



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Transmittal of Addendum to the 1996 Hazardous Waste Enforcement Response Policy

FROM: Desi Crouther, Acting Director
RCRA Enforcement Division
Office of Regulatory Enforcement

TO: RCRA Enforcement Managers, Regions I-X

Ann Dobbs, Chair
Enforcement and Compliance Assurance Task Force
Association of State and Territorial Solid Waste Management Officials

Since the 1996 Hazardous Waste Enforcement Response Policy (ERP) was issued, various EPA Regional Offices and States have asked questions about the classification of Significant Non-Compliers (SNCs) under the policy. Based on our discussions with EPA and State personnel, the RCRA Enforcement Division is issuing an addendum to the ERP addressing some of the questions raised about the policy (see attachment).

The 1996 ERP was the result of a multi-year effort by a national workgroup that included Regional and State representatives. The Office of Enforcement and Compliance Assurance (OECA) issued the policy after receiving and addressing a multitude of comments from Regional and State hazardous waste personnel. In revising the ERP, OECA specifically recognized the need for greater flexibility to accommodate the variety of environmental conditions faced by federal and state regulators, as well as the differing enforcement procedures used by state agencies to bring the regulated community into compliance. In particular, OECA adopted a definition of significant non-compliance that allows the Regions and States to ensure that formal enforcement actions are targeted at violators that present the greatest potential threats to human health and the environment.

By issuing this addendum, I want to reiterate EPA's commitment to the principles of the 1996 ERP. EPA believes that proper implementation of the policy can be accomplished if EPA and State managers make thoughtful and conscientious decisions as to whether a violator should be classified as a SNC or a secondary violator (SV) based on the criteria set forth in the policy and this addendum. The policy was written with the intention of providing the Regions and states with more flexibility than the previous policy. However, the amount of variation in the reporting of SNCs raises questions about the effectiveness and consistency by which the 1996 ERP is being implemented.

Therefore, in addition to this addendum, we will be reviewing the ERP over the next year to evaluate whether any additional modifications or revisions to the policy are necessary to ensure that it is being implemented consistently across the Regions and states.

I appreciate your continued efforts to keep the RCRA Enforcement Division apprised of the successes and challenges associated with implementing the ERP. Please feel free to contact me at (202) 564-2264 if you have any questions. Alternatively, your staff may contact Ann Stephanos at (202) 564-4006.

Attachment

Addendum to the 1996 Hazardous Waste Enforcement Response Policy

The 1996 Hazardous Waste Enforcement Response Policy ("ERP") establishes three criteria for classifying a facility as a significant non-complier (SNC). These are: (1) actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents; (2) chronic or recalcitrant violators; or (3) substantial deviation from the terms of a permit, order, agreement, or from RCRA statutory or regulatory requirements. The main purpose of this addendum is to further clarify the factors that should be considered in applying these criteria to the classification of a SNC. Additionally, this addendum provides guidance concerning a violator's return to compliance after a Region or State has initiated an informal enforcement response.

I. Clarification of Criteria for Classifying a Facility as a Significant Non-Complier

A. Actual or Substantial Likelihood of Exposure to Hazardous Waste or Hazardous Waste Constituents

In evaluating whether there has been actual or likely exposure to hazardous waste or hazardous waste constituents, the Region or State should consider both environmental and human health concerns. As stated in the ERP, "environmental impact alone is sufficient to categorize a facility as a SNC, particularly when the environmental media affected requires special protection (e.g., wetlands or underground sources of drinking water)." Additionally, when deciding whether a violator meets this criterion, the Regions and States should consider the potential exposure of workers to hazardous waste or hazardous waste constituents. Many of RCRA's requirements are designed to protect the individuals who work with or near hazardous waste. Therefore, the protection of these workers should be valued as highly as the protection of the general public.

Under this criterion, the Region or State need not identify significant damage to the environment or human health to justify a SNC classification. Rather, the mere fact of exposure or a substantial likelihood of exposure is sufficient to satisfy this criterion. Additionally, even in situations involving a minor release, the type of hazardous waste involved (e.g., mobility, exposure to air) or the location of the release (e.g., located in an populated area or in a building to which the public has access) may lead the Region or State to conclude that this criterion has been met.

Finally, the Regions and States are reminded to look beyond actual releases to threatened releases. A threatened release is sufficient to meet this criterion if there is a substantial likelihood that the release would result in exposure to hazardous waste or hazardous waste constituents. Also, releases that might otherwise be considered insignificant should be examined in the larger context of the overall management of the hazardous waste. If a minor release taken together with other factors, suggests an ongoing threat of future releases, then the Region or State

should determine that this criterion has been met.

