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INTERPRETATION OF SECTION 3008(h) OF THE SOLID WASTE DISPOSAL ACT

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TO: Regional Administrators  
Regional Counsels  
Regional Waste Management Division Directors  
Director, National Enforcement Investigation Center

As part of our effort to support case development activities undertaken by United States Environmental Protection Agency personnel, we are transmitting to you guidance on the use of Section 3008(h), one of the corrective action authorities added to the Solid Waste Disposal Act by the Hazardous and Solid Waste Amendments of 1984. As you are aware, Section 3008(h) allows the Agency to take enforcement action to require corrective action or any other response necessary to protect human health or the environment when a release is identified at an interim status hazardous waste treatment, storage or disposal facility. Because the authority is broad, both with respect to the kinds of environmental problems that can be addressed and the actions that the Agency may compel, we have produced the attached document to provide initial guidance on the interpretation of the terms of the provision and to describe administrative requirements. The document will be revised as case law and Agency policy develop. In addition, the Office of Solid Waste and Emergency Response intends to develop technical guidance on various types of response measures and the circumstances in which they might be appropriate.

In view of the need to issue RCRA permits and to ensure that the substantial number of interim status facilities expected to cease operation in the near future are closed in an environmentally sound manner, we encourage you to use the interim status corrective action authority as appropriate to supplement the closure and permitting process. Questions or comments on this document or

the use of Section 3008(h) authority in general can be addressed to Gene A. Lucero, Director of the Office of Waste Programs Enforcement (FTS 382-4814, WH-527) or Fred Stiehl, Associate Enforcement Counsel for Waste (FTS 382-3050, LE-134S).

## Attachment

### I. INTRODUCTION

The Hazardous and Solid Waste Amendments of 1984 have substantially expanded the scope of the RCRA hazardous waste management program. One of

the most significant provisions is the interim status corrective action authority, which allows EPA to take enforcement action to compel response measures when the Agency determines that there is or has been a release of hazardous waste at a RCRA interim status facility. Prior to the 1984 Amendments, EPA could require remedial action at interim status facilities by, inter alia, (1) using RCRA §7003 or CERCLA §106 authorities if an imminent and substantial endangerment may have been presented, or (2) when significant ground-water contamination was detected, calling in Part B of the RCRA permit application and requiring corrective action as a condition of the permit. The Amendments added Section 3008(h) to deal directly with environmental problems by requiring clean-up at facilities that have operated or are operating subject to RCRA interim status requirements.

The purpose of this document is to provide preliminary guidelines on the scope of Section 3008(h) and to summarize appropriate procedures. The document will be revised as case law and Agency policy develop. Other relevant RCRA guidances that may be consulted include:

- Final Revised Guidance on the Use and Issuance of Administrative Orders under Section 7003 of RCRA, Office of Enforcement and Compliance Monitoring and Office of Solid Waste and Emergency Response-September, 1984.
- Issuance of Administrative Orders under Section 3013 of RCRA, Office of Enforcement and Compliance Monitoring and Office of Solid Waste and Emergency Response - September, 1984.
- Draft Guidance on Corrective Action for Continuing Releases, Office of Solid Waste and Emergency Response - February, 1985.
- Final RCRA Ground-Water Monitoring Compliance Order Guidance, Office of Solid Waste and Emergency Response - August, 1985.

To expedite §3008(h) actions, the Regions should establish procedures for drafting and reviewing orders and referrals and clearly delineate the roles and responsibilities of Regional RCRA enforcement and program personnel (including CERCLA personnel as necessary) and the Office of Regional Counsel in those processes. Draft orders should be sent to the Chief, Compliance and

Implementation Branch, RCRA Enforcement Division, Office of Waste Programs Enforcement.

Headquarters is committed to conducting timely review of §3008(h) orders. To avoid the delays associated with discussion and review of rough drafts, we ask that orders be in "near final" form when they are submitted. Generally, the orders will be examined to determine whether (1) the elements of proof are adequately defined and documented, (2) the response to be compelled is practicable and environmentally sound, and (3) the action supports national RCRA program goals. Written comments or concurrence will be provided to the Regions within ten working days of receipt.

