



Federal Facility Compliance Act Implications for RCRA Corrective Action

BACKGROUND: The Federal Facility Compliance Act (FFCA) was signed into law on October 6, 1992. This Act, which amends the Solid Waste Disposal Act (as amended by the Resource Conservation and Recovery Act (RCRA)), makes major changes to existing sections of RCRA as they apply to Federal facilities and adds provisions that specifically address waste issues germane to the Department of Energy (DOE). The most significant and far-reaching provision of the FFCA is the statute's waiver of the Federal government's sovereign immunity. This waiver will now give the Environmental Protection Agency (EPA) and the various States authorized to implement the RCRA program the authority to require "...each department, agency, and instrumentality of the United States..." to comply with all relevant substantive and procedural requirements of RCRA. This provision essentially places all Federal facilities on the same compliance footing as private industry and may result in punitive fines if violations occur. In addition to the sovereign immunity waiver, other important issues addressed by the FFCA include the following provisions: 1) States are allowed to collect fines, penalties, and oversight fees from Federal entities; 2) EPA or authorized States are required to conduct yearly RCRA inspections at Federal facilities and to seek reimbursement from those facilities for all inspection costs; 3) DOE must evaluate the inventory of radioactive mixed wastes it currently controls and investigate present and future treatment capacity and technologies for the management of DOE mixed wastes; 4) the management of RCRA wastes on public vessels are governed; 5) EPA is required, in consultation with the Department of Defense (DOD), to promulgate regulations addressing waste military munitions and their safe transport and storage; and 6) Federally Owned Treatment Works, (FOTWs) and the types of wastes they manage are governed. Provisions 1, 3, and 6, above, are of particular relevance to the RCRA Corrective Action program and are highlighted in this Information Brief.

STATUTE: The Federal Facilities Compliance Act (Public Law 102-386), the Resource Conservation and Recovery Act (RCRA) (Public Law 94-580), and the Hazardous and Solid Waste Amendments of 1984 (HSWA) (42 USC §6901, et seq.).

REGULATIONS: Regulations promulgated in response to the FFCA include 40 CFR Parts 264 and 265, Subpart EE, 40 CFR Part 266, Subpart M (Military Munitions) and 40 CFR 22.37(g); however, this Information Brief discusses the implications of the Act regarding "Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities; Proposed Rule" 55 FR 30798, July 27, 1990, as updated, supplemented, and refined by an Advanced Notice of Proposed Rulemaking (61 FR 19442; July 1, 1996); as partially finalized in the "Corrective Action Management Units and Temporary Units: Corrective Action Provisions Under Subtitle C" (58 FR 8658, February 16, 1993) and the "Amendments to the Corrective Action Management Unit Rule" (67 FR 2962; January 22, 2002); and as partially withdrawn on October 7, 1999 (64 FR 54604).

- REFERENCES:**
1. "Joint Explanatory Statement on the FFCA of the Committee of Conference," House Conference Report No. 102-886, September 22, 1992.
 2. "[Corrective Action Management Units and Temporary Units - CAMU/TU Final Rule Issued](#)," Regulatory Bulletin, DOE Office of Environmental Guidance, RCRA/CERCLA Division, EH-231, May 12, 1993.
 3. "[Corrective Action Management Units and Temporary Units](#)," U.S. Department of Energy, Office of Environmental Policy and Guidance, RCRA/CERCLA Division, RCRA Information Brief, EH-231-043/0394 (March 1994, Updated September 2002).
 4. "[Amendments to the Corrective Action Management Unit Rule; Final Rule \(67 FR 2962\)](#)," U.S. Department of Energy (DOE), Office of Environmental Policy and Guidance, RCRA/CERCLA Division (EH-413), Regulatory Bulletin, July 2002.
 5. "Publication of Schedule for Submitting Plans for Treating Mixed Waste Generated or Stored at Each Site as Required by the Federal Facility Compliance Act of 1992," 58 FR 17875, April 6, 1993.

How does the FFCA waiver of sovereign immunity affect the corrective action process?

The waiver of the Federal government's sovereign immunity will have a dramatic effect upon the relationship between Federal departments, agencies and

instrumentalities, and regulatory agencies such as EPA and States authorized to implement RCRA in lieu of EPA. Previously, Federal facilities, such as those owned by DOE were immune from most EPA or authorized State enforcement authorities, fines, and penalties. Now, Federal entities are subject to all the provisions of

RCRA, including Federal and State enforcement mechanisms. This new authority will allow regulators to enforce milestones or deadlines identified in Federal Facility Compliance Agreements, consent orders, or other binding administrative clean-up orders. Such requirements may be built into corrective action permits and orders as a means of requiring Federal entities to implement effective corrective action measures. For example, if a DOE facility fails to comply with all permit requirements that were made as the result of a RCRA Facility Investigation (RFI), penalties may be assessed against DOE for failure to comply with stipulated permit conditions. In addition to Federal penalties that might be assessed for noncompliance, States that are authorized to implement the corrective action program in lieu of EPA may also seek enforcement under their own authorities.

Will regulatory audits of DOE facilities be mandatory?

The FFCAct Sections 104(1) and (2) requires EPA to conduct annual RCRA inspections of all Federal facilities. As part of the first inspection, the regulator is required to “. . . conduct a comprehensive ground water monitoring evaluation . . .,” unless such an evaluation was conducted in the preceding 12 months. Authorized States are permitted to conduct inspections at Federal facilities to ensure compliance with State hazardous waste regulation.

Under the FFCAct Section 104(4), a Federal agency is required to reimburse EPA for the costs of facility inspections. States are allowed to recover the costs of inspections under the authority granted in Section 102(3). The implication for corrective action is that these inspections, which include periodic progress inspections, will require the facility to reimburse all eligible expenses incurred by the regulator.

