OSWER Directive No. 9930.0-1

October 16, 1985

MEMORANDUM

SUBJECT: Loss of Interim Status Enforcement Strategy

FROM: Gene A. Lucero, Director
Office of Waste Programs Enforcement

TO: Waste Management Division Directors, Regions I-X
Regional Counsels, Regions I-X

Attached is the revised strategy for enforcing the Loss of Interim Status Provision set out in the 1984 amendments to RCRA. It bears repeating one more time that we must aggressively enforce the requirements of this provision, if we are to effect the intent of Congress. Please review this strategy closely.

You will receive information shortly about the two contract mechanisms that have been established to help you with the additional workload created by the Section 3007 letters. You may call me, Lloyd Guerci or Jackie Tenusak (FTS 475-8729) if you have any questions about the implementation of the strategy or the contracts.

Attachment

cc: Environmental Enforcement Section, DOJ
OECM-Waste
OECM-Criminal Enforcement
NEIC

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Resource Conservation and Recovery Act
Loss of Interim Status Enforcement Strategy

## Introduction

The Environmental Protection Agency underscored the significance of the RCRA loss of interim status provision in the FY 1986 RCRA Implementation Plan. The Agency also has published a Federal Register Notice outlining its implementation and enforcement policy, as well as an interpretative guidance. This guidance supplements those documents by delineating the loss of interim status enforcement strategy.

## Summary

Section 3005(e)(2) of RCRA requires interim status land disposal facilities that desire to retain interim status (1) to submit an operating (Part B) permit application by November 8, 1985 and (2) to certify compliance with all applicable ground-water monitoring and financial responsibility requirements by November 8, 1985. While encouraging valid certification on a facility-wide basis, the Agency is allowing unit by unit certification. RCRA land disposal units that do not submit Part B applications and certifications of compliance (i.e., that lose interim status */) must immediately cease operation and comply with applicable closure requirements.

The loss of interim status provision is self implementing and imposes requirements on owners and operators of land disposal facilities rather than directly on EPA. Nonetheless the Agency will aggressively implement and enforce the loss of interim status provision and related requirements.

There are four major elements of the loss of interim status enforcement strategy.

First, a communications strategy will advise the public, the Congress and regulated community of our interpretation of the loss of interim status provision and our serious intentions to implement and enforce the provision. Second, inventories of facilities on a unit by unit basis will be developed. These will identify facilities by unit that (a) certify compliance and submit a Part B (retain interim status), (b) fail to certify compliance and/or submit a Part B (lose interim status) and (c) of those that lose interim status, those that do not submit closure plans. These inventories will provide an information base for program and enforcement management in the aftermath of November 8, 1985. Third, facilities/units with clear

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*/ Under the Agency's implementation and enforcement policy which is set forth in the Federal Register, facilities such as non-notifiers and late notifiers that technically did not have interim status are subject to the loss of interim status provision. Accordingly, this strategy generally will refer to facilities that did not satisfy the provision's requirements as facilities that did not certify or submit a Part B; as a short hand expression such facilities also will be referred to as losing interim status.

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violations will be targeted for priority enforcement. This will include (a) clearly inadequate facilities/units, including facilities without wells (and without a valid waiver) or without satisfactory financial responsibility assurances, identified before November 8, that attempt to certify compliance, (b) facilities/units that do not certify compliance and/or submit a Part B but continue to operate as identified during annual inspections or by an informant, and (c) facilities/units that do not certify compliance and/or submit a Part B, and fail to submit closure plans. Criminal enforcement actions are to be developed and referred to the Department of Justice where justified on the facts; other enforcement authorities will be used to seek proper closure of facilities/units, including some that certified. Fourth, during FY 1986 facilities/units that retain interim status as well as those that submit closure plans will be subject to evaluations of their ground-water monitoring systems, Part B applications or closure plans as part of ongoing programmatic activities. Instances of noncompliance will be addressed through enforcement actions.

Elements of the Strategy

A. Communications

Each Region has advised facilities with RCRA land disposal units of the loss of interim status provision. In addition, in October each Region is to send a copy of the Federal Register Notice to each such facility. This transmittal will be part of a single RCRA section 3007 letter that will seek phased responses from each facility on units that close, submission of closure plans, and optionally, waste disposition. The letter is discussed below; a model letter is set forth in Attachment A.

