GOVERNMENT OF THE DISTRICT OF COLUMBIA

District Department of the Environment

MEMORANDUM

Subject: On-Site Permit Exemption for Site Remediation

From: Keith A. Anderson, Director 06/13/13

To: Paul Connor, Deputy Director
Environmental Services Administration
Hamid Karimi, Deputy Director
Natural Resources Administration
Brendan Shane, Deputy Director
Office of Policy and Sustainability
Kimberly Katzenbarger, General Counsel

This document describes how DDOE will implement and manage the "on-site permit exemption" described in the District of Columbia Brownfield Revitalization Amendment Act of 2000 ("District's Brownfields Law"; D.C. Official Code § 8-634.01) and section 121(e) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The recent amendments to the District's Brownfields Law borrowed extensively from CERCLA and one of the provisions of CERCLA that was copied into District law is the "on-site permit exemption."

Statement of Policy

If a person is performing a response action under the authority of D.C. Official Code § 8-634.01 or CERCLA, and the response action includes an activity that would require a permit issued by a District department or agency, then the person is not required to submit an application for the permit to the permitting authority. However, the person must prepare a work plan describing how the person intends to comply with the substantive requirements, but not the procedural requirements, of the permit.

Applicability of the On-Site Permit Exemption

Located in section 8-634.01(c) of the District's Brownfields Law, the language reads as follows:

(c) A federal[1], state, local, or District permit shall not be required for the portion of a response action conducted entirely onsite, if the response action is selected and carried out in compliance with this section.

This language is nearly identical to CERCLA and is intended to streamline the cleanup process. This permit exemption applies where:

1. A person is conducting a response action under the authority of section 8-634.01 of the District's Brownfields Law;
2. The response action involves an activity that would otherwise require a permit (such as installing a monitoring well); and
3. The activity is conducted entirely onsite.

This permit exemption applies to response actions performed by DDOE or responsible parties, provided the cleanup is carried out in a manner that is consistent with section 8-634.01. This statutory language authorizes the Mayor to respond to an actual or threatened release of hazardous substances because D.C. Official Code § 8-634.01(a) states that "Upon receipt of information of a threatened or actual release of a hazardous substance, the Mayor may [take actions 1-6]." Accordingly, the on-site permit exemption applies to any response action performed under the authority of, and consistent with, section 8-634.01. The on-site permit exemption is not limited to sites enrolled in the District's voluntary cleanup program because the voluntary program is established in section 8-633 – a different subchapter of the Brownfields Law from subchapter 8-634.

The applicability of the on-site permit exemption to cleanup of petroleum is a little more complex. Pure petroleum, and its refined products, are exempt from the federal definition of "hazardous substances" and therefore, the on-site permit exemption would not apply to cleanups of petroleum. However, used oil, waste petroleum, and hazardous substances mixed with petroleum will qualify as "hazardous substances" for the purposes of CERCLA and D.C. Official Code § 8-634.01. Therefore, cleanups of mixtures of petroleum and hazardous substances qualify for the on-site permit exemption provided the cleanup qualifies as an eligible site under D.C. Official Code § 8-634.01.

This permit exemption does not shield anyone from an enforcement action based on violations of Federal or District laws or regulations. The permit exemption simply removes the requirement to undergo the process of obtaining a permit. If DDOE has reason to believe that there is a violation of District law or regulations at the location of a site cleanup, then DDOE may pursue an enforcement action. The nature and extent of the violation(s) should be brought to the attention of the Remedial Project Manager ("RPM") prior to any enforcement action. In many instances, DDOE will already have an enforceable agreement against the violator, in which case it may be easier to correct the violation and impose a fine through the existing framework.

[1] This DDOE guidance does not address how federal agencies implement this requirement, or Section 121(e) of CERCLA, 42 U.S.C. § 9621(e).

Coordination with Other Programs

In most cases, the Environmental Services Administration (ESA) will have the lead for the cleanup, and ESA shall coordinate with the relevant programs or agencies responsible for issuing the permit. The RPM in ESA shall seek input and comments on the work plan (or other relevant documents describing how the person intends to comply with the substantive requirements of the permit) from the program or agency responsible for the permit. The coordination will most often involve the Natural Resources Administration and other cleanup programs within the ESA.

