



Federal Facilities Environmental Journal

## NEGOTIATING AND IMPLEMENTING

### RCRA 3008(h) ORDERS

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*Recent trends in EPA enforcement at active federal RCRA facilities indicate an increased use of 3008(h) orders for corrective action. A 3008(h) order for a federal facility is significantly different from that for a private facility and presents several unique challenges and opportunities. This article discusses both the negotiation procedure and the finished order for a particular federal facility; that agreement is the first 3008(h) order issued to any facility of this federal agency. Similar processes and considerations generally apply to negotiations at any federal facility.*

The Resource Conservation and Recovery Act (RCRA) corrective action program is receiving increased attention from EPA as regulated facilities become better known through the permit review process. Information developed through permit review, coupled with data gathered from EPA or state inspections, has provided the basis for the issuance of an increasing number of corrective action orders by EPA or authorized states. These orders, issued under Section 3008(h) of RCRA, are increasingly being issued to federal facilities to address releases or contamination problems associated with past or current practices.

The 3008(h) negotiation process is complex for federal facilities. Not only must they develop language consistent with specific facility needs, but they must also address the potential precedential nature of any final order in future agency negotiations. These overall legal and administrative concerns are very important, because EPA will attempt to use a standard set of conditions for successive orders with that agency at other facilities. This article examines the process of preparing for, negotiating, and implementing a major 3008(h) order for a federal facility. The article examines the process of developing negotiation strategies and the outcome in terms of order requirements using examples from a federal agency's first 3008(h) order for a large complex test facility. The authors' knowledge of the order is based

upon their intimate involvement in the negotiation process as a result of their company's role as the environmental contractor for the federal facility. This article should assist other federal facility managers or environmental coordinators in working through the 3008(h) process, if and when it is required at their facility.

## **NEGOTIATION OF A RCRA 3008(h) CORRECTIVE ACTION ORDER**

Several factors and objectives should be considered when a federal facility manager is faced with a 3008(h) order. These considerations and objectives include:

- **Negotiation of an order that satisfies facility-specific technical and budget constraints;**
- **Modification of EPA "model language" to fit the constraints and bureaucracy of the specific agency; and**
- **Developing and maintaining a framework of cooperation between EPA and the facility such that flexibility, which is critical to success of environmental projects, is maintained**

These objectives and considerations were the guiding principles in the 3008(h) negotiation process detailed in the following discussion.

Each of these objectives appears to have been well met in the final document, although the true degree of success can only be ascertained through implementation of the order's requirements. Each consideration holds a different degree of significance for each section of the order. In some areas, such as technical requirements and schedule, the concern is primarily a facility-specific one; whereas in the case of administrative procedures and legal issues, it is primarily a concern about how the agency's bureaucracy must respond to achieve the order's requirements.

## **THE NEGOTIATION TEAM**

To balance these objectives, a negotiating team was formed that consisted of:

- **Technical experts (federal agency and contractors)**
- **Legal and regulatory experts (federal agency and contractors)**
- **Facility environmental and operational management (federal agency)**
- **Headquarters environmental management (federal agency)**

This team was supported by numerous technical and administrative staff and worked closely throughout the entire twenty-month negotiation period. The core of the negotiating team was five key technical and administrative personnel. The team conferred frequently with technical experts from the environmental contractor that had already been working on the RCRA contamination assessment and closures at the site. Every time a new draft of the order was developed or new technical data demanded a change in direction, the entire team reviewed the order. The team was

consistent throughout the entire period and received frequent management support from the facility manager's office and the principal-in-charge for the environmental contractor.

Federal agencies will often find that EPA's technical and enforcement representatives may change due to the number of regulated RCRA facilities and the strain on EPA personnel resources. During the twenty-month negotiation period, EPA's lead technical representative changed three times and the legal/enforcement representative changed twice. This made the consistency of the facility negotiating team even more critical to avoid losing ground between drafts. All draft orders were reviewed and critiqued by the entire team.

Technical and regulatory summary and review meetings were held each quarter for the entire technical support team to examine critical technical and regulatory issues as they developed. These meetings also evaluated key points in the ongoing technical corrective action investigations to assure that new findings regarding the RCRA facility investigation and ongoing RCRA closures were integrated into the technical and budgetary planning requirements for any resulting order.

#### **THE IMPORTANCE OF VOLUNTARY COMPLIANCE**

A critical factor in the facility's success in negotiating a favorable order with EPA was the facility management's clear commitment, supported by the agency's headquarters, to a proactive approach to environmental compliance. This facility had been carrying out a facility investigation and numerous RCRA closures over a three-year period (1985-1988) prior to the order without any pending enforcement action, state or federal. This significant, voluntary compliance effort indicated to the regulators, from the outset of the process, that the agency was willing to take the steps necessary to protect human health and the environment. The importance of this factor cannot be overstated in setting a generally cooperative tone of negotiations with EPA.

