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

January 2, 2001

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

**MEMORANDUM**

SUBJECT: Transmittal of Guidance on Enforcement Approaches for Expediting RCRA Corrective Action

FROM: Steven A. Herman **/signed by Sylvia K. Lowrance**
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TO: RCRA Senior Policy Managers, Regions I - X
Regional Counsels, Regions I - X

The purpose of the attached document is to provide guidance to EPA and RCRA authorized State project managers on a variety of enforcement approaches that can be used to accomplish timely, protective, and efficient corrective action at RCRA Subtitle C facilities. This guidance document is a part of EPA's RCRA Cleanup Reforms, EPA's current administrative reform effort focused on achieving faster, more efficient cleanups at RCRA facilities while still ensuring protection of human health and the environment.

Corrective action is one of the top priorities for the RCRA Subtitle C program. Through the completion of necessary corrective action activities, EPA can ensure protection of human health and the environment. The ultimate, long-term success of the Corrective Action program will be measured, in large part, by whether each facility has completed corrective action activities that are protective of human health and the environment.

As we continue to move toward the final goal of cleanup at RCRA corrective action facilities, EPA is measuring the near-term successes of the corrective action program by whether the Environmental Indicator (EI) goals are being met nationally. These goals were developed as part of the RCRA Cleanup Reforms in response to the Government Performance and Results Act (GPRA). The EI goals are targeted at the 1,714 facilities on the RCRA Cleanup Baseline. To meet our GPRA goals, by the year 2005, EPA and the States will need to:

- control current human exposures at 1,628 Baseline facilities; and
- control contaminated groundwater migration at 1,200 Baseline facilities.

These are challenging commitments for the Agency and States to meet over the next five years. Currently, approximately 500 of the 1,714 facilities have met both EIs.

EPA believes one of the best ways to meet the near-term GPRA goals is through the RCRA Cleanup Reforms. Part of the Reform effort includes encouraging results-based approaches to corrective action. Results-based approaches emphasize outcomes, or results, in cleaning up actual releases, rather than the process used to achieve those results. EPA has recently published a draft guidance document titled: "Results-Based Approaches to Corrective Action" which should help facilitate discussions and planning between regulatory agencies and facilities on how to progress towards final cleanup and meet the EI goals along the way.[1]

Another part of the Reform effort includes providing for appropriate enforcement approaches to encourage timely and efficient corrective action activities, as described in the attached guidance, "Enforcement Approaches for Expediting Corrective Action." This guidance document is a part of the Reform effort, and describes a range of newer approaches that EPA Regions have developed to help expedite corrective action, which also helps in meeting our GPRA goals and final cleanup.

Several of the enforcement approaches discussed in this document represent a divergence from the more traditional approaches. For example, some of the approaches are less enforcement-oriented than some traditional enforcement approaches. Generally, examples that provide for reduced agency oversight, or flexible compliance schedules, are approaches that would be appropriate to consider for a facility that is cooperative, has a good working history with the agency, and has the capacity to complete the necessary corrective action activities. While these approaches may succeed at many facilities, traditional enforcement approaches will still play an appropriate and important role in the corrective action program. Traditional corrective action orders (e.g., consent orders and unilateral administrative orders), have been successful tools for ensuring protection of human health and the environment, and should be considered equally with innovative tools. When there is noncompliance, whether it be under an innovative or traditional tool, the agency should take prompt action to enforce the terms of the document, and bring the facility back into compliance in a timely manner.

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[1] Results-based approaches include the use of streamlined, innovative enforcement mechanisms as well as traditional RCRA enforcement authorities and mechanisms. *See* July 26, 2000 Draft Results-Based Approaches to Corrective Action, OSW, available in USEPA Internet Website: http://www.epa.gov/correctiveaction/resource/guidance/gen_ca/results.htm or from RCRA Hotline: 1-800-424-9346.

Determining the appropriate enforcement approach at a facility is a site-specific decision, driven by factors associated with the particular facility, and by input from the appropriate government entities, and the surrounding community. Federal and State project managers are encouraged to use the entire panoply of enforcement approaches and tools to provide incentives for compliance with corrective action obligations. Regardless of the enforcement approach taken, the desired outcome is the same: to protect human health and the environment.

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# Enforcement Approaches for Expediting RCRA Corrective Action

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## SECTION I: OVERVIEW

This document describes innovative enforcement approaches, developed by EPA Regions, for expediting corrective action at RCRA facilities. As demonstrated by the variety of approaches in this document, there are many ways EPA and authorized States can implement the existing corrective action requirements. In certain instances, a strong enforcement presence is essential to providing a safeguard to protect human health and the environment. In other circumstances, a strong enforcement presence may not be as critical because the facility has demonstrated a willingness and ability to cooperatively perform the necessary cleanup activities. Use of these innovative approaches, which may result in streamlining the overall process, does not mean there should be a reduction in the level of public involvement opportunities in cleanup decisions and activities. Maintaining a high level of public participation is essential regardless of the approach.

Federal and State project managers (project managers[2]) are encouraged to use these enforcement approaches in creative ways, and to be flexible in their application, in order to provide incentives for compliance with corrective action permit or order obligations. Many of the examples in this document are from existing orders, however most of these examples could be adapted, as appropriate, to the permitting context.

The remainder of this document is split into three Sections. In Section II, *Expediting Components of Corrective Action*, specific Regional approaches, or examples, are described, offering suggestions on language that could be included in permits, orders, or work plans, to enhance the efficiency and effectiveness of corrective action. The examples discussed in this section have been successful at many facilities; however they may not be relevant, nor appropriate, at every facility. EPA and the State should carefully evaluate any corrective action approach being contemplated to ensure that it is appropriate, given the specific characteristics of the facility.

