

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

APRIL 26, 1991

MEMORANDUM

SUBJECT: Federal Hazardous Waste Generator Notification Policy

FROM: Don R. Clay
Assistant Administrator
Office of Solid Waste and Emergency Response

Raymond B. Ludwiszewski
Acting Assistant Administrator
Office of Enforcement

TO: Waste Management Division Directors
Regions I-X

Regional Counsels
Regions I - X

Frank Covington, Director
National Enforcement Investigations Center

I. Introduction

Federal agencies and departments engaged in the generation of RCRA hazardous waste ("Federal generators") must routinely select commercial hazardous waste treatment, storage and disposal facilities ("TSDs") for management of their wastes. The purpose of this policy memorandum is to facilitate the release of information from EPA to Federal generators regarding EPA's civil enforcement actions and criminal investigations at TSDs. The policy objective for this release of information to Federal generators is to assist them in making the most informed decision when selecting a commercial TSD to manage RCRA hazardous waste generated by the United States.ⁱ

II. Background

On September 21, 1989, the House Subcommittee on Environment, Energy and Natural Resources held a hearing on Marine Shale Processors ("MSP") of Amelia, Louisiana. A concern was raised in the course of the hearing that a number of Federal facilities may have sent hazardous waste to

MSP despite the fact that the company had been under criminal investigation for many months. A view was expressed at the hearing that this was a problem which resulted from EPA's failure to comprehensively share compliance and enforcement information with Federal generators so that these Federal generators could make informed decisions regarding whether to use MSP to manage their wastes. This Policy has been developed to enhance the transfer of important compliance and enforcement information from EPA to Federal generators in a manner which will not unfairly impact the rights of TSDs subject to the regulatory and investigatory authority of EPA.

III. Notification Policy

This policy establishes two independent mechanisms for the transfer of relevant information regarding TSDs from EPA to Federal generators. The first mechanism draws on the concepts contained in the Superfund Off-site Policy which ensures that wastes removed from a Superfund site are sent to appropriate treatment and disposal facilities. The second mechanism involves the creation of a Federal Generator Notification System for the routine transmittal of relevant information from EPA to Federal generators.

Please note that the bulk of information which may be relevant to a Federal generator's analysis of a TSD is in the possession of state RCRA programs rather than in the possession of EPA. Therefore, in the course of selecting a TSD, Federal generators are strongly encouraged to seek substantially more information about candidate TSDs than that which will be provided by EPA under this Policy. Appropriate inquiries by a Federal generator may include, for example, their own inspection and/or audit of candidate TSDs as well as their request for relevant information from appropriate state regulatory programs.

A. Use of the Off-Site Policy

EPA's revised Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") Off-site Policyⁱⁱ assists in directing CERCLA wastes to properly permitted waste management facilities which have relevant releases controlled and which have no relevant environmental violations. The CERCLA Off-site Policy minimizes the possibility that hazardous substances removed from a CERCLA site pursuant to a CERCLA-authorized or CERCLA-funded response action will create or contribute to future environmental problems.ⁱⁱⁱ

EPA has determined that much of the data which was utilized by a Regional Off-site Coordinator ("ROC") to make a CERCLA Off-site policy determination (generally referred to herein as an "acceptability" determination) for a particular TSD may be useful to Federal generators in selecting TSDs for management of their RCRA hazardous waste. Therefore, upon request, EPA will share with Federal generators relevant, publicly available data which was utilized by the ROC in making a final CERCLA Off-site Policy "acceptability" determination for a TSD. To obtain this data for a TSD, Federal generators should submit a written request to the appropriate ROC^{iv} for release of relevant, publicly available data which was utilized by the ROC in making a final CERCLA Off-site Policy "acceptability" determination for the TSD^v.

The ROC shall respond to the Federal generator's request for data as expeditiously as practicable. The ROC's response to the Federal generator's request for data should normally take the form of a simple transmittal of relevant, publicly available Off-site data used by the ROC in the course of making his or her final "acceptability" determination.^{vi} Because the purpose of this Policy is to provide Federal generators relevant, publicly available data utilized by EPA in making its final CERCLA "acceptability" determinations to assist Federal generators in making the most informed decision regarding the proper management of their hazardous waste, it is unnecessary for the ROC to provide his or her conclusion regarding the "acceptability" of a TSD to receive CERCLA waste as determined pursuant to the CERCLA Off-site Policy.

In the event that the ROC has ~ made an "acceptability" determination regarding the subject TSD, a Federal generator's request for information from the ROC does not trigger the I-. initiation of an EPA CERCLA off-site investigation of the TSD. Where the ROC has not made final "acceptability" determination, the ROC shall notify the requesting Federal generator that no final "acceptability" determination has been performed and, therefore, the ROC has no CERCLA off-site data responsive to the request. Regardless of whether CERCLA off-site data is available to Federal generators for a particular TSD, Federal generators may seek and obtain relevant, publicly available information from EPA from other sources, including the Federal Generator Notification System described below.

