



1990

# Corrective Action under the Resource Conservation and Recovery Act

Joseph F. Guida

Follow this and additional works at: <https://scholar.smu.edu/smulr>

## Recommended Citation

Joseph F. Guida, *Corrective Action under the Resource Conservation and Recovery Act*, 44 Sw L.J. 1331 (1990)  
<https://scholar.smu.edu/smulr/vol44/iss4/4>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# CORRECTIVE ACTION UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT

*Joseph F. Guida\**

THE enactment of the Hazardous and Solid Waste Amendments of 1984<sup>1</sup> (HSWA) received a great deal of attention from both industry and environmentalists. The new corrective action powers conferred upon the U.S. Environmental Protection Agency (EPA) did not share the limelight with such starring issues as the land disposal ban,<sup>2</sup> statutory termination of "interim status,"<sup>3</sup> and federal regulation of underground storage tanks.<sup>4</sup> Nonetheless, the corrective power granted to the EPA by HSWA<sup>5</sup>, nevertheless, is a veritable blockbuster in the nation's environmental theater. These new corrective action powers also occupy a significant void which previously existed in hazardous waste management regulation.

Prior to the enactment of the corrective action provisions, the Resource Conservation and Recovery Act (RCRA)<sup>6</sup> was primarily aimed at prevention of future problems.<sup>7</sup> Although the Comprehensive Environmental Re-

---

\* Partner, Gardere & Wynne, Dallas, Texas; B.A., with Honors, 1976, M.A., J.D. 1979, University of Virginia. Member, Texas, Ohio, and District of Columbia Bars; Section of Natural Resources, Energy, and Environmental Law, American Bar Association. The views expressed herein are solely those of the author and do not represent the position of any other person or entity. The author expresses his appreciation to Ms. Rhonda B. Davis for her expert secretarial assistance in the preparation of this article.

1. Pub. L. No. 98-616, 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 3224 (amending 42 U.S.C. § 6901 (1982)). The EPA adopted rules codifying the statutory changes. See Hazardous Waste Management System, 40 C.F.R. §§ 260-62, 264-66, 270-71, 280 (1989).

2. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901(b)(7), 3004(d),(e),(f),(g), 6924(d),(e),(f),(g) (Supp. 1989)).

3. See *id.* § 6925(e)(2) (Supp. 1989).

4. See *id.* §§ 6991-6991i (Supp. 1989). As was the case with the general hazardous waste management regulations, the EPA required several years to publish final rules governing the underground storage tank program. Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks, 40 C.F.R. § 280 (1989).

5. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6924(u),(v) 6928(h) (Supp. 1989)). See *infra* text accompanying notes 60-62.

6. Pub. L. No. 94-580, 90 Stat. 2795 (1976), codified as amended at 42 U.S.C. §§ 6901-6987 (1988). 42 U.S.C. §§ 6921-6934 (1982 & Supp. 1989) establishes the federal regulatory program governing hazardous waste management. RCRA was an amendment to the Solid Waste Disposal Act, Pub. L. No. 89-272, 1965 U.S. CODE CONG. & ADMIN. NEWS (79 Stat.) 992 (SWDA) and is codified as part of the SWDA. Because almost all of the statutory sections cited in this article fall within Subtitle C, however, the acronym "RCRA" will be used in connection with code citations instead of the acronym "SWDA."

7. See EPA's discussion of inactive facilities in its initial promulgation of interim status

sponse, Compensation, and Liability Act (CERCLA) of 1980<sup>8</sup> addressed problems inherited from the past, it primarily focused on the most serious instances of endangerment to human health or the environment.<sup>9</sup> The new corrective action provisions of RCRA allow the EPA to address, through permits or administrative orders, past "sins" at those facilities most likely to suffer from some form of contamination,<sup>10</sup> without having to demonstrate an exceptional hazard to human health or the environment.

Since the EPA's administrative implementation of its statutory corrective action powers has thus far occurred mainly through the issuance of limited policy statements, and, thus, remains at an early stage,<sup>11</sup> no doubt more attention will be directed to the legal underpinnings of RCRA corrective action responsibilities.<sup>12</sup> This article discusses RCRA's corrective action provisions and reviews related case law and administrative developments with primary emphasis on corrective action orders. In addition, the article briefly focuses on some interesting, but as yet unanswered, questions concerning who ought to be liable for corrective action obligations. Finally, the

---

standards for hazardous waste treatment, storage, and disposal facilities. 45 Fed. Reg. 33,153, 33,170 (May 19, 1980). *American Iron & Steel Inst. v. United States E.P.A.*, 886 F.2d 390, 393 (D.C. Cir. 1989); *See United Technologies Corp. v. United States E.P.A.*, 821 F.2d 714, 717 (D.C. Cir. 1987).

8. 42 U.S.C. §§ 9601-9675 (1982).

9. Through the establishment of the National Priorities List (NPL), CERCLA § 105, 42 U.S.C. § 9605 (1982) provides for prioritization of response actions under CERCLA § 104, 42 U.S.C. § 9604 (1982), based upon the hazards posed by specific sites. Similarly, CERCLA § 106, 42 U.S.C. § 9606 (1982), provides the President with the authority to order or undertake immediate response action in situations where there is a release which may cause "an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility. . ." *Id.* There are sites, however, where CERCLA and RCRA corrective action authorities may overlap. The EPA has adopted a policy of deferring site listings on the NPL where the site is subject to RCRA Subtitle C corrective action authorities and, among other grounds, the owner/operator (1) has not declared bankruptcy, or (2) has not lost authorization to operate and expressed unwillingness to undertake RCRA corrective action, or (3) has not had a clear history of unwillingness to undertake corrective action regardless of continued authorization to operate. 54 Fed. Reg. 41,004-06 (October 4, 1989).

10. As discussed in more detail below, facilities which are required to have interim status are those at which hazardous waste treatment, storage, or disposal is occurring, or has occurred, on-site. The EPA recently observed that "the RCRA regulated universe consists of 4,700 hazardous waste treatment, storage, and disposal facilities. Within these facilities are approximately 81,000 waste management units, most of which are units that have received hazardous waste and from which contamination may have spread to the soil and groundwater." ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, *THE NATION'S HAZARDOUS WASTE MANAGEMENT PROGRAM AT A CROSSROADS: THE RCRA IMPLEMENTATION STUDY*, EPA Doc. No. 205-0001 at 7 (1990) [hereinafter *RCRA IMPLEMENTATION STUDY*].

11. *See RCRA IMPLEMENTATION STUDY* at 76-77.

12. The EPA recently issued proposed rules implementing its corrective action authorities. Corrective Action for Solid Waste Management Units (SWMUs) at Hazardous Waste Management Facilities, 55 Fed. Reg. 30, 798 (1990) (to be codified at 40 C.F.R. § 264, Subpart S). Some of the Agency's prior legal interpretations should be clarified, or at least amplified, in that proceeding. For useful earlier analyses of the HSWA corrective action authorities, see Bourdeau, *Corrective Action Authorities under RCRA*, 14 Chem. Waste Lit. Rept. 1104 (1987); Bourdeau, *The Corrective Action Requirements of the 1984 RCRA Amendments*, 11 Chem. Waste Lit. Rept. 201 (1986).

article examines whether there is, or should be, a right of contribution for the costs associated with government-compelled corrective action.

