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

MEMORANDUM

SUBJECT: Guidance Concerning EPA Involvement in RCRA Section
7002 Citizen Suits

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INTRODUCTION

This guidance is written to establish a systematic review of RCRA citizen suit notices and to provide guidance for EPA enforcement staff to use in deciding what involvement, if any, by EPA is appropriate when a notice of intent to file suit is received or when an action is filed under RCRA §7002. This guidance supplements and is not in lieu of other guidance concerning procedures for filing judicial enforcement actions under RCRA.

STATUTORY AUTHORITY

The Hazardous and Solid Waste Amendments of 1984 (HSWA) substantially expanded Section 7002 of the Resource Conservation and Recovery Act (RCRA), the citizen suit provision. Prior to the enactment of HSWA, the only actions allowed under Section 7002 were suits brought by any person on his own behalf.

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against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this Act; [Section 7002(a)(1)(A)]

or

against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator. [Section 7002(a)(2)].

Since the enactment of HSWA, any person also may file suit on his own behalf

against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.... [Section 7002(a)(1)(B)].

Subsection (g), added by HSWA, provides a narrow exemption from liability for transporters which provides that

A transporter shall not be deemed to have contributed or to be contributing to the handling, storage, treatment, or disposal, referred to in subsection (a)(1)(B) taking place after such solid waste or hazardous waste has left the possession or control of such transporter, if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste.

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HSWA also provides that in actions brought pursuant to Section 7002(a)(1)(A) (for "violation of any permit, standard, regulation, condition, requirement, prohibition, or order"), the court shall have jurisdiction "to apply any appropriate civil penalties under Section 3008(a) and (g)." (Section 7002(a)(2)). Thus, in citizen suits which allege violations of RCRA Subtitle C, plaintiffs may ask the court to assess penalties for such violations.

RESTRICTIONS

1.) Violation of any Permit, Standard, etc.

Actions under Section 7002(a)(1)(A) (violation of any permit, standard, regulation, etc.) are barred when either the State or EPA

has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order. [Section 7002(b)(1)(B)].

Note that the section does not appear to bar such actions if an administrative order (AO) has been issued. Almost identical provisions in the Clean Air Act and Clean Water Act have been interpreted by two Federal courts of appeals. The Second Circuit found that enforcement actions brought by a State agency which culminated in consent orders did not bar subsequent citizen suits brought under the Clean Water Act. Friends of the Earth v. Consolidated Rail Corporation, 768 F.2d 57 (2d Cir. 1985). The Third Circuit has suggested that state administrative proceedings which are "substantially equivalent" to a Federal court proceeding might bar filing of a citizen suit under Section 304 of the Clean Air Act. Baughman v. Bradford Coal Co., 592 F.2d 215 (3rd Cir. 1979), cert. den., 441 U.S. 961 (1979). A more recent district court opinion in the Third Circuit, however, held that only a State or EPA judicial proceeding to enforce the same emission limitations precludes citizen action under Section 304 of the Clean Air Act. Maryland Waste Coalition v. SCM Corp., 23 Env't Rep. Cases 1256 (D. Md. 1985) (order granting in part and denying in part a motion to dismiss the complaint).

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2.) Imminent Hazard Actions

Imminent hazard actions pursuant to Section 7002(a)(1)(B) are barred if EPA

in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment-

(i) has commenced and is diligently prosecuting an action under section 7003 of [RCRA] or under section 106 of [CERCLA];

(ii) is actually engaging in a removal action under section 104 of [CERCLA];

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study [RI/FS] under section 104 of [CERCLA] and is diligently proceeding with a remedial action under that Act; or

(iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of [CERCLA] or section 7003 of [RCRA] pursuant to which a responsible party is diligently conducting a removal action, [RI/FS], or proceeding with a remedial action.

In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) are prohibited only as to the scope and duration of the administrative order referred to in clause (iv). [Section 7002(b)(2)(B)].

