRA statutory authorities. It does not include 40 C.F.R. part 264 (permitting) and part 265 (interim status) subpart F regulatory requirements except for 40 C.F.R. § 264.101 which requires facility-wide corrective action. Other Subpart F regulations are unit-specific and include requirements for ground-water monitoring and Corrective Action (CA) for releases to groundwater from RCRA regulated units (e.g., 40 C.F.R. § 264.100).

A. RCRA Section 3004(u) and (v) – Corrective Action Permits

- Section 3004(u) requires any permit issued to a TSD Facility under RCRA section 3005(c) after 11/8/84 to address CA for releases of hazardous waste or constituents from any solid waste management unit (SWMU) at the facility.
- Such permits must contain schedules of compliance for CA and financial assurance for completing CA.
- Section 3004(v) requires owner/operators to perform CA to address releases beyond a facility's boundary.
- Section 3004(u) and (v) are codified at 40 C.F.R. § 264.101.
- States must have regulations that are equivalent to 40 C.F.R. § 264.101 to be authorized for CA.
- At least 1,000 of the facilities in the 2020 CA universe of facilities are subject to permits.
- Section 3005(c)(3) (i.e., "omnibus" authority) allows EPA (or State) to establish conditions in a facility's RCRA permit as needed to protect human health and the environment.
 - EPA occasionally has used this authority to implement cleanup activities at RCRA-permitted facilities.
 - The omnibus authority is codified at 40 C.F.R. § 270.32(b)(2).
 - States have used State omnibus authorities.

B. RCRA Section 3005(c) – EPA Omnibus Permitting Authority

- Additional conditions, based on EPA's omnibus authority, require the record for the permit needs to support why the added conditions are necessary to protect human health or the environment. See In re Chemical Waste Management of Indiana, Inc., 6 E.A.D. 144, 162 (EAB, 1995) and In re Sandoz Pharmaceuticals Corp., 4 E.A.D. 75, 80 (EAB, 1992); see also 56 Fed. Reg. 7147 (Feb. 21, 1991).

C. RCRA Section 3007 – Information Gathering and Inspections

- Section 3007 provides broad information gathering authority.
- Section 3007 allows EPA to conduct inspections and engage in sampling at past or present hazardous waste handlers.

- Section 3007 is helpful for obtaining information about releases, contamination and finances (see section IV.A. for discussion about use of this section for financially marginal and bankrupt facilities).
- Section 3007 authority may be used to build a case for an enforcement action.

D. RCRA Section 3008(a) – Compliance Orders

- Section 3008(a) is used to require compliance with a RCRA Subtitle C requirement when a violation occurs. Subtitle C requirements include CA provisions in a permit.
- Section 3008(a) provides broad authority to require any actions necessary to ensure compliance.
- Section 3008(a) authorizes EPA to issue administrative orders or to initiate civil actions.
- Section 3008(a) allows EPA to assess civil penalties for non-compliance for up to \$37,500 per day per violation.
- States have authorities that are comparable to section 3008(a).
- Very few section 3008(a) orders have been issued for non-compliance with CA requirements.

E. RCRA Section 3008(h) – Interim Status Corrective Action Orders

- Section 3008(h) authority is used for requiring CA at interim status facilities.
- Section 3005(e) allows certain facilities to be granted “interim status” and treated as though they had been issued a permit until final administrative action is taken on their permit applications.
- Section 3008(h) may be used to address facilities that have interim status, should have had interim status, and some that once had interim status but no longer do.
- Section 3008(h) authorizes EPA to issue administrative orders and to initiate civil actions.
- Under section 3008(h) requires EPA to determine that there is or has been a release of hazardous waste (or hazardous constituents).
- EPA may assess civil penalties for non-compliance with orders issued under section 3008(h) for up to \$37,500 per day. Penalties under Section 3008(h) are higher than those under sections 3013 and 7003.
- Regions have collected stipulated penalties for non-compliance with section 3008(h) orders.
- Section 3008(h) does not require EPA to make a finding of imminent and substantial endangerment (ISE) or substantial hazard.
- Section 3008(h) is a versatile authority that allows EPA to require all types of CA activities. It is EPA’s most commonly-used enforcement authority for CA.
- Section VI.A. of NESCA provides examples of streamlined section 3008(h) orders.

F. RCRA Section 3013 – Monitoring, Analysis and Testing Orders

- Section 3013 authority is used for requiring monitoring, testing, analysis and reporting.

