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

SEP 10 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Policy on Enforcing Information Requests in Hazardous Waste Cases

FROM: Courtney M. Price
Assistant Administrator for Enforcement and Compliance Monitoring

TO: Regional Administrators, I-X
Regional Counsels, I-X
Lee M. Thomas, Assistant Administrator for Solid Waste and Emergency Response

The attached policy has been developed to assist the Regions in enforcing information request letters issued pursuant to Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Section 3007 of the Resource Conservation and Recovery Act (RCRA). The policy is intended to encourage agressive enforcement against parties that do not comply with such letters.

The policy delineates statutory authority to obtain information, briefly discusses other sources of information and sets forth options available to the Agency to enforce requests for information in civil cases dealing with hazardous waste and hazardous substances.

If you or your staff have any further questions regarding enforcement of CERCLA and RCRA information requests, please contact Fred Stiehl (FTS) 382-3050 or Jerry Schwartz at (FTS) 382-3104.

Attachment

POLICY ON ENFORCING INFORMATION REQUESTS IN HAZARDOUS WASTE CASES

INTRODUCTION

Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and section 3007 of the Resource Conservation and Recovery Act (RCRA) provide EPA with considerable authority to obtain information from parties involved with hazardous substances or hazardous wastes (collectively "hazardous materials").1/ Information request letters issued pursuant to these sections have proven quite useful, particularly because of the high rate of compliance associated with these letters. Occasionally, however, letter recipients refuse to respond to requests, or provide an inadequate response. This policy document delineates statutory authority to obtain information and sets forth options available to the Agency to enforce requests for information in civil cases dealing with hazardous materials.2/

This policy has been developed along with the guidance document on issuing notice/information request letters ("Notice Letter Guidance"), which will be issued shortly.

1/ These sections also provide authority to enter facilities to perform inspections, conduct studies, and obtain samples. Access authority is discussed in a policy document which will be issued separately.

2/ With regard to obtaining information in the context of parallel civil and criminal cases, consult Courtney M. Price's memorandum "Policy and Procedures on Parallel Proceedings at the Environmental Protection Agency," dated January 24, 1984.

STATUTORY AUTHORITY

Section 104(e)(1) of CERCLA provides:

> For purposes of assisting in determining the need for response to a release under this title or enforcing the provisions of this title, any person who stores, treats, or disposes of, or, where necessary to ascertain facts not available at the facility where such hazardous substances are located, who generates, transports, or otherwise handles or has handled, hazardous substances shall upon request ... furnish information relating to such substances...." (Emphasis supplied)

Section 3007(a) of RCRA provides: 3/

> For purposes of ... enforcing the provisions of this title any person who generates, stores treats, transports, disposes of, or has handled hazardous wastes shall, upon request ... furnish information relating to such wastes...." (Emphasis supplied)

In most information request letters, both sections should be cited as authority for the request. Note that it is appropriate to cite RCRA §3007(a) as authority for requests relating to those wastes the regulation of which has been partially suspended by Congress pursuant to RCRA §3001(b)(3)(A) (e.g., "mining waste"). This suspension does not limit the wastes which may be considered "hazardous wastes" for purposes of several sections of the statute, including section 3007. 45 Fed. Reg. 33090, (May 19, 1980) and 40 CFR 261.1(b). Additionally, if the "mining waste" or other waste suspended under RCRA falls within the definition of

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3/ The Agency has also issued RCRA §3013 Orders which contain, inter alia, requests for information.

hazardous substance under categories A,B,D,E, or F of CERCLA §101(14), the waste is a hazardous substance for CERCLA purposes and is properly subject to a request under CERCLA §104. See U.S. v. Metate Asbestos Corp., et al., ___ F. Supp. ___, (Az., 1984) (Globe case) holding that asbestos tailings, which are mining wastes, are hazardous substances pursuant to CERCLA §101(14).