B. Chronic or Recalcitrant Violators

With respect to chronic or recalcitrant violators, the ERP states that the violator's compliance history "should be evaluated on a multi-media basis." Although this information may be difficult to obtain in some circumstances, the Regions and States should use their best efforts to obtain and consider this information. In many cases, this evaluation will provide insight into the overall environmental management practices and may indicate whether a violator will be responsive to an informal enforcement action. To the extent practicable, the Region or State should also consider previous violations by the same individual or entity at other locations.

In weighing the violations that make up a regulated entity's compliance history, the Regions and States should give the heaviest weight to similar violations and to multiple violations at the same process or unit. In addition, while there is no set time period for evaluating the violator's past conduct, misconduct occurring less than three years ago should be weighted more than misconduct occurring beyond a three year period. The Regions and States should consider but give less weight to violations of other media requirements. Similarly, they should consider but give less weight to violations by the same regulated individual or entity at other locations. The exception to this last principle is where the previous violation was identical to the one currently identified by the Region or State. In such cases, the previous violation should be given considerable weight.

By itself, chronic non-compliance or recalcitrance will generally not turn a violator that is clearly a secondary violator (SV) into a SNC. Minor deviations from RCRA requirements that clearly do not present the risk of exposure to hazardous wastes should not result in a SNC classification simply because the regulated entity previously committed similar minor violations. Rather, information concerning past violations and/or recalcitrance should be considered when it is unclear as to whether a violator should be designated a SNC or an SV. Notwithstanding this general rule, however, the Regions and States should keep in mind the need to escalate the enforcement response, by initiating a formal enforcement response, if a regulated entity continues to demonstrate a pattern of similar violations over a longer period of time.

C. Substantial Deviation from the Terms of a Permit, Order, Agreement, or from RCRA Statutory or Regulatory Requirements

This criterion involves a judgment call based on the totality of circumstances associated with the violator. Listed below are some principles that the Regions and States should keep in mind when making this determination.

First, the Regions and States should not consider the size or financial viability of a

business when determining whether the violator is a SNC: After the government discovers a violation, the size and viability of the business should be factors in deciding the appropriate relief sought in any formal enforcement action that ensues.

Second, the Regions and States should focus on the importance of the particular requirement violated and how substantially the violator failed to comply with it. For instance, violations that enable an entity subject to Subtitle C to remain outside the scope of the regulatory program are, by their very nature, substantial deviations from the regulatory program. When applying this principle, the Regions and States do not necessarily need to evaluate the percentage of the total applicable requirements that were violated.

The more important the requirement in terms of furthering RCRA's statutory or regulatory purposes or procedures, the less the Regions and States should tolerate deviation from the requirement. In determining the importance of the requirement, the Regions and States should consider the direct contribution that the provision offers to protect human health or the environment. Additionally, the Regions and States should remember that a particular requirement may be important because the information it requires to be maintained or provided to another individual is essential to the integrity of the RCRA regulatory program.

Finally, in marginal situations, the Regions and States should consider any steps the violator has taken to expeditiously come into compliance prior to discovery by the government and to mitigate any risks resulting from its violation. In some circumstances, the deviation from the requirements may not be considered substantial if the violator, on its own initiative, identifies the violation soon after the violation begins, takes steps to return to compliance as expeditiously as possible, and mitigates any potential harm to the environment or the regulatory program.

II. Demonstration of a Violator's Return to Compliance After a Region or State Initiates an Informal Enforcement Response

The ERP provides that once a decision is made to utilize an informal enforcement mechanism, the violator should be given notice of its non-compliance and the enforcing agency should establish a date by which all violations must be corrected. The ERP further provides that the correction period during which a violator should correct all known violations should not exceed 90 days.

To help ensure that timely and appropriate action is taken if a violator fails to return to full physical compliance by the established date, the Regions and States should require a demonstration of a violator's return to compliance (e.g., a certification by a responsible representative, documentation, photographs). Generally, a violator should be required to notify the Region or State within five (5) business days after compliance is achieved. However, depending on the nature of the violation(s) involved, the enforcing agency may elect to extend

the time frame for providing sufficient demonstration.

Note: This document does not establish or modify any statutory or regulatory requirements; it provides guidance on policies and procedures but does not constitute final Agency action on any matter. It also is intended, and cannot be relied upon to create any right, benefit or trust responsibility enforceable by any party in litigation with the United States.