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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: Guidance on Developing Compliance Orders under Section 3008 of the RCRA; Enforcement of Ground-Water Monitoring Requirements at Interim Status Facilities

FROM: Douglas MacMillan, Acting Director
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TO: Regional Administrators
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As you are aware, owners or operators of surface impoundments, landfills and land treatment facilities for management of hazardous waste were to have implemented a ground-water monitoring program as specified in 40 C.F.R. §265.90 by November 19, 1981. The Agency regards the ground-water monitoring requirements to be a fundamental component of the Federal hazardous waste management program. Enforcement of the requirements will be a major new undertaking for the Agency. Because of their innovative nature, broad scope and the variety of circumstances to which they must be applied, it is important that a consistent framework exist for the enforcement of the requirements. This memorandum, developed in conjunction with Office of General Counsel and Office of Solid Waste, provides such a framework.

Background

Strategies for the enforcement of the ground water monitoring requirements must be designed to reflect a number of considerations. The number and type of facilities subject to the ground-water monitoring requirements present a wide variety of monitoring problems and the enforcement policy must be flexible enough to omodate those differences. On the other hand, enforcement icy should be generally consistent in its application so at like situations will be treated in a similar manner and the

regulated community will have adequate notice of what actions are xpected of it. In addition, an enforcement policy for the ground-water monitoring requirements must reflect the possibility that, due to the comprehensive and innovative nature of the program, substantial noncompliance may exist, particularly during the initial months of the program.

Inspections

During the next several months (at least until inspections have been conducted at a representative number of the facilities required to conduct ground-water monitoring) particular emphasis should be placed on ground-water monitoring when conducting compliance inspections. A determination should be made at each facility as to the existence and proper operation of a ground-water monitoring system. Compliance with the more specific requirements of §265.90 should also be determined. The inspector should discuss the §265.90 provisions with the owner/operator to ensure that the owner/operator understands the requirements which are applicable to that facility. All detected violations and appropriate remedies should be recorded in the inspection report, carefully explained to the owner/operator, and a copy of the inspection report should be supplied to the owner/operator. In addition, all facilities which are thought to require groundwater monitoring but which do not submit quarterly reports should be assigned a high priority 'or early inspection.

All required documentation (i.e., waiver demonstration, assessment plan outlines, alternative monitoring system plans, sampling and analysis plans, sampling results, reports and, after November 19, 1982, assessment plans) should be examined. (If the adequacy of these documents cannot readily be determined on the basis of the site inspection, copies should be made for further analysis at the office). Moreover, since failure by the Agency to detect and respond to deficiencies could be interpreted as approval, priority should be placed on the analysis of any waiver demonstrations and assessment plans developed pursuant to §265.90(c) and (d) respectively. In addition, any alternative monitoring system plans submitted in accordance with 40 C.F.R. §265.90(d) or waiver demonstrations voluntarily submitted by an owner/operator should be reviewed and a response provided within thirty days. The Office of Solid Waste will be providing further guidance in the near future concerning evaluation of these documents.

Response to Detected Violations

When violations are detected enforcement should proceed in accordance with previously issued guidance on developing compliance orders under §3008 of RCRA. (See July 7, 1981 Memorandum, Douglas MacMillan to the Regional Administrators, Guidance on Developing 'ompliance Orders Under Section 3008 of the Resource Conservation and Recovery Act). The classification scheme contained in the 7/7/81 memo, however, addressed only the interim status require-

ments in effect at that time. In that guidance, violations which pose direct and immediate harm or threats of harm to public health or the environment are classified as Class I violations. Since failure to have or, properly operate, a monitoring system may prevent discovery of conditions which clearly could constitute such harm, such failures should be considered to constitute threats of harm.

Violations of the following ground-water monitoring requirements should therefore be presumed to be Class I violations: failure to monitor (§265.90(a)), waivers by the owner/operator of all or part of the ground-water monitoring requirements which are not justifiable on the basis of low migration potential (§265.90(c)), failure to design and operate an acceptable monitoring system (§265.91), failure to develop and implement an acceptable sampling and analysis plan (§265.92), failure to prepare and implement an acceptable assessment program on a timely basis either when an alternative monitoring system is chosen pursuant to §265.90(d) or, after November 19, 1982, when contamination is detected (§265.93), and failure to submit required reports when contamination is detected (§265.94). Section 3008 compliance orders should be issued to the owners/operators of all facilities at which these violations are detected. Violations of other requirements (these would primarily be documentation, recordkeeping and routine reporting requirements) should be considered Class III violations and addressed through a warning letter.