## I. OVERVIEW OF THE RESOURCE CONSERVATION AND RECOVERY ACT

Several years after a national crescendo of environmental consciousness culminated in extensive improvements in legislation governing air and water pollution control,<sup>13</sup> Congress, in 1976, enacted a major amendment to the Solid Waste Disposal Act,<sup>14</sup> known as the Resource Conservation and Recovery Act (RCRA). The EPA, however, did not adopt regulations to implement the provisions of the Act until 1980,<sup>15</sup> and then only after several groups and the State of Illinois filed lawsuits to compel the agency to adopt these regulations.<sup>16</sup>

RCRA generally focuses on the problems associated with handling and disposal of the billions of tons of discarded material generated in this country each year, from household trash, to sewage sludges, to highly complex chemical substances.<sup>17</sup> Although some provisions of RCRA relate to non-hazardous waste disposal,<sup>18</sup> RCRA is primarily directed towards the handling and disposal of hazardous wastes.<sup>19</sup> In 1980, the EPA estimated that almost sixty million metric tons of hazardous wastes were generated during the preceding year.<sup>20</sup> For years, only a small percentage of these wastes were disposed of in what the Agency considered an environmentally sound manner.<sup>21</sup>

Subtitle C of RCRA embodies the fundamentals of the federal hazardous waste management program. Section 3001<sup>22</sup> provides two ways in which a waste will be considered "hazardous." First, a waste will be classified as "hazardous" where the EPA has specifically listed the wastes as hazardous.<sup>23</sup> By regulation, the EPA has listed a number of wastes as hazardous.<sup>24</sup> The EPA will also classify a waste as "hazardous" if it exhibits one or more

---

13. See Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified at 42 U.S.C. §§ 1857, 7401-7642 (1990)) Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, (codified at 33 U.S.C. §§ 1251-1376 (1987)).

14. See RCRA, 42 U.S.C. §§ 6901-6987. See *supra* note 6 and accompanying text.

15. On February 26, 1980, the EPA promulgated standards for generators and transporters of hazardous waste. 40 C.F.R. §§ 262, 263 (1989). The EPA also issued a public notice establishing procedures for filing a notice of hazardous waste activity under RCRA. See 42 U.S.C. § 6930 (1990).

16. *Illinois v. Costle*, 12 Env't Rep. Cas. (BNA) 1597 (D.D.C. 1979).

17. In the House Report which accompanied the passage of RCRA, the House observed that, during the preceding few years, the amount of discarded materials had grown to approximately 4 billion tons per year and that an annual increase of 8 percent was anticipated over the next decade. H. R. REP. NO. 94-1491, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6240.

18. See RCRA, 42 U.S.C. §§ 6941-6949a (1990).

19. See *supra* note 17.

20. 45 Fed. Reg. 33,084 (1980). See generally ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF WATER & WASTE MANAGEMENT, EVERYBODY'S PROBLEM: HAZARDOUS WASTES, EPA Doc. No. SW-826 (1980).

21. 45 Fed. Reg. 33,084 (1980).

22. 42 U.S.C. § 6921 (1990).

23. *Id.*

24. See 40 C.F.R. §§ 261.31-261.33 (1989).

of the four characteristics which the EPA believes is indicative of hazardousness.<sup>25</sup>

Of course, for a material to be considered a hazardous waste, it must first be a waste. Over the years, much confusion has reigned over the status of certain materials that are not disposed of, but, instead, are either reused, recycled, or reclaimed, either by the generator itself or by some other party. EPA took the position that, because of the way Congress defined the term "solid waste" in RCRA,<sup>26</sup> the EPA has jurisdiction to regulate so-called recycled materials.<sup>27</sup>

The EPA established a "cradle-to-grave" waste tracking system at the heart of the hazardous waste regulatory program promulgated pursuant to RCRA.<sup>28</sup> As set forth in the implementing regulations, RCRA generally requires notification and waste manifesting for regulated hazardous waste generation, transportation, treatment, storage, and disposal.<sup>29</sup> The waste manifesting procedure is the centerpiece of this system.<sup>30</sup> In addition, the regulations adopted by the EPA pursuant to RCRA establish an array of detailed operating requirements for firms that generate, transport, treat, store, or dispose of hazardous wastes.<sup>31</sup> Treaters, storers, and disposers of hazardous waste must obtain a permit.<sup>32</sup> Congress recognized that, after the enactment of RCRA, the EPA would adopt rules covering operational standards and permit requirements, and lead time would be associated with

---

25. See 40 C.F.R. §§ 261.21-24. Originally, these four characteristics were ignitability, corrosivity, reactivity, and what was termed EP toxicity. *Id.* Recently, the so-called Toxicity Characteristic, with its accompanying Toxicity Characteristic Leaching Procedure (TCLP), was substituted for EP toxicity. 55 Fed. Reg. 11,798 (1990) (to be codified at 40 C.F.R. § 261.24).

26. The statute provides that the term "solid waste" means:

any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section [402 of the Federal Water Pollution Control Act, as amended (33 U.S.C.S. § 1342)], or source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923)[42 U.S.C.S. §§ 2011 et. seq.].

42 U.S.C. § 6903(1990).

27. Industry has long and bitterly contested the EPA's authority and approach in regulating recycled materials. See *American Mining Congress vs. EPA*, 824 F.2d 1177 (D.C. Cir. 1987) (holding that EPA had acted in contravention of Congress' intent by regulating in-process secondary materials). See generally Gaba, *Solid Waste and Recycled Materials under RCRA: Separating Chaff from Wheat*, 16 *ECOLOGY L.Q.* 623 (1989) (arguing EPA's approach is basically sound, but suggesting several improvements to existing regulations).

28. Some people with poetic flair call it a "womb-to-tomb" waste tracking system. See RCRA, §§ 42 U.S.C. § 6930 (1990) (notification of hazardous waste management activity); 42 U.S.C. § 6922 (1990) (generator manifesting); 42 U.S.C. § 6923 (1990) (transporter manifesting); 42 U.S.C. § 6924 (1990) (treatment, storage, and disposal facility manifesting). The EPA's rules implementing the manifest system are set forth at 40 C.F.R. §§ 262.23 (generator), 263.20 (transporter), and 265.71 (treatment, storage, and disposal facilities) (1989).