Note that imminent hazard actions brought under Section 7002(a)(1)(B) are not barred if EPA is prosecuting an action or has issued an administrative order under RCRA Sections 3008 or 3013.

Imminent hazard actions brought pursuant to Section 7002 (a)(1)(B) are also barred if the State

in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment-

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(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B);

(ii) is actually engaging in a removal action under section 104 of [CERCLA]; or

(iii) has incurred costs to initiate a [RI/FS] under section 104 of [CERCLA] and is diligently proceeding with a remedial action under that Act. [Section 7002 (b)(2)(C)].

Citizen suits brought under Section 7002(a)(1)(B) are not barred if the State has issued an administrative order or has brought an enforcement action under authority other than Section 7002(a)(1)(B), such as a State RCRA statute.

3.) "Diligently Proceeding" and "Diligently Prosecuting" Defined

The phrases "diligently proceeding" and "diligently prosecuting" are discussed in some detail in the legislative history to HSWA. The legislative history notes that, in general, the phrases must be applied on a case by case basis. The Conference Report states that "diligently proceeding" with a removal action applies only "while removal activities are in progress."^{1/} A citizen action alleging that an imminent hazard existed after a removal action had been completed would not be barred, if no remedial action was planned for the site. "Diligently proceeding" with a remedial action is intended to apply only to situations where "the RIFS, design, and construction activities at a site occur in a continuous, uninterrupted sequence."^{2/} The term "has commenced and is diligently prosecuting an action", as it is used in subsection (b)(2)(B)(i), means that a judicial case has been filed or an administrative order under CERCLA §106 or RCRA §7003 has been issued.^{3/}

4.) Miscellaneous (Notice, Service, etc.)

Only a State or local government may commence an imminent hazard action under Section 7002(a)(1)(B) concerning the siting of a hazardous waste treatment, storage, or disposal facility (TSDF) or to enjoin the issuance of a permit for a TSDF. (Section 7002(b)(2)(D)).

^{1/} H.R. 2867, Conf. Rep., 98th Cong., 1st Sess. 118 (1984).

^{2/} Ibid.

^{3/} Rep.98-284, 98th Cong., 1st Sess. 55 (1983).

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Sixty (60) days notice must be given to the Administrator, the State in which the alleged violation occurs, and to any potential defendant before an action may be brought under Section 7002(a)(1)(A)(violation of any permit, standard, etc.), except that such an action may be brought immediately after notification in cases concerning a violation of Subtitle C. (Section 7002(b)(1)(A)). Only violations of other subtitles (Subtitle D or I, for example) trigger the 60 days notice requirement.

Ninety (90) days notice must be given to the Administrator, the State in which the alleged violation occurs, and to any potential defendant before an action may be brought under Section 7002(a)(1)(B)(imminent hazard), except that such an action may be brought immediately after notification in actions concerning violations of Subtitle C. (Section 7002(b)(2)(A)).

Section 7002(b)(2)(F) requires that a copy of the complaint in any imminent hazard action filed pursuant to Section 7002(a)(1)(B) be served on the Attorney General of the United States and on the Administrator. There is no corresponding requirement for service of complaints in actions brought pursuant to Section 7002(a)(1)(A).

INTERVENTION AND COSTS

In citizen suits filed under Section 7002(a)(1)(A) any person may intervene as a matter of right. (Section 7002(b)(1)). In citizen suits filed under Section 7002(a)(1)(B)

any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties. [Section 7002(b)(2)(E)].

Although this is similar to Federal Rule of Civil Procedure 24 (Intervention As Of Right), a critical modification has been made by the amendment in shifting the burden from the applicant for intervention to the Government, requiring the Government to show that the applicant's interest is adequately represented by the Government. This change only encompasses private intervention into Section 7002(a)(1)(B)(imminent hazard) actions; it does not apply to private intervention into any EPA enforcement actions, although legislative history indicates that the change

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was intended to apply to private intervention in enforcement actions as well. As discussed in the following section, Section 7002 is silent with respect to intervention in EPA enforcement actions.

