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

OFFICE OF  
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Inspection Authority Under Section 3007 of RCRA

FROM: Francis S. Blake *F. S. Blake*  
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TO: J. Winston Porter  
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A number of questions have arisen concerning the scope of the Agency's inspection authority under Section 3007 of RCRA. As discussed below in more detail, I believe that our inspection authority (including the authority to sample) extends to any establishment, place, or facility that either presently or in the past has handled solid wastes that EPA reasonably believes may meet the statutory definition of a hazardous waste. This authority is limited by the fact that it must be used to gather information concerning hazardous wastes and must be exercised for the purposes of RCRA rule-making or enforcement. Within these limits, section 3007 authorizes inspections in connection with a number of RCRA provisions including the Agency's section 7003 imminent hazard authority, its present Subtitle C regulations, its corrective action authority under sections 3004(u) and 3008(h), and its Subtitle D authority under sections 4005 and 4010.

Section 3007(a) provides that "[f]or purposes of developing or assisting in the development of any regulation or enforcing the provisions of this title," EPA is authorized

- (1) to enter at reasonable times any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of or transported from;

- (2) to inspect and obtain samples from any person of any such wastes and samples of any containers or labeling for such wastes.

A plain reading of this language unambiguously suggests a broad grant of inspection authority. As noted above, the exercise of this authority is expressly limited by only two conditions. First, the specific information gathered must relate to hazardous wastes. Second, it must be used for the purposes of RCRA rulemaking or enforcement. Each of these conditions, while providing clear limits on the use of the Agency's inspection authority, is nonetheless stated in expansive terms. 1/

a. Hazardous Wastes

The first condition is stated in general unrestrictive language. By providing authority to enter "any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of or transported from" (emphasis added), Congress unequivocally provided for a broad application of the Agency's inspection authority. There is no limiting reference in this language to Subtitle C facilities or units. Nor is there any requirement that the hazardous waste management activity be currently ongoing or even that the site of the activity be a disposal area. For example, under the language noted above, EPA's inspection authority extends to generator sites, storage areas, treatment operations and transfer points. Thus, the emphasis is on any geographical location where hazardous wastes presently may be or in the past have been handled - whether or not in compliance with Subtitle C. Quite clearly, this may include solid waste management units otherwise subject to Subtitle D.

Use of the phrase "hazardous wastes" is itself a further indication that the scope of section 3007(a) is not limited to Subtitle C facilities and units. Unlike sections 3002 through 3004 and section 3010, Congress did not confine the operation of 3007(a) to "hazardous wastes identified or listed under this subtitle" (emphasis added). As explained in the preamble of the May 19, 1980 hazardous waste identification

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1/ The inspection provisions of section 3007(a) are similar to those under section 104(e) of CERCLA. Although not addressed in this discussion, it is important to note that section 104(e) as well as other provisions of CERCLA may provide additional and independent grounds for entry and inspections at solid waste facilities.

and listing rules 2/ and more recently articulated in the Agency's amendments to the definition of solid waste 3/, EPA believes Congress' unrestricted use of this phrase confirms that the scope of section 3007(a) extends to any solid waste that the Agency reasonably believes may meet the statutory definition of a hazardous waste under section 1004(5). 4/

As defined by Congress, the term hazardous waste means any solid waste that EPA reasonably believes

because of its quantity, concentration, or physical, chemical, or infectious characteristics may

- (A) cause or significantly contribute to an increase in mortality or any increase in serious irreversible, or incapacitating reversible, illness; or
- (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. (emphasis added)

Clearly a waste which is "classified" as hazardous pursuant to regulations under section 3001 (i.e., is listed or meets one of the characteristics) would automatically fall within the scope of the section 1004(5) definition. But just as clearly, any other solid waste that "may pose a...hazard...when improperly...managed" (emphasis added) also meets the statutory definition even though no formal action identifying it as a hazardous waste has been taken. This second group includes, for example, solid wastes containing any of the hazardous constituents listed in Appendix VIII to Part 261

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2/ 45 Fed. Reg. 33084, 33090 (May 19, 1980).

3/ 50 Fed. Reg. 614, 627 (January 4, 1985); 40 CFR § 261.1(b)(2).

4/ This view was expressly affirmed by Congress in its consideration of the 1984 Hazardous and Solid Waste Amendments: "EPA's authority under these provisions [sections 3007 and 7003] is not limited to wastes that are 'identified or listed' as hazardous, but rather includes all wastes that meet the statutory definition of hazardous waste." H.R. Rep. No. 198, 98th Cong., 1st Sess. 47 (1983).

which may form the basis for listing actions under 40 CFR § 261.11. As explained at length in the Agency's May 19, 1980 rule, "the presence of any of these constituents in the waste is presumed to be sufficient to list the waste unless after consideration of the designated multiple factors [specified at 40 CFR § 261.11] EPA concludes the waste is not hazardous." 5/

