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Signed 9/15/80

ENFORCEMENT MEMORANDUM OF UNDERSTANDING
BETWEEN THE
TEXAS WATER COMMISSION
AND
U.S. ENVIRONMENTAL PROTECTION AGENCY

Introduction

The Texas Water Commission (TWC) and the U.S. Environmental Protection Agency (EPA) agree that enforcement is one of the key components of any environmental protection program. To ensure that both State and Federal resources are used effectively to achieve high rates of compliance within the State's authorized Resource Conservation and Recovery Act (RCRA) Program and to work together to deter noncompliance, the undersigned enter into this Memorandum of Understanding (MOU).

This MOU documents the State/EPA relationship for implementing an effective enforcement program in accordance with minimum national criteria for enforcement response, as outlined in Appendices A through F, and Exhibits A through F. Specifically, the MOU ensures that there are 1) clear oversight criteria and procedures for EPA to use in assessing State compliance and enforcement program performance, 2) clear criteria for direct Federal enforcement, including procedures for advance consultation and notification, 3) adequate State reporting to ensure effective oversight, 4) criteria for timely, visible, and effective enforcement actions, 5) a clear commitment by both EPA and the State to take timely and appropriate enforcement action, and 6) adequate Federal reporting to ensure effective opportunities for State input to Federal actions.

Oversight Criteria and Measures

A good enforcement program must 1) have a complete and accurate list of all regulated facilities, 2) have clear enforceable requirements, 3) have reliable compliance monitoring, 4) strive toward high rates of continuing compliance, 5) take timely, visible, and effective enforcement actions, 6) maintain accurate and up-to-date files and records on facility performance and enforcement responses, 7) possess sound overall management, and 8) have the personnel to implement the program. The TWC and EPA are committed to maintaining such a program.

The TWC and EPA agree to continuously update and maintain a complete inventory of known hazardous waste facilities under its jurisdiction and to submit Hazardous Waste Data Management Systems (HWDMS) monthly updates in accordance with the schedule stipulated in the fiscal year grant workplan to indicate compliance status.

The TWC agrees to ensure compliance with program requirements through on-site inspections and record reviews in accordance with the fiscal year grant workplan schedule.

The TWC agrees to take timely, visible, and effective enforcement action using procedures under State statutes. If compliance is not achieved TWC will escalate enforcement activities as appropriate.

The above program requirements, combined with timely and appropriate enforcement, will lead toward a high level of compliance with State and Federal laws and regulations. The TWC and EPA agree to maintain within staffing and budgetary constraints, a qualified, trained staff to review permit applications, write permits, conduct inspections, review all reports, and write enforcement orders and referrals, to ensure that the RCRA program is effectively enforced.

Oversight Procedure and Protocols

EPA agrees to maintain a qualified, trained oversight review staff. EPA will conduct two major evaluations of State RCRA program enforcement activities to monitor the implementation of this Enforcement MOU. These reviews will be conducted in conjunction with the regularly scheduled midyear and end-of-year State Program evaluations. During these evaluations, EPA's activities will also be discussed. In addition, EPA will conduct reviews on a monthly basis. State programs will be reviewed against six measures of compliance and enforcement performance. These are:

1. Overall compliance with the appropriate timeframes for High Priority Violators (HPV), Medium Priority Violators (MPV), and Low Priority Violators (LPV) reflected in HWDMS and State files.
2. On a monthly basis, proper designation of violations and violators in HWDMS and notification to EPA of those HPVs and Class I violators that cannot be identified in HWDMS (i.e., non-notifiers).
3. Appropriate level of enforcement with timely escalation or referral to EPA where needed, and resolution of violations.
4. Ensure facilities are meeting scheduled compliance dates as required in enforcement actions; if not, enforcement is escalated.
5. Attempts to resolve any known differences of TWC findings versus EPA findings during lead and/or oversight inspections. TWC will notify EPA in writing within 30 days of receipt of EPA's inspection and summary of violations of any differences of opinion regarding Class I violation findings. EPA and TWC will attempt to resolve within 30 days any such differences prior to TWC initiating any enforcement action.
6. Document facilities return to compliance status and extension of compliance schedules.

