



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

AUG 10 1989

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Federal Facilities Negotiations Policy

FROM: Jonathan Z. Cannon *J. Cannon*
Acting Assistant Administrator

TO: Regional Administrators

Much progress has been made over the past year in establishing new principles governing our relationship with other Federal agencies we are charged to regulate. We now have specific tools and procedures in place to resolve RCRA and CERCLA compliance and cleanup issues. The challenge we now face is to manage the process so that these issues are resolved in a timely and efficient manner.

BACKGROUND

We recently concluded negotiations on several agreements with the Department of Energy (DOE) and the Department of Defense (DOD) under both RCRA and CERCLA. I know that you agree that these negotiations took far too long to conclude and that negotiations with Federal facilities, in general, are taking a disproportionate amount of your staff's time. I share your frustration. I believe it is EPA's role to be a catalyst and a facilitator for obtaining three-party agreements with the states and other Federal agencies, and that we must use every tool available to make this happen. For these reasons, I am establishing the following policy governing Federal facilities negotiations. This policy was developed in consultation with your Waste Management Divisions and Offices of Regional Counsel.

POLICY

RCRA COMPLIANCE AGREEMENTS

The process for resolving RCRA compliance issues at Federal facilities is described in the memorandum, Enforcement Actions at Federal Facilities under RCRA and CERCLA (January 25, 1988 OSWER Directive Number 9392.0). Negotiation time frames and the process for elevating compliance disputes are described in the memorandum,

Elevation Process for Achieving Federal Facility Compliance under RCRA (March 24, 1988, OSWER Directive Number 9992.1)¹

In all future RCRA Notices of Noncompliance (NON) to Federal facilities, Regions should include a statement notifying the facility of the negotiation time frames established by EPA policy, and the automatic elevation of disputes after 90 days or 120 days with an extension. When a RCRA compliance dispute is elevated pursuant to the March 24, 1988 memorandum, the Region should consider issuing a press release concerning the compliance status of the facility. EPA policy concerning the use of press releases at Federal facilities is described in EPA's Federal Facilities Compliance Strategy.

RCRA SECTION 3008(h) ORDERS

In accordance with the January 25, 1988 memorandum, the existing administrative procedures for issuing RCRA 3008(h) orders, as set forth in 40 CFR Part 24, will be applied to Federal agencies. However, Federal agencies will have the opportunity to elevate disputes to the Administrator for a final decision in the event a dispute cannot be resolved at the Regional Administrator level.

CERCLA SECTION 120 AGREEMENTS

Section 120 Interagency Agreements (IAG) are complicated and often difficult to negotiate because of the different jurisdictional arguments raised by the negotiating parties, the scope of the agreements relative to NPL and non-NPL areas, the different layers of bureaucracy involved, and the relative newness (i.e., post model) of the negotiation process. The model language negotiated with DoD and DOE has been helpful in moving the negotiations forward and should continue to be used without changes or further negotiation except to accommodate important state concerns.

The same model language should be used when negotiating CERCLA Section 120 Agreements with Federal Agencies other than DoD and DOE. The use of the model language would reduce the amount of time it takes to negotiate the Agreement, ensure consistency among the different Federal agencies, and reaffirm EPA's commitment to the model language.

¹The guidance referenced above does not apply to enforcement actions against contractor operators at Federal facilities (GOCOs) since EPA can utilize its full range of enforcement authorities at GOCOs to achieve compliance. The Regions are encouraged to consider proceeding against GOCOs and a separate GOCO enforcement strategy is being developed.

I expect that negotiations will become less protracted with each site-specific settlement, since the parties will gain more experience with the negotiation process, model language and concepts. Notwithstanding recent agreements and experience gained, however, I am still concerned that IAG negotiations take too long and are too resource intensive. Therefore, I am establishing this Federal facility negotiation policy to expedite the negotiation process. This policy requires establishing deadlines for settlement and provides for elevating unresolved disputes to Headquarters with subsequent referral of a CERCLA §106 Administrative Order to the Department of Justice (DOJ) or settlement of a two-party agreement between the Federal agency and EPA, as appropriate. The policy is as follows:

- 1) Establishing Deadlines: The first step is for the EPA regional office to establish a deadline for conclusion of negotiations. This deadline is not to exceed 90 days. The deadline for ongoing negotiations should be less than 90 days depending on how long the negotiations have been in progress. If most major issues are resolved, and prospects for agreement are good, the deadline may be extended once for 30 days by mutual agreement among the parties.