In Section III of this document, *Innovative Mechanisms for Requiring Corrective Action*, there is a short description of agreements and orders (referred to in this document generally as "mechanisms") that several Regions have developed as an alternative to the traditional order for corrective action. These mechanisms are not appropriate at every facility; therefore, they should be selected carefully for use at a particular facility. EPA Headquarters is planning to take a closer look at some of the mechanisms described in this document and intends to provide additional guidance on how and when to use them in the future. The final section, Section IV, is the conclusion of the document.

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[2] Throughout this document the general term "project manager(s)" is used to refer to RCRA project managers in both EPA and authorized States.

## SECTION II: EXPEDITING COMPONENTS of CORRECTIVE ACTION

EPA encourages the use of creative approaches for implementing corrective action to achieve cleanup results. Many of the approaches discussed in this Section were designed to reduce the amount of process and procedures traditionally associated with RCRA corrective action, while still ensuring cleanups that are protective of human health and the environment. These examples were developed and are used in EPA Regions, and can be considered for use at permitted, interim status or generator facilities, as appropriate.

Some of the enforcement approaches discussed in this Section are designed for cooperative facilities that are willing and able to complete the corrective action activities in a timely manner. Other approaches in this Section are more consistent with a traditional, enforcement-oriented approach. These are generally more appropriate in situations, where, for example, the facility has not demonstrated its ability to perform cleanup activities, or where the facility is not motivated or willing to conduct the work in a timely manner, or where the site conditions more appropriately warrant a traditional approach. All of the examples described in this Section are aimed at facilitating an efficient and effective cleanup.

In selecting the appropriate approach for a given facility, the project manager should carefully consider the relevant site specific factors, including: the facility owner/operator's ability to complete a timely and protective cleanup, including assessing their technical and financial capabilities, and the nature of the potential harm posed by the contamination at the facility; the facility's motivation level to conduct the investigation and cleanup; the facility's compliance history; and consideration of the interests and concerns of the surrounding community, including local governments.

This Section is divided into four major parts. Part A, "Use Schedules and Deadlines Creatively to Expedite Corrective Action," includes several sets of examples pertaining to the use of schedules or deadlines as a way to keep the various phases of corrective action activities progressing at an appropriate rate. Part B, "Discuss Alternatives to a Collaborative Approach with Facilities," addresses the importance of discussing with facilities the role of unilateral orders and potential judicial action, in situations where collaborative approaches are not adequately progressing. Part C, "Include Penalty Provisions in Enforcement Documents and Collect Upon Noncompliance," summarizes the role that penalty provisions can play in encouraging compliance. Part D, "Consider Other Federal Statutory Authorities" includes a discussion of other federal cleanup authorities that may be appropriate for EPA to consider for requiring corrective action at a particular facility.

Project managers are encouraged to use the approaches in this Section if they will facilitate corrective action activities at a particular facility, and to develop new, similar approaches to expedite corrective action – without jeopardizing the quality of the cleanup or the level of public involvement.

## A. Use Schedules and Deadlines Creatively to Expedite Corrective Action

Several different types of approaches are discussed below, all based on using schedules and deadlines to help expedite the various stages of corrective action. As with all of the examples discussed in this document, the facility-specific factors will help project managers determine what type of approach will be most effective at enhancing the incentives for compliance and encouraging timely actions.

### 1. Limit Time Spent Negotiating Consent Orders and Permits

To ensure timely implementation of an order, the Office of Enforcement and Compliance Assurance (OECA) recommends that final agreement on the terms of the order or permit for corrective action should generally be reached no later than 60 calendar days from the date the agency provides the facility with a draft consent order.[3] The agency should inform the party orally and in writing that agreement on the terms of the permit or order must be met by a specified date. In order for this deadline to provide an incentive for cooperation, the agency should be sure it intends to enforce the deadline, before imposing it in the first place. If the negotiations do not reach closure by the specified date, the agency should be prepared, in the context of an order negotiation, to issue a Unilateral Administrative Order (UAO) for corrective action, or seek judicial action.

The following language from a Regional notification letter is an example of how to limit consent order negotiations, and to allow for some flexibility within the 60-day time frame:

> "With this letter we are notifying you that EPA is establishing a 45-day period to begin on the date of your receipt of this letter to negotiate an order on consent. Such negotiations are intended to result in a settlement with EPA under which **FACILITY** agrees, among other things as explained in this letter, to perform cleanup actions at the facility, specifically, actions constituting a RCRA Facility Investigation, Corrective Measures Studies, Corrective Measures Implementation, and other necessary Interim Measures. I have enclosed with this letter a proposed or draft Corrective Action Order on Consent. The 45-day negotiation period may be extended for an additional 15 days if EPA determines that **FACILITY** has submitted an acceptable response and has otherwise entered into and participated in good faith negotiations for an appropriate settlement to conduct the above-described activities for the facility."

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[3] The 60-day time period is generally recommended based on common practice by several Regions. On a site-specific basis, a longer or shorter negotiation period may be justified due to the nature and extent of the conditions at the facility.

This example specifies the conditions that the facility's initial response must meet to be accepted by the Region, and the time limit for receipt of the initial response. Elsewhere in the notification letter, the Region also expressly reserves its right to issue a unilateral order under RCRA, or other statutes, for necessary actions at the facility. Placing a limitation on negotiations is particularly appropriate when, for example, the agency suspects that a facility might unnecessarily prolong the negotiation process. This approach might also be used when there is an urgent need to investigate or clean up potential contamination.