The focus of the reviews will be an evaluation of the timeliness and appropriateness of responses to violations. The data needed to evaluate this enforcement program will be drawn from the evaluations of the TWC program and EPA's oversight inspections and reporting data supplied by the TWC. In addition, EPA will identify facilities that are brought back into

physical compliance and the enforcement mechanism that caused the return to compliance.

The senior managers of the EPA and TWC will meet quarterly (if needed) to mutually review the status of significant violators. The focus of these meetings is to be a constructive, joint problem-solving process to direct management attention on problem sources, and to assign enforcement leads between the two agencies. Solutions to problems involve selection of a remedy most likely to return the facility to physical compliance.

Scope

The definition for a High Priority Violator, Medium Priority Violator, and Low Priority Violator, contained in the December 21, 1987, Enforcement Response Policy (ERP), applies to violations discovered in FY 89. The State will take timely and appropriate enforcement against violators as described in Appendix A.

Prior to the TWC receiving authorization from EPA to enforce Class I violations of the Hazardous and Solid Waste Amendments (HSWA), which TWC and/or EPA may discover at permitted facilities, EPA will be responsible for initiating Federal enforcement for these violations. The TWC will notify EPA in writing within 5 days of violation discovery whenever HPV/MPV violations of the HSWA portion of the permit are identified and its intended State enforcement action. Prior to TWC taking enforcement action under State law for violations of State regulations, or EPA taking enforcement action under Federal law for violations of Federal regulations, EPA and TWC will coordinate by means of a monthly informal conference (telephone or meeting) enforcement actions for violations for which the State has not yet received authorization. If the TWC issues an Order addressing HSWA permit violations under its State authority or EPA issues an Order under its Federal authority, each will provide the other agency with a copy of the Order.

It is recognized that the EPA has not authorized the TWC to enforce the Federal land disposal (land ban) restrictions at the time of the signing of this MOU. It is further recognized that the State of Texas has similar regulations in place concerning some of these land ban restrictions. In order to avoid duplication of effort, the TWC agrees that EPA may take Federal enforcement action on most substantial violations of the land ban restrictions until such time as the TWC receives formal authorization from EPA for these activities. However, the TWC may, on a case-by-case basis, elect to take State enforcement action for such substantial violators under State law. The TWC will issue NOV letters to those owners/operators determined by the TWC to have non-substantial violations of the land ban restrictions. In accordance with a policy of "no surprises" and until formally authorized, TWC will refer cases involving substantial violations of "land ban" to EPA within 5 days of violation discovery for any necessary Federal enforcement action. In addition, the TWC and EPA agree to keep each other apprised of their respective "lead" enforcement actions or any concurrent actions by means of a monthly informal conference (telephone or meeting).

Prior to the State receiving corrective action authority through HSWA authorization, EPA will be responsible for taking corrective action under 3008(h). EPA will coordinate with TWC prior to issuance of the Order and will send TWC a copy of the Order within 10 working days of issuance. If the TWC issues an Order addressing corrective action similar to 3008(h) under its State authority, it will send EPA a copy of the Order within 10 working days of issuance.

This FY 1989 MOU does not and is not intended to address criminal actions or matters. However, it must be noted that the criminal prosecution of a handler is an encouraged response where criminal conduct can be demonstrated. While it is understood that timeframes are much longer for such cases, violations should not be allowed to continue which pose a substantial threat to human health or the environment. Civil action to compel a return to compliance should be taken in such a case. A parallel process may be possible for continued pursuit of criminal charges. EPA and the TWC will keep each other informed in those instances where ongoing criminal investigations might prohibit the filing of needed enforcement for newly discovered violations and of program development needs.