Deadlines should be set in accordance with the SCAP targets and in consultation with states. The process for establishing deadlines is to send the Federal facility a Federal facility version of a Special Notice Letter with a draft IAG attached (See Attachment I: Sample Federal Facility Notice Letter). This notice letter and draft IAG should be sent at least 30 days before the start of the targeted quarter. Regions with multiple targets in any given quarter should stagger deadlines to avoid elevation of multiple IAGs at the same time.

Since states are an integral part of the negotiations process, they should be involved in the planning for establishing negotiation deadlines to assure their availability. Regions should contact their State counterparts and outline SCAP targets for FY89 and FY90 to allow the states to factor these targets into their internal planning and budget cycles. This planning process should be conducted annually. Additionally, the draft IAG sent with the Special Notice letter should have State roles reflected in the language. The three-party version of the model language recently sent to the Regions can be used as guidance. You should discuss the incorporation of this language into the draft IAG with the State in the course of your initial contact.

- 2) Establishing scope: As part of the deadline setting process, Regions need to address the scope of the IAG. This is

imperative because the scope will often dictate the difficult jurisdictional issues that arise. The EPA regional office should discuss the scope with the State and the Federal facility to determine whether either party has specific concerns relative to the releases potentially addressed by the IAG. EPA's general policy is to address all releases at a facility under a CERCLA IAG. However, in some situations, the scope of the IAG may be limited to areas on the facility that caused the facility to be listed on the NPL with the remaining releases (i.e., non-NPL releases) to be addressed under RCRA permitting or State enforcement. In other situations, the IAG scope could include both RCRA and CERCLA lead activities. Scoping decisions will most often be based on technical judgements about the nature and location of contamination at the facility.

- 3) Negotiations: To expedite the negotiation process, prior to the start of actual negotiation, the Region should coordinate with the Federal facility and the State to establish negotiation teams which are limited in number and have authority for most negotiation decisions. After initial negotiation sessions have occurred, it may be effective to schedule a lengthy negotiation session of 3-5 days to address and resolve all outstanding issues. These intensive negotiation sessions have proven to be fruitful and an effective use of time. It is important for Regions to closely coordinate with the Federal Facilities Hazardous Waste Compliance Office (FFHWCO) during the negotiation process by either sending the FFHWCO copies of draft IAGs as they are developed, or in some cases by including the FFHWCO on the negotiation team. Nationally - significant issues that are tentatively agreed to in negotiations need to be elevated to decision-makers for concurrence or further discussion. The intent of this policy is to preclude last minute changes to language that was previously agreed upon. Finally, in some situations where the Region knows that a state will raise significant issues, it may make sense to discuss these issues and EPA's position prior to three-party negotiations. You should inform the Federal agency that you are engaged in such discussions with the State.
- 4) Elevation: If no agreement is reached on the deadline date (up to 90 or 120 days with extension) then the Region is to elevate the dispute to Headquarters for a 30 day period of negotiation and concurrently prepare, in consultation with Headquarters, either a CERCLA §106 Order for referral to DOJ or a two-party agreement, depending on which is appropriate. Headquarters will coordinate closely with the Region during this 30 day period.

A dispute should be elevated with a recommendation for a §106 Order when, in EPA's judgment, the Federal facility is refusing to agree to a reasonable demand by EPA or the State, or is failing to devote adequate resources to the negotiating process. A dispute should be elevated with a recommendation for a two-party IAG when, in EPA's judgment, the Federal facility has taken reasonable positions on all outstanding issues and the State is taking positions which EPA or the Federal facility cannot reasonably agree to, or the State is devoting inadequate resources to the negotiating process.

If the dispute cannot be resolved at Headquarters within 30 days, then either the §106 Order will be referred to DOJ for concurrence, or EPA and the Federal Agency will enter into the two-party IAG. DOJ has agreed to a 14-day turnaround time for review of referred §106 orders. The Region has the flexibility of elevating a dispute to Headquarters at any time during the established negotiation period should it become necessary (i.e., outstanding issues remain that present national policy concerns which can only be resolved in Headquarters). The Region, in the case of early elevation, should still prepare the order or two-party agreement. Attached is a copy of DOJ's memorandum on concurrence procedures for §106 Orders (Attachment 2) which can be used as guidance.

- 5) Planning: The Regions should establish the deadlines for ongoing negotiations and fourth quarter SCAP targets and forward this information to the FFHWCO within 14 days of the date of this policy. Subsequent deadlines should be forwarded to the FFHWCO two weeks prior to the start of each quarter. The FFHWCO will provide these deadlines to the appropriate Federal agency headquarters.

