

RCRA, Superfund & EPCRA Hotline Training Module

Introduction to:

**RCRA Enforcement
and Compliance**

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RCRA ENFORCEMENT AND COMPLIANCE

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1. INTRODUCTION

The effective implementation of the RCRA program depends on whether the regulated community complies with the various RCRA requirements. The goals of the RCRA enforcement program are to ensure that the regulatory and statutory provisions of RCRA are met, and to compel necessary action to correct violations. To achieve these goals, EPA and the states closely monitor hazardous waste handlers, taking expeditious legal action when noncompliance is detected. EPA also has various programs to provide compliance incentives and assistance.

Many of the questions the Hotline receives on enforcement are purely legal and beyond our purview. We do not interpret the law or legal concepts; we only answer questions relating to statutory and regulatory programs and how enforcement and compliance tools are used as part of the RCRA process.

When you have completed this module you will be able to explain RCRA enforcement and describe the enforcement mechanisms. Specifically, you will be able to:

- Describe enforcement procedures and mechanisms and cite the statutory authorities
- Describe the three different types of enforcement actions, administrative, civil, and criminal
- Explain when and how EPA can enforce the RCRA regulations in authorized states
- State the differences between enforcement at interim status and permitted facilities and describe enforcement at federal facilities
- Describe some of EPA's compliance incentive and assistance policies.

Use this list of objectives to check your understanding of this topic after completing the training session.

2. STATUTORY SUMMARY

The success of the RCRA program depends on the regulated community's compliance with the regulations. To ensure compliance with the program, Congress gave EPA certain distinct powers, or authorities, for enforcement. EPA has the authority to inspect and collect information from facilities and, if a violation is discovered, employ any one of several enforcement actions to bring facilities into compliance. EPA uses a combination of monitoring, administrative actions, and civil actions to reduce the number of waste handlers that are out of compliance and to deter future violators. EPA works with the Regional offices, the states, and, where appropriate, the Department of Justice (DOJ) to implement the RCRA enforcement program.

2.1 ENFORCEMENT AUTHORITIES

EPA's hazardous waste enforcement program is designed to promote compliance with statutory and regulatory requirements and to abate imminent hazards. Enforcement provides EPA and citizens with mechanisms for carrying out the RCRA program and promotes the protection of human health and the environment. Since EPA has not codified regulations covering enforcement, with the exception of some administrative procedures found in 40 CFR Parts 22 and 24, RCRA enforcement personnel rely on the following statutory authorities to enforce the RCRA program:

- Section 3007 - Inspections and Information Gathering
- Section 3008
 - (a) Compliance Orders
 - (b) Public Hearings
 - (c) Violation of Compliance Orders
 - (d) Criminal Penalties
 - (e) Knowing Endangerment
 - (g) Civil Penalties
 - (h) Interim Status Corrective Action Orders
- Section 3013 - Monitoring, Analysis, and Testing
- Section 7002 - Citizen Suits
- Section 7003 - Imminent Hazards.

2.2 INSPECTIONS AND INFORMATION GATHERING

An important component of the enforcement process is the authority to monitor facilities for verification of compliance with the regulations. The Agency collects compliance monitoring information primarily through facility inspections and

information requests. An inspection is a formal visit by an EPA or state representative to a facility to review records, take samples, and observe facility operations. Congress granted EPA the authority to conduct such inspections and collect necessary information to determine compliance under RCRA §3007.

Section 3007 gives EPA the authority to inspect facilities that handle or have handled hazardous wastes. In addition, the inspection authority is applicable to facilities that handle mixtures of hazardous wastes and domestic sewage (§3018(d)). Furthermore, §4005(c)(2)(B) extends EPA's §3007 authority to facilities that handle wastes from households and conditionally exempt small quantity generators.

A number of different types of inspections are conducted under RCRA authority. Inspections are conducted by EPA, authorized states, or both, or authorized representatives of either EPA or authorized states. Typically, either the state or EPA has overall responsibility, or the lead, for conducting the inspection. The inspector's role is to gather information that will then be used by the Region and/or state to determine compliance status. Some of the different kinds of inspections are described below.

