



**DIRECTIVE NUMBER:** 9320.1-5

**TITLE:** RCRA/NPL Listing Policy

**APPROVAL DATE:** September 10, 1986

**EFFECTIVE DATE:** September 10, 1986

**ORIGINATING OFFICE:** OERR/HSCD/DIB

**FINAL**

**DRAFT**

**STATUS:**

- |     |    |   |
|-----|----|---|
| [ ] | A- | Pending OMB approval                          |
| [ ] | B- | Pending AA-OSWER approval                     |
| [ ] | C- | For review &/or comment                       |
| [ ] | D- | In development or circulating<br>headquarters |

**REFERENCE (other documents):**

---

**OSWER      OSWER      OSWER**  
**/E DIRECTIVE   DIRECTIVE   DA**

---

United States Environmental Protection Agency Washington, DC 20460		Interim Directive Number 9320.1-5
<b>OSWER Directive Initiation Request</b>		
Originator Information		
Name of Contact Person Lucy Sibold	Mail Code WH-548E	Telephone Number 382-2454
Lead Office <input checked="" type="checkbox"/> OERR <input type="checkbox"/> OSW <input type="checkbox"/> OUST <input type="checkbox"/> OWPE <input type="checkbox"/> AA-OSWER	Approved for Review	
Signature of Office Director		Date
Title  RCRA/NPL Listing Policy		
Summary of Directive  Guidance reflecting RCRA/NPL listing policy as promulgated in Federal Register (51 FR 21054, June 10, 1986)		
Key Words: Superfund, CERCLA, Remedial Program, National Priorities List (NPL), RCRA/NPL Eligibility Policy		
Type of Directive (Manual, Policy Directive, Announcement, etc.)		Status <input type="checkbox"/> Draft <input checked="" type="checkbox"/> Final <input checked="" type="checkbox"/> New <input type="checkbox"/> Revision
Does this Directive Supersede Previous Directive(s)? <input type="checkbox"/> Yes <input type="checkbox"/> No      Does it Supplement Previous Directive(s)? <input type="checkbox"/> Yes <input type="checkbox"/> No If "Yes" to Either Question, What Directive (number, title)		
Review Plan <input type="checkbox"/> AA-OSWER <input type="checkbox"/> OUST <input type="checkbox"/> OECM <input type="checkbox"/> Other (Specify) <input type="checkbox"/> OERR <input type="checkbox"/> OWPE <input type="checkbox"/> OGC <input type="checkbox"/> OSW <input type="checkbox"/> Regions <input type="checkbox"/> OPPE		
This Request Meets OSWER Directives System Format		
Signature of Lead Office Directives Officer 		Date 8-12-86
Signature of OSWER Directives Officer 		Date



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

SEP 10 1986

OFFICE OF  
SOLID WASTE AND EMERGENCY RESPONSE  
OSWER DIRECTIVE 9320.1-5

MEMORANDUM

SUBJECT: RCRA/NPL Listing Policy

FROM: Jack McGraw, Deputy Assistant Administrator  
Office of Solid Waste and Emergency Response

TO: Regional Administrators,  
Regions I-X

On June 10, 1986, the Agency announced the first phase of a new policy for listing RCRA Subtitle C facilities on the National Priorities List (NPL) (51 FR 21057-21062 and 21109-21112). The Agency intends to announce the complete policy in February 1987. This memo presents interim guidance for implementing the first phase of the new policy, and solicits information from the Regions to assist in the development of the final policy. Specifically, this memo:

- Transmits the final and proposed RCRA/NPL listing policy;
- Provides a questionnaire for an initial screening of potential NPL sites with respect to their RCRA status;
- Solicits suggestions about effective policy development and implementation from the Regional offices; and
- Identifies an interim course of action until more definitive guidance is available.

FINAL/PROPOSED RCRA POLICY

Background

Since the first NPL final rule, it has been the Agency's policy to defer placing sites on the NPL that can be addressed through RCRA Subtitle C corrective action authorities. Prior to enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA), only releases to ground water from surface impoundments, waste piles, land treatment areas, and landfills that received RCRA hazardous wastes after July 26, 1982 and did not certify

- 2 -

closure prior to January 26, 1983 (the effective date of the RCRA regulations requiring permits for land disposal facilities) were subject to corrective action requirements under Subtitle C. Since these units were subject to the corrective action requirements they were not eligible for listing unless they were abandoned, lacked sufficient resources or RCRA corrective action requirements could not be enforced.