INADEQUATE OR NON-RESPONSE

A diligent, good faith effort by the information request letter recipient to directly respond to the Agency's questions and to provide information is adequate. The determination of whether a diligent, good faith effort has been made is necessarily a case by case decision. Most information requests require the recipient to indicate the types of files searched in response to the request. This information should help the Case Development Team (CDT) determine whether the recipient's file searching efforts were diligent and whether the recipient actually has submitted all available information.

In some cases, letter recipients may not have retained records pertaining to the time period in which the Agency is interested. This may frequently be the case in multi-party cases containing many "small" generators who dealt with a site that was in operation many years ago. In these cases, unless the Agency has evidence to the contrary, the CDT generally will accept the recipient's assertion that its records do not go back

that far. The CDT can help ensure the veracity of a recipient's claim that it does not have pertinent records by insisting on a signed affidavit to that effect from a duly authorized company official.

Of course, the easiest determinations regarding adequacy of response are those where the company simply refuses to comply. This includes cases where a recipient responds by stating it will not answer the questions, or simply does not respond by the deadline included in the letter. 4/

In one case, a letter recipient asserted that certain information requested by the Agency was properly withheld because it was "covered by the attorney-client privilege and the work product rule." In that case, the Agency issued a RCRA §3008 administrative order (AO) to enforce compliance with the information request. The Administrative Law Judge (ALJ) rejected the company's claim and ordered it to comply with the AO. The ALJ looked to the language and purpose of the statute and the relevance of the information requested in rejecting the privilege claims of the company. 5/ While there have been several cases supporting the Agency's information gathering authority under other statutes,

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4/ Information request letters are sent return receipt requested. The CDT should ensure the party actually received the letter before taking further action.

5/ See "Order Denying Motion and Requiring Compliance" in the Matter of Hughes Aircraft Company case. (Attachment A) Subsequent to this Order, the company submitted the requested information.

this is the only case addressing a privilege claim as a defense to an information request under RCRA or CERCLA.

ENFORCEMENT RESPONSE

A. First Step: Reminder Letter

Once the CDT has made a decision that a recipient has not responded or has responded inadequately to a request, a "reminder" letter should be issued. If a letter recipient, however, clearly indicates its refusal to respond to a request, a reminder letter would be inappropriate. The letter should recite pertinent past details (such as when the first letter was sent and a general description of the information sought), and indicate that the response is inadequate or that no response was received. It should also point out that the Agency is considering further enforcement action if it does not receive the requested information by a date within the next several weeks. See Attachment B for a sample reminder letter.

Compliance with information request letters can also be increased by informing the responsible party coordinating committee (in multi-party cases) that the government will not settle nor exchange information with any party that has not complied with a request. This has proven effective in several multi-party cases.

Any telephone or other contacts with the recipient regarding the request should be well documented, including telephone calls requesting clarification to questions or agreements to extend the deadline for response. This information will be critical should the Agency decide to take further enforcement action.

B. Second Step: Evaluate Candidates for Further Action

As a general rule, the CDT should first consider for further enforcement action those recipients that clearly have not complied with the information request. These are recipients whom the CDT is sure received the information request and, if applicable, reminder letters, but have not responded at all or have responded by refusing to comply with the request. The CDT should next consider for further enforcement action those recipients that responded with a less than diligent effort at searching their files, or whose response was otherwise inadequate. Finally, the CDT should consider those recipients that responded late to the request.

C. Third Step: Evaluate Enforcement Options

The Agency's authority for enforcing an information request is contained in §3008(a) of RCRA, and §§104(e) and 113 of CERCLA.

Section 3008 provides in pertinent part:

> "... whenever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subtitle, the Administrator may issue an order requiring compliance immediately or within a specified time period or the Administrator may commence a civil action..."

Section 3008 civil actions and AOs can seek both injunctive relief and penalties.

Section 113 of CERCLA grants federal district courts jurisdiction to hear an EPA motion for injunctive relief to compel compliance with an information request. Unlike §3008 of RCRA, however, §104(e)(1) of CERCLA does not provide for penalties. Section 113(b) provides in pertinent part:

> "...the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act...."