B. The Federal Generator Notification System

The second information transfer system, known as the Federal Generator Notification System ("FGNS"), provides for the transfer of hazardous waste enforcement information from EPA to Federal generators.^{vii} The FGNS is designed to share with Federal generators certain types of information regarding TSDs which has been drawn from EPA's Hazardous Waste Data Management System (HWDMS), from the Office of Enforcement's judicial enforcement docket, and from EPA's criminal investigations.

1. - Enforcement Summary

The first component of the FGNS is comprised of a quarterly transfer of a list of EPA's pending civil and criminal hazardous waste enforcement cases to Federal agencies and departments known to be generating significant volumes of hazardous wastes.^{viii} This list of enforcement cases will contain:

- a) a list of all civil enforcement actions (judicial and administrative) initiated by EPA against TSDs; and,
- (b) a list of all cases charged by the United States, at the request of or in conjunction with EPA, against TSDs.

Following receipt of the EPA enforcement summaries, Federal generators may then wish to obtain further information about a TSD subject to an EPA enforcement action. If further information about a particular TSD is desired, the Federal generator should inquire with the appropriate EPA Regional office to obtain relevant and publicly available data in EPA's possession associated with the enforcement action taken at the TSD. The Federal generator's inquiry should be directed to the Regional Waste Management Division Section Chief or Branch Chief for RCRA Enforcement (for civil matters) or to the Regional Office of Criminal Investigations (for criminal matters).^{ix} The Waste Management Division (for civil matters) or the Office of Criminal Investigations (for criminal matters) shall consult with the appropriate Office of Regional Counsel attorney before responding to the Federal generator's inquiry.

2. Information Obtained Via Pre-Indictment Criminal Investigations

The second component of the FGNS authorizes EPA to disclose to Federal generators, as appropriate, publicly available information obtained by EPA while conducting a criminal investigation. Generally this type of information may be considered for disclosure where the information reflects the nature of the operations and conditions at a TSD, including possible or alleged violations, and where the information may be useful to Federal generators in selecting an appropriate TSD for management of their hazardous waste.

Given the nature of criminal investigations, any actual disclosure of information collected in the course of a criminal investigation must be considered and made on a case-by-case basis following thorough discussion with and among the prosecuting attorneys, including the Department of Justice (see EPA Ethics Advisory 90-2).^x Initial case-by-case determinations regarding disclosure can be made in conjunction with the regular monthly criminal program meetings in each Region attended by the Special or Resident Agent-in-Charge of the Office of Criminal Investigations (collectively, the "SAC"), the Office of Regional Counsel's Criminal Enforcement Counsel, and the Waste Management Division Director. However, all final determinations regarding whether to disclose to Federal generators information obtained in the course of a criminal investigation shall be made in consultation with, and with the concurrence of, the Office of Regional Counsel Criminal Enforcement Counsel and the prosecuting attorneys at the Department of Justice.

In the event that information obtained in the course of a criminal investigation is to be released to Federal generators, the following steps shall be taken:

- (a) the SAC shall contact the appropriate investigative service^{xi} of each Federal generator known or believed to be utilizing the TSD;
- (b) the SAC shall inform, and supply releasable documents to the Director, Office of Federal Facilities Enforcement (OFFE), of the Office of Enforcement^{xii}; and,
- (c) the SAC shall inform the Director of the Office of Criminal Enforcement Counsel (Office of Enforcement) of his or her action.

Following notice by the SAC, the Director of OFFE shall, in consultation with the SAC, contact the OFFE's counterpart at those Federal agencies or departments known or believed to be utilizing the TSD to formally notify the Federal agency or department of the investigation and to transmit to them all supporting documents subject to disclosure.^{xiii}

IV. Points of Contact

If you have any questions about the implementation of this Policy, please contact Richard Emory, Office of Criminal Enforcement (FTS 475-9669), Robert Meunier, Chief of the Compliance Branch, Grants Administration Division (FTS 475-8025), or Nancy Browne, Office of Waste Programs Enforcement (FTS 475-9326), as appropriate.

Attachments

cc: Deputy Administrator
Regional Administrators, Regions I-X
Director, Office of Waste Programs Enforcement, OSWER
Director, Office of Criminal Enforcement Counsel, OE
Director, Office of Federal Activities, OE
Director, Office of Federal Facilities Enforcement, OE

ATTACHMENT 2

Model Letter From EPA ROC to Federal Generator
In Response to Inquiry Regarding Commercial TSD

[Addressee]

Dear _____:

This letter responds to your request dated _____ for all relevant and publicly available information or data which was utilized by the Environmental Protection Agency's ("EPA") Regional Off-site Coordinator in determining the "acceptability" of the _____ treatment, storage or disposal facility to receive CERCLA waste pursuant to EPA's CERCLA Off-site Policy.

