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United States Environmental Protection Agency
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Office of Solid Waste and Emergency Response

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SUBJECT: Coordination of Corrective Action Through Permits and Orders

FROM: Susan E. Bromm, Director
RCRA Enforcement Division

Joseph Carra, Director
Permits and State Programs Division

TO: Waste Management Branch Chiefs, Regions I-X

An increasing number of RCRA facilities are becoming subject to both §3008(h) orders and §3004(u) permit requirements at facilities where the orders were issued prior to permit issuance. This memorandum is intended to provide guidance on how to coordinate permit and order requirements for corrective action in these situations.

The issuance of a permit requiring corrective action to a facility does not absolve an owner/operator of any responsibility to comply with an order for corrective action previously issued to the facility. The facility owner/operator must comply with both the permit and an existing order. Hence, coordination between the two is essential.

Although 3008(h) and 3004(u) both authorize the Agency to require clean-up of releases at operating facilities, the distinctions between the two authorities should be considered when issuing or modifying a permit, or amending an order. The §3008(h) order authority authorizes the Agency to require corrective status facilities or those that should have had interim status, prior to the issuance or denial of permits. Prior to issuing a permit to a facility subject to a §3008(h) order, the Region must make a decision whether to incorporate the terms of the order into the permit by reference, incorporate the terms directly into the permit

and terminate the order, or require the respondent to comply with the separate terms of the order and the permit. If not terminated, the order continues in effect, according to its terms, past the point of permit issuance for the facility. If a change in the corrective action requirements becomes necessary at a facility subject to a separate permit and an order, the Region should determine whether an amendment to an order or a permit modification will effectuate a change in the corrective action cleanup more efficiently. Because it is impossible to anticipate every scenario where both a permit and an order are in effect at a facility, it is important to be cognizant of the distinctions between the authorities, and make the determination about which vehicle is more appropriate in light of the facts surrounding each case. Of course, a 3008(h) order cannot be issued to a facility after final disposition of the permit application. Also, after 3004(u) has been triggered, modifications to an order may be limited only to those additional requirements needed to effectively implement cleanup of releases already covered by the order. To the extent that modifications to an existing order are made, the Region must ensure that no conflict with permit conditions will be created.

Section 3004(u) authorizes corrective action only with respect to a release from a solid waste management unit. However, please note that if a release cannot be attributed to a unit, the omnibus authority in 3005(c)(3) can be used as authority for permit conditions that address corrective action for that release, provided that the Region can demonstrate that the conditions are necessary to protect human health and the environment. In order to establish the basis for issuing a 3008(h) order, the Agency need only establish that there has been a release of "hazardous waste" as defined under 1004 from the facility. Therefore, once it has been established that a release attributable to the facility has occurred, it is not necessary to determine that a "unit" is the source of the release prior to issuing an order for corrective action.

The regulations require EPA to provide the public with an opportunity to comment on proposed permit conditions, including corrective action provisions. The processes prescribing the requirements for public participation are set forth at 40 CFR 124.10-.19. An OSWER directive, "Guidance for Public Involvement in RCRA Section 3008(h) Actions," sets forth the requirements for public involvement in the order issuance process and reiterates

EPA's commitment to providing meaningful opportunity to the public to be informed of and participate in decisions that affect them and their communities.

As previously stated, the Agency is not required to integrate the requirements of the order into the permit to ensure the respondents continued compliance with the corrective action requirements. Regions should require facility owners/operators to comply with both the permit and the order requirements if the requirements of the order are not subsumed in the permit. Therefore, increased coordination between the permitting and enforcement programs will be critical to ensure that cleanups at these facilities are not hindered by poor coordination of these requirements.

Headquarters is developing an additional policy to address the relationship between post-closure permits and 3008(h) orders at closing facilities based on issues raised at the last branch chiefs meeting in Chicago. Please plan to discuss any comments you have on how the Agency can most effectively regulate the activity at these closing facilities at the next Branch Chiefs meeting. Headquarters is also considering the use of stipulated penalties in the compliance schedules in the permits to compel corrective action.

If you have questions or comments about the relationship between the permit and the order at a facility, please contact Susan Hodges in OWPE at (FTS) 475-9315 or Dave Fagan in OSW at (FTS) 382-4497. Also, see the attached March 8, 1988, memorandum on Use of the 3008(h) Orders or Post-Closure Permits at Closing Facilities for additional discussion on how the two authorities can be used.

Attachments

cc: Steve Botts, OECM; Fred Chanania, OGC; RCRA Permits Section Chiefs, Region I-X; RCRA Enforcement Section Chiefs, Region I-X