How are remediation wastes that are mixed wastes affected by the FFCAct?

The waiver of sovereign immunity applies to all Federal entities as of October 6, 1992; however, one notable exception to this waiver was stipulated in the FFCAct. Federal and State regulators may not pursue civil, criminal, or administrative penalties and fines for violations of the land disposal restrictions (LDR) storage prohibition for “mixed wastes” [40 CFR 268.50] for a period of three years after enactment of the FFCAct. Mixed wastes are defined by the FFCAct as those wastes that contain both RCRA hazardous waste and source, special nuclear, or by-product material subject to the Atomic Energy Act (AEA) of

1954 [42 USC 2011, et seq.]. In addition, the FFCAct Section 102(c)(3)(B) stipulates that DOE will be sheltered from mixed waste storage violations as long as DOE: submits plans under FFCAct Section 105(b) for developing treatment capacities and technologies for each facility that generates mixed wastes; and is in compliance with the approved plans pursuant to an order issued by a regulatory agency.

Since mixed wastes are generated by DOE facilities undertaking corrective action activities, such wastes are also subject to the delayed effective date for mixed waste provided they are not subject to existing agreements; permits, or administrative or judicial orders. If wastes are subject to an agreement or order, they must be managed in a manner that is in compliance with those documents. In response to FFCAct Section 105(c), DOE published a schedule for submitting plans for developing mixed waste treatment capacities and technology as required under the FFCAct Section 105(b) (Reference 4). In general, DOE met this schedule by having approved plans and orders in place by October 1995; thus, DOE’s mixed waste (including mixed waste generated during RCRA corrective action) are not subject to fines and penalties relative to violations of the LDR storage prohibition. Interestingly, mixed wastes at some sites may be exempt from the site treatment plan requirements if they are covered by an agreement or similar mechanism with the State, or the plan is waived in lieu of a different type of agreement and order.

Mixed wastes generated by site cleanup activities undertaken during the corrective action process may be managed using corrective action management units (CAMUs). Under the CAMU regulations, solid and hazardous wastes, and all media (including ground water, surface water, soils, and sediments) and debris, that are managed for implementing cleanup (i.e., remediation wastes) are *not* required to meet technology-based LDR treatment standards or CAMU treatment requirements for principal hazardous constituents (PHCs) prior to being placed within grandfathered CAMUs. Grandfathered CAMUs include those units that were approved before April 22, 2002, or for which substantially complete RCRA permit applications (or equivalents) were submitted to the permitting agency on or before November 20, 2000. Similarly, a subcategory of remediation wastes — CAMU-eligible waste (defined in 40 CFR 264.552(a)(1)) — can be placed in non-grandfathered CAMUs without triggering LDR requirements; however, these CAMUs are subject to prescribed design, operating and minimum treatment requirements codified in the CAMU amendments (67 FR 2962; January 22, 2002). Mixed wastes are eligible for management in CAMUs provided the additional

requirements of the AEA are also met. The AEA requirements are primarily performance-based standards that must be met in order to be considered protective of the environment and human health. Mixed wastes that would be considered for incorporation into a CAMU (such as a landfill) would be limited in that no wastes identified as transuranic or high-level mixed waste would be considered. Various Federal, State, and local requirements concerning the site-specific design of the CAMU would have to be addressed. In addition, future liability from the management of remediation wastes in CAMUs would have to be considered. Further, since the CAMU rule is considered to be less stringent than existing RCRA regulations, it is not an available option in States that are already authorized for corrective action until those States adopt the CAMU rule. Nevertheless, while the decision to utilize CAMUs for the management of remediation wastes and CAMU-eligible wastes, which are also mixed waste, is complex, it is a potentially viable means for waste management and warrants further consideration at DOE facilities.

Can corrective action wastes be treated in federally owned treatment works?

The statutory language of the FFCAct amends the existing statutory definition of solid waste to further define the exemption for "...solid or dissolved material in domestic sewage..." Under the amendment, solid or dissolved materials in domestic sewage that are discharged to federally owned treatment works (FOTWs) are exemption the statutory definition of solid waste, provided that they meet at least one of the following criteria:

- ' Materials must be subject to a pretreatment standard under Section 307 of the Clean Water Act (provided the source is in compliance with established pretreatment standards).
- ' Materials not currently subject to a pretreatment standard use subject to an EPA-promulgated schedule for establishing such standards before October 6, 1999 (provided that (1) the standard is in effect prior to or on the date set forth in the schedule and (2) the source is in compliance after the effective date of the standard).
- ' Materials not covered under either of the above criteria must be treated by appropriate technologies or to established concentration standards specified by the RCRA LDR regulations.

The generator is considered a RCRA household or a conditionally exempt small quantity generator (CESQG) by generating either less than 100 kilograms of hazardous waste or less than 1 kilogram of acutely hazardous waste per month.

In addition to those materials or CESQG waste limitations identified above, the FFCAct prohibits the introduction of a RCRA hazardous waste into a FOTW. This prohibition does not include the above cited exceptions (i.e., they are not solid wastes and therefore cannot be considered hazardous wastes) nor does it include other materials expressly exempted from RCRA Subtitle C.

Based on the considerations stated above, use of FOTWs as a means of further treating or disposing of certain kinds of corrective action wastes (primarily wastewaters) is viable as long as the wastes in question are treated to a concentration meeting Clean Water Act pretreatment or RCRA LDR standards.

Questions of policy or questions requiring policy decisions will not be dealt with in EH-413 Information Briefs unless that policy has already been established through appropriate documentation. Please refer any questions concerning the subject material covered in this Information Brief to:

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