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MEMORANDUM

SUBJECT: Guidance on Administrative Records for RCRA § 3008(h) Actions

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Attached is guidance on compiling administrative records for RCRA § 3008(h) corrective action orders. The 40 C.F.R. Part 24 hearing procedures for § 3008(h) unilateral orders make compiling good administrative records key to successfully prosecuting these cases. As we said when this guidance was issued in draft for your comment, however, many of the underlying concepts for compiling records are not limited in application to § 3008(h) administrative records. This guidance can, therefore, assist in the preparation of records compiled under other authorities.

We would like to thank those of you who commented and offered suggestions on the draft. We believe we addressed them all. In addition, we have modified the guidance to answer many of the questions that are being asked at the workshop on § 3008(h) administrative records and hearing procedures that is traveling to all the Regions. So far, this workshop has been given in Regions II, III, IV, IX and VIII and will soon be given in Regions V and X and Headquarters.

If you have comments or questions concerning this guidance or the workshop, please contact Rick Colbert, OWPE, at (FTS) 475-9847.

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Guidance on Administrative Records for RCRA § 3008(h) Actions

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Table of Contents

Appendix A: Federal Register Notice for 40 C.F.R. Part 24 Final Rule

Appendix B: Model Public Notice of Record Availability

I. Scope of Guidance

This guidance applies to administrative records compiled for administrative orders for corrective action issued pursuant to § 3008(h) of RCRA. Specifically, it covers administrative records for unilateral § 3008(h) orders subject to 40 C.F.R. Part 24 hearing procedures (reprinted in Appendix A) and to § 3008(h) consent orders. This guidance does not address administrative records for unilateral § 3008(h) orders subject to 40 C.F.R. Part 22 hearing procedures.[1]

This guidance focuses on the responsibilities of RCRA enforcement personnel. The extent of those responsibilities depends on whether an administrative record is for a consent order or for a unilateral order (subject to Part 24). In accordance with Part 24 requirements for unilateral orders, enforcement personnel must compile an initial administrative record and deliver it to the Regional hearing clerk by the date the unilateral order is served on the respondent. During the Part 24 process the hearing clerk is responsible for maintaining the record.[2]

Consent orders are not subject to the Part 24 process. Administrative records for these orders are not, therefore, required to be delivered to and maintained by the hearing clerk.

The administrative record can be a component in a public involvement strategy for a facility subject to a § 3008(h) order.

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[1]/ 40 C.F.R. Part 22 governs administrative hearings for unilateral orders issued under RCRA § 3008(h) authority if the orders contain RCRA § 3008(a) claims, include a suspension or revocation of authorization to operate under RCRA § 3005(e) or seek penalties under RCRA § 3008(h) for non-compliance with a § 3008(h) order. 40 C.F.R. Part 24 governs unilateral orders (called "initial orders" in Part 24) not subject to Part 22. (40 C.F.R. § 24.01.)

[2]/ 40 C.F.R. § 24.03 requires the EPA office issuing a unilateral § 3008(h) order to deliver the order and administrative record to the "Clerk designated by the Regional Administrator." This will generally, if not always, be the Regional hearing clerk. The hearing clerk is responsible for maintaining the record and docket for the Part 24 proceeding. In some Regions, it may be extremely difficult or impossible for the hearing clerk physically to receive, hold and maintain the record and the clerk may require the assistance of the office issuing the order in fulfilling these duties under Part 24. Therefore, before issuing an order, Regional enforcement personnel should make arrangements with the hearing clerk for the delivery and maintenance of the record.

This guidance includes some discussion of RCRA public involvement requirements and strategies. For more information on public involvement, this guidance should be read in conjunction with "Guidance for Public Involvement in RCRA Section 3008(h) Actions," OSWER Directive No. 9901.3, May 5, 1987, and "Guidance on Public Involvement in the RCRA Permitting Program," OSWER Directive No. 9500.00-1A, January 1986.

II. Purposes of the Administrative Record

- Fulfill Part 24 hearing requirements
- Form basis of judicial review
- Facilitate public participation
- Assist oversight
- Improve decisionmaking and quality of orders

A. Part 24 Hearing Requirements for Unilateral Orders and Judicial Review

An administrative record is the compilation of information upon which an administrative decision is based. In the context of Part 24 hearings, the administrative record is the basis of EPA's adjudication of an owner/operator's objection to the issuance of a § 3008(h) order. The process for development of the record under Part 24, however, is different from that for other administrative adjudications in which RCRA enforcement personnel are often involved, namely 40 C.F.R. Part 22 hearings for RCRA § 3008(a) actions.

