




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MAR - 1 1990

MEMORANDUM

SUBJECT: Releasing Information to Potentially Responsible Parties at CERCLA Sites

FROM: Bruce M. Diamond, Director 
Office of Waste Programs Enforcement

Glenn L. Unterberger 
Associate Enforcement Counsel for Waste

TO: Waste Management Division Director, Regions I-X
Regional Counsel, Regions I-X

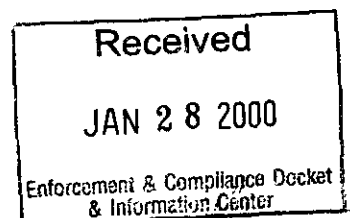
This memorandum transmits to you a policy directive "Releasing Information to Potentially Responsible Parties at CERCLA Sites." This directive is issued pursuant to a recommendation in the Management Review of the Superfund Program.

We received only a few comments to the December 22, 1989, draft sent to you. Opinion was mixed on a change from current policy concerning releases of information to potentially responsible parties (PRPs) who do not respond to CERCLA section 104(e) information requests. In light of the Management Review findings and recommendation, we believe on balance that the policy change is appropriate. We note that the policy adopts a case-by-case approach that allows, in appropriate circumstances, withholding information.

Pursuant to the Management Review we plan issuing guidance on how to compile waste-in lists and volumetric rankings. If you or members of your staff would like to contribute to this effort, please contact as soon as possible Rick Colbert, OWPE, at FTS 382-4015, Mail Code OS-510.

Attachment

cc: Henry Longest, OERR
Lisa Friedman, OGC
David Buente, DOJ





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OSWER Directive 9835.12

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The release of information in appropriate circumstances to potentially responsible parties (PRPs) at CERCLA sites advances the goal of facilitating settlements. For PRPs to coalesce into a negotiating group and to participate in settlement negotiations with the Agency, they must have information about the site and other PRPs. This information can help PRPs allocate costs and responsibilities among themselves and increase the pool of PRPs participating in settlements. This can help achieve Agency goals of expediting cleanups, encouraging PRPs to undertake or finance cleanups, and avoiding unnecessary litigation.

Background

The initial Agency policy developed on releasing information to PRPs addressed both the exchange of documents with PRPs and the provision of aggregate waste-in information to PRPs. First, the policy called for a mutual exchange of information -- EPA would provide certain information to any PRP that reciprocated by providing all site-related information to EPA. Second, PRPs at CERCLA sites would receive the names and addresses of all other PRPs at the site, and if available, information regarding the volume and nature of substances contributed by each PRP ("waste-in lists") and a ranking by volume of the substances at the site ("volumetric rankings"). To the extent this information is available, it is to be released as early as reasonably possible. The Agency first stated this policy in the "Interim CERCLA Settlement Policy," 50 FR 5034, December 5, 1984, OSWER Dir. 9835.0. The 1986 amendments to CERCLA essentially mandated, in section 122(e)(1) of CERCLA, application of this policy when special notice procedures are invoked. In 1988, the Agency

restated and provided further guidance on the policy in the "Interim Guidance on Notice Letters, Negotiations and Information Exchange," 53 FR 5298, February 23, 1988, OSWER Dir. 9834.10. [On January 26, 1984, the Agency issued guidance concerning specifically "Releasing Identities of Potentially Responsible Parties in Response to FOIA Requests," OSWER Dir. 9834.0.]

Discussion

The Agency's experience in negotiating settlements with PRPs in CERCLA cases and viewing PRP efforts to organize has shown that the focus on waste-in lists and volumetric rankings in its PRP information-release policy is not always appropriate. For example, in many cases there is not enough information available early to develop the lists or rankings. In addition, for PRPs to coalesce into a negotiating group and to limit the reticence of some PRPs to join the group based upon the fact that they have not reviewed underlying documentation, it may be helpful to release to PRPs the information upon which the Agency concludes that a person is a PRP (or upon which the Agency based, or could base, a waste-in list or volumetric ranking). Because of PRPs' potential joint and several liability, this liability information can encourage PRPs to cooperate with other PRPs and not "sit it out." With this information available to PRPs as a group, PRPs can encourage other PRPs to cooperate. It also can be used as the basis for PRPs to allocate responsibilities among themselves using their own allocation schemes.