There is little question that materials meeting the definition of hazardous waste may be improperly disposed of at Subtitle D solid waste management sites. We, therefore, believe the scope of section 3007(a) may extend to such locations. As Congress recognized in enacting amendments to Subtitle D as part of the 1984 Hazardous and Solid Waste Amendments,

Subtitle D facilities are the recipients of unknown quantities of hazardous waste and other dangerous materials resulting from the disposal of household waste, small quantity generator wastes and illegal dumping. 6/ (emphasis added)

To interpret EPA's inspection authority as applying only to wastes managed at Subtitle C facilities or units leads to the incongruous result of EPA's inspecting a self-defined class of facilities that have already acknowledged their hazardous waste management responsibilities. This narrow interpretation essentially precludes the Agency from identifying other situations where the improper and unacknowledged storage or disposal of hazardous wastes may pose a threat to the environment. We do not believe that this is either what Congress intended or what the plain language of section 3007(a) suggests.

b. Rulemaking and Enforcement

The second condition of section 3007(a) explicitly provides hazardous waste inspection authority "[f]or the purposes of developing or assisting in the development of any regulation or enforcing the provisions of this title" (emphasis added). In passing the 1980 amendments to the Solid Waste Disposal Act, Congress substituted the term "title" in place of "subtitle" specifically to extend the scope of section 3007(a) beyond Subtitle C. As explained in the accompanying Senate report, this change

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5/ 45 Fed. Reg. 33084, 33107.

6/ H.R. Rep. No. 1133, 98th Cong., 2d Sess. 117 (1984).

. . . expands the Administrator's authority to request information or examine the records of a person handling solid waste. At present, this authority applies only to actions under Subtitle C dealing with hazardous wastes. The amendments would allow such access for purposes of the entire Act. 7/

Thus it is clear that the Agency's inspection authority extends not only simply to Subtitle C actions but also to activities under other RCRA Subtitles, as well. Within the general constraint that it be related to hazardous waste, the scope of section 3007(a) authority is determined primarily by the specific rulemaking or enforcement purposes for which it is used. In this context, we believe there are a number of legal bases under which the authority to enter and inspect is broadly available to the Agency.

#### 1. Rulemaking

With regard to rulemaking, section 3007(a) by its terms is available to assist "in the development of any regulation" under RCRA. Under this provision, we believe that the Agency has the authority to gather preliminary data both to determine the need for regulation and, where the need is established, to develop an appropriate regulatory strategy adequate to carry out the requirements of RCRA. Depending on the criteria and relevant requirements of the provisions or section under which a particular rulemaking is developed, this may include detailed scientific, technical, or financial questionnaires and surveys, as well as on-site inspections and sampling.

This authority extends not only to rulemakings under Subtitle C but, as noted above, to rulemakings under other provisions of RCRA. With respect to Subtitle C, this authority would extend, for example, to gathering information to assist in developing corrective action standards under section 3004(u). Because the provisions of section 3004(u) apply to both solid waste and hazardous waste units at any facility seeking a section 3005(c) permit, the inspection and sampling authority of section 3007 would also extend to such units to assist in gathering data relevant to the rulemaking process.

With respect to non Subtitle C provisions, section 4010 provides an example of section 3007's applicability under Subtitle D. Enacted as part of the 1984 HSWA amendments, section 4010 requires the Administrator to conduct a study on

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7/ S. Rep. No. 172, 96th Cong., 2d Sess. 3 (1979); see also H.R. Rep. No. 1444, 96th Cong., 2d Sess. 35 (1980).

the adequacy of existing Subtitle D guidelines and criteria and to promulgate revised criteria for Subtitle D facilities that "may receive hazardous household wastes or hazardous wastes from small quantity generators under section 3001(d)". Because one of the purposes of the study and the central purpose of the revisions is to address hazardous wastes at Subtitle D facilities, we believe the Agency's entry and inspection authority under section 3007(a) extends to gathering information at Subtitle D facilities both for the purpose of conducting the study as it relates to hazardous wastes and to assist in developing revisions to existing Subtitle D criteria.

## 2. Enforcement

With regard to enforcement, the scope of section 3007(a) is equally broad and, again, extends not simply to Subtitle C actions but also, for example, to enforcing the broad imminent hazard provisions of section 7003(a). By its terms, this section applies to any situation under RCRA (whether or not it is regulated under Subtitle C) in which "the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment".

In addition to enforcing section 7003, the Agency's inspection authority is available to gather information in support of actions under the general Subtitle C enforcement authority of section 3008, as well as under the Subtitle D enforcement authority of section 4005(c). With respect to both sections, EPA interprets its "enforcement" inspection authority to extend not only to information gathering in connection with a particular judicial or administrative proceeding but also to assist in the preliminary day-to-day information gathering and data analysis associated with permitting and compliance assessments that ultimately may lead to specific enforcement actions. Section 3008 applies to a "violation of any requirement" of Subtitle C and thus, for purposes of enforcement, the inspection and sampling authority of section 3007 is available for determining and assuring compliance with any Subtitle C requirement. Under section 4005(c), EPA's inspection authority is also available but in a somewhat more limited context for purposes of enforcing Subtitle D open dumping criteria that have been revised under section 4010. This open dumping enforcement authority and, by extension, EPA's inspection authority is available only in those circumstances where a state has failed to adopt an adequate program assuring compliance with the revised criteria.