Thus, the options available to the Agency to pursue an inadequate response are: (1) issue a RCRA §3008 AO seeking injunctive relief and penalties, (2) file a civil action pursuant to RCRA §3008 and CERCLA §113 seeking injunctive relief and penalties, where appropriate and (3) issue a RCRA §3008 AO seeking penalties only. In determining which option to choose, the CDT should examine the same considerations as in other potential enforcement cases, such as the likelihood that the particular recipient will comply with an AO and the immediacy of the need for the information. In those cases where the information is needed immediately or likelihood of compliance is small, a civil action may be preferable. Each option is discussed in more detail below.

1. <u>RCRA §3008 AOs Seeking Injunctive Relief and Penalties</u>:

AOs issued to compel compliance with an information request are similar to other RCRA §3008 AOs. They should contain findings of fact and determinations, should assess penalties in accordance

with the Agency's RCRA Penalty Policy 6/ and should order the respondent to comply with the original information request. Care should be taken to ensure that the findings of fact demonstrate the relevance of the information requested, that the information is necessary to respond to a release or to enforce the appropriate provisions of the Acts, and that the recipient deals with hazardous waste. Note that under RCRA §3008(a) each day of noncompliance with an AO is a separate violation for purposes of assessing penalties.

2. Filing RCRA §3008 and CERCLA §113 Civil Actions: 7/

A referral to the Department of Justice (DOJ) for inadequate or non-response to an information request should include all relevant letters, documentation of telephone contacts, information sufficient to demonstrate that the recipient deals with hazardous materials, and that the information request is for one or both of the specified purposes of the statutes. Again, these referrals are similar to other referrals and all pertinent guidance should be followed. As indicated in previous guidance, a referral pursuant to §3008 can seek enforcement of an AO, penalties or remedies for the underlying §3008 violation.

6/ See the Final RCRA Civil Penalty Policy, May 8, 1984, page 31, number (4) for an example of a penalty calculation for noncompliance with a RCRA §3007 information request.

7/ The United States has filed a complaint for noncompliance with a RCRA §3007/ CERCLA §104 information request in U.S. v. George Liviola, Jr., et al., No. C84-1879Y, Northern District of Ohio. Copies are available from OECM-Waste.

3. Issuing AOs Assessing Penalties Only:

RCRA §3008 AOs issued to letter recipients who eventually submit the requested information, but submit it late or after the Agency had issued reminder letters only assess a penalty, since injunctive relief (for submission of the information) is no longer necessary. Regional enforcement personnel are encouraged to use penalty-only AOs for late submissions if adequate resources are available. These AOs will demonstrate to the regulated community that the Agency is serious about utilizing its information gathering authority and taking further action to enforce the use of that authority, where appropriate.

CONCLUSION

The information gathering authority available to the Agency will continue to be effective only if the Agency takes a strong stand in enforcing these requests. Whenever possible, the CDTs should take whatever action is necessary to ensure compliance with these letters.

Attachments

Attachment 4

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:	)	Docket No. IX-81-RCRA-123
	)	
Hughes Aircraft Company,	)	Marvin E. Jones
	)	Administrative Law Judge
Respondent.	)	Environmental Protection Agency
	)	324 East 11th Street
	)	Kansas City, Missouri 64106

ORDER DENYING MOTION AND REQUIRING COMPLIANCE

By Motion dated November 3, 1981, Respondent Hughes Aircraft Company moves to dismiss the Complaint filed herein on September 30, 1981. Said motion is based on its contentions set forth in its "Memorandum in Support Hughes' Motion --", filed therewith, which recounts that on July 17, 1981, Complainant (U.S. Environmental Protection Agency, Region 9) issued a letter requesting that Respondent provide certain information relating to tests conducted by it on soil, water supply and well water samples taken on grounds of Air Force Plant No. 44 or in the vicinity of Tucson International Airport, along with information relating to samples taken in March and May 1981, pursuant to Section 3007(a) of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976 (hereinafter "RCRA"), 42 U.S.C. Section 6927(a), including "Solid Waste Disposal Act Amendments of 1980" P.L. 96-482, October 21, 1980). Said Section 3007 of RCRA, 42 U.S.C. Section 6927, provides in pertinent part as follows:

> "For purposes of ... enforcing the provisions of this title, any person who generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous wastes shall, upon request of any officer, employee or representative of the Environmental Protection Agency, duly designated by the Administrator ... furnish information relating to such wastes and permit such person at all reasonable times to have access to, and to copy all records relating to such wastes." (emphasis added)

Said 3007 letter states, in pertinent part, as follows:

> "On or about March 5, 1981 and again on or about May 28, 1981 representatives of Ecology and Environment, Inc. took well samples in the vicinity of the airport for EPA. Some of these wells were located on your property and the samples taken from these wells were split for a duplicate analysis by your own or a contracted laboratory.
>
> EPA hereby requests the results of the above mentioned samples obtained by your laboratory. EPA also requests the results of any sampling (soil, water supply and well water) for TCE, DCE, or Cr+6 that you conducted on your property or in the vicinity of the Tucson International Airport."

Hughes responded on August 11, 1981, and on August 31, 1981, to the first and second parts, respectively, of said 3007 Letter, as follows:

August 11, 1981

"1. Hughes did not obtain a split sample from the samples taken by representatives of Ecology and Environment, Inc., on March 5, 1981. This fact is documented on page three of the Sampling Documentation attached to the FIR.

2. The split samples obtained from the representatives of Ecology and Environment, Inc., on May 28, 1981, were obtained and analyzed under the direction and supervision of Hughes counsel. These tests results are covered by the attorney-client privilege and the work product rule, and are not properly subject to disclosure under your Section 3007 request. Also, please note that Section 3007 expressly requires the Environmental Protection Agency to furnish promptly to the party being investigated the results of any analysis made of such samples. Section 3007, however, does not have a similar requirement with respect to the party under investigation. We interpret this to mean that Section 3007 does not require the party under investigation to disclose the results of its analysis and that the Environmental Protection Agency is not authorized by Section 3007 to seek disclosure of such results."

August 31, 1981

"1. Hughes has not conducted tests for DCE on its property or in the vicinity of the Tucson International Airport.

2. Except for the data obtained from an outside laboratory (see Attachment A), and for data covered by the attorney-client privilege and the work product rule, and not properly subject to disclosure under your Section 3007 request, Hughes has not conducted tests for TCE on its property or in the vicinity of the Tucson International Airport.

3. The attached data relating to Cr+6 (See attachments B-C) are the only data which Hughes has been able to locate relating to tests conducted by Hughes on its property or in the vicinity of the Tucson International Airport."

Hughes was served, on October 7, 1981, with the subject Complaint and Compliance Order which alleges that Hughes' reply contained in its letters of August 11 and 31 "did not provide the information requested in the Section 3007 letter" and for said cause concludes that Hughes thereby is "in violation of Section 3007 of RCRA." The Compliance Order therein issued to require Respondent to provide Complainant all of the information requested in its Section 3007 letter. Hughes' motion is bottomed on its factually unsupported contention stated in its said letters dated August 11 and 31 and in its Motion's supporting memorandum, that the test results sought are "covered by the attorney-client privilege and the work product rule" and thus are not

properly subject to disclosure under Complainant's 3007 request. In its August 31 letter it states that Hughes conducted no tests for dichloroethylene (DCE) on subject sites; and apparently contends that any tests made for trichloroethylene (TCE) and data relating to TCE, on subject sites, are privileged and not properly subject to disclosure. The August 31 letter further indicates that data relating to Hexavalent Chromium (Cr+6) as furnished therewith and as the only data which Hughes has been able to locate (relating to tests conducted by Hughes) on subject sites.

In the alternative, Respondent characterizes the allegations in subject complaint as "vague, ambiguous and overly broad" to the extent that Respondent cannot reasonably frame its answer thereto and requests that Complainant be directed to set forth a more definite statement of its claim.

