12.02-11/08/88-00546

UNITED STATES MARINE CORPS
MARINE CORPS BASE
CAMP LEJEUNE, NORTH CAROLINA 28542-5001

IN REPLY REFER TO:
6280/9
FAC
NOV 08 1988

From: Commanding General, Marine Corps Base, Camp Lejeune, North Carolina 28542-5001
To: Commander, Atlantic Division, Naval Facilities Engineering Command, Norfolk, Virginia 23511-6287 (Code 114)

Subj: EPA POLICY ON RCRA/CERCLA ENFORCEMENT

Encl: (1) EPA Region IV ltr 4WD-SISIB/VW of 20 Oct 88 w/encl

1. We are forwarding the enclosure to keep you abreast of regulatory policies. A central issue is the development of an Interagency Agreement between MCB, EPA, and the State.

2. Request your assistance in providing further NAVFAC guidance as it becomes available on the Interagency Agreement process. Our point of contact is Mr. Bob Alexander, MCB Environmental Engineer, autovon 484-3034.

T. J. Dalzell
T. J. DALZELL
By direction

Copy to:
CMC-LFL
CO, MCAS, NR (Attn: EnvCoord)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV
345 COURTLAND STREET
ATLANTA, GEORGIA 30365

OCT 20 1988

REF: 4WD-SISIB/VW

Colonel T. J. Dalzell
U. S. Marine Corps
Assistant Chief of Staff
Marine Corps Base
Camp LeJuene, NC 28543-5001

Re: RCRA/CERCLA Enforcement Action Strategy

Dear Colonel Dalzell:

Enclosed is the RCRA/CERCLA enforcement action strategy that Mr. Robert Alexander requested on your behalf on September 29, 1988. The Environmental Protection Agency (EPA) is currently composing Interagency Agreement (IAG) language for contamination remediation at Camp LeJuene. EPA anticipates that an IAG developed for Camp LeJuene will address all sites, both RCRA and CERCLA, which pose a real or potential threat to human health or the environment. EPA is hopeful that the enclosure gives you better insight as to how our RCRA/CERCLA strategy at Camp LeJeune may be implemented.

Sincerely yours,

H. Kirk Luelus, Chief
Site Investigation and Support Branch
Waste Management Division

Enclosure

ENCL: (1)

cc: Fed. Fac. Unit

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

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

JAN 25 1988

MEMORANDUM

SUBJECT: Enforcement Actions Under RCRA and CERCLA at Federal Facilities

FROM: J. Winston Porter, Assistant Administrator
Office of Solid Waste and Emergency Response

TO: Regional Administrators
Regions I-X

BACKGROUND

Statutory language makes it clear that Federal facilities must comply both procedurally and substantively with RCRA and CERCLA in the same manner as any non-Federal entity. The purpose of this memo is to lay out the statutory authorities under RCRA and CERCLA that EPA may use at Federal facilities to achieve compliance and expeditious cleanup.

Over the past year, a great deal of effort has been spent identifying those enforcement tools that are available to EPA in the hazardous waste programs to achieve a higher level of compliance at Federal facilities. Specifically, the successful negotiation of individual agreements such as the corrective action order with the Department of Energy (DOE) at the Idaho National Engineering Lab and the Interagency agreement with the Department of Army (DOA) at the Twin Cities Army Ammunition Plant demonstrated significant progress in efforts to achieve compliance and cleanup at Federal facilities. Further clarification of EPA's enforcement capabilities at Federal facilities has come from the Department of Justice in Congressional testimony.

To continue the above progress in resolving compliance and cleanup issues at Federal facilities, I am outlining the enforcement and permitting response actions that EPA can currently implement to formalize compliance and cleanup actions

at Federal facilities. A description of the available enforcement and permitting response actions is given for each of the following scenarios.

1) A Federal facility with RCRA compliance issues.

2) A Federal facility with RCRA corrective action issues.

3) A Federal facility with CERCLA issues.

4) A Federal facility with RCRA and CERCLA issues.

I. A FEDERAL FACILITY WITH RCRA COMPLIANCE ISSUES

At a Congressional hearing on April 28, 1987 before the House Oversight and Investigation Sub-Committee, of the Committee on Energy and Commerce, the U.S. Department of Justice testified that EPA may not issue Administrative Orders at Federal facilities under Section 3008(a) of RCRA to address compliance violations of regulatory requirements. (See Attachment 1 for a copy of DOJ's Congressional testimony). When addressing RCRA compliance violations, EPA will issue the Federal facility a Notice of Noncompliance (NON). EPA will then negotiate a Federal Facility Compliance Agreement (FFCA) to resolve the compliance issues outlined in the NON. Detailed below is a description of the components of a NON and a FFCA.

