Final Enforcement Guidance on Implementation of the Federal Facility Compliance Act

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MEMORANDUM:

SUBJECT: Final Enforcement Guidance on Implementation of the Federal Facility Compliance Act

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On October 6, 1992, the Federal Facility Compliance Act of 1992, Pub.Law No. 102-386 (the Act), became law. This Act amends the waiver of sovereign immunity found in the Resource Conservation and Recovery Act (RCRA). The Act's legislative history indicates that its rimary purpose is to ensure that Federal facilities are treated the same as private parties with regard to compliance with the requirements of RCRA. For example, the Conference Report states "[w]here EPA uses an administrative complaint pursuant to section 3008(a) to address particular types of violations detected at a private company or municipality the Administrator must use an administrative complaint to address the same types of violations at a federal facility." H.Rep. No. 102- 886, 102nd Cong., 2nd Sess., p. 19 (1992). See also H.Rep. No. 102-111, 102nd Cong., 1st Sess., p.2 (1991); S.Rep. No. 102-67, 102nd Cong., 1st Sess. p.1 (1991).

The purpose of this memorandum is to provide guidance on the use of the Agency's authority to issue compliance orders to Federal agencies pursuant RCRA Section 3008. It supersedes the Interim Final Guidance, dated April 15, 1993.

Background

Prior to the Act's passage, EPA took RCRA enforcement actions against Federal agencies differently than against private parties. This difference was tied to the language

of section 6001 of RCRA, 42 U.S.C. 6961. According to the Department of Justice's 1987 testimony before the House Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, EPA lacked the statutory authority necessary to issue administrative compliance orders pursuant to RCRA section 3008(a). EPA, thus negotiated Federal Facility Compliance Agreements with Federal facilities to bring them into compliance.

Through passage of the 1992 Act, Congress clarified that administrative order authority is available to the Administrator, and this authority has been given directly to the Administrator: "The Administrator shall initiate an administrative enforcement action against such a department...in the same manner and under the same circumstances as an action would be initiated against any other person." See section 102(b)(1) of the Act, 42 U.S.C. 6961(b)(2). In addition, under section 103 of the Act, Congress further clarified that federal agencies are persons for purposes of RCRA. EPA now has RCRA administrative compliance order authority against Federal facilities.

I. Hearing Procedures

As quoted above from the Conference Report "[w]here EPA uses an administrative complaint pursuant to RCRA section 3008(a) to address particular types of violations detected at a private company or municipality the Administrator must use an administrative complaint to address the same types of violations at a federal facility." Upon issuance of a complaint and compliance order, the Regions should also issue a press release.

Since private parties have an opportunity to challenge that complaint using the 40 C.F.R. 22 procedures, the same opportunity should be available to a Federal agency. While the Part 22 procedures are available, the Act also provides the recipient Federal agency with an opportunity to confer with the Administrator before an order becomes final. "No administrative order issued to such a department, agency, or instrumentality shall become final until such department, agency, or instrumentality has had the opportunity to confer with the Administrator." See section 102(b)(2), 42 U.S.C. 6961(b)(2).

II. Settlement Negotiations

Settlement is encouraged in the same circumstances as with a private party. See 40 C.F.R. 22.18. The Act also states that any voluntary resolution or settlement of such an action shall be set forth in a consent order. Cases which settle do not require a conference with the Administrator, and in settling a matter, the Respondent waives its opportunity to confer under the new Act on the settled matter. In addition, Federal parties have the same opportunity to confer with EPA as provided under 40 C.F.R. 22.18. As a result, after EPA issues the complaint, the respondent Federal agency may confer with the complainant under Part 22 (EPA employee authorized to issue the complaint) concerning settlement whether or not the respondent requests a hearing. This Part 22 opportunity to confer, however, does not affect the thirty-day deadline for filing an answer, just as with

a private party under 22.18(a).

Following the Federal agency's 22.18 opportunity to confer, if EPA or the Federal agency determine that the case cannot be settled immediately consistent with the provisions and objectives of RCRA, the case will be submitted to the Part 22 hearing procedures. Often, however, settlement discussions continue on a parallel track with the hearing procedures. A case against a Federal agency proceeds as would any other compliance hearing matter pursuant to Part 22.

III. Opportunity to Confer Under the New Act

The new Act's "opportunity to confer" requirement would be satisfied by providing an opportunity to confer with a Regional official with properly delegated authority within a reasonable period of time following issuance of the order, but based on input from Regions and as a matter of policy, the Administrator will retain that opportunity to confer personally, as set out below. Federal agencies will have the opportunity to meet with the Administrator only after exhaustion of the Part 22 procedures. Placing the conference at the end of the process will enable the Regions to proceed with their enforcement case against the Federal agency in the same manner as they do against private parties.