2. Establish Time Limits for Negotiating Work Plans

Most Regions identified the time spent negotiating work plans and schedules as a common obstacle to achieving faster cleanups. Many Regions have been able to encourage cooperation by including language in the controlling document (i.e., order or permit) to limit the time allowed for negotiating work plans. For example, project managers can limit the time allowed for negotiating work plans by identifying a date certain (e.g., March 20, 2001) in the permit or order that is the date upon which the work plan must be finalized. Alternatively, if there is a preference to use time periods in the schedule instead of specific dates (e.g., RFI draft work plan is due 120 days after agency approval of the Current Conditions Report), but the agency wants to ensure that work plan negotiations don't significantly slow down the overall schedule, a universal provision can be included in the order or permit which provides that after a specified amount of time (e.g., 30 days) since the first submission of any work plan to the agency, the agency will approve the submitted work plan as modified by the agency. This approach not only helps to keep the facility on schedule for the overall cleanup, but it also establishes at the outset the expectation that there is a limit to the amount of time the agency and facility will have to agree on the final work plans.

3. Consider Fixed and Flexible Schedules of Compliance

Schedules, which are typically a part of the work plan, can be a useful tool for ensuring that corrective action activities occur within a reasonable amount of time. Project managers can structure the schedule in a way that seems most appropriate for the particular facility. In most traditional schedules, deadlines are based on completion of the last step in the process, e.g., 90 days after the agency approves the RFI. In this scenario if the facility does not complete a milestone on time, the subsequent deadlines are pushed farther into the future.

Some Regions have found that in certain limited circumstances, using actual dates (e.g., March 20, 2001) instead of a schedule based on a succession of events, can be more effective. This approach places greater consequence on completing each step of the process on time, while still keeping the overall time-line intact. Under this structure there is great incentive for the facility to meet each deadline, because a missed deadline not only means they will pay penalties for noncompliance, it also means that the next phase suffers the consequences by having less than the originally allocated amount of time for completion. This strategy also requires the

agency to adhere to a fixed schedule for reviewing documents and making decisions concerning milestones in the schedule.[4]

Although it may be challenging for the project manager to adhere to a fixed review schedule, given the array of competing priorities they may have, it is a necessary component of maintaining facility compliance with a schedule based on fixed dates. Facilities may like this arrangement for the very fact that it does hold the agency to date-specific commitments, given that a common frustration expressed by facilities is that cleanups are slowed down by the length of time the agency sometimes takes to review and comment on a particular report or plan.

An alternative to a fixed schedule is a flexible, or fluid schedule. A flexible schedule is most appropriate for a facility that has demonstrated its ability to perform good work within an acceptable time frame. For example, one EPA Region has developed a framework for a compliance schedule which contains a combination of floating and fixed deadlines. The fixed deadlines represent the significant milestones, whereas the intermediate steps between milestones have floating, or flexible due dates. This could be desirable to a facility owner/operator who may want the flexibility to manage the time frames for deliverables between the milestones for reasons such as, for example, the facility's production schedules, construction plans, or budget-approval process. Generally, under a flexible schedule approach, where there are a limited number of set deadlines, the agency and the facility should meet on a regular basis to update and review the schedule, and confirm whether the major milestones will be met (generally, quarterly meetings would be appropriate under this type of arrangement).

As with any schedule that is part of a permit or order, missed milestones, where the milestones are missed due to factors under the facility's control, should typically result in an enforcement action (e.g., notice of violation and collection of penalties). For example, an EPA Region that has used the flexible schedule reserved the right to approve the schedule with modifications, and if the milestones were not met, the Region retained the express option to collect stipulated penalties for noncompliance and seek "other remedies or sanctions which may be available." This type of schedule typically works well for facilities that are highly motivated by external forces (e.g., redevelopment opportunities).

4. Limit Facility's Revision Opportunities

Another common impediment to moving the corrective action process along more quickly is related to the review-revise-approve process for corrective action work plans and reports

[4] Project managers should consult with agency counsel prior to selecting this approach, taking into consideration any potential legal limitations regarding the use of this approach, presented by existing relevant Federal or State statutes (e.g., Anti-Deficiency Act, 31 U.S.C. §1341).

generated pursuant to an order (the examples discussed in this subsection are all from orders).[5] Designing appropriate schedules, and using time limitations for negotiating orders, permits and work plans, as discussed above, can be effective methods for minimizing the time that is spent on revising draft documents. Another way to reduce the time and resources spent on revising documents such as work plans or reports is to limit the number of opportunities a facility has to revise a specific required work product.

In the following examples, the order, as a whole, is written with the expectation that the facility will produce adequate and approvable submissions for agency review. However, as indicated by these examples – which represent a range of approaches – the agency can make it clear by the terms of the order, that it may approve submissions with agency-imposed modifications, or if appropriate, the agency may replace the facility's submission with an agency-drafted document. Any one of these approaches should create an incentive for the facility to reach consensus with the agency and submit quality work, because there can be disadvantages to the facility if they lose the opportunity to influence the plans they are developing and ultimately responsible for implementing.

This is a straight-forward approach that has been used in corrective action orders, which simply acknowledges the range of agency responses that could occur:

> "Within thirty (30) calendar days of approval, or approval with modifications of any Work Plan, or receipt of a document drafted by EPA after failure by **FACILITY** to draft an approvable document, **FACILITY** shall commence work to implement the tasks required by the Work Plan in accordance with the standards, specifications and schedules set forth in the Work Plan approved by EPA."