A. Federal Facility Notice of Noncompliance

EPA will issue a Notice of Noncompliance (NON) as the initial enforcement action at a Federal facility with RCRA compliance violations. The notice should be sent to the responsible Federal official at the facility, or their delegate. The issuance of a NON at a Federal facility is parallel to the issuance of a RCRA Section 3008(a) administrative complaint to a private facility and, therefore, must conform with a RCRA Section 3008(a) complaint in content and format. As outlined in the model language (Attachment 2), the NON should contain the following components:

1) A general reference to the Resource Conservation and Recovery Act as amended.

2) The factual basis for the issuance of the NON (e.g., acts, omissions and conditions identified during an inspection).

3) A reference to the waiver of sovereign immunity under Section 6001 of RCRA.

4) A reference to the citizen suit provisions of Section 7002 of RCRA.

5) A reference to administrative, civil, and/or criminal sanctions under Section 3008 of RCRA that may be applied to an individual who is in charge of hazardous waste management activities at a facility.

6) A detailed allegation of all RCRA violations with citations to authorized state or EPA regulations.

7) A detailed compliance schedule (both actions and timeframes) for the correction of violations.

8) The alternatives to the actions provided for in the NON (e.g., Presidential exemption or specific legislative relief from Congress).

9) A specific date or timeframe by which the Federal facility must provide a written response to EPA regarding their plans for addressing the violations outlined in the document and/or a specific date for a conference.

It is essential that the NON specify the violations, remedy, and timeframes for implementing the remedy in the same manner that a strong administrative or civil complaint would be drafted.

B. Federal Facility Compliance Agreement

After the NON has been issued, the final negotiated document resolving compliance violations between the Federal facility and EPA will continue to be called a Federal Facility Compliance Agreement (FFCA). A very important section in any new FFCA is the enforceability clause. Model enforceability language is attached (Attachment 3) for your inclusion in any new FFCA. Where appropriate, and when you can obtain expeditious agreement from the affected Federal facility, you should add the enforeability clause to existing Federal Facility Compliance Agreements as well. This language reflects EPA's view that a "requirement" in Section 7002 includes statutory and regulatory requirements and other items which are mandated by these requirements (e.g., schedules of compliance, various plans, recordkeeping and reporting) and that this final negotiated document is enforceable under Section 7002. This language also recognizes that under RCRA Section 6001, Federal agencies are required to comply with the agreement, subject to available appropriations.

All FFCAs should contain the model dispute resolution clause found at Attachment 4. This dispute resolution language emphasizes resolution of disputes at a lower level. In cases where disputes are escalated to higher levels, the EPA Administrator is the final decision maker.

C. Issuance of RCRA Section 3008(a) Order to a Government-Owned Contractor Operated Facility (GOCO)

When addressing RCRA compliance issues at a Federal facility, EPA also has the option of issuing an enforcement action against the non-Federal operator of a facility. In many cases, contractors have the operational responsibility for waste generation and management operations at a Federal facility.

At the aforementioned Congressional hearing on this topic, DOJ stated that they saw no constitutional or statutory problems to asserting Section 3008 authority (or any other authority) against contract operators of government-owned facilities (GOCOs)(see Attachment I, DOJ Testimony). This means that EPA and the states have the full range of enforcement authorities under RCRA and CERCLA at GOCOs that are available for private facilities.

Actions against GOCOs can be valuable enforcement tools, especially at facilities where the contractor does the majority of the waste management work (i.e., DOE facilities). On a factual basis EPA has not experienced trouble establishing the contractor as the operator. The Mixed Energy Waste (MEWS) task force found that at most of the major DOE facilities the contractor(s) were responsible for the day-to-day operations and long term management, or oversight of hazardous waste at the facility. In some instances, both the Federal agency and the contractor(s) are the operators. A memo labeled Attachment 5 in this package gives some criteria for determining the operator at a Federal facility.

GOCOs are not shielded from enforcement actions for non-compliance with environmental laws. Therefore, I strongly encourage you to determine who is the operator of hazardous waste management activities at a Federal facility when developing an enforcement strategy at the facility. You should then examine the factual association of the contractor at the facility. When the primary operator at a Federal facility is clearly the contractor(s), and the factual basis for the enforcement action is clearly defined, you should consider the use of all RCRA and CERCLA authorities available for non-Federal facility actions. The Federal Facilities Compliance Task Force in the Office of Waste Programs Enforcement and the Office of Enforcement and

Compliance Monitoring will be working with your staff to identify those cases which may be good candidates for a GOCO enforcement action.

