



OFFICE OF INSPECTOR GENERAL

AUDIT REPORT

RCRA ENFORCEMENT

RCRA SIGNIFICANT NON-COMPLIER IDENTIFICATION AND ENFORCEMENT BY THE RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

E1GSD8-01-0006-9100078

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**Inspector General Division
Conducting the Audit:**

**Eastern Audit Division
Boston, Massachusetts**

Region Covered:

Region 1

Program Offices Involved:

**Office of Environmental Stewardship &
Office of Ecosystem Protection**

(Photographs provided by RIDEM)

MEMORANDUM

SUBJECT: Report of RCRA Significant Non-Complier Identification and Enforcement by the Rhode Island Department of Environmental Management (RIDEM)
Audit Report No. E1GSD8-01-0006-9100078

FROM: Paul D. McKechnie
Divisional Inspector General
Eastern Audit Division

TO: John DeVillars
Regional Administrator
Region 1

Attached is our audit report, *RCRA Significant Non-Complier Identification and Enforcement by the Rhode Island Department of Environmental Protection*. This report contains findings and recommendations that are important to both EPA and the Rhode Island Department of Environmental Management.

This audit report contains findings that describe problems the Office of Inspector General (OIG) has identified and corrective actions the OIG recommends. This audit report represents the opinion of the OIG and the findings contained in this audit report do not necessarily represent the final EPA position. Final determinations on matters in this audit report will be made by EPA managers in accordance with established EPA audit resolution procedures. Accordingly, the findings described in this audit report are not binding upon EPA in any enforcement proceeding brought by EPA or the Department of Justice.

ACTION REQUIRED

In accordance with EPA Order 2750, you as the action official are required to provide this office a written response to the audit report within 90 days. Your response should address all recommendations, and include milestone dates for corrective actions planned, but not completed.

We have no objection to the release of this report to the public.

Should you or your staff have any questions about this report, please contact me or Linda Fuller, Team Leader at (617) 918-1470.

Attachment

cc: G. Mollineaux, Region 1 Audit Coordinator
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RIDEM

EXECUTIVE SUMMARY

INTRODUCTION

The Resource Conservation and Recovery Act (RCRA) required EPA to develop a framework of hazardous waste regulations. Congress intended that States assume responsibility for implementing RCRA regulations with oversight from EPA. As a result, States are primarily responsible for identifying RCRA Significant Non-Compliers (SNCs) and taking formal enforcement actions against them. For the RCRA program to be effective in reducing risks to human health and the environment, it is essential that facilities out of compliance be identified and quickly returned to compliance. Over the past year, Region 1 identified weaknesses in the Rhode Island Department of Environmental Management's (RIDEM's) enforcement of RCRA. These weaknesses were conveyed by the Regional Administrator in writing, to the Governor and RIDEM's Director. The letters conveyed deep concern over a serious shortfall in committing financial resources and personnel which impeded RIDEM's ability to effectively implement the enforcement program. EPA grant funds were not fully spent and vacancies were slow to be filled.

OBJECTIVES

The overall objective of our audit was to determine if RIDEM implemented its RCRA enforcement program in accordance with EPA's Enforcement Response Policy (ERP). Specifically, we determined whether RIDEM:

1. Issued appropriate and timely enforcement actions;
2. Ensured that violators complied with enforcement compliance schedules; and
3. Identified SNCs.

RESULTS IN BRIEF

RIDEM did not effectively enforce its RCRA program in accordance with the EPA ERP. RIDEM did not: (1) issue

appropriate and timely enforcement actions; (2) ensure that violators complied with enforcement compliance schedules; and (3) identify SNCs. Specifically, RIDEM's failure to dedicate available resources to RCRA indicated a lack of management commitment to effective enforcement. To compound the problem, RIDEM did not have a detailed RCRA enforcement policy or an effective enforcement tracking system. Additionally, RIDEM management did not believe the identification of SNCs was a State responsibility. As a result, hazardous wastes were not managed in an environmentally sound manner, thus risking the health and protection of the State's population and environment. Such serious violations as leaking battery acid and drums of hazardous waste did not receive formal enforcement. Also, RIDEM's over-reliance on informal enforcement actions could provide non-complying facilities an economic advantage over facilities complying with the RCRA law, while allowing the violation to continue.

**Inappropriate
Enforcement Actions**

RIDEM did not take formal enforcement in 12 of the 20 case files (60 percent) reviewed. In our opinion, RIDEM staff did not correctly interpret the EPA ERP when determining the appropriate level of enforcement to take. They issued Letters of Deficiency (LODs), informal enforcement, when violations were serious enough to merit formal enforcement.

Untimely Enforcement

None of the four cases proposed for formal enforcement were finalized within EPA ERP's time frame of 180 days. Three cases were still not finalized after 206 to 376 days had passed. One case was finalized after 461 days. Overall, RIDEM's enforcement production and timeliness have been deteriorating. The number of formal and informal actions issued has dramatically decreased, while the average time to take these actions has increased. Untimely enforcement resulted from RIDEM's reluctance to establish time frames for taking actions. Also, RIDEM had not utilized a tracking system to ensure program efficiency.

**Inadequate Follow-up
to Cited Violations**

RIDEM did not conduct effective follow-up of cited violations to ensure that facilities returned to compliance. In 10 of the 20 files reviewed (50 percent), follow-up was non-existent or inadequate. RIDEM management had not set an appropriate emphasis to conduct follow-ups and had not established an effective system to track compliance schedules.

SNC Identification

In the past, Region 1 did not hold RIDEM responsible for identifying SNCs. The current grant now adds identification of SNCs as a RIDEM responsibility. Corrective action has been taken.

RECOMMENDATIONS

We recommend that the Regional Administrator instruct regional staff to continue to work with RIDEM to improve its management of the RCRA enforcement program. Specific recommendations for achieving this can be found in the Recommendations section at the end of Chapter 2. If RIDEM's performance does not improve within a determined period of time, the region should begin the process of withdrawal of the State's delegated authority for RCRA enforcement.

**AGENCY COMMENTS
& OIG EVALUATION**

The Regional Administrator responded to our draft report on December 15, 1998. The Regional Administrator stated that the Region is in agreement with the findings, conclusions, and recommendations contained in the draft report regarding RIDEM's administration of the RCRA program and more specifically, RIDEM's enforcement of its hazardous waste regulations.

RIDEM responded to our draft report on December 4, 1998. RIDEM stated that they were disappointed in the audit process and claimed that its response to the OIG position paper was not recognized. However, their response was

**RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management**

considered when developing our audit report. RIDEM

provided a listing of the actions they have already taken to address the issues raised in the audit report.

We concur with the Region 1's proposed actions and believe that RIDEM's response shows they are taking positive steps to improve their RCRA Enforcement Program.

Abbreviations

CA	Consent Agreement
EPA	Environmental Protection Agency
ERP	Enforcement Response Policy
FMFIA	Federal Managers' Financial Integrity Act
HW	Hazardous Waste
LOD	Letter of Deficiency
NOV	Notice of Violation
OC&I	Office of Compliance and Inspection
OIG	Office of Inspector General
OWM	Office of Waste Management
RCRA	Resource Conservation and Recovery Act
RCRIS	Resource Conservation and Recovery Information System
RIDEM	Rhode Island Department of Environmental Management
SNC	Significant Non-Complier
SV	Secondary Violator
TSD	Treatment/Storage/Disposal

**RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management**

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Table of Contents

EXECUTIVE SUMMARY	i
ABBREVIATIONS	v
CHAPTERS	
CHAPTER 1 - Introduction	
Purpose	1
Background	1
Scope and Methodology	4
Prior Audit Coverage	7
CHAPTER 2 - RIDEM Is Not Adequately Enforcing RCRA	9
Inappropriate Enforcement Actions	10
Untimely Enforcement	13
Inadequate Follow-up to Cited Violations	19
Significant Non-Complier Identification	23
Conclusion	25
Recommendations	26
Regional Comments	26
OIG Comments	27
RIDEM's Comments	27
OIG Comments	28
Appendix A: Inadequate Level of Enforcement	29
Appendix B: Inadequate Follow-up to Cited Violations	31
Appendix C: Regional Response	33
Appendix D: RIDEM Response	42
Appendix E: Distribution	46

**RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management**

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CHAPTER 1

Introduction

PURPOSE

EPA developed the Resource Conservation and Recovery Act (RCRA) regulations for the safe management of hazardous waste. EPA also delegated authority to State agencies, such as the Rhode Island Department of Environmental Management (RIDEM), the primary responsibility for implementing RCRA to ensure that the public health and environment are protected. Over the past year, Region 1 identified serious weaknesses in RIDEM's enforcement of RCRA. Among the issues raised, the Region cited RIDEM for not spending grant funds and not filling staff vacancies. By not dedicating available resources, Rhode Island management indicated that it lacked commitment to carry out an effective RCRA enforcement program. In view of the Region's cited weaknesses, the overall objectives of our audit were to determine whether RIDEM:

1. Issued appropriate and timely enforcement actions;
2. Ensured that violators complied with enforcement compliance schedules; and
3. Identified SNCs.