29. See *supra* note 28.

30. See *supra* note 28.

31. See 40 C.F.R. §§ 262-265 (1989).

32. RCRA, 42 U.S.C. § 6925 (1990); 40 C.F.R. §§ 264, 265 (1989).

processing permit applications.<sup>33</sup> In order to avoid a situation where existing hazardous waste treatment, storage, or disposal facilities (TSDFs) would have to stop operations, Congress provided a special "interim status" for existing operations to continue pending the receipt of a permit.<sup>34</sup> If existing operations meet the statutory prerequisites for interim status,<sup>35</sup> and comply with interim operating standards prescribed by rule,<sup>36</sup> these operations remain authorized. Should a facility later be found unfit to continue operating, however, its application for a final permit can be denied by the permitting authority, and the facility will have to shut down.<sup>37</sup>

## II. PRE-HSWA CORRECTIVE ACTION AUTHORITY UNDER RCRA

In 1982, EPA promulgated a program for monitoring and remedying groundwater releases from regulated hazardous waste management units at TSDFs.<sup>38</sup> The following facilities were affected by these requirements: surface impoundments, waste piles, land treatment units, and landfills.<sup>39</sup> Compared to the expanded corrective action authorities conferred upon the EPA under HSWA, this program was relatively narrow. It focused only on units that were regulated and required corrective action only up to property boundaries.<sup>40</sup> The 1982 program also focused solely upon site conditions that impacted groundwater to the exclusion of other environmental media.<sup>41</sup>

This pre-HSWA corrective action program will continue to affect corrective action associated with regulated units.<sup>42</sup> As this program currently

---

33. See *EPA v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1182 (N.D. Ind. 1989).

34. 42 U.S.C. § 6925(e) (1990). For a useful discussion of the steps required to secure interim status, see *Northside Sanitary Landfill, Inc. v. Thomas*, 804 F.2d 371, 373-74 (7th Cir. 1986).

35. RCRA, 42 U.S.C. § 6925(e)(1) (1990), provides in pertinent part:

Any person who (A) owns or operates a facility required to have a permit under this section which facility (i) was in existence on November 19, 1980, or (ii) is in existence on the effective date of statutory or regulatory changes under this chapter [42 U.S.C.S. §§ 6901 et. seq] that render the facility subject to the requirement to have a permit under this section, (B) has complied with the requirements of section [3010(a) 42 U.S.C.S. § 6930(a)], and (C) has made an application for a permit under this section shall be treated as having been issued such permit until such time as final administrative disposition of such application is made. . . .

36. 40 C.F.R. § 265 (1989). See also RCRA, 42 U.S.C. § 6925(d) (1990).

37. RCRA, 42 U.S.C. § 6925(c) (1990). HSWA forced the EPA, or an authorized state, to act promptly on permit applications by providing so called "hammer" dates by which the EPA or the state was to act on permit applications submitted prior to November 8, 1984. See 42 U.S.C. §§ 6925(c)(2)(A), (B). Interestingly enough, RCRA does not appear to be explicit as to whether interim status continues at facilities for which the EPA or a state issues neither a permit approval nor a denial by the "hammer" dates.

38. The EPA also required reporting of releases from permitted units. See 40 C.F.R. §§ 264.98 - .99 (1989).

39. *Id.*

40. See the preamble discussion concerning the scope of the corrective action authority prior to HSWA at 47 Fed. Reg. 32,274, 32,311 (1982). See *id.* 32,299 (1982).

41. *Id.*

42. The EPA plans to propose revisions to the existing subpart F regulations to harmonize them with its HSWA corrective action program. See 55 Fed. Reg. 30,798, 30,853-54 (1990).

stands, corrective action is the final phase of a three-phase program for addressing releases of hazardous wastes and hazardous constituents to groundwater. The first stage in the program is detection monitoring.<sup>43</sup> If a release is confirmed by detection monitoring, the second phase is triggered and the owner or operator of the facility must characterize the nature and extent of contamination.<sup>44</sup> After completing this second phase, the owner or operator must then treat or remove the contamination.<sup>45</sup> The rules provide that clean-up standards are to be established on the basis of site-specific groundwater protection requirements.<sup>46</sup> These requirements can be background levels, maximum contaminant levels for fourteen constituents established pursuant to the Safe Drinking Water Act,<sup>47</sup> or "alternate concentration limits."<sup>48</sup>

### III. NEW HSWA CORRECTIVE ACTION AUTHORITIES

The new corrective action authorities established under HSWA, are sweeping and ambiguous, and dwarf the pre-HSWA corrective action program. These authorities were enacted in three different sections of the statute.<sup>49</sup> Two of these sections, section 3004(u) and section 3004(v), will be implemented through the EPA permitting process.<sup>50</sup> The third, section 3008(h), empowers the EPA to require corrective action through an administrative order.<sup>51</sup> The authorities granted under section 3008(h) are the principal focus of the discussion presented in the final portion of this Article.

Even though HSWA was enacted in 1984, the EPA has failed to adopt rules implementing these authorities, with the exception of two rudimentary codification rules,<sup>52</sup> and rules establishing procedures for agency hearings on the issuance of unilateral corrective action orders.<sup>53</sup> As mentioned earlier the EPA, to date, has implemented HSWA's corrective action program largely by policy statements and technical guidance documents.<sup>54</sup> This ap-

---

43. Owners and operators must monitor groundwater at the downgradient edge of the waste management boundary for indicator parameters or constituents that indicate the likelihood of a release. 40 C.F.R. § 264.98 (1989). See summary discussion of the program at 55 Fed. Reg. 30,798, 30,800.

44. See 40 C.F.R. § 264.99 (1989).

45. 40 C.F.R. § 264.100 (1989).

46. 40 C.F.R. §§ 264.92, 264.93 (1989).

47. 42 U.S.C. §§ 300f-300k (1990).

48. 40 C.F.R. § 264.94 (1989). Alternate concentration limits are standards that must be protective of human health and the environment, but which take into account certain site specific circumstances that justify less stringent cleanup levels. 40 C.F.R. § 264.94(b) (1989).

49. See 42 U.S.C. § 6924; 42 U.S.C. § 6924(u); 42 U.S.C. § 6928(h) (1990).

50. This approach provides the EPA with a great deal of leverage to secure corrective action facilities not only at interim status facilities that are seeking final permits, but also certain interim status facilities that already have been closed in accordance with regulations.

51. RCRA, 42 U.S.C. § 6928(h) (1990).

52. See *supra* note 1.

53. 40 C.F.R. Parts §§ 22, 24 (1989). The D.C. circuit court upheld these rules in the face of a constitutional due process challenge. See *Chemical Waste Management vs. EPA*, 873 F.2d 1477 (D.C. Cir. 1989).

