EC-P-1998-061

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

JAN 7 1994

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OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: EPA Enforcement Policy for GOCO Facilities

FROM: Steven Herman
Assistant Administrator for Enforcement

TO: Waste Management Division Directors, Regions I-X
Water Division Directors, Regions I-X
Air Division Directors, Regions I-X
Regional Counsels, Regions I-X

EPA ENFORCEMENT POLICY FOR PRIVATE CONTRACTOR OPERATORS AT GOVERNMENT-OWNED/CONTRACTOR-OPERATED (GOCO)[1] FACILITIES

I. General GOCO Enforcement Response Policy

Where EPA has the authority under a given statute to initiate an enforcement action against an owner or an operator at a facility, and the contractor (or subcontractor) fits the statutory or regulatory definition of an operator, EPA may exercise its discretion to pursue enforcement against the Federal agency, the contractor-operator, or both.[2] While Federal owners are ultimately responsible for compliance with environmental requirements, EPA supports enforcement actions against government

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[1] The term "GOCO" as used in this Enforcement Policy is intended only as a term of convenience. The use of this term does not limit EPA's discretion to bring appropriate enforcement actions against any government contractor not expressly referred to by the contracting federal agency as a "GOCO".

[2] For example, under RCRA, as amended by the Federal Facility Compliance Act, EPA has the authority to issue administrative compliance orders to Federal agencies, and to recover penalties for violation of those orders. Thus, for violations of RCRA, it may be productive to proceed against the Federal owner and the contractor-operator simultaneously.

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contractors for violations at Federal facilities where appropriate.

Upon the initiation of an enforcement action against a contractor, EPA will treat the contractor the same as it treats all other private parties that are subject to environmental laws and regulations. Thus, in most instances, EPA has the option to issue a compliance order, issue an order for penalties, or initiate judicial action for injunctive relief and penalties. The Department of Justice has stated in Congressional testimony that while there may be institutional distinctions between Federal agencies and private parties which affect EPA's policy with regard to enforcement against Federal facilities, those distinctions do not apply to government contractors. Thus, the Justice Department does not treat such contractors differently than any other private party for purposes of law enforcement. See Statement of F. Henry Habicht II, Assistant Attorney General Before the Subcomm. on Oversight and Investigations of the House Committee on Energy, 95th Cong., 1st Sess. at 13-14 (1987). Once an enforcement action has been initiated solely against a contractor, Federal owners should be discouraged from engaging in substantive (i.e., beyond requests for general case status) communication with EPA on behalf of the contractor-operator.

II. Permit Applications

Where a contractor at a Federal facility meets the statutory or regulatory definition of an operator under the particular environmental statute at issue, the contractor should sign the permit application as an operator as would any other operator at a privately owned facility. For example, the Resource Conservation and Recovery Act (RCRA) requires that hazardous waste permit applications be signed by both the owner and the operator of the permitted facility. EPA has defined "operator" by regulation as "the person responsible for the overall operation of a facility." See 40 C.F.R. § 260.10. The Office of Waste Programs Enforcement (OWPE) of EPA issued guidance in 1987 to clarify application requirements under RCRA. The OWPE guidance states "[w]henever a contractor or contractors at a government-owned facility are responsible or partially responsible for the operation, management or oversight of hazardous waste activities at the facility, a contractor should sign the permit as the operator(s)." See Attachment 1.

The OWPE clarification recognizes that in many cases a Federal facility consists of several separate and distinct units that may be operated by different contractors. Each contractor that operates a unit dealing with hazardous waste management at a Federal facility should be a signatory to the permit application. See In the Matter of: Olin Corporation, Badger Army Ammunition Plant, 1989 RCRA LEXIS 26 (November 22, 1989) (holding that contractors are necessarily subject to being named as co-

permittees where they have responsibility for the operation of hazardous waste facilities).

The RCRA analysis applies to permits issued under the other environmental statutes; however, each media should use its own statutory or regulatory definition of operator when determining the appropriate signature requirements. EPA recognizes that in some instances both a Federal agency and its contractors are operators of a facility, and multiple operator signatures on the permit application would be appropriate. Finally, for contractors hired subsequent to the issuance of the permit, the permit should be modified to include the new contractor as an operator of the facility.

