



The Imminent and Substantial Endangerment Provision of Section 7003 of RCRA

Office of Site Remediation Enforcement

Quick Reference Fact Sheet

Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6973, provides EPA with a broad and effective enforcement tool that can be used to abate imminent and substantial endangerments to health or the environment. Designed for use by EPA staff, this fact sheet helps clarify the meaning of "imminent and substantial endangerment" and describes the usefulness of Section 7003.

Introduction

RCRA § 7003 allows EPA to address situations where the handling, storage, treatment, transportation, or disposal of any solid or hazardous waste may present an imminent and substantial endangerment to health or the environment. In these situations, EPA may initiate judicial action or issue an administrative order to any person who has contributed or is contributing to such handling, storage, treatment, transportation, or disposal to require the person to refrain from those activities or to take any necessary action.

Section 7003(a) is very similar to the imminent and substantial endangerment provision contained in Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9606(a). In addition, it allows EPA to require some actions that can also be required under the corrective action provision set forth in Section 3008(h) of RCRA, 42 U.S.C. § 6928(h). However, RCRA § 7003 provides EPA with

a very valuable enforcement tool by allowing EPA to address several types of situations that are beyond the scope of CERCLA § 106(a) and RCRA § 3008(h).

The Meaning of "Imminent and Substantial Endangerment"

Despite the dramatic sound of the term "imminent and substantial endangerment," it is not very difficult to meet the endangerment standard set forth in RCRA § 7003. The "imminent and substantial endangerment" language and standard are very similar to the language and standard contained in CERCLA § 106(a) and RCRA § 7002, 42 U.S.C. § 6972, the RCRA citizen suit provision which allows any person to commence a civil action to seek abatement of an imminent and substantial endangerment to health or the environment. Thus far, the courts have not distinguished between the endangerment standards of these three provisions. The following principles have emerged from courts interpret-

ing RCRA and CERCLA's imminent and substantial endangerment provisions:

- **An "endangerment" is an actual, threatened, or potential harm to health or the environment.[1]** As underscored by Congress' use of the words "may present" in the endangerment standard of Section 7003, neither certainty nor proof of actual harm is required.[2] Moreover, neither a release nor threatened release is required.[3] Endangerment to the environment does not require a risk to living organisms. Thus, a risk to groundwater in a populated area is sufficient even if the conditions may not present an endangerment to humans or other life forms.[4]
- **An endangerment can be "imminent" if the present conditions indicate that there may be a future risk to health or the environment,[5] even though the harm may not be realized for years.[6]** It is not necessary for the harm to be immediate.[7]
- **An endangerment can be "substantial" if there is reasonable cause for concern that health or the environment may be at risk.[8]** It is not necessary that the risk be quantified.[9]

Factors to consider when determining if conditions may present an imminent and substantial endangerment under RCRA § 7003 include (1) the levels of contaminants in various media, (2) the existence of a connection between the solid or hazardous waste and air, soil, groundwater, or surface water, (3) the pathway of exposure from the solid or hazardous waste to the population at risk, (4) the sensitivity of the population, (5) bioaccumulation in living organisms, and (6) visual signs of stress on vegetation.[10] It is important to note, however, that in any given case, one or two factors may be so predominant as to be determinative of the issue.[11]

The following are some examples of situations where courts have determined that imminent and substantial endangerments have existed under RCRA:

- At a shooting range where lead from lead shot had accumulated in the tissues of nearby waterfowl and shellfish.[12]
- At a facility where oily waste containing hazardous constituents had leaked from tanks into surrounding soils.[13] EPA had determined that there was a potential for off-site migration of the contaminants through a drainage ditch leading toward a nearby river.[14] EPA also documented the death of several migratory birds and introduced evidence from the U.S. Fish and Wildlife Service indicating that there was a continuing threat to migratory birds.[15]

- At a municipal landfill that had leaked at least 10% of its leachate containing low levels of lead into an adjacent wetland.[16] Lead levels in test wells surrounding the landfill were generally below the maximum contaminant levels (MCLs) for drinking water,[17] and no actual harm was shown to the wetland.[18] However, an expert testified that cattails in the wetland would not show actual harm until they had been exposed to contamination for an extended period of time.[19]
- At a shopping center where dry cleaning solvents discharged from dry cleaning facilities had contaminated groundwater in a populated area.[20] Contaminant levels in the migrating plume exceeded MCLs.[21] Although some area wells had been closed at least in part because of the contaminated plume, the court found that the conditions may have presented an imminent and substantial endangerment to the environment, but not necessarily to human health.[22]