II. A FEDERAL FACILITY WITH RCRA CORRECTIVE ACTION ISSUES

A. Corrective Action Orders (3008(h)) at Federal Facilities

With regard to corrective action and the applicability of administrative orders under RCRA Section 3008(h) at Federal facilities, DOJ has taken the view that corrective action orders are integral to the permitting process. Since Section 6001 of RCRA expressly requires Federal facilities to comply with hazardous waste permits, DOJ has concluded that administrative orders under Section 3008(h) can be issued to Federal facilities.

Based on this DOJ determination, Section 3008(h) administrative orders should be issued whenever possible and appropriate (e.g., an interim status facility which is not seeking a RCRA permit or the issuance of the permit is not expected in the near future). The existing administrative procedures for issuing RCRA 3008(h) orders, as set forth in the February 19, 1987 memorandum to the regional offices, will be applied to Federal agencies. However, Federal agencies will have the opportunity to elevate disputes to the Administrator for a final decision in the event a dispute cannot be resolved at the Regional Administrator level. Consistent with these procedures, EPA will issue orders as necessary, and provide a reasonable opportunity for Federal agencies to discuss the order with EPA. If the Federal agency chooses not to invoke these procedures, the order becomes final and effective.

As in the NON and FFCA, a Section 3008(h) order being issued to a Federal facility should state the waiver of sovereign immunity found in Section 6001 of RCRA. It should also contain the model dispute resolution language found in Attachment 4. The the model enforceability language found in Attachment 3 is not necessary since the order will explicitly cite the statutory authority in Section 3008(h), and is, therefore, enforceable under Section 7002 of RCRA. There should be no difference in the factual basis for the issuance of a corrective action order between a private facility and a Federal facility. The initial order should be sent to the responsible Federal official at the facility, or their delegate.

B. Issuance of a 3008(h) Order to a Government-Owned Contractor-Operated Facility (GOCO)

As described in Part III, RCRA Compliance, Section C, DOJ has determined that EPA has the authority to exercise all of its Section 3008 enforcement options at GOCOs. This authority is not limited to RCRA compliance issues under Section 3008(a). It includes corrective action authorities under Section 3008(h) and Section 3013 of RCRA. All CERCLA enforcement authorities apply to GOCOs as well.

III. A FEDERAL FACILITY WITH CERCLA COMPLIANCE ISSUES

A. Section 120 Interagency Agreements

Under Section 120 of the Comprehensive Environmental Response Compensation and Liability Act as amended by the Superfund Amendments and Reauthorization Act (hereinafter referred to as CERCLA), Federal agencies must enter into an "interagency" agreement (IAG) for all necessary remedial actions at Federal facilities on the NPL.

The Agency is viewing the Section 120 Interagency agreement as a comprehensive document to address hazardous substance response activities at a Federal facility from the remedial investigation/ feasibility study (RI/FS) through the implementation of the remedial action. All such interagency agreements must comply with the public participation requirements of Section 117. The timetables and deadlines associated with the RI/FS and all terms and conditions associated with the remedial actions (including operable units or interim actions) are enforceable by citizens and the States through the citizen suit provisions of Section 310 of CERCLA. In addition, Section 122(l) of CERCLA authorizes the imposition of civil penalties against Federal agencies for failure to comply with interagency agreements under Section 120. Procedures for imposing these penalties are provided for in Section 109 of CERCLA.

B. Other CERCLA Authorities Available at Federal Facilities

EPA has the authority to issue administrative orders to Federal agencies under Section 104 and Section 106 of CERCLA. Section 106 orders should be used where needed to assure compliance with Federal facility requirements for response action. Orders under Section 104(e)(5)(A) of CERCLA can be used to collect information and obtain access to Federal agency sites where needed.

Executive Order 12580 clarifies that EPA is authorized to issue Section 104 and Section 106 administrative orders to other Federal agencies, with the concurrence of the Department of Justice. Section 4(e) of the Executive Order provides that:

> Notwithstanding any other provision of this Order, the authority under Section 104(e)(5)(A) and Section 106(a) of the Act to seek information, entry, inspection, samples or response action from Executive Departments and agencies may be exercised only with the concurrence of the Attorney General.