Part 22 hearings follow a formal adversarial model. Each party to the proceeding attempts to present only that information supportive of its position and only at that time when it is most appropriate for its case. The administrative records for these decisions are developed as each party, chiefly during the hearing, submits documents and testimony to the presiding officer. The administrative hearing procedures found in Part 24 for RCRA § 3008(h) cases depart from this process to some extent. These differences have important implications to RCRA enforcement personnel preparing the documentation for a Part 24 hearing.

Part 24 creates streamlined procedures for adjudicating RCRA § 3008(h) order disputes. These procedures allow for less discovery and fewer opportunities to introduce information after a unilateral order is issued than is the norm for Part 22 hearings. In light of this, Part 24 requires EPA to compile, at the beginning of the administrative proceedings, an administrative record on which it bases its initial order and to include in the record not only documents supporting issuance of the order, but all relevant documents (excluding privileged information) considered by EPA in developing and issuing the order. This might include information that does not always support EPA's conclusions and remedial decisions. These

administrative record requirements give respondents an early opportunity to understand the basis for issuance of the order and EPA's theory of the case.

By the date the unilateral order is issued, the record is prepared by EPA enforcement personnel, including Regional counsel, and submitted to the Regional hearing clerk. This initial record, now maintained by the clerk, grows as parties make additional submissions during the hearing process. Especially for EPA, however, opportunities for additional submissions are limited or subject to the presiding officer's discretion. Since the record is the basis of the presiding officer's recommendation and the Regional Administrator's decision to accept, modify or withdraw the unilateral order, the streamlining achieved by Part 24 forces EPA to ensure that the administrative record be as complete as possible from the start.

Another feature of the Part 24 procedures has similar implications. Part 24 does not give parties the right to present and examine witnesses at a hearing. This means that EPA cannot expect or plan to supplement or fill in gaps in the record by presenting witnesses. Therefore, testimony that EPA believes is necessary to its case should instead be in the form of a written statement or memorandum included in the record submitted to the hearing clerk when the unilateral order is issued.

Under these circumstances, those compiling the initial record should act as if this is the first and last opportunity for EPA to submit documents and information into the record. Enforcement program personnel should, therefore, seek out the cooperation and assistance of Regional counsel in compiling the record to ensure that it will support issuance of the unilateral order and is otherwise complete.

Part 24 does not address judicial appeals of § 3008(h) decisions. The administrative record developed for a Part 24 hearing, however, will be the basis of judicial review of a Part 24 decision. If the record is poor or incomplete, the court will either overturn the decision as arbitrary and capricious or, <u>at best</u>, hold a trial and reconsider the decision itself. At trial the court could require discovery of and live testimony from EPA personnel and other supplementation of the record. In all cases, an inadequate record will cause delay and wasted resources.

The above discussion concerns records for unilateral orders. It can never be assumed, however, that settlement negotiations will always be successful. An anticipated consent agreement may, in fact, become a unilateral order. As a practical matter, therefore, every order to be issued under § 3008(h) should be assumed to be a potential unilateral order requiring a record satisfying Part 24. If enforcement personnel want to be "ready to go" with a unilateral order as soon it is clear that

negotiations are unsuccessful, the record also has to be "ready to go." The comments and issues raised during negotiations by a facility and EPA responses to them should be memorialized for the record.

B. Public Participation, Oversight, Improved Decisionmaking and Quality Orders

The administrative record serves other purposes besides satisfying Part 24 requirements for unilateral orders. These other objectives are relevant to both unilateral and consent orders.

As discussed in the "Guidance for Public Involvement in RCRA Section 3008(h) Actions," EPA is committed to providing meaningful opportunity to the public to be informed of and participate in decisions that affect them and their communities. Since the administrative record is the basis for corrective action decisions, it can be a tool in fulfilling EPA public involvement objectives. It should also be noted that, regardless of efforts by EPA to integrate administrative record and public involvement activities, most documents in the administrative record are, in any case, available to the public through Freedom of Information Act (FOIA) requests. EPA's compiling and making publicly available an administrative record may save EPA's and the public's time and resources in making and processing FOIA requests.