COMPLIANCE EVALUATION INSPECTION

The compliance evaluation inspection (CEI) is an on-site evaluation of a hazardous waste handler's compliance with RCRA regulations and permit standards. The purpose of the CEI is to gather information necessary to determine compliance and support enforcement actions. The inspection may include a characterization of the handler's activities, identification of the types of hazardous wastes managed on-site, a record review of reports, documents, and on-site plans, and the identification of any units that generate, treat, store, or dispose of hazardous waste. Treatment, storage, and disposal facilities (TSDFs) must be inspected every two years, except facilities owned or operated by a federal or state agency, which must be inspected every year (§§3007(c), (d), and (e)).

COMPLIANCE SAMPLING INSPECTION

EPA sometimes finds it necessary to inspect a facility in order to collect samples for laboratory analysis. These sampling inspections are very resource-intensive because they require advanced planning for the sampling scheme and laboratory analysis. A sampling inspection may be conducted in conjunction with a CEI or any other inspection.

COMPREHENSIVE GROUNDWATER MONITORING EVALUATION

During the comprehensive groundwater monitoring evaluation (CME), enforcement officials evaluate the adequacy of the design and operation of a facility's groundwater

monitoring system. This evaluation should be completed by a hydrogeologist and includes a review of the owner and operator's characterization of the hydrogeology underlying the hazardous waste management units; monitoring well placement, depth, and spacing; and well design and construction. The CME is used to determine whether a facility implementing detection monitoring should instead be using compliance or assessment monitoring. CMEs at compliance or assessment monitoring facilities include a detailed examination of the assessment monitoring plan and implementation of the plan.

CASE DEVELOPMENT INSPECTION

The case development inspection (CDI) is an intensive investigation that is conducted to gather sufficient information to support an enforcement action. The CDI can be used to collect supplemental data to support a forthcoming enforcement action identified through a CEI, a CME, or a record review.

OPERATION AND MAINTENANCE INSPECTION

The operation and maintenance inspection (OMI) occurs periodically, evaluating whether a groundwater monitoring system is continuing to function as designed. The OMI focuses on the condition of the wells and their associated sampling devices. The findings from an OMI will indicate whether case development is warranted or will serve to focus future CMEs.

INFORMATION GATHERING

In addition to authorizing EPA to conduct inspections, §3007 allows the Agency to request specific information from "...any person who generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous wastes." This means EPA may request information from past generators as well as those parties who may not have been subject to the RCRA regulations, but who have actually handled hazardous waste.

Normally the public has access to the information obtained under §3007 authority. The facility owner and operator may, however, claim records or other information gathered by EPA as confidential business information by submitting the information with a cover sheet stamped "confidential," "trade secret," or "proprietary information" (§3007(b)). EPA will then determine whether or not the material is confidential.

In addition to obtaining information for enforcement proceedings, EPA may use §3007 authority to gather data to assist in the development of regulations and to track program progress and accomplishments.

2.3 MONITORING, ANALYSIS, TESTING, AND REPORTING

When EPA receives information showing that hazardous waste is present or has been released at a facility or site, or that the release of any such waste may present a hazard, the Agency may issue an administrative order or obtain a judicial injunction requiring the owner and operator to conduct monitoring, analysis, or testing to ascertain the extent and nature of the hazard (§3013). Information means some reliable data upon which a reasonable person would base a decision to take action, and may include citizen complaints and inspection reports. With respect to §3013 orders, the statutory definition of hazardous waste is used, rather than the regulatory definition (§1004(5)).

EPA has the authority to issue administrative orders to any past or present owner and operator who would reasonably have knowledge of the presence of hazardous waste and potential releases (§§3013(b) and (c)). The orders may compel him or her to perform monitoring, testing, analysis, and reporting. The Agency also retains the option of performing the work and recovering costs from the owner and operator. EPA may sue anyone who fails to comply with a §3013 administrative order for up to \$5,500 per day of noncompliance.