This second example is a bit different from the first in that it establishes, in a general provision, the limited period of time that will be allowed for revising work according to agency comments provided:

> "The EPA may approve, disapprove, require revisions to, or modify any document, plan or submission required under this Order. If EPA requires revisions, Respondents shall submit a revised version of the submission within 30 days of receipt of EPA's notification of the required revisions. The EPA may, at its sole discretion, unilaterally modify a submission upon EPA's first review or after Respondents have revised and resubmitted a document. Once approved, modified by EPA, or approved with modifications, all submissions due under Paragraph XX shall be fully incorporated into and made an enforceable part of this Order."

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[5] The examples in this subsection would generally be limited to use in orders; some legal questions could be raised if these examples are considered in the context of a permit, where there are regulatory provisions governing the development and modification of permit conditions. Agency counsel should be consulted early where this approach is being considered for a permitted facility, to ensure that any potential legal issues are appropriately addressed.

This third example is slightly different in emphasis from the previous two examples. This language is more focused on limiting the facility's number of opportunities to submit revisions, as compared to the previous examples, which limit the time period allowed for resubmission:

> "The following procedure will apply to the review and approval of all plans, reports, or other documents submitted to EPA for review and approval, including plans and reports submitted pursuant to paragraph XX, above, pertaining to Additional Work. The EPA will review each such document and notify Respondents, in writing, as to its approval or disapproval thereof. In the event EPA does not approve any such document, it will provide written comments regarding the basis of the disapproval. Within XX days of receipt of the EPA comments, or such longer time period as agreed to in writing by the Parties, Respondents shall modify the submission to incorporate EPA's comments, and shall submit the amended report to EPA.
>
> Upon resubmission, EPA, in its sole discretion, may either approve the document, or, if EPA determines that the document does not adequately address the comments provided by EPA, EPA may unilaterally modify the document, and will provide Respondents with a copy of the document as modified by EPA, to be implemented in accordance with any modifications. If, upon resubmission, a document, or portion thereof, is disapproved or modified by EPA, Respondents shall be deemed to have failed to submit such plan, report, or item timely and adequately.
>
> EPA's determination that any submission does not conform to the requirements of this Order shall be subject to the Dispute Resolution procedures set forth in paragraph XX below; however, invocation of dispute resolution shall not stay any Respondent's obligation to perform any work required by any approved or modified document."

This fourth example is generally more appropriate for a unilateral order with a facility with historic patterns of submitting inadequate deliverables. Several excerpts from a unilateral order developed by an EPA Region are provided below, to show how the agency can design tighter controls on the quality of submissions, where appropriate. The UAO that these excerpts were taken from is designed such that the agency will only review and comment on work that is "acceptable." Work that is submitted and does not meet this threshold standard of "acceptable" might not receive any review by the agency. Rather, it might by rejected on its face and returned for resubmission, or it might be replaced in its entirety by an agency-generated document. This approach would typically be reserved for a UAO with a facility that has a strong history of submitting inadequate deliverables time and time again. One of the benefits of this approach is that it establishes a strong incentive for the facility to place greater emphasis and attention on the quality of the work generated at the outset for agency review.

This first excerpt from the order demonstrates how the Model Order definition of the term "Acceptable" has been modified – note that if it is "acceptable" it warrants agency review:

> "Acceptable shall mean that the quality of the submittals or completed work is sufficient to warrant EPA review in order to determine whether the submittal or work meets the terms and conditions of this order, including attachments, scopes of work.... Acceptability of submittals or work, however, does not necessarily imply that they will be approvable. Approval by EPA of submittals or work, however, establishes that those submittals were prepared, or work was completed, in a manner acceptable to EPA"

This second excerpt from the order is an example of how the provisions in the order acknowledge that only "acceptable" submissions receive agency comments:

> "1. EPA shall review the CC/RA Report and EPA shall notify **FACILITY** in writing which data EPA has determined are sufficient for the purposes of this order.
>
> 2. Unless the CC/RA Report is not acceptable, EPA shall provide its written site-specific analysis and technical justification to support EPA's determination that any portion of the CC/RA Report is insufficient...."

This final excerpt demonstrates that work which is "not acceptable" may be rejected by the agency, might not receive agency comment, and could constitute a violation of the order if not remedied in time:

> "1. EPA will provide **FACILITY** with its written approval, conditional approval, approval with modification, rejection as not acceptable, disapproval with comments and/or modifications, or notice of intent to draft and approve, for any work plan, report (except progress reports), specification or schedule submitted pursuant to or required by this order.
>
> 2. EPA may reject and not comment on, any submittal which EPA determines is not acceptable. Submittal of a document not acceptable is a violation of this order, unless such document is resubmitted prior to the due date for such submittal, and EPA determines that submittal is acceptable..."

This approach clearly sets out the agency's expectations, discourages inadequate work-product, streamlines the process, keeps the pace of work-product development at an acceptable and efficient rate, and fosters an efficient use of everyone's resources. It also creates incentives for clear communication, generation of serious work-product, and coordination with the agency throughout corrective action. Note that the reverse scenario also presents an opportunity for streamlining the process. If an owner/operator demonstrates an ability to submit consistently

"acceptable" work-products, the implementing agency may allow for reduced oversight and review.[6]

**B. Discuss Alternatives to a Collaborative Approach with Facilities**

In certain circumstances, where consent order negotiations are not proceeding at an acceptable pace, project managers may be able to encourage more cooperative responses from a facility if the agency presents the alternative of proceeding with a less collaborative approach, such as a unilateral administrative order (UAO) or judicial action. Because of the costs and time associated with responding to litigation, the potential for judicial action may encourage the facility to cooperate with the negotiation. Discussing the possibility of a UAO can be particularly effective when project managers make it clear to facilities at the beginning of the slow down in negotiations, that if negotiations fail, the agency will issue a UAO (for example, where negotiations have been occurring for 45 days [under a 60 day negotiation period] and there is little common ground on substantive provisions in the order, discussions of a UAO would be appropriate). The agency should be prepared to follow through on a promise to issue a UAO and/or seek an action in court, before making such promises.