54. See PRELIMINARY OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE (OSWER) GUIDANCE: RCRA SECTION 3008(H), THE INTERIM STATUS CORRECTIVE ACTION AUTHORITY (1985) [hereinafter "THE INTERIM STATUS CORRECTIVE ACTION AUTHORITY"];

proach appears to leave much of the program to be developed on an *ad hoc* basis by regional and headquarters enforcement personnel.<sup>55</sup>

The EPA, however, has been developing proposed rules, which, when promulgated, will fill much of the regulatory vacuum. The Agency, in 1986, proposed rules for demonstration of financial responsibility for corrective action as required by Section 3004(u).<sup>56</sup> Recently, after almost a two-year delay caused by the Office of Management and Budget's (OMB) cost-related objections, the EPA also proposed a rule intended to govern site investigations, corrective measures studies, and corrective action selection under Section 3004(u).<sup>57</sup> Those rules are also intended to serve as guidelines in the EPA's implementation of the Section 3008(h) program.<sup>58</sup> Given the continuing controversy between the EPA and OMB, however, and the EPA's commitment to reconsider its economic impact analysis, it may be two years or more before final corrective action rules are promulgated.<sup>59</sup>

#### A. Statutory Corrective Action Provisions

Section 3004(u) provides as follows:

Standards promulgated under this section shall require, and a permit issued after the date of enactment of the Hazardous and Solid Waste Amendments on 1984 [enacted Nov. 8, 1984] by the Administrator or a State shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subtitle [42 U.S.C.S. §§ 6921 et. seq], regardless of the time at which waste was placed in such unit. Permits issued under section 3005 [42 U.S.C.S. § 6925] shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action.<sup>60</sup>

---

U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, NATIONAL RCRA CORRECTIVE ACTION STRATEGY (undated) *reprinted at* 17 *Env. Rep.* (BNA) 1068 (1986) [hereinafter "NATIONAL RCRA CORRECTIVE ACTION STRATEGY"]; OSWER Directive 9502.00-5 on Definition of SWMU under S3004(u), July 24, 1987; OSWER Directive 9901.3 on Public Involvement in RCRA Section 3008(h) Actions, May 5, 1987; Technical documents listed at 55 *Fed. Reg.* 30,798, 30,802 (1990) (to be codified at 40 C.F.R. §§ 264, 265, 270, 271). *See generally* Kastner, *RCRA Corrective Action: EPA's Emerging Plan To Clean Up Waste Facilities*, 4 *TOXICS L.R.* (BNA) 299 (1989) (presenting an excellent discussion of the existing regulatory regime).

55. *See RCRA IMPLEMENTATION STUDY*, *supra* note 10, at 78.

56. 51 *Fed. Reg.* 37, 854 (October 24, 1986) (to be codified at 40 C.F.R. §§ 264, 270, 271). Interestingly enough, the EPA routinely has imposed financial responsibility obligations in the context of § 3008(h) orders, but that section, unlike § 3004(u), provides no explicit authority for such obligations.

57. *See Corrective Action Rule Delayed Again As Top Officials Negotiate Over Cost Estimates*, 21 *Env't Rep.* (BNA) 286 (1990). The proposed rule was published at 55 *Fed. Reg.* 30,798 (1990), (to be codified at 40 C.F.R. § 264, Subpart S). For a discussion of the basic elements of the proposed rule see Spracker, *The Proposed RCRA Corrective Action Rule*, 20 *Chem. Waste Lit. Rept.* 739 (1990).

58. 55 *Fed. Reg.* 30,789, 30,802.

59. *See Corrective Action Rule For RCRA Sites Still Far From Final Approval, Officials Say*, 21 *Env. Rep't* (BNA) 427 (1990).

60. 42 U.S.C. § 6924(u) (1990).



Section 3004(v) amends the pre-HSWA corrective action program. The provision basically provides that corrective action should be taken beyond a facility boundary when necessary to protect human health and the environment, unless the owner or operator of the facility concerned can justify not doing so. The pre-HSWA authority required corrective action at the "point of compliance" which, at a maximum, was the facility boundary.<sup>61</sup>

Section 3008(h) provides EPA similar authority, although the language is different in some interesting respects:

Whenever on the basis of any information the Administrator determines that 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 (42 U.S.C.S. §§ 6921 et seq.)] the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.<sup>62</sup>

In implementing the statutory authorities, the EPA adopted a more expansive view of its corrective action jurisdiction under section 3008(h).<sup>63</sup> In justifying its more expansive view of section 3008(h), the EPA sometimes emphasizes similarities between the two sections and other times draws sharp distinctions between them.<sup>64</sup> The relationship between these sections bears upon, among other things, the issue of exactly what Congress intended to do when it gave the EPA the power to administratively order corrective action under section 3008(h). Indeed, section 3008(h) presents especially fertile ground for legal controversy between the EPA and the regulated community. Although recent agency interpretations and limited case law cast some light on the circumstances in which EPA can legally require corrective action under section 3008(h), substantial uncertainties remain. This section reviews certain related developments under section 3004(u) and section 3008(h) and sets the stage for consideration of some of the more important unresolved issues under section 3008(h).

### B. "Releases of Hazardous Waste"

Jurisdiction under section 3004(u) and section 3008(h) is predicated upon "releases of hazardous waste."<sup>65</sup> Section 3004(u) also covers releases of

---

61. See 47 Fed. Reg. 32,274, 32,299 (1982). See also 130 CONG. REC. H 11,129 (daily ed. Oct. 3, 1984).

62. 42 U.S.C. § 6928(h)(1) (1990). Section 3008(h)(2) further provides that:

Any order issued under this subsection may include a suspension or revocation of authorization to operate under Section 3005(e) of this subtitle [42 U.S.C. § 6925(e)], shall state with reasonable specificity the nature of the required corrective action or other response measure, and shall specify a time for compliance.

In addition, this section provides for a civil penalty not to exceed \$25,000 for each day of noncompliance with an order.

63. See NATIONAL RCRA CORRECTIVE ACTION STRATEGY, *supra* note 54.

64. *Id.* at 1069.

65. 42 U.S.C. §§ 6924, 6928 (1990).

"constituents."<sup>66</sup> Is a "constituent" different from a hazardous waste? Must a "constituent" derive from a hazardous waste to be regulated under either section 3004(u) or section 3008(h)? Moreover, does section 3008(h) regulate releases of "constituents" even though, in contrast to section 3004(u), it does not mention them? The existing regulatory scheme,<sup>67</sup> as well as a recent decision in the United States Court of Appeals for the District of Columbia,<sup>68</sup> give weight to the view that the terms "hazardous waste" and "hazardous constituents" are not synonymous. If they are not synonymous, must a hazardous constituent derive from a hazardous waste for purposes of triggering corrective action authority under RCRA? The legislative history of section 3004(u) has been read to suggest that Congress wanted the term "hazardous constituents" to be distinguishable from the term "hazardous wastes" and that both categories of substances were subject to section 3004(u) corrective action.<sup>69</sup> Section 3004(u), moreover, explicitly covers releases of constituents from all *solid waste* management units,<sup>70</sup> not

---

66. HSWA does not define the term "release." See the EPA discussion at 50 Fed. Reg. 28,702, 28,713, 28,716 (1985), including a discussion of "release" in Section 3008(h) context. Under both provisions, the EPA takes the position that its corrective action jurisdiction now covers releases to all media.