III. Identification of Appropriate GOCO Enforcement Responses

In determining the appropriate enforcement response at a particular facility, site-specific factors are of primary importance. In evaluating enforcement response options, EPA should not consider conclusive the language and content of the contract which governs relations between the Federal agency and the contractor. For example, the existence of an indemnification provision within the contract does not control EPA's determination of the appropriate party to be named in an enforcement action. Similarly, the title given to the contractor within the contract is not necessarily indicative of the contractor's operator status for enforcement purposes. Essentially, the contractor should be treated in the same manner as any private violator, and the terms of the government contract should not shield the contractor from liability that would otherwise be imposed under environmental laws and regulations.

There are some common factors which should be considered in the evaluation of which enforcement option to initiate at GOCO facilities. Specific factors affecting EPA enforcement decisions include, but are not limited to: (1) the statutory and regulatory de.initions and limitations regarding entities subject to enforcement by EPA under the particular program, (2) the degree of contractor-operator oversight and control over facility operations, (3) the degree of contractor-operator responsibility for management of the particular regulated activity at issue (e.g., waste management, toxic substances management, NPDES discharges), (4) the amount of responsibility for the violation which is attributable to the contractor, and (5) the degree to which compliance has been delayed due to prolonged and inconclusive negotiations between EPA and the Federal agency.

IV. Special Considerations For CERCLA Enforcement Actions

EPA Regional offices should consider carefully the implications of issuing CERCLA orders to government contractors. In some instances, there may be policy considerations which make

this enforcement response inappropriate. For example, it may be inappropriate for EPA to pursue the contractor-operator without also pursuing the Federal government. As stated in the Listing Policy for Federal Facilities, it is EPA's belief that "in most situations, it is appropriate to address sites comprehensively under CERCLA pursuant to an enforceable agreement (i.e., an interagency agreement [IAG] under CERCLA section 120) signed by the Federal facility, EPA, and, where possible, the State." 54 Fed. Reg. 10,520 (1989). Because EPA is required by law to enter into §120 interagency agreements with Federal agencies, and because the Federal agency has the lead responsibility for the remediation, as a practical matter EPA's enforcement against contractors at Federal facilities would be in addition to the development and enforcement of these interagency agreements. Thus, noncompliance with the IAG by the Federal agency may be addressed through the assessment of stipulated penalties in parallel to the GOCO enforcement action.

Despite these policy considerations, there is no prohibition in CERCLA restricting EPA's enforcement authority against government contractors. Contractor liability at Federal government facilities is as extensive as it would be for private contractors operating non-government facilities. As implied by the Listing Policy language quoted above, situations may arise when it is appropriate for EPA to proceed against the contractor for investigatory or remedial activities that either parallel or exceed the scope of the IAG. The discretion as to whether or not to proceed against the contractor-operator is vested in the Regional offices, in accordance with the 1992 Guidance on Coordination of Federal Facility Enforcement Actions with the Office of Enforcement.

In determining whether or not it is appropriate to proceed against a contractor, the Region should evaluate the compliance history and cooperation of the Federal facility, the amount of resources the Region would expend ensuring Federal agency compliance and/or contractor-operator compliance and the culpability of the contractor with respect to known releases. When bringing an action against a contractor, the Region should follow the national administrative order and consent decree models developed for enforcement against private parties. Similarly, referrals to the Department of Justice should follow normal procedures.

Where the contractor is a long-term operator at the facility, or if the contractor is believed to have contributed to the contamination problem at the facility, a CERCLA §106 unilateral order may be effective. See Attachment 2. There may be instances where a contractor-operator does not meet these specific criteria. Nevertheless, where the Federal agency fails to comply with the schedules in a CERCLA §120 interagency agreement, EPA retains the discretion to issue a §106 order to

the contractor-operator. Since a § 106 order to a government contractor will not require concurrence by the Department of Justice, this option is an efficient and streamlined enforcement alternative for EPA. The schedule contained in the contractor enforcement action should seek to accelerate work whenever feasible and should, at a minimum, contain deadlines as rigorous as the IAG. Since EPA has the enforcement discretion to pursue owners or operators by law, it is EPA's policy to utilize that discretion in choosing an enforcement response which most effectively protects human health and the environment.

V. Notice

This guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. Such guidance and procedures do not constitute rule making 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 action at variance with this guidance and its internal implementing procedures.