### III. SCOPE OF SECTION 3008(h)

Section 3008(h) provides:

- (1) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under Section 3005(e) of this subtitle, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment, or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary permanent injunction.
- (2) Any order issued under this subsection may include a suspension or revocation of authorization to operate under Section 3005(e) of this subtitle, shall state with reasonable specificity the nature of the required corrective action or other response measure, and shall specify a time for compliance. If any person named in an order fails to comply with the order, the Administrator may assess, and such a person shall be liable to the United States for, a civil penalty in an amount not to exceed \$25,000 for each day of noncompliance with the order."

"Hazardous constituents" are the substances listed in Appendix VIII to 40 CFR Part 261. H. Rep. No. 198, 98th Cong., 1st Sess. 60-61 (1983). According to the legislative history for Section 3004(u), which is read in conjunction with Section 3008(h), the term also includes Appendix VIII hazardous constituents released from solid waste and hazardous constituents that are reactor by-products. S. Rep. No. 284, 98th Cong., 1st Sess. 32 (1983). It should be noted that the legislative history for the new

underground storage tank provisions states that Section 3008 is not applicable to underground storage tanks regulated under Subtitle I. Such releases may be addressed by Section 7002 and Section 7003 authorities, however. H. Rep. No. 1133, 98th Cong., 2d Sess. 127 (1984). Section 3008(h) remains applicable to releases from underground tanks containing hazardous or solid waste subject to Subtitle C provisions.  
"...from a facility..."

For interim status corrective action purposes, EPA intends to employ the definition of 'facility' adopted by the Agency in the corrective action program for releases from permitted facilities. The preamble to the permitting requirements for land disposal facilities indicates that the term 'facility' refers to..."the broadest extent of EPA's area jurisdiction under Section 3004 of RCRA...[meaning] the entire site that is under the control of the owner or operator engaged in hazardous waste management." 47 FR 32288-89 (July 26, 1982). See also the Final Codification Rule. 50 FR 28712 (July 15, 1985). Therefore, the definition of facility encompasses all contiguous property under the owners control.

The permit program, as amended by Section 3004(u), requires corrective action for releases of hazardous waste and hazardous constituents from solid waste management units at a facility. EPA interprets 'solid waste management unit' releases from waste management units not required to undertake corrective action or otherwise exempt from RCRA regulations and releases, such as air emissions, to environmental media other than groundwater. Id. at 112.

The text of the statute, the broad remedial purpose, and the clear intent to authorize action beyond the scope of the permit regulations support the position that Section 3008(h) authorizes EPA to address all types of releases of hazardous waste within a facility. As discussed previously, the term 'hazardous waste' encompasses 'hazardous constituents' from both hazardous and solid waste.

Section 3008(h) will also be used to address releases that have migrated from the facility. New Section 3004(v), which provides that EPA may issue orders requiring corrective action for releases that have crossed the facility boundary if the permission of the owner of the affected property can be obtained, supports the agency's interpretation that such releases are subject to action under Section 3008(h). See also the Final Codification Rule. 50 FR 28716 (July 15, 1985).

In a §3008(h) order or judicial referral, Agency personnel should describe hazardous and solid waste management units within the boundary of the facility and hazardous and solid wastes (and associated hazardous

constituents) managed by the facility in addition to information indicating that a release has occurred. Since Section 3008(h) unequivocally authorizes EPA to address releases from units, the order or complaint should establish some link between the hazardous constituents in a release and the hazardous or solid wastes in waste management units where possible. For example, the findings of facts might state that the facility treats, stores or disposes of certain listed Subtitle C wastes, that those wastes were listed because they contain the hazardous constituents cited in Appendix VII to 40 CFR Part 261 and that some or all of those constituents have been found in the environment, thereby indicating a release.

The Agency believes that Congress intended the interim status corrective action authority to apply to such facilities. The legislative history for Section 3008(h) supports this position by making it clear that the authority can be used to address releases from units that do not have interim status, such as wastewater treatment tanks. H. Rep. No. 1133, 98th Cong., 2d Sess. 112 (1984).

Third, EPA considers Section 3008(h) to be applicable not only to owners or operators of facilities in the above two categories but also to units or facilities at which active operations have ceased and interim status has been terminated to 40 CFR Part 124 or Sections 3005(c) and 3005(e)(2) of RCRA. Section 3008(h) specifically provides that the interim status corrective action orders may include a suspension or revocation of the authority to operate under interim status, as well as any other response necessary to protect human health or the environment. Consequently, a corrective measures program can be imposed under Section 3008(h), even if a facility's interim status has been taken away as a result of an interim status corrective action order. The Agency also believes that Section 3008(h) can be used to compel responses to releases at facilities that lost interim status prior to a §3008(h) action. This approach is consistent with Congressional intent to assure that significant environmental problems are addressed at facilities that treat, store or dispose of hazardous waste but do not have a final RCRA operating or post-closure permit. H. Rep. No. 1133, 98th Cong., 2d Sess. 110-112 (1984).