Throughout the negotiations, EPA was continuously updated as data were developed, and approximately three million dollars of work was completed on the facility investigation in the twenty-month negotiation period. This process was instrumental in demonstrating to EPA that the federal facility was not only serious about resolving the problem; but, equally important, had the technical experts on board to accomplish the effort.

#### **WHY A 3008(h) ORDER?**

Based on the regulatory history of the facility, its operating permit status, and the state's lack of authorization for corrective action, EPA chose a 3008(h) order to gain control of investigations and potential remedial actions at the facility. This mechanism also allowed for negotiations between the agency and EPA to achieve a workable order for such a complex and varied site.

Recent trends in EPA enforcement at active federal RCRA facilities indicate an increased use of 3008(h) orders for corrective action unless a RCRA compliance issue also exists, in which case EPA may choose instead a Notice of Noncompliance (NON) followed by a Federal Facilities Compliance Agreement (FFCA). Currently, FFCAs have a specific elevation process for resolution of issues that is more restrictive than with a 3008(h)<sup>1</sup>. 3008(h) orders have greater flexibility in terms of the progress of review of draft orders and response times to agency submittals.

This greater flexibility was used by EPA at this facility. The initial order proposed by EPA made specific requests for investigatory procedures and interim measures. Many of these were carried out as a logical part of the facility investigation that was ongoing during the entire negotiation process. The 3008(h) is an ideal vehicle to assure that a logical process is implemented at a federal facility to carry out corrective actions if it is properly negotiated to protect the agency's objectives.

### **THE PROCESS OF NEGOTIATING THE ORDER**

Based on our experience at this and other sites, several key factors contribute to the negotiation of a successful 3008(h) order. These factors include:

- Clear definition of facility objectives;
- Competent and experienced technical and legal negotiation and support teams;
- Understanding of existing problems at facility;
- Accurate definition of available resources;
- Good working relationship with EPA and state regulators; and
- Cooperation of regulated agency's headquarters environmental staff.

### **EPA'S INITIAL PROPOSED ORDER**

The following discussion of the negotiation of this facility's 3008(h) order will serve as a detailed example of this process at a complex federal facility with numerous active and closed RCRA units. This process began when technical portions of the draft order were sent to the facility in May 1988. This order's technical requirements consisted basically of three major activities:

1. Implementation of Interim Measures
2. A Complete RCRA Facility Investigation (RFI)
3. A Complete Corrective Measures Study (CMS)

Deadlines established in the initial order for each of these activities were not technically feasible given the extent and magnitude of potential groundwater contamination and the number of solid waste management units (SWMUs) that needed to be investigated at the facility. Originally, Interim Measures would have required a groundwater pump and treat system at the facility boundary. The potential construction cost was estimated at up to fifteen million dollars. Given the

facility location, this proposed system was ill advised because of low technical feasibility; furthermore, it did not, in any way, protect human health or the environment. The RFI/CMS process required by the initial order was to be completed in fifteen months. This would have been difficult, if not impossible, considering that there was a twelve-square-mile study area that contains four distinct aquifers which needed to be evaluated.

The initial order was an EPA standard model order developed for a Department of Defense facility; it lacked considerations for site-specific needs and for this agency's administrative procedures. This situation is not unusual due to the many sites in EPA's universe of RCRA-regulated facilities and the variability of administrative procedures between federal agencies. For this reason, and because of the potential precedential nature of the order for the agency, the facility director assembled the negotiation and technical support team from agency and contractor personnel experienced in the RCRA regulations and already familiar with and working on the site's problems.

## **NEGOTIATION BEGINS**

The team's first assignment was to review the order in detail and provide comments to the facility manager on budget impacts and the technical feasibility of the proposed technical requirements. This review was conducted in parallel with an extensive effort aimed at familiarizing EPA technical and enforcement staff with the site characteristics and the voluntary, ongoing facility environmental investigation. EPA's enforcement staff were also familiarized with agency-specific bureaucratic procedures and limitations that would have to be addressed in the final order.

EPA's technical and enforcement staffs were invited to the facility for a site visit after our initial review. Comments were prepared for the purpose of a detailed initial meeting in which major concerns on both sides could be aired openly in the context of a sound technical base. This first meeting took place in July 1988. The meeting was an important first step in EPA's understanding of the site issues and the agency's concerns over the need for the order to fit within established agency administrative and funding procedures.