After the Federal Register Notice was signed, Headquarters - OWPE briefed the Congress and Washington, D.C. external groups about the loss of interim status provision and of this strategy. Each Region should adopt a communications plan regarding the loss of interim status provision. The plan is to be oriented toward widespread communications and should emphasize the Region's intent to enforce the provision.

B. Inventories of Facilities (on a Unit by Unit Basis) in Operating Permit Applicant and in Closure Universes

1. Facilities (by unit) that certify compliance and submit Part B permit applications (operating permit universe).

The loss of interim status provision requires owner/operators to submit permit applications and certify compliance with ground-water monitoring and financial responsibility requirements to retain the authority to operate*/ and remain in the operating permit applicant

*/ This includes non-notifiers and late notifiers.

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universe. In implementing this provision, the Agency has authorized owner/operators to certify compliance on a unit by unit basis. It also has advised owner/operators to send compliance certifications and permit applications to EPA and, where authorized, the States. We expect that most certifications will be mailed in early November. The Regions should implement procedures to check transmittal (post mark) dates and reject late transmissions.

Following receipt of the certifications of compliance and Part B applications, the Regions are to develop promptly an inventory of facilities, on a unit by unit basis, that certify compliance and submit Part B applications. The inventory should identify each facility (with RCRA ID number) that certifies compliance and submits a Part B and, for each such facility, should identify the units that certified (or the facility as a whole). This inventory of facilities in the operating permit applicant universe will be utilized by Regional enforcement and permitting personnel and shared with states. The inventory will also be submitted to headquarters. The schedule for developing the post November 8 universe of operating permit applicant facilities by unit is set forth below. In addition the Regions are to make a copy of each certification and place it in a separate certification file.

2. Facilities/units that do not certify compliance and/or submit Part B permit application (closure universe).

In the event that a land disposal facility does not submit a Part B application and certification by November 8, 1985, it must cease operation of its land disposal units. Those units enter the closure universe by operation of law by that date. The Regions are to develop a separate inventory of facilities that do not certify compliance and/or do not submit a Part B application. Generally, this closure universe may be developed by listing the Regional universe of land disposal facilities as amended in the summer of 1985 and then subtracting each facility that certifies all units and submits a Part B application that addresses all. The remainder are the facilities in the closure universe. There may be some questions, however, as to identity of all the RCRA Subtitle C land disposal units at a closing facility. Moreover, where a facility does certify/submit a Part B for units identified in those documents, it may be difficult to determine with confidence whether any RCRA Subtitle C land disposal units are not within the scope of those submissions.

The potential problem in defining the universe of units subject to closure results in part from the fact that the loss of interim status provision does not expressly require submissions regarding individual units that must close because they lost interim status. To fill this gap, the RCRA section 3007 letters that the Regions are to send to facilities in October will require in part an identification of land disposal units that are not within the scope of a certification and Part B. A model section 3007 letter, which the Regions may modify provided that the basic information is obtained, is set forth as Attachment A. The schedule for mailing and response is

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set forth below. The results will be collated to compile a closure universe, by facility by unit, which includes the same classes of information as in the operating permit applicant universe above. This universe will be provided to permitting and enforcement personnel, as well as to states and Headquarters. In addition, information in HWDMS will be updated to reflect the current status of the facilities.

3. Facilities/units that do not certify and/or submit a Part B permit application, and do not submit closure plans.

As a result of the loss of interim status provision, a large number of facilities/units must close. Those facilities/units will be identified in the closure universe noted above. The Regions and States must assure that a closure plan is submitted for facilities/ units that close. In most instances, authorized states will receive the closure plans on or shortly after November 23, 1985. As a matter of national consistency, and to assure that closures, which are a national priority, begin with the timely submission of a closure plan, the Regions are to obtain information on closure plan submission as part of the section 3007 letter to be sent in October. The model section 3007 letter requires the owner/operator to state when the closure plan was submitted. Regions are to use the responses to the section 3007 letters to develop an inventory of closing facilities that do not submit closure plans. This will be used for enforcement management.

C. Identify Facilities with Clear Violations and Take Priority Enforcement (Criminal or Closure)

In connection with the loss of interim status provision, there will be several classes of clear violations that must be given high enforcement priority by the Regions and States: (A) facilities/units clearly not in compliance with ground-water monitoring and financial responsibility requirements that certify, (B) facilities/units that are required to but do not submit closure plans, and (c) facilities/units that lose interim status that continue to operate.