In the case of inspections at a Subtitle C facility to determine compliance with applicable hazardous waste regulations, the scope of section 3007(a) authority is determined, again,

by the two constraints that the information gathered relate to hazardous wastes and be used to enforce a RCRA provision. The clearest example of an authorized inspection at such a facility under section 3007(a) is, of course, sampling at solid waste units that are expressly managed as Subtitle C hazardous waste units. The information obtained unquestionably will relate to hazardous wastes and can be used to enforce applicable regulatory requirements. However, it should be emphasized, as noted above, that section 3007(a) inspection authority just as clearly extends to other non-Subtitle C units at a Subtitle C facility where there is some basis for concluding that they may also provide information relating to hazardous wastes. Samples from the non-Subtitle C unit may provide information concerning hazardous wastes that have been disposed of in the unit itself, and, in certain circumstances, the samples may provide information regarding the management of hazardous wastes that have been placed in nearby Subtitle C units. An example of the second case would be a situation in which both the solid waste and hazardous waste units were located near one another over the same aquifer. Depending on the hydrogeology at the site and the placement of wells at each unit, samples from the solid waste unit may well provide information regarding leachate from the hazardous waste unit.

The corrective action requirements in sections 3004(u) and 3008(h) provide additional grounds for the broad application of section 3007's enforcement inspection authority. Section 3004(u) requires corrective action "for all releases of hazardous waste or constituents from any solid waste management unit at a...facility seeking a permit under this Subtitle [C]" (emphasis added). 8/ Congress made clear that the phrase "solid waste management unit" was specifically

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8/ Congress specifically provided that the corrective action requirement is to be implemented through standards promulgated under section 3004 and permits issued after November 8, 1984. EPA's inspection authority for rulemaking purposes is discussed above. The Agency has incorporated the general requirement for corrective action in its regulations at 40 CFR § 264.101. See 50 Fed. Reg. 28747 (1985). Thus, the requirement is presently in effect and applies to any "facility seeking a permit for the treatment, storage or disposal of hazardous waste...". 40 CFR § 264.101(a). EPA intends to issue more detailed national standards addressing appropriate corrective action for releases of hazardous waste or constituents from solid waste management units at such facilities, but until such standards are established the Agency will implement the corrective action requirement of section 3004(u) on a case-by-case basis. See 50 Fed. Reg. 28713 (1985).

added to the language of section 3004(u) "to reaffirm the Administrator's responsibility to examine all units at the facility from which hazardous constituents might migrate, irrespective of whether the units were intended for the management of solid or hazardous wastes." 9/

By explicitly requiring that the provisions of section 3004(u) apply to any solid waste management unit at a hazardous waste facility, Congress has made the cleanup of such units an element of hazardous waste management under section 3004. Congress' specific reference to releases of hazardous constituents from solid waste management units confirms the broad scope of section 3004(u) and is consistent with the Agency's interpretation of hazardous waste discussed above, which includes not only "identified" hazardous wastes but also those wastes that may contain hazardous constituents listed in Appendix VIII of 40 CFR Part 261. These factors when considered in conjunction with the explicit legislative history noted above reaffirming "the Administrator's responsibility to examine all units" at a Subtitle C facility confirm that Congress considered the regulation of these units to be an integral part of the hazardous waste program under Subtitle C and thus clearly within the scope of section 3007(a) inspection authority.

With respect to interim status corrective action authority, section 3008(h) provides that "whenever on the basis of any information the Administrator determines there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 3005(e) of this subtitle, the Administrator may issue an order requiring corrective action." Congress viewed this provision as "a supplement to EPA's power to impose corrective action through permits" 10/, that EPA would use "to achieve the environmental standards promulgated under section 3004." 11/ Because section 3004 has been amended to extend corrective action requirements to all solid waste management units at facilities seeking a RCRA permit, the Agency has interpreted this mandate to authorize the issuance of corrective action orders to any interim status facility containing solid waste management units (regardless of whether they are Subtitle C or Subtitle D units) from which there has been a release of hazardous waste to the environment. 12/

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9/ H.R. Rep. No. 198, 98th Cong., 1st Sess. 60 (1983).

10/ H.R. Rep. No. 1133, 98th Cong., 2d Sess. 111 (1984).

11/ Id.

12/ See 50 Fed. Reg. 28716 (1985).

Because section 3008(h) extends corrective action authority to releases from any solid waste management unit at an interim status facility, we believe that section 3007(a) inspection authority also extends to such units for the purpose of determining whether there has been a hazardous constituent release and what corrective action would be appropriate.

cc: Richard H. Mays (LE-133)  
Regional Counsels