

April 4, 2005

Michael A. Bussell  
Director, Office of Compliance and Enforcement  
Environmental Protection Agency Region X  
1200 Sixth Avenue  
Seattle, WA 98101

RE: Hazardous Waste Program Review Report for Fiscal Years 2000 to 2002

Dear Mike:

Thank you for the opportunity to review EPA's Draft Program Evaluation Report for Federal Fiscal Years 2000, 2001, and 2002. We appreciate EPA's positive comments on many aspects of our hazardous waste program.

We have summarized below our response to each recommendation included in the program review. In general, we agreed with several of EPA's recommendations on ways to improve our program. Several recommendations covered issues that we have already addressed in previous program reviews, including formal enforcement actions and SNC designations, and the department's practice of allowing our clean-up program to take the lead on corrective action sites. Several of our responses include requests for clarification or assistance from EPA.

***Recommendation:*** *Enter as much of their compliance assistance work as possible into the national database to more accurately portray their program accomplishments. (p.28)*

ODEQ has made great strides in its ability to manage data on a state-wide basis. Our data management software tracks compliance assistance visits and these visits are then entered into RCRAInfo as CAVs.

While we are now tracking compliance assistance visits on a statewide basis, RCRAInfo will continue to underreport compliance assistance efforts since RCRAInfo only accepts data on facilities with RCRA ID numbers. Many of our compliance assistance visits are to conditionally exempt generators who are not required to have RCRA ID number. ODEQ requests that EPA explore ways to resolve this reporting conflict so the national database more accurately portrays our program accomplishments.

**Recommendation:** *Improve the consistency of return to compliance documentation in the facility files. (p. 29)*

ODEQ agree that we can make improvements in this area.

**Recommendation:** *Make appropriate SNC designations in conjunction with referral for formal enforcement. (p. 29 and improve the connection between referring violators for enforcement and making SNC designations. (p. 33)*

ODEQ's Significant Non-Complier (SNC) policy and EPA's SNC policy are identical in the criteria used to determine SNC designation. The process of determining whether a violator is a SNC often involves a judgment call based on the totality of circumstances associated with the violator and not all of these circumstances are documented in the case file. We are confident that we properly applied the SNC criteria to violators during the program review period, which resulted in seven SNC designations. We took formal enforcement actions against all seven SNCs. As noted in the report, ODEQ has increased the number of SNC designations since the previous program review.

There remains a general discrepancy between ODEQ and EPA on the use of formal enforcement actions and SNC designation. SNC designation is an important tool to ensure appropriate enforcement response on the federal level. However, ODEQ's Oregon Administrative Rules require us to take formal enforcement actions against violators that do not meet the criteria for SNC designation. We recognize that this approach uses more enforcement related resources and that the increased number of enforcement actions reduces the average penalty assessment relative to EPA and other states that do not use formal enforcement actions so liberally.

**Recommendation:** *Inspect facilities required to have post-closure permits to ensure that systems are operated effectively to prevent releases of, or exposure to, hazardous waste that remains on site. (p. 30)*

ODEQ has successfully implemented its management of corrective action sites through a cooperative relationship with the department's clean-up program. The clean-up project managers provide oversight as part of their project management role. Where active generation activities are on-going at a particular site, ODEQ continues to schedule hazardous waste inspections based on the priorities set within each region, such as inspecting LQG's once every 5/yrs.

The hazardous waste program can improve its coordinate with the Clean-up program to ensure the clean-up project manager's over sight information gets entered into the RCRIS data system to show that a facility has had a compliance determination.

***Recommendation:*** Allow only the net present after tax value of SEPs when negotiating reductions in the gravity component of their penalties and verify the public and environmental benefits of the project in the case files. (p.32)

We agree that the SEP documentation does not include present after tax cost calculations. However, we address this issue in our SEP Mutual Agreement and Order which requires the violator to agree that they will not use the value of the SEP as a tax deduction or as part of a tax credit application.

ODEQ reviews all Supplemental Environmental Project (SEP) proposals to ensure they meet the required criteria, as outlined in ODEQ's SEP policy, before a SEP is approved. As noted in the program review, ODEQ allowed one company to partially mitigate the gravity component of its civil penalty with an environmental management system (EMS) SEP that included a public outreach component. The report noted that SEPs that allowed violators to fund their own management systems were hard to validate. We note that in June 2003, EPA developed a policy to encourage and expand the use of SEPs in enforcement settlements. We request that EPA clarify its current position on whether it is appropriate to develop an EMS as a Supplemental Environmental Project.

***Recommendation:*** Align internal time lines more closely with EPA's revised 2003 Enforcement Response Policy to allow sufficient time to complete formal enforcement orders. (p. 33)

ODEQ agrees that our projected case time lines are ambitious. We are in the process of reviewing our internal case timeliness measures. We will take into consideration the time lines outlined in EPA's 2003 ERP. We plan to complete this project by the end of the calendar year.

We were pleased to note that in 2002 we averaged 221 days to complete initial formal enforcement, which is within EPA's 2003 ERP guidelines. In addition to meeting the current EPA timeliness guidelines, we also present cases that are legally strong and defensible.

