

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

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OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Ms. Karen Florini
Senior Attorney
Environmental Defense Fund
1875 Connecticut Ave., N.W.
Washington DC 20009

Dear Ms. Florini:

Thank you for your letter of March 13, 1997 requesting clarification of the Environmental Protection Agency's (EPA's) recent guidance on coordination of clean-up actions undertaken pursuant to the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). I am pleased to respond to your questions on fate and transport modeling during closure of RCRA regulated units and public participation during RCRA corrective action. This response was coordinated with EPA's Office of Enforcement and Compliance Assurance.

You expressed concern that the discussion of fate and transport modeling in the RCRA/CERCLA memorandum might be used by facility owner/operators as justification for leaving Waste or waste residues in place during clean closure. I assure you, this is not the intent of the new fate and transport policy.

By allowing appropriate use of fate and transport modeling during closure of RCRA regulated units, EPA is not altering the fundamental, unit-specific requirements for clean closure which, as discussed in the March 19, 1987 Federal Register notice cited in your letter, require facility owners and operators to "remove all waste and contaminated liners and to demonstrate that any hazardous constituents left in the subsoil will not cause unacceptable risks to human health and the environment" (52 FR 8206). The 1987 notice went on to discuss the Agency's policy for demonstrating that any materials contaminated with waste that are not removed do not present unacceptable risks. The RCRA/CERCLA memorandum revises only the policy for these demonstrations -- by allowing appropriate use of fate and transport modeling. It does not change the requirements for removal of all wastes. The Agency is developing additional guidance to clarify this issue.

You also expressed concern about public participation during RCRA corrective

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actions. I assure you that EPA remains committed to full, fair, equitable and meaningful public participation in all of its environmental programs, including the RCRA corrective action program. Our commitment to public participation is the same whether corrective action is implemented in the context of a RCRA permit or an enforcement order. Guidance on public participation during RCRA corrective action can be found in the RCRA Public Participation Manual, EPA530-96-007, September 1996. We have not developed specific guidance on deferral to non-RCRA programs, and will continue to consider your concerns as we address that issue further.

In the meantime, where implementation of RCRA corrective action requirements is deferred to a non-RCRA clean-up program (e.g., a state superfund program), we fully expect that the non-RCRA clean-up program will provide an appropriate level of public participation, e.g., at a minimum, offer the affected community an opportunity to review and comment on any proposed remedy. We note that decisions on deferrals to non-RCRA programs are site-specific, and that the amount and timing of public participation is one factor EPA may consider when making deferral decisions.

In addition to public participation provided in a non-RCRA clean-up program, the public has an opportunity to review and comment on whether it is appropriate for the Agency to defer RCRA corrective action requirements to a non-RCRA program when: (1) a RCRA permit is issued; (2) modification of a RCRA permit is proposed to reflect that corrective action requirements are satisfied; or, (3) a permit is no longer needed (i.e., the facility has clean closed all regulated units) and permit denial is proposed to terminate interim status. For example, if a deferral decision is made during the permitting process, the public has an opportunity to review and comment on the deferral decision, including the extent to which the contemplated non-RCRA clean-up satisfies substantive corrective action requirements as well as whether it affords an appropriate level of public participation, during permit issuance.

EPA encourages program implementors to, whenever appropriate, coordinate and consolidate opportunities for public participation to minimize duplication of effort and respect the time and resource constraints often faced by community groups. For example, in cases where corrective action has been deferred to a state Superfund program, EPA encourages program implementors to combine public notice on proposed remedies with public notice (if appropriate) of the proposed determination that the state superfund remedy will satisfy corrective action requirements.

Thank you again for your inquiries into these matters, and for your continuing interest in and assistance with the national RCRA program. I hope these responses have resolved your concerns. If you require additional information or have any follow-up questions, please do not hesitate to contact me or Elizabeth McManus, of my staff, at (703) 308-8657.

Sincerely,

Elizabeth, Cotsworth, Acting Director
Office of Solid Waste

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March 13, 1997

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Re: September 24, 1996 Memorandum Regarding Closure and Corrective Action

Dear Sirs:

I am writing to seek clarification of several aspects of your memorandum of September 24, 1996 to RCRA/CERCLA National Policy Managers. As you know, EDF has a long-standing interest in matters involving clean closure and corrective action, and your memorandum raises several matters of great concern.

First, the memorandum purports to change 10 years of policy regarding clean closures and now allow the use of fate and transport models to establish risk-based clean closure levels. However, the legal basis for this policy change is entirely unclear, given EPA never finalized the closure changes proposed in March 1987.

Of particular importance to EDF is whether this change in policy applies both to wastes and contaminated media, or, contaminated media only. While the contained-in principle could theoretically provide some flexibility in applying the clean closure rules to contaminated media, there is no apparent legal or policy basis for allowing wastes or residues other than contaminated media: to remain onsite under a clean closure

scenario.

In case of hazardous wastes, clean closure rules typically require the owner/operator to "remove or "decontaminate" all waste residues, actions not satisfied by simply leaving the material in place. See 52 FR 8706 (March 19, 1987). Moreover, as EDF has consistently argued in the ongoing debate regarding the scope of the proposed HWIR-media rules, it is poor public policy to both encourage substandard waste management practices and discourage source removal by providing incentives or mechanisms aimed at avoiding comprehensive waste treatment and proper disposal otherwise achievable at closure. Therefore, even where a tank, pile, or drip pad is closed "as a landfill" (i.e., with some contaminated soils remaining in place) because it is not "practical" to remove all contaminated soil, the Agency's closure rules still require waste removal or decontamination first. See e.g., 40 CFR 264.197(b), 264.258(b), 265.445(b).

Accordingly, EDF seeks clarification as to whether the September 24 memorandum or other Agency guidance contemplates or otherwise allows hazardous waste or residues other than contaminated media to be left in place under EPA's clean closure rules on the basis of fate and transport modeling, and if so, the legal and policy bases for the Agency position.

Second, the September 24 memorandum indicates federal or state regulatory agencies may defer RCRA corrective actions where 'equivalent' actions are underway pursuant to state/tribal cleanup programs. However, it is unclear in the memorandum whether these "equivalency considerations apply both substantively and procedurally.

Specifically, where the non-RCRA authorities do not provide for public participation in all significant aspects of the cleanup process (i.e., provide for public participation only at remedy selection or not at all, deferral to non-RCRA authorities may result in a substantial loss of public participation rights and opportunities currently provided under RCRA and its permit modification procedures. For example, the opportunity to provide input on site investigations, feasibility studies, compliance schedules; or to seek judicial appeal of final agency actions, may be lost under non-RCRA authorities.

Under these circumstances, the RCRA and non-RCRA processes lack the equivalency discussed in the September 24 memorandum. This scenario is not simply a hypothetical concern, since state cleanup procedures (especially for voluntary programs and/or programs relying upon enforcement authorities) do not uniformly provide for public participation. The resulting loss of public participating rights would be particularly inappropriate originating from an Administration heretofore committed to advancing public participation and environmental justice in environmental decisionmaking.

Accordingly, EDF seeks clarification as to whether equivalent public participation opportunities must be provided where RCRA corrective actions are deferred to non-RCRA authorities, and if not, the legal and policy bases for authorizing such deferrals.

Given the importance of the issues raised by the September 24 memorandum, please provide a response to this letter within 30 days. please feel free to contact me or my colleague, David Lennett, at (207) 582-3826, if you have any questions or need further information. I look forward to your response.

Sincerely,

Karen Florini
Senior Attorney

cc: Hugh Davis, OSW
David Lennett

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