Timeframes

It is the goal of EPA and the TWC to meet the timeframes in the ERP in all cases. However, the goal of enforcement action is to return the facility to compliance as quickly as possible and deter potential violators. The TWC and the EPA recognize that in the following circumstances, the ERP timeframes may be insufficient to prepare and initiate the appropriate enforcement action:

1. Bankruptcy/site abandonment
2. Multi-party and/or interrelated cases
3. Changes in facility ownership
4. Additional violations determined during case development
5. Cases involving multi-media cases (i.e., Air, CERCLA, Toxic, UIC, etc.)
6. Novel legal issues
7. Need for outside technical expertise
8. Alleged criminal actions
9. When caseload exceeds resources*

The TWC will notify EPA in writing within 10 working days once TWC determines the ERP timeframes will be missed. In the event EPA does not find TWC's reasons for the delay acceptable, the EPA may decide to take Federal action and will so notify TWC in writing.

* In cases where timely enforcement action by TWC will not be feasible due to existing caseload, TWC and EPA will determine which agency can best meet the ERP timeframes and, if needed, develop an alternative schedule for case resolution.

Criteria for Direct Federal Enforcement

In authorized programs, primary enforcement responsibility for action resides with the TWC. EPA will take direct administrative or civil enforcement action under the conditions and procedures specified in Appendix B, as EPA's priorities and resources allow. In summary, EPA may take administrative or civil enforcement action when TWC has not met, or will not meet, the timeframe for violators, based on the latest HWDMS data or other relevant information, file review, or monthly status meeting between EPA and TWC. EPA will also consider penalty-only actions if TWC fails to impose an appropriate penalty/economic sanction as required by the ERP. EPA recognizes the concept of prosecutorial discretion and will consider case-specific facts in implementing any penalty-only action.

In the event that EPA does take a direct administrative or civil enforcement action in the State, in order to maintain a strong and effective State/EPA working relationship:

1. EPA agrees to make arrangements for coordinated action, where possible, considering the circumstances.
2. EPA agrees to define to the TWC the extent of EPA's enforcement actions. In certain cases referred by the TWC to EPA and based on State inspection, EPA may also choose to inspect the facility and/or may choose to send a Section 3007 inquiry letter to the facility to gather information that is not obtainable in a file review at TWC. EPA agrees that new violations discovered at the facility by that EPA inspection, or Section 3007 inquiry, will be addressed by the EPA. EPA will notify the TWC within 30 days of new violations discovered. In the event TWC conducts routine inspections of facilities under EPA enforcement lead and discovers new violations, the TWC will notify EPA within 30 days of the discovery of these violations and indicate whether these violations are referred to EPA. In order to avoid duplication of effort, it is the TWC's anticipation that new violations found by TWC prior to issuance of a compliant by EPA would be referred to EPA for handling.
3. EPA agrees to offer advance notification to TWC (at the same time the facilities are contacted) for 'facts-finding' meetings and settlement conferences. In the event the TWC has a conflict with the settlement conference schedule, EPA will attempt to accommodate TWC so that its representatives can participate.
4. EPA will acknowledge the contribution of TWC in any news release to ensure that the State is credited with supporting enforcement of the State and Federal hazardous waste rules.
5. EPA agrees to keep TWC apprised of the status of all EPA lead enforcement cases in the State, including significant milestones such as issuance of complaints, settlement conferences, final orders, etc.

6. TWC agrees to keep EPA management apprised where necessary of the status of enforcement actions, events, and reasons for TWC actions, including advance notice in instances of joint enforcement lead. The EPA Oversight personnel may use the monthly reviews to obtain enforcement updates from TWC personnel.
7. When TWC and EPA agree that EPA is in the enforcement lead, the TWC will not pursue enforcement for the violation(s) being pursued by EPA (unless joint action has been arranged) so that there is no duplication of effort or confusion. The TWC will not communicate with the facility regarding EPA violations without coordinating with EPA.

Advance Notification and Consultation

The EPA will provide advance notice of direct (pending and final) administrative or civil enforcement actions in accordance with a policy of "no surprises". EPA will also coordinate with TWC any inspection activity (except criminal) EPA intends to undertake.

When EPA is taking formal enforcement action regarding a facility and the TWC is taking a concurrent or separate formal action regarding the same facility, TWC will provide advance notice of administrative or civil enforcement actions in accordance with a policy of "no surprises".