- Section 3013 allows EPA to commence a civil action against any person who does not comply with a section 3013 order.
- EPA may assess civil penalties for non-compliance with orders issued under section 3013 for up to \$7,500 per day.
- Section 3013 requires EPA to determine that statutory hazardous waste is present or the release of any such waste has occurred.
- Section 3013 requires EPA to determine that the presence of the hazardous waste or the release *may* present a substantial hazard.
- Section 3013 orders may be issued to current owner/operators or previous ones in certain situations.
- Under certain circumstances (e.g., if EPA determines that no owner/operator is able to do the required work satisfactorily), EPA may conduct work or authorize a state or local authority to do so.
- Section 3013 allows EPA to require work costs to be recovered from the owner/operator.
- Under section 3013 the substantial hazard threshold is lower than the “imminent and substantial endangerment” threshold for section 7003.
- Section 3013 orders may be used to require RCRA Facility Investigations (RFIs), Corrective Measures Studies (CMSs), risk assessments, and Environmental Indicator (EI) evaluations.
- Using section 3013 authority, Regions have issued informal “letter” orders.

G. RCRA Section 7003 – Imminent Hazard Orders

- Section 7003 provides authority to compel any person to address conditions that may present an imminent and substantial endangerment.
- Section 7003 authority applies to the past or present handling of statutory solid or hazardous waste.
- Section 7003 may be used to reach parties other than current owner/operators.
- Section 7003 authorizes EPA to issue administrative orders and to initiate civil actions.
- EPA may assess civil penalties for non-compliance with orders issued under section 7003 for up to \$7,500 per day.
- Section 7003 is a versatile authority that may be used to require all types of CA activities.
- Courts have repeatedly recognized that the “*may* present an imminent and substantial endangerment” language of section 7003 is quite broad.
 - Neither certainty nor proof of actual harm is required, only a *risk* of harm.
 - An endangerment may be “imminent” even though harm may not be realized for years.
- Section 7003 provides EPA with a broad and powerful authority.
 - “Notwithstanding any other provision of this chapter” allows 7003 to be used at facilities that claim not to be subject to a permit or interim status or try to use the “permit as a shield” provision to avoid taking appropriate actions.
 - Under section 7003, neither a release nor a threatened release is required.
 - CERCLA section 106 has similar language about addressing an imminent and substantial endangerment.

- EPA has used section 7003 and CERCLA section 106 individually and jointly to help further CA goals.
- The “Guidance on the Use of Section 7003 of RCRA,” dated October 1997, available at <http://www.epa.gov/compliance/resources/policies/cleanup/rcra/971020.pdf>, discusses the advantages and disadvantages to using section 7003 versus CERCLA section 106 and section 3008(h).

APPENDIX B

A variety of mapping tools exist which Regions, States, and communities can use to view and gather information about specific areas in order to identify EJ concerns and issues. Although there are on-going efforts to standardize the tools at our disposal, there is currently no national requirement to use any specific tool for priority setting or reporting. Regions and States are encouraged to implement the suggested tools and strategies outlined in this document, tools developed by the Region, or another tool they find useful, to meet the needs of their CA program as they deem appropriate.

- The US Census Bureau's interactive mapping tool, [American Fact Finder](http://factfinder.census.gov/home/saff/main.html?_lang=en), is a data dissemination tool for accessing and mapping Census 2000 and other census data. (http://factfinder.census.gov/home/saff/main.html?_lang=en)
- [Environmental Justice Geographic Assessment Tool](http://www.epa.gov/compliance/whereyoulive/ejtool.html) (EJGAT) provides information relevant to assessing adverse health or environmental impacts, aggregate or cumulative impacts, unique exposure pathways, vulnerable or susceptible populations, or lack of capacity to participate in decision making process among other conditions. (<http://www.epa.gov/compliance/whereyoulive/ejtool.html>)
- [Welcome to My Environment](http://www.epa.gov/myenvironment/) is a powerful web-based tool that provides a range of federal, state and local information about environmental conditions and features for an area of your choice. (<http://www.epa.gov/myenvironment/>)
- [Environmental Justice Smart Enforcement Assessment Tool](http://www.epa.gov/compliance/resources/policies/ej/ej-seat.html) (EJ SEAT) identifies areas with potential environmental justice concerns based on indicators (e.g., health, environmental, compliance and social demographics). EJSEAT is currently a draft tool in development, intended for internal EPA use only. (<http://www.epa.gov/compliance/resources/policies/ej/ej-seat.html>)
- [Enforcement and Compliance History Online \(ECHO\)](http://epa-echo.gov/echo/index.html) is a Web-based tool that provides public access to compliance and enforcement information for approximately 800,000 EPA-regulated facilities, including permit, inspection, violation, enforcement action, and penalty information covering the past three years. (<http://epa-echo.gov/echo/index.html>)