During consent order negotiations, project managers should also explain the full implications of a UAO. The UAO, by definition, is typically less desirable for a facility, and it may not necessarily contain any of the terms agreed to during the consent order negotiations. UAOs for example, typically do not include provisions for Dispute Resolution, Force Majeure, or Excusable Delay, which are often found in a consent order and are provisions facilities typically prefer to have included in an order. The terms of the UAO should clearly reflect those requirements that the agency, in its best professional judgment, believes are necessary. Provisions that were considered during consent order negotiations may not necessarily be included in the UAO. An explanation of these trade-offs during consent order negotiations may provide incentives for reaching consensus within the established time frame. To make the incentive more tangible, the project manager may want to bring the drafted UAO to a negotiation session, so the facility can understand the alternative to a negotiated approach.

Project managers may find that other facilities in the Region/State modify their own behavior in response to witnessing the agency's commitment to taking enforcement actions where appropriate. In other words, in those appropriate circumstances where, for example, the agency seeks judicial enforcement of an administrative order that is not being complied with, the

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[6] The Office of Solid Waste is in the process of drafting a document on results-based approaches to corrective action that will provide guidance on opportunities for "tailoring" oversight, *See* 65 FR 58275 (September 28, 2000) announcing July 26, 2000, Draft Results-Based Approaches to Corrective Action, OSW, available in USEPA Internet Website: http://www.epa.gov/correctiveaction/resource/guidance/gen_ca/results.htm or call RCRA Hotline: 1-800-424-9346.

regulated community becomes more aware that the agency has the capacity and intent to respond to uncooperative and noncompliant facilities with an agency enforcement action.

## C. Include Penalty Provisions in Enforcement Documents and Collect Upon Noncompliance

At most facilities, a critical component in the development of facility-specific incentives is the inclusion of penalty provisions in enforcement documents, and collection of penalties when the facility fails to comply with the permit or order. For example, in UAOs, the agency should include a provision indicating that noncompliance with the terms of the order could result in a judicial action by the agency, seeking compliance with the terms of the order and assessment of appropriate statutory penalties for noncompliance.[7] Penalty provisions in consent orders should contain stipulated penalty provisions, including a provision for interest on any unpaid stipulated penalty balance.[8] Several Regions have successfully collected penalties and observed improved compliance from those facilities that were penalized for their non-compliance.[9]

The penalty amount for non-compliance depends, in part, on the statutory authority used because different authorities allow for varying amounts of penalties. This should be a consideration when project managers and legal counsel initially determine which authority to use for requiring corrective action at a particular facility. For example, statutory penalties under §3013 are limited to $5,500[10] per day; this may not be the preferred authority if a party is known to be recalcitrant and higher penalty provisions are likely to create a compliance incentive. Instead, if the legal thresholds can be met and it is appropriate to consider a CERCLA action for the site, it may be better to issue a CERCLA §106(a) order, which includes penalties of up to $27,500/day[11] for non-compliance or, if the facility is an interim status facility, a §3008(h) order, which also allows for statutory penalties of up to $27,500/day.

The mere threat of pursuing penalties does not provide sufficient motivation for compliance. If the facility fails to comply with the terms of the order, the agency generally should notify the

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[7] For example, see language in Appendix A (§3013 UAO example), "Issuance of Administrative Orders Under Section 3013 of the Resource Conservation and Recovery Act," OECM/OSWER Memo, (9/26/84).

[8] For example, see language in Final RCRA §3008(h) Model Consent Order, OWPE, (12/15/93).

[9] EPA's RCRA Civil Penalty Policy provides that RCRA civil penalties should be assessed in a fair and consistent manner, be appropriate for the gravity of the violation, eliminate any economic incentives for non-compliance, serve to deter the facility from committing a violation, and serve to achieve and maintain compliance in an expeditious manner. RCRA Civil Penalty Policy at 5 OE/OSWER (10/90).

[10] Pursuant to the EPA's Civil Monetary Penalty Inflation Adjustment Rule (implementing the Debt Collection Improvement Act of 1996 and codified at 40 C.F.R. Part 19), EPA adjusted for inflation the maximum civil monetary penalties that can be imposed pursuant to the Agency's statutes. For violations occurring after January 30, 1997, the maximum penalty amounts under the relevant provisions of CERCLA and RCRA have been adjusted from the $5,000 statutorily provided amount to $5,500, and from the $25,000 statutorily provided amount to $27,500. For violations occurring on or before January 30, 1997, the lower statutorily provided amounts would apply.

[11] CERCLA §107(c)(3) also allows for punitive damages for up to three times the amount of Superfund monies expended as a result of a party's failure to comply with a CERCLA §106(a) order.

facility promptly in writing of its non-compliance and the penalties that are due, in order to emphasize the importance of compliance. The letter should include the dollar amount due and owing as of the date of the notification, including the applicable interest rate, and the agency should take the appropriate action to begin collection.[12] Like other examples in this section, issuing penalties upon non-compliance, at one or a few appropriate facilities encourages compliance at other facilities, because it exhibits the agency's willingness to pursue facilities that fail to comply with their legal RCRA corrective action obligations.