All compliance monitoring and enforcement activities to be conducted by EPA and TWC shall be in agreement with the policies, responsibilities and procedures set forth in the applicable Memorandum of Agreement between TWC and EPA, except as modified herein, and except as overriding considerations relating to imminent and substantial endangerment to health or the environment may require.

State Reporting

The TWC and EPA are fully committed to using HWDMS to the extent possible. The TWC will enter data into the System as required by this MOU, the FY 89 RCRA Work Plan, and the FY 89 RCRA Implementation Plan. EPA will also enter all data relating to activities not delegated to State and any activities generated by EPA.

Disputes Resolution

The TWC and EPA agree to attempt to resolve, within 30 days through discussions between first-level management, disputes which might arise concerning this Enforcement MOU.

If the first-level managers are unable to resolve disputes, senior management will discuss them within 15 days thereafter in an effort to resolve them. If unable to resolve, EPA will proceed with implementing the national policy and TWC will proceed with implementing the State policy. This does not affect the grant remedies of either party that are consistent with RCRA. These disputes might concern, but are not limited to, inspection reports, classification of violations, violation discovery dates, regulatory interpretation, and/or any other matters which are the subject of this MOU.

Grant Incorporation

This MOU is incorporated by reference as part of the FY 1989 grant, and is part of the grant commitments and milestones as contained in the FY 89 grant workplan and award documents.

Effective Date

This agreement is meant to provide the framework within which the two agencies intend to operate. This agreement does not waive any legal rights that either party has nor does it provide any rights to facilities or any person not a signatory. Once executed, this MOU will continue in effect unless modified by the mutual consent of both parties. However, this MOU is subject to re-negotiation based on revisions to State or Federal guidance, regulations, or statutes. The MOU will be re-evaluated annually, and revised as necessary. The effective date of the MOU is October 1, 1988.



Allen P. Beinke
Executive Director
Texas Water Commission

9/18/88



Allyn M. Davis, Director
Hazardous Waste Management Division
Environmental Protection Agency

9/15/88

APPENDICES SUMMARY

Appendix A: NATIONAL MINIMUM ENFORCEMENT PERFORMANCE EXPECTATIONS

Presents the minimum national performance expectations for the State program as outlined in the "National Criteria for a Quality Hazardous Waste Management Program under RCRA" and the "Enforcement Response Policy" dated December 21, 1987. Enforcement actions appropriate to all levels of violations are included in this document.

Appendix B: RCRA ENFORCEMENT BY EPA

Defines protocol for EPA lead enforcement actions in an authorized State. The situations which would merit EPA enforcement actions are presented as well as the procedures for State notification.

Appendix C: OVERSIGHT MEASURES: EPA RESPONSIBILITIES

Outlines EPA's reporting and overview responsibilities in support of the State's enforcement program. These activities allow EPA to present an accurate picture of the State's enforcement activities to EPA Headquarters.

Appendix D: RCRA FEDERAL, STATE, AND LOCAL FACILITY ENFORCEMENT

Presents the national performance expectations for Federal, State, and Local Facility compliance.

Appendix E: STATE REPORTING

Provides national guidelines on State reporting requirements

a. Hazardous Waste Data Management System (HWDMS)

Appendix F: EXAMPLES OF VIOLATION AND VIOLATOR CLASSIFICATION

Presents examples to help guide compliance officials in determining violation classification as well as classification of the violator for the purposes of determining the appropriate enforcement response.

Appendix A

National Minimum Enforcement Performance Expectations

Introduction

The revised Resource Conservation and Recovery Act (RCRA) Enforcement Response Policy (ERP) was signed in December, 1987 and is effective in FY 1989. The ERP sets forth policy and procedures intended solely for the guidance of employees of the Environmental Protection Agency (EPA) and State Enforcement Agencies. The ERP also provides a general framework for identifying violations and violators of concern and describing timely and appropriate enforcement responses to noncompliance.

I. Violator Definitions and Enforcement Responses

A RCRA handler is classified as a violator based upon the nature of his or her violation(s) along with a number of other factors (e.g., compliance history, previous recalcitrant behavior, etc.). The ERP establishes three categories of violators - High Priority, Medium Priority, and Low Priority - and defines timely and appropriate enforcement responses.

