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RCRA POST-CLOSURE PERMITS FOR REGULATED UNITS AT NPL SITES

United States Environmental Protection Agency
Washington, D.C. 20460
Office of Solid Waste and Emergency Response

July 2, 1992

MEMORANDUM

SUBJECT: RCRA Post-Closure sites

FROM: Don R. Clay Assistant Administrator

TO: Patrick Tobin
Regional Administrator Region IV

Thank you for your inquiry regarding the ability to issue post-closure permits to RCRA regulated units at NPL sites. Attached you will find a final legal analysis from the Office of General Counsel (OGC). Based on the legal interpretation, I conclude that CERCLA 121(e)(1) does not eliminate the need to procure a RCRA permit where the facility is required to obtain such permit due to the presence of a RCRA Subtitle C treatment, storage or disposal unit that was not created by the CERCLA action.

This interpretation is consistent with Agency policy that EPA has the discretion to use its authorities under CERCLA, RCRA, or both to accomplish appropriate cleanup action at a site, even where the site is listed on the NPL. The integration of these authorities should be applied on a case by case basis, taking into account Regional priorities, to avoid duplication of efforts where possible. Some options for integration include:

adding language to the RCRA post-closure permit that establishes a schedule of compliance (as allowed under RCRA section 3004(u)), according to which the appropriate corrective action would be determined after completion of the CERCLA action. If a thorough CERCLA response is carried out, there should be no need for further action when the site is reviewed under RCRA.

dividing responsibilities in the Interagency Agreement, focusing CERCLA activity only on

> certain prescribed units. This could leave cleanup of other units under the direct control of RCRA authorities. This may be appropriate where the RCRA regulated unit is

DOE has taken the position, based on CERCLA section 121(e)(1), that RCRA permits are not necessary or required at NPL sites and that instead, RCRA requirements for groundwater protection and post-closure care need to be met only to the extent they constitute ARARs for the CERCLA response action at the facility; DOE further argues, based on the decision in United States v. Colorado (D.Colo. Aug. 14, 1991) that the State has no authority to enforce RCRA permit requirements at an NPL site. Region IV takes a contrary position, arguing that DOE has an obligation to apply for and obtain post-closure permits for non-CERCLA, RCRA-regulated units at Oak Ridge. The Region notes that RCRA permitting requirements were triggered by DOE's decision to operate and close these specific types of hazardous waste management units beyond key dates established in RCRA regulations.

In addition to the legal issue, DOE expressed the practical concern that a requirement to study and respond to groundwater contamination at individual RCRA units as part of separate post closure permits, rather than addressing the site groundwater in its entirety under CERCLA, would not be efficient or cost effective.

Region IV has raised three specific questions for Headquarters' review.

DISCUSSION

Question 1: Does CERCLA section 121(e)(1) relieve DOE from the requirement to apply for post-closure permits at NPL sites and instead require RCRA 40 CFR 264 standards for post-closure care and groundwater protection be considered as ARARs in a ROD?

No; CERCLA does not relieve DOE from the requirement to obtain post-closure permits for pre-existing, RCRA-regulated units at NPL sites. CERCLA section 121(e)(1) provides that:

> No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section.

Thus, no permits need to be obtained in order to conduct a remedial action "selected and carried out in compliance with" CERCLA section 121, even if that action will involve the treatment, storage or

disposal of hazardous waste. However, this does not eliminate the need to secure a permit where the facility is required to obtain a permit due to the presence of a RCRA Subtitle C treatment, storage or disposal unit that was not created by the CERCLA action.

Of course, any remedial action selected for the site under CERCLA section 121 would have to attain (or waive) the substantive standards set out in RCRA 40 CFR 264, to the extent they are determined to be ARARs.

The decision in United States v. Colorado (D.Colo. Aug. 14, 1991) does not change this analysis. In that case, Colorado was attempting to enforce a closure plan under RCRA that was in conflict with a cleanup plan under CERCLA; the district court found, in effect, that in order to evaluate whether or not to enforce Colorado's claim, he would have been required to review EPA's remedial action decision under CERCLA -- such review is barred by CERCLA section 113(h). The Colorado decision does not limit the ability of a state to issue, and seek to enforce, RCRA orders or permits that do not conflict with the CERCLA-selected remedy.