67. Compare the waste characteristics and listings contained in 40 C.F.R. pt. 261 with app. VIII to that same section; (1989).

68. *Natural Resources Defense Council, Inc. v. United States EPA*, 907 F.2d 1146, 1159-62 (D.C. Cir. 1990). Although RCRA provides no definition of the term "hazardous constituent," the court confidently observed that it is "a term of art referring to a list of chemical compounds compiled at 40 C.F.R. Part 261, Appendix VIII." *Id.* at 1159. The court went on to observe that "[s]ince [hazardous constituents] are defined by molecular formulae without reference to concentrations, a single molecule of such a chemical is a 'hazardous constituent.' A hazardous waste, by contrast, is such only if various factors, including the *concentration* of hazardous constituents, actually make it hazardous to human health or the environment." *Id.* (footnote omitted) (emphasis in original).

69. This section originated in the Senate Bill, and, according to the companion Senate Report, "[t]he requirement for corrective action applies not just to releases of hazardous wastes, but also to releases of hazardous constituents." S. REP. NO. 284, 98th Cong., 1st Sess. 32 (1983)(emphasis added), cited in *Natural Resources Defense Council, Inc. v. EPA*, 907 F.2d at 1170 (Wald, J., dissenting). In the EPA's proposed corrective action rule, hazardous constituents will also include substances listed in 40 C.F.R. Part 264, Appendix IX (1989). See 55 Fed. Reg. 30,797, 30,809 (1990). Interestingly enough, the preamble to EPA's proposed corrective action rule appears to support the position that "hazardous constituents" must derive from hazardous wastes to trigger corrective action authority. EPA believes that use of the phrase "hazardous wastes or constituents" (emphasis added) [in section 3004(u)] indicates that Congress was particularly concerned that the Agency use the section 3004(u) authority to address a specific subset of this broad category [i.e. "hazardous waste"], that is, hazardous constituents. 55 Fed. Reg. 30,809. Note specifically EPA's use of the term "specific subset." Elsewhere, in the body of the proposal rule, EPA specifically states that the term "hazardous waste" includes "hazardous constituents." See, e.g., the proposed definition of "hazardous waste" at 55 Fed. Reg. 30,874 (to be codified at 40 C.F.R. § 264.501). See also *id.* § 264.510.

As discussed later, the EPA apparently compensates for this narrowing of authority by taking the position that, for purposes of the corrective action program, the term "hazardous waste" will be construed according to the broad statutory definition in RCRA rather than by reference to wastes subject to EPA regulation. See 55 Fed. Reg. 30,809 and text accompanying footnotes 71-74.

70. On a related note, the United States Court of Appeals for the District of Columbia Circuit recently held that certain mining industry wastes (Bevill wastes) and oil, gas, and geothermal production wastes (Bentsen wastes) exempted from regulation under RCRA were still subject to corrective action requirements under § 3004(u). *American Iron & Steel Inst. v. EPA*, 886 F.2d 390, 393-96 (D.C. Cir. 1989).

just those containing hazardous waste.

Section 3008(h), on the other hand, speaks only in terms of "hazardous wastes," and makes no mention of "constituents" or "hazardous constituents". If hazardous wastes and hazardous constituents are legally distinguishable, and if Congress is presumed to know the difference, then the absence of the term "constituent" could mean that the EPA's authority under section 3008(h) is narrower than under section 3004(u).

Not to be unduly restricted by statutory lapses, the EPA took the position that Congress intended the broadest possible meaning of the "hazardous waste" term as it is defined in RCRA.<sup>71</sup> The EPA's argument is that the terms "hazardous waste" as used in section 3004(u) and section 3008(h) is not limited to wastes which have been listed or which meet one of the characteristics.<sup>72</sup> The EPA's view instead, is that any kind of waste within the broad statutory definition of "hazardous waste", may be reached by the corrective action authority.<sup>73</sup> As a result many common industrial wastes that are not currently regulated hazardous wastes would be within the limits of section 3008(h). Among other things, the EPA's broad interpretation of wastes covered by its corrective action authority compensates for the absence of the terms "constituents" or "hazardous constituents" in section 3008(h). Whether the EPA's broad interpretation of the term "hazardous wastes" in section 3008(h) will serve its intended purpose remains to be seen.<sup>74</sup>

### C. The Meaning of "Facility"

Under section 3004(u), corrective action may follow "all releases . . . from any solid waste management unit at a . . . facility" seeking a final RCRA permit.<sup>75</sup> Section 3008(h) authorizes the administrator to commence corrective action where "there is or has been a release . . . from a facility author-

---

71. 55 Fed. Reg. at 30,809. The statutory definition of "hazardous waste" is set forth at 42 U.S.C. § 6903(5) (1988).

72. 55 Fed. Reg. at 30,809.

73. *Id.*

74. Some courts, however, already have upheld § 3008(h) authority in connection with releases of "hazardous constituents." *United States EPA v. Clow Water Sys.*, 701 F. Supp. 1345, 1356 (S.D. Ohio 1988); *United States EPA v. Environmental Waste Control, Inc.*, 698 F. Supp. 1422, 1429 (N.D. Ind. 1988).

75. 42 U.S.C. § 6924(u) (1988). According to the EPA, its § 3004(u) authority covers facilities seeking any RCRA § 3005(c) permit, including permits under 40 C.F.R. pt. 264 (1989), and post-closure permits for facilities closing on and after January 26, 1983, as required under 40 C.F.R. § 270.1(c) (1989). *See* 50 Fed. Reg. 28,701, 28,712 (1985). The EPA maintains that it also covers facilities subject to RCRA permits by rule. *See* 50 Fed. Reg. at 28,715 (1985). The EPA's interpretation of its corrective action authority under § 3004(u) in connection with post-closure permits and permits by rule has been upheld. *American Iron*, 886 F.2d at 397-99. *See also* *United Technologies Corp. v. EPA*, 821 F.2d 714 (D.C. Cir. 1987). In its recently proposed corrective action rule, the EPA would exempt the following type of permits from coverage under the § 3004(u) corrective action program: permits for land treatment demonstrations, emergency permits for immediate actions necessary to protect human health and the environment, permits-by-rule for ocean disposal barges or vessels, and research, development and demonstration permits. 55 Fed. Reg. at 30,805-07.

ized to operate under section 6925(e). . . ."<sup>76</sup> Obviously the term "facility" is pivotal in construing the scope of the EPA's powers under these provisions. Prior to the passage of HSWA, the EPA used the term inconsistently. Originally, facility was used in a very narrow sense to cover only those areas and activities directly related to hazardous waste management.<sup>77</sup> It did not cover, nor was it construed to cover, the entire tract of property surrounding such an area.<sup>78</sup> In 1982 the EPA modified its usage of the term solely for purposes of amended rules governing groundwater protection.<sup>79</sup> These rules authorized corrective action for hazardous waste releases from regulated land disposal facilities up to the limit of the property boundary.<sup>80</sup> Hence, under the 1982 rules, the term "facility" was synonymous with all the property under control of the owner or operator.<sup>81</sup>

In its first Final Codification Rule,<sup>82</sup> codifying portions of HSWA, the EPA took the position that, for purposes of section 3004(u), the term "facility" would be used in the same sense as defined in the 1982 rules.<sup>83</sup> Accordingly, under section 3004(u), the EPA maintained that it could compel corrective action for all hazardous releases from solid waste management units<sup>84</sup> on "all contiguous property under the owner or operator's control."<sup>85</sup> The EPA observed that the legislative history of section 3008(h)

---

76. 42 U.S.C. § 6928(h) (1988).

