

OSWER Directive No. 9502.00-7

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

MAR 8 1988

MEMORANDUM

SUBJECT: Use of §3008(h) Orders or Post-Closure Permits At Closing Facilities

FROM: J. Winston Porter, Assistant Administrator

TO: Regional Administrators, Regions I - X

SUMMARY

The purpose of this memorandum is to clarify the use of §3008(h) orders and post-closure permits to address corrective action at closing interim status facilities. The first part of this memo briefly reviews the authorities and their applicability. The second part of this memo presents considerations that may be used in making your decision on whether to use a §3008(h) order or a post-closure permit with §3004(u) and §3004(v) conditions.

#### I. BACKGROUND

Many closing RCRA facilities require corrective action to mitigate potential threats to human health and the environment. Corrective action at environmentally significant closing facilities should be completed as expeditiously as possible.\* Two principal authorities can be used to compel corrective action at these facilities: §3008(h) orders and post-closure permits.\*\* Questions have arisen regarding which authority to use. In particular, advice has been sought on when to use a post-closure permit instead of §3008(h) order to compel corrective action at interim status facilities or facilities that have lost interim status.

\*The Environmental Priorities Initiative (EPI) provides a priority-setting mechanism for identifying and evaluating environmentally significant facilities.

\*\*Two other RCRA corrective action authorities, §3013 and §7003, may also be available. Additionally, Superfund authorities may also be applicable. Furthermore, these authorities may be used in combination.

A. Section 3008(h)

Section 3008(h) authorizes EPA to issue corrective action administrative orders and to initiate civil actions for facilities currently under interim status, facilities that once had interim status, or facilities that should have had interim status. A §3008(h) order may be issued whether the facility is operating (prior to receiving a permit), is closing, or is closed.

Section 3008(h) orders may address releases to potential releases to all media. EPA may use these orders to require study or cleanup actions where the Agency has made the determination that there is or has been a release of hazardous waste or hazardous constituents into the environment from a facility. (Guidance on the interpretation of §3008(h) is provided in a December 16, 1985 memorandum from J. Winston Porter.)

B. Section 3004(u)

Section 3004(u) requires every treatment, storage or disposal facility that is seeking a RCRA permit after November 8, 1984 to undertake corrective action for releases of hazardous waste or hazardous constituents from solid waste management units (SWMUs), regardless of when the waste was placed in the unit involved. Section 3004(u) allows the use of schedules of compliance in the permit to accomplish corrective action.

C. Post-Closure Permits

Post\_closure permits are required for any landfill, waste pile, surface impoundment, or land treatment unit which received waste after July 26, 1982, or which ceased the receipt of wastes prior to July 26, 1982 but did not certify closure until after January 26, 1983. However, a post-closure permit is not required if the unit closes by removal under standards equivalent to §264 standards.\* Post-closure permits are also not required for treatment and storage units, although under the new tank regulations (51 FR 25422), post-closure permits may be required. For treatment and storage units, we

\*Interim status units that closed by removal after January 26, 1983 under Part 265 standards are subject to post-closure responsibilities unless such units demonstrate that the facility meets the closure by removal standards of Part 264. (See December 1, 1987, 52 FR 45788 amending 40 C.F.R. §270.1(c)).

recommend that a RCRA Facility Assessment (RFA) be completed and a §3008(h) order be issued, if necessary, before the operating permit is denied.

Under current regulations post-closure permits are required even where a facility has closed under interim status and a §3008(h) order has been issued to address corrective action. The terms of any §3008(h) order may, of course, be made part of the post-closure permit, as appropriate.

## II. Considerations in Selecting §3008(h) Orders or Post-Closure Permits

As discussed above, there are situations in which only one authority is applicable. For example, units not subject to post-closure care (e.g., interim status treatment and storage facilities or facilities with surface impoundments that have clean closed according to Part 264 standards), §3008(h) orders are the appropriate corrective action authority. In many cases, however, either authority may be used; e.g., interim status land disposal facilities subject to the post-closure care requirements.

Since §3008(h) and §3004(u) provide overlapping authority in terms of the scope and type of cleanup actions which may be required of interim status facility owner/operators, when a choice is available we leave the decision to the Regions to determine whether to use a 3008(h) order or §3004(u) conditions in an operating or post-closure permit. The following considerations are offered to assist you in deciding, on a case-by-case basis, how to proceed.

A post-closure permit may be an easier approach than a §3008(h) order in the case of a willing owner/operators. A §3008(h) order/judicial action may be the preferable first step where the owner/operator is uncooperative, or where there is disagreement with the Agency or uncertainty over the scope of activities to be conducted. (Some regions have found that the owner/operator may prefer a post-closure permit instead of a §3008(h) order because of the perceived stigma attached to an enforcement order.)

In situations which will require long-term oversight, it may be more appropriate to determine at the outset to use a post-closure permit instead of issuing a §3008(h) order. Permits are designed to address long-term activities. Enforcement authorities, which may involve judicial action and approvals, are less well-suited for activities requiring long-term oversight. (Of course, as noted above the cooperativeness of the owner/operator will influence this decision).

A §3008(h) order may be more appropriate where a prompt action is necessary and where a post-closure permit is not soon scheduled to be issued.\* This is because §3008(h) orders allow more flexibility in both timing and scope than permits. For example, a §3008(h) order could focus only on the specific cleanup requiring immediate attention without having to address post-closure care or corrective action elsewhere on the facility. Conversely, a post-closure permit must address, to the extent necessary, releases from all SWMUs as well as post-closure care activities.

A §3008(h) order may be more appropriate than a post-closure permit where there is concern that releases are coming from sources other than SWMUs. The language of section 3008(h) refers to releases from facilities. This may be broader language than that in section 3004(u) which refers to releases from SWMUs.

#### CONCLUSION

These considerations should be evaluated and weighed in any decision on which corrective action authority should be used. The Agency's objective for closing facilities is to minimize the post-closure release of hazardous wastes and hazardous constituents into the environment and to address corrective action for existing or potential releases at the time of closure. The post-closure permit provides a coordinated one-step mechanism for addressing corrective action at the entire facility together with post-closure care for regulated units. In the long-run, therefore, we anticipate that post-closure permits should serve as the routine mechanism for the majority of corrective actions at closing land disposal facilities. Under current regulations, use of §3008(h) will not obviate the need to issue a post-closure permit, unless closure by removal takes place and satisfies Part 264 standards as required under the new rules promulgated at 52 FR 45788. Hence, complementary use of both a §3008(h) order and a post-closure permit (with or without additional §3004(u) conditions added) remains an important option.

\*If an imminent and substantial endangerment to health or the environment exists, a §7003 order may be appropriate.