**D. Consider Other Federal Statutory Authorities**

The RCRA statutory provisions provide program implementers with effective authorities for requiring corrective action under a variety of circumstances – whether they be used in a traditional or innovative manner. In some cases, however, other federal environmental statutes may provide EPA with enforcement authorities that fit the issues presented by a particular facility better than the RCRA authorities.[13] Consult EPA's "Guidance on the Use of Section 7003 of RCRA,"[14] which includes a comparison chart of some of the potential federal authorities, such as the Clean Water Act and CERCLA, that EPA could consider using for requiring cleanup at a RCRA facility.

When EPA relies on other federal authorities for completing the corrective action obligations, it is critical that the RCRA project manager maintain close coordination with those from other program offices who will be involved in overseeing all or portions of the clean up. To ensure that additional work will not be required under RCRA at a later date, RCRA facilities should conduct corrective actions that are consistent with the RCRA requirements, even if a different federal enforcement authority is used to require the corrective action activities. Therefore, cross-program coordination throughout the process is critical to the overall success of the clean up at the facility.

The most common complementary federal authority EPA could use at RCRA treatment, storage and disposal facility is CERCLA §106(a). EPA has stated that "generally, cleanups under RCRA corrective action or CERCLA will substantively satisfy the requirements of both programs."[15]

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[12] See relevant EPA guidance documents regarding penalty calculations, assessment and collection. E.g., Policy on Civil Penalties, (2/16/84); A Framework for Statute-Specific Approaches to Penalty Assessments, (2/16/84); 1990 RCRA Civil Penalty Policy; Hazardous Waste Enforcement Response Policy (1996 Revisions). See also, Federal Claims Collection Action 31, U.S.C. §3711 *et seq.*; Federal Claims Collection Standards, 4 C.F.R. §102.2; and EPA regulations at 40 C.F.R. Part 13 (Claims Collections Standards).

[13] This discussion is limited to EPA's use of other federal statutory authorities at RCRA facilities. Because State authorities are so diverse, it is beyond the scope of this document to provide any guidance on whether a State could rely on any authority other than their authorized RCRA program for achieving corrective action.

[14] Signed by Steven A. Herman, Assistant Administrator, OECA (10/20/97).

[15] Consistency issues as between a CERCLA cleanup and a RCRA cleanup is discussed in the EPA Memo, "Coordination between RCRA Corrective Action and Closure and CERCLA Site Activities," OECA/OSWER, (9/24/96).

This CERCLA authority carries with it high penalties for non-compliance, and treble damages if EPA incurs response costs due to the facility's inaction. Where appropriate, project managers should consider this authority as a viable option when evaluating which authority to use for an order-based action. A decision to pursue cleanup under a CERCLA authority, instead of RCRA order authority should be well supported and documented. Additionally, when considering the use of CERCLA authorities, project managers should consult closely with Superfund personnel before and during implementation of the cleanup, for adequate cross-program coordination, and to ensure that CERCLA-specific issues are appropriately managed.[16]

## SECTION III: INNOVATIVE MECHANISMS FOR REQUIRING CORRECTIVE ACTION

RCRA's statutory enforcement framework allows project managers to take a flexible, less enforcement-oriented approach, in appropriate circumstances.[17] Several EPA Regions have taken advantage of this flexibility and developed new and innovative mechanisms for requiring RCRA corrective action activities. This section briefly explains the following three new mechanisms: (1) facility-initiated agreement; (2) streamlined consent order; and (3) unilateral letter order. These mechanisms are typically used with facilities that do not have a history of noncompliance and that truly are interested in completing their corrective action obligations in a cooperative and timely manner. OSRE plans to develop a document that provides specific guidance for using the types of innovative documents that are only briefly described in this Section. In the interim, Regions are encouraged to share draft documents with the OSRE contacts listed at the end of this document, when developing these innovative, non-traditional mechanisms for requiring corrective action.

Traditional mechanisms, for the purposes of this discussion, include typical unilateral administrative orders, typical administrative consent orders (both generally based on a Model Order), and typical corrective action permit conditions. The corrective action requirements included in these traditional documents are based on regulatory requirements and Agency guidance,[18] and the same should be true for any non-traditional mechanisms that are developed, including the innovative mechanisms discussed in this Section. Under innovative mechanisms for corrective action, the general corrective action framework should remain the same as under a traditional mechanism, the cleanup standards should not be any different than they would be

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[16] For example, taking into consideration CERCLA §106(b) which allows for claims against the Fund in certain cases.

[17] This section is limited to approaches for requiring corrective action at facilities that are not already subject to permits or orders. While there may be similar opportunities for innovations at facilities currently subject to permits or traditional orders, such approaches are outside the scope of this document.

[18] EPA's primary corrective action guidance is in the 1996 Advanced Notice of Proposed Rulemaking: "Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities," 61 FR 19432. 64 FR 54604 at 54607 (October 7, 1999).

under a traditional mechanism, and the agency should still retain responsibility for selecting and approving the final remedy for the facility. Likewise, there should still be meaningful opportunities for public involvement, and the agency should develop and maintain a full record to support corrective action decisions made at the facility. The primary benefit of these innovative mechanisms is that they can modify (e.g., minimize or streamline) some of the process that is generally associated with traditional mechanisms, thereby increasing the overall efficiency of the cleanups. The end result should be the same under an innovative mechanism as it would be under a traditional mechanism: a cleanup that is protective of human health and the environment.