BACKGROUND

Serious environmental and health problems caused by hazardous waste mismanagement resulted in legislation and regulations to clean up waste released into the environment and to prevent further releases. Congress enacted RCRA in 1976 which established, under Subtitle C, a framework for managing hazardous waste from generation to final disposal. Hazardous waste is solid waste which, because of its quantity, concentration, physical, chemical, or infectious

characteristics, may pose a hazard to human health or the environment. RCRA mandated that EPA develop a comprehensive set of hazardous waste regulations. As a result, all solid waste generators must determine if their waste is hazardous and thus subject to regulation under Subtitle C. Hazardous waste generators, transporters, treatment, storage, and disposal facilities must manage their wastes in accordance with these regulations. In addition, most treatment, storage, and disposal facilities must be permitted.

Congress intended that States assume responsibility for implementing RCRA hazardous waste regulations with oversight from the Federal Government. In order to become authorized to implement the Subtitle C program, a State must develop a hazardous waste program which is equivalent to and consistent with the Federal program and have it approved by EPA. Although a State with an authorized program has primary responsibility for administering Subtitle C, EPA retains oversight responsibility and parallel enforcement authority.

In addition, EPA awards annual grants to States, under RCRA Section 3011, for the development and implementation of hazardous waste programs. States and EPA regions negotiate the specific work that must be accomplished with the grant funds. State authorization may be withdrawn by EPA if the EPA Administrator determines that the State program no longer complies with the regulatory requirements, and the State fails to correct the problem.

Since Rhode Island is a delegated State, RIDEM carries out the primary responsibility of implementing and enforcing the RCRA program. In recent years, the Rhode Island State Legislature attacked RIDEM's operations, claiming RIDEM had misused its environmental regulatory powers. In response, according to RIDEM's Associate Director, RIDEM was reorganized in September 1996, to bring consistency to its enforcement program.

As a result of this reorganization, the Offices of Waste Management (OWM) and Compliance and Inspection (OC&I) were created. Hazardous waste, solid waste and underground storage tank licensing, permitting and site remediation functions were consolidated with the OWM. Compliance activities (e.g., inspections), including emergency response and enforcement programs, were consolidated into the OC&I. However, inspections and informal enforcement actions for treatment, storage, and disposal (TSDs) facilities were handled by the OWM.

When facilities are cited for violations during inspections, RIDEM must take appropriate enforcement actions. Appropriate enforcement responses are discussed in EPA's hazardous waste enforcement response policy (ERP). An enforcement response may be either a formal or informal enforcement action.

Formal enforcement may take the form of an administrative order, civil lawsuit, or criminal lawsuit. A monetary penalty may be imposed as part of the enforcement action. A facility classified as a significant non-complier (SNC) merits a formal enforcement action.

The 1996 EPA ERP defined a SNC:

The designation of Significant Non-Complier (SNC) is intended to identify non-compliant facilities for which formal enforcement is appropriate. Specifically, SNCs are those facilities which have caused actual exposure to hazardous waste or hazardous waste constituents; are chronic or recalcitrant violators; or deviate substantially from the terms of a permit, order, agreement or from RCRA statutory or regulatory requirements.

An informal enforcement response, consists of issuing a Letter of Deficiency (LOD) which cites the violations and provides a schedule for returning the facility to compliance. This is the minimally appropriate enforcement action for a

Secondary Violator (SV). A facility which does not meet the SNC definition is classified as a SV. An informal enforcement action does not include economic sanctions. However, a facility which fails to return to compliance following an informal enforcement response should be reclassified as a SNC and receive a formal enforcement response.

The ERP defines a chronic or recalcitrant facility as one having repeated violations (even if minor in themselves) or one that fails to quickly correct violations in the past. This designation may classify the facility as a SNC. A facility should be evaluated on a multi-media basis to determine whether it is a chronic violator or recalcitrant. However, a facility may also be found to be a chronic or recalcitrant violator based solely on prior RCRA violations.

RIDEM was not identifying SNCs in the Resource Conservation and Recovery Information System (RCRIS) based on an agreement with EPA Region 1. However, in RIDEM's draft FFY 1998 Compliance Strategy, RIDEM will identify significant non-compliers and continue to submit data for national enforcement databases maintained by EPA.

A core principle of EPA's enforcement and compliance assurance program is that violators should not gain an economic advantage. EPA's Enforcement Response Policy states that an appropriate enforcement response "will achieve a timely return to compliance and serve as a deterrent to future noncompliance by eliminating any economic advantage received by the violator." An additional reason for recovering economic benefit is to eliminate the economic advantage violators gain over their competitors who have invested time and money in achieving compliance.

**SCOPE AND
METHODOLOGY**

We performed this audit in accordance with *Government Auditing Standards (1994 Revision)* issued by the Comptroller General of the United States as they apply to performance audits. Our review included tests of the

program records and other auditing procedures we considered necessary.

RIDEM was selected for review because it had not identified any SNCs in several years and the Region had documented concerns regarding RIDEM's RCRA Enforcement program.

We reviewed facility files containing inspection reports, enforcement actions and related correspondence to determine whether RIDEM took appropriate enforcement actions against facilities with violations. We did not evaluate the quality of inspections or penalties calculated for formal enforcement actions. Twenty facility files were reviewed in total. Seventeen files were selected on a judgmental basis from a universe of 47 facilities from the Federal fiscal years 1996 and 1997 RCRIS report of inspections with violations. Three files were selected based on discussions with RIDEM staff and review of RIDEM's inspection inventory. The 20 sampled cases included permitted facilities, large quantity generators, small quantity generators, and non-classified facilities.

In order to address our audit objectives we conducted the following audit work:

- ✓ Interviewed EPA Region 1 and RIDEM staff.
- ✓ Reviewed the inspection reports and the level of enforcement action taken by RIDEM in response to the cited violations.
- ✓ Compared cited violations to the 1996 EPA Enforcement Response Policy and to RIDEM's Enforcement Response Policy, in order to evaluate whether RIDEM's level of enforcement taken complied with the above policies.
- ✓ Obtained technical assistance in our case file reviews from the Region 1 RCRA staff.

- ✓ Compared the information in the RIDEM facility case files to the RCRIS database for accuracy and completeness.
- ✓ Evaluated the timeliness and adequacy of RIDEM's follow-up response to cited violations reported to facilities in LODs.
- ✓ Evaluated the amount of time it took RIDEM to issue enforcement actions from the date of the inspection and compared this amount of time to the Enforcement Response Policy guidance.

We reviewed management controls and procedures specifically related to our objectives. However, we did not review the internal controls associated with the input and processing of information into RCRIS or other automated records system.

We reviewed Region 1's Fiscal Year 1997 Assurance Letter prepared to comply with the Federal Managers' Financial Integrity Act (FMFIA). Based upon the Region's oversight efforts and the OIG's September 29, 1997 report, *Validation of Air Enforcement Data Reported to EPA by Massachusetts*, Region 1 reported identification of facility non-compliance by States as a weakness for all New England States for the three major media enforcement programs (NPDES, RCRA and Air). Our current review and report provides detailed information and recommendations related specifically to RIDEM and its administration of its RCRA program which the 1997 Assurance Letter did not address.

Our fieldwork was performed from March 3, 1998 to July 31, 1998. Field work was conducted at Region 1's Boston, Massachusetts office and RIDEM's Providence, Rhode Island office. We discussed our preliminary conditions with RIDEM's OC&I and OWM managers and provided them a position paper on June 24, 1998. They responded on July

16, 1998 and their comments have been considered in the preparation of this draft report. Another meeting was held with RIDEM officials on September 16, 1998 to further discuss RIDEM's response.

PRIOR AUDIT COVERAGE

No prior OIG audits have been conducted of RIDEM's RCRA program. OIG's Headquarters Audit Division (HAD) issued an audit report, *Significant Non-Complier Enforcement by EPA and Washington State* (Report No. E1GSF7-11-0019-8100093) issued March 31, 1998. EAD's assignment is considered a follow-on audit to HAD's work.

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CHAPTER 2

RIDEM Is Not Adequately Enforcing RCRA

The Rhode Island Department of Environmental Management (RIDEM) did not take enforcement actions in accordance with the EPA Enforcement Response Policy (ERP). RIDEM did not: (1) issue timely and appropriate enforcement actions; (2) ensure that violators returned to compliance timely; and (3) identify Significant Non-Compliers (SNCs). Specifically, RIDEM's failure to dedicate available resources to RCRA indicated a lack of management commitment to effective enforcement. To compound the problem, RIDEM did not have a detailed RCRA enforcement policy or an effective enforcement tracking system. Additionally, RIDEM management did not believe the identification of SNCs was a State responsibility. As a result, RIDEM did not ensure that wastes were managed in an environmentally sound manner, thus risking the protection of human health and the environment.