The mere presence of hazardous waste at a site or facility is sufficient cause to issue a §3013 order, provided that the information indicates that the presence of the waste may present a substantial hazard. Only the potential for harm, as opposed to actual harm, to human health and the environment must be ascertained to determine whether a substantial hazard exists.

2.4 ENFORCEMENT MECHANISMS

When the Agency determines that a facility is in noncompliance with the hazardous waste regulations, an enforcement action may be taken. Under RCRA, EPA uses three types of enforcement mechanisms: administrative, civil, and criminal actions. The Agency has substantial latitude in deciding which action or combination of actions to pursue, depending on the nature and severity of the problem.

ADMINISTRATIVE ACTIONS

An administrative action is a nonjudicial enforcement action taken by EPA or a state under its own authority. These actions can be broken down into two general categories: informal and formal. Both of these actions provide for enforcement response outside the court system. This means the Agency takes direct enforcement action against the violator based on its authority granted by the statute, and does not rely on a court of law for enforcement authority.

Informal Actions

Once a decision is made to utilize an informal enforcement mechanism, the facility owner and operator should be given notice of its noncompliance and the steps to take to correct the violations. Examples of informal actions are letters or phone calls to the facility. For informal actions, EPA or the state notifies the facility owner and operator that the facility is out of compliance with hazardous waste regulations. Informal actions are most appropriate where the violation is a minor threat to human health and the environment. A warning letter, sometimes referred to as a Notice of Violation (NOV), may be sent, which lays out the specific actions that need to be taken by the facility owner and operator to correct the violation(s). The letter should require demonstration of a facility's return to compliance within an appropriate timeframe, not to exceed 90 days, to ensure that enforcement is escalated appropriately should the facility fail to return to full physical compliance by the established date.

Formal Actions (Administrative Orders)

In cases where a facility has been classified as a significant non-complier or the facility owner and operator have failed to respond to an informal action, EPA can issue an administrative order. Administrative orders impose enforceable legal duties. For example, orders can be used to compel the facility owner and operator to comply with specific regulations, to take corrective action, to perform testing, monitoring, or analysis, or to pay fines.

The four authorities for issuing administrative orders under RCRA are:

- Section 3013 Orders to conduct monitoring, analysis, and testing
- Corrective Action Orders under §3008(h)
- Compliance Orders under §3008(a), including revocation of permits
- Section 7003 Orders for imminent hazards.

Each of these authorities is discussed in detail elsewhere in this module.

CIVIL ACTIONS

A civil action is a formal lawsuit filed in a federal district court by DOJ against a person who has either failed to comply with a statutory or regulatory requirement or administrative order, or who has contributed to a release of hazardous wastes or hazardous constituents. The statutory authorities for judicial actions under RCRA are:

- Section 3013 - injunctions to conduct monitoring, testing, and analysis
- Section 3008 – compliance orders and criminal penalties
- Section 7003 - injunctions to address violations which pose an imminent and substantial endangerment to health or the environment.

For example, §3008(a) gives EPA the right to take administrative or judicial action for violations of RCRA that have transpired since November 19, 1980. If the facility owner and operator violate a compliance order, §3008(c) gives EPA the authority to issue a civil penalty of up to \$27,500 per day per violation or to revoke or suspend the facility permit. Civil penalties are described in §3008(g). Specifically, each violation of a Subtitle C requirement is subject to a fine of up to \$27,500 per day per violation. This means that each day of noncompliance is considered a separate violation. For detailed information on penalties, refer to the RCRA Civil Penalty Policy (OSWER Directive 9900.1A). This contains information on the classes of violations, and possible injunctive relief and other fines and penalties that may be assessed.

