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United States Environmental Protection Agency
Washington, D.C. 20460
Office of General Counsel

March 27, 1991

MEMORANDUM

SUBJECT: Use of Proposed Subpart S Corrective Action
Rule as Guidance Pending Promulgation of the
Final Rule

FROM: Lisa K. Friedman
Associate General Counsel
Solid Waste and Emergency
Response Division (LE-132S)

TO: Regional Counsel RCRA Branch Chiefs, Regions
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This memorandum is in response to your request for assistance in determining which portions of the proposed Subpart S rule, implementing corrective action requirements for permitted facilities under Section 3004(u) of RCRA, can be implemented immediately on a case-by-case basis without further rulemaking.

Background

Section 3004(u) generally requires that each permit for a RCRA hazardous waste treatment, storage or disposal facility issued after November 7, 1984 contain provisions requiring corrective action for releases from any solid waste management unit (SWMU) at the facility. EPA has implemented this requirement through codification of the requirement (40 C.F.R. 264.101), interpretative rules (July 15, 1985 (50 Fed. Reg. 28702) and December 1, 1987 (52 Fed. Reg. 45788)), and guidance documents (including the RCRA Facility Assessment Guidance (October, 1986), Interim Final RCRA Facility Investigation Guidance (May, 1989), Corrective Action Plan (May, 1988), and RCRA Corrective Action Interim Measures Guidance (June, 1988)).

On July 27, 1990, EPA published a proposed rule which would

codify in detail the procedures and standards for implementing Section 3004(u). 55 Fed. Reg. 30798 (July 27, 1990). Much of the proposal would be a codification of the current site-by-site process by which EPA is currently implementing Section 3004(u). In addition, certain portions of the preamble represent interpretations of the existing statutory or regulatory requirements that apply to these corrective actions. At the same time, however, some of the proposal involves changes in the existing regulatory requirements in order to facilitate corrective action.

The preamble does not state how the proposed rule relates to ongoing corrective actions or those which will be begun prior to promulgation of the rule in final form. We understand that the Headquarters program office primarily responsible for the rule (the Office of Solid Waste) is generally instructing the Regions to apply the proposal in the interim as "guidance". However, because some aspects of the proposal represent proposed changes in existing regulatory requirements, which will not be effective until the rule is promulgated in final form, some parts of Subpart S cannot be relied upon in establishing or defending corrective action requirements imposed at a facility in the interim.

Based on the questions we have been receiving about this issue, as well as our discussions with you, there seems to be a certain amount of confusion over which aspects of proposed Subpart S can legally be relied on in implementing corrective action prior to promulgation of the rule. At your request, following is our advice concerning which portions of the rule can be used as "guidance" in the interim and which cannot. Note, however, that those portions of the rule which can be used as "guidance" before promulgation of the final rule must be applied and defended on a case-by-case basis in individual permit proceedings.

Analysis

As a general matter, portions of the preamble or rule that are interpretative and which are not based on changes to currently applicable regulatory requirements can be used as guidance during the interim, but must be established and defended on a case-by-case basis. Most of the preamble and proposed rule are interpretative and are not inconsistent with any current regulatory requirements and thus can be used as guidance in the interim. In contrast, portions of the rule or preamble that are based on changes to

currently applicable rules cannot be used as guidance during the interim. In the paragraphs below, we have outlined the major portions of the rule and identified which portions should not be used guidance until the final rule is promulgated and effective.

1. Applicability (preamble pages 30805-07).

This section represents EPA's interpretation of the facilities at which Section 3004(u) is applicable based on the statute and legislative history. Because this discussion represents the Agency's current interpretation of the statutory requirement, it can (and should) be applied to facilities undergoing corrective action prior to promulgation of the final rule.

2. Definitions (preamble pages 30808-10).

Like the applicability section, this section represents EPA's current interpretation of key terms in Section 3004(u). These interpretations are applicable to corrective actions prior to promulgation of the final rule (see footnote 1).

3. Investigation and selection of corrective measures (preamble pages 30810-40).

The proposed process for investigating SWMUs and selecting appropriate corrective measures represents a proposed codification of existing practices which are currently found, if at all, in guidance documents, not in existing regulatory provisions. As a result, the proposed process, including the provisions governing interim measures and conditional remedies, can be used as guidance until promulgation of the final rule.