The enactment of HSWA greatly expanded RCRA Subtitle C corrective action authorities. For example, under section 3004(u), hazardous waste treatment, storage and disposal facilities\* seeking RCRA permits were now required to address all releases of hazardous constituents to any medium from solid waste management units (SWMU's) whether active or inactive. HSWA also provided new authorities in Section 3004(v) to address releases that have migrated beyond the facility boundaries. In addition, section 3008(h) authorized EPA to compel corrective action or any response necessary to protect human health or the environment when there is or has been a release of hazardous waste at a RCRA interim status facility.

In light of the new authorities, on April 10, 1985, the Agency announced in the preamble to proposed NPL Update 3, a revised policy for listing of RCRA-related sites on the NPL. The policy announced on June 10, 1986 evolved from this earlier proposal.

#### Policy Overview

The policy statement in the June 10, 1986, Federal Register contains two major components: a final policy of three elements that is presently in effect and a proposed policy consisting of two elements. This proposed policy is not in effect now but is under consideration for inclusion in the final, complete policy currently scheduled for announcement in February 1987. In addition, the Agency solicited public comments on additional categories of RCRA sites that might be considered eligible for the NPL (e.g., non-notifiers).

The final policy is generally consistent with the proposal and with the Agency's previous RCRA listing policy. Sites not subject to RCRA Subtitle C corrective action authorities will

---

\* When using the term "facility", the Agency is referring to the broadest extent of EPA's area of jurisdiction under Section 3004 of RCRA, i.e., the entire site that is under the control of the owner or operator engaged in hazardous waste management. Therefore, the term "facility" is not limited to those portions of the property at which RCRA hazardous waste management units are located but extends to all contiguous property under the owner or operator's control (See the Final Codification Rule, July 15, 1985, 50 FR 28712).

- 3 -

remain eligible for the NPL. (These may include sites at which action can be taken pursuant to Section 7003 of RCRA.) Examples include but are not limited to:

- (1) facilities that ceased treating, storing or disposing of hazardous wastes prior to November 19, 1980 (the effective date of Phase I of the RCRA regulations)
- (2) facilities which need not seek permits because they manage only materials exempted from the statutory or regulatory definition of solid waste or hazardous waste (e.g. facilities that handle only household waste)
- (3) facilities whose only Subtitle C waste management units are exempt from Subtitle C Parts 264 and 265 requirements (e.g. totally enclosed treatment units)
- (4) facilities that handle hazardous waste subject to Subtitle C but who are not required to have interim status or a final RCRA permit (e.g. generators and transporters).

In most situations, listing of sites with releases that can be addressed under the RCRA Subtitle C corrective action authorities will be deferred.

Although sites that can be addressed by RCRA Subtitle C corrective action authorities generally will not be placed on the NPL, in certain situations facilities subject to the corrective action requirements may be listed if they meet all the other listing criteria (e.g., an HRS score of 28.5 or greater). The situations qualifying for consideration on the NPL and the reasons why the Agency has made these facilities eligible for listing are outlined below.

#### Final Policy

The final portion of the policy identifies three categories of RCRA Subtitle C facilities that are eligible for the NPL. Specifically they are:

- ° Facilities owned by entities that are bankrupt
- ° Facilities that have lost authorization to operate and whose owner/operator has also demonstrated a probable unwillingness to undertake corrective action
- ° Facilities where a case-by-case analysis indicates that the owners/operators appear unwilling to take corrective action.

- 4 -

## (1) Bankruptcy

Once an entity is in bankruptcy, the entity's assets are protected by the courts. In such situations, the Agency does not have adequate assurance that funds will be available in a timely manner for response actions. Therefore, RCRA facilities that are bankrupt are eligible for the NPL listing.

In applying this policy component, it is necessary to document that the facility is actually bankrupt. In general, this means documenting that the facility has filed for bankruptcy under Chapter 7 or 11 of the Bankruptcy Code or under State law.

## (2) Loss of Authorization to Operate and Probable Unwillingness to Undertake Corrective Action

RCRA facilities that have lost authorization to operate and that have also demonstrated a probable unwillingness to undertake corrective action are eligible for listing on the NPL.