CRIMINAL ACTIONS

A criminal action is an action by EPA or the state pursuant to §3008(d) that can result in the imposition of fines and/or imprisonment. The key to criminal liability is that a person knowingly violated RCRA requirements. Seven actions identified in §3008 carry criminal penalties. Six of these seven actions carry a penalty of up to \$50,000 per day of violation and up to 5 years in jail. These acts are:

- Knowingly transporting waste to a nonpermitted facility
- Knowingly treating, storing, or disposing of waste without a permit or in violation of a permit or interim status standards
- Knowingly omitting information from or making a false statement on a label, manifest, report, permit, or compliance document
- Knowingly generating, storing, treating, or disposing of waste without complying with recordkeeping and reporting requirements
- Knowingly transporting waste without a manifest
- Knowingly exporting waste without the consent of the receiving country.

The seventh criminal act is knowingly transporting, treating, storing, disposing, or exporting waste in a way that places another person in imminent danger of death or serious bodily injury. This act carries a possible penalty of up to \$250,000 and 15 years in prison for an individual, and a \$1 million dollar fine for a corporation (§3008(e)).

2.5 COMPLIANCE ORDERS AND PENALTIES

EPA may issue a compliance order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both (§3008). A "person" is defined in §1004(15) as an "...individual, trust, firm, joint stock company, corporation, partnership, association, state, municipality, commission, political subdivision of a state, or any interstate body...."

2.6 CORRECTIVE ACTION

Just as the Agency can request or obtain information and can require a facility to conduct testing and analysis, it can also require a facility to perform a cleanup. The corrective action program is one of the primary mechanisms to facilitate cleanup of contamination at TSDFs. EPA can issue an administrative order to compel the owner and operator to undertake corrective action, or EPA can sue (i.e., bring a civil action) to have the court order the owner and operator to clean up. The authority for requiring corrective action at permitted facilities is found in §§3004(u) and (v); EPA uses §3008(a) to enforce the corrective action requirements found in §§3004(u) and (v).

Interim status corrective action authority is found in §3008(h). The opening clause of §3008(h) authorizes the Agency to make the determination that there is or has been a release on the basis of "any information." In practice, EPA will obtain appropriate information from a variety of sources, including lab analyses, inspection reports, and photographs. For the purposes of §3008(h), actual sampling is not needed to verify a release. An inspector may find other evidence that a release has occurred, such as a broken dike at a surface impoundment or stressed vegetation. Less obvious indications might also be adequate to make the determination. For example, EPA might have sufficient information on the hydrogeology of the site to conclude that there may have been a release.

2.7 IMMINENT HAZARD

Section 7003 gives EPA a broad and powerful enforcement tool to use in abating imminent hazards caused by hazardous or solid wastes. RCRA §7003 states that upon receipt of evidence that the past or present handling, storage, treatment, transportation, or disposal of any solid waste or hazardous waste may present imminent and substantial endangerment to human health or the environment, EPA may bring suit against any person who has contributed or who is contributing to the handling of the waste to restrain the person, order the person to take any action that may be necessary, or both.

The action taken by EPA may be administrative or civil. To issue a §7003 order, EPA must possess evidence that the waste handling may present an imminent and substantial endangerment to human health or the environment. Evidence may be documentary, testimonial, or physical and may be obtained from a variety of sources, including inspections, investigations, or requests for production of documents or other data pursuant to §§3007, 3013, or the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) §104. This evidence must be reliable enough to enable a reasonable person to conclude that the action is appropriate. The phrase "may present" indicates that the standard of proof does not require certainty. That is, an order may be issued if there is sound reason to believe that an endangerment exists; evidence of actual harm is not required.

2.8 CITIZEN SUITS

Administrative or civil actions are mechanisms that EPA can employ against violators, but RCRA also offers a course of action for citizens. Section 7002 provides that any person may sue any past or present generator, transporter, treater, storer, or disposer who has contributed or who is contributing to the past or present handling of waste which may present an imminent and substantial endangerment, or may be in violation of a permit, standard, regulation, condition, requirement, or order. Prior to HSWA, the only actions allowed under §7002 were suits brought by any person on his or her own behalf against any person who was alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order. HSWA broadened this provision significantly.