There are examples where providing liability information to PRPs has been critical to achieving settlement. The types of information given to PRPs in these cases have ranged from simply identifying documents upon which a waste-in list or volumetric ranking was, or will be, based to providing copies of manifests or disposal site log-books.

To make the information release process efficient and effective, information release should be included in PRP search and negotiation planning. In addition, it is strongly recommended that information collected by the Agency be analyzed for its potential release periodically during collection and not later when time constraints may be greater. This early focus on releasing information may encourage improvements in our information gathering and investigation practices and result in the earlier and greater release of information to facilitate PRP organization and enhance prospects for settlement.

Considering the resource demands upon the Agency in organizing, reviewing and controlling releases of information, facilitating release does not necessarily mean that we initiate

the releases of information¹, although in many cases initiating release may in the long run save resources and promote PRP organization. Whether we initiate release or respond to requests, it may be valuable, through discussions with PRPs (or other requesters), to identify more specifically what the actual PRP information needs are in a particular case. Such discussions can also involve developing a release process that reduces resource demands and ensures widespread dissemination of the information.

Policy

Information about PRP liability at a CERCLA site should normally be available to all PRPs (and other members of the public) unless there are countervailing legal, policy, or strategy reasons not to make such information available. In the case of confidential business information, the Agency must withhold information from PRPs. For other information, such as that subject to the deliberative process, attorney-client or attorney work-product privileges or that falling within the law enforcement records exemption under the Freedom of Information Act, release may be appropriate after the documents have been screened by legal counsel to determine whether the documents are privileged and the implications of waiving any such privilege. Decisions to release or withhold information that will facilitate settlement, whether or not upon request, should be made case-by-case and should ensure that such information is not unnecessarily withheld.²

The "Interim CERCLA Settlement Policy" states that the release of information to PRPs will generally be conditioned on a reciprocal release of information by PRPs. The Agency does not, however, believe that reciprocal release should be the uniform policy. Such a policy might unnecessarily restrict the release of information where, for example, liability information possessed by the Agency might encourage a non-responding PRP to

¹ Note that if Regions use the special notice procedures of CERCLA section 122(e)(1), the Region must release, to the extent available, the names and addresses of other PRPs, a waste-in list and a volumetric ranking.

² For example, early results from PRP searches about a limited number of PRPs may, in some cases, have little effect on encouraging PRPs to coalesce as a group and not outweigh litigation risks associated with releasing the information. On the other hand, release of the information in certain cases might help create a core group to deal with some immediate problems at a site, thus changing the balance in favor of release.

cooperate with other PRPs and thereby promote group settlement with the Agency. Thus, a blanket policy for reciprocity might limit desirable flexibility, and the release of some information to non-responding PRPs may be appropriate in certain circumstances. Given considerations such as these, the release of information to PRPs is to be decided case-by-case.

This change from the "Interim Settlement Policy" is not meant to imply that there may not be sound reasons for withholding liability information from PRPs under some circumstances. The change is meant only to help ensure that the appropriate action is taken in each case and that decisions are made on a case-by-case basis at the Regional level, while reflecting a general bias in favor of information release. In addition, this change in no way affects the Agency's use of its other information gathering authorities. See, "Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas," August 25, 1988, OSWER Dir. 9834.4A, and "Final Model Litigation Report for CERCLA Section 104(e) Enforcement Initiative," (Office of Enforcement and Compliance Monitoring/Office of Solid Waste and Emergency Response, January 31, 1990).

For more information on this policy, contact Rick Colbert, OWPE, at FTS 382-4015 or Douglas Dixon, OECM-Waste, at FTS 475-8212.