77. See 40 C.F.R. § 260.10 (1989). According to the pre-existing regulatory definition, a "facility" is "all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units (e.g. one or more landfills, surface impoundments, or combination of them)." *Id.*

78. *Id.* See also *United Technologies Corp.*, 821 F.2d at 721-23.

79. See 47 Fed. Reg. 32,273, 32,288-89, 32,311 (1982).

80. *Id.*

81. *Id.*

82. 50 Fed. Reg. 28,902 (1985).

83. See *id.* at 28,712.

84. The term "solid waste management unit" (SWMU) is not defined in HSWA. Congress, however, gave some useful guidance in the legislative history. The term is said to include any unit at a facility "from which hazardous constituents might migrate, irrespective of whether the units were intended for the management of solid and/or hazardous wastes." H.R. REP. NO. 198, 98th Cong., 1st Sess., pt. 1, at 60 (1983). Congress also noted that the term "unit" is "intended to be defined as in the preamble to the EPA regulations published on July 26, 1982 and as further defined by the EPA in the future." *Id.* Based on this guidance, the EPA has stated its belief that a SWMU "at least encompasses the units identified in that preamble, which refers to 'containers, tanks, surface impoundments, waste piles, land treatment units, landfills, incinerators, and underground injection wells.'" 50 Fed. Reg. at 28,712 (citing 47 Fed. Reg. 32,281 (1982)). Under § 3004(u), however, the EPA believes its corrective action authority is limited to discernible units. The EPA believes that spills that cannot be linked to SWMUs are not covered by § 3004(u). See 50 Fed. Reg. 28,712. "For example, a spill from a truck traveling through facility would not constitute a release from a solid waste management unit." *Id.* at 28,712-13. In the EPA's recently proposed corrective action rule, which would be codified as 40 C.F.R. § 264.501, the term "solid waste management unit" means "any discernible unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous waste. Such units include any area at a facility at which solid wastes have been routinely and systematically released." 55 Fed. Reg. 30,874.

85. 50 Fed. Reg. 28,712 (1985). The EPA's position in this regard was upheld in *United Technologies Corp. v. EPA*, 821 F.2d 714 (D.C. Cir. 1987). A review of the relevant legislative history, nevertheless, could be construed to support a narrower reading of EPA's author-

notes that the power to issue corrective action orders is "a supplement to the EPA's power to impose corrective action through permits."<sup>86</sup> Based on this observation, the EPA concluded:

Since section 3004 has been amended to extend corrective action requirements to all solid waste management units at facilities seeking a RCRA permit, the Agency interprets this mandate to authorize the issuance of corrective action orders to any interim status facility containing solid waste management units, including regulated units, from which there has been a release to the environment.<sup>87</sup>

As the preceding quotation shows, the EPA may have initially believed that section 3008(h) authority, like section 3004(u) authority, included only releases from solid waste management units, or at least had to be predicated on such a release. Whatever its initial posture, however, the EPA later concluded that, unlike section 3004(u), corrective action orders issued pursuant to section 3008(h) were not limited to releases from solid waste management units.<sup>88</sup> The EPA now even takes the position that its authority to impose corrective action in RCRA permit proceedings is not limited to releases from solid waste management units, as provided in section 3004(u).<sup>89</sup> In recent RCRA administrative permit appeals, the EPA held that section 3005(c)(3),<sup>90</sup> the so-called omnibus provision, empowers the EPA to require corrective action for releases not associated with solid waste management units.<sup>91</sup> (The EPA originally proposed use of the omnibus provision for this purpose in the 1986 National RCRA Corrective Action Strategy,<sup>92</sup> but it was mentioned almost as an afterthought and comment was specifically requested.)<sup>93</sup> The EPA, furthermore, reaffirmed its support for this broad in-

---

ity. In its discussion of the EPA's authority to issue corrective action orders under § 3008(h), the Conference Committee made the following statement:

Examples of where such orders might be needed include ground-water contamination from tanks (where the current regulations do not appear to require a cleanup), from units subjected to limited exemptions (e.g., wastewater treatment units), or from "non-regulated" units (i.e., units not subject to current corrective action requirements) at land disposal facilities.

CONF. REP. NO. 1133, 98th Cong., 2d Sess. 112, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 5649, 5683. This statement suggests that Congress had in mind releases from discernible units even under § 3008(h).

86. 50 Fed. Reg. 28,716 (quoting 130 CONG. REC. H11,135 (daily ed. Oct. 3, 1984)).

87. *Id.*

88. See THE INTERIM STATUS CORRECTIVE ACTION AUTHORITY, *supra* note 54, at 8; NATIONAL RCRA CORRECTIVE ACTION STRATEGY, *supra* note 54, at 1069.

89. 55 Fed. Reg. 30,809.

90. 42 U.S.C. § 6925(c)(3) (1988). This section provides: "Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment." *Id.* See also, 40 C.F.R. § 270.32(b)(2) (1989).

91. See In the matter of: Amerada Hess Corp. Port Reading Refinery, RCRA Permit No. NJD 045-445-483, RCRA App. No. 88-10 (EPA August 15, 1989), 1989 RCRA Lexis 25; In the Matter of: American Cyanamid Co. (Santa Rosa), RCRA Permit No. FLD 057-231-821, RCRA App. No. 88-22 (EPA undated); In the Matter of: Shell Oil Co., RCRA Permit No. WAD-009-275-082, RCRA App. No. 88-48 (EPA March 12, 1990), 1990 RCRA Lexis 3.