Region 1 had previously identified similar problems with RIDEM's RCRA enforcement program. Since early 1997, Region 1 provided increased oversight and assistance to RIDEM. In March 1998, the Regional Administrator wrote to the Rhode Island Governor expressing EPA's dissatisfaction with RIDEM's efforts to fill positions and the downward trend in formal enforcement initiated by RIDEM. The Regional Administrator expressed further displeasure with RIDEM's poor performance in subsequent letters to the RIDEM Director. Our review provided further confirmation of the inadequacy of Rhode Island's RCRA enforcement program.

Our review disclosed breakdowns in the administration of the RCRA program in the following areas:

- 1(a). Inappropriate Enforcement Actions
 - (b). Untimely Enforcement
 2. Inadequate Follow-up to Cited Violations
 3. Failure to Identify SNCs.
-

**Inappropriate
Enforcement Actions**

RIDEM did not take formal enforcement in 12 of the 20 cases (60 percent) reviewed. In each of the cases reviewed, RIDEM staff issued Letters of Deficiency (LODs), which are classified as informal enforcement actions. Contrary to the ERP, LODs were issued for such serious violations as leaking drums and battery acid, missing secondary containment, and to chronic violators or facilities operating without a RCRA permit. RIDEM's selection of informal enforcement for these type of violations showed that the State did not properly interpret the EPA ERP. In most cases, formal enforcement includes a monetary penalty. RIDEM's over-reliance on informal enforcement actions allows non-complying facilities an economic advantage over facilities complying with RCRA. In our opinion, RIDEM's actions send a message to the regulated industry that violations will not be penalized.

Region 1 conducted a 1997 mid-year review of RIDEM's RCRA compliance monitoring and enforcement. The Region 1 RCRA technical staff person reviewed issued and pending enforcement actions, and provided RIDEM a summary of his review. For four proposed informal enforcement actions reviewed, explanations were provided detailing why RIDEM's proposed actions were inappropriate. EPA recommended that RIDEM re-evaluate each case and

issue formal enforcement. This mid-year review was provided to RIDEM as technical guidance to improve the RCRA enforcement program.

In order to evaluate whether the level of enforcement taken was adequate, we compared the reported violations contained in the LODs to the SNC definition. Based on the information available on file, we concluded that 12 of the 20 facilities should have received formal enforcement (See Appendix A for details). However, all 12 received informal enforcement action.

The following cases are examples of inadequate enforcement:

Case RI10 was a chronic violator and was responsible for the release of hazardous waste. The company was under a consent agreement, dated November 1994. A May 30, 1996, inspection reported the following violations: many drums of waste oil and accumulated, leaking lead-acid batteries stored throughout the site without any containment; drums of regulated hazardous waste (waste oil, capacitors) not labeled; no hazardous waste contingency plan; and several discrepancies with manifest/shipping documents. Based on this inspection, RIDEM issued an informal enforcement action. The number and seriousness of these violations warranted formal enforcement action. Furthermore, the EPA ERP provides that a facility classified as a secondary violator (informal enforcement) should not have a history of non-compliant conduct. Facilities should be evaluated on a multi-media basis to determine whether they are a chronic violator or recalcitrant. The 1996 violations coupled with the facility's history of violations, should have warranted a formal enforcement action.

Case RI01 was another chronic violator which also was responsible for releasing hazardous waste. RCRIS provided a list of 7 informal enforcement actions assessed against this facility between 1984 and 1995.

On September 15, 1995, a RIDEM inspection found:

- ✓ Condition of Containers - drums containing hazardous waste were in poor condition with detectable odors being emitted.
- ✓ Aisle Space - insufficient aisle space in the hazardous waste storage area.
- ✓ Secondary Containment - inspectors observed cracks on the surface of the secondary containment areas.
- ✓ Storage Area - inadequate/incorrect signage for the storage area.

Based on this inspection, RIDEM issued an LOD on November 10, 1995. The facility responded in writing on December 5, 1995 to the noted violations.

On September 29, 1997, a RIDEM inspection found:

- ✓ Condition of Containers - drums containing hazardous waste were leaking.
- ✓ Aisle Space - insufficient aisle space in the hazardous waste storage room.
- ✓ Containment Building - inspector observed cracks in the surface of the treatment area.
- ✓ Storage Area - signage for storage areas in building 4 was obstructed from view and unclearly labeled.

RIDEM issued this facility an LOD on October 22, 1997. The facility responded to an October 1997 informal enforcement action on November 12, 1997 providing assurances that violations were addressed. However, both the 1995 and 1997 informal enforcement actions were

inappropriate. The facility has a history of chronic violations and recalcitrance.

RIDEM did not agree with our analysis of the cases. However, RIDEM did not provide any contrary evidence to support their position that the 12 cases warranted informal rather than formal enforcement. We provided RIDEM with a “position paper” describing what we found during the file review and our preliminary conclusions. After reviewing our position paper, RIDEM responded by writing:

[T]he RCRA ERP allows the State flexibility in determining whether or not a facility should be designated an SNC or SV and considerable guidance is provided. While the wording in the RCRA ERP regarding Appropriate Enforcement Response (Section IV. A.) is fairly clear regarding actual or substantial likelihood of exposure to hazardous wastes and chronic or recalcitrant violators, it is less clear when it refers to substantial deviation from RCRA statutory or regulatory requirements. This section, RIDEM believes is subject to interpretation based upon the facts of the case. While RIDEM did not affirmatively declare in RICRIS [sic] that a violator was an SNC or SV, it is our belief that, based upon the circumstances of the case, the appropriate action for the cases noted was informal enforcement.

In our opinion, the cited cases clearly showed a substantial likelihood of exposure to hazardous wastes and/or chronic violators.

Untimely Enforcement

RIDEM did not take formal enforcement within 180 days in accordance with the EPA ERP. Of four proposed formal actions, three remained outstanding from 206 to 376 days and one formal action was issued after 461 days. In one case, hundreds of containers of hazardous waste were stored in rusted drums without secondary containment. This

situation provided a potentially hazardous condition. In

another case, chemical analysis indicated that a release of hazardous waste had occurred. Overall, RIDEM's enforcement production and timeliness at both the formal and informal levels have deteriorated. RIDEM management needs to establish time frames for completing actions and to utilize a system such as RCRIS to oversee production progress. Untimely enforcement could result in harm to the public and environment. Also, non-complying facilities may have an economic advantage over their competitors as compliance with RCRA regulations often adds to the cost of doing business.

The following table shows how long each case has remained in the pipeline:

FACILITY	INSPECTION DATE	ELAPSED DAYS AS OF 5-31-98	ERP TIME FRAMES
RI15	11-05-97	206	180
RI17	08-13-97	288	180
RI18	05-20-97	376	180
RI19	02-06-97	461 (issued 5-12-98)	180

The following two cases are examples of RIDEM's untimely formal enforcement:

Case RI18 - The original inspection was conducted May 20, 1997. The inspectors reported observing literally hundreds of containers of waste paints and paint related wastes being stored without secondary containment. Sizes of containers ranged from pints to 55 gallon drums. Most containers were rusted without labels. There was no enforcement action issued based on this inspection. A reinspection of the facility by RIDEM staff was conducted on September 10, 1997. A draft formal enforcement

action dated November 3, 1997 was in the file but was never issued. A third inspection was conducted by RIDEM's

Emergency Response and RCRA staff on March 23, 1998. The RCRA inspector reported that with the exception of rearranging individual containers and an apparent turnover of waste for off-site disposal, little had changed with respect to on-site management of hazardous waste. A draft formal enforcement action dated April 1998 was under OC&I management's

review but was not issued as of May 1998. The EPA provided that enforcement should take 180 days. RIDEM spent 376 days in May 1998 enforcing the action.



review but was not issued as of May 1998. The EPA provided that enforcement should take 180 days. RIDEM spent 376 days in May 1998 enforcing the action.