After the meeting, the negotiating team provided EPA with a revised draft of the order that incorporated the following key points:

- **Revised Interim Measures**
- **Technically justifiable RFI/CMS schedule**
- **Administrative/legal language consistent with agency procedures**

In addition, a significant amount of technical data regarding ongoing facility investigations, contamination assessments, and RCRA closures was also submitted at this time to EPA's technical staff. Shortly after submission of this data, EPA technical staff attached to this project were transferred and the project was

reassigned. This caused a delay because additional EPA personnel had to be educated about the project, eliminating much of the progress that had been made in EPA's understanding of site conditions.

Technical discussions resumed, including a series of meetings at EPA and at the facility. Another draft order was sent to the facility in March 1989. This draft order still did not adequately address many of our technical and administrative concerns.

The negotiating team met to review the details of the new order and a decision was made to redraft a complete order that would be acceptable to the facility, using EPA's order as a baseline. This process required a detailed examination of the technical issues and the associated costs of carrying out the proposed work. This approach proved very successful in helping the facility develop a logical document that was coordinated to address EPA's concerns about what was technically and administratively feasible for the facility. A technically justifiable RFI/CMS and Interim Measures package was developed along with appropriate modifications in administrative and legal language to accommodate issues such as elevation of disputes, Anti-Deficiency Act requirements, and potential variations in agency funding levels outside of the facility's control. This new draft order became the basis for future negotiations, and it appeared that a final order would be negotiated by spring or summer of 1989.

## **NEGOTIATIONS COME TO A CLOSE**

Then – as the old adage goes, it is darkest just before the dawn – EPA sent the facility a "final" order containing many of the deficiencies in the original order. At this point, it was clear that a different approach would be required to keep the negotiation process from breaking down. The facility negotiating team suggested a three-day marathon session including all facility and EPA technical, legal, and administrative staff (including headquarters' staff from both agencies). The purpose of the meeting was to review all the order's technical requirements and schedule, EPA's requirements, and legal/administrative issues in anticipation of either reaching a final agreement on the 3008(h) order or elevating the order to EPA and the facility's agency headquarters for resolution.

The first day of the meeting consisted of presentations by the facility's and consultant's technical experts of data and analyses that had been collected to date at the facility, with special emphasis on the additional requirements to complete a technically justifiable RFI/CMS. The meeting included detailed presentations on the hydrogeology and contaminant distribution at the site. In addition, a detailed analysis of the facility's plan and schedule to complete an RFI/CMS was presented along with the supporting technical arguments. All audiovisual materials and technical data were prepared as handouts for EPA technical and legal staff. The first day concluded with a site tour/inspection to add perspective to the information presented earlier in the meeting.

The second day began early with a joint page-by-page review of the entire order. This review covered all administrative and technical issues and was set up to reach agreements on all issues as they were encountered. When necessary, time was allowed for caucus among individual groups and to allow both parties' legal staff to prepare draft language on particular sections to present to the group for discussion, modification, and agreement. When administrative or funding issues arose that affected EPA and agency headquarters positions, these issues were addressed by headquarters personnel and acceptable language was developed. The commitment by both sides to reach agreement on all major points and the consequent participation of decision makers was critical to the success of this type of negotiation.

The page-by-page review of the order continued through the third day. By the end of that day, substantive agreement had been reached and EPA agreed to redraft the final order. The final order was sent to the facility and signed by both parties in December 1989.

### **TYPICAL REQUIREMENTS OF 3008(h) CORRECTIVE ACTIONS ORDERS**

The final 3008(h) order negotiated for this facility has three primary requirements:

- **RCRA Facility Investigation (RFI)**
- **Corrective Measures Study (CMS)**
- **Corrective Measures Implementation (CMI)**

These requirements are typical of many 3008(h) orders drafted for active RCRA transportation, storage, and disposal (TSD) facilities. The process of complying with the 3008(h) order consists of the successful completion of each of the three requirements above. These requirements are designed to allow EPA and the agency to arrive at a determination of what type of corrective action is appropriate for the contamination detected at the facility. The process for a RCRA facility is analogous to a RI/FS at a CERCLA site. The goal of the RFI/CMS is to define an appropriate corrective action to be implemented at the site, if any is found to be required. The last two sections provide a detailed description of the requirements of the order and the technical requirements of the RFI/CMS process.