This analysis is further supported by the fact that RCRA "facilities" and CERCLA "sites" are not necessarily coterminous. In cases where the CERCLA site is only a portion of the RCRA facility (e.g., consisting of several of the larger solid waste management units), the corrective action portion of the RCRA permit must be available to address the contamination that is subject to RCRA only. However, if in that example the permitted unit were on the CERCLA site, and if RCRA requirements could not be enforced at RCRA-regulated units on a CERCLA site (as DOE argues), then the RCRA permit's ability to address releases at solid waste management units of the RCRA facility would be improperly prevented; this cannot be correct.

EPA has recognized that where there are corrective action requirements in a RCRA post-closure permit and remedial action requirements a CERCLA decision document, there is the potential for conflict or overlap between the two authorities in addressing contamination problems (see NPL Listing Policy for Federal Facilities, 53 Fed. Reg. 10520; 10522-23 (March 13, 1989) (attached)). As the Agency noted in the preamble to the 1990 revisions to the NCP,

> EPA . . . has the discretion to use its authorities under CERCLA, RCRA, or both to accomplish appropriate cleanup action at a site, even where the site is listed on the NPL. (See 54 FR at 41009 (Oct. 4, 1989).... In the

> context of federal facility cleanups, this decision, and the cleanup plan in general, would be discussed in the Interagency Agreement (IAG) for the facility.

55 Fed. Reg. 8666, 8698 (March 8, 1990). The Agency has a number of options for harmonizing operation of the two authorities and avoiding duplicative orders and overlaps.

First, any conflict or overlap could be avoided by establishing a timing sequence for evaluation of site problems under RCRA and CERCLA. For instance, the RCRA post-closure permit could establish a schedule of compliance (as allowed under CFR section 3004(u)), according to which the appropriate corrective action would be determined after completion of the CERCLA action; if a thorough CERCLA response is carried out, there will be no need for further action when the site is reviewed under RCRA. Such a provision in a RCRA permit might read as follows:

> In light of the requirement in the FFA to achieve a cleanup under CERCLA that is protective of human health and the environment, corrective action under this permit shall be determined according to the following schedule: after the work called for in the FFA has been completed, the need for any further corrective action, under this permit, shall be evaluated. Such further corrective action shall be limited to action required based on new information or conditions, not available at the time of the remedy selection under the FFA, that render the FFA remedy no longer protective of human health or the environment.

Similarly, the CERCLA decision document could delay its review of certain units (or "carve out" those units) while action proceeds under RCRA; such areas would then be revisited under CERCLA after the RCRA action has been completed, as part of the review of the site for possible deletion from the NPL. As EPA explained in the NPL Listing Policy for Federal Facilities,

> In some circumstances, it may be appropriate under an [Interagency Agreement] to divide responsibilities, focusing CERCLA activity only on certain prescribed units, leaving the cleanup of other units under the direct control of RCRA authorities, such as where the RCRA-regulated hazardous waste management unit is physically distinct from the CERCLA contamination and its cleanup would not disrupt CERCLA activities.

53 Fed. Reg. at 10523. It is generally expected that sites cleaned

up under RCRA would qualify for "no action" under CERCLA. (This approach is discussed in your memorandum, "Requirements for Cleanup of Final NPL Sites Under RCRA" (Don R. Clay, July 11, l990) (attached).)

Alternatively, a potential overlap could be resolved by drafting a RCRA permit that references the CERCLA cleanup actions. For instance, the corrective action condition of the RCRA permit could be written to say:

> In light of the requirement in the FFA to achieve a cleanup under CERCLA that is protective of human health and the environment, corrective action under the permit is unnecessary, as long as the permittee complies with the conditions in the FFA, including modifications thereto.

In situations like Oak Ridge, where there are interconnected groundwater plumes rather than distinct source units, EPA has stated that it is generally most appropriate to address the contamination comprehensively under an enforceable agreement under CERCLA (e.g., an FFA), see 53 Fed. Reg. at 10523, and to use mechanisms like those discussed above to have the RCRA permit take into account the CERCLA action.

Finally, the Agency recognizes that there may be cases where a RCRA-authorized State declines to coordinate RCRA cleanup actions with an on-going CERCLA action, and a conflict may occur that cannot be resolved through discussions. In that case, EPA may resolve the conflict using CERCLA section 122(e)(6), which prohibits a PRP from taking remedial action at a CERCLA site without EPA's authorization (see footnote 1):

> Inconsistent Response Action -- When [an RI/FS has been initiated] for a particular facility under this Act, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

EPA has interpreted this authorization requirement to extend to PRP remedial actions ordered by a State. See discussion at 53 Fed. Reg. 10523. Thus, once an RI/FS has been initiated, EPA can deny a PRP authorization to comply with a State order or permit calling for remedial action at the CERCLA site.