Waste Stored at RI18

Case RI15 - RIDEM OC&I Enforcement staff conducted inspections on May 8, 1997 and June 5, 1997 and issued a LOD dated July 17, 1997 based

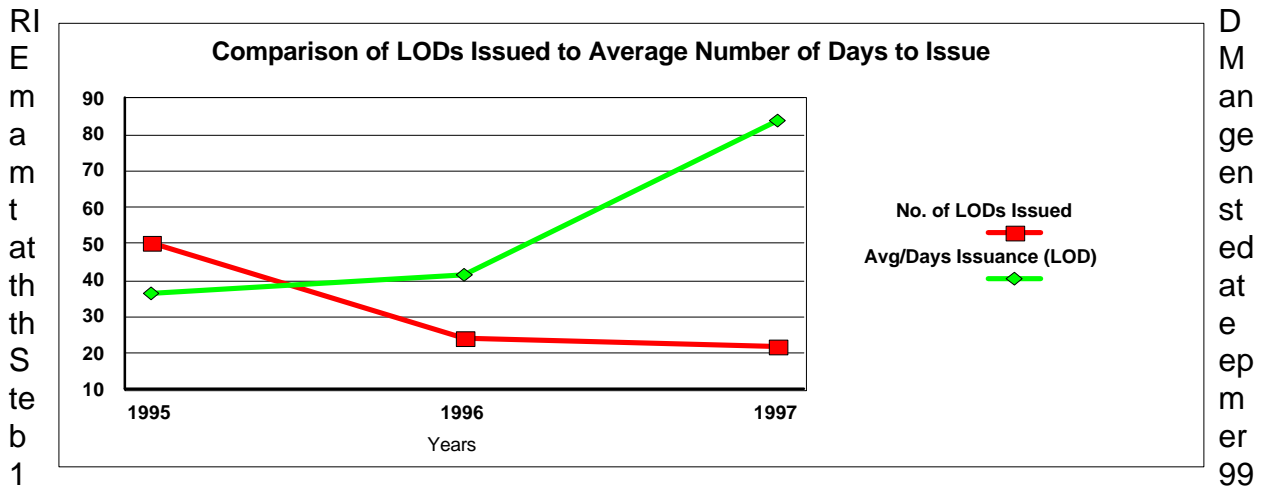
on violations found during their inspection. The violator did not respond to RIDEM's LOD which resulted in RIDEM issuing the facility a ten day warning letter on October 1, 1997. A third inspection of the facility was conducted on November 5, 1997. An NOV was under review by OC&I management but was not issued as of May 31, 1998. RIDEM's untimely enforcement has allowed this facility to go 206 days since the November 1997 inspection.

RIDEM disagreed with the OIG conclusions of untimely enforcement because of the small number of cases reviewed and the specific issues surrounding these four cases. RIDEM also stated that the ERP allows 20 percent of formal enforcement actions to exceed the standard time frames.

RIDEM's total universe of proposed formal enforcement cases was four. All four cases exceeded the ERP standard time frame, two by more than 100 percent. RIDEM's statement that the ERP allows 20 percent of formal

**RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management**

enforcement cases to exceed the standard time frames is not applicable to this situation. The ERP allows 20 percent of formal enforcement to exceed standard time frames when there are unique factors which necessitate a larger time frame. Even when there are unique factors, 80 percent of formal enforcement actions should be on time. We found that all (100 percent) of RIDEM's formal enforcement actions in process since the reorganization, exceeded the ERP's standard time frame.



1996 reorganization reduced resources which affected enforcement performance. From September 1996 to March 1997, RCRA enforcement staff was reduced from two inspectors to one. As of March 1997, RCRA enforcement staff was back to its 1995/1996 level. RIDEM does not have established time frames for issuing enforcement actions nor a formal system for management to track enforcement case status.

The following graph shows two lines which represent the reduced level of informal enforcement actions issued and the increase in time to issue these actions. The left side of the graph represents the number of days to issue, and the number of informal actions issued over years. The period covered by the graph is fiscal years 1995, 1996, and 1997.

**RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management**

Currently, there are seven proposed informal enforcement actions from 1997 and 1998 inspections which had an average of 323 days elapsed as of May 31, 1998 with no enforcement actions issued. The cases are as follows:

FACILITY	INSPECTION DATE	STATUS	DAYS ELAPSED
RI20	3-2-97	Not Issued	454
RI21	3-28-97	Not Issued	428
RI14	4-16-97	Not Issued	410

**RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management**

RI22	6-9-97	Not Issued	352
RI23	10-18-97	Not Issued	233
RI24	11-19-97	Not Issued	192
RI25	11-19-97	Not Issued	192

In responding to our position paper, RIDEM stated that in six of the cases, management received either outdated inspection reports or incomplete files. As a result, management required the staff to reinspect the facilities, in some of the cases, to determine the current status of the violations. This explanation supports the need for RIDEM to establish an effective administrative control system. RIDEM management needs a system to track where enforcement actions are at all times. Also, RIDEM management needs to set time frames on when action should be completed and do more oversight of RCRA case production to ensure timely enforcement is taken. The EPA ERP provides that the objectives of an informal enforcement response are to compel the violator to cease its non-compliant activities and ensure that full physical compliance is achieved in the shortest possible time frame. Not only is RIDEM failing to compel facilities to quickly return to compliance, but it is also putting a strain on its own resources by requiring re-inspections. Such re-inspections take time away from inspecting other facilities.

**Inadequate Follow-up
to Cited Violations**

RIDEM's OC&I did not conduct effective follow-up of cited violations to ensure that facilities returned to compliance. In 10 of the 20 files reviewed, OC&I's follow-up was non-existent or inadequate (See Appendix B). In addition, our review of the 1996 and 1997 RCRIS data listings of inspections, with violations, showed that 31 of 47 cases exceeded the EPA ERP correction period deadline of 90 days by as many as 888 days as of March 31, 1998. The average number of days the violations were opened without an actual compliance date was 393. OC&I managers did not have a system to assure that RIDEM staff conducted adequate follow-up. As a result, hazardous conditions may continue to exist longer than necessary.

Region 1 previously noted RIDEM's lack of follow-up. As part of its oversight activities, in February 1997, Region 1 identified an increasing number of facilities (210 facilities State-wide) with violations which had not returned to compliance. In response to Region 1's questioning of these open cases, RIDEM included a specific initiative in its 1997 Waste Compliance Strategy to address these 210 facilities having incomplete RCRIS reporting. At the time of our audit, lack of follow-up continued to be a problem.

The EPA ERP provided the following informal enforcement response time guidance:

The objectives of an informal enforcement response are to compel the violator to cease its non-compliant activities and ensure that full physical compliance is achieved in the shortest possible time frame.

At the time a violator is formally notified of the violation determination it is given a compliance date which establishes a deadline for the violator to correct all known violations. A correction period during which a violator should correct all known

violations should not exceed 90 days.

Failure to achieve full compliance by the compliance date or a failure to notify the implementing agency of the inability to correct violations should result in an escalation to formal enforcement.

The following two case files are examples of inadequate follow-up to cited violations:

Case RI13 - While RIDEM correctly took formal enforcement action and issued Notices of Violation (NOVs) on February 14, 1995 and April 9, 1996, RIDEM did not assure that the violations were corrected. These NOVs reported a total of eight violations severe enough to warrant formal enforcement. RIDEM and the facility negotiated a Consent Agreement (CA). The CA dated January 20, 1998 addressed the penalties associated with the NOVs but not the cited violations. The inspector advised that no follow-up to the cited violations was conducted. RCRIS showed the 1995 inspection violations remained open. This facility's history of chronic violations with RIDEM required timely and effective follow-up which RIDEM did not provide.

RIDEM stated that enforcement actions against this facility took place well before OC&I came into existence.

Additionally, the enforcement actions were appealed to the adjudicatory division, outside the control of the regulatory program.

While the NOVs were issued before OC&I was created, since November 1996, OC&I was involved in ongoing negotiations for the consent agreement which did not address the previously cited violations. Currently, OC&I is responsible for assuring that RCRA violators return to compliance. RCRIS showed that violations going back to 1995 remained open. However, the RCRA enforcement program was delegated to the State, and it is the State's

responsibility to assure that this facility returns to compliance.

Case RI04 - This facility was issued an informal enforcement action on November 20, 1995. The LOD contained three violations based on an inspection conducted on October 25, 1995. The LOD called for compliance to be completed within 30 days. RIDEM's LODs contained the following:

Please be advised that failure to comply with any of the above-cited requirements within the specified compliance schedule will result in the issuance of a Notice of Violation and Order and Penalty. Enforcement actions resulting from continued non-compliance may result in a maximum fine of \$10,000 per day and/or five (5) years imprisonment.

The facility did not respond. RIDEM's follow-up to ensure compliance was excessively late. More than two years later, RIDEM issued a ten day warning letter on March 9, 1998. In this letter, RIDEM advised the facility that failure to comply with requirements within ten days may result in a Notice of Violation and Order and Penalty. Well beyond ten days later, on May 22, 1998, RIDEM sent the facility another letter advising that two of the three violations were still outstanding and that continued non-compliance may include the assessment of an administrative penalty. This case further illustrates the ineffectiveness of RIDEM's follow-up system. Sending a ten day warning letter two and a half years after the violations were discovered conveys the wrong message to the regulated industry. The EPA ERP says failure to return to compliance within 90 days should result in raising the enforcement response to the formal enforcement level.

Case RI16 was another facility included in our sample. RIDEM issued an informal enforcement action but there was no evidence in the file to show the facility's return to

compliance. Based on questions raised by the auditor, RIDEM inspectors reinspected the facility and found at least

one of the previously cited violations still outstanding. RIDEM planned to issue an enforcement action based on the reinspection results.

Cases RI04 and RI16 were two facilities with open violations. When RIDEM followed-up on these facilities, it found that previously cited violations were still open. These two examples demonstrate the importance for timely follow-up in order to determine the status of open violations. This follow-up is especially important for RIDEM because of the large number of open violations recorded in RCRIS.