### **DESCRIPTION OF THE RFI**

The RFI consists of a series of field investigations and data analyses to determine immediate and long-term exposure potentials for contaminants identified at the facility. Many of the source areas at the facility had undergone extensive characterization as a result of inclusion in other environmental documents (e.g., Part B Permit Application). These characterizations were based on past operating practices as well as thorough chemical evaluations. Other identified units will be examined during the soils and contaminant characterization portion of the RFI. These investigations will concentrate on quantifying the physical and chemical

properties of the soils and adjacent to each unit as well as determining the extent and nature of any vadose (unsaturated, above groundwater) zone contamination. Although the RFI also specifies a thorough characterization of the surface water and air exposure routes, these are considered minor pathways at this facility due to restricted access and the lack of any permanent bodies of surface water; however, they could be very significant at other facilities.

The major emphasis of the RFI will be an extensive examination of the hydrogeologic settings and groundwater contaminant characterization. This pathway has resulted in off-site transport of groundwater contaminants and is the only route capable of posing significant future threats to human health and the environment. The facility will continue to evaluate exposure potentials throughout the entire RFI process through its groundwater modeling efforts. It will use data gathered in the RFI and associated activities to develop a health risk assessment that examines the impacts of human exposure to the contaminants present in off-site areas.

## **DESCRIPTION OF THE CMS**

The CMS, which runs concurrently with the RFI, will evaluate existing and developing technologies that could potentially be employed in remediating existing contamination or ensuring that no exposure occurs. The CMS will initially screen available remediation technologies to determine whether they are applicable to site conditions and to the types of compounds that have been identified in groundwater. Once the initial screening has been completed, the CMS will then focus on the technical, environmental, human health, and institutional considerations of each alternative to determine which are most practical and feasible. Issues to be addressed include evaluations of the effectiveness and long-term usefulness of each alternative as well as its reliability and innate safety characteristics. Obviously, preferences will be given to those alternatives that both achieve maximum protection of human health and the environment and are capable of satisfying federal, state, and local ordinances.

When the CMS is complete, the facility will select the alternative(s) that best fits the conditions encountered at the site and will submit its recommendations and justifications to EPA for approval.

## **SCHEDULE FOR COMPLETION**

The time frame for completion of the RFI/CMS was a major concern during the 3008(h) negotiations. The study area is quite large and hydrogeologically complex. Agency budgetary constraints also figured prominently throughout the negotiation process. As the EPA representatives became more familiar with site-specific conditions and the wide areal extent of ongoing environmental investigations, they began to perceive the necessity of an extended schedule. Such a schedule was



further warranted by the low potential for human exposure in the off-site areas so that there was no need for immediate interim measures to protect human health.

Language negotiated for inclusion in two major provisions of the order will allow the facility to extend the schedule in certain instances. These provisions are Force Majeure and Funding. Under Force Majeure, the schedule can be extended for delays caused by any unforeseen circumstances. The actual circumstances and their status as a Force Majeure are subject to negotiation between EPA and the facility. The funding section provides that the schedule can be modified due to shortfalls in the agency's headquarters' environmental budget. Should conditions at other facilities become of greater priority, funds can be reallocated to mitigate immediate environmental threats. This shift in funds could result in an extension of the RFI/CMS schedule at the facility.

## **CONCLUSION**

The use of 3008(h) corrective action orders at federal facilities is currently undergoing a significant increase. These orders can present a large problem to facility managers and their budgets. However, if properly negotiated, a 3008(h) order can provide an orderly framework for a federal RCRA facility to address environmental problems in a coordinated fashion. When properly drafted, these orders will contain not only specific points that affect the facility in question, but overall legal and administrative procedures that can provide relief for the regulated facility in the event of budget cutbacks or unforeseen problems in implementing the order's requirements. Critical to the success of negotiating a 3008(h) order are the following factors:

- Experienced and technically competent negotiators
- Good understanding of facility's physical and regulatory environment
- Proactive compliance stance
- Support of headquarters or parent agency personnel
- Persistent and detailed order reworking and modification
- Understanding of regulator's mission and objective

The successful negotiation of a 3008(h) order, such as that negotiated by this facility, serves to provide a framework for complete RCRA compliance for corrective actions at a federal facility while avoiding potential future violations. Furthermore, with a signed 3008(h) order, federal facilities may avoid some state/local permit requirements for specific short-term activities being carried out to comply with the requirements of the order. In conclusion, the time and resources spent up front assuring that 3008(h) order requirements are reasonable and contribute to the facility's objective will be spent to assure ongoing RCRA compliance and remove barriers to finalizing Part B operating permits at federal facilities.

## **NOTES**

1. Davidson, G.M. and Grundler, c. 1990, "EPA's Federal Facility Hazardous Waste Compliance Program," *Federal Facilities Environmental Journal*, Vol. 1, No. 1, pp 55-67.

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