As is the case with section 3008 orders generally (see July 7, 1981 Memorandum, p.4), questions may arise as to whether, in a particular set of circumstances, a violation should be considered a Class I or Class III violation. For example, a single late submission of a required report, when no contamination is detected, would, under this scheme, be considered a Class III violation. General disregard of the routine reporting requirements could, however, be considered a Class I violation.

On the other hand, particular Class I violations may be de minimis in nature. Violations of some of the ground-water monitoring requirements, which should otherwise be presumed to be Class I violations, may, in many instances, not pose a direct and immediate threat of harm to public health or the environment. Specifically, the requirements relating to the monitoring system (§265.91), the sampling and analysis plan (§265.92), and the assessment program (§265.93) may be violated because the system, plan or program is somewhat incomplete or technically inadequate, but not sufficiently incomplete or inadequate as to pose a direct and immediate threat of harm. In such cases the warning letter approach for Class III violations would be more appropriate. However, because they will always pose a direct and immediate threat of harm, the remaining Class I violations (i.e., failure to monitor (§265.90(a)), waivers which are not justifiable on the basis of low migration potential §265.91 (c)), and failure to submit required reports when contamination is detected (§265.94)) should always be addressed through the issuance of a section 3008 compliance order.

There will-no-doubt-be many close calls. In those cases gional assessment as to the proper Agency response must be guided y informed judgement. As with section 3008 compliance orders generally, questions which arise concerning the proper classification of a particular violation should be discussed with the appropriate Headquarters liason staff prior to preparation of the proposed order.

As is the case with 3008 orders generally, the inclusion of penalties in compliance orders relating to ground-water monitoring will be at the discretion of the Regional Offices. When determining whether to include penalties in a section 3008 compliance order the Regional Office should take into account the harm which has or may result from the violation and any "good faith" efforts on the part of the owner/operator to bring the facility into compliance. It is expected, based on these criteria, that section 3008 compliance orders issued for violation of the following requirements will generally include penalties: failure to monitor (§265.90(a)), waivers which are not justifiable on the basis of low migration potential (§265.90(c)), and failure to submit required reports when contamination is detected (§365.94). When compliance orders are issued which do not include penalties, it should emphasized that failure to comply with a compliance schedule can result in a civil action being brought in Federal District Court ursuant to section 3008(a) with penalties being judicially imposed. is anticipated that as the program progresses and owner/operators ecome increasingly familiar with the ground-water monitoring equirements, penalties will be included in compliance orders for all types of Class I violations with greater frequency.

The compliance schedule specified in the order should coincide with the quarterly analyses required by §265.92(c) and should require compliance within as short a period as possible. In general, the order should specify that the next quarterly analysis, which is required to be completed in not less than three months, be performed. For example, a facility inspected February 1, 1982, at which a Class I violation is found would be issued a compliance order requiring that the analysis required by §265.92(c) be completed by May 19, 1982, the end of the next quarter. Such a schedule would allow owners/operators at least three months but no more than six months to complete the monitoring necessary for a quarterly report. In the overwhelming majority of cases this should be a sufficient period of time for an owner/ operator to comply.

The Regional Offices should attempt to adjust compliance schedules according to the circumstances found at particular facilities. In those cases where a facility is considered to be capable of complying within a shorter period of time (e.g., where, e to the nature of the facility, the waste, or hydrogeologic ditions, monitoring is a relatively simple matter, or where rtial compliance has occurred) an earlier date for final comliance should be included in the compliance schedule. Compliance

schedules with a final compliance date later than the due date of the facility's next quarterly analysis, which is due in not less than three months, should not be allowed however, except upon a strong showing of impracticability. (Absent this strong showing facilities would be required to comply in no more than six months.)