EPA Policies and Guidances

Issuing a policy or guidance document is the strongest statement that EPA may make, short of issuing regulations, regarding the manner in which EPA will generally approach the handling and evaluating of a regulated entity. Although courts are not required to consider EPA's administrative policies or guidance documents, they have recognized EPA's technical expertise and have previously given deference to EPA's administration of the laws over which the Agency has jurisdiction. When a site, circumstance, or party fall within the defined criteria of an EPA policy or guidance document, individuals should find satisfaction in the fact that EPA will act in a manner consistent with that policy. In many cases, EPA's statement of policy not to pursue a particular party will provide adequate protection and comfort to an eligible party so that additional documentation from EPA is not needed. In other cases, the potential for liability may motivate a party either to enter into an agreement with EPA that provides protection from CERCLA or RCRA actions brought by EPA or other parties, or to seek written comfort from EPA.

The policy and guidance documents summarized in this section describe the different options to manage CERCLA and RCRA liability risks. Because the documents focus on issues at non-federally-owned properties, parties interested in property currently or formerly owned by the federal government should consult the relevant documents listed in Appendix A.

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Policy Towards Owners of Residential Property at Superfund Sites

July 3, 1991

Owners of residential property located on a CERCLA site have raised concerns that they would be responsible for performance of a response action or payment of cleanup costs because they fell within the definition of "owner" under CERCLA. Additionally, these owners were concerned that they might be unable to sell their properties given the uncertainty of EPA taking action against them or the new owners. EPA issued its policy toward residential property owners to clarify when it would not require these owners to perform or pay for cleanup. The policy states that EPA, in the exercise of its enforcement discretion, will not take an enforcement action against an owner of residential property unless his activities lead to a release or threat of release of hazardous substances, resulting in EPA taking a response action at the property.

EPA's policy also applies to lessees of residential property whose activities are consistent with the policy. In addition, the policy applies to parties who acquire residential property through purchase, foreclosure, gift, inheritance, or other form of acquisition, as long as those persons' activities after acquisition are consistent with the policy.

Other Considerations

With respect to EPA's exercise of enforcement discretion under this policy, it is irrelevant whether an owner of residential property has or had knowledge or reason to believe that contamination was present on the site at the time of purchase or sale of the residential property.

Threshold Criteria

An owner of residential property located on a CERCLA site is protected if the owner:

- Has not and does not engage in activities that lead to a release or threat of release of hazardous substances, resulting in EPA taking a response action at the site;
- Cooperates fully with EPA by providing access and information when requested and does not interfere with the activities that either EPA or a state are taking to implement a CERCLA response action;
- Does not improve the property in a manner inconsistent with residential use; and
- Complies with institutional controls (e.g., property use restrictions) that may be placed on the residential property as part of the Agency's response action.

For further information contact:
(202) 564-5100
Office of Site Remediation Enforcement

Policy Towards Owners of Property Containing Contaminated Aquifers

July 3, 1995

The contaminated aquifer policy addresses the CERCLA liability of owners of property that contain an aquifer contaminated by a source or sources outside their property. These owners were concerned that EPA would hold them responsible for cleanup under CERCLA even though they did not cause and could not have prevented the groundwater contamination. The policy states that EPA, in an exercise of its enforcement discretion, will not take an action under CERCLA to require cleanup or the payment of cleanup costs provided that the landowner did not cause or contribute to the contamination.

Other Considerations

If a third party who caused or contributed to the contamination sues or threatens to sue the landowner, EPA may consider entering into a *de minimis* landowner settlement with the landowner covered under this policy.

For further information contact:
Elisabeth Freed - (202) 564-5117
Office of Site Remediation Enforcement

Threshold Criteria

A landowner is protected by this policy if **all** of the following criteria are met:

- The hazardous substances contained in the aquifer are present solely as the result of subsurface migration from a source or sources outside the landowner's property;
- The landowner did not cause, contribute to, or make the contamination worse through any act or omission on his part;
- The person responsible for contaminating the aquifer is not an agent or employee of the landowner, and was not in a direct or indirect contractual relationship with the landowner (exclusive of conveyance of title); and
- The landowner is not considered a liable party under CERCLA for any other reason such as contributing to the contamination as a generator or transporter.