One of the most important guides for determining the quality of § 3008(h) orders is the administrative record. A review of the order and record answers questions about the enforceability of, evidentiary support for and judgment exercised in drafting and issuing an order. These concerns are shared, in varying degrees, by EPA Headquarters staff, the public at large and respondents. This should also, therefore, be a concern of Regional personnel in their day-to-day activities. By emphasizing the importance of compiling a good administrative record, Regions can ensure good decisionmaking.

III. Contents of the Record

A. General

The administrative record prepared by enforcement staff for § 3008(h) corrective action orders supports the order's findings of fact, determinations of law and ordered relief and must contain all relevant non-privileged documents and oral information (which has been reduced to writing) considered by EPA in the process of developing and issuing the order, regardless of whether the documents support the order.

Just as the order itself must address the elements of a § 3008(h) action:

- o EPA jurisdiction (issuance by a delegated authority)
- o a release into the environment
- o of hazardous wastes or hazardous constituents
- o from an interim status facility owned or operated by the respondent
- o requiring corrective measures to protect human health or the environment,

the administrative record must provide factual support for statements and provisions in the order. For example, jurisdiction could be supported by copies of delegation orders; releases by sampling data, inspection reports where evidence of spills is identified, or statements made by respondents in correspondence, submissions or notifications to EPA; interim status by notifications, permit applications or certifications required by § 3005(e) of RCRA, statements by respondents contained in those or other submissions or correspondence.[3] Without this support, orders issued unilaterally may be modified, withdrawn or vacated by the Regional Administrator or a court. Although consent orders are less likely to be challenged, disputes concerning interpretation of orders could, in some cases, be more readily resolved (and perhaps avoided) by a complete record.

Determining what documents are needed to support an order involves judgment and discretion. For example, if an aspect of an order is likely to be contested by a respondent, more supporting documentation may be needed in the record in that area. These documents may, in fact, raise positions rejected by EPA. When they, however, are read in the context of other documents in the record that give reasons for rejecting these positions and accepting EPA's position, they may lend support and credibility to the order. Whatever the specific reason may be for including in the record a supporting document, a fundamental

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[3]/ If a respondent failed to satisfy the submission requirements of § 3005(e)(1), the record will need to show that the respondent should have had interim status. If statements by the respondent are insufficient to substantiate this allegation, the record may need to include deeds, contracts, certifications from a secretary of state concerning the respondent's corporate identity, reports showing that respondent treated, stored or disposed of hazardous wastes when it should have had a permit or interim status, etc.

factor in making that determination is that EPA may have limited opportunity after an order is issued to make additional submissions to the record. As previously discussed in II. Purposes of the Administrative Record, this factor encourages making the record complete from the beginning.

In addition to documents that support the order, the record must also include all non-privileged documents and oral information (which has been reduced to writing) considered by EPA in developing and issuing an order. Under Part 24, documents considered by EPA are documents that were relied upon or comments which EPA solicited and received from respondents or the public to proposed EPA decisions or actions relevant to the order.

The record prepared by enforcement personnel for RCRA § 3008(h) cases is not supposed to be one-sided, reflecting only EPA's point of view. As already discussed, choosing to include opposing positions in the record can lend support to the order. While making that choice in the context of determining what will or will not support the order involves discretion and judgment, comments solicited and received by EPA to decisions relevant to the order must be included, regardless of whether they include information or opinions that support the position taken by EPA in the order. It is recommended that an EPA response accompany them. (Unsolicited comments received by EPA are not required to be included in the record, but if they are significant, it is recommended that they be included, along with an EPA response, since they are likely to be raised at the Part 24 hearing.)

Although a respondent has the opportunity to add information to the record under the Part 24 hearing procedures, those procedures, as discussed previously, require and rely on EPA's effort to include in the initial record all relevant information considered (relied upon) by the Agency in issuing the order. Since it cannot always be determined precisely whether specific information was relied upon, there should be a preference for including relevant documents in the record when compiling the record. Questions concerning inclusions in the record should be referred to Regional counsel.

B. Document Sources

Documents are writings, drawings, graphs, charts, photographs, and data compilations from which information can be obtained. Physical samples are not documents. Computer disks or tapes are not documents (and are not part of the record), but records containing information saved on disks or tapes and printouts from disks or tapes are documents.

