

April 29, 1985

Honorable Malcolm Wallop
United States Senate
Washington, DC 20510

Dear Senator Wallop:

Mr. Thomas has asked me to reply to your inquiry of March 21, 1985, regarding the process of delisting of hazardous wastes. This process was established in 1980 when EPA promulgated its regulations which identified hazardous wastes. The Texas Mid-Continent Oil and Gas Association (TMOGA) has correctly pointed out in their statement that the purpose of the delisting provision was to allow individual facilities to demonstrate that their particular waste is not hazardous even though it is listed as hazardous by the Agency.

Most of the hazardous waste identified in subpart D of Part 261 is considered toxic according to the criteria described in §261.11 (a) (3). In listing wastes as hazardous, the Agency identifies the specific toxic constituents which cause the waste to be listed (see Appendix VII of 40 CFR Part 261). Prior to the 1984 Amendments to RCRA, the standard for delisting required petitioners to address only those factors considered by the Agency in listing the waste as hazardous, i.e., the specific toxic constituents identified by the Agency in the listing process. However, there could be a situation where a specific waste may not contain the toxic constituents that caused the waste to be listed (or may not contain them in an immobile form or at levels below those of regulatory concern) while it contains other toxicants at harmful levels. Such situations have actually occurred in the past.

Congress recognized this shortcoming, and in the 1984 Amendments, required the Agency to modify its delisting procedures to take additional hazardous constituents into account. Anticipating that this change to the delisting procedures was likely, in mid-1983, the Agency notified all petitioners of the expected change and requested additional information to determine whether additional hazardous constituents were, in fact, present in their wastes.

The Agency requested this information before the Amendments were signed to avoid possible delays that might be experienced by petitioners in collecting this information after the Amendments became law.

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While it is true that implementation of the Amendments has caused some delay (the delisting process had to be modified and additional criteria established for the review of the additional information), the Agency believes that TMOGA's statements regarding the delisting program are misleading. (Between December 1980, and December 1984, for example, the Agency processed over 350 of the 580 petitions it had received.)

The Agency held meetings with representatives from TMOGA on February 6, 1985, in Dallas, and on April 2, 1985, here in Washington, and pointed out that of the 53 exclusion petitions that have been received from refineries, only 3 of the companies have provided the information necessary for the Agency to determine whether additional hazardous constituents are present in their wastes. We further explained that the Agency cannot propose decisions without consideration of these factors. All refineries were notified in January 1984, and in November 1984, of the information needed on other hazardous constituents.

With respect to EPA's "mixture" and "derived from" rules, the Agency had maintained from the outset that mixing a hazardous waste with a non-hazardous waste does not mean the resulting waste is not hazardous. Furthermore, the Agency took this position since we believe that diluting a hazardous waste with a large volume of a non-hazardous diluent is not a reasonable treatment option to render the resulting waste non-hazardous. The Agency is aware, however, that there are some legitimate processes where dilution of the hazardous waste with a large volume of a non-hazardous diluent is normally encountered as part of the manufacturing process. However, for the Agency to make such a finding for the refining industry, TMOGA or some other authorized representative of the industry would need to file a petition to amend the regulations. To date, we have received no such petition or information from the industry indicating that the wastes covered by the "mixture" and "derived from" rules are not hazardous. (In the past, we have excluded wastewater contaminated with small quantities of solvents from regulation in this matter.)

We regret any hardship or problems encountered by TMOGA. However, we believe that the Agency has done, and will continue to do its best to treat all petitioners fairly and exclude only those wastes which are truly non-hazardous.

If you have additional questions or need further clarification or explanation, please contact Mr. James Poppiti, who is the delisting program manager, at 382-4665. I thank you for your interest in this matter.

Sincerely yours,

Jack W. McGraw
Acting Assistant Administrator

March 21, 1985

The Honorable Lee M. Thomas
Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Thomas:

I am enclosing a copy of a statement I recently received regarding the delisting of hazardous wastes. I'm concerned about some of the programs outlined in this statement about the delisting program. I would appreciate any information you could provide me about how this process works and what is being done to ensure that only hazardous substances are included.

Thanks very much for your time and attention to this request. I look forward to your reply.

Sincerely,

Malcolm Wallop
United States Senator

Enclosure

STATEMENT OF THE TEXAS MID-CONTINENT OIL & GAS ASSOCIATION
TO THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Public Meeting on the Delisting of Hazardous Wastes

February 7, 1985
Dallas, Texas

The Texas Mid-Continent Oil & Gas Association (TMOGA) is pleased that the United States environmental Protection Agency (EPA) has scheduled this public meeting to provide detailed guidance to those companies who have petitioned or who intend to petition to have one or more of their solid wastes excluded from the EPA's list of hazardous wastes. An important purpose of this public meeting is for the EPA to explain the impact of the Hazardous and Solid Waste Amendments of 1984 (the "Amendments") on the EPA's delisting program. TMOGA and its members wish to present this statement to express their concerns about EPA's delisting program. TMOGA and its members wish to present this statement to express their concerns about EPA's current delisting program and to request that the EPA act in a timely and positive manner with a delisting program that allows member companies to delist wastes that do not meet the criteria of a hazardous waste. TMOGA's concerns and its request for administrative relief are set forth below in more detail. Technical comments on the delisting program are provided in Appendix A to this statement.