The Usefulness of Section 7003

Section 7003 provides broad enforcement authority that can be used against a variety of parties to address endangerments resulting from various types of materials and to require a wide variety of abatement actions. Section 7003 is especially valuable because it allows EPA to address certain situations which cannot be addressed under either CERCLA § 106(a) or RCRA § 3008(h).

Two examples of the general usefulness of Section 7003 are the following:

- **Under Section 7003, "any person" includes any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility.** EPA can therefore initiate actions under Section 7003 against parties including those falling into any of the four categories of potentially responsible parties (PRPs) under CERCLA.
- **Section 7003 allows EPA to require the respondent or defendant to cease any activities contributing to the endangerment and/or to take any necessary action.** Possible abatement actions include investigations and studies, interim measures, comprehensive corrective action, controls on future operations, and discontinuance of operations.

Under CERCLA § 106(a), EPA may initiate a judicial action or issue an administrative order to a PRP when there may be an imminent and substantial endangerment because of an actual or threatened release of a

"hazardous substance." Advantages of RCRA § 7003 over CERCLA § 106(a) include the following:

- **Section 7003 can be used to issue administrative orders to any federal department or agency in an expeditious manner.** Section 6001(a) of RCRA, 42 U.S.C. § 6961(a), contains an express waiver of sovereign immunity that allows administrative orders and civil and administrative penalties and fines to be issued and assessed against any federal department or agency. Section 6001(b) of RCRA, 42 U.S.C. § 6961(b), expressly grants the Administrator the authority to issue an administrative order to another federal department or agency pursuant to RCRA's enforcement authorities, including Section 7003. Although RCRA § 6001(b) provides that an administrative order issued to a federal department or agency does not become final until the department or agency has had the opportunity to confer with the Administrator, concurrence from the Department of Justice (DOJ) is not required for orders issued under RCRA § 7003. In contrast, Executive Order 12580 on Superfund Implementation (January 23, 1987) requires EPA to obtain DOJ concurrence before issuing an order to a federal department or agency under CERCLA § 106(a). RCRA § 7003 therefore allows for more expeditious issuance of orders to federal departments and agencies.
- **Section 7003 can be used to address endangerments caused by waste which is "solid waste" as defined in Section 1004(27) of RCRA, 42 U.S.C. § 6903(27), but which is not "hazardous waste" as defined in Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), or in the regulations promulgated pursuant to Section 3001 of RCRA, 42 U.S.C. § 6921.** The definition of "hazardous substance" in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), includes "hazardous waste" having characteristics identified under or listed pursuant to Section 3001 of RCRA. CERCLA's definition of "hazardous substance" does not include all materials that qualify as "solid waste" under RCRA § 1004(27), although it does encompass some materials, such as radionuclides, which are not "solid waste" and therefore cannot be addressed under RCRA § 7003. Nevertheless, RCRA § 7003 can be used to address a significant category of materials, "solid waste" under Section 1004(27), that cannot be addressed under CERCLA § 106(a).
- **Section 7003 can be used to address endangerments caused by "hazardous waste" that meets the broad definition of that term**

under Section 1004(5) of RCRA, but which does not meet the more narrow definitions of "hazardous waste" promulgated in 40 C.F.R. Part 261 pursuant to RCRA § 3001. As noted above, CERCLA's definition of "hazardous substance" includes "hazardous waste" having characteristics identified under or listed pursuant to RCRA § 3001. The CERCLA definition of "hazardous substance" does not include all materials that qualify as "hazardous waste" as defined in RCRA § 1004(5). Section 7003 can therefore be used to address some hazardous wastes that are beyond the scope of CERCLA § 106(a).

- **Section 7003 can be used to address endangerments caused by petroleum.** Petroleum is excluded from the definition of "hazardous substance" in CERCLA § 101(14). Petroleum is not excluded from the definitions of "solid waste" under RCRA § 1004(27) or "hazardous waste" under RCRA § 1004(5). RCRA § 7003 can therefore be used to address a significant category of materials — petroleum and petroleum products — that cannot be addressed under CERCLA § 106(a).