Regardless of the specific mechanism used (whether it is innovative or traditional), it should clearly define the work required, include a schedule for critical milestones, and contain explicit repercussions for non-compliance with the provisions. In addition, the specific mechanism used should include appropriate regulatory references, for example regulatory references that specifically correspond to the performance standards included in the terms of the controlling document (e.g., streamlined consent order). Project managers should also provide the facility with the guidance documents that will help them meet their corrective action obligations in a manner that is likely to be acceptable to the agency. In addition, project managers should compile an official administrative record for any order or agreement for corrective action. Ideally, the record should begin to be compiled prior to issuing the order or entering into the agreement. As discussed in prior Agency guidance documents on the importance of establishing an administrative record, a carefully compiled administrative record will facilitate negotiations, provides useful information to the public about the facility and the proposed activities, and serves as a basis for any judicial review of an administrative order.[19]

## A. Facility-Initiated Agreement

A facility-initiated agreement (sometimes called voluntary, owner/operator initiated, or facility-lead agreement) is a non-binding corrective action agreement, between the agency and a facility. Several Regions have entered into facility-initiated agreements with facilities that are taking a pro-active approach to corrective action (i.e., the agency has not yet required corrective action from the facility, but the facility is interested in beginning the clean up). This type of agreement may be most appropriate for facilities that the agency has determined have the ability to complete corrective action requirements without an enforceable order in place.[20] Generally, a facility is a

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[19] For more detailed guidance on compiling an Administrative Record, please consult the statute-specific guidance documents, e.g., "Issuance of Administrative Orders Under Section 3013 of the Resource Conservation and Recovery Act," OECM/OSWER (9/26/84); "Guidance on the Use of Section 7003 of RCRA," OECA (10/20/97). Project managers may also find it useful to consult relevant CERCLA guidance documents, e.g., "Compilation and Public Access to Administrative Records, OSWER (10/2/97); "Final Guidance on Administrative Records for Selecting CERCLA Response Actions," OSWER Dir. 9833.3A-1 (12/3/90).

[20] Facilities that already have a corrective action permit will generally not be able to enter into a facility- initiated agreement with the agency.

good candidate for a facility-initiated agreement if it is cooperative, pro-active, and has adequate financial and technical capability to complete the necessary work in a timely manner. Other site-specific and community factors should also be considered, as determined appropriate by the agency.

The purpose of the facility-initiated agreement is to allow motivated facilities to initiate and perform corrective action work in a manner that is still consistent with all relevant laws and regulations, but without getting involved in negotiating an enforceable order. This results in streamlining, or eliminating, the up-front process (e.g., negotiating order provisions), and depending on the site-specific terms of the agreement, may also result in less process during the implementation of the corrective action activities.

These agreements will only work well at certain facilities. Project managers should carefully evaluate whether the facility will succeed under a facility-initiated agreement prior to negotiations. Furthermore, if the agency decides to enter into a facility-initiated agreement with a facility, and subsequently determines the agreement is no longer the appropriate tool for accomplishing corrective action at a particular facility (because, for example, the facility is not following the terms of the agreement), the agency should issue an enforceable order or permit for the remainder of the necessary activities.

The scope of a facility-initiated agreement will vary with each agreement and should be tailored to each facility's unique characteristics, including the nature and extent of contamination. As a general matter, certain key issues should be addressed in this type of agreement. For example, the agreement should clearly present the agency's expectations regarding work to be performed, standards to be met, and corresponding deadlines. To ensure timely completion of activities, at a minimum, a schedule for completion of major milestones should be included.[21] In addition, public participation requirements should be included in facility-initiated agreements. The agency should ensure that oversight expectations are clearly articulated during negotiations and in the actual agreement; the level of oversight provided by the agency should be tailored to the specific facility.[22] Finally, the document should clearly state that it is a non-binding agreement and does not affect the agency's authority to issue enforceable orders in any way, including where the agreement fails to accomplish what is intended, or if there is noncompliance with the terms of the agreement.

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[21] While stipulated penalties will typically not be a part of a schedule or deadlines in a facility-initiated agreement, given that this is a voluntary agreement, it is still important to have an agreed upon schedule and deadlines, to ensure timely implementation of the corrective action activities.

[22] Corrective Action Oversight Guidance, (OSWER Directive, EPA / 9902.7), January 1992; *For additional information see* DRAFT - Results Based Approaches to Corrective Action: Tailored Oversight Guidance, OSW available in USEPA Internet Website: www.epa.gov/correctiveaction/resource/guidance/gen_ca/results.htm or from RCRA Hotline: 1-800-424-9346.

**B. Streamlined Consent Order**

Consent orders are distinctly different from a facility-initiated agreement; they are enforceable, legally binding administrative orders entered into pursuant to RCRA's statutory enforcement or cleanup authorities. As with any innovative approach, the RCRA corrective action requirements are unchanged, but in a streamlined order, the provisions implementing those requirements are pared-down, as compared to the more detailed provisions in a traditional consent order. A streamlined order would typically be results-based, with enforceable deadlines and stipulated penalties; it lacks the traditional specificity in the order as to *how* the corrective action activities should be accomplished, and instead identifies performance standards that must be met by specific dates. A defining characteristic of this type of order is that the agency's oversight role is minimized throughout the corrective action process. However, generally the agency and facility should, at a minimum, meet prior to critical decision points, and/or provide for an agency review opportunity of key investigation and cleanup documents.