Under RCRA, authorization to operate may be terminated by any of the following four mechanisms:

- ° Section 3005(c) permit denial
- ° Section 3005(e) termination due to failure of owner/operator to certify compliance with ground water and financial assurance requirements or failure to submit Part B permit application by the required statutory date
- ° Termination via Section 3008(h) authority to revoke interim status
- ° Termination via permit revocation under Section 3005(d)

In applying this policy component, EPA will have to demonstrate that an owner/operator who has lost authorization to operate is likely to be unwilling to carry out necessary corrective action. To do this, the Region needs to compile a history of violations by the facility, enforcement actions taken against the facility or other indications of unwillingness. If no enforcement efforts have been initiated or if no violations are documented, then the facility cannot be listed under this policy component. The Region should review the enforcement/compliance history for each facility to determine whether the facility is eligible for NPL listing.

## (3) Case-by-Case Determinations of Unwillingness

This case-by-case listing component was intended to be included as an interim policy. It was included to address situations where a RCRA facility has not lost authorization to operate yet there is reason to believe, based on prior enforcement

or compliance history, that the owner/operator will not perform the necessary corrective action. Once the full criteria for listing RCRA sites on the NPL is fully developed in the final policy, this case-by-case component may be withdrawn or narrowed in scope. Until such time, the Agency will consider, for a limited number of sites, case-by-case determinations of the unwillingness of the owner/operator to carry out corrective action.

To determine whether this criteria applies to a particular site, the Region will need to compile a history of enforcement actions that have been initiated against the facility, of violations by the facility, or of other indications of unwillingness including failure to take action in response to CERCLA 106 notice letters. If no enforcement efforts have been initiated or if no violations are documented, it is unlikely that the facility can be listed under this policy component.

Documentation of unwillingness to satisfy the second or third components may include memoranda of meetings or telephone conversations in which an owner/operator expressed unwillingness to perform corrective actions. Confirmatory follow-up letters would further strengthen the case.

#### Proposed Policy

EPA proposed two additional categories of sites where RCRA authorities may not result in expeditious or adequate remedial action. Sites that may be eligible for the NPL under the proposed policy are:

- ° Facilities where the owner/operator has not complied adequately with an administrative order, judicial action, or RCRA permit condition requiring response or corrective action.
- ° Facilities where the owner/operator has not submitted or implemented an adequate closure plan as required under RCRA.

The Agency specifically requested comment on how it would evaluate the adequacy of compliance with an order or permit conditions or of a closure plan or implementation of a closure plan.

In addition to proposing these two categories, the Agency solicited comments on other situations that may indicate that the owner/operator is unwilling or unable to undertake corrective action. For example, additional categories might include non-notifiers.

## HEADQUARTERS' POLICY DEVELOPMENT SCHEDULE

The Agency has requested comment on the proposed components of the RCRA policy and requested comment on other categories of RCRA sites that the Agency should consider incorporating into the final policy. Related to this policy development is the application of the complete, final policy (scheduled for publication in the Federal Register for February 1987) to final and proposed NPL sites. Accordingly, we have developed a schedule for the RCRA policy development process which is included in Attachment A for your reference.

In addition, we plan to provide guidance in early 1987 which elaborates on the complete, final policy. The guidance will provide greater definition of unwillingness, non-compliance, bankruptcy and other appropriate terms or concepts. The guidance will also describe the internal management system for identifying and referring RCRA sites for NPL consideration and resolving the final disposition of a site. Interim milestones for this guidance are also included in Attachment A.

We are planning to hold a meeting soon with some of the Regional RCRA and CERCLA branch chiefs to obtain their input in the RCRA policy development process. We will distribute more information on this as soon as we are able to schedule an appropriate time.

## REGIONAL ACTION

To support the Headquarters guidance and policy development process as well as to help you anticipate the application of the policy to existing and future NPL sites, we have identified a number of items for immediate Regional action.

### (1) Evaluation of the RCRA policy

We have solicited regional participation in the workgroup that will develop the final policy and guidance. In addition, we specifically request that each region evaluate the final and proposed policy relative to your current operations so that we may better understand the impact of this policy on your program. Your input will guide us in our upcoming policy and guidance development. We specifically ask that you identify categories of RCRA sites that the final or proposed RCRA policy may not effectively address, discuss the impact that this policy may have on your program as well as identify any other areas that might be of particular concern to you.

Regions should not submit comments to the public docket. Rather, please mail your evaluation to Harold J. Snyder, (WH-548E), by October 10, 1986.