This policy may not apply in cases where:

- The property contains a groundwater well that may influence the migration of contamination in the affected aquifer*;* or
- The landowner acquires the property, directly or indirectly, from a person who caused the original release.

Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities

June 30, 1997

The lender liability policy clarifies the circumstances in which EPA intends to apply, as guidance, the provisions of the 1992 CERCLA Lender Liability Rule ("Rule") and its preamble in interpreting CERCLA's lender and involuntary acquisition provisions. The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 amended these CERCLA provisions and generally followed the approach of the Rule. EPA's subsequent lender policy explains that when interpreting the amended secured creditor exemption, EPA will treat the Rule and its preamble as authoritative guidance. For example, the amendments do not clarify the steps that a lender may take after foreclosure and still remain exempt from owner/operator liability. In making liability determinations, EPA, following its policy, will defer to the Rule (*see box,* page 60).

The 1996 amendment also validates the portion of the Rule that addresses involuntary acquisitions by government entities. EPA's policy clarifies that similar to the preamble of any valid regulation, EPA will look to the preamble to the CERCLA Lender Liability Rule as authoritative guidance on the meaning of the portion of the Rule that addresses involuntary acquisitions.

For further information contact:
Bob Kenney - (202) 564-5127
Office of Site Remediation Enforcement

Example

After foreclosure, a lender who did not "participate in management" prior to foreclosure may generally:

- Maintain business activities;
- Wind up operations; and
- Take actions to preserve, protect, or prepare the property for sale provided that the lender attempts to sell or re-lease the property held pursuant to a sale or lease financing transaction, or otherwise divest itself of the property in a reasonably expeditious manner using commercially reasonable means. This timeframe will generally be met if the lender, within 12 months of foreclosure, lists the property with a broker or advertises it for sale in an appropriate publication.

Policy on the Issuance of EPA Comfort/Status Letters

November 12, 1996

Some properties may remain unused or underutilized because potential property owners, developers, and lenders are unsure of the environmental status of these properties. By issuing comfort/status letters, EPA helps interested parties better understand the likelihood of EPA involvement at a potentially contaminated property. Although not intending to become involved in typical private real estate transactions, EPA is willing to provide a comfort/status letter when appropriate.

Comfort/status letters are intended to clarify the likelihood of EPA involvement at a site; identify whether a party is protected by a statutory provision or discretionary enforcement policy; or indicate the progress of a Superfund cleanup. If EPA is not involved at the property, the party may be referred to the appropriate state agency for further information.

Comfort letters address a particular set of circumstances and provide whatever information is contained within EPA's databases. Questions typically addressed by comfort letters include:

- Is the site or property listed in CERCLIS?
- Has the site been archived from CERCLIS?
- Is the site or property contained within the defined boundaries of a CERCLIS site?
- Has the site or property been addressed by EPA and deleted from the defined site boundary?
- Is the site or property being addressed by a state voluntary cleanup program?
- Is EPA planning or currently performing a response action at the site?

Evaluation Criteria

EPA may issue a comfort letter upon request if:

- The letter may facilitate cleanup and redevelopment of potentially contaminated property;
- There is the realistic perception or probability of incurring CERCLA liability.
- There is no other mechanism available to adequately address the party's concerns.

- Are the conditions at the site or activities of the party addressed by a statutory provision or EPA policy?
- Is the site in CERCLIS but designated as state-lead or deferred to the state agency for cleanup?

The agency generally uses four **sample** comfort letters to respond to requests. The samples can be found in Appendix D. A summary of the report on the effectiveness of comfort/status letters may be found in Appendix C.

For further information contact:
Elisabeth Freed - (202) 564-5117
Office of Site Remediation Enforcement

Interim Approaches for Regional Relations with State Voluntary Cleanup Programs

November 14, 1996

State and local empowerment to clean up sites is at the center of EPA's Brownfields program. Many states have developed voluntary cleanup programs that are designed to achieve protective cleanups at sites that are not on the NPL.