92. NATIONAL RCRA CORRECTIVE ACTION STRATEGY, *supra* note 54, at 1069.

93. *Id.*

terpretation in its recently proposed corrective action rule.<sup>94</sup>

It nevertheless remains uncertain whether the inclusion of specific corrective action powers under section 3004(u) supersedes the more general grant of authority under § 3005(c)(3). Indeed, the EPA's expansive reading of section 3005(c)(3) appears to render section 3004(u) superfluous. Consequently, for purposes of corrective action under RCRA, the EPA considers a facility to be an imaginary plane covering the surface of a given tract of property. Any vertical or horizontal "release" can subject the owner/operator to RCRA corrective action requirements. As a practical matter then, any conceivable release of regulated waste materials into any environmental medium can, in the EPA's view, be the subject of corrective action under RCRA.<sup>95</sup>

#### D. The "Interim Status" Prerequisite Under Section 3008(h)

Congress clearly intended that corrective action orders only be issued against facilities "authorized to operate" under the interim status authorities of RCRA.<sup>96</sup> The statute, however, is not clear about how this authority relates to facilities that were authorized to operate under interim status authority, but are not currently authorized<sup>97</sup> either because interim status was lost by operation of law<sup>98</sup> or because it was terminated by agency action.<sup>99</sup> The statute also does not address whether corrective action orders can be issued at facilities which should have been authorized to operate, but were not so authorized either because of technical defects in compliance with the statutory prerequisites for interim status<sup>100</sup> or because the facility was clearly operating illegally. This aspect of the statute may not pose a problem for the EPA in instances where facilities that have not possessed interim status are still subject to post-closure permitting requirements,<sup>101</sup> and, therefore, corrective action requirements under section 3004(u).<sup>102</sup>

Courts that have considered the interim status prerequisite have ruled favorably to the EPA. In *United States v. Environmental Waste Control, Inc.*,<sup>103</sup> the court held that the facility was subject to section 3008(h) even though interim status had terminated. In the same vein, in *United States v.*

---

94. 55 Fed. Reg. 30,797, 30,809 (1990).

95. *Id.*

96. 42 U.S.C. § 6928(h) (1990).

97. The tense of the statutory language, of course, can have a profound impact on its effect as has been recently seen in the area of citizen suits under § 505 of the Clean Water Act, 33 U.S.C. § 1365 (1988). See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987).

98. For the statutory provisions regarding automatic termination of interim status see 42 U.S.C. § 6925(c), (e) (1988).

99. See 40 C.F.R. § 270.73 (1989) (regarding termination of interim status).

100. For example, failure to timely submit the preliminary notification required by § 6925(e)(1)(B) can defeat interim status.

101. 42 U.S.C. § 6925(c) (1988); 40 C.F.R. § 270.1(c) (1989).

102. See *American Iron & Steel Inst. v. United States EPA*, 886 F.2d 390, 397-98 (D.C. Cir. 1989) (holding that corrective action requirements apply to facilities subject to post-closure permitting or permits by rule).

103. 710 F. Supp. 1172 (N.D. Ind. 1989).

*Indiana Woodtreating Corp.*,<sup>104</sup> the court held that section 3008(h) applies to facilities that failed to attain interim status.<sup>105</sup> Nevertheless, due to the peculiar wording of section 3008(h) on this point, controversy should continue in this area.

#### IV. IS SECTION 3008(h) A LIABILITY PROVISION?

On its face, section 3008(h) does not provide any clear standard for determining the nature or object of corrective action liability. It makes no reference as to the appropriate recipient of a corrective action order or what connection a recipient must have to the facility. In light of these significant omissions, the provision could be construed to grant only a remedy to the administrator where a release of hazardous waste has occurred, thereby forcing the courts to look to other parts of the statute to establish substantive liability.<sup>106</sup> In this respect, section 3008(h) would resemble section 106 of CERCLA.<sup>107</sup> That section, in similarity to section 3008(h), grants the administrator of EPA (through the President) the right to issue an administrative order or institute a civil action against unspecified parties for abatement of releases, or threatened releases, of hazardous substances under certain circumstances.<sup>108</sup> In *United States v. Outboard Marine Corp.*,<sup>109</sup> the court observed that, "Read plainly, Section 106 does not appear to create liability in any party. It authorizes lawsuits and injunctions, but it does not indicate who may be sued or enjoined; also, it does not specify what one must do to be subject to suit or injunction."<sup>110</sup>

The court went on to observe that some other authority would be necessary to impose liability.<sup>111</sup> Although the court did not precisely define the source of such liability, it held that "[w]hatever the source," it would have to include section 107 of CERCLA, the basic statutory liability provision.<sup>112</sup>

A similar debate about RCRA section 7003 also has raged. In *United States v. Diamond Shamrock*<sup>113</sup> the court held that section 7003 was both jurisdictional and substantive.<sup>114</sup> The court reasoned that "the standard for

---

104. 686 F. Supp. 218 (S.D. Ind. 1988).

105. *Id.* at 223.

106. The author acknowledges the contribution of Carol L. Dorge, Esq. to the instant analysis.

107. 42 U.S.C. § 9606 (1988).

108. Interestingly enough, one court recently ruled that, in comparison with CERCLA § 106, § 3008(h) does not necessarily preclude pre-enforcement judicial review of an administrative order. *Sinclair Oil Co. v. Scherer*, 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,009 (D. Wyo. 1989).

109. 556 F. Supp. 54 (N.D. Ill. 1982).

110. *Id.* at 55.

111. *Id.*

112. *See also*, *United States v. Bliss*, 667 F. Supp. 1298, 1313 (E.D. Mo. 1987); *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1393 (D.N.H. 1985); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 184 (W.D. Mo. 1985); *Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.*, 21 Env't Rep. Cas. (BNA) 1108 (C.D. Cal. 1984) *rev'd in part*, 840 F.2d 691 (9th Cir. 1988). *But see* *United States v. Stringfellow*, 20 Env't Rep. Cas. (BNA) 1905 (C.D. Cal. 1984).

113. 17 Env't Rep. Cas. (BNA) 1329 (N.D. Ohio 1981).

114. *Id.* at 1332.

determining the impropriety of the conduct sought to be enjoined . . . is whether a hazardous waste presents 'an imminent and substantial endangerment of health or the environment.'"<sup>115</sup>

A determination of whether section 3008(h) is jurisdictional or substantive would not be purely academic since, among other things, it would have a bearing on who is liable for corrective action. If section 3008(h) is only jurisdictional, and if a basis for liability must be found in other parts of RCRA, then perhaps a section 3008(h) order could only be issued against current owners and operators, the only class of parties logically fitting under both section 3008(h) and other regulatory provisions of the statute. If section 3008(h) is substantive, however, and does not depend on other provisions of RCRA, like section 7003, it could theoretically be expanded to any party linked to an interim status site, conceivably including off-site generators and transporters.

#### V. WHO IS LIABLE FOR SECTION 3008(h) CORRECTIVE ACTION?

At the very least, section 3008(h) presumably grants, or was intended to grant, the EPA the power to require the present owner or operator of an interim status facility to take corrective action at the facility.<sup>116</sup> Does it also require a present owner or operator to remedy the "sins" of its predecessors when the present owner or operator played no role in the creation of the relevant conditions and may not have even been aware of them prior to a regulatory investigation? The relevant legislative history can be read to suggest that Congress intended current owners and operators to be responsible for correcting past disposal problems without regard to when they occurred.<sup>117</sup> From this observation, one may infer that Congress intended to impose corrective action responsibilities on present owners or operators without regard to causation or culpability, or, in other words, on a strict liability basis. In addition, that the present owner or operator would be forced to shoulder the entire corrective burden could be construed as a congressional expectation that the liability would also be joint and several.<sup>118</sup> In the final codification rule, the EPA appears to adopt this perspective, arguing that the present owner or operator can pursue other responsible parties in private party cost recovery actions.<sup>119</sup>

A more interesting question is whether the EPA also has the authority to issue a corrective action order against prior owners or operators. Based on the nature of the corrective action scheme, such authority might be implied, although with greater difficulty. Under the original version of RCRA sec-

---

115. *Id.* See also *Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984). *Contra*, *United States v. Midwest Solvent Recovery, Inc.*, 484 F. Supp. 138 (N.D. Ind. 1980).