ESA shall implement the on-site permit exemption in a way that is similar to EPA's approach and EPA's relevant guidance ("Permits and Permit 'Equivalency' Processes for CERCLA On-Site Response Actions") is attached for reference. The guidance document states that application for and receipt of permits is not required for on-site[2] response actions taken under the Fund-financed or enforcement authorities of CERCLA. Similarly, the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 CFR §300.400(e)(1) states that "[n]o federal, state, or local permits are required for on-site response actions conducted pursuant to CERCLA sections 104, 106, 120, 121, or 122." EPA's guidance applies the permit exemption to response actions performed by the lead agency, response actions performed by a State (including the District), response actions performed by a potentially responsible party ("PRP") under an administrative order, and those performed by a PRP through a Consent Decree.

The coordination and review process should occur as early in the cleanup process as possible. The comment period will identify substantive permit requirements at an early stage of the cleanup process and minimize any disruptions to the cleanup. The review and comment process will typically focus on applicable or relevant and appropriate requirements ("ARARs") and any other substantive requirements of the permit program. In general, the RPM will provide a 30-day comment period to the DDOE or other District permitting program to identify the applicable substantive requirements of the permit.

At the onset of a project, the RPM will identify the appropriate branches within DDOE that may require substantive review. The RPM will contact the Branch Chief and request review of a deliverable. The Branch will have thirty (30) days to review the deliverable and submit comments to the RPM. Any comments must be provided in writing, and comments should be limited to *substantive requirements, not procedural requirements.* If no comments are received, then the RPM may move forward with the project as planned.

The RPM will try to resolve any issues informally, and may call a meeting with the appropriate staff. If the Branch Chief and the RPM are unable to reach a resolution of the issues contained in the comments, then the Branch Chief or RPM may raise the issue to the Associate Director level

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[2] CERCLA Compliance with Other Laws Manuals (1988, 1989. EPA interprets 'on-site' for permitting purposes to mean the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.

for resolution. However, in the interim, the RPM may continue upon his or her chosen direction. If a resolution cannot be reached at the Associate Director level, then the issue may be raised to the Deputy Director level, and the Director level (if necessary).

For any questions about this policy, please contact Paul Connor at (202) 481-3847, paul.connor@dc.gov, or Jared Piaggione at (202) 299-3346, jared.piaggione@dc.gov.

Attachment

cc: Steve Kelton
Collin Burrell
Jared Piaggione
Associate Directors, ESA
Branch Chiefs, ESA

 EPA web site
www.epa.gov/superfund/resources/remedy/pdf/93-55703-s.pdf

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

FEB 19 1992

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

OSWER Directive 9355.7-03

MEMORANDUM

SUBJECT: Permits and Permit "Equivalency" Processes for CERCLA On-site Response Actions

FROM: Henry L. Longest II, Director /s/
Office of Emergency and Remedial Response

TO: Director, Waste Management Division
Regions I, IV, V, VII, and VIII
Director, Emergency and Remedial Response Division
Region II
Director, Hazardous Waste Management Division
Region X

PURPOSE

The purpose of this directive is to clarify the Environmental Protection Agency (EPA) policy with respect to attaining permits for activities at CERCLA sites. CERCLA response actions are exempted by law from the requirement to obtain Federal, State or local permits related to any activities conducted completely on-site. It is our policy to assure all activities conducted on sites are protective of human health and the environment. It is not Agency policy to allow surrogate or permit equivalency procedures to impact the progress or cost of CERCLA site remediation in any respect.