Combined Impact of the EPA's Past Inaction on Delisting Petitions and the
November 8, 1985, Deadline for Part B Applications By Land Disposal Facilities

When the EPA first promulgated its list of hazardous substances, the members of TMOGA and other companies looked to the delisting provisions in 40 C.F.R. §§ 260.20 and 260.22 as the mechanism that could be used to ensure that the EPA's hazardous waste regulations would be fairly administered and not require needless expenditures on the storage, treatment, and disposal of wastes that were not in fact hazardous. The EPA included a delisting provision because it recognized that while a waste may generally be described as hazardous, a specific waste from an individual facility may not be hazardous. 43 Fed. Reg. 58953 (Dec. 18, 1978).

The delisting procedure that was seen by TMOGA's members as a mechanism for fairness, has to date been merely a mirage. The EPA's delisting regulations provided for

relief, but the EPA has never granted final relief in ninety percent or more of the delisting petitions on file. Many delisting petitions have been on file from one to three years without any formal action by the EPA. Such delays were not justified even in view of the complex scientific nature of many delisting decisions.

The adverse impact of EPA's inaction on TMOGA members and others with pending delisting petitions has been compounded by the requirement in the Amendments that Part B applications for interim status land disposal facilities must be submitted prior to November 8, 1985, to continue in operation pending a final permit decision. Unless the EPA gives some assurance of administrative relief, some companies with long-pending delisting petitions will soon have to make substantial expenditures to prepare Part B applications for alleged hazardous waste land disposal facilities that are not in fact hazardous waste facilities. Land disposal facilities are defined in the Amendments to include surface impoundments.

Combined Impact of the EPA's Past Inaction on Delisting Petitions and the EPA's "Mixture" and "Derived From" Rules

The impact of EPA's past inaction on long-pending delisting petitions has also been compounded by the EPA's stringent "mixture" and "derived from" rule provides that a mixture of a solid waste and a listed hazardous waste is itself a hazardous waste unless the mixture has been delisted. 40 C.F.R. §261.3 (a) (2) (iv). The "derived from" rule provides that any waste generated from the treatment, storage, or disposal of a listed waste is a hazardous waste unless the "derived from" waste has been delisted. 40 C.F.R. § 261.3 © (2) & (d) (2). The Stringent application of these two rules often leads to unjustified results. A minimal amount of a listed waste entering a large surface impoundment containing non-hazardous wastewater, makes the entire contents of the surface impoundment a hazardous waste even though there is no doubt that the mixture is not hazardous. EPA's positive action on delisting petitions would eliminate many problems associated with the "mixture" and "derived from" rules. A "de minimis" exception to the "mixture" and "derived from" rules is also needed to help alleviate these problems. Because most delisting petitioners believed that the EPA would act in a timely and favorable manner on their petitions, they did not bother to go to the additional expense of also filing delisting petitions to protect themselves from the harsh results of the "mixture" and "derived from" rules. Thus by delaying to act on delisting petitions the EPA has placed TMOGA's members and other companies in the position of having to spend millions of dollars to prepare Part B applications and possibly construct facilities to comply with the Resource Conservation and Recovery Act (RCRA) regulations for listed hazardous wastes that probably are not hazardous.

The EPA's delays may also cause refineries to spend additional millions to comply with RCRA regulations for wastes that are clearly not hazardous except for the legal fiction created by the EPA's "mixture" and "derived from" rules.

Impact of Continued EPA Inaction on Delisting Petitions

As noted above, if the EPA does not move quickly to complete action on the delisting petitions, companies will have to proceed with the expensive task of preparing Part B applications for listed hazardous wastes that are in fact not hazardous and for which delisting petitions have been on file for a year or more. This will require the petitioners to begin expending personnel and financial resources on detailed engineering studies and possibly actual construction to comply with the EPA's 40 C.F.R. Part 264 standards and the new requirements in the Amendments even though the wastes are in fact not hazardous. The potential cost of the EPA's inaction is multiplied by the EPA's stringent and unreasonable "mixture" and "derived from" rules. Some type of EPA administrative relief is necessary and appropriate.