RIDEM responded that enforcement actions took place well before the creation of OC&I for the cases of RI04, RI05, RI16, RI12, and RI08. The response continued, "According to the time frames provided in the EPAIG's report, those enforcement actions should have been resolved well before OC&I came into existence. Therefore, it is inappropriate to cite the OC&I for the above noted cases in the EPAIG's findings."

We concur with OC&I's statement that enforcement actions should have been resolved well before OC&I came into existence. However, they were not, and it is now OC&I's responsibility. RIDEM is responsible for RCRA enforcement and OC&I is that office within RIDEM that has responsibility for enforcement against all non-permitted facilities. RIDEM included a provision in the 1997 Waste Compliance Strategy to dedicate staff to close over 200 open violations in RCRIS. In our opinion, this provision showed that RIDEM's OC&I accepted responsibility for unresolved violations. Additionally, with regards to RI04 and RI05, OC&I eventually was involved with these cases. OC&I

issued a ten day warning letter on March 9, 1998 to RI04 and reinspected RI05 on December 20, 1996.

Timely and effective follow-up could also have prevented the unproductive use of staff used to perform second and sometimes third reinspections. RIDEM stated it is not their

normal practice to perform second and third inspections. However, we found reinspections were conducted at RI18, RI15, RI14, RI26, RI21, RI22, RI23, and RI20. Reinspections were used primarily in current cases.

Management did not effectively utilize RCRIS as a tracking system or provide effective oversight to ensure that inspectors were conducting timely and appropriate follow-up to cited violations. Management relied upon individual inspectors to track facility compliance. Inspectors informed us that conducting inspections was a priority, not follow-up. As a result, RIDEM allowed facilities with cited violations to continue to operate without ensuring that the facility returned to compliance. In instances when facilities did not return to compliance within stated time-frames, RIDEM did not escalate enforcement actions. By allowing this to occur, the State residents' health and safety may not be protected; non-complying facilities may be provided an economic advantage because of their non-compliance; and the RCRA Enforcement Program was not administered in compliance with EPA and RIDEM's policies and guidance.

SNCs Identification

The RIDEM RCRA Supervisor stated that RIDEM historically did not identify SNCs in RCRIS because this was an EPA "bean count" and RIDEM did not want to be locked into the time frame constraints dictated by the SNC designation. The RIDEM RCRA Supervisor said that there was an agreement between EPA and Region 1 whereby EPA designated a facility as a SNC if appropriate. The prior Region 1 RCRA Enforcement Coordinator confirmed the

RIDEM Supervisor's statements.

The RIDEM Fiscal Year 1996 RCRA Grant application contained the following statement:

In response to the issue of designation of significant non-compliers, ...once an Order is issued, it begins to get caught up in the legal system, and often times due to scheduling conflicts, unavailability of lawyers, continuance, etc...., we are unable to proceed with a closure of the action as planned. It is due to these delays, which are beyond our control, that the state is hesitant to "designate" this status, and then be "locked-in" to strict deadlines. The state can easily identify these types of violations, and does proceed with the enforcement in accordance with the enforcement policy, and the potential for a missed deadline to be viewed as a "missed commitment" for the state, makes this issue one that this state wishes to avoid. EPA has previously agreed to identify these violators at the regional level, based on our monthly reports to the regional office, in order to meet their regional commitment. The state is satisfied with this level of interaction and will continue to deal with this issue in this manner.

RIDEM's OC&I Director stated that RIDEM will be responsible for identifying SNCs in RCRIS as part of the Fiscal Year 1998 Enforcement and Compliance Plan. This plan provided:

According to national enforcement policy, implementers of programs to enforce the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Resource Conservation and Recovery Act are required to identify and address significant noncompliers (also called significant violators) to minimize or eliminate risk to human health and the

environment. To this end, to the extent that resources and laws allow, the state commits to (1) undertake targeting strategies and inspection protocols designed to identify significant noncompliance, (2) identify detected significant noncompliers and continue to submit data for the national enforcement database maintained by EPA, (3) communicate and coordinate with EPA on the enforcement actions undertaken in response to the significant noncompliance on a monthly or quarterly basis depending on the program needs, and (4) address these identified facilities with enforcement responses sufficient to ensure compliance and recovery of penalties.

RIDEM has agreed to now identify SNCs. No further action on SNC identification is necessary at this time. However, RIDEM still needs to proceed with appropriate and timely enforcement actions on those SNCs.

CONCLUSION

RCRA enforcement was not a State priority. RIDEM's enforcement performance has been declining over the past three years. RIDEM's enforcement program has not provided the level of assurance that (1) violators received the appropriate level of enforcement within recommended time frames and that (2) violators returned to compliance on a timely basis.

This decline is a direct consequence of the insufficient management priority given to the program. Grant funds were not fully spent and vacancies were not timely filled. In addition, RIDEM needed to provide more management oversight by establishing stronger administrative controls over its RCRA enforcement program.

The Regional Administrator and his staff have been actively working at all levels of State government attempting to

**RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management**

improve RIDEM's RCRA program. We support the Region's efforts to work cooperatively with the State. A strong enforcement program is essential to effective environmental protection.

RECOMMENDATIONS

We recommend that the Regional Administrator:

2-1. Continue to monitor RIDEM's RCRA enforcement program to ensure that:

enforcement actions are issued within EPA ERP standard time frames;

significant non-compliers are identified and receive a formal enforcement response;

RCRIS is updated and utilized as a tracking system for all evaluations and all enforcement action types;

timely follow-up inspections are performed to assure that non-complying facilities return to compliance; and

facilities which do not come into compliance within the established time frames have their enforcement action elevated to formal enforcement status and aggressively tracked until compliance is achieved.

We are aware the Regional Administrator has established goals and milestones on which to evaluate RIDEM's progress in improving its RCRA enforcement program. If RIDEM does not satisfactorily meet these milestones, we recommend that the Regional Administrator:

2-2. Begin the process of withdrawal of the State's delegated authority for RCRA enforcement.

**REGIONAL
COMMENTS**

Region 1 agreed with our findings, conclusions and recommendations. The Regional Administrator issued a letter on September 29, 1998, outlining specific milestones

that RIDEM must meet in order to demonstrate its commitment to environmental protection and the RCRA enforcement program. The Regional Administrator stated that EPA is prepared to proceed with formal RCRA authorization withdrawal proceedings if necessary.

The Region's response noted one minor point that should be clarified in the report. Some of the cases reviewed involved inappropriate or untimely enforcement of non-Federally regulated wastes.

OIG COMMENTS

We concur with the Regional response and its planned actions. Two non-Federally regulated cases were included in our review in order to evaluate RIDEM's total program. We found that RIDEM did not adequately address either State or Federal violations of their RCRA program. Additionally, these cases were tracked in RCRIS and are regulated under State law as hazardous waste. We recognize that EPA would not have authority to enforce these cases.

RIDEM's COMMENTS

RIDEM stated that it was disappointed in the audit process and claimed that its response to the OIG position paper was not recognized. However, the response went on to focus on the following positive steps RIDEM is taking:

- ! Staffing - The State created three new positions in the RCRA enforcement program.
- ! Enforcement Response Policy - RIDEM has developed a new enforcement policy that is as stringent as EPA's ERP.
- ! Issuance of Formal Enforcement Actions - Weekly meetings have been initiated to ensure formal enforcement actions are issued on a timely basis.

- ! Penalty Calculations - RIDEM has taken steps to ensure that the RCRA enforcement program will perform, and document a calculation of an appropriate penalty that includes economic benefit of the alleged violation.
- ! Enforcement Strategy Documentation - Files will be documented to justify any future decisions with respect to non-penalty actions or no action after discovery of RCRA violations at a facility.
- ! Backlog of Unresolved Cases - RIDEM has developed a plan to address the backlog.
- ! Inspections - RIDEM has committed to complete an established number of inspections.
- ! Maintenance of the RCRIS Data Base - RIDEM has completed submitting all outstanding compliance data and has dedicated a staff assistant to maintain the RCRIS database.
- ! Identification of Significant Non-Compliers - RIDEM will identify SNCs in the RCRIS.
- ! Follow-up on enforcement action and tracking - RIDEM is creating a data management system to insure that enforcement actions are taken within appropriate time frames and required time frames to return to compliance are met.

OIG COMMENTS

We considered and evaluated RIDEM's response to the position paper in developing the draft report. We concur with the actions being taken by RIDEM to improve its RCRA enforcement program. We believe RIDEM should continue

**RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management**

to work closely with Regional staff to assure that their steps are successful at improving RIDEM's RCRA program.

