



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Policy for Enforcement Actions Against Transporters
Under CERCLA

FROM: Gene A. Lucero, Director *Gene A. Lucero*
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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.

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