A. High Priority Violators

Definition: A High Priority Violator (HPV) is a handler who:

- ° Has caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous constituents; or
- ° Is a chronic or recalcitrant violator (This may include some handlers who are regularly found to have many Class I or Class II violations.); or
- ° Deviates from terms of a permit, order or decree by not meeting the requirements in a timely manner and/or by failing to perform work as required by terms of permits, orders, or decrees*;
- ° Substantially deviates from RCRA statutory or regulatory requirements.

1. The TWC will provide EPA with information regarding the existence of an HPV within 30 days of the discovery date for those facilities that are not identified in HWDMS**. This information can be provided to the EPA Oversight Coordinator during the monthly visit, via telephone, or through the State's Personal Computer (PC) tracking report.

* Such deviations may include failure to perform work of minimum quality, violations which interfere with a facility's ability to fully comply with an order or any other action provided these failures or actions create a potential or actual serious environmental significance. Deviations may not include schedules missed which are beyond a facility's control provided the responsible government entity was promptly notified of the problem and agreed to, and documented, the necessary schedule changes.

** Note that emergencies (such as imminent and substantial endangerment situations) should be acted on immediately and not be limited by these criteria.

2. An Administrative Petition/Order with penalty* shall be issued by the TWC/EPA within 90 days of the violation discovery date. Upon issuance of the enforcement action, TWC will send EPA a copy of the action within 10 working days of issuance. If TWC chooses not to issue formal enforcement, pursue economic sanctions or penalties, or pursue Attorney General referral, it must notify EPA via telephone of the disposition of the case within five days of that decision date. A written notification will follow within 10 working days.
3. A penalty or economic sanction is required for HPVs* regardless of whether a facility has returned to compliance. Examples of appropriate HPV enforcement response actions include: judicial or administrative imposition of civil penalties; shut-down of the hazardous waste management activities at the facility by administrative order; by seeking injunctive relief in the courts, or by permit or license revocation or suspension; seeking to have a violator held in contempt when violation is of a court decree (or any administrative order (AO) in those States which punish the violator of an AO by contempt); denial of any pending or future permits to operate any facility in the State; permit bars, or some other permit actions.**

[Any non-monetary economic sanction must have a quantifiable economic impact at least as great as the monetary penalty which would have been sought.]

- * Federal Facilities "initial violations" do not require a penalty or economic sanction.
- ** The TWC may petition the Region to request that certain types of permit actions be deemed "appropriate economic sanctions" for addressing High Priority Violators. The petition shall demonstrate to the Region that all objectives, purpose, and results which can be achieved by an order/civil penalty action, will be achieved by use of the proposed permit action. If the Region, with concurrence of the Office of Waste Programs Enforcement, finds the proposed permit action equivalent to or more stringent than an order/civil penalty action for purposes of this policy, the petition may be granted.

4. After the administrative process is exhausted, if the handler is not returned to compliance with the Administrative Order or not meeting the Administrative Order's schedule*, the TWC shall refer the case to the Attorney General's office for State judicial action. The TWC shall notify EPA within 10 working days of its decision of referral and to which Agency.
5. A referral for State judicial action shall request that the Attorney General's office file the case within 60 days of the referral and pursue appropriate penalties.** The TWC will send EPA a copy of the filing within 10 working days of receipt from the judicial authority. For cases referred for State judicial action which are not filed within 60 days, the TWC and EPA agree to discuss the anticipated progress of the case, and, if necessary, EPA may choose to initiate a parallel Federal action.

B. Medium Priority Violators

Definition: A Medium Priority Violator (MPV) is a handler with one or more Class I violations who does not meet the criteria for a High Priority Violator. Handlers with only Class II violations may also be Medium Priority Violators when the compliance official believes an administrative order is the appropriate response to a facility with only Class II violations.