In October 1985 the Regions should develop lists of facilities that should be targeted for enforcement promptly after November 8, 1985 if they certify compliance with ground-water monitoring and financial responsibility requirements. This includes several classes of facilities. First, facilities without monitoring wells that lack valid waivers may not certify. Second, facilities that lack the requisite financial assurances may not certify. There is no prosecutorial discretion to allow these facilities to certify or to allow these facilities (or facilities that do not certify) to continue to operate under an order or other mechanism. Any order, including State agency orders, that purports to do so beyond November 8, 1985 is invalid. Unless there is a legislative change for liability insurance, land disposal facilities that do not meet financial responsibility requirements may not certify or operate on and after November 8, 1985. Enforcement must be directed toward closure and/or be criminal in nature for this group of facilities. In seeking

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closure, temporary restraining orders and preliminary injunctions should be considered. Potential criminal actions should be referred immediately to the Office of Criminal Investigations in the Region. Facilities where there are substantial questions about whether RCRA Subtitle C requirements apply may not be good candidates for criminal action.

In most cases, the facilities that certify compliance and submit a Part B will have a monitoring well system. These cases remain subject to the sound evaluation and enforcement discretion of the Region. In exercising this discretion, the Region should consider, among other relevant factors, its view of the adequacy of the ground-water monitoring system, an authorized State's legitimate views, and any past representations of the adequacy of the system. In the event that the Region believes, and an authorized State does not substantially dispute that there is a strong, consistent case on the inadequacy of the well system, the complaint should seek closure and, alternatively if that relief is denied, an upgraded system that satisfies both part 265 and 270 standards. Where the Region and the State substantially disagree, or other factors lead to the conclusion that the hearing official or court probably will not order closure, the complaint should seek an upgraded well system that satisfies both part 265 and 270 standards.

Facilities/units that close and do not submit closure plans by November 23, 1985 should be targeted for enforcement by an authorized State or the Region.

Finally, the facilities/units that do not certify compliance and/or submit a Part B application and enter the closure universe will be inspected. In the event that the inspection or other credible information from an informant reveals that these facilities/units operated after November 8, the case should be referred immediately to the Office of Criminal Investigations in the Region. Neither EPA nor State regulatory personnel may negotiate with the facility, as this may detract from the criminal action. This does not preclude a prompt and unequivocal filing for a Temporary Restraining Order.

D. Ongoing Enforcement Throughout FY 1986

Facilities/units that retain interim status and are in the permit applicant universe, as well as facilities in the closure universe, may not be in full compliance with applicable requirements, or may be appropriate candidates for corrective action. They FY 1986 RIP, recognizing that manpower and resources must be applied throughout the year, provides for inspections and enforcement during the entire year.

Of those facilities/units retaining interim status, some will have monitoring well systems that EPA and/or the State considered marginal at the last inspection. Where the interim status well system is marginally acceptable, the Region/State should review the Part B application, update the inspection, and as appropriate, take enforcement action during FY 1986 to require compliance with 40 C.F.R.

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Parts 265 (Subpart F) and 270.14(c), or the State analogue. Where the well system in the view of the State is adequate to certify compliance, and notwithstanding its reservations, the Region believes that it cannot develop a successful case to terminate interim status and force closure, the Region/State should review the Part B application, update the inspection and, as appropriate, take enforcement during FY 1986 to require compliance with 40 C.F.R. Parts 265 (Subpart F) and 270.14(c), or the State analogue.

The Region/State must take actions to require adequate ground-water monitoring, a satisfactory closure plan, appropriate corrective action and implementation of the closure plan for those facilities entering the closure universe. These activities will occur throughout FY 1986 in accordance with the RIP.

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LOSS OF INTERIM STATUS ENFORCEMENT STRATEGY TIMETABLE

Pre - November 8, 1985

| | |
|---|---|
| 9/18 | Federal Register Notice on interpretation of provision signed |
| 9/19 | Congressional briefings and other communications begin |
| 9/25 | Federal Register notice published |
| 9/26 | Draft of this strategy to the Regions |
| 10/16 | Final of this strategy to the Regions |

Bi-weekly conference calls with regions to go over questions raised (participation optional)

Mail responses to questions submitted by Regions

Enforcement continues through this period.