Various documents may contain relevant information that should be looked to for inclusion in the administrative record. These documents may typically be, but are not limited to:

- o EPA Investigative Records
  - Inspection reports
  - Sampling and analytical data and related chain of custody and quality control/quality assurance documentation (discussed further below)
  - Photographs
  - Statements by witnesses (factual or expert witnesses)
  - Statements/interview reports with current or past facility employees, managers, etc.
  - Records of leads or complaints by citizens
- o Communications with Respondents
  - Records of conferences or telephone calls
  - Written communications
  - Technical documents
- o RCRA Sources
  - Section 3010(a) notifications
  - Part A or Part B permit applications
  - Response to § 3007 letter concerning presence of SWMUs
  - Comprehensive Monitoring Evaluations (CMEs)
  - Exposure Information Report
  - Biennial reports
  - Waste manifests
  - Facility Assessments (RFAs)
  - Facility Investigations (RFIs)
  - Corrective Measures Studies (CMSs)
  - Responses to § 3007 information requests

- Information obtained through § 3013 orders
- Administrative or Judicial Orders (e.g., §§ 3008(a), 3013, 7003) and supporting documentation
- Groundwater Task Force reports
- Applicable guidances and directives (discussed below)
- IRIS reports
- Progress reports
- EPA release determination

o CERCLA Sources (discussed below)

- Section 103(c) Notifications of Reportable Quantities
- Responses to § 104 information requests
- Preliminary Assessments (PAs)
- Site Investigations (SIs)
- Hazard Ranking System (HRS) documentation
- Remedial Investigation/Feasibility Studies (RI/FS)
- Proposed remedial design and action plans
- Records of Decision (RODs)
- Field Investigation Team Reports
- Action memoranda for removals

o State Sources (discussed below)

- Investigative records
- Studies
- Orders
- EPA/State or State/respondent communications
- Permit applications
- Responses to demands for corrective action

- o Other Federal Program Records
  - Clean Air Act or Clean Water Act permits and permit applications
  - TSCA/OSHA inspections
  - DOD Installation Restoration Program Reports
  - Reports from the Department of Interior and other Federal or State Natural Resource Trustees
- o Documents Filed with the Regional Hearing Clerk or Presiding Officer. (For enforcement personnel compiling a record for a consent order or a unilateral order, this category of documents generally includes only documents submitted in a related prior proceeding. The hearing clerk handles submissions made during pending Part 24 proceedings.)
- o Miscellaneous sources
  - Well permits
  - Deeds
  - Legal descriptions of property
  - U.S. Geologic Survey and state hydrogeologic maps
  - Population data from U.S. Census Bureau or local utilities
  - Weather information from airports or weather bureaus
  - Toxicological reports
  - Financial reporting documents, such as Dunn & Bradstreet profiles (for issues such as the need for financial assurance)
  - Securities and Exchange Commission (SEC) corporate filings
- o Public Involvement
  - Public notice and analysis of proposed corrective measures
  - Public comments
  - Documentation of information obtained at public meetings

- Other communications with public, including congressional correspondence

- Responses to public comments

- Newspaper or magazine articles

This list is not exhaustive and there will likely be other possible sources for documents included in the record. As discussed under III. I., Documents Not Included in the Record, some documents listed above, or parts of them, may be privileged and should not be in the record.

C. Guidances and Directives

EPA guidances or directives that were relied upon in developing or issuing the order should be part of the administrative record. They do not, however, have to be physically in the record if they are referenced in the index and readily accessible for inspection and copying in the same building where the administrative record is kept. In determining whether to include copies of guidances or directives (or portions of them) in the record, the burden to EPA of making copies of voluminous or repeatedly used documents should be weighed against the added burden to those reviewing the record of having to look elsewhere in the building for these documents. To minimize this problem, it is recommended that the Region keep a guidance and directive library in the same area as the administrative record.

D. Legal Sources

Legal sources - statutes, regulations, court or administrative decisions, notices published in the Federal Register - are not required to be part of the administrative record. For legal sources not generally available at a public law library, such as unreported court cases and administrative orders or decisions, it is recommended that copies be available for inspection and copying in the building where the administrative record is kept. This procedure can assist the respondent and the public in reviewing the record.

E. Technical Sources

Technical sources such as scientific or engineering textbooks, manuals or articles that were relied upon in issuing or developing the order must be part of the administrative record. Large documents or ones that are frequently referenced in Agency orders may be treated analogously to EPA guidances or directives, as discussed above, and not physically placed in the record.