The "critical" provisions for a streamlined order depends on the particular facility and the agency's assessment of what requirements are necessary to ensure timely and protective actions. When streamlining a Model Order to fit the facility-specific corrective action issues, project managers should pay particular attention to the EPA guidance provided in the Model Orders regarding which provisions should generally appear in orders.[23] There may also be legal reasons to retain certain key provisions from the Model Order in any particular streamlined order, thus it is crucial to involve agency legal counsel in drafting these orders.

Some provisions should not be eliminated from the order, but may be abbreviated or tailored to include suitable provisions for a specific facility. For example, one EPA Region significantly reduced the detail embodied in the "work to be performed" section of a streamlined §3008(h) order it entered into with a facility. There is limited detail in this particular order regarding how the Facility Investigation should be conducted or how EIs should be met; instead there are results-based standards that must be met by certain dates. Similarly, this particular streamlined order provides for reduced Agency oversight, as compared to the type of oversight under a typical traditional consent order. For example, this order requires quarterly progress reports to the Region, and there is a commitment in the order for the agency and facility to meet at least twice per year to discuss the work proposed and performed under the order; however none of the facility's work is subject to an EPA review/approval process. The Region's first opportunity, per the terms of this particular order, to request additional work from the facility is after the facility has completed the Corrective Measures Study (CMS). In this example, the burden is on the

[23] For example, see Final RCRA §3008(h) Model Consent Order, (e.g. see page 22) (12/15/93); Issuance of Administrative Orders under Section 3013 of the Resource Conservation and Recovery Act, (e.g. see page 6), OSWER/OECM (9/26/84).

facility to seek Agency input where they might need it, or risk having to conduct additional work, under EPA's direction, upon completion of the CMS.

Even though the agency and a facility may agree to eliminate certain Model Order provisions from a streamlined order, modify provisions to minimize processes, and/or reduce the agency's oversight role, a streamlined order is still an enforceable administrative order and should contain certain necessary components common to an enforcement order. For example, streamlined consent orders should contain deadlines for key milestones, with stipulated penalties attached to the milestones. In addition, just as under a traditional order, Regions may seek judicial enforcement of the streamlined order (including statutory penalties for noncompliance), or the Region may issue a new, more stringent order, if appropriate.

**C. Unilateral Letter Order**

A unilateral letter order, like the streamlined consent order, is a legally binding results-based order, that can be entered into under any RCRA statutory administrative order authority. This type of order is formatted similar to a letter, and is written in a less formal format and style than a traditional order. Simply through the message communicated by its format and tone, a letter order may be more successful at getting a complete and timely response than the traditional consent order. The letter order approach can also be used for an order on consent.

Like the streamlined order, the critical provisions of a letter order should be determined by the specific issues presented at the facility. For example, one Region issued a unilateral §3013 letter order which is fairly short and focused in scope: it is designed to obtain a results-based RFI and development of the CMS; one of its goals was to determine what work, if any, would be necessary to meet the EI goals. The scope of a letter order should be specifically designed to fit the issues that need to be addressed at the particular facility. However, as suggested above for streamlined orders, when developing a letter order, project managers should consult the appropriate EPA Model Order guidance documents for guidance as to which Model provisions should appear in the order. There may also be legal reasons to retain certain key provisions from the Model Order, thus it is crucial to involve agency legal counsel in drafting these letter orders.

When a letter order is used, the document should clearly state up front that it is an order, and the appropriate legal authority should be referenced. It is important for the facility to immediately understand that the document is a legally enforceable order, and not merely a notice letter. As is true with the streamlined order, a letter order is an enforceable administrative order and should be treated as such in terms of enforcing the provisions, seeking penalties, and considering judicial enforcement if necessary.

## SECTION IV: CONCLUSION

EPA encourages the appropriate use of innovative mechanisms and creative approaches for accomplishing corrective action. The particular enforcement approach, or innovative mechanism selected for requiring corrective action activities should match the particular set of circumstances presented at the facility, and project managers are responsible for continually monitoring the success of a selected approach. For example, during corrective action implementation, where an innovative mechanism is used, project managers are responsible for recognizing when such an approach is not resulting in timely and protective cleanup activities, and taking prompt action to ensure that the facility changes its behavior and implements the necessary corrective action activities. This might require replacing the innovative mechanism with a traditional enforcement document because the traditional document might provide the agency with more control over the facility's activities and may include more significant incentives for compliance (e.g., larger penalties, judicial action). Alternatively, depending upon the circumstances, it might only require modifying the existing innovative enforcement document so that it contains a few more enforcement-based incentives, or increased agency oversight, for example, to ensure future timely and appropriate corrective action activities.

RCRA enforcement authorities provide program implementers with effective and flexible ways to develop new, expedited approaches to successfully achieve completion of corrective action activities within the RCRA framework. Other federal environmental statutes – in particular CERCLA – also may offer EPA alternative enforcement authorities which could be appropriate, under certain circumstances, for requiring corrective action. Regardless of which type of document (traditional or innovative; permit or order) or statutory authority is used, the corrective action mechanism used should be tailored to the facility's demonstrated willingness and ability to comply with the corrective action requirements, as well as account for the nature of the risks posed by the facility. The enforcement approach used, whether innovative or traditional, should be designed to ensure that protective cleanups occur in a timely manner and provide opportunities for meaningful public involvement throughout corrective action.

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**Notice:** This document provides guidance to EPA and authorized States regarding enforcement approaches for expediting RCRA corrective action. This document does not create any legally binding requirements, but rather suggests approaches that may be used at particular facilities as appropriate given the site-specific circumstances. This document does not substitute for EPA's statutes and regulations and interested parties are free to raise questions and objections about the appropriateness of the application of the examples presented in this guidance to a particular situation. EPA may change this guidance in the future.