As set forth in EPA's Federal Generator Hazardous Waste Notification Policy, upon the request of a department, agency or instrumentality of the Federal government which generates hazardous waste, EPA will provide the Federal generator with all relevant, publicly available information and data utilized by the Region's CERCLA Off-site Coordinator in analyzing the "acceptability" of the treatment, storage or disposal facility under the CERCLA Off-site Policy. [OPTION 1: Enclosed please find that information and data which the Region has determined is responsive to your request.] OR [OPTION 2: Please be advised that the Regional Off-site Coordinator has not reviewed the "acceptability" of _____ facility pursuant to the CERCLA Off-site Policy and, therefore, the Regional Off-site Coordinator has no information or data which is responsive to your request. However, please be advised that relevant publicly available information regarding _____ facility may be available from EPA through other means, including the Federal Generator Notification System. Please review the Federal Hazardous Waste Generator Notification Policy for further information regarding the Federal Generator Notification System).

[OPTION 1: The enclosed information and data is forwarded to you, at your request, to assist you in selecting an appropriate treatment, storage or disposal facility for your hazardous waste. EPA's transmittal of this information and data to you in no way constitutes: (1) a recommendation by EPA regarding whether you should utilize the subject treatment, storage or disposal facility for management of your hazardous waste or (2) a determination regarding the "acceptability" of the subject facility under the CERCLA Off-site Policy.]

Please note that there may be additional significant sources of information and data which you may find helpful in determining whether to utilize a particular treatment, storage or disposal facility. For example, we strongly encourage you to perform your own inspections and audits of potential treatment, storage or disposal facilities which you may be considering for management of your hazardous waste; we also encourage you to contact the appropriate state agencies for any information which they may have regarding any treatment, storage or disposal facility which you may be considering for management of your hazardous waste.

Sincerely,

Regional Off-site Coordinator

Enclosures

ATTACHMENT 3

Model Memorandum From SAC to CB/GAD Notifying of
Information Release and Transmitting Relevant Documents

MEMORANDUM

SUBJECT: Release of Information to Federal Generators Pursuant to the Federal Hazardous Waste Generator Notification Policy

FROM: _____
Special or Resident Agent-in-Charge
Office of Criminal Investigations (OE)

TO: _____
Chief of the Compliance Branch
Grants Administration Division (OARM)

This memorandum serves to notify you that the Office of Criminal Investigations (OCI), the Regional Criminal Enforcement Counsel (RCEC), the Regional Waste Management Division, and the Department of Justice have collectively decided to release certain information which has been obtained by the United States in the course of conducting a criminal investigation of the _____ treatment, storage or disposal (TSD) facility to Federal hazardous waste generators. As you know, EPA's Federal Hazardous Waste Generator Notification Policy authorizes the release to Federal generators of any publicly releasable facts or data discovered during a criminal investigation which reflect the nature of TSD operations and conditions (including possible or alleged violations), which may be relevant to a Federal generator's decision of whether to use a commercial TSD facility.

Pursuant to the Federal Hazardous Waste Generator Notification Policy, attached please find information which should now be considered available for release to the appropriate investigative services of relevant Federal generators. I have also attached a list of the Federal generators believed to be utilizing the subject TSD so that you may contact and transmit the attached information to your counterparts in those organizations.

If you have any questions about this information release or about the attached information, please do not hesitate to call _____ of my staff at _____.

Attachments

cc: Office of Criminal Enforcement

ATTACHMENT 4

Model Letter From OE To Federal Generators

[Addressee]

Dear _____:

EPA has reason to believe that (agency/department) uses or has used the _____ treatment, storage or disposal (TSD) facility for management of the [agency/department's] hazardous wastes. If [agency/department] does not utilize this TSD, and has no foreseeable plans for doing so, please disregard this notification and attached documentation.

EPA's Federal Hazardous Waste Generator Notification Policy authorizes EPA's disclosure of certain types of publicly available information and data regarding commercial TSD facilities to Federal generators of hazardous waste where such information may assist Federal generators in selecting a TSD facility for management of their hazardous waste. EPA currently has information or data in its possession regarding the _____ TSD facility which [agency/department] may find useful in making hazardous waste management decisions. Therefore, EPA has elected to enclose copies of such information or data for your review.

This letter of notice and documents supplied with it serve no other purpose than to share publicly available information currently in EPA's possession with other organizations within the Federal government. Notwithstanding this sharing of information, [agency/department] retains full responsibility for all decisions made with respect to the management of its hazardous waste.