Conferring with the Administrator before exhaustion of the Part 22 procedures would be premature, and EPA policy is that the Administrator will confer with the respondent Federal agency only after exhaustion of the Part 22 procedures. Likewise, Regions should not confer with the Federal agency outside of their usual conferring opportunity as found in the Part 22 procedures. In other words, each Region should use the same conference and settlement discussion procedures with Federal agencies that it uses with private parties under Part 22.

Within ten (10) days of service of a final decision by the Environmental Appeals Board under 40 C.F.R. 22.31, the Federal agency may seek further review by petitioning the Board for reconsideration under 22.32, if it believes the Board's decision was erroneously decided. Within thirty (30) days of service of the Board's decision if no petition for reconsideration is filed or within thirty (30) days of service of the Board's final decision if a petition for reconsideration is filed, the head of the Federal agency, if it wishes to confer with the Administrator, must file a written request addressed to the Administrator to seek an opportunity to confer with the Administrator. If no written request to confer is filed within these thirty-day periods, the administrative order is final under the terms of section 102(b)(2) of the Act.

In many cases, the conference might be conducted through an exchange of letters. If the conference is handled through letters, the head of the Federal agency should serve his/her letter on the Administrator with a copy to the Director, Office of Federal Facilities Enforcement and all parties/counsel of record. In addition, the letter should specifically identify the issues which the Federal agency proposes that the Administrator consider. The head of the Federal agency should also attach copies of all prior administrative decisions and briefs in the underlying proceedings. Copies of the briefs and underlying

decisions should be provided to the Director, Office of Federal Facilities Enforcement.

The head of the Federal agency, however, may prefer to request a direct meeting with the Administrator. The request for a direct conference should be served on the Administrator with a copy to the Director, Office of Federal Facilities Enforcement, and all parties/counsel of record. The request for a direct conference should specifically identify the issues which the Federal agency proposes to discuss with the Administrator, and should specifically identify who will represent the Federal agency. In addition, as part of its request for a direct conference, the head of the Federal agency should attach copies of all prior administrative decisions and briefs in the underlying proceedings. Copies of the briefs and underlying decisions should also be provided to the Director, Office of Federal Facilities Enforcement.

The parties/counsel of record may request to be present during the direct conference. This request to attend the direct conference, likewise, should be in writing and served on the Director, Office of Federal Facilities Enforcement and the parties/counsel of record. The Administrator or her designee shall notify the head of the Federal agency who requested the direct conference and the parties/counsel of record regarding her plan and arrangements for the direct conference.

Following the conclusion of the direct conference, a person designated by the Administrator will provide a written summary of the issues discussed and addressed. Copies of the written summary shall be provided to the parties/counsel of record. Ordinarily, within thirty (30) days of the conference, or within thirty (30) days following the receipt of the letter from the head of the Federal agency in the event of no direct conference, the Administrator shall issue a written decision with appropriate instruction regarding the finality of the order. This decision shall be filed with the Regional Hearing clerk and made part of the administrative case file.

If the Board referred the matter to the Administrator for decision under 22.04(a) rather than deciding the matter itself and if the Federal agency wants to request a conference with the Administrator, the Federal agency must do so prior to the Administrator's decision.

To assure that federal agencies are aware of these procedures, Regions should draw responding agencies' attention to Part 22 and this and any other relevant Agency guidance.

IV. Penalties

In the Federal Facility Compliance Act of 1992, Congress stated that "[t]he Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or imposed for isolated, intermittent, or continuing violations." See Section 102(a)(3), 42 U.S.C. 6961(a)(3).

As a matter of policy, EPA will pursue penalties only from the effective date of the Act forward. If violations occurred prior to the effective date and are ongoing, EPA could assess penalties for the violations from October 6, 1992 until correction of the violation.

In summary, the Federal government is liable for RCRA civil and administrative penalties just like any other person (with the exception of the effective date of the Act limitation). Since the law and the Congressional intent state that Federal agencies are liable for penalties, EPA will apply its current applicable penalty policy, presently the 1990 RCRA Civil Penalty Policy, against the Federal government for violations of RCRA in the same manner and to the same extent as against any private party. The February 12, 1991 "Policy on the Use of Supplemental Enforcement Projects" also applies in this context. Moreover, for settled cases that require compliance work, stipulated penalties should be included in the Consent Agreement and Consent Order.

V. Conclusion

EPA is issuing this final policy to assist the Regions in carrying out their RCRA enforcement program. This guidance supersedes earlier guidance regarding RCRA enforcement at Federal facilities for compliance violations such as that found in the 1988 Federal Facilities Compliance Strategy. It may be necessary in the future to amend Part 22 to address the issue of the requirement for the opportunity for a conference before finalizing an Environmental Appeals Board order. Should you have any concerns or questions, please have your staff call Barry Breen or Sally Dalzell at (202) 260-9801.

VI. Notice

This guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. Such guidance and procedures do not constitute rule making by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this guidance and its internal implementing procedures.