However, because the specific requirements for these corrective actions are not currently regulatory requirements, they must generally be imposed in the permit, and justified on a case-by-case basis, in order to make them mandatory for the permittee. For example, the Agency will not be able to rely on the proposal for the authority to require the permittee to submit corrective action reports. In order to impose corrective action reporting requirements, the permit must contain the reporting requirement, and it must be based on Section 3004(u) or Section 3005(c)(3) or other relevant statutory or regulatory authorities, as well as the factual circumstances at the particular facility.

Similarly, the current regulations do not explicitly provide EPA with unilateral authority to modify the permit to add requirements or to address disputes that arise during implementation, as proposed under Section 270.34(c) (preamble pages 30837 and 30850). This proposed modification procedure, which would be an alternative to the current procedure for Agency-initiated codifications under 40 C.F.R. 270.41, was intended to minimize procedural delays for imposing changes to corrective action schedules of compliance, while ensuring due process.

We understand that the corrective action model permit includes a modification procedure similar to proposed 270.34(c), and that many permits already issued include this provision. With respect to existing permits containing such provisions, permittees and members of the public have had an opportunity to object to such provisions during the comment period on the draft permit, and to the extent they did not, have arguably waived their rights to do so. To the extent that there are objections raised in regard to including this procedure in pending or future permits, we recommend that you rely instead on the existing modification procedures in the regulations.

4. Management of wastes (preamble pages 30840-45).

Several of the proposed regulations governing the management of wastes generated during a corrective action require changes in the existing regulations and thus may not legally be used as guidance until those changes have been made final and effective. Such proposed changes include the provisions allowing for waiver of applicable closure requirements, reduced requirements for "temporary units", and any use of the CAMU concept other than to allow designation of an area of broad contamination as a single unit for purposes of determining what RCRA management standards apply.

The Agency can, however, continue to use existing waivers or variances to achieve many of the same objectives as the proposed rule changes. The CAMU, for example, can currently be used to define the boundaries of a land disposal unit to the same extent as the Agency described the Superfund AOC in the preamble to the revised NCP (55 Fed. Reg. 8758-60 (March 8, 1990)) because this interpretation relies on the broad definition of "landfill" under the current regulations. However, if hazardous wastes are managed in the CAMU, the unit must comply with currently applicable hazardous waste requirements, including groundwater monitoring

under 40 C.F.R. 264, Subpart F, and closure under 40 C.F.R. Part 264, Subpart G. The authority to alter applicable closure/post-closure requirements for CAMUs, proposed in the rule, does not currently exist.

In addition, if the area to be included in a CAMU includes an already-regulated hazardous waste land disposal unit, such as a "regulated unit", the facility may need to obtain a redesignation of the unit boundaries as they appear on the Part A. The reconfiguration of unit boundaries, which must be approved by the permitting authority, can occur prior to permitting, pursuant to 40 C.F.R. 270.72, or after permit issuance, pursuant to 40 C.F.R. 270.41 or 270.42. As noted above, the owners/operators of such redesignated units would need to comply with applicable hazardous waste disposal requirements, including groundwater monitoring and closure.

5. Required notices (preamble pages 30845-46).

The required notices are additions to, not changes of, current regulatory requirements. As a result, such requirements can be currently applied if imposed in the permit and justified on a case-by-case basis under the authority of Section 3004(u).

6. Permit requirements (preamble pages 30846-51).

Most of the proposed permit requirements are changes to currently existing requirements and thus cannot be imposed until the changes are final and effective. The provisions which cannot be used as guidance pending the final rule include the requirement to maintain or obtain a permit to implement corrective action and the special modification procedures for schedules of compliance. The proposed requirement concerning reporting of new SWMUs and the requirement to maintain an information repository can currently be required if imposed in a permit based on Section 3004(u) and 3005(c)(3) authorities.

7. Closure requirements (preamble pages 30851-52).

As discussed above, proposed requirements to alter applicable closure regulations cannot be used as guidance until the changes are final and effective. Similarly, the proposed addition to the interim status closure plan requirements cannot be required until the rule is final. However, the clarifications of the closure

regulations discussed in this section of the preamble are interpretations of existing regulations and thus may be currently implemented.

If you or your staff have questions about the use of the Subpart S proposal as guidance, please feel free to call Carrie Wehling or my staff at 382-7720.

cc: Kathie Stein; Bruce Diamond; Sylvia Lowrance

- 1 As many of you know, several of the key definitions, as well as EPA's interpretation of the applicability of the Section 3004(u) requirements, have been upheld by the D.C. Circuit Court of Appeals. See *American Iron & Steel Institute v. EPA*, 886 F.2d 390 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 3237 (1990); *United Technologies Corp. v. EPA*, 821 F.2d 714 (D.C. Cir. 1987).