The purpose of this policy is to preclude protracted negotiations by establishing deadlines for all parties with consequences for failure by the Federal agency or the state to reach settlement. I believe that in most cases 90 days is sufficient time to successfully conclude negotiations and that the potential for a §106 Order or two-party agreement serves as an incentive to keep all parties at the negotiating table. The Federal Facilities Hazardous Waste Compliance Office (FFHWCO) will continue to provide Regions with assistance in negotiating IAGs, FFCAs, and 3008(h) orders.

Questions on this policy and the negotiation deadlines should be referred to Chris Grundler, Director, or Gordon Davidson, Deputy Director, or your regional coordinator within the FFHWCO at FTS 475-9801 (mail code OS-530).

Attachments

ATTACHMENT 1

FOR NPL SITES ONLY

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: Interagency Agreement for (name of site)
National Priority List Superfund Site

Dear _____:

The United States Environmental Protection Agency (EPA) has identified releases or threatened releases of hazardous substances, pollutants or contaminants at the _____ site. The _____ site is a Federal facility which is owned or operated by the _____ (name of Federal agency or department). Therefore, pursuant to Section 120 of CERCLA, the _____ (agency or department) is ultimately responsible for addressing releases or threatened releases of hazardous substances, pollutants or contaminants at or from the _____ site.

This letter serves to notify _____ (agency or department) that EPA is prepared to negotiate an Interagency Agreement (IAG) to formally establish that the _____ (agency or department) will investigate and control the releases or threatened releases of hazardous substances, pollutants or contaminants at or from the _____ site pursuant to CERCLA. While the _____ (agency or department) is responsible for addressing the releases or threatened releases pursuant to CERCLA, EPA intends to oversee the Remedial Investigation and Feasibility Study (RI/FS) phases, as part of the CERCLA remedy selection process, and the Remedial Design and Remedial Action (RD/RA) phases of the response action at the _____ site. The IAG (see EPA draft enclosed) will be developed under Section 120 of CERCLA and will reflect the commitment of _____ (agency or department) to conduct the RI/FS and any remedial action needed at the site, as determined by the RI/FS, in accordance with CERCLA, as amended, the National Contingency Plan (NCP) and appropriate EPA Guidance.

EPA has determined that establishing a pre-defined period of time for negotiation of an IAG will facilitate the development of the Agreement with (agency or department) and will ultimately serve to expedite remedial action at the site. Therefore, this letter serves as "special notice" pursuant to Section 122(e)(1) of CERCLA, as amended, of EPA's intent to conduct negotiations with (agency or department) and the State of for the development of an IAG.

By this special notice, EPA hereby establishes a ninety (90) day period for negotiation of the IAG. If at the end of the ninety (90) day period an IAG is not successfully negotiated between EPA, (agency or department) and the State, EPA may, where appropriate, extend the negotiation period for an additional thirty (30) days. If at the end of the ninety (90) day period (or one hundred and twenty (120) day period, where extended by EPA) an IAG is not successfully negotiated, EPA may issue an order to (agency or department) pursuant to Section 106 of CERCLA, with the concurrence of the Department of Justice, for the conduct of the required work. Where State participation in the IAG cannot be achieved within the ninety (90) day period (or one hundred and twenty (120) day period, where extended by EPA), prior to EPA's issuance of an order under Section 106 of CERCLA, EPA may, as appropriate, attempt to negotiate a two-party IAG with the (agency or department) . This two-party option does not serve as a limitation on EPA's discretion to develop and issue an order under Section 106 of CERCLA.

In response to this special notice, please provide EPA with a letter indicating:

- o the address and telephone number of the (agency or department) official for EPA to utilize as a point-of-contact; and
- o a statement of the (agency or department) willingness to negotiate an IAG.

Should such a letter not be received by EPA within fourteen (14) days of your receipt of this letter, or should the deadline pass without successful negotiation of an IAG, EPA will consider the period of negotiations closed. EPA then will have the option of issuing an order under Section 106 of CERCLA, proceeding under other available statutory authority, or proceeding with any appropriate off-site response using Superfund monies.

If you are already involved in discussions with State or local authorities, engaged in voluntary action, or involved in a lawsuit regarding this Site, you should not interpret this letter to advise or direct you to restrict or discontinue any such

activities. Please provide a copy of your letter to any other party involved in those discussions. You also should be aware that EPA will not delete the _____ site from the National Priorities List until the necessary remedial work has been concluded in accordance with CERCLA and the NCP.