Of course, EPA also has the discretion under section 122(e)(6) to allow the PRP to implement the State-ordered remedy; this might be appropriate where, for example, the State-ordered cleanup

activities would be consistent with, or distinct from, the CERCLA action. To our knowledge, the Region has not yet made any decisions under the CERCLA section 122(e)(6) authorities.

> Question 2: Does the Tennessee Department of Environment and Conservation (TDEC) reserve its rights to require DOE to apply for post-closure permits if DOE fails to fulfill its obligation to conduct timely remedial investigations and remedial-actions (schedules to be negotiated pursuant to the FFA) for certain RCRA regulated units at Oak Ridge Reservation (ORR)?

The answer to the question of whether TDEC has "reserved" specific rights depends on the language agreed to by TDEC in the FFA as well as the language of the post-closure permit and applicable State regulations. (Clearly if TDEC incorporated a schedule of compliance into the permit, then it would have reserved its right to at least review the site after the CERCLA action has been completed to determine if any permits or other action are necessary under RCRA; similarly, if the permit included a permit condition stating that "corrective action under the permit is unnecessary as long as the permittee complies with the conditions in the FFA," the failure to comply with the FFA could trigger a review of RCRA responsibilities.) However, as explained above, it is clear that the simple issuance of an FFA for the Oak Ridge site does not, without more, act to preempt the effect of permits required under RCRA (including RCRA-authorized State law) for non-CERCLA activities.

The continued applicability of RCRA permitting requirements appears to have been contemplated by DOE and EPA in the FFA for Oak Ridge. Section IV, C. of the FFA provides that:

> ongoing hazardous waste management activities at ORR [Oak Ridge Reservation] may be subject to or require the issuance of additional permits under Federal or State laws. This agreement does not relieve the DOE of its obligations, if any, to obtain such permits. This Agreement does not supersede, modify, or otherwise change the requirements of the DOE's existing RCRA permits.

> Question 3: Does EPA have discretionary authority to disallow entirely, or limit the CERCLA section 121(e)(1) permit waiver provision to ensure that NPL and non-NPL RCRA facilities are treated equitably?

CERCLA section 121(e)(1) provides that no federal, State, or

local permit "shall be required" for CERCLA response actions, thereby effectively limiting EPA's ability under the statute to require a PRP to obtain a permit for a CERCLA response action.

However, this does not mean that a PRP may not have an obligation to comply with a permit issued with regard to matters other than the CERCLA response action. For example, where a facility has a pre-existing NPDES discharge permit related to on going activities distinct from the CERCLA actions, that permit remains in force even if the site is listed on the NPI and an RI/FS is initiated under CERCLA. In addition, if obligations under a preexisting permit would overlap with planned CERCLA activities, EPA could authorize a PRP, under CERCLA section 122(e) (6), to carry out remedial actions called for in an order or permit issued under another federal or State law.

If you have any questions concerning these responses, or would like to discuss the issues further, please contact me (260-7697) or Larry Starfield of my staff (260-1598).

1 In the Superfund Executive Order, No. 12580, the President's authority under CERCLA section 122(e)(6) for NPL sites has been delegated to EPA. See E.O., Section 4(d)(1). See also discussion at 54 FR at 10523, n. 10.

Attachment

United States Environmental Protection Agency
Washington, D.C. 20460
Office of Solid Waste and Emergency Response

July 11, 1990

MEMORANDUM

SUBJECT: Requirements for Cleanup of Final NPL Sites
Under RCRA

FROM: Don R. Clay
Assistant Administrator

TO: Stephen R. Wassersug, Director
Hazardous Waste Management Division

Marcia Mulkey, Regional Counsel
Office of Regional Counsel

In your memorandum of May 16, 1990, you requested guidance in the applicability of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) to the final National Priorities List (NPL) sites being addressed pursuant to RCRA corrective action authorities. Specifically, you question whether the NCP mandates, for sites being addressed under RCRA, specific cleanup procedures and deletion criteria for site cleanup and ultimate removal from the NPL which are not requirements of RCRA 3008(h). You are concerned that a site that is considered by RCRA to be remediated, may not be able to be removed from the NPL due to a failure to address an administrative or procedural NCP requirement.