CERCLA enforcement authorities under Section 106, both administrative and judicial, can be used against government contractors at Federal facilities. Administrative orders against contractors do not require concurrence of the Department of Justice. In addition, Section 120(e)(6) provides that, if the Administrator determines that the response actions can be done properly at the Federal facility by another responsible party, then the Administrator may enter into an agreement with such party under the settlement provisions of Section 122 of the statute. Following the approval by the Attorney General of any such agreement relating to a remedial action, the agreement will be entered in the appropriate United States district court as a consent decree under Section 106 of CERCLA.

States also have a variety of enforcement authorities under CERCLA, so the exercise of EPA's enforcement authorities should be closely coordinated with the States. First, Section 121(e)(2) of CERCLA authorizes States to enforce any Federal or state standard, requirement, criteria or limitation to which the remedial action must conform under CERCLA. Second, Section 310 authorizes citizen suits to require Federal agencies to comply with the standards, regulations, conditions, requirements, or orders which have become effective pursuant to CERCLA including IAGs under Section 120 of the Act. Third, Section 120(a)(4) clarifies that State laws concerning removal and remedial action, including State laws regarding enforcement, are applicable at Federal facilities not included on the NPL. In addition, Section 120(i) states that nothing in CERCLA Section 120 shall affect or impair the obligation of the Federal agency to comply with the requirements of RCRA, including corrective action requirements (see section IV.C., "Importance of the States as a Party to the IAG"). EPA enforcement actions against Federal agencies should therefore be carefully coordinated with States, to avoid potentially duplicative or conflicting exercises of authority.

IV. A FEDERAL FACILITY WITH CERCLA AND RCRA ISSUES

In many cases, facilities subject to an IAG will also have RCRA liabilities. The most common example of the RCRA/CERCLA overlap is where a unit(s) at the facility has interim status or a permit under RCRA and a portion of the facility is undergoing a CERCLA remedial investigation.

A. Enforcement Options

When developing a comprehensive strategy for addressing both RCRA and CERCLA issues at a Federal facility, EPA and the states should consider the following options, alone or in combination, as possible mechanisms for getting enforceable requirements in place:

1. A RCRA permit

All RCRA Subtitle C permits issued after November 8, 1984, will contain provisions for implementing the corrective action requirements of 40 CFR Part 264 Subpart F (or authorized state requirements), and Section 3004(u) and (v) of RCRA. For facilities that have or are seeking a RCRA permit, the requirements for a "CERCLA" remedial investigation and cleanup could be met by implementing these requirements through RCRA corrective action. It is important to keep in mind, however, that the extent of coverage of the RCRA permit is generally limited to hazardous wastes/constituents (e.g., some CERCLA hazardous substances such as radionuclides are not RCRA hazardous constituents and, therefore, the permit may not be able to address all of the releases at a facility).

2. A RCRA Corrective Action Order

The corrective action authority under Section 3008(h) of RCRA can be used at RCRA interim status facilities to address releases from RCRA regulated units and other solid waste management units. At a Federal facility that has interim status, a RCRA corrective action order could address the investigation and clean-up of releases in lieu of a "CERCLA" response action or as an interim measure. (Again, the extent of coverage in the RCRA corrective action order is limited to RCRA hazardous wastes/constituents.)

3. Imminent and Substantial Endangerment Orders

CERCLA Section 106 can be used to address releases from RCRA units or CERCLA sites when an "imminent and substantial endangerment" is shown.

4. An Interagency Agreement under Section 120 of CERCLA

A Section 120 IAG could be drafted to incorporate all RCRA corrective action requirements and CERCLA statutory requirements. Where some or all of a Federal installation has been listed on the NPL, the CERCLA Section 120 IAG is required for remedial action by statute.

The first agreement under Section 120 of CERCLA (IAG) was finalized on August 12, 1987. The IAG at Twin Cities Army Ammunition Plant (TCAAP) is a three party agreement between EPA, the State of Minnesota, and the U.S. Department of the Army. Several notable provisions that should be incorporated in every CERCLA Section 120 IAG include a dispute resolution process that denotes the EPA Administrator as the final decision maker, an enforceability clause which states that provisions of the agreement are enforceable by citizens and the State through the citizen suit provision of Section 310 of CERCLA, and a means for resolving both the RCRA and CERCLA requirements when both statutes apply. Further guidance on CERCLA Section 120 agreements is being developed and will be made available to the Regions as soon as possible. In the interim, the Regions should consult with Headquarters on any IAG issues they encounter.