Appendix A

INADEQUATE LEVEL OF ENFORCEMENT

FACILITY	INSPECTION RESULTS
RI01	Chronic violator, leaking hazardous waste (HW) and inadequate inspections.
RI02	Improper waste stream identification and management, inadequate labeling and secondary containment, HW stored in excess of 90 days, operating HW storage facility without a RCRA permit, staff not aware of contingency plan and no training.
RI03	Chronic violator, open enforcement order not fully complied with, improper waste storage, significant floor cracks in containment area and inadequate secondary containment.
RI04	No contingency plan, no training of staff and manifest deficiencies.
RI05	No contingency plan, no training, HW stored in excess of 90 days and inadequate secondary containment.
RI06	Inadequate secondary containment, no HW contingency plan, HW stored in excess of 90 days.
RI07	No contingency plan, no training of staff, HW determinations not made, unlabeled drums and manifest deficiencies.

**RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management**

RI08	No contingency plan, no secondary containment, waste allowed to migrate out of container into ground.
RI09	Public health issue, chronic violator, no secondary containment.
RI10	Chronic violator, leaking lead-acid batteries with no containment, no contingency plan or training of staff.
RI11	No secondary containment, no contingency plan, no training, potential HW material spilled on ground.
RI12	Inadequate secondary containment, no HW contingency plan, no training, evidence of contaminated soil and no spill control materials.

Appendix B

INADEQUATE FOLLOW-UP TO CITED VIOLATIONS


FACILITY	COMMENTS
RI13	Facility was issued 2 NOVs dated 2-95 and 4-96. The consent agreement dated 1-98 dealt with penalties only. There was no follow-up to the cited violations. Days elapsed from last NOV to consent agreement was 646.
RI14	Facility inspected on 4-16-97. LOD dated 12-2-97 was in file but never issued. Facility was re-inspected 1-29-98 and inspection noted material previously cited as waste was now gone, used as product. Days elapsed from inspection to compliance reinspection 283.
RI04	LOD issued 11-20-95, 10 day warning notice issued 3-9-98 as follow-up to LOD. As of 5-22-98 facility has not complied with LOD. This case should have been raised to formal enforcement level. Days elapsed from inspection to 5-22-98 was 936.
RI05	LOD issued on 5-22-96 calling for compliance in 30 days. Follow-up was conducted on 12-20-96. Inspector found that waste was gone, however, file does not indicate where waste had gone. Days elapsed from inspection to compliance date 249.

**RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management**

RI15	LOD dated 7-17-97, 10 day warning notice issued 10-1-97, two reinspections conducted. Violator failure to come into compliance should have resulted in elevating the enforcement to formal enforcement. Days elapsed from LOD Issuance to 5-31-98 was 314.
RI06	LOD issued on 10-28-96. The facility did not provide evidence of compliance and RIDEM did not re-inspect to determine compliance. This case may need to be elevated to formal enforcement. Days elapsed as of 5-31-98 was 579.
RI16	Letter of violation issued 11-28-95, inspector called facility on 2-28-96. Facility responded on 2 of 3 violations. In May 1998, a reinspection was conducted and the same violation (Labeling) was found. This represents an instance where formal enforcement is required even though it is very late. Days elapsed as of 5-31-98 was 913.
RI12	No evidence of compliance to RIDEM's 5-8-96 LOD containing 10 violations. Days elapsed as of 5-31-98 was 753.
RI09	No evidence of compliance to 9-13-96 LOD containing 3 violations. Days elapsed as of 5-31-98 was 623.
RI08	No evidence of return to compliance to RIDEM's 6-26-96 LOD containing 8 violations. Days elapsed as of 5-31-98 was 700.

RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management

Appendix C



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
JOHN F. KENNEDY FEDERAL BUILDING
BOSTON, MASSACHUSETTS 02203-0001

12/15/98
Rec'd
CC: Linda
Jan

OFFICE OF THE
REGIONAL ADMINISTRATOR

MEMORANDUM

DATE: December 15, 1998

SUBJ: EPA-New England Response to Audit Report No. E1GSD8-01-0006
Draft Report of RCRA Significant Non-Complier Identification and Enforcement by the Rhode Island Department of Environmental Management (RI DEM)

FROM: John P. DeVillars *J.P.V.*
Regional Administrator

TO: Paul D. McKechnie, Divisional Inspector General
Eastern Audit Division

As the Action Official pursuant to EPA Order 2750, I have reviewed the findings and recommendations prepared by your office from its investigation of RI DEM's RCRA inspection and enforcement program. EPA-New England is in agreement with the findings, conclusions and recommendations contained in the draft report regarding RI DEM's administration of the RCRA program and, more specifically, RI DEM's enforcement of its hazardous waste regulations.

Your office correctly stated that my office has conducted its own review of RI DEM's enforcement programs pursuant to EPA's oversight responsibilities and had identified significant weaknesses within RI DEM's RCRA enforcement program. As stated in the audit findings, I have deep concerns over the level of staffing, the decline in overall enforcement and RI DEM's shortfall in committing the necessary financial resources that prompted the Region to put these concerns, into writing, to Andrew McLeod, Director of RI DEM, and Governor Lincoln Almond. Your office's focus on timely and appropriate enforcement, violator compliance schedules and proper identification of significant noncompliers (SNC's) were appropriate areas to investigate and is relevant to the concerns my office has with respect to RI DEM's implementation of an effective RCRA enforcement program.

My review of the audit report findings has found the report to be factually correct. One minor point that should be clarified in the report is the fact that some of the cases reviewed involved inappropriate or untimely enforcement of non-federally regulated wastes that EPA would not have the authority to enforce due to the fact that the regulation of these wastes were not contemplated by EPA and are broader in scope to the federal hazardous waste scheme. However, despite this issue, RI DEM felt compelled to regulate these wastes as hazardous wastes under state law out of concern over the potential harm created by the mismanagement of these wastes and failed to take appropriate enforcement action when violations of its requirements were found.

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and Enforcement by the Rhode Island
Department of Environmental Management**

We are actively engaged with RI DEM management and have been meeting every two to four weeks for the purpose of reviewing all RCRA cases that are currently in RI DEM's pipeline for the purpose of determining that the violations have been properly classified, economic benefit is captured and to generally ensure that RI DEM is initiating the appropriate enforcement action and understands what EPA's position is relevant to RCRA compliance and enforcement.

On September 29, 1998, I issued a letter to RI DEM outlining specific milestones that RI DEM must meet in order to demonstrate its commitment to environmental protection and the RCRA enforcement program. The criteria addressed in the letter were identified as important and necessary components of an effective RCRA enforcement program. The letter establishes short-term deadlines for DEM activities to satisfy the criteria, with an expectation that RI DEM will maintain an appropriate level of activity and practices over the long term in order to ensure the maintenance of a healthy RCRA enforcement program. In addition, as RI DEM focuses on the criteria, my office has requested that RI DEM maintain an appropriate level of effort in other aspects of its RCRA program, including for example, responding to citizens' complaints, making biannual reports, and filling administrative functions such as issuing identification numbers and temporary identification numbers. A copy of this letter is attached as Attachment #1.

On December 4, 1998, RI DEM provided my office with their comments on the audit draft report. These comments primarily outline steps RI DEM has taken to meet the requirements outlined in my September 29, 1998 letter. A copy of this letter is attached as Attachment #2.

There are two minor comments on the draft report text. First, in Chapter 1, page 2 in the paragraph starting "In addition, EPA...", it should be RCRA Section 3011 not 1011. Secondly, in the Recommendations section, the comment concerning RCRIS on page 25 should not be limited to specific enforcement actions. It should encompass all evaluations and all enforcement action types.

My office is committed to ensuring that RI DEM lives up to its commitments. We are utilizing significant resources in continuing our oversight of activities in Rhode Island. We are prepared to proceed with formal RCRA authorization withdrawal proceedings if necessary. The practical implications of this process to my office would be the redeployment of the regional RCRA enforcement resources to directly oversee the inspection and enforcement of the hazardous waste regulations in Rhode Island.

Attachments

ATTACHMENT 1

RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
JOHN F. KENNEDY FEDERAL BUILDING
BOSTON, MASSACHUSETTS 02203-0001

ML
G. Silverman
J. Murphy
B. Mudge

September 29, 1998

Andrew H. McLeod, Director
Department of Environmental Management
235 Promenade Street
Providence, RI 02908

OFFICE OF THE
REGIONAL ADMINISTRATOR

Dear Mr. McLeod:

Thank you and your senior managers for coming to Boston on August 26 to discuss your perspective on the status of the environmental programs in Rhode Island. I also appreciate our follow-up meeting with Governor Almond on September 18, 1998 to review EPA's concerns in several areas. Our meetings were productive. I especially appreciate Governor Almond's commitment to six new positions for DEM, Department of Administration Director Bob Carl's commitment to work with DEM to streamline external contracting procedures, and your proposal to work together with EPA on future DEM staffing needs.

The information you presented at both meetings helped inform our decisions on the next steps that EPA will take in support of the environmental goals we both share. I believe we can all work cooperatively as we did two years ago with the NPDES program challenges to effect change, respond to EPA's concerns, and thereby deliver more effective protection for Rhode Island's citizens and environment.