F. Sampling Data

Sampling data relied upon by EPA in issuing or developing the order should be in the record. The sampling data and sampling chain of custody forms are part of the record but they may be kept in their original storage location, e.g., Environmental Services Division or contract laboratory. Data summary sheets, however, must be physically located in the record. The index must list the data summary sheets, reference the underlying sampling data and chain of custody forms, and indicate where the underlying data and forms can be found.

G. CERCLA Sources

If RCRA § 3008(h) action is taken at a site where there is also Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) activity, information developed for CERCLA actions will likely be relevant to § 3008(h) decisions and should be part of the § 3008(h) record. At the same time, information developed under RCRA, including under § 3008(h) authority, will likely be included in CERCLA files and administrative records. The administrative record requirements for CERCLA response actions are discussed in "Interim Guidance on Administrative Records for Selection of CERCLA Response Actions," OSWER Directive No. 9833.3A, dated March 1, 1989.

The often close relationship between RCRA § 3008(h) and CERCLA activity at the same facility or site will require coordination to ensure that the requirements of both legal authorities are efficiently met. Generally, either CERCLA or RCRA staff will have lead responsibility at a site. With respect to administrative records, good organization of documents concerning a facility or site will make compiling records for RCRA § 3008(h) orders or CERCLA response actions easier. Compiling a joint § 3008(h)/CERCLA response action administrative record, however, is not recommended. There are various reasons for this.

Although some aspects of a RCRA § 3008(h) orders and CERCLA response selections are similar - such as using or requiring information as to the nature and extent of contamination or the ability of certain technologies to effect a cleanup - other aspects are not. These differences in the decisionmaking process may affect what goes into an administrative record for a RCRA § 3008(h) order or a CERCLA response action and dictate against compiling joint records.

H. State Sources

States may be taking actions under their own authorities at facilities that may be subject to § 3008(h) orders. As with

CERCLA activity, information developed by the State may be relevant to § 3008(h) decisions. If this information was relied upon, it must be in the § 3008(h) administrative record to make it complete. Inspecting the record must not be a treasure hunt. Merely referring to or referencing state files or "administrative records" is generally not sufficient and requiring those reviewing the record to go to different locations to find the various pieces is not acceptable. Since many States will not have one centralized agency collecting documents relevant to the § 3008(h) order, EPA may have to look for documents kept in various agencies, such as those for health, agriculture, fish and wildlife, transportation, etc.

I. Information Not Included in the Record

- internal deliberative material
- attorney work-product
- attorney-client communications
- investigative techniques or procedures
- confidential business information in the public record

Certain documents, even though they relate to a facility, might not meet the test for inclusion - they neither support the order nor were they relied upon or considered by EPA in developing or issuing the order and thus are not relevant. These documents might be kept in a file for the facility, but they should not be included in the administrative record for a § 3008(h) order that is compiled, indexed and subject to inspection and copying by respondents and members of the public. (Although these documents are not part of the record, some might be available to the public through Freedom of Information Act (FOIA) requests.)

Privileges that EPA may claim. Inter- or intra-agency documents that are pre-decisional deliberative material, attorney work-product, attorney-client communications and certain law enforcement records, including those that disclose investigative techniques and procedures (such as certain enforcement guidances and manuals) or could reasonably be expected to interfere with enforcement proceedings, are exempted from disclosure to respondents and the public and should not be included in the record.[4] EPA may, however, waive these privileges (by disclosure to third parties), but this should not be done without first consulting Regional counsel.

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[4]/ Part 24 states that the record be "...exclusive of privileged internal communications." 40 C.F.R. § 24.03. Note that rules concerning inclusion of privileged documents in administrative records compiled under CERCLA for selection of response actions may be different.

Inter- or intra agency documents that are pre-decisional deliberative material are frequently drafts, notes or memoranda expressing opinions or recommendations, as opposed to factual information, to staff or management. To be within the privilege, documents must be pre-decisional. Drafts are a category of documents likely to be within the privilege. If the draft document is expressly adopted in or is used as the final document, however, or if it is circulated outside the government (and its contractors), the draft loses the deliberative process privilege protection.

Attorney work product includes documents prepared in anticipation of litigation by an attorney or under an attorney's supervision, including reports by consultants or program staff and certain witness statements and interview reports. Since this privilege does not terminate when a proceeding is concluded, documents subject to the privilege could include work related to past enforcement proceedings.