- 7 -

(2) Application of RCRA listing policy to proposed and final NPL sites

The Federal Register notice states that the Agency plans to review the status of and apply this policy to RCRA sites that are already listed on the final NPL. To assist us in understanding the effect of applying this policy to proposed and final NPL sites, we need to know how many current NPL sites are subject to the RCRA corrective action requirements. We have attached a questionnaire (Attachment B) to aid you in determining which sites have some RCRA relationship and how these sites relate to the final and proposed policy.

Please complete the attached questionnaire for all proposed and final NPL sites from your region. Send your completed questionnaires to Harold J. Snyder, Hazardous Site Control Division (WH-548E) by October 10, 1986.

(3) Initiation of RCRA/CERCLA enforcement action

At sites where no RCRA enforcement action has been taken and/or there is no record of significant violations, it may be difficult to justify continuing to list existing NPL sites or proposing new sites based on the final elements of the RCRA policy. Accordingly, each Region needs to compile and assess the enforcement/compliance history of all existing NPL and future NPL sites that are subject to RCRA corrective action to assess whether there is a sound basis for arguing that a site should be eligible or remain eligible for the NPL. Sites where (1) no enforcement action has been taken or where there is no record of non-compliance or (2) where there is a weak case for arguing that the owner/operator is unwilling to take action, should be referred for enforcement action. At this point it might be prudent for the Regional enforcement programs to initiate a joint RCRA/CERCLA enforcement action against the owner/operator to get him/her to undertake the appropriate corrective actions or studies. This is especially true for current NPL sites where Fund-lead remedial studies or action has been initiated. If such efforts are unsuccessful in obtaining a response, the Region would have a stronger record to justify continuing to list existing NPL sites or listing a new site on the NPL.

(4) New sites submitted for NPL consideration

For all new sites submitted for NPL Quality Assurance (QA) review, the Regions should assess whether the final and proposed components of the policy could apply. In situations where the site could be eligible based on the final elements of the policy, the Regions should submit a memorandum from the Regional Division Director with the QA package justifying why the site should be considered eligible for the NPL. The memorandum should describe the enforcement/compliance history of the facility or its bankruptcy status and include the appropriate documentation. The attached questionnaire should assist the Region in the preparation of the memorandum.

## COMMUNITY RELATIONS

In light of the new RCRA listing policy, it is possible that some sites that are currently addressed via CERCLA authorities may be referred to the RCRA program for attention. Until a specific site-by-site determination is made as to the continued eligibility of all final and proposed NPL sites, we suggest that the CERCLA community relations staff continue to take the lead for community relations at these sites, especially where CERCLA enforcement or response actions are underway. As usual, the CERCLA and RCRA community relations staff should work closely on this matter and coordinate with the CERCLA and RCRA program staff on community relations activities.

Thank you for your cooperation in this RCRA/NPL listing effort. If you have any questions, call Sylvia Lowrance at FTS-475-8253 or Hal Snyder at FTS-475-8103. Community relations questions should be addressed to the appropriate Headquarters coordinator.

Attachment A

Schedule of Milestones for RCRA/NPL Policy and  
Guidance Development

Final RCRA Policy - FR notice

Distribute Summary of Public Comments	9/19/86
Regional Comments and Questionnaires to HQ	10/10/86
OWPE Prepare Draft Policy	10/10/86
Workgroup Meeting on Draft Policy	10/17/86
CERCLA/RCRA Regional Branch Chief's Workshop	TBA
Workgroup Meeting - Incorporate Br. Ch. comments	10/31/86
Brief OD's on draft final policy	12/10/86
Brief AA on draft final policy	12/17/86
Submit final policy to Red Border review	1/12/87
Policy Signed	2/11/87

Final Guidance

Draft Guidance prepared	2/10/87
Workgroup review complete	2/25/87
Draft Guidance to AA for signature	3/3/87
Comments received on Guidance	3/31/87
Final Guidance to AA for signature	5/6/87

## ATTACHMENT B

### PURPOSE OF THE QUESTIONNAIRE:

The purpose of the following questionnaire is to:

- ° To determine the universe of facilities on the proposed/final NPL that may be subject to the RCRA/NPL policy
- ° To determine the effect of the eligibility categories (bankruptcy, unwillingness) on the continued listing of RCRA sites
- ° To gather information to be used in formulating the final RCRA/NPL policy

### GENERAL INSTRUCTIONS

Please complete the following questionnaire for each final and proposed NPL site. It is not necessary at this time to attach supporting documentation, but the responses to the questionnaire should be based on verifiable information.