The court is empowered to award the costs of litigation, including reasonable attorney and expert witness fees to the prevailing or substantially prevailing party, whenever the court determines such an award to be appropriate. (Section 7002(e)).

PARTICIPATION BY EPA

EPA may intervene as a matter of right in any citizen suit brought under Section 7002. (Section 7002(d)).^{4/} EPA and the Department of Justice may also choose to file a separate suit and then move to consolidate the actions. Language in Section 7002 which previously allowed any person to intervene as a matter of right in any EPA enforcement action brought to require compliance with a permit, standard, regulation, condition, requirement, or order issued under RCRA was deleted in HSWA. Intervention in such enforcement actions is no longer expressly permitted by statute, although permissive intervention remains available under the Federal Rules.

When a notice or a complaint in a RCRA §7002 action is served on the Administrator, copies are sent to the Office of General Counsel, the Office of Enforcement and Compliance Monitoring - Waste, the Office of Waste Programs Enforcement, the appropriate Regional Administrator, and the Department of Justice. A Headquarters enforcement attorney and a Regional attorney are assigned to track the development of each case. Except for cases in which EPA is named a party, the initial decision concerning the extent of EPA's involvement, if any, is to be made by the Waste Management Division Director, in consultation with the Regional Counsel's office.

The filing of an action by the United States or initiation of a response action when a citizen suit notice has been received generally will be considered only where an enforcement or response action is already planned and is ready to be commenced. Likewise, in cases in which a complaint is filed under Section 7002 and EPA is not a party, intervention generally will be considered in cases concerning sites subject to ongoing enforcement actions (where the Agency asserts that the ongoing enforcement action bars the citizen suit) and sites listed on

^{4/} As with other civil actions, EPA refers recommendations to intervene or to file amicus briefs to the Department of Justice for action.

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the National Priorities List (NPL).^{5/} Filing an amicus curiae brief may be considered in such cases if a decision is made not to intervene. Filing an amicus brief also will be considered if the case involves an important enforcement or programmatic issue, such as interpretation of what EPA's regulations may require in a particular instance.

Before making the initial decision of what, if any, involvement EPA should have in a particular citizen suit, the Regional attorney assigned to track the notice or complaint should evaluate the following factors in consultation with the designated Headquarters enforcement attorney:

1) Is EPA named as a defendant?

If the Agency is named as a defendant, the Office of General Counsel and the Office of Regional Counsel, along with the Department of Justice, will represent the Agency in defending the suit. If the suit concerns a site which is the subject of a planned or ongoing enforcement action or CERCLA cleanup action, the enforcement staff should remain actively involved in the handling of the suit.

2) Is an EPA enforcement or response action planned?

In cases where the 60 or 90 day notice of intent to file suit under Section 7002 is properly given, the Regional attorney assigned to track the notice should determine if an enforcement action or CERCLA Section 104 response action concerning the site is planned or is appropriate. If such action is contemplated, the Regional Waste Management Division Director, in consultation with the Regional Counsel, OECM-W and OWPE, should determine if steps should be taken to preempt the filing of the citizen suit by commencing an enforcement or response

^{5/} Not all §7002 suits are barred by ongoing EPA or State enforcement actions. See §7002(b)(1)(B), (b)(2)(B), (C), (D) and (E). In general, only those actions which attempt to duplicate ongoing enforcement actions are barred. For example, a suit by a transporter filed pursuant to Section 7002 for reimbursement by a generator for expenses incurred by the transporter in paying for fines and removal activities in connection with drums found to be leaking while in transit would not be barred because of any ongoing enforcement action against either the transporter or generator.

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action within the applicable 60 or 90 day notice period. At this point, contact with the Department of Justice should also be initiated.