BACKGROUND

In implementing remedial actions, EPA has consistently taken the position that the acquisition of permits is not required for on-site remedial actions. However, this does not remove the requirement to meet (or waive) the substantive provisions of permitting regulations that are applicable or relevant and appropriate requirements (ARARs). (For further discussion on ARARs in general, see the attachment to this directive. For definitions of "substantive" and "administrative," see 55 FR 8756-57 and the CERCLA Compliance with Other Laws Manual, Part I, pages 1-11-12.) The proposed and final 1982 National Oil and

Hazardous Substances Pollution Contingency Plan (NCP) made no mention of the permit issue. However, EPA addressed the issue in a memorandum entitled "CERCLA Compliance with Other Environmental Statutes" which was attached as an appendix to the proposed 1985 NCP (50 FR 5928, February 12, 1985). The memorandum stated:

> "CERCLA procedural and administrative requirements will be modified to provide safeguards similar to those provided under other laws. Application for and receipt of permits is not required for on-site response actions taken under the Fund-financed or enforcement authorities of CERCLA."

EPA determined in the final rule [1985 NCP section 300.68(a)(3)] that "Federal, State, and local permits are not required for Fund-financed action or remedial actions taken pursuant to Federal action under section 106 of CERCLA." The 1986 amendments to CERCLA codified section 300.68(a)(3) of the 1985 NCP with a statutory provision, section 121(e)(1). CERCLA section 121(e)(1) provides that no Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely <u>on-site</u>, where such remedial action is selected and carried out in compliance with section 121.

The 1990 NCP [section 300.400(e)(1)] implements this permit exemption for "on-site" actions, defining "on-site" as "the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action." The preamble to the NCP (at 55 FR 8689, March 8, 1990) explains that "areal" refers both to the surface areas and the air above the site. EPA policy further defines "on-site" to include the soil and the groundwater plume that are to be remediated. On-site remedial actions may involve limited areas of noncontaminated land; for instance, an on-site treatment plant may need to be located above the plume or simply outside of the waste area itself.

As provided in NCP section 300.400(e)(1), response actions covered by CERCLA section.121(e)(1) include those conducted pursuant to CERCLA sections 104, 106, 120, 121, and 122. Thus response actions conducted by a lead agency, or by a potentially responsible party or other person under an order or consent decree with EPA, are covered under the ambit of CERCLA section 121(e)(1). Response actions by a lead agency include those response actions implemented by EPA, the Coast Guard, or another Federal agency. They also include response actions implemented by a State or political subdivision operating pursuant to a contract or cooperative agreement executed pursuant to CERCLA

section 104(d)(1), under which EPA selects (or must approve) the remedy. Hereafter, the discussion concerning lead agencies should be understood to include, where appropriate, potentially responsible parties or other persons acting under CERCLA section 106.

DISCUSSION

While permits may not be required for CERCLA on-site response actions, some permitting authorities have attempted to require lead agency participation in a process that is "equivalent" to a permitting process in order to satisfy the authority's concern that there will be compliance with ARARs. In effect, they argue that participation in a permit-like process is necessary to identify the substantive provisions of permitting regulations.

Under a permit "equivalency" process, the lead agency is asked to participate in a process that an applicant would pursue to secure a permit, except that most fees and public hearing requirements are normally waived. The permit "equivalency" process itself has caused delay and cost increases in some response actions. The process holds the potential for further delays and cost increases due to often lengthy review of documents submitted to the permitting authority as if a permit were actually required, and due to the attachment of non-ARAR conditions by the permitting authority to the permit "equivalency." It also suggests, incorrectly, that the approval of a permitting authority is required before a CERCLA action may proceed or before an ARARs determination may be made with respect to the permitting regulations.

Unfortunately, some lead agencies have acquiesced to participation in such "equivalency" processes. Such acquiescence has been rationalized by the fact that it is particularly difficult to determine compliance with the substantive requirements of permitting programs, where levels are set on a site-specific basis, e.g., such as based upon the equipment provided by the remedial action contractor, or as would normally be set in a permit or in the Record of Decision (ROD) at Superfund sites. In some cases, lead agencies have agreed to participate in a permit "equivalency" process, although both the lead agency and the permitting authority have acknowledged the applicability of CERCLA section 121(e)(1).

