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

OSWER # 9829.0

DEC 23 1985

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

(7)

MEMORANDUM

SUBJECT: Policy for Enforcement Actions Against Transporters
Under CERCLA

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

Frederick F. Stiehl *Frederick F. Stiehl*
Associate Enforcement Counsel for Waste

TO: Regional Counsels
Regional Waste Management Division Directors

Background

Section 107(a)(4) of CERCLA imposes liability for response costs on:

"any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance..."

Substantial controversy has arisen over the interpretation of this provision particularly as it relates to interstate common or contract carriers. The Agency's practice has previously been to issue notice letters to all transporters. In some circumstances, civil judicial enforcement actions have named transporters as defendants prior to a determination of whether they selected the facility. More recently, the Agency practice has been to bring suit only against those transporters who have selected the facility or site.

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Transporters involved at many Superfund sites have argued that CERCLA was intended to impart liability only when the transporters selected the facility or site to which the hazardous substances were delivered. Consequently, those transporters contend that interstate common or contract carriers, who under the authority of the Interstate Commerce Commission do not exercise control of the destination of shipments, are excluded from the liability provision of §107(a)(4). No judicial opinion has been rendered to date on the interpretation of this provision.

Policy

As part of the responsible party searches, Regional staff should gather and review all available information related to transporters and the nature of their involvement with the facility or site at which the hazardous substances are located. This review should include all of the common sources of information such as site records and records from federal, state and local regulatory agencies. In addition, information related to the transporters should be obtained through §104(e) information request letters to the owner/operators, generators and to the transporters. Information request letters, and any subsequent interviews, should seek documentation as to the source, volume, nature and location of wastes transported. Regional staff should also seek to identify through this process the role of the transporter in the selection of the facility or site.

Notice letters informing transporters of potential liability under CERCLA will not be issued unless and until the information gathering process indicates that the transporter may have selected the site or facility to which the hazardous substances were delivered. (However, as indicated above, information request letters should be routinely sent to all transporters.) Issuance of notice letters to transporters is appropriate only when information obtained indicates that the transporter may have selected the site or facility.

Similarly, enforcement actions (whether administrative or judicial) would be brought under §106 or §107 only under the same circumstances. As a matter of policy, EPA will bring action only against transporters where information is available which indicates that the transporter selected the site or facility. However, in the event that information is inconclusive due to a lack of cooperation from transporters in providing information, EPA may bring action against any transporter to compel full response to information requests.

Transporter Liability Under RCRA

This policy is not intended to address the potential liability of hazardous waste transporters under RCRA §7003. The recent RCRA amendments explicitly state that the imminent hazard provisions of RCRA apply to past and present transporters who contributed to the transportation of solid or hazardous waste.

For further information on this policy and its application to particular sites, please contact Michael Kilpatrick of OWPE (382-4835) or Heidi Hughes of OECM-Waste (382-2845).

Note on Purpose and Uses of this Memorandum

The policies and procedures set forth here, and internal Government procedures adopted to implement these policies, are intended as guidance to Agency and other Government employees. They do not constitute rulemaking by the Agency, and may not be relied on to create a substantive or procedural right or benefit enforceable by any other person. The Government may take action that is at variance with the policies and procedures in this memorandum.

cc: Superfund Branch Chiefs
Superfund Enforcement Section Chiefs
David Buente, DOJ
Lisa Friedman, OGC

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

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OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSEMEMORANDUM

SUBJECT: Reporting and Exchange of Information on State Enforcement
Actions at National Priorities List Sites

FROM: *J. Winston Porter*
J. Winston Porter
Assistant Administrator

TO: Addressees

Recent developments in the Superfund enforcement program prompt me to personally address the issue of reporting and exchange of information on State enforcement actions at National Priorities List (NPL) sites. I recently approved guidance on funding States during their oversight of Potentially Responsible Party (PRP) conduct of Remedial Investigations (RI), Feasibility Studies (FS) and Remedial Designs (RD). Furthermore, the current Superfund reauthorization language will allow State funding for a variety of other enforcement activities. These include such activities as oversight of PRP conducted Remedial Actions (RA), and negotiation, litigation and other efforts leading toward private party cleanup. This expansion of the program's funding authorities will inevitably increase State enforcement actions at NPL sites.