Your letter to EPA should be addressed to:

Site Remedial Project Manager
U.S. Environmental Protection Agency
Region _____

If you have any questions _____ RPM's name _____ can be reached at _____ phone number _____. Legal questions should be addressed to _____ attorney's name _____, at _____ attorney's number _____.

Thank you for your cooperation.

Sincerely,

_____, Director
Hazardous Waste Management Division

Enclosure

cc: Federal Department or Agency Headquarters

State Environmental Protection Agency

_____, Deputy Chief
Environmental Enforcement Section
Department of Justice



ATTACHMENT 2

Office of the Assistant Attorney General

Washington, D.C. 20530

DEC 27 1988

PROCEDURES AND CRITERIA FOR DEPARTMENT OF JUSTICE CONCURRENCE
IN EPA ADMINISTRATIVE ORDERS TO FEDERAL AGENCIES

1. Purpose -- The purpose of these Procedures and Criteria is to implement the responsibilities of the Attorney General (as delegated to the Assistant Attorney General for the Land and Natural Resources Division) under section 4(e) of the Superfund Executive Order (EO 12580, Jan. 23, 1987) to review any administrative order ("AO") that the Environmental Protection Agency ("EPA") proposes to issue to a federal agency under sections 104(e)(5)(A) or 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9604(e)(5)(A), 9606(a).

2. Procedure -- The EPA Assistant Administrator for Solid Waste or, if delegated, the EPA Regional Administrator, should submit the proposed AO and a referral letter to:

Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530

with a copy to:

Chief
Policy, Legislation and Special Litigation Section
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530

The referral letter should include the following information:

-- A statement of the technical basis for the AO, including all necessary findings that support the existence of an imminent and substantial endangerment from an actual or threatened release (for an order issued pursuant to CERCLA § 106(a)), or the basis for believing that there may be a release or threatened release (for an order issued pursuant to CERCLA § 104 (e)(5)(A));

-- A statement of EPA's prior dealings with the agency and the efforts that have been made to resolve the matter;

-- A statement of the objections raised by the agency in objecting to compliance and EPA's response to those objections;

-- A statement of whether there are non-federal PRPs or government contractors responsible for the facility and the status of any EPA enforcement efforts against such persons;

-- The name and telephone number of both the EPA attorney with line responsibility for the AO and the EPA Headquarters contact in the Federal Facilities Hazardous Waste Compliance Office within the Office of Waste Programs Enforcement.

Upon receipt, the Policy, Legislation and Special Litigation Section ("PLSL") will promptly (i) enter the proposed AO onto its docket; (ii) review the proposed AO and advise the EPA line attorney and the Federal Facilities Hazardous Waste Compliance Office contact at EPA Headquarters if additional information will be required; (iii) evaluate the proposed AO according to the criteria listed below and prepare a recommendation for the Assistant Attorney General. PLSL will then forward the proposed AO and its recommendation to the Assistant Attorney General for a decision. If the proposed AO and referral letter include all the necessary information, the Assistant Attorney General will make his or her decision within two weeks of receipt of the proposed AO. The decision will be provided to the Assistant Administrator for Solid Waste or the Regional Administrator, as the case may be, in a letter stating the Assistant Attorney General's concurrence, concurrence subject to conditions, or objection to the proposed AO.

In situations where faster action is required (for instance, where there may be an emergency that presents a direct and immediate threat to the public health), PLSL and the Assistant Attorney General will attempt to review the proposed AO within 24 hours. To obtain expedited review, the EPA line attorney or the Federal Facilities Hazardous Waste Compliance Office contact at EPA Headquarters should contact PLSL by telephone at FTS 633-1442 at the earliest possible time.

3. ~~Criteria~~ -- In deciding whether to issue the proposed AO, the Assistant Attorney General will consider the following factors:

-- whether the proposed AO is consistent with EPA's statutory authority;

-- the extent of prior consultation with the affected federal agency at the appropriate levels of authority;

-- whether any non-federal PRP has responsibility that affects ~~the~~ appropriateness of the issuance of an AO to the federal agency.

In addition to the foregoing, EPA and the Department of Justice may raise, and the Assistant Attorney General may consider, any other factors that may be relevant under the circumstances.



ROGER J. MARZULLA
Assistant Attorney General

DATED: December 27, 1988

ADD TO E275. PLSL 4642Z

DATE VAC, 033 464Z