116. 42 U.S.C. § 6928(h).

117. See H. R. CONF. REP. NO. 1133, 98th Cong., 2d Sess. 110-12, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5649, 5681-83.

118. The courts have consistently found joint and several liability in analogous circumstances under CERCLA § 107. *E.g.*, *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810-11 (S.D. Ohio 1983).

119. 50 Fed. Reg. 28,716.



tion 7003, no guidance was given as to the class of parties subject to an action for abatement of an imminent and substantial endangerment. Prior to the 1984 amendments to RCRA's imminent hazard provision,<sup>120</sup> uncertainty surrounded the identity of parties subject to order or suit for the abatement of an imminent hazard action.<sup>121</sup> The courts ultimately enlarged the class of liable parties beyond the present owner or operator to any person who had a causal link to the site, including non-negligent, off-site generators.<sup>122</sup> Some courts held, for example, that the basic legislative purpose and pre-existing common law duties formed a basis for imposing such liability beyond present owners and operators.<sup>123</sup> The statute was subsequently amended to do precisely that. Given some of the obvious similarities between the pre-1984 version of section 7003 and the current section 3008(h), the issue of which parties may be liable for corrective action under section 3008(h) does not seem completely academic. Congress, therefore, may be forced to clarify this issue in the context of section 3008(h).

## VI. COST RECOVERY UNDER SECTION 3008(h)

The prospect of imposing liability for all necessary corrective action on the current owner or operator of a facility without regard to causation raises significant fairness questions, if the liability is strict, joint, and several. Prior to the explicit addition of a right of contribution for CERCLA response costs in 1986,<sup>124</sup> several courts had held a right of contribution among responsible parties was implicit in CERCLA's statutory scheme of strict, joint, and several liability.<sup>125</sup>

Some courts held that the right of contribution under CERCLA was an implied statutory right.<sup>126</sup> Others held that such a right existed as a function of federal common law.<sup>127</sup> All of these courts, however, agreed that in light of CERCLA's imposition of strict, joint, and several liability, a right of contribution among responsible parties was a logical and necessary goal of equitable relief.<sup>128</sup> Liability under RCRA section 7003 has also been held to

---

120. 42 U.S.C. § 6973 (1988).

121. *E.g.*, *United States v. Waste Indust.*, 556 F. Supp. 1301 (E.D.N.C. 1982), *rev'd*, 734 F.2d 159 (4th Cir. 1984); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984); *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981). The 1984 amendments explicitly specified that § 7003 could impose liability on non-negligent, off-site generators.

122. *E.g.*, *United States v. Hardage*, 26 Env't Rep. Cas. (BNA) 1049 (W.D. Okla. 1987); *United States v. Bliss*, 667 F. Supp. 1298, 1313 (E.D. Mo. 1987). *Contra* *United States v. Wade* 546 F. Supp. 785, 788-92 (E.D. Pa. 1982).

123. *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982). *Accord* *United States v. Stringfellow*, 20 Env't Rep. Cas. (BNA) 1905 (C.D. Cal. 1984); *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100 (D. Minn. 1982).

124. 42 U.S.C. § 9613(f) (1988).

125. *E.g.*, *Marden Corp. v. C.G.C. Music Ltd.*, 804 F.2d 1454, 1457 n.3 (9th Cir. 1986) (collecting cases).

126. *E.g.*, *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249, 1254 (S.D. Ill. 1984).

127. *E.g.*, *United States v. New Castle County*, 642 F. Supp. 1258, 1268-69 (D. Del. 1986).

128. *See* C. SCHRAFF & R. STEINBERG, *RCRA AND SUPERFUND 16* (1989); Note, *The*

be strict,<sup>129</sup> joint, and several.<sup>130</sup> Accordingly, at least one court has recognized a right of contribution under RCRA section 7003.<sup>131</sup>

Given the extensive nature of the obligations that conceivably can be imposed upon firms or individuals under section 3008(h) for hazardous waste management problems created in the distant past,<sup>132</sup> recognition of a right of contribution or cost recovery under section 3008(h) would be reasonable. Such a right would be a valuable supplement to the existing CERCLA contribution right for at least two reasons. First, CERCLA's petroleum exclusion<sup>133</sup> could preclude petroleum-based, characteristic hazardous wastes from being the subject of contribution actions. Second, RCRA corrective action activities, as presently constituted, will not necessarily be conducted in substantial consistency with the National Contingency Plan, a prerequisite to cost recovery under CERCLA.<sup>134</sup> Indeed, recognition of cost recovery rights would promote corrective action programs since it would serve to increase the pool of parties available to pay for such work.

## VII. CONCLUSION

The corrective action provisions of RCRA doubtlessly will continue to affect industry into the foreseeable future. The EPA's proposed rulemaking suggests that it is prepared to exercise considerable flexibility in implementing the program.<sup>135</sup> This may well place EPA on a collision course with environmentalists.<sup>136</sup> The preceding discussion should illustrate that, in the controversies which can be expected to develop during finalization of the proposal and implementation of the program, significant legal issues remain. These issues go to the heart of the program. None is perhaps more significant than how the burden of cleanup is to be distributed. The EPA, and perhaps Congress, should focus on promoting equitable allocation of the costs associated with remedying all the problems of the past. This would improve both the economic efficiency and the environmental benefits of the program.

---

*Right to Contribution for Response Costs Under CERCLA*, 60 NOTRE DAME L. REV. 345 (1985).

129. *E.g.*, *United States v. Aceto Agricultural Chem. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989).

130. *See United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 199 (W.D. Mo. 1985).

131. *See United States v. Waste Industries, Inc.*, 16 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,501 (E.D.N.C. 1985).

132. *See Huffman, Karam, Bailey, Estimating the Costs of Corrective Action at Land Disposal Facilities*, 1 *Remediation* 19 (New York, Executive Enterprises Publications Co., Inc., 1990).

133. 42 U.S.C. § 9601(14) (1988).

134. 42 U.S.C. §§ 9607(a)(4)(A), (B) (1988). The National Contingency Plan (NCP) is published at 40 C.F.R. § 300 (1989). The NCP provisions relating to private party cost recovery actions under CERCLA are set forth at 40 C.F.R. § 300.700 (1989).

135. Chambers, *Overview of RCRA Corrective Action Requirements*, 26 *Chem. Waste Lit. Rept.* 723, 733 (1990).

136. *Id.* at 734.