Pursuant to §7002(a)(1)(B), suits may be undertaken by any person against any person, including the United States or any governmental instrumentality, when that person has in the past or present handled any solid or hazardous waste in a way so as to present an imminent or substantial endangerment to health or the environment.

Citizens may sue EPA where the Agency fails to perform any action or duty that is not discretionary (§7002(a)(2)). Section 7002(a) also gives the courts the power to restrain any person who is out of compliance or whose actions in handling solid or hazardous waste present an imminent or substantial endangerment to human health or the environment. Section §7002(e) allows the court to award, when appropriate, court costs to the prevailing or substantially prevailing party in the citizen suit.

Some legal actions by citizens are prohibited. According to §7002(b), if the Administrator of EPA or a state has begun an action to bring the violator into compliance, no citizen suit will be allowed. Section 7002(d) gives EPA the right to participate, or intervene, in any action brought under this section as long as EPA is not a party to the original suit.

3. SPECIAL ISSUES

Because the majority of enforcement issues are determined on a case-by-case basis depending on the factual details of a given situation, enforcement is full of anomalies. Three situations require particular attention.

ENFORCEMENT IN AUTHORIZED STATES

Determining which agency, either EPA or the state, will take the enforcement lead in an authorized state generally depends on whether the state is fully authorized to enforce the applicable provisions (state authorization is discussed in detail in the module entitled State Programs). If the provision being enforced was promulgated as a pre-HSWA provision, the authorized state has the primary responsibility for ensuring compliance. As states become authorized for all aspects of HSWA, they will assume enforcement authority for HSWA enforcement actions. In authorized states, EPA maintains the authority to take independent enforcement actions. It is EPA's policy to take enforcement actions in authorized states when (1) the state requests EPA to do so and provides information on the case-specific circumstances; (2) the state fails to take timely and/or appropriate action; (3) a case could establish a legal precedent or federal involvement is needed to ensure national consistency; or (4) it is a federal lead action.

According to §3008(a)(2), in order to enforce a provision for which a particular state has authorization, EPA shall notify the state prior to issuing an order or starting a civil action. For provisions promulgated pursuant to HSWA, EPA has the sole authority for enforcement until the state either becomes fully authorized for that provision (§3006(g)), or receives interim authority for that provision.

ENFORCEMENT AT INTERIM STATUS VS. PERMITTED FACILITIES

The applicable regulations for interim status facilities are directly enforceable pursuant to §3008(a). This means that if a facility is not in compliance with a specific regulation, enforcement actions of any kind may be taken against that facility. For permitted facilities, however, the site-specific conditions of the written permit are enforceable. Even if the permit is poorly written or does not conform to the regulations, the owner and operator need only comply with the requirements detailed in the permit. This is an example of the "permit as a shield" provision, codified at §270.4(a). This section states that compliance with a RCRA permit constitutes compliance for purpose of enforcement. The exceptions to this provision are those requirements that are not included in the permit; those provisions that become effective by statute subsequent to the issuance of the permit; and those provisions that are promulgated under the land disposal restrictions, land disposal unit leak detection requirements, or the air emission standards.

ENFORCEMENT AT FEDERAL FACILITIES

Many federal agencies (e.g., Department of Energy, Department of Defense) are hazardous waste handlers subject to RCRA. Initially in the RCRA program, there was some question whether sovereign immunity protected federal agencies from some EPA and state enforcement actions. In the Federal Facility Compliance Act of 1992 (FFCA), Congress amended RCRA to explicitly waive sovereign immunity for purposes of RCRA enforcement. RCRA now specifically states that all RCRA penalties or fines "...punitive or coercive in nature or ... imposed for isolated, intermittent, or continuing violations" apply to the federal government. Therefore, EPA and authorized states can issue orders and penalties against federal facilities in the same manner as against private parties.