Please note that EPA's decision to transmit the attached information should not be construed as a recommendation regarding whether to use the subject TSD facility. The information is transferred to you so that [agency/department] may make the most informed decision regarding the management of hazardous waste which (agency/department) may generate. As you know, the mere existence of a criminal investigation into a facility's practices is not in arid of itself cause for terminating ongoing or future hazardous waste treatment, storage, or disposal contracts. Prior to the filing of charges, in no way does the existence of a criminal investigation constitute a determination by EPA or the Department of Justice that criminal activity occurred at the subject TSD, and only the U.S. Courts can conclusively establish that criminal activity in fact occurred. [This letter should have alternative language to address whether the fact of a criminal investigation is information available to the public.]

Further, please note that this letter does not constitute notification of a suspension or debarment action and should not be construed by [agency/department] as a recommendation to take any action other than to review EPA's Federal Hazardous Waste Generator Notification Policy, this letter, and the enclosed information.

If you have any questions concerning this notification or the of my staff at attached documentation, please call _____ of my staff at _____.

Sincerely,

Chief of the Compliance Branch
EPA Grants Administration Division

Enclosures

cc: Special or Resident Agent-in-Charge (Office
of Criminal Investigations)
Office of Criminal Enforcement
Regional Off-site Coordinator

ⁱ This policy is applicable only to Federal generators. Any request for information under this Policy from a non-Federal generator regarding a commercial TSD or concerning a Federal generator's request for information, shall be processed as any other request for information would be processed under the Freedom of Information Act, 5 U.S.C. 552.

ⁱⁱ The revised CERCLA "Off-site Policy" is dated November 13, 1987, and designated as OSWER Directive Number 9834.11.

ⁱⁱⁱ The Off-site Policy helps to ensure that decisions involving the off-site transfer of CERCIA waste "are made in an environmentally sensible manner, consistent with sound public policy and business practices." Revised Off-site Policy at page 7.

The policy generally provides that EPA will make an initial determination regarding the acceptability of a facility to receive CERCLA waste. EPA provides the owner/operator of the facility with notice of its initial acceptability determination. Following notice, the owner/operator may confer with EPA and/or submit comments on EPA's initial acceptability determination. EPA then may issue a final determination as to a facility's acceptability to receive CERCIA waste under the Off-site Policy.

The Off-site Policy, and facility acceptability determinations, is managed by designated Regional Off-site Coordinators.

^{iv} A list of ROCs (current as of the date of this Federal Generator's Notification Policy) is provided as Attachment 1.

^v To properly track each request, EPA requires that each written request seek data for only one TSD. Further, the Federal generator's written request for data must be as limited in scope as possible so as to minimize EPA's resource burdens in responding to the Federal generator's request. A Federal generator's request for information pursuant to this portion of the Policy should be limited to: (1) current authorized hazardous waste management operating parameters for the TSD (Part A permit information); (2) inspection reports for the past three years for the TSD; and (3) hazardous waste management information for the past three years for the TSD which the ROC determines to be relevant and responsive to the Federal generator's request.

^{vi} The ROC's response to the Federal generator's inquiry should utilize the model response letter provided as Attachment 2.

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^{vii} Information supplied to a Federal generator through the FGNS shall not constitute:

- (1) a recommendation by EPA as to whether to use the TSD; or,
- (2) a determination of the TSDs “acceptability” under the CERCLA Off-site Policy.

^{viii} The Office of Federal Facilities Enforcement (Office of Enforcement) will circulate the enforcement summary to all Federal generators known to generate significant quantities of hazardous waste.

^{ix} The Federal generator’s inquiry should be as precise and as streamlined as possible so as to minimize EPA’s resource burdens in providing relevant and publicly available information to the Federal Generator.

^x The following may serve as useful examples of the types of inquiries which may be made in the case-by-case disclosure determinations:

- 1) Is the information being considered for disclosure generally available to the public? This may include information which is generally known to the public as well as information which is part of a public record.
- 2) Has the target been made aware of the existence of the criminal investigation? Generally, disclosure should be made only after the target has been made aware of the existence of the criminal investigation or after the existence of the criminal investigation has been revealed publicly;
- 3) Does the information contain relevant and objective data regarding a TSD which a Federal generator may find valuable in determining whether to utilize the TSD?
- 4) Should the information be disclosed in light of special legal and procedural concerns including, but not limited to, the Federal rules regarding criminal proceedings (including the requirements for grand jury secrecy) and the Federal rules concerning discovery.

^{xi} An appropriate investigative services may be, for example, the Federal generator’s Office of Inspector General.

^{xii} The SAC shall contact the CB/GAD using the model memorandum provided as Attachment 3.

^{xiii} OE shall contact appropriate Federal generators using the model letter provided as Attachment 4.