### SOURCES OF INFORMATION

To minimize as much as possible the resource burden to complete these forms we have identified some sources of information that should help you answer or begin to answer the questions. None of the data sources is impeccable therefore, please update the response to the questionnaire based on your personal knowledge of the facility. It is not necessary at this time to exhaustively investigate any of the questions. However, one of the purposes of this effort is to also help you assess the likelihood that the facility will continue to be eligible for the NPL. Therefore, the more complete and accurate your findings, the better you will be able to assess the next steps.

#### (1) RCRA Sources

##### HWDMS

- ° Pertinent data elements in HWDMS include:
  - C1105 - RCRA permit application or permit status
  - 2100 corridor in HWDMS - permit processing data elements
  - 2300 corridor in HWDMS - compliance/enforcement history
- ° A data dictionary describing each data element in the database is available through the HWDMS RPO.

#### (2) Financial Information Sources

##### BANKRUPTCY MEMO (enclosed)

- ° Identifies bankrupt HWDMS facilities identified by ICF and GAO studies (not guaranteed to be exhaustive or up to date, i.e. a facility may have emerged from Chapter 11 reorganization)
- ° Update information based on personal knowledge

- Additional information can be obtained through:
  - PRP searches for NPL sites
  - Federal bankruptcy courts
  - Dun & Bradstreet's Business Information  
(available through NEIC)

(3) CERCLA Sources

SITE SPECIFIC FUNDING REPORT (enclosed)

- Arranged by State and by site
- Data elements include:
  - obligations and outlays to date
  - activities funded

ENFORCEMENT CASE MANAGEMENT SYSTEM (enclosed)

- Arranged by Region and site
- Includes summary information on:
  - CERCLA notice letters
  - negotiations
  - 3013 orders
  - 106 orders
  - 7003 order
  - DOJ referred cases
  - cases filed
  - settlements

RCRA/NPL POLICY QUESTIONNAIRE FOR INITIAL SCREENING

Site Name \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_

Facility I.D. Number \_\_\_\_\_

Type of Facility: Generator \_\_\_\_\_ Transporter \_\_\_\_\_ TSD \_\_\_\_\_

- | I. RCRA APPLICABILITY   | yes | no  |
|---|-----|-----|
| Does the facility have RCRA interim status?                                     | ___ | ___ |
| Did the facility ever have RCRA interim status?                                 | ___ | ___ |
| Does the facility have a final or post-closure permit? If so, date issued _____ | ___ | ___ |
| Is the facility a non-notifier that has been identified by States or EPA?       | ___ | ___ |
| Is the facility a known or possible protective filer?                           | ___ | ___ |

STOP HERE IF ALL ANSWERS TO QUESTIONS IN SECTION I ARE NO

II. FINANCIAL STATUS

Is the facility owned by an entity that has filed for bankruptcy under federal laws (Chapter 7 or 11) or State laws? \_\_\_\_\_

If yes, what has it filed under?  
 Chapter 7 \_\_\_\_\_ Chapter 11 \_\_\_\_\_ Other \_\_\_\_\_

III. ENFORCEMENT

RCRA Status

Has the facility lost authorization to operate via LOIS, 3005(c) permit denial, 3008(h) IS termination, 3005(d) permit revocation? \_\_\_\_\_

Has the facility's Interim Status been terminated via another mechanism (i.e. administrative termination)?

CERCLA Status

What CERCLA financed remedial or removal activities have been initiated at the site? (RI/FS, RD/RA, O&M, forward planning, and removal; does not include enforcement or PA/SI activities)

Enforcement Status

In general, would you characterize the facility as demonstrating an unwillingness to undertake corrective action based on prior State, CERCLA or RCRA actions?

YES                      NO

\_\_\_\_\_

If yes, please describe and cite the authorities exercised.

Is the owner/operator a party to any enforcement action at the site? \_\_\_\_\_

If not, why not?

Are any PRPs (including owner/operators) undertaking remedial studies or action in response to CERCLA enforcement authorities? What is the extent/type of work that has been completed (RI/FS, etc.) and who (generators, owner/operator, etc.) is conducting the work?