Attorney-client communications, as between Regional counsel, OECM, OGC or DOJ and EPA program personnel, include information intended to be kept confidential and made in connection with obtaining or giving legal advice. In order to retain the privilege, the information must be treated confidentially and not be disclosed to third persons.

The above privileges are the most likely to arise in compiling the record. This is, however, not an exhaustive list or a complete discussion of privileges. Regional counsel should, therefore, be consulted concerning the applicability of privileges. In addition, Regional and Headquarters personnel responsible for implementing FOIA may be able to provide advice on privileges.[5]

Confidential Business Information. Confidential business information (CBI) furnished to EPA is subject to a privilege claimed by the business submitting the information. EPA does not have the discretion to waive CBI and disclose it to the public. In fact, there are penalties for improper disclosure of business information that is entitled to CBI treatment. See 18 U.S.C. § 1905.

EPA has issued, under 40 C.F.R. Part 2, Subpart B, detailed regulations concerning CBI, including the rules for handling business information which is or may be entitled CBI treatment and for determinations by EPA of whether information is, in fact,

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[5]/ The Freedom of Information Case List, published annually by the Department of Justice, Office of Information and Privacy, is a good reference for FOIA and privileges.

entitled to CBI treatment. Certain statutory provisions may set different standards for what qualifies as CBI (for example, SARA Title III) so the statutory provision under which information is submitted should be referred to when a question concerning CBI arises. Other statutory provisions may affect rules for non-disclosure of information. For example, information obtained under RCRA § 3007 may be disclosed in certain circumstances if relevant to a proceeding under RCRA, such as issuance of a § 3008(h) order. See 40 C.F.R. § 2.305. Before including in the record material that may be subject to CBI, Regional counsel should be consulted.

Since CBI is a privilege claimed by the business submitting the data, that business can waive the claim. EPA can ask the business to waive CBI or narrow its claim. In addition, EPA may provide CBI to the business submitting it.

Using Privileged Information and CBI. EPA may wish to include in the administrative record relevant documents protected from disclosure because of a privilege or CBI. Rather than waiving a privilege (assuming EPA may do so) or not using the document and excluding it from the record, EPA can consider certain alternatives. First, documents can be included in a confidential portion of the administrative record that is withheld from public disclosure but is available to the respondent. This can be used with CBI submitted by the respondent since CBI treatment is maintained. For most other privileges, however, disclosure to the respondent may waive EPA's privilege. All documents placed in the confidential portion of the administrative record must be identified in the administrative record index, which is available to the public.

Second, information contained in an excluded document can, if feasible, be extracted and placed in the record available to the public and the respondent. This can be done by summarizing the relevant information or editing out the information not to be made public. For example, factual information contained in a draft document subject to the privilege for inter- or intra-agency pre-decisional deliberative material can be extracted into another document and placed in the record. If EPA follows the first alternative and creates a confidential portion of the record available to the respondent, it should also attempt to extract from that record non-protected information for public disclosure.

V. Compiling the Record

A. When

The record must be compiled and indexed on or before the date a § 3008(h) unilateral order is served on a respondent (40

C.F.R. § 24.03). A record should be compiled and indexed for consent orders when they are issued.

Ideally, the record should be compiled as documents and information are obtained by EPA. The process of indexing, organizing and updating the record can help make EPA decisionmaking more orderly and efficient. Following such a process will make it easier for staff newly assigned to work on a case to become familiar with it and allows staff already assigned to a case to leave one case to work on another. Managers also will have the flexibility to require these moves.

Public interest concerning activities at a facility should be considered when deciding when to begin compiling a record. If there is exceptional public interest and there has been or may be requests for access to documents in a facility file, beginning to compile a record early and making it available to the public is advisable. The final compilation of the record can be done before the order is issued.

As an alternative to beginning to compile the record early in the process, Regions could make available to the public especially important documents related to corrective action. These could include the RCRA Facility Assessment (RFA), the RCRA Facility Investigation (RFI) Report and the Corrective Measures Study (CMS) Report. The public comment period for selection of a corrective action plan is a critical point for public involvement and making these documents publicly available could facilitate the process. Regions are very strongly urged to adopt this approach for the comment period. Note that the comments received by EPA, along with its responses, must be included in the record.