As we discussed at our meetings, EPA continues to be concerned with the state's inability to adequately meet its environmental commitments under the FY98 Performance Partnership Grant between EPA and RIDEM. Our concern is especially acute in the water and RCRA enforcement programs. In addition, we are very troubled that DEM is not expending EPA grant funds in a timely and efficient manner with the result that some of the important environmental work that these grants support is not being undertaken.

In the water programs, DEM has not fully met either its current nor its past commitments to expend grant dollars in the non-point source, water quality, and wetland protection areas. The grant expenditure process in the water programs requires far too lengthy time periods to issue external contracts as well as for issuance of permits to projects that are necessary to correct current water quality violations. The Governor and Bob Carl's commitments and the difficult follow-up that is necessary should make a difference.

We recognize the progress that has been made to hire staff and to restore lost positions,

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**RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management**

particularly in the NPDES program. As you know, in the Fall of 1996, EPA determined that the staffing in this program had been reduced from 10 to 2 people, resulting in the state severely compromising its delegated responsibilities. My ensuing conversations with the Governor, his staff, DEM, and legislative leadership began a process for restoring needed staff to this program. I am particularly pleased with the fact that your current NPDES staff is 11.5 FTE and that you are actively training these new people.

Nevertheless, EPA needs to see substantial progress in the following problem areas. The pledges and commitments from the Governor, Director Carl, and you at our recent meeting are a positive first step to address these issues.

1. Specific current shortfalls in DEM staffing of water and waste programs, and DEM's need to assess future staffing requirements.

The Governor's commitment to the immediate hiring of 6 new positions, (3 in Compliance and Enforcement for RCRA and 3 in Water Programs) is laudable. We understand these positions shall result in an actual increase in the level of staffing within DEM. This will help to correct the problems EPA has flagged in our FY99 PPA negotiations. However, as we discussed, it is important to accelerate the process to fill the large number of existing vacancies across all DEM's programs. Bob Carl's commitment to assist the DEM personnel office in that regard is appreciated.

As you know, it is also necessary to identify the future positions and resources necessary for the DEM to adequately meet its federal and state program requirements. I am committed to working with you, the Governor, and the Budget Office to prepare this assessment as consistent with the Governor's proposed FY2000 Budget request. We need to receive this analysis by November 15, 1998. We understand this will be proposal only and is subject to the Legislative process and final approval of the General Assembly.

2. Barriers to DEM contracting and procurement procedures which have caused delays in spending down federal non-point source, water quality and wetland protection grants over the past several years are significant.

Unfortunately, there has been a pattern of inability by DEM to adequately spend all the federal grants in the above programs. We understand this is largely due to cumbersome complex external contract procedures. Director Carl's commitment to institute new and improved procedures over the next 2 weeks to provide DEM with a more streamlined contract review process should help to correct this problem. However, the backlog of old grants and my current assessment of DEM staffing to get these grant funds out the door leads me to conclude that this area requires specific and heightened attention by EPA. Thus I have decided to withhold \$200,000 of the remaining water PPG funds for FY98.

**RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management**

I have asked my staff to work collaboratively with RIDEM to identify and transmit these funds to eligible applicants in Rhode Island for mutually-agreeable projects that support the goals enumerated in the Performance Partnership Agreement (PPA).

I am eager to work with you and your office to ensure these funds are put to good use to address environmental problems at the local level.

In addition, I have decided that EPA should give special oversight to Rhode Island's FY1999 grants for the wetlands protection programs and much of the non-point source (319) funds. Thus, EPA will retain these funds until the three new staff positions in water resources to which the Governor has committed, and which are referenced earlier in this letter, are filled in full by the State. I expect that this will occur on or before December 1, at which time we will work together to establish criteria and clear identifiable milestones leading to satisfactory progress for the expenditure of these funds.

3. There are lengthy permitting procedures on environmental improvement projects such as Best Management Practices (BMP's), stormwater management, wetlands protection enhancements. These contribute to the delay in expending federal funds.

EPA has discussed with you for the past year, the need for the Department to establish an expedited permitting process that allows beneficial environmental projects to undergo a fast track environmental review and approval process. EPA pledges to work with you and other partners, such as Natural Resource Conservation Service (NRCS), to pursue these changes.

4. As I indicated at our August 26 and September 18 meetings, and as you know from the preliminary findings of the Inspector General, the RCRA enforcement program is another critical area in which DEM has not adequately fulfilled its obligation to date under the FY98 PPA as specified in the Compliance Strategy section of the Agreement. The strongest tool that EPA has to rectify this problem is withdrawal of RCRA authorization from Rhode Island. Based on the efforts you are making to increase RCRA enforcement outputs, such as the docket review meetings your managers are holding monthly to identify good candidates for formal enforcement, I am reserving judgment on whether to begin the process of withdrawal of the RCRA program. I will make this decision based on DEM's performance as measured by the 9 criteria listed below. Failure to satisfy any of the criteria below by the associated due date will constitute grounds to commence the formal process for EPA withdrawal of the RCRA program.

- (1) Staffing - After a review of DEM's historical RCRA enforcement staffing levels and associated federal funding for those positions, EPA has determined that the current enforcement staffing level of DEM's RCRA inspection and enforcement program is inadequate. As we agreed to at our meeting, DEM will hire within 60 days of this letter, a minimum of 3 additional full-time staff dedicated to RCRA

**RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management**

compliance and inspection activities. We understand from our discussions the hiring for these positions is well underway. These positions shall be in addition to the existing 3 full-time positions and 1 half-time manager position currently dedicated to the program. DEM shall provide any needed training to the new staff. In addition, DEM shall provide the appropriate level of legal staffing for its Office of Legal Counsel to support its RCRA enforcement actions.

- (2) Enforcement Response Policy (ERP) - Within 30 days of receipt of this letter, DEM shall adopt a written RCRA Enforcement Response Policy (ERP) that is at least as stringent as EPA's Hazardous Waste Civil Enforcement Response Policy (March 15, 1996), and that, at a minimum, shall identify: specific classes of violators, the criteria for determining such violators, appropriate enforcement responses for the types of violators identified, and the appropriate enforcement response time lines.
- (3) Issuance of Formal Enforcement Actions - EPA has spent considerable time with DEM reviewing your RCRA enforcement cases to evaluate both the timeliness and appropriateness of each potential case. Based on the number of cases we understand to be under development at DEM, we believe that DEM should issue at least 3 RCRA Notices of Violation (NOVs) with appropriate penalties within 90 days of receipt of this letter and at least an additional 5 RCRA NOVs with appropriate penalties during the second 90 day period after receipt of this letter. During this 180-day period, EPA also expects DEM to continue issuing informal actions in a timely fashion where appropriate.
- (4) Penalty Calculations - Effective immediately, before initiating any administrative or judicial RCRA penalty action, DEM shall perform, and document to the case file, a calculation of the appropriate penalty to seek in each case. This calculation shall include, as a minimum, the economic benefit of the alleged violations to the violator. Any proposed penalty shall seek to recover at least that economic benefit amount. Effective immediately, DEM shall also document to the case file the justification for all final penalty amounts in administrative or judicial RCRA actions.
- (5) Penalty Collection Mechanism - Within 14 days of receipt of this letter, DEM shall have in place financial management mechanisms to 1) track the payment of final administrative or judicial penalty amounts by violators in RCRA cases and 2) initiate timely action to collect overdue penalty amounts.
- (6) Enforcement Strategy Documentation - Within 14 days of receipt of this letter, DEM shall start producing memoranda to the file justifying any future decision to take any non-penalty action or no action after the discovery of RCRA violations at a facility.
- (7) Backlog of Unresolved Cases - Based upon recent discussions with DEM and

**RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management**

review of the RCRIS data base, EPA believes that DEM has 62 RCRA enforcement cases or matters that have been opened since FY96, only a portion of which have been closed out. EPA also believes that DEM has approximately 200 older RCRA cases or matters that have to be closed out. To address this backlog, within 30 days of receipt of this letter, DEM shall submit to EPA a plan that identifies priority criteria for eliminating the open RCRA case backlog and also submit a timetable for completion of this project. EPA will then review and comment on the plan, as appropriate. Within 20 days of EPA's concurrence with this plan, DEM shall begin its implementation.

- (8) Inspections - Within 90 days of receipt of this letter, DEM shall conduct a minimum of 5 RCRA Compliance Evaluation Inspections (CEI); at least 2 of these inspections shall be of large quantity generators of federally regulated hazardous waste. During the second 90 days after receipt of this letter, DEM shall conduct a minimum of another 21 RCRA CEIs; at least 8 of these inspections shall also be of large quantity generators of federally regulated hazardous waste.
- (9) Maintenance of the RCRIS Data Base - DEM shall submit to EPA all outstanding RCRA compliance data from FY97 within 90 days of receipt of this letter and shall submit all other RCRA reportable data within 30 days after each event. DEM shall make best efforts to submit all FY98 RCRA data by October 1, 1998. If DEM is or becomes the implementer of record for such data, then this information shall be entered within the specified time frames above and submitted to EPA accordingly.