In its letter of August 31, 1981, Respondent states: "Hughes considers all of the information contained in both letters (August 10 and August 31, 1981) to be confidential" and asserts its claim of "confidentiality."

I find that Respondent's claim that the information, sought by Complainant in its 3007 letter, is privileged and not properly subject to disclosure is without merit. Respondent is in violation and continues in violation of the Act by its refusal to furnish information so requested.

Rules of disclosure were not known at common law. The scope of privilege, if properly claimed, must be determined primarily by words and intent of pertinent statutes. (State ex rel Von Hoffman Press v. Seitz, 607 S.W.2d 219 (MO); 27CJS Section 69, p. 203)) Privilege when properly claimed is limited to work product of the attorney with respect to the pending action and goes no further (27 CJS, Discovery, Note 3.6, p. 227), and whether any information is privileged in any instance is a question of fact and the burden is on the party claiming the privilege.

Administrative agencies are not rigidly restricted by jury trial rules of evidence (Buckwater v. FTC, 235 (F2d) 344; Opp Cotton Mills v. ADMR, 312 US 126, 155, 61 S.Ct. 524). Davis, Adm. Law Treatise, Section 8.15, p. 534 states that Federal Rules of Civil Procedure Governing Discovery do not apply to administrative proceedings. More important in the instant case, the salient question as ruled by the express provisions, cited hereinabove, of Section 3007 of RCRA:

"(Respondent) shall, upon request --- furnish information relating to such wastes ---".

The offense here charged is "regulatory." As stated in Belsinger v. D.C. (1969), 295FS159; 436 F.2d 214, "In regulatory offenses, the public interest outweighs the individual interest." For the sake of adequate public protection, it is necessary to require a standard of conduct which assures a result that will protect the public to the extent intended by the Act. The relevance of the subject information to the instant proceeding is an important consideration. The information sought consists of data and records necessary to the proper prosecution of the subject Complaint and regulatory action germane thereto. In general, exemption of documents from discovery is based on principles of public policy, and the holdings indicate that such exemptions are narrowly construed; interpretations of such are generally grounded in the principle that the interpretation must uphold rather than vitiate the Act. Here the subject statue must be read in a manner which affectuates rather than frustrates the major purpose of the legislation (see Shapiro v. U.S., 335 US1 (1948)). Further, I do not find that Complainant's request for subject information to be either "too broad" or "vague and indefinite." A movant for production should not be held on "too strict a showing" of content of record he has never seen. (State ex rel Boswell v. Curtis, 334 S.W.2d 757 (MO 1960)). The reponses of Hughes make clear that no information is available as to tests for DCE and indicate that tests for TCE are "data covered by privilege." In like manner Respondent's claim of confidentiality must be summarily rejected (see 40 C.F.R. 2.305(g) where provision is made for disclosure of information (actually furnished) "because of the relevance of the information in a proceeding under the Act (RCRA).")

By reason of the foregoing, Respondent's Motion to Dismiss and Alternative Motion for a More Definite Statement, along with its suggestion of confidentiality appearing herein, are denied.

ORDER

It is hereby ordered that Respondent shall, within fifteen days from the date hereof:

1. Furnish to U.S. Environmental Protection Agency the results of any and all tests, made by it or at its instance or procurement, of samples taken by Ecology and Environment, Inc. from wells in the vicinity of Tucson International Airport (TIA) on March 5, 1981, on or about May 28, 1981, and

2. Furnish to U.S. Environmental Protection Agency the test results of any sampling (soil, water supply, and well water) for TCE, DCE or Cr+6 conducted by Respondent on its property or in the vicinity of TIA.

It is further ordered that:

1. Failure of Respondent to comply with the above order, and with the Compliance Order herein previously made, shall constitute a continuing violation;

2. Prompt compliance with said orders shall be considered in arriving at the amount of the penalty, if any, to be properly assessed herein.

It is so ordered.