4. COMPLIANCE INCENTIVES AND ASSISTANCE

Given the complexity of the various federal environmental regulatory programs and the size of the regulated community, EPA's task of enforcing RCRA and other federal environmental laws is enormous. In reality, EPA can only accomplish the ultimate goal of ensuring protection of public health and the environment by supplementing a strong enforcement program with programs designed to encourage and assist compliance.

The Office of Enforcement and Compliance Assurance (OECA) has produced several policies and programs designed to encourage and assist compliance. While EPA is aggressively pursuing compliance assistance and incentive programs, a strong, formal enforcement program is still the best tool to ensure compliance. Therefore, EPA's compliance incentive and assistance programs are only a complement to, and not a replacement of, the enforcement tools described elsewhere in this module. Some of the incentive and assistance programs are described below.

SMALL BUSINESS COMPLIANCE CENTERS

EPA has established four Small Business Compliance Centers (SBCCs) (62 FR 18115; April 14, 1997). These are information centers where businesses with less than 10 employees can get regulatory compliance assistance. In cooperation with states, universities, and trade groups, EPA has established centers for the metal finishing, printing, auto services, and agriculture industries. EPA plans to establish centers for transportation, local governments, chemical manufacturers, and printed wiring board manufacturers.

COMPLIANCE INCENTIVES FOR SMALL BUSINESSES

EPA has also established a policy to encourage businesses to use the SBCCs. Under the Interim Policy on Compliance Incentives for Small Businesses (61 FR 27894; June 3, 1996), when businesses make a good faith effort to comply with environmental regulatory programs by utilizing SBCCs or other nonconfidential governmental or government-supported compliance assistance programs, the businesses can qualify for reduced civil penalties for violations.

COMPLIANCE INCENTIVES FOR SMALL COMMUNITIES

The EPA Policy on Flexible State Enforcement Responses to Small Community Violations describes the circumstances in which the EPA will generally defer to a state's efforts to return small communities to environmental compliance. This deference will be based on an assessment of the adequacy of the process a state uses to address small community noncompliance.

AUDIT POLICY

On December 22, 1995, EPA issued the Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations Policy (60 FR 66706). This EPA-wide policy (commonly known as the "Audit Policy") contains incentives for the regulated community to voluntarily identify, evaluate, disclose, and correct violations. Incentives include substantially reduced or eliminated penalties and deferral of criminal enforcement in settlements for violations disclosed and corrected pursuant to the policy.

5. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

The Small Business Regulatory Enforcement Fairness Act (SBREFA, P.L. 104-121) addresses the enforcement of environmental regulations against small businesses and small entities, and amends the rulemaking process to ensure that environmental regulations do not unreasonably impact small businesses.

For purposes of SBREFA, "small entity" includes small businesses, small governmental jurisdictions, and not-for-profit organizations that are not dominant in their field. U.S. Small Business Administration (SBA) defines "small business" in terms of the number of persons employed and in some case by annual revenues as well. In general, businesses employing 500 persons or less are considered small, however, businesses with as many as 1500 employees or up to \$25 million in annual receipts may be defined as small (see 13 CFR §121). Small governmental jurisdictions include towns, cities, and counties of 50,000 persons or less.

SBREFA was signed into law on March 29, 1996, and consists of five subtitles. These subtitles are:

- Subtitle A - Regulatory Compliance Simplification - EPA requirements for providing assistance to small entities
- Subtitle B - Regulatory Enforcement Reforms - process for small businesses to comment on agency enforcement and compliance activities;
- Subtitle C - Equal Access to Justice Act - the award of attorney fees and costs to prevailing and non-prevailing parties in administrative or civil judicial enforcement actions
- Subtitle D - Regulatory Flexibility Act Amendments - requirement that any final rule promulgated after June 26, 1996 that will have a significant economic impact on a substantial number of small entities be supported by a final "regulatory flexibility analysis."
- Subtitle E - Congressional Review of Agency Rulemaking - Congress has the opportunity to review and potentially disapprove rules promulgated on or after March 1996.