1. An Administrative Petition/Order may be issued by the State within 120 days of the violation discovery date. If the decision is made

* Handlers on a compliance schedule will be monitored to ensure conformance with the schedule; decision is made to escalate action if a handler (on a compliance schedule) is not in compliance within 30 days of schedule date.

** The TWC recognizes that filing the case within 60 days and pursuing appropriate penalties are expected performance standards. The State will report to EPA, on a monthly basis, the progress of cases at the Attorney General's office including filing, dates of all documents, final decrees, penalties, and scheduled compliance dates.

not to issue a petition, the TWC may issue a Notice of Violation (NOV).^{*} Upon issuance of the enforcement action, TWC will send EPA a copy of the action within 10 working days of issuance. If the NOV does not result in final compliance or a compliance schedule incorporated in an enforceable order within 90 days of violation discovery (exception: generators with no land ban violations may be allowed 120 days to return to compliance), a decision must be made to escalate. Escalation entails either a judicial referral or issuance of an administrative order.

2. If an Administrative Order is chosen as the escalated response, the State has 60 days to issue the petition. The TWC will send EPA a copy of the petition within 10 working days of issuance.
3. If a judicial referral is chosen as the escalated response, the State has 90 days to develop and refer the case to the Attorney General. The case should then be filed within 60 days of referral.
4. After the administrative process is exhausted, if the handler is not returned to compliance with the Administrative Order or not meeting the Administrative Order's schedule^{**}, the State shall refer the case to the EPA or to the Attorney General's office for State judicial action. The TWC shall notify EPA within 10 working days of its decision of referral and to which agency.
5. A referral for State judicial action shall request that the Attorney General's office file the case within 60 days of the referral and pursue appropriate penalties.^{***} The TWC will send EPA a copy of the filing within 10 working days of receipt from the judicial authority.
6. For cases referred for State judicial action which are not filed within 60 days, the TWC and EPA agree to discuss the anticipated progress of the case, and, if necessary, EPA may choose to initiate a parallel Federal action.

^{*} While it is acceptable for TWC to initially address an MPV with an NOV no more than one NOV should be issued. If compliance does not result, escalation should immediately follow.

^{**} Handlers on a compliance schedule will be monitored to ensure conformance with the schedule. Decision is made to escalate action if a handler (on a compliance schedule) is not in compliance within 30 days of schedule date.

^{***} The TWC recognizes that filing the case within 60 days is an expected performance standard. The TWC will report to EPA, on a monthly basis the progress of cases at the Attorney General's office, including filing dates of all documents, final decrees, penalties, and scheduled compliance dates.

C. Low Priority Violators

Definition: A handler who has only Class II violations who is not a Medium or High Priority Violator.

1. The TWC shall issue an NOV within 60 days of the violation discovery date. If the facility does not return to compliance expeditiously, the TWC should consider whether the violation warrants issuing an order. In cases involving large numbers of Class II violations, repeated Class II violations, or any other case which the State considers serious, the handler meets any of the HPV criteria or may be better addressed as an MPV.

Note: Due to limited resources and the fact that that entering of Class II data is optional in HWDMS, EPA does not plan to monitor LPV's in FY 89. However, EPA reserves the right to monitor LPV's should the need arise. If EPA does commence monitoring LPV's, it will so notify TWC in writing.

II. Timeframes

A. Violation Discovery Timeframe

A violation is discovered as of the date when the case development staff determines, through review of the inspection report, record review, and/or data (e.g. laboratory reports), that a violation has occurred. The violation discovery date for evaluation purposes, assumed in the National Quality Criteria and restated here, is 45 days from the date of inspection.

Cases in which circumstances may require more than 45 days from inspection to violation discovery are cases in which:

- ° The laboratory analyzing samples taken during an inspection can not return the results to the State within 45 days from the day of inspection;*
- ° Analytical results of samples taken during an inspection are inconclusive, thus requiring additional sampling and analysis to confirm the discovery of the violation(s);
- ° Contractor inspection report is not received in a timely manner.*

B. Referral to Filing Timeframe

Circumstances which may require more than 60 days from civil referral to case filing are cases in which:

- ° Additional data or information collection is requested by the Attorney General's office for case development;

* The regulating agency is responsible for assuring that contracts/ Interagency Agreements stipulate that reports and other deliverables are made available in a timely manner so that ERP timeframes may be met.