The above criteria are all important and necessary components of an effective RCRA enforcement program. While this letter establishes short-term deadlines for DEM activities to satisfy the criteria, EPA also expects DEM to maintain the level of activity and practices described above over the long-term in order to ensure the maintenance of a healthy RCRA enforcement program. In addition, as DEM focuses on the above criteria, DEM must maintain an appropriate level of effort in other aspects of its RCRA program, including for example, responding to citizen's complaints, making biannual reports, and filling administrative functions such as issuing identification numbers and temporary identification numbers.

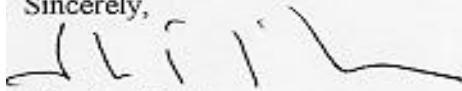
I have been encouraged by our recent communications, and our meeting with the Governor and Director Carl and DEM's commitment to focus on making improvements in its RCRA enforcement program. Your delegation of enforcement decision authority dated September 21, 1998, to the Chief of the Office of Compliance and Inspection should result in more timely enforcement decisions and improvement in your RCRA enforcement program. Our conversations about the other elements necessary for an improved program have led EPA to formulate the above criteria to ensure that our expectations are clear.

You and I both firmly believe that strong state programs are essential for effective environmental protection. I know you are working hard to achieve that necessary strength for RIDEM. I am taking these steps with the hope and expectation you will be successful and that DEM will once again be fully capable of aggressively implementing and enforcing all required environmental statutes and programs. EPA pledges its assistance in these efforts.

**RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management**

I am committed to working with you, Governor Almond, and the leadership of the General Assembly to ensure that the additional positions agreed to in our meeting and the other measures articulated in this letter are included in your FY99 Supplemental Budget and the FY2000 Budget, as necessary. I recognize the particular importance in obtaining the support and cooperation of the leadership of the General Assembly to achieve these objectives and I look forward to assisting you in this effort.

Sincerely,



John P. DeVillars
Regional Administrator
EPA-New England

cc: Governor Lincoln Almond
Director Robert Carl

**RCRA Significant Non-Complier Identification
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Appendix D

**RCRA Significant Non-Complier Identification
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12/07/98 MON 17:03 FAX 401 222 3811

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- 1) Staffing – The State has created three new positions in the RCRA enforcement program. These positions include two (2) new Environmental Scientists and one (1) Technical Staff Assistant. These positions have been filled and the new staff are onboard working in the program.
- 2) Enforcement Response Policy (“ERP”) – DEM has developed a new ERP for the RCRA Enforcement Program that is as stringent as EPA’s Hazardous Waste Civil Enforcement (March 15, 1996). This draft is currently under review by EPA Region I.
- 3) Issuance of Formal Enforcement Actions – DEM has initiated weekly meetings for managers in the Office of Compliance & Inspection, DEM Legal Council and DEM Associate Director to ensure that formal enforcement actions with appropriate penalties are issued on a timely basis for RCRA related cases. Three (3) RCRA related penalty actions have been issued since October 1, 1998 as agreed to between EPA Region I and DEM. DEM will ensure that five (5) additional formal enforcement penalty actions are completed within the second quarter of FFY 1999.
- 4) Penalty Calculations – DEM has already taken steps to ensure that the RCRA enforcement program will perform, and document to the case file, a calculation of an appropriate penalty that includes economic benefit of the alleged violation. Both existing Department criteria and EPA criteria shall be used in calculating an economic benefit penalty. The Department will seek to recover at least the economic amount and will document to the case file all final penalty amounts in administrative or judicial RCRA actions.
- 5) Penalty Collection Mechanism – DEM’s Office of Management Services will now perform the necessary functions to track the payment of final administrative or judicial penalty amounts by violators in RCRA cases and notify the Office of Compliance and Inspection and the Office of Legal Services so that timely actions to collect overdue penalty amounts can be initiated.
- 6) Enforcement Strategy Documentation – Beginning October 14, 1998, the Office of Compliance and Inspection has initiated a procedure to produce memoranda to the file justifying any future decisions with respect to any non-penalty action or no action after discovery of RCRA violations at a facility.
- 7) Backlog of Unresolved Cases – DEM has developed a plan to address the backlog. This plan addresses priority criteria for eliminating the open RCRA case backlog relating to the 62 RCRA enforcement cases opened since FY 96 and it addresses the approximately 200 older RCRA cases that have to be closed out.

RIDEM’s priority criteria time table on the 62 RCRA enforcement cases opened since FY 96 is as follows:

1. By December 1, 1998, DEM will review the status of each case and determine if the case is closed or remains open.
2. If closed, DEM will ensure the case file reflects closure and will update RCRIS to reflect closure by January 1, 1999.

**RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management**

12/07/98 MON 17:04 FAX 401 222 3811

COMPLIANCE & INSPECTION

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3. Regarding all opens cases, by December 15, 1998, DEM will prioritize all open cases by age and action necessary to ensure compliance is met. Action necessary to ensure compliance is likely to include at least the following:
 - a. Enforcement actions already issued will be reviewed to determine if compliance has been met. Where necessary, inspection will be scheduled and carried out.
 - b. Inspections identifying violations not already acted upon will result in an enforcement action.
 - c. Where hazardous waste generators have submitted information for DEM review, evaluation will proceed and compliance determined.
 - d. Where it is determined that compliance with informal enforcement has not been met, timely and appropriate enforcement will follow.
 - e. Where formal enforcement is warranted, DEM will prioritize cases depending upon severity of non-compliance, threats or risk to workers or public safety and the environment to effectively proceed with formal enforcement.
 - f. Where DEM determines its staff and legal resources do not allow for timely and appropriate enforcement, request will be made to EPA for assistance in taking over the enforcement case.
 - g. All action taken will be properly recorded in RCRIS.
4. DEM anticipates bringing all the 62 open RCRA enforcement cases since FY 96 to closure or to the next step of enforcement action before June 1, 1999.

There are approximately 200 older RCRA cases or matters opened prior to FY 96. DEM has determined that the use of an external staff (consultant service) may be the most expeditious way to evaluate these cases. Negotiations are presently underway with a consultant that is one of the Department's technical assistance contractors. It is anticipated that the evaluation would begin in December and take approximately 500 man-hours to complete. On April 1, 1999 the Department would begin reviewing the completed evaluation and prioritize the cases for follow-up activity as necessary. A list of all cases and scheduled completion dates will be submitted to EPA no later than May 1, 1999.

- 8) Inspections – DEM has committed the resources to conduct a minimum of five RCRA Compliance Evaluation Inspections, including two at large quantity generators within the first quarter of FFY 1999, and shall conduct a minimum of another 21 RCRA CEIs, at least eight of these shall be at large quantity generators, as required in the second quarter of FFY 1999.
- 9) Maintenance of the RCRIS Data Base – The Office of Compliance and Inspection has substantially completed submitting all outstanding compliance data for FY97, and FY98. Every effort will be made to continue to submit required data in the required time frames. A technical staff assistant is now dedicated to maintain the RCRIS database. This staff person shall coordinate and validate the transfer and quality of information from DEM field inspectors.
- 10) Identification of Significant Non-Compliance ("SNC's") – The identification of SNC's into RCRIS will be undertaken by DEM and this determination will be made in accordance with the DEM ERP.

**RCRA Significant Non-Complier Identification
and Enforcement by the Rhode Island
Department of Environmental Management**

12/07/98 MON 11:04 FAX 401 422 3811

COMPLIANCE & INSPECTION

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- 11) Follow-up on enforcement actions and tracking – The new technical staff assistance is creating a data management system that will track all actions of the RCRA program. The system is designed to insure that enforcement actions are taken within appropriate time frames and that required time frames to return to compliance are met. This internal tracking system is being designed to work in concert with RCRIS.

As you can see from the above, DEM is committed to resolving problems identified by the USEPAIG and, in cooperation with EPA New England, is moving forward to ensure DEM will have a strong and efficient RCRA Enforcement Program both now and into the future. DEM welcomes the continued support and cooperation of EPA New England in protecting the health, safety and welfare of citizens of the State of Rhode Island. While DEM disagrees with the suggestion by the USEPAIG that the health, safety and welfare of our citizens were immediately threatened in any of the actions cited in the report, we heartily agree that a strong enforcement program is necessary to prevent potential harm and ensure compliance to protect our citizens.

I respectfully request that you add DEM's comments to EPA New England's comments on the USEPAIG's report regarding the RCRA Enforcement Program in Rhode Island. To do so will ensure Rhode Island's legitimate interests in this matter are fully and fairly represented.

Thank you very much.

Sincerely,



Andrew H. McLeod
Director

cc: Michael DeBiase, Office of Governor Almond
Sam Silverman, EPA
Robert Mendoza, EPA

Appendix E

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