If it is decided that no action will be taken to preempt the filing of the citizen suit, the assigned attorneys should reevaluate the appropriateness of Agency involvement if the suit is ultimately filed. Although it will be too late to preempt a RCRA §7002 suit after the suit is filed, the assigned attorneys should decide at this point whether to file a separate action, or whether intervention or filing an amicus brief is appropriate. Remember that while notice to the Agency is required to be given in all §7002 cases, a copy of any complaint is expressly required to be served on the Administrator and the Attorney General only in cases filed pursuant to Section 7002(a)(1)(B) (imminent hazard). (Section 7002(b)(2)(F)).

3) Is the action barred by Section 7002(b)(1)(B), (b)(2)(B), (b)(2)(C), or (b)(2)(D)?

Section 7002(b)(1)(B) and 7002(b)(2)(B) and (C) bar the filing of a citizen suit when EPA or the State has initiated certain enforcement actions or, in suits alleging an imminent hazard, has incurred costs to initiate an RI/FS or has commenced site cleanup pursuant to CERCLA §104.

Upon receipt of a complaint in a citizen suit, the Regional attorney assigned to track the suit should determine what, if any, enforcement or CERCLA response action has already been taken by EPA or the State. If any such actions have been taken which would bar the commencement of a suit under Section 7002, the Region may want to consider in a particular situation whether to intervene in the citizen suit. Generally, such defenses will be left to the defendant to the Section 7002 suit to raise. In situations where the State has commenced an enforcement or response action which bars the suit, EPA should coordinate closely with the State to determine whether action is appropriate under the circumstances.

Section 7002(b)(2)(D) bars the filing of a citizen suit by any person, other than a State or local government, with respect to the siting of a treatment, storage or disposal facility or to enjoin issuance of a permit to a TSDF. If such an action is filed by any one other than a State or local government, a motion to dismiss may be filed along with a motion to intervene.

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4) Is the action an intervention in an EPA RCRA enforcement action?

As noted on page 6, supra, the language in Section 7002 which provided that any person may intervene in an EPA RCRA enforcement action was deleted by HSWA. Therefore, if an action is filed pursuant to Section 7002 seeking to intervene in an EPA RCRA enforcement action, filing a motion to oppose the intervention may be appropriate. Given the apparent conflict between the legislation and the legislative history noted above on p. 6, opposition to intervention in such a situation normally should be considered only where permissive intervention is not likely to be granted.

5) Is a Federal facility named as a defendant?

If a Federal facility is named as a defendant in a RCRA Section 7002 action, EPA will not, as a matter of policy, intervene as a plaintiff, because of the justiciability problems associated with a case in which the Federal government is represented on both sides of the case. However, if EPA receives a notice regarding a citizen suit against a Federal facility under Section 7002(a)(1)(B) (imminent hazard), the action could be barred if, inter alia, an administrative order under CERCLA §106 or RCRA §7003 has been issued (See Section 7002(b)(2)(B)(iv)), but such action would be barred "only as to the scope and duration of the administrative order referred to in clause (iv)." (Section 7002(b)(2)(B), emphasis added).

On the other hand, citizen suits against Federal facilities under Section 7002(a)(1)(A) (violation of any permit, standard, etc.) cannot be barred by such orders, since such suits can only be barred if the Administrator (or State) has commenced and is diligently prosecuting a civil or criminal judicial action. (See Section 7002(b)(1)(B)).

ADDITIONAL CONSIDERATIONS

Because of the wide variety of possible situations which may arise under actions taken pursuant to Section 7002, each case must be dealt with individually, taking into consideration the specific facts presented. Actions brought by or against a State or municipality will require that particular attention be paid to consultation with the State in order to determine whether EPA involvement is appropriate or necessary. Likewise, in actions brought concerning an NPL site which has been designated a State lead site, coordination with the State will be required as a matter of policy before a decision concerning whether or not EPA should become involved is made.

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USE OF THIS GUIDANCE

The policy and procedures set forth here, and internal office procedures adopted in conjunction with this document, are intended for the guidance of staff personnel, attorneys, and other employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take any action at variance with the policies or procedures contained in this memorandum or which are not in compliance with internal office procedures that may be adopted pursuant to those materials.

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