RCRA § 3008(h) allows EPA to require corrective action to address the release of hazardous waste or hazardous constituents at any treatment, storage, or disposal facility authorized to operate under interim status pursuant to Section 3005(e) of RCRA, 42 U.S.C. § 6925(e). EPA interprets the term "authorized to operate" to include facilities currently operating under interim status, as well as those that lost interim status or should have obtained interim status but failed to do so. RCRA § 3008(h) does not require a finding of imminent and substantial endangerment. Nevertheless, advantages of RCRA § 7003 over RCRA § 3008(h) include the following:

- **Section 7003 can be used to address endangerments caused by "solid waste" that meets the definition of that term under Section 1004(27) of RCRA, but which does not meet the definition of "hazardous waste" under RCRA § 1004(27).** At least one court has held that RCRA § 3008(h) applies to the release of hazardous constituents listed by EPA in Appendix VIII of 40 C.F.R. Part 261 and not merely to the release of "hazardous waste" as stated in RCRA § 3008(h).[23] Nevertheless, RCRA § 3008(h) does not appear to apply to the release of merely "solid waste" that is not a hazardous waste or a hazardous constituent. RCRA § 7003 can therefore be used to address a significant category of materials, "solid waste" under Section 1004(27), that cannot be addressed under RCRA § 3008(h).

- **Section 7003 can be used to address spills of solid or hazardous waste by generators at facilities that are not authorized (and not required to be authorized) for interim status under RCRA § 3008(h).** RCRA § 3008(h) applies only to releases from treatment, storage, or disposal facilities that have, had, or should have had interim status. Section 7003 can therefore be used to address releases and other endangerments at a large category of facilities that are beyond the scope of Section 3008(h): facilities at which solid or hazardous waste is generated but which neither have, had, nor were required to have, interim status.

- [1] See, e.g., Dague v. City of Burlington, 935 F.2d 1343, 1356 (2d Cir. 1991).
- [2] Id.
- [3] United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373, 1382 (8th Cir. 1989).
- [4] See, e.g., Lincoln Properties, Ltd. v. Higgins, 23 Env'tl. L. Rep. (Env'tl. L. Inst.) 20665, 20671-672 (E.D. Cal. 1993).
- [5] See, e.g., Dague, 935 F.2d at 1356.
- [6] See, e.g., United States v. Conservation Chemical Co., 619 F. Supp. 162, 194 (W.D. Mo. 1985).
- [7] Dague, 935 F.2d at 1356.
- [8] See, e.g., Conservation Chemical Co., 619 F. Supp. at 194.
- [9] Id.
- [10] See, e.g., Dague v. City of Burlington, 732 F. Supp. 458 (D.Vt. 1989).
- [11] Conservation Chemical Co., 619 F. Supp. at 194.
- [12] Connecticut Coastal Fishermen's Association v. Remington Arms Co., Inc., 989 F.2d 1305, 1317 (2d Cir. 1993).
- [13] United States v. Valentine, 856 F. Supp. 621, 625 (D. Wyo. 1994).

- [14] Id. at 624.
- [15] Id. at 624-625.
- [16] Dague, 935 F.2d at 1356.
- [17] Dague, 732 F. Supp. at 463.
- [18] Id. at 469.
- [19] Id. at 468.
- [20] Lincoln Properties, 23 Env'tl. L. Rep. at 20671-672.
- [21] Id. at 20671.
- [22] Id. at 20672.
- [23] United States v. Clow Water Systems, 701 F. Supp. 1345, 1356 (S.D. Ohio 1988).

For Further Information

The Office of Site Remediation Enforcement, in conjunction with the Office of Regulatory Enforcement, is currently developing a guidance document to supersede EPA's 1984 guidance on the use and issuance of administrative orders under RCRA § 7003. The 1984 guidance will remain in effect until the new guidance is issued.

If you have questions about this fact sheet or the project to develop new Section 7003 guidance, please contact Laura Bulatao in EPA's Office of Site Remediation Enforcement at (202) 564-6028.