Attachments

ATTACHMENT 1

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

JUN 2 6 1987

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Determination of Operator at Government-Owned Contractor-Operated (GOCO) Facilities

FROM: Gene A. Lucero, Director
Office of Waste Programs Enforcement

Marcia E. Williams, Director
Office of Solid Waste

TO: Waste Management Division Directors
Regions I - X

The purpose of this memorandum is to clarify who should sign as the operator on permit applications for Government-Owned Contractor-Operated (GOCO) facilities. Earlier guidance (see attached memo) had recommended that the Regional office consider the role of the contractor in the operation of the facility before determining who should sign the permit application. We also noted that in some cases where the contractor's role is less precisely defined the Region should exercise judgment given the factual situation.

It appears that there is still some confusion regarding signatories for permit applications. Whenever a contractor or contractors at a government-owned facility, are responsible or partially responsible for the operation, management or oversight of hazardous waste activities at the facility; they should sign the permit as the operator(s). In some instances both the federal agency and the contractor(s) are the operators and multiple signatures to that effect would be appropriate. A review of the facility's operating records, contingency plans, personnel training records, and other documents relating to waste management should indicate who the operator(s) are. As a general rule, contractors will meet this test and therefore in most situations should be required to sign the permit application.

If you have any questions please contact Jim Michael, Office of Solid Waste at FTS 382-2231 or Anna Duncan, Office of Waste Programs Enforcement at FTS 382-4829.

Attachment

cc: Bruce Weddle, OSW
Elaine Stanley, OWPE
Chris Grundler, OSWER
Matt Hale, PSPD
Federal Facility Coordinators, Region I-X

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

ATTACHMENT 2

SEP 8 1988

OFFICE OF
SOLID WASTE AND EMERGENCY RESPON

MEMORANDUM

SUBJECT: Enforcement Actions at Government-Owned Contractor-Operated Facilities

FROM: Bruce Diamond, Director
Office of Waste Programs Enforcement

TO: Hazardous Waste Management Division Directors
Regions I-X

Regional Counsels
Regions I-X

The purpose of this memorandum is to provide you with copies of three enforcement actions that EPA recently issued to the contract operators of government owned facilities (GOCO). Two of these actions were brought under RCRA Section 3008(a) for violations of RCRA regulatory requirements. The third action is a notification letter for potential liability under CERCLA Section 107. I commend Region V and VI for taking the initiative in issuing these actions, as the Assistant Administrator has encouraged in both the January 1988 guidance and in congressional testimony.

To assist you in determining whether an action against a contractor may be an appropriate means of achieving compliance and cleanup at a Federal facility, I have highlighted the rationale [illegible] by Regions V and VI for proceeding against the GOCO in each of these cases.

Case #1 - GOCO has primary responsibility for hazardous waste management activities

In the case of the Lone Star Army Ammunition Plant, a RCRA Section 3008(a) complaint was issued to the contractor after it [illegible] determined that the contractor had practical and contractual responsibility for the hazardous waste management activities at issue. The ability to correct the violations was within the contractor's control. The complaint included a proposed penalty [illegible] the violation.

Case #2 - Prolonged and inconclusive negotiations with the Federal Agency

At the Ravenna Army Ammunition Plant, a RCRA Section 3008 [illegible] complaint was issued to the contractor after lengthy correspondence

with the Federal Agency failed to resolve the compliance issue. The complaint included a proposed penalty for the violation.

Case #3 - GOCO is performing the work

At Air Force Plant #4, the contractor was issued a CERCLA notice letter as a potentially responsible party for the performance of a remedial investigation. In this case, the contractor is a long-term operator at the facility; it is believed that the contractor contributed to the contamination problem at the facility; and the contractor is already performing the remedial investigation at the facility.

The decision on whether to pursue a GOCO enforcement action and the timing of that action will always be made on an individual basis as the facts of each case are unique. However, it is useful to build upon practical experience in an effort to anticipate the problems and issues before they occur.

I encourage you to provide the Federal Facility Hazardous Waste Compliance Office (FFHWCO) within OPWE your ideas and comments on the criteria for pursuing enforcement actions under RCRA and CERCLA at GOCO facilities. As I mentioned, the Assistant Administrator is encouraging these actions and the FFHWCO is developing a policy on when they should be pursued. You should relay to the FFHWCO any issues or problems that you have encountered when considering or pursuing enforcement actions at a GOCO facility.

cc: Ed Reich, OECM
Dick Sanderson, OFA