The complete § 3008(h) corrective action process will not generally involve a single order or a single event for implementation. The process is dynamic. Documents and information resulting from earlier activities at a facility may be used to build administrative records for subsequent actions. For example, orders will generally be issued in two stages - the RCRA Facility Investigation (RFI) through the Corrective Measures Study (CMS) as one order, and the Corrective Measures Implementation (CMI) as a second order - with the second building on the first. There may be additional orders required to enforce implementation a § 3008(h) order. In addition, many activities, some over extended periods of time, will be occurring during implementation. The information may be of interest or necessary to those following or overseeing corrective action activities at a facility.

Regions should, therefore, keep with the record for the final order (i.e., the record accompanying issuance of a consent order or the record as it stands after completion of Part 24 proceedings) relevant documents obtained during implementation of

the order. Technically, these post-decisional documents are not part of the record for the final order and should be identified as supplemental to the record for the final order.

B. Location

The record should be located in the Regional Office issuing the order. (For unilateral orders, the record must be maintained by the Regional hearing clerk at the Regional office during the Part 24 process). If there is substantial public interest in a facility, Regions should consider keeping additional copies of the record (or a subset of documents from it) near the facility - a library, for example, or other information repository - or at a state environmental office. If RCRA permitting or CERCLA has created an information repository at or near the site, the Region should consider using the same location.

It should be noted that CERCLA regulations require that the complete administrative record file be kept at the EPA Regional office and a copy of this file, with some exceptions, be located at or near the site. At Federal facilities where CERCLA authorities are being used, CERCLA administrative records are compiled by the Federal agency in accordance with CERCLA administrative record and public participation requirements. However, the complete record is located at the Federal agency office comparable to an EPA Regional office, rather than at the EPA office. If a § 3008(h) order is issued to a Federal facility, regardless of whether CERCLA activity is also occurring, EPA retains responsibility for compiling the § 3008(h) record and locating it at the EPA Regional office.

C. Organization

The record must be in some logical order. The record is supposed to be a working file that allows users to locate documents relevant to their interests. A logical order helps achieve this goal.

The simplest and often most useful organization is arranging all documents chronologically. Even if documents are arranged by subject areas in sub-files, documents should be arranged chronologically within each sub-file. Generally, documents should be put in the record according to the date they were completed, not received by EPA. The date of EPA's receipt of a document is, however, often relevant and Regions should make it standard practice to stamp the date of receipt on all documents.

There are innumerable subject areas that can be used to organize the record into sub-files. The headings found under Document Sources in this guidance are one possible set of subjects. Other possibilities include arranging the record

according to the elements of the order or segregating documents relating specifically to the facility from other documents, such as guidances, directives or technical sources. When certain issues can be identified beforehand as being of special interest or subject to dispute, they can be the basis for record division. The choice of file organization can be a matter of personal preference. For example, an attorney handling a § 3008(h) hearing may prefer, in presenting the record to the hearing officer, one file organization over another. As long as the chosen organization is logical, it is acceptable.

Each document should be given a document number or letter. This number should be marked on the front of the document or the blank flip side of the first page. The number should be a serial number showing the document's location in the entire record or within some sub-file. The number must be unique to the document so that documents with similar descriptions, titles or dates can be differentiated. It is recommended that each page of the record be numbered in series.

D. Index

The record must be indexed. The index serves several functions. It must, at a minimum, identify all documents in the record and their location. By knowing what is supposed to be in the record and where, EPA is better able to prevent the unauthorized addition or removal of documents from the record by those inspecting it. The index also helps the user to locate documents in the record.

An index may be little more than a table of contents that tracks record organization. The index, however, can also supplement organization. For example, if the record is arranged chronologically, the index could be arranged by subject. This gives the user two ways of locating documents in the record.

If the resources are available, various indexes can be created by using a computer database management system. Documents comprising the record can be coded according to various fields, and indexes created by the choice of fields. A chronological index, for example, could be created using the date field.

Regardless of the type of index used, it should contain the following information for each document:

- Description of the document. This should include the document's title, if any, and a very brief description identifying a document's subject or contents. This description should enable differentiating the document from other documents in the record.

- o Identity of the author and recipient. It is recommended that their affiliations or titles also be included.

- o Date. Give the date (or approximate date) that the document was completed or generated.

- o Location of the document. If the document is physically in the record, give the sub-file name, if any, and the document's number (see Organization, above). If the document is not physically in the file (such as an EPA guidance or CBI that is in a confidential file), identify where it is located.