EPA has consistently rejected the notion that CERCLA response actions are subject to such processes (see Background discussion above). The NCP, while acknowledging the need for coordination and consultation with other agencies, notes (at 55

FR 8756-7, March 8, 1990) that CERCLA section 121(e))(1) and other CERCLA provisions:

> "...reflect Congress' judgment that CERCLA actions should not be delayed by time-consuming and duplicative administrative requirements such as permitting, although remedies should achieve the substantive standards of applicable or relevant and appropriate laws... EPA's approach is wholly consistent with the overall goal of the Superfund program, to achieve expeditious cleanups, and reflects an understanding of the uniqueness of the CERCLA program, which impacts more than one medium (and thus overlaps with a number of other regulatory and statutory programs). Accordingly, it would be inappropriate to subject CERCLA response actions to the multitude of administrative requirements of other Federal and State offices and agencies.
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> At the same time, EPA recognizes the benefits of consultation, reporting, etc. To some degree, these functions are accomplished through the State involvement and public participation requirements in the NCP. In addition, EPA has already strongly recommended that its Regional offices (and States when they are the lead agency) establish procedures, protocols or memoranda of understanding that, while not recreating the administrative and procedural aspects of a permit, will ensure early and continuous consultation and coordination with other EPA programs and other agencies. CERCLA Compliance with Other Laws Manual, [Part I], OSWER Directive No. 9234.1-01 (August 8, 1988). In working with States, EPA generally will coordinate and consult with the State Superfund office. That State Superfund office should distribute to or obtain necessary information from other State offices interested in activities at Superfund sites.
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> The basis for this recommendation is a recognition that such coordination and consultation is often useful to determine how substantive requirements implemented under other EPA programs and by other agencies should be applied to a Superfund action. For example, although the Superfund office will make the final decision on using ARARs, a water office may provide information helpful in determining ARARs when a surface water discharge is part of the Superfund remedy.
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> EPA also recognizes the importance of providing information to other programs and agencies that maintain environmental data bases. This is particularly true where the remedy includes releases of substances into the air or water and

the extent of such releases is integral for air and water programs to maintain accurate information on ambient air and surface water quality in order to set statutorily-specified standards."

IMPLEMENTATION

There are several possible ways to alleviate the delays and cost increases caused by a permit "equivalency" process. First, lead agencies can refuse to participate in this process, based on the fact that actual permits are not required under CERCLA section 121(e)(1), and procedural requirements are not ARARs under CERCLA section 121(d)(2) and the NCP.

Alternatively, and preferably, the lead agency could actively consult on a regular and frequent basis with the permitting authority, in situations where the lead agency deems it helpful to hasten ARARs identification. To facilitate such consultation, the lead agency should provide copies of the submittals of the design contractor and remedial action contractor in a timely manner to the permitting authority whose ARARs are the subject of the submittals. The NCP preamble explains (at 55 FR 8757, March 8, 1990) that if EPA is the lead agency, the coordination and consultation with State permitting authorities will generally be conducted through a single State office. Support Agency Cooperative Agreements, Superfund Memoranda of Agreement, or other protocols may be appropriate vehicles to establish specific time limits for the permitting authority to provide technical assistance in the evaluation of site-specific ARARs.

However, any such agreement should be based on the understanding that a procedural "permit" or permit equivalency approval is not required, but that the lead agency is participating in the process in order to facilitate coordination and consultation with the permitting authority. In some instances, because of the need to complete a response action and to avoid delays and cost increases, the lead agency may decide to terminate the consultation process. Nevertheless, this process should result in the lead agency's designing the remedy to meet all of the substantive requirements of the permitting regulations that are ARARs.

NOTE: The above policies and procedures are intended solely as guidance to EPA employees. They do not constitute rulemaking by the Agency, and may not be relied on to create a right or benefit, substantive or procedural, enforceable at law or in equity by any other person. EPA may take action that is at variance with the policies and procedures in this directive.