Your memo refers to language in the proposed NCP which states that "it is appropriate to apply different and more stringent criteria in actions to delete based on deferral to other authorities." It also mentions examples of NCP requirements (e.g., the ROD must detail how the selected remedy attains ARARs and utilizes permanent solutions; a five-year review of remedial actions is required if hazardous substances remain at the site above certain levels; and State involvement requirements must be met) which are not required by RCRA Section 3008(h) actions.

In response to your inquiry, it should first be noted that the final NCP states that EPA "has the discretion to use its authorities under CERCLA, RCRA or both to accomplish appropriate

cleanup at a site, even where the site is listed on the NPL." 55 FR 8698 (March 8, 1990). See also 54 FR 41009 (Oct. 4, 1989). Thus the Agency has clearly stated that RCRA authorities may be used at NPL sites.

Second, the "different" and "more stringent" criteria you referred to from the proposed NCP related to deletion of final NPL sites "based on deferral" to another authority. 53 FR 51421 (Dec. 21, 1988). That draft policy has not been adopted by the Agency, and therefore, the preamble language is irrelevant.

The criterion that must be met before a site on the final NPL is deleted is that "no further response [at that site] is appropriate." 40 CFR 300.425(e) (55 FR 8845, March 8, 1990). Where a remedial action has been carried out under RCRA and there is no significant threat to public health or the environment, a CERCLA response should not be necessary. (See 40 CFR 300.425(e)(1)(iii)). In effect, where the Program takes action at an NPL site, the CERCLA program may simply delay the start-up of its Remedial Investigation/ Feasibility Study (RI/FS) site assessment process, in order not to interfere with or duplicate the ongoing RCRA work. When the RCRA remedy is complete, the Agency will do an abbreviated RI (incorporating by reference in most cases, information from the RCRA cleanup) and make a determination of whether any CERCLA action is required. The Agency expects that sites cleaned up under RCRA corrective action would be considered "no action" sites under CERCLA.

The finding of no action should be set out in a close-out report in preparation for deletion from the NPL. The site close out report should include appropriate documentation on the RCRA action and any other action at the site under RCRA or CERCLA), and a finding that no further action under CERCLA is warranted for any of the units and areas of contamination. Site deletion can proceed when all necessary response actions have been completed. For more information, refer to the April 1989 OSWER Directive 9320.2-3A entitled "Procedures for Deletion and Completion of NPL Sites."

You also asked whether actions taken under RCRA section 3008(h) at an NPI site must meet NCP requirements for remedy selection. Because no CERCLA remedy is being selected in a RCRA corrective action situation, the remedy selection requirements in CERCLA Section 121 and NCP Section 300.430 do not have to be met in order to delete the site from the NPL. Therefore, the requirements of a ROD -- for example, that it detail how the remedy will attain ARARs and utilize permanent solutions -- do not apply to RCRA activities at NPL sites.

In addition, the formal State involvement discussed in Subpart F of the NCP does not apply to RCRA activities at NPL sites although the 3008(h) order should allow States to be kept informed of the progress of the RCRA corrective action activities, and include some type of State review of workplan submittals.

It should also be noted that State concurrence and public participation are required prior to the deletion of all NPL sites, even if much of the site was addressed under RCRA corrective action authorities. NCP Section 300.425(e)(2),(4) (55 FR 8846).

With regard to the five-year reviews under CERCLA, these reviews are required only at sites where a CERCLA remedy has been selected and thus would not apply to sites where no action is taken under CERCLA (e.g., RCRA corrective action sites). However, as a matter of policy, the Agency may decide to include in the CERCLA five-year review program no-action NPL sites where RCRA corrective action has occurred and hazardous substances remain on site above levels that allow for unrestricted use and unlimited exposure. The Agency is presently considering whether five-year review would be appropriate at NPL sites where monitoring is already being conducted under a RCRA post- closure permit.

If you have any questions regarding these issues, please call Nancy Parkinson, OWPE, at 475-8729 or Larry Starfield, OGC, at 245-3598.

cc: Hazardous Waste Division Directors, Regions I, II, IV-X
Regional Counsels, Regions I, II, IV-X