***Recommendation:*** Include an explanation of delays in case file when time lines are exceeded. (p. 33)

ODEQ agree we can improve case file documentation. Improved documentation will make it easier to understand why time lines are exceeded. Currently, the inspector and the environmental law specialist explain case delays on a timeliness sheet. The timeliness sheet becomes part of the case file and the data is entered into a database. With hazardous waste cases, in particular, delays are frequently caused by waiting for criminal case evaluation. This is not always something we record in the public record portion of our files.

***Recommendation:*** Continue to provide economic benefit training to inspectors and enforcement specialists to ensure that calculations are documented for all penalty assessments. (p. 34)

ODEQ will continue to provide economic benefit training to inspectors and enforcement specialists. Additionally, we are in the process of developing an internal management directive on the penalty factor for economic benefit (EB). As part of the directive, we are proposing standard economic benefit amounts for some of the more common de minimis variables so that these economic benefits may be easily alleged even when they are small. Additionally, it may be beneficial for EPA to consider developing a set of standards to which states can refer when assessing economic benefit. EPA standards would assist us with EB defensibility and would contribute to uniformity.

***Recommendation:*** Assess the appropriate penalties for each day violations exist in significant multiple day cases to deter extended periods of non-compliance. (p. 34)

There are some differences in EPA's RCRA Civil Penalty Policy and the way the ODEQ calculates multi-day or multiple penalties based on our rules in Division 12 and State statute. EPA's enforcement policy states that multi-day penalties are mandatory for days 2 through 180, for all violations with the certain gravity-based designations. The daily penalties are assessed at 5 to 20% of the gravity based-factor. EPA has the discretion to waive the multi-day penalties in highly unusual cases.

ODEQ does not assess partial penalties for multiple days. Additionally, the assessment of multiple penalties and multiple days is discretionary, unless it is associated with the economic benefit calculation. However, we are in the process of developing an internal management directive for the assessment of multiple penalties. The internal management directive is designed to promote and maintain consistency between enforcement cases. Specifically, it will outline the Director's expectations for assessing penalties on multiple violations and multiple days of violation. The directive will not completely mimic the EPA's multi-day penalty policy, but should address consistency concerns.

***Recommendation:*** Include documentation in case files that hazardous waste violations have been corrected and applicable requirements enforced along with the cleanup activities completed. (p. 34)

ODEQ will work to ensure that pertinent information is shared with other programs and that information is referenced in the appropriate files. The updated Centralized Compliance Database, which will link to the HW program internal database, will also encourage the use of closure or completion letters to better ensure data quality and transparency for the regulated community.

***Recommendation:*** *Establish clear roles and responsibilities to improve the consistency of tracking case conclusion data. (p. 35)*

The Office of Compliance and Enforcement and the Hazardous Waste Program are currently reviewing who has responsibility for case closure data. The person responsible for updating RCRAInfo has already established procedures with ODEQ's business office to receive direct notification when a civil penalty is paid.

In addition, ODEQ has developed a Centralized Compliance Database to improve data tracking and case progress. The Department is in the process of training inspectors and support staff that enter data, on this new system. The training will cover data entry, as well as generation of warning letters, pre-enforcement notices, and referrals. At the same time, ODEQ is conducting enforcement training for all hazardous waste inspectors. The centralized database will improve consistency and make it easier to track cases, including case conclusion data.

***Recommendation:*** *Include enforceable hazardous waste requirements in orders, including injunctive relief, as well as pursuing cleanup through other programs. (p. 35)*

We are working to better coordinate the assessment and cleanup of potentially contaminated sites with our Site Assessment and Voluntary Cleanup staff and to include cleanup orders in the hazardous waste actions. We maintain that our division between cleanup and hazardous waste is an appropriate mechanism for cleaning up releases and assessing potentially contaminated sites. We do not agree that all sites and all hazardous waste tanks, regardless of whether the facilities are RCRA permitted, require full RCRA closure.

Facilities that are willing to move forward in a cooperative manner and who desire to get into full compliance quicker are allowed to proceed with clean-up through the department's Voluntary Clean Program (VCP) by signing a written agreement specifying Department oversight on the clean-up activities and approval. Recalcitrant facilities are referred into the Department's Site Response Program (SRP) where a formal unilateral order is issued directing the clean-up actions by the Department.

The Department's desire to achieve timelier clean-ups is an important value and is achieved successfully through the use of the voluntary clean-up agreement process. In addition the voluntary clean-up path way allows the Department to fully collect its costs associated with the Department's oversight activities. Implementing a clean-up process that is timely and fully cost recoverable are important values to the Department in a time of lean budgets.

ODEQ recommends that EPA's program reviews include the environmental results of the tools used by a state program to achieve compliance and not rely on a simple comparison that the state method is different or inconsistent with the federal approach.

States often have more tools in their tool box to solve problems than are typically available to individual federal programs. The use of the State's voluntary clean-up program to solve problems should not be viewed as a negative by Region 10 because the tool is not the same as EPA's enforcement orders. Instead Region 10 needs to look at the complete picture and compare the environmental results that each tool provides in bringing a facility into full compliance.

Thank you again for the opportunity to comment on the recommendations included in the program review. We look forward to continuing to work with EPA to improve our hazardous waste program.

Sincerely,

Al Kiphut  
Land Quality Division Administrator

Cc: Stephanie Hallock, Director, Department of Environmental Quality  
Wendy Wiles, Program Manager, Hazardous Waste  
Anne Price, Compliance and Enforcement Division Administrator