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Discussion on ARARs

CERCLA section 121(d)(2)(A) and NCP section 300.430(f)(1)(i)(A) require EPA to select remedies that meet or waive certain Federal or State ARARs. ARARS are defined in the NCP at section 300.5 under the rubrics of "applicable requirements" and "relevant and appropriate requirements." For guidance on ARARs identification, see NCP sections 300.400(g); 300.430(e)(2); 300.515(d)(1) and (3) and (h)(2); CERCLA Compliance with Other Laws Manual, Parts I and II, OSWER Directives No. 9234.1-01 and -02 (August 8, 1988 and August 1989). The NCP does not require the concurrence of States or other Federal agencies (or other EPA program offices) on the Superfund Program's determination as to which standards are ARARs, although consultation with the appropriate State or Federal agency is required.

NCP section 300.435(b)(2) provides that once ARARs are selected, it becomes the responsibility of the lead agency during the Remedial Design (RD) and Remedial Action (RA) to ensure that all Federal and State ARARs identified in the ROD are met. In accordance with CERCLA section 121(d)(4) and NCP section 300.430(f)(1)(ii)(C), EPA may select a remedial action that does not meet an ARAR under any one of 6 waiver circumstances. If waivers from any ARARs are involved, the lead agency is responsible for ensuring that the conditions of the waivers are met. Pursuant to CERCLA section 121(f)(1), States must be provided an opportunity to comment on proposed ARARs waivers and may challenge ARARs waivers, as provided in CERCLA section 121(f)(2)and(3).

Remedial actions must comply with those requirements that are determined to be ARARs at the time of ROD signature. NCP section 300.430(f)(1)(ii)(B), in effect, "freezes" ARARs when the ROD is signed unless compliance with newly promulgated or modified requirements is necessary to ensure the protectiveness of the remedy. If ARARs were not frozen at this point, promulgation of a new or modified requirement could result in a reconsideration of the remedy and a restart of the lengthy design process, even if protectiveness were not compromised. This lack of certainty would adversely affect the operation of the CERCLA program, would be inconsistent with Congress' mandate to expeditiously clean up sites, and could adversely affect negotiations with potentially responsible parties.

As a general policy, EPA considers newly-promulgated requirements or other information as part of the review conducted

at least every five years, under CERCLA section 121(c), for sites where hazardous substances remain on-site. The review requires EPA to assure that human health and the environment are being protected by the remedial action. Hence, the remedy should be examined in light of any new standards that would be applicable or relevant and appropriate to the circumstances at the site and in light of any other pertinent new information to ensure that the remedy is still protective. However, if such information comes to light at times other than at the five-year reviews, EPA will consider the necessity of acting to modify the remedy at such times.

After the ROD is signed, new information may be generated during the RD/RA process that could affect the remedy selected in the ROD. Such new information may result in "nonsignificant," "significant," or "fundamental" changes to the remedy. Nonsignificant changes are minor changes that usually arise during design and construction, when modifications are made to the functional specifications of the remedy to optimize performance and minimize cost. This may result in minor changes to the type and/or cost of materials, equipment, facilities, services and supplies used to implement the remedy. The lead agency need not prepare an explanation of significant differences for minor changes. These changes should be documented in the post-ROD file, such as the RD/RA case file. Significant changes to a remedy are generally incremental changes to a component of a remedy that do not fundamentally alter the overall remedial approach. The lead agency would need to publish in a local newspaper an explanation of significant differences announcing such changes. On the other hand, if the action, decree, or settlement fundamentally alters the ROD in such manner that the proposed action, with respect to scope, performance, or cost, is no longer reflective of the selected remedy in the ROD, the lead agency will issue a notice of availability and brief description of the proposed amendment to the ROD in a local newspaper in order to facilitate public comment. Proposed ROD amendments should identify new requirements that are ARARs and whether they will be met or waived.

For more guidance on responding to post-ROD information, see "Guide to Addressing Pre-ROD and Post-ROD Changes," Publication No. 9355.3-02FS-4 (April 1991), and "ARARs Q's & A's: General Policy, RCRA, CWA, SDWA, Post-ROD information, and Contingent Waivers," Publication No. 9234.2-01/FS-A (June 1991), Questions 14-16.