Where a State is authorized to administer the RCRA program, the requirements for obtaining the State's equivalent to interim status may differ from those of the federal program. In authorized States that do not duplicate the federal procedures, hazardous waste treatment, storage and disposal facilities that have not been granted or denied a final RCRA permit are generally considered interim status facilities. Land disposal facilities that were issued State permits

pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment. The exemptions described in the CERCLA definition are considered inapplicable or inappropriate for RCRA purposes, however, and are not included in the RCRA definition. The term 'environment' is also broad. The legislative history for Section 3008(h), which discusses use of the authority to respond to releases to various environmental media, makes it clear that Section 3008(h) is not limited to a particular medium. H. Rep. No. 1133, 98th Cong., 2d Sess. 111-112 (1984). The Agency will use Section 3008(h) to address releases to surface waters, groundwater, land surface or subsurface strata and air. It is not necessary to have actual sampling data to show a release. An inspector may find other evidence that a release has occurred, such as a broken dike at a surface impoundment. Less obvious indications of release might also be adequate to make the determination. For example, the Agency could have sufficient information on the contents of a land disposal unit, the design and operating characteristics of the unit, and the hydrogeology of the area in which the unit is located to conclude that there has been a release to groundwater.

In addition to on-site information gathering undertaken specifically to support a §3008(h) action, other sources that may provide information on releases include:

- Inspection Reports.
- RCRA Part A and Part B permit applications.
- Responses to RCRA §3007 information requests.
- Information obtained through RCRA §3013 orders.
- Notifications required by CERCLA §103.
- Information-gathering activities conducted under CERCLA §104.
- Informants' tips or citizens' complaints corroborated by supporting information.

For example, a §3008(h) order might require that the owner or operator conduct a study to characterize the nature and extent of contamination, then select a remedy and submit a corrective action plan to EPA. The Agency and the owner or operator would then confer on the plan and amend the order to reflect any modifications. H. Rep. No. 1133, 98th Cong., 2d Sess., 111 (1984). Because a study on the nature and extent of contamination and the

selection and design of a remedy may require a significant amount of time, Section 3008(h) should be employed to require interim measures as necessary to protect human health and the environment prior to completion of the study and selection of a remedy. Examples of interim remedies that could be compelled include removal of the waste or containment of the sources of the contamination by lining a unit or erecting dikes. In some instances, preliminary pumping and treating of affected groundwater may be appropriate. While the information needed to make a determination that there is or has been a release is minimal, more information may be needed to justify a specific interim or full remedy. The Administrator can require "corrective action or such other response measures as he deems necessary to protect human health or the environment." To show that a response may be necessary to protect human health or the environment, the present or potential threat posed by the release should be described. The Agency may consider a variety of factors, including the quantity of hazardous waste; the nature and concentration of hazardous constituents or other hazardous properties exhibited by the waste; the facility's waste management practices; potential exposure pathways; transport and environmental fate of hazardous constituents; humans or environmental receptors that might be exposed; the effects of exposure, and; any other appropriate factors. To compel corrective action investigations or studies, only a general threat to human health or the environment needs to be identified.

#### Elements of Orders

Because it is the focal point in all proceedings subsequent to its issuance, the initial order must be as complete as possible. Failure to develop an adequate document may have adverse consequences if the Agency seeks judicial enforcement. All §3008(h) orders should contain the following general elements:

- A statement of the statutory basis for the order.
- Factual allegations showing that there is or has been (1) a release (2) of hazardous waste or hazardous constituents (3) into the environmental (4) at or from an interim status facility. Facts indicating that the response is necessary to protect human health or the environment should also be presented.
- A determination, based on the factual allegations, that there is or has been a release of hazardous waste or hazardous constituents to the environment from an interim status facility.
- An order that clearly identifies the tasks to be performed, and a schedule of compliance accompanied by appropriate reporting and approval requirement



- A statement informing the respondent that he has a right to request a hearing within 30 days of issuance concerning any material fact in the order or the terms of the order.
- A notice of opportunity for an informal settlement conference. It is the Agency's policy to encourage settlement of §3008(h) actions through informal discussions. the respondent should be cautioned, however, that a request for a conference does not affect the 30 day period for requesting a hearing.
- A statement that EPA may assess penalties not to exceed \$25,000 per day of non-compliance with the order.