B. Strategy for Action at RCRA/CERCLA Sites

The decision on which of the above mechanisms to employ at a Federal facility will be made on a facility specific basis. However, if the Federal facility is on the NPL or is likely to be placed on the NPL, I encourage the use of a Section 120 IAG to incorporate both RCRA and CERCLA activities under one enforceable agreement and to serve as a comprehensive plan for investigatory and remedial activities at the facility, whether RCRA or CERCLA. EPA, the State, and the Federal facility would agree on a facility wide strategy, setting priorities and schedules for action. If properly framed, the agreement would satisfy the facility's RCRA corrective action requirements,as well as the public participation requirements of Section 117 of CERCLA and Part 124 of RCRA. At a later date, if appropriate, corrective/ remedial action requirements found in the IAG could be incorporated into the RCRA permit for those facilities seeking an operating or post-closure permit, in satisfaction of RCRA Section 3004(u) and (v) requirements. An Interagency agreement under Section 120 of CERCLA does not serve as the replacement for a RCRA permit at a unit seeking an operating permit.

C. Importance of the State as a Party to the IAG

CERCLA Section 120(i) states that nothing in CERCLA Section 120 shall affect or impair the obligation of the Federal agency to comply with the requirements of RCRA, "including the corrective action requirements." One interpretation of CERCLA

Section 120(i) is that the provision allows "re-cleanup" of a release using RCRA corrective action authorities during or after a cleanup of that release under CERCLA; this could be a problem if a State, authorized to implement the RCRA program, contested the technical standards of an IAG. In order to avoid arguments over the interpretation of Section 120(i), as well as to avoid potentially duplicative exercises of authority, I encourage the inclusion of the State as a full signatory party for IAG's at RCRA facilities.

A three party agreement will ensure the following state roles in the agreement:

- O appropriate application of state clean-up standards
- O public participation requirements
- O enforceability
- O involvement in setting priorities
- O dispute resolution
- O review and comment on technical documents

This type of agreement would resolve differences between EPA and state requirements up front.

CONCLUSION

This memo is the first step in developing an integrated RCRA/CERCLA Federal facility compliance and cleanup strategy. The fundamental principle of the strategy is that there is no difference between environmental standards for Federal facilities and private facilities. EPA holds Federal facilities accountable for environmental cleanup and will proceed with enforcement actions at Federal facilities in the same way that we would proceed at private facilities. Although the limitations of enforcement authorities at Federal facilities have frustrated EPA's enforcement capabilities in the past, the RCRA corrective action requirements in combination with CERCLA authorities under Section 106 and Section 120 provide many options for achieving cleanup at Federal facilities.

I have recently established a Federal Facilities Compliance Task Force within OWPE which is dedicated to achieving compliance and cleanup at Federal facilities. The Task Force will be working closely with the CERCLA Enforcement Division and RCRA Enforcement Division of OWPE, other offices within Headquarters, and the Regions to develop guidance and policy regarding Federal facilities, to resolve difficult issues that arise from EPA's negotiations with Federal facilities, to track ongoing negotiations between EPA and Federal agencies, to pinpoint areas

for potential enforcement response, and to relay the Agency's efforts at resolving compliance, corrective action and permitting issues at Federal facilities.

I am requesting that you forward any Federal Facility Compliance Agreements, Interagency Agreements, etc., that you are negotiating with Federal facilities in your Region to Gene A. Lucero, Director of the Office of Waste Programs Enforcement (Mail Code: WH-527).

As I mentioned earlier, the Task Force will be working with the Regions to pinpoint areas for possible enforcement action. As DOJ has encouraged EPA to take appropriate enforcement actions at GOCOs, the Task Force is interested in GOCO candidates for an enforcement action under RCRA or CERCLA. I am polling the Regions for suggestions of Federal facilities where the need for an enforcement action is imminent and there is a clear means of establishing the contractor as the operator. We will provide Headquarter's support for the development of the order and throughout the negotiation process.

If you have any questions regarding this memorandum or recommendations of candidates for potential enforcement actions, please contact Christopher Grundler, Director of the Federal Facilities Compliance Task Force at FTS 475-9801. Questions can also be directed to Jacqueline Thiell of the the Task Force at FTS 475-8727.

Attachments

cc:

Gene Lucero, OWPE
Roger Marzulla, DOJ
Henry Longest, OERR
Tom Adams, OECM
Marcia Williams, OSW
Frank Blake, OGC
Richard Sanderson, OFA
Hazardous Waste Management Division Directors, Regions I-X
Regional Counsels, Regions I-X
CERCLA Branch Chiefs, Regions I-X
RCRA Branch Chiefs, Regions I-X
Federal Facility Coordinators