Additionally, EPA has developed the following tools which may help in outreach efforts in communities:

- The RCRA Public Involvement Manual (1996), an in-depth users' manual intended to help all stakeholders in the permitting and corrective action processes: citizens, regulators, members of public interest or environmental groups, and owners/operators of hazardous waste management facilities. (<http://www.epa.gov/osw/hazard/tsd/permit/pubpart/manual.htm>)
- Online technology can also be used to encourage community involvement, including, for example:
 - EPA's CA program Web page (<http://www.epa.gov/epawaste/hazard/correctiveaction/index.htm>) which can be used by the public to find information about the RCRA corrective action

processes, as well as information about facilities in their neighborhoods, such as in information on facility status;

- Information-sharing websites, such as Quickplace, as a resource for regulators to share ideas and information; and
 - Blogging, which is another information-sharing tool for facility- or community-specific information.
- EPA has several options for assisting the public in understanding both the regulations and facility operations so they may participate more meaningfully in discussions regarding those operations:
 - Programs such as Technical Assistance Services for Communities (TASC);
 - Materials, such as brochures, which can be made available in Spanish as well as English (or funding can be provided for interpretation services);
 - Cross-media, management-level outreach to communities; and
 - RCRA staff can be sent out to communities prior to major meetings to help prepare the communities to participate more effectively in those meetings.

APPENDIX C

Several Regions and States have initiated a number of projects that already demonstrate the benefits of applying CERCLA provisions to further RCRA Corrective Action:

- Regions have developed joint information requests relying upon CERCLA section 104(e) as well as RCRA section 3007. This may be done to address different areas of a facility (some facilities are under both CERCLA and RCRA regulatory and enforcement schemes.)¹;
- One Region established a Superfund special account to retain performance bond funds, received under an agreement with the insurer, to help implement CERCLA response actions in order to meet Corrective Action obligations;
- Regions have entered agreements under both CERCLA and RCRA to obtain Corrective Action; and
- Permit conditions in RCRA permits have included conditions that expressly rely upon a prior CERCLA agreement to meet Corrective Action requirements.

Use of CERCLA information gathering tools to aid Corrective Action is already being conducted routinely in some Regions. These Regions have found that CERCLA section 104(e), the principal investigatory and information gathering tool in CERCLA, can provide a useful supplement to the authorities contained in RCRA.

Some Regions already delegate the use of CERCLA section 104(e) to managers and staff with responsibility for RCRA Corrective Action. For example:

- Region 7 delegates the authority to the Chief of the Air and RCRA Compliance Branch;
- Region 8 delegates the authority to both the Assistant Regional Administrator of the Office of Ecosystems Protection and Remediation and the Assistant Regional Administrator for the Office of Enforcement, Compliance and Environmental Justice; and
- Region 10 delegates the authority to personnel in the Office of Air, Waste and Toxics (which is responsible for RCRA Corrective Action and permitting).

¹ Courts also have long held there is an interconnection between CERCLA and RCRA. See, e.g., United States v. Rohm & Haas Co., 790 F. Supp. 1255 (E.D. Pa. Apr. 24, 1992) (holding that different parts of the site were allowed to be regulated under different authorities, depending on the nature and severity of the environmental issues associated with each, and that it is permissible to use both statutes to regulate a single site because different remedial programs serve varying public policy purposes, replete with different cleanup objectives and standards).

APPENDIX D

In order to truly account for the impact of the overall enforcement strategy on attaining the RCRA CA 2020 Goal, EPA and States should be able to take credit for their combined enforcement efforts, as it will be the overall “encouragement” and “deterrent” effect of these combined efforts that will produce results among recalcitrant facilities.

Existing Measures to be Tracked for Corrective Action

OECA Measures - *Integrated Compliance Information System*

Corrective Action Related Enforcement Actions and Environmental Benefits:

VCMA - Volume of Contaminated Media Addressed

PPRTE - Pounds of Pollutants Reduced, Treated or Eliminated

OSWER Measures - *RCRAInfo*

Corrective Action and GPRA Milestones:

CA725 - Current Human Exposures Under Control Environmental Indicator

CA750 – Migration of Contaminated Groundwater Under Control Environmental Indicator

CA400 - Remedy Decision

CA 550 – Remedy Constructed

Cross-Program Revitalization Measures:

PFP – Protective for People Under Current Conditions

RAU – Ready for Anticipated Use