EPA regional offices have developed partnerships with states that have voluntary cleanup programs through the negotiation of Memoranda of Agreements (MOAs). Through the MOA, EPA and the interested state address state capabilities, programmatic areas, and the types of sites the state will include in the MOA.

With the guidance, EPA intends to facilitate regional/state MOA negotiations. The MOA delineates the roles and responsibilities between a state and EPA with respect to sites being cleaned up under the state's voluntary cleanup programs. This interim guidance sets out six baseline criteria that are evaluated before a region enters into an MOA with a state for its voluntary cleanup program. Through the completed and signed MOA, EPA acknowledges the adequacy of the state voluntary cleanup program. EPA also agrees that for sites addressed under the MOA, it does not plan or anticipate taking a removal or remedial action, unless EPA determines that there may be an imminent and substantial danger to public health or welfare or the environment.

Similar to CERCLA MOAs, EPA is developing Memoranda of Understanding (MOUs) between interested states and EPA

regional offices when states use an appropriate non-RCRA authorized state authority to oversee the cleanup of specific RCRA facilities. Where considered mutually beneficial, a regional office, working with Headquarters, may enter into a MOU to solidify expectations and worksharing arrangements between the region and state.

For further information contact:
Matt Sander - (202) 564-7233
Office of Site Remediation Enforcement

Jennifer Wilbur - (202) 566-0797
Outreach and Special Project Staff

Program Evaluation Criteria

EPA may enter into a MOA that addresses a state voluntary cleanup program if all of the following baseline criteria are met:

- Opportunities for meaningful community involvement.
- Voluntary *response actions* are protective of human health and the environment.
- Adequate resources to ensure that voluntary *response actions* are conducted in an appropriate and timely manner, and that both technical assistance and streamlined procedures, where appropriate, are available from the state agency responsible for the voluntary cleanup program.
- Mechanisms for the written approval of *response action* plans and a certification or similar documentation indicating that the response actions are complete.
- Adequate oversight to ensure that voluntary *response actions* are conducted in such a manner to assure protection of human health and the environment, as described above.
- Capability, through enforcement or other authorities, of ensuring completion of *response actions* if the volunteering party(ies) conducting the response action fail(s) or refuse(s) to complete the necessary response action, including operation and maintenance or long-term monitoring activities, if appropriate.

Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties

November 6, 2002

EPA provides enhanced protection for a subset of *de minimis* waste contributors referred to as non-exempt de micromis waste contributors. Non-exempt de micromis settlements may be available to parties who generated or transported a minuscule amount of waste to a Superfund site, which is an amount less than the minimal amount normally contributed by *de minimis* parties. EPA's revised guidance defines eligible non-exempt de micromis parties as those parties who fall outside the statutory definition of a qualified exempt de micromis (see Section 107(o)), but who may be deserving of similar treatment based on case-specific factors. The presumptive cut-off for a non-exempt de micromis party is 110 gallons (e.g., two 55 gallon drums) or 200 pounds of material containing hazardous substances. Regions have the flexibility to consider higher amounts on a site-specific basis.

As a matter of policy, EPA does not pursue non-exempt *de micromis* waste contributors for the costs of cleaning up a site. If, however, a non-exempt de micromis party is threatened with litigation by other parties at the site for the costs of cleanup, EPA may enter into a zero dollar settlement with the non-exempt de micromis party. Non-exempt de micromis settlements provide both a covenant not to sue from the Agency and contribution protection against other parties at the site.

Refer to http://cfub.sdc-moses.com/compliance/policies/cleanup/superfund/index.cfm for more information.

For further information contact:
Victoria Van Roden - (202) 564-4268
Office of Site Remediation Enforcement

Guidance on Enforcement Approaches for Expediting RCRA Corrective Action

Expediting corrective action cleanup activities at facilities that treat, store, or dispose hazardous waste is essential to protecting human health and the environment and potentially making these properties available for other uses. EPA Regions and States authorized to implement the corrective action program in lieu of EPA have developed innovative approaches to achieve timely, protective, and efficient cleanups. This guidance describes a number of enforcement approaches to expedite corrective action (*see box on page 68*). It provides examples of approaches designed to reduce the amount of process and procedures such as creative use of schedules and other federal statutory cleanup authorities. It also provides specific examples of tools such as facility-initiated agreements that are more flexible than typical corrective action enforcement orders.