As States expand their involvement in the Superfund enforcement program, the Agency's oversight and review of their actions will become an increasingly important activity. We must ensure that State enforcement actions at priority sites are conducted in a manner consistent with Agency procedures and are adequate to allow for deletion from the NPL. We must also be able to determine, in addition to a State's enforcement efforts, whether Federal review and participation is necessary. This can only occur if we are kept informed of the progress and major decisions made at these sites.

CERCLA reauthorization will also increase the amount of interaction required with States in conducting Federal enforcement actions. Specifically, the House Bill mandates State participation in the following areas:

- Applying State standards and permits to on-site and off-site response actions carried out under Section 106;
- Regulations for State involvement in the CERCLA enforcement response process; and
- State concurrence of Section 106 enforcement actions.

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The language in the House Bill is subject to revision. However, I believe the direction is towards increased State participation and will continue to be the case even if reauthorization takes some time to occur. This increased emphasis on State participation in Federal-lead enforcement actions coincides with our need to keep States equally informed and involved in our activities. The sharing of information needs to be reciprocal if we expect to be successful in our efforts to seek private party cleanups and NPL site deletions.

As you are aware, on October 2, 1984, EPA and the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) signed a joint policy statement establishing a framework for coordinating Federal and State enforcement actions. Among the many issues recognized as needing to be dealt with in a cooperative manner was that "sharing of information between EPA and the States is key to developing a more effective relationship." The policy also encouraged that States "keep EPA informed of their activities, including consulting with the Regional office when issues arise that do not have clear cut solutions." I strongly encourage that you more actively implement the suggested approach toward sharing of enforcement information outlined in the policy.

Meanwhile, very little information is currently available that outlines the national picture of State enforcement actions at NPL sites. The information must be brought to a level that assures responsiveness to our own concerns, as well as to Congress and other interested parties. The Office of Waste Programs Enforcement (OWPE) recently reviewed the Case Management System (CMS) for information on State-lead enforcement sites. Of the 157 sites currently listed as State-lead enforcement only 44 have a negotiation activity listing (Removal, RI/FS, RD/RA or other). Of the 44 sites, 21 are listed as having initiated negotiations with PRPs to conduct the activity. Of the 21 sites, only 7 have information on the type of negotiation taking place (administrative order, judicial action, cost recovery, etc.). This is also the case for State-lead enforcement RI/FS. The system records only 5 sites as having obligations for State-lead enforcement RI/FS. Furthermore, the system does not provide any information on the progress in getting these site actions completed.

As an initial step toward getting a handle on State enforcement actions, OWPE conducted a survey during the recent first quarter Superfund Comprehensive Accomplishments Plan (SCAP) review. The survey confirmed those sites listed as State-lead enforcement in your Region, and categorized each site by the type of enforcement action taking place. I have attached the results of this survey for your information, and want OWPE to continue using the SCAP process to keep me informed of these ongoing actions. During the second quarter SCAP review we may ask for additional information on these sites. I have attached a list of some additional data

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requirements that could be addressed, and would appreciate any comments you have on collecting this information. It would also be helpful if you could identify what information is routinely collected and exchanged in your Region.

I also want OWPE to continue working with ASTSWMO and the National Association of Attorneys General (NAAG) to outline our future State enforcement information requirements and the States' desires on information at Federal-lead sites. I will be calling on representatives from the Regions to assist in this effort. Without your active participation and support we will not be able to realize these long-term goals.

In the meantime, if you have any information to provide or concerns to address, please contact Jack Stanton (FTS-382-4811) or Tony Diecidue (FTS-382-4841) of OWPE.

Attachment

Addressees:

Directors, Waste Management Division, Regions I, IV, V, VII, VIII
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Waste Management Division, Region III
Director, Air and Waste Management Division, Region VI
Director, Toxics and Waste Management Division, Region IX
Director, Hazardous Waste Division, Region X
Regional Superfund Branch Chiefs, Regions I-X
Regional Counsels, Regions I-X