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Post - Nov 8 (Regions)
target dates

| | |
|---|---|
| 9/30-11/7 | Regional lists identify facilities/units that are unable to certify (e.g., no wells, no insurance, clearly inadequate wells ("targets")) |
| 11/8-11/19 | Regions receive the vast majority of certifications and Part Bs |
| 11/12-11/19 | Regions receive responses to §3007 letters on noncertified units (closure universe) |
| 11/20-11/25 | Regions compile preliminary operating permit applicant and closure universe lists by name and I.D. number of (1) all facilities (by unit) that certify & submit Part B and (2) all facilities (by unit) not certifying and/or submitting Part B |
| 11/25 | Regions submit preliminary universe lists (above) to OWPE/States; also send States answers to §3007 requests |
| 11/25-12/5 | First screen - Regions determine if targets certified: compare list of those that certified to target list; identify certifiers that are enforcement targets; confer with Office of Criminal Investigations in the Region; confer with Regional Counsel on TROs. |
| 11/27-12/3 [11/23 is a Sat; 11/28 is Thanksgiving] | Regions receive response to §3007 letters on closure plans filed |
| 12/3-12/6 | Second screen - Regions determine if facilities/units that lost interim status filed closure plan. Amend list of facilities (by unit) not certifying and submitting Part B to include untimely filing or nonfiling of closure plan. |
| 12/9 | Regions submit to OWPE/State preliminary census, stating for each facility (with RCRA ID Number): identity of units that certified & submitted Part B; units not certified or no Part B; untimely or no submission of closure plan |
| 12/10-12/30 | Verify/resolve questions in census |
| 12/30/85 | Regions submit final census to OWPE, States (final version of 12/9 Census) |

NOTE: ENFORCEMENT IS TO PROCEED FROM NOVEMBER 8, 1985 AND THEREAFTER UPON DISCOVERY OF A SIGNIFICANT VIOLATION

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ATTACHMENT A

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[ADR]
[1]

RE: Request for Information Pursuant to §3007 of the Resource Conservation and Recovery Act, 42 U.S.C. §6927

Dear [NAME]:

Earlier this year, the Environmental Protection Agency sent your Company a letter to advise you that the Resource Conservation and Recovery Act (RCRA) had been amended by the Hazardous and Solid Waste Amendments of 1984 (the Amendments), and in particular to inform you of a new provision known as the loss of interim status provision. The purpose of this letter is to provide additional guidance relative to the loss of interim status provision and to request information regarding your operations before and after November 8, 1985.

The loss of interim status provision provides:

> (2) In the case of each land disposal facility which has been granted interim status under this subsection before the date of enactment of the Hazardous and Solid Waste Amendments of 1984, interim status shall terminate on the date twelve months after the date of the enactment of such Amendments unless the owner or operator of such facility-
>
> > (A) applies for a final determination regarding the issuance of a permit under subsection (c) for such facility before the date twelve months after the date of the enactment of such Amendments; and
> >
> > (B) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

The Environmental Protection Agency's interpretation of the requirements under this provision is published at 50 Federal Register 38946 (September 25, 1985), a copy of which is enclosed. Please read and follow this closely. In order for you to continue to place hazardous wastes in land disposal units at your facility on and after November 8, 1985, by that date you must (1) submit a Part B operating permit application and (2) a certification of compliance with all applicable groundwater monitoring and financial responsibility requirements. Certification is authorized on a facility-wide or unit-by-unit basis. The Part B application should be mailed or delivered before November 8, 1985 to:

and

EPA State

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The certification should be mailed or delivered before November 8, 1985 to:

and

EPA State

The owner/operator of a facility may certify compliance only if the facility or units for which interim status is retained is in physical compliance. Because this is a provision of federal law, an order by any agency that has a compliance date on or beyond November 8, 1985 does not relieve the owner/operator of the obligation to be in physical compliance by the statutory date when the certification is due. You may not interpret or rely on an order or compliance schedule therein as an extension of the November 8, 1985 deadline. Moreover, difficulties in achieving compliance, such as obtaining insurance, are not grounds for filing a certification if you are not in physical compliance.

If you do not certify compliance with ground-water monitoring and financial responsibility requirements and/or you do not submit a Part B permit application by November 8, 1985, you must cease placement of wastes into the land disposal units in question by that date and you must comply with all closure and post-closure requirements. This follows by operation of law and does not require notice from EPA.

