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

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OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Criteria for Elimination of Headquarters' Concurrence on Selected RCRA §3008(h) Orders

FROM: J. Winston Porter
Assistant Administrator

TO: Regional Administrators
Regions I - X

Regional Administrators may issue Administrative Orders (both consent and unilateral) under RCRA §3008(h) pursuant to Delegation 8-32, dated March 6, 1986, "Administrative Enforcement Corrective Action Authority: Issuance of Orders and Signing of Corrective Consent Agreements". However, under the current delegation for §3008(h), Regional Administrators must obtain the advance concurrence of the Assistant Administrator for Solid Waste and Emergency Response [which has been redelegated to the Director, Office of Waste Programs Enforcement (OWPE)] before exercising the authority to issue §3008(h) orders.

In order to complete full delegation, we have developed criteria for eliminating the Headquarters' concurrence requirement for individual Regions. In developing the criteria, we incorporated the key elements outlined in the §3008(h) model order, the Corrective Action Plan and the Interim Measures Guidance document. We have also reviewed past criteria used to determine delegation of the authority for RCRA §3008(a), consulted with the Office of Enforcement and Compliance Monitoring, and considered Regional comment on draft criteria.

For waiver of Headquarters' concurrence on consent orders, the Region must have issued four consent orders of acceptable technical and legal quality. Waiver of Headquarters' concurrence for unilateral orders will require the issuance of four quality orders (consent plus unilateral) of which at least two must have been unilaterals. The specific quality criteria are attached.

Once concurrence has been waived, Headquarters will still maintain a 21 day consultation role for the §3008(h) orders which involve cases of national significance (high visibility or precedent setting cases), federal facilities, commercial land disposal facilities, commercial incinerators, and the corrective measures decision. We are retaining this consultation role on the federal facilities to ensure national consistency in light of recent congressional and agency concerns and on the commercials to assure consistent implementation of the off-site disposal requirements of §121 of SARA.

In order to ensure consistency with Superfund's selection of remedy decisions, I would also like to maintain the consultation role on all corrective measures decisions regardless of whether the decision comes at some point during the existing order requiring the RFI/CMS or is embodied in a separate, new order. Please submit these decisions to the RCRA Enforcement Division Director for review prior to notifying the owner/operator of the final decision. We will be issuing guidance on the selection of corrective measures in the future.

When the 21 day consultation is in effect, the Region should submit the order or corrective measures decision to Headquarters for review. If Headquarters does not raise issues during the consultation period, then agreement can be assumed and the Region may issue the order or decision. Should there be a disagreement and Headquarters and Regional staff cannot come to resolution, then I will discuss the outstanding issues directly with you.

I anticipate waiving Headquarters' consultation for the categories mentioned above as further program experience is gained.

Attachment

# CRITERIA FOR ELIMINATING HQ's CONCURRENCE ON RCRA §3008(h) ORDERS

The factors to be considered in making the determination to eliminate HQ's concurrence on Section 3008(h) orders will be related to quantity and quality of the orders submitted to Headquarters for concurrence. Regarding quantity, Regions must develop, obtain Headquarter's concurrence, and issue four (4) quality consent orders. Waiver of Headquarter's concurrence on unilaterals will require the preparation and issuance of four quality orders (consent plus unilateral) of which at least two must be unilaterals. Regarding quality, Headquarters will consider the underlying technical development, findings of fact, the general procedural and legal provisions and the relief being sought (particularly the scopes of work). The Corrective Action Plan (CAP), the §3008(h) model order and the Interim Measures Guidance provide the points of reference for these criteria.

Specifically, as shown in the model order, the findings of fact should clearly define the release and identify the potential threat to human health or the environment. Also, as shown in the model order, the general procedural and legal provisions should: provide for record keeping and reporting; identify points at which EPA will review and approve/disapprove plans, activities, etc.; specify conflict resolution procedures for plan approval or modification; provide for EPA's access to the facility while activity is being conducted; specify penalties for failure to comply with the §3008(h) order; and address public involvement.

As discussed in the Corrective Action Plan, the scopes of work for the relief should: ensure that any interim measures identify all tasks necessary to mitigate any immediate threat to human health and the environment; set forth clearly and in detail the scope and elements of the RCRA Facility Investigation (RFI) work plans, site investigations, data (including sampling) collection and analysis, reports, etc.; ensure that the Corrective Measures Study (CMS) provides for an initial screening and evaluation of alternative(s), draft CMS, etc; and ensure that Corrective Measures Implementation (CMI) provides for the implementation of the selected corrective actions in sufficient detail.