It may be appropriate to include a provision for stipulated penalties in orders on consent. Such a provision, however, should be drafted to make it clear that the stipulated penalty is not EPA's sole remedy and that Agency has not waived its statutory authority to assess penalties under Section 3008(h)(2). It is recommended that the Regions pursue judicial referrals to impose penalties for noncompliance with a §3008(h) administrative order rather than issuing a subsequent order for penalties.

#### Development and Preservation of the Administrative Record

§3008(h) orders might be reviewed in administrative or judicial proceedings. Therefore, it is essential that information required by the statute and all other relevant information or documents obtained by the Agency be compiled in an administrative record, preserved and readily retrievable. The EPA official initiating the action should maintain a file that contains the following:

- EPA investigative records, such as inspection reports, sampling and analytical data, copies of business records, photographs, etc.;
- Reports and internal Agency documents used in generating or supporting the enforcement action, including experts witness statements;
- Copies of all documents filed with the Regional Hearing Clerk or the Presiding Officer;
- Copies of all relevant correspondence between EPA and the respondent;
- Written records of conferences and telephone conversations between EPA and the respondents, and;

- Copies of all correspondence between EPA and State or other federal agencies pertaining to the enforcement action.

## V. CIVIL JUDICIAL ACTION

Under Section 3008(h), EPA may initiate civil judicial action to compel appropriate relief, including a temporary or permanent injunction, or to enforce a §3008(h) administrative order. As noted previously, the decision to pursue administrative or judicial remedies will be made on a case-by-case basis. Generally, however, a civil judicial action may be preferable to issuance of an administrative order in the following types of situations:

- A person is not likely to comply with an order or has failed to comply with a §3008(h) order.
- A person's conduct must be stopped immediately to prevent irreparable injury, loss or damage to human health or the environment.
- Long-term, complex and costly response measures will be required. (Because compliance problems are more likely to arise during implementation of these actions than while carrying out a simple, short-term action, it may be better to have the matter already before the court for ease of enforcement.)

In addition to increasing the number and kinds of units subject to corrective action, EPA will use the Section 3004(u) authority to address releases to air, land and surface waters as well as to groundwater. Furthermore, Section 3004(v) allows EPA to require corrective action beyond the facility boundary where necessary to protect human health and the environment unless the facility owner or operator is unable to obtain permission from the owner of the affected property.

Permitting can be a lengthy process. Therefore, the interim status corrective action authority should be used to address significant environmental problems prior to issuance of the permit. With respect to 'regulated units', which cannot be permitted until the facility is in compliance with Part 270 requirements to assess ground-water contamination and develop a corrective action plan if necessary, Section 3008(h) may be particularly useful for compelling activities not addressed by the Part 265 and Part 270 regulations. For instance, interim corrective action measures could be required prior to permit issuance. For release from solid waste management units hazardous waste management units other than 'regulated units', Section 3008(h) may be used to compel interim measures, studies to characterize the nature and extent of contamination and the threat posed by the release,

selection of remedy and design, construction and implementation of the remedy.

If an interim status facility is seeking an operating permit or will be required to obtain a post-closure permit, any §3008(h) action at that facility should be designed to meet the needs of the permitting process to the extent possible. If all necessary steps in a corrective measures program will not be completed prior to issuance of a permit, compliance schedules in the order should be developed so that they can be readily incorporated in the permit.

With regard to imminent and substantial endangerment actions, the legislative history makes it clear that enactment of Section 3008(h) does not alter the Agency's interpretation of Section 7003. H. Rep. No. 1133, 98th Cong., 2d Sess. 111 (1984). RCRA §7003 or CERCLA §106 actions are appropriate if conditions at an interim status facility may present an imminent and substantial endangerment and the Agency needs to move quickly to address the problem. The 'imminent hazard' provisions of RCRA and CERCLA may be especially helpful if the Agency wishes to take action against responsible parties other than or in addition to the current owner or operator.

## VII. RESERVATION

The policies and procedures set forth herein and the internal office procedures adopted pursuant hereto are intended solely for the guidance of United States Environmental Protection Agency personnel. These policies and procedures are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States. The Agency reserves the right to take any action alleged to be at variance with these policies and procedures or that is not in compliance with internal office procedures that may be adopted pursuant to these materials.