You are hereby required, pursuant to the authority of §3007 of RCRA, 42 U.S.C. §6927, to report to EPA information regarding hazardous waste land disposal units that had interim status on or before November 8, 1985 and/or received hazardous waste after November 19, 1980. In particular, you are to submit the information specified in Paragraphs 1-2 of Attachment I between November 8 and 13, 1985. Information in paragraph 3 is to be submitted between November 23 and November 27, 1985. Information in paragraph 4 is to be submitted between January 3 and 10, 1986. Paragraph 5 is ongoing. Each submission must identify the facility by name, address and RCRA I.D. number, refer to the information request number or repeat the request, be a self-explanatory and complete response, be dated and be signed.

You may, if you desire, assert a business confidentiality claim covering part or all of the information requested, in the manner described by 40 CFR §2.203(b). You should read the above-cited regulations carefully before asserting a business confidentiality claim, since certain categories of information are not properly the subject of such a claim. Information covered by such a claim will be disclosed by EPA only to the extent, and by the means of the procedures, set forth by 40 CFR Part 2, Subpart B. If no such claim accompanies the information when it is received by EPA, it may be available to the public by EPA without further notice to you.

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Please forward the information requested to:
U.S. Environmental Protection Agency
Waste Management Division
Federal Building - Room
City/State
Attn: [2]

Failure to comply with the above request within the time frame specified may result in an enforcement action by EPA under the authority of §3008 of RCRA, including the assessment of penalties. You should also be aware that knowing falsification of any information provided pursuant to this request is a criminal violation under §3008(d)(3) of RCRA, and other provisions and may result in fines and imprisonment.

If you have any questions with regard to the above, or should you need further clarification regarding your response to this letter, please contact [Technical lead] of my staff at (617) 223-

Sincerely,

Director,
Waste Management Division

cc: State representative

bcc: Analyst
Technical Lead

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ATTACHMENT I

For purposes of the information request, the following definitions shall apply:

"Hazardous waste" means those solid wastes identified as hazardous waste in 40 CFR part 261, or the authorized state program in which a facility is located whichever is more inclusive.

"RCRA Land Disposal Units" shall include landfills, land treatment units, surface impoundments used for storage, treatment or disposal, waste piles and class I hazardous waste underground injection wells subject at any time to regulations or other requirements under subtitle C of the Resource Conservation and Recovery Act.

INFORMATION REQUEST

(1) Identify each RCRA land disposal unit at your facility by stating the common name or identifier used by the facility and type of unit, and by identifying the unit on a photocopy of a topographic map attached to your response.

(2) Identify each RCRA land disposal unit at your facility which was not within the scope of a certification of compliance with all applicable groundwater monitoring and financial responsibility requirements and a Part B permit application, transmitted to EPA by November 8, 1985, by indicating for each such unit the common name or identifier used by the facility, which unit must be identified on the topographic map identified in response to information request number 1 above.

(3) For each RCRA land disposal unit at your facility which was not within the scope of a certification of compliance with all applicable groundwater monitoring and financial responsibility requirements and a Part B permit application transmitted to EPA by November 8, 1985 (these units were to be identified in answer No. 2 above), state when and to whom a closure plan was submitted.

[ITEMS 4-5 are OPTIONAL]

(4) For each RCRA land disposal unit at your facility which was not within the scope of a certification of compliance with all applicable groundwater monitoring and financial responsibility requirements and a Part B permit application transmitted to EPA by November 8, 1985:

a. State the type and average quantity of hazardous wastes placed in each on a daily (or monthly) average during the year prior to November 8, 1985.

b. State when the unit ceased receiving hazardous waste;

c. State whether hazardous waste was placed in the unit at any time between November 8, 1985 and December 31, 1985;

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d. State how the hazardous waste introduced into the unit before November 8, 1985 has been treated, stored or disposed of between November 8, 1985 and December 31, 1985.

If waste is stored on-site, report:

(i) the type of storage;
(ii) the quantity presently in storage; and
(iii) the rate of generation.

If waste is shipped off-site for treatment, storage or disposal, list the name and address of the receiving facilities utilized.

e. State how you intend to treat, store or dispose of that hazardous waste identified in "d", in 1986, including the identity of any off-site facility to which you intend to ship it.

(5) If at any time in the future, hazardous waste is placed in any unit which was not authorized by Federal law to receive hazardous waste on or after November 8, 1985, a report must be submitted to EPA no later than (5) five days after placement of waste in the unit. Such report shall include:

(a) the data on which waste was placed in to the unit;
(b) the type and amount of waste placed in to the unit; and
(c) the circumstances surrounding recommencement of operation of the unit.

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