Request for EPA Administrative Relief

Because TMOGA members and other companies with long-pending delisting petitions have been placed in the position of soon having to expend significant personnel and financial resources because of EPA's long delays in acting on delisting petitions, TMOGA requests that the EPA give special treatment to those delisting petitions on file at least one year prior to the effective date of the Amendments. TMOGA requests that pursuant to 40 C.F.R. §260.22 (m) the EPA grant temporary exclusions to those petitioners whose wastes in all likelihood would be delisted under the regulations existing prior to the Amendments. The temporary exclusion could be conditioned on the petitioner subsequently providing the EPA with the additional information required for a delisting review under the Amendments. Such temporary exclusions would stop the probably needless expenditure of millions of dollars by the delisting petitioners. Temporary exclusions also would allow EPA and state permit review programs to concentrate their resources on Part B applications for truly hazardous waste facilities. The temporary exclusions need to be granted as soon as possible but not later than June 1, 1985, so that petitioners do not have to proceed with completing Part B applications until the EPA makes final delisting decisions.

TMOGA also requests that the EPA make its RCRA regulations more reasonable by adding "de minimis" exceptions to its "mixture" and "derived from" rules. Such a "de minimis" exception would be appropriate particularly for mixtures consisting of wastewater the discharge of which is subject to regulation under either Section 402 or Section 307 (b) of the Clean Water Act.

TMOGA is prepared to meet with EPA representatives and others for further discussion of the concerns expressed in this statement and TMOGA's request for EPA administrative relief.

Thank you for allowing TMOGA the opportunity to present this statement.

Respectfully submitted,

Charles V. Rice Chairman
Solid Waste Task Force
Texas Mid-Continent Oil & Gas Association

APPENDIX A

Technical Comments on EPA's Delisting Program for Refinery Wastes

In September 1982, the EPA placed a moratorium on granting petroleum refinery delisting petitions because of a concern over the appropriateness of the E.P. Toxicity test when applied to oily wastes. The EPA continued this moratorium in anticipation of language in the Hazardous and Solid Waste Amendments of 1984 which would require the EPA to consider hazardous constituents in a waste other than those for which the waste was originally listed.

During this period, several members of TMOGA along with other refineries across the country jointly funded two studies performed by ERM-Southwest, Inc. utilizing samples of wastes from their refineries. The first study demonstrated that the EPA's concern relative to the use of the Extraction Procedure as an appropriate test was largely unfounded. However, in spite of this data, the EPA began developing the very rigorous Extraction Procedure for Oily Wastes to be used as the test for metal mobility under a mismanagement scenario.

In late 1983, the EPA announced its concern over the possible presence of trace hazardous organics in refinery wastes and began developing a list of these compounds which require analysis for delisting petitions. At that time, the EPA was unable to provide guidance relative to levels of the organics which would be acceptable for delisting because of a lack of relevant data on refinery wastes. Thus, ERM-Southwest began the second study on a total of 27 wastes in order to assist the EPA in establishing threshold values for the various test parameters for delisting. Without these guidelines it would be poor business practice for each individual refinery to spend \$30,000 to \$50,000 per waste to prepare complete petitions only to find that the acceptable levels were set lower than contained in their wastes. This is the reason why many refineries have not yet submitted their initial delisting petitions to the EPA and why other refineries with petitions pending have not attempted to supplement their petitions.

The results of the second ERM-Southwest study were sent to EPA in advance of a meeting on September 6, 1984. The study report asked EPA these four basic questions:

1. For the 22 organic compounds detected in the refinery wastes, what concentrations would preclude delisting of the wastes?
2. For heavy metals of concern, what mobile metal concentration resulting from the E.P. for Oily Wastes would preclude delisting?
3. In light of the fact that only 22 organic compounds were detected in the 27 wastes analyzed, is it possible to reduce the list of 94 or more organic compounds of concern to this list of 22 in order to reduce costs and make the data base more manageable?
4. Since application of the E.P. for Oily Wastes showed that the mobile metal concentrations of the 13 heavy metals specified by EPA were all low or not detected, except for chromium and lead, can future delisting petitions concentrate on analyzing only for these two metals, possibly with only one representative waste sample being analyzed for all 13 metals?

At the September 6, 1984, meeting, EPA responded only with a commitment to provide a written response to the questions within two to three weeks. After almost five months, EPA finally responded to those questions in a February 1, 1985, letter that was received by ERM-Southwest on February 3, 1985. ERM-Southwest has quickly reviewed EPA's letter and asked the EPA for additional information. However, because TMOGA and its members have not yet had an opportunity to completely review the February 1, 1985, letter, TMOGA is not able to comment on the letter at this time.

TMOGA will submit its comments on the EPA's February 1, 1985, letter in the very near future. TMOGA requests that EPA give high priority to this matter and act quickly to establish realistic guidelines for delisting oil refinery wastes. Clearly, if special measures are not taken by the EPA, many refineries will have to expend critical resources in pursuit of compliance with hazardous waste regulations for wastes that are not hazardous.

~~Wastes that are not hazardous are not hazardous waste regulations~~