- o Number of pages in document.

V. Maintaining the Record

A. Public and Respondent Access

During the time a unilateral § 3008(h) order is subject to the 40 C.F.R. Part 24 procedures, the hearing clerk must satisfy Part 24 administrative record requirements for public and respondent access to the record.

The administrative record for consent orders and unilateral orders after the Part 24 process is completed should be accessible to the respondent and the public for inspection at the Regional Office during normal business hours, for example, 9 A.M. to 4 P.M., Monday through Friday. Every effort should be made to make the record available without requiring the respondent or members of the public to give EPA prior notice or make an appointment. Resource shortages, both personnel and space, may, however, justify a reasonable prior notice requirement.

Even if it adopts such a requirement, the Region should attempt to continue to work toward obviating the need for requiring prior notice. If continual need for access to a specific record is anticipated, as where there is substantial public interest in a facility's activities, an attempt should be made to arrange for access without requiring prior public or respondent notice to the Region.

In no case should the person seeking access to the record demonstrate need or be required to pay a search or access fee. (See Document Copying, below.)

B. How Long Available

The record for consent orders and unilateral orders that are final after the Part 24 process should be available to the public and the respondent until the respondent's obligations under the order are satisfied and the order terminated. Order

implementation may occur over a long period and public interest in having easy access to the record may eventually decline, as when a remedy is in a routine maintenance and monitoring phase. Taking this into account, Regions may wish to balance the resources required for keeping the record at the Regional Office against archiving it elsewhere and retrieving it when a specific request for access is made.

C. Notice of Availability

At or before the time the administrative record for a unilateral order is delivered to the hearing clerk or a consent order is issued, the Region should notify the public of the availability of the record for inspection. (Appendix B contains a model notice.) The procedures for public notice found in "Guidance on Public Involvement in the RCRA Permitting Program," should be followed. Regions should also consider providing additional notices for the availability of the record at other times. For example, if the Region has started compiling the record and making it publicly available prior to issuance of an order, such as during the comment period for selection of the corrective measure, the public should be notified. Notices should contain any requirement for those seeking to review the record to contact Regional personnel beforehand.

Unilateral orders must notify respondents of the availability of the record.

D. Controlling the Record

Access to the record should be controlled to ensure its continued integrity. There should be a sign-in log for those inspecting the record. The log should ask for the individual's name, address, phone number, and affiliation, and also record which administrative record (there may be records for other cases at the same location) was inspected and any copying fee collected or waived (see Document Copying, below).

Agency personnel should be at or near the area where a record is being reviewed. They can provide assistance to those reviewing the record and also help supervise the area to prevent documents being lost or damaged or the record becoming disorganized. After a record has been inspected, it should be checked to determine that all documents have been returned intact.

The record available for public and respondent inspection should be a duplicate copy of the record. It is very strongly recommended that EPA request that respondents provide at least one additional copy of their submissions for inclusion in the

publicly available record. The master copy of the record should be kept by the Agency.

E. Document Copying

The record at the Regional Office should be available to the public and respondent for copying. EPA can have a copying machine available for public use where the record is located, or the Agency can make copies for requestors.

If EPA makes partial or complete copies of the record available for inspection in addition to the one at the Regional office, EPA should also attempt to have copying facilities available at these locations.

Regions should follow FOIA requirements and policies in determining the appropriate charge for copying. Generally, copying fees should be waived for other Federal agencies, members of Congress and EPA contractors or grantees. For all other persons or entities, including respondents, the duplication cost for paper copies of paper originals is $.15 per page, actual cost for duplicating photographs and non-paper originals. No fee should be charged to anyone for the first 100 copies of paper originals. In addition to these free copies, there is an administrative fee waiver for subsequent copying costs up to $25.00. (At $.15 per page, this administrative fee waiver covers another 166 copies.) The reason for this waiver is that the Agency does not collect a fee if the cost of processing and collecting the fee exceeds the amount it is permitted to collect. The Agency has determined that $25.00 is the cost of collecting and processing fees. There is no administrative fee waiver if copying costs exceed $25.00. Therefore, if more than 266 copies are made (100 free copies plus 166 copies under the administrative fee waiver), the $.15 per page charge should apply to all copies beyond the free first 100 copies.

Appendix A: Federal Register Notice for 40 C.F.R. Part 24 Final Rule