Dated December 29, 1981

Marvin E. Jones
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that the original of this Order Denying Motion and Requiring Compliance was mailed by certified mail, return receipt requested, to the Regional Hearing Clerk, Region IX, U.S. Environmental Protection Agency, 215 Fremont Street, San Francisco, California 94105 and that true and correct copies were sent to the following on this 29th day of December 1981.

Mr. David L. Mulliken
Latham & Watkins
555 South Flower Street
Los Angeles, California 90071

Certified Mail P04 5831713
Return Receipt Requested

Mr. John D. Rothman
Enforcement Division
U.S. Environmental Protection Agency
Region IX
215 Fremont Street
San Francisco, California 94105

Certified Mail P04 5831714
Return Receipt Requested

Mary Lou Clifton
Secretary to Marvin E. Jones

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

Address

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: Silresim Chemical Corporation hazardous waste facility in Lowell, Massachusetts

Dear Sir or Madam:

In notice letters issued in August and September of this year, the Environmental Protection Agency (EPA) and the Commonwealth of Massachusetts notified you of potential liability that your company may incur or may have incurred in connection with the Silresim Chemical Corporation hazardous waste facility in Lowell, Massachusetts. In that same correspondence, EPA requested that you furnish information and copies of records describing your company's involvement with the Silresim facility. You were advised that this information was being requested pursuant to Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and pursuant to Section 3007 of the Resource Conservation and Recovery Act (RCRA). Responses to these information requests were due to EPA within 30 days of your receipt of the request. At a September 21 meeting in Boston with responsible parties, this deadline was altered to require response within 30 days of receipt or by October 1, whichever came later. In addition, because of the difficulty your company had experienced in locating information relevant to the information request, your company also received a letter supplying you with further information to assist you in locating information in your files. As announced at the September 21 meeting, recipients of these "tip sheet" letters received an additional ten day extension of the response deadline dating from the date of receipt of that letter.

EPA has not yet received any information from your company in reponse to this information request, despite the fact that the applicable deadline has passed. We hereby request that you promptly supply EPA with any information that you have collected to date in reponse to this information request. We also ask that you complete your document search promptly and forward any additional material to EPA at that time. In the event that you have been unable to find any such information at the conclusion of your document search, you are requested to provide an affidavit to that effect in order to formalize your company's compliance with EPA's information request. Your affidavit should be signed by the company

official responsible for the company's response to EPA's information request, and it should indicate that a diligent search of the company records has been conducted and that all relevant information discovered in that search, if any, is being presented to EPA.

Continued noncompliance with these information requests may pose a serious impediment to the negotiations currently underway on this site. Moreover, it is EPA's position that failure to comply with these requests within the specified time period is a violation of federal law which may result in administrative or civil enforcement action, including penalties under Section 3008 of RCRA of up to $25,000 per day for each day of continued noncompliance. In most cases EPA will consider noncompliance to have begun on the revised deadline described in the first paragraph of this letter.

EPA is currently evaluating which of its enforcement options might be most appropriately taken in response to noncompliance with its information requests relative to the Silresim facility and will decide on a course of action shortly after November 11, 1983. In order to mitigate the extent of any enforcement actions that may be forthcoming in this matter, your company is hereby encouraged to comply in full with the information request by close of business on that date. Your response should be sent to:

E. Michael Thomas, Esq.
Environmental Protection Agency
Office of Regional Counsel
JFK Federal Building, Room 2203
Boston, MA 02203

If you have any questions on this matter, please call me or Attorney James T. Owens, III at (617) 223-0400.

Sincerely,

E. Michael Thomas, Attorney
Office of Regional Counsel

cc: Paul Ware, Esq. Chairman, Silresim Generators Negotiating Subcommittee
Director, EPA Office of Waste Programs Enforcement
Douglas Farnsworth, Esq., EPA Office of Enforcement and Compliance Monitoring
Lloyd Guerci, Esq., US. Department of Justice
Lee Breckenridge, Esq., Massachusetts Office of the Attorney General