For further information contact:
Karin Koslow - (202) 564-0771

Expediting Components of Corrective Action

Creative Schedules and Deadlines - include time limits to negotiate work plans, consent orders, and permits; fixed and flexible schedules of compliance; and limiting work product revisions.

Alternatives to a Collaborative Approach - encourage a more cooperative response from the facility owner/operator by presenting a less collaborative alternative such as a judicial action or a unilateral administrative order (UAO).

Penalty Provisions - include penalty provisions in enforcement documents, and collection of penalties when the facility fails to comply with the permit or order.

Other Federal Statutory Authorities - use other federal authorities such as CERCLA §106(a).

Innovative Mechanisms to Require Corrective Action

Facility-Initiated Agreement

A facility-initiated agreement is a non-binding corrective action agreement between EPA and a facility owner/operator. The purpose of the agreement is to allow a motivated owner/operator to initiate and perform corrective action in a manner that is consistent with all relevant laws and regulations and avoid negotiating an enforceable order.

Streamlined Consent Order

A streamlined consent order is a pared-down, results-based order. It contains enforceable deadlines and stipulated penalties and lacks the traditional specificity as to how the owner/operator should accomplish corrective action activities. Instead, it identifies performance standards that must be met by specific dates. With this type of order, EPA's oversight role is minimized throughout the corrective action process.

Innovative Mechanisms to Require Corrective Action

Unilateral Letter Order

The unilateral letter order is a legally binding, results-based order that can be entered into under any RCRA statutory administrative order authority. It is similar to a letter in that it is written in a less formal format and style than a traditional order.

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Coordination Between RCRA Corrective Action and Closure and CERCLA Site Activities

September 24, 1996

The goal of this memorandum is to continue to coordinate the CERCLA and RCRA cleanup programs in order to eliminate duplication of effort, streamline cleanup processes, and build effective relationships with states and tribes. Three areas are discussed in the memorandum to accomplish this goal: acceptance of decisions made by other remedial programs; deferral of activities and coordination among RCRA, CERCLA and state/tribal cleanup programs; and coordination of the specific standards and administrative requirements for closure of regulated units with other cleanup activities. Topics that are discussed in greater detail in the memorandum include program deferral and coordination between programs with examples of current approaches that are in use.

For further information contact:
Office of Site Remediation Enforcement
(202) 564-5100

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Comfort/Status Letters for RCRA Brownfield Properties

February 14, 2001

On November 8, 1996, the Office of Enforcement and Compliance Assurance (OECA) issued its "Policy on the Issuance of Comfort/Status Letters," which focuses on properties primarily associated with Superfund sites. Since that time, regional staff and private parties have inquired about the applicability of that policy to property within or adjacent to facilities subject to RCRA.

While EPA has not yet issued a formal policy on the use of RCRA comfort/status letters, there may be sites subject to RCRA requirements where the circumstances are analogous to the circumstances at Superfund sites. Site-specific circumstances determine whether a comfort/status letter is appropriate, but generally comfort/status letters may be appropriate at brownfields associated with RCRA treatment, storage, and disposal facilities; "generator-only" sites; or other property where RCRA hazardous waste is discovered during cleanup and/or redevelopment activities. This memorandum encourages regional staff to use "comfort/status" letters at such RCRA facilities, where appropriate, and provides some examples of regional RCRA comfort/status letters. In the RCRA context, comfort/status letters relate only to EPA's intent to exercise its RCRA corrective action response and enforcement authorities. As with the Superfund policy, the "comfort" comes from knowing what EPA knows about the property and what EPA's intentions are in terms of a response action. Regional

staff should look to the Superfund comfort/status letter policy for general guidelines on the issuance of RCRA comfort/ status letters.

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