- ° The Attorney General is investigating to determine if criminal prosecution is appropriate;
- ° Cases involving other media (e.g. air pollution violations were also involved at the facility); or
- ° Novel legal issues or defenses.

In order to assist the State Attorney General or other appropriate legal authority in meeting established timeframes, is the responsibility of the State program office to fully prepare a case so that it is complete when referred for judicial filing. This preparation includes conferring with the legal staff in advance of referral in order to know and develop what the legal staff needs to support the anticipated enforcement action. After referral, the program office must be prepared to provide further case development support.

IV. Establishing Priorities

The Regions and TWC should prioritize their enforcement efforts in the following order; 1) Significant Non-Compliers, 2) High Priority Violators, 3) Medium Priority Violators, and 4) Low Priority Violators. However, enforcement actions need not be taken against all HPVs before any actions are initiated against MPVs. The Region and the TWC should keep in mind that oversight activities will focus first on Significant Non-Compliers. Therefore, the emphasis must be on these and other HPVs.

V. Federal, State, and Local Treatment, Storage, and Disposal Facilities (TSDF)

The 1984 Amendments to RCRA require inspection of each Federally owned and operated TSDF annually. In addition, EPA is required to inspect annually each hazardous waste facility operated by a State or municipality. Although EPA is required to inspect these facilities, it is appropriate that the States with authorized programs conduct any potential enforcement actions. It is necessary then to define roles of the States and EPA by establishing procedures under this Enforcement Agreement.

1. EPA will inspect facilities owned by State and local municipalities. The State is not required to accompany EPA during these inspections. The EPA will initiate any enforcement actions warranted as a result of these inspections.* The EPA will forward copies of draft enforcement actions to the State for review and comment.
2. The State will inspect Federally owned facilities and will initiate any enforcement action warranted as a result of these inspections. EPA may perform oversight inspection at Federal facilities.
3. The State will initiate enforcement action for any High Priority Violator or Medium Priority Violator determined by the State according to the procedures in Appendices A and B. A copy of the enforcement action will be sent to the EPA.
4. EPA will review the State's action according to the oversight responsibilities outlined in this MOU.

* Except for Gulf Coast Waste Disposal Authority. The TWC plans to accompany EPA during the lead EPA inspection and plans to initiate any enforcement action if warranted.

APPENDIX B

RCRA ENFORCEMENT BY EPA

A. EPA may take enforcement in:

1. Situations involving an imminent hazard where EPA can take action more quickly than TWC or TWC requests EPA assistance.
2. Cases of national significance (e.g., interstate or multistate issues).
3. Situations where the State is not authorized to take RCRA action (i.e. corrective action and land disposal restrictions). Where the TWC discovers Class I violations of the Federal land disposal restrictions (land ban), within 5 working days of the violation discovery, the TWC will submit a copy of the inspection report to EPA. The Class I violations are:
 - ° For generators (including generating TSDs): shipping waste exceeding treatment standards to land disposal facilities without notifying about need for treatment.
 - ° For treaters (who have inadequately treated wastes): directing waste exceeding treatment requirements to land disposal;
 - ° For disposers: illegally disposing of wastes exceeding treatment standards; and
 - ° For all handlers: falsification of records.
4. Situations where TWC formally refers a case or requests EPA lead/assistance, including brief case description.
5. Situations where TWC fails to meet the timely and/or appropriate enforcement criteria defined in the MOU. This will be based on EPA's oversight evaluation of TWC's enforcement program during the previous quarter. Where alternative schedules have been agreed to by the TWC and EPA, these schedules will define timely action on a case specific basis.
6. Those facilities with Class I or High Priority violations as of September 1, 1988, which either have not been formally addressed, per the FY 88 MOU timeframe or which did not come into physical compliance by August 31, 1988, and are overdue to receive enforcement.
7. Situations where EPA has conducted State and local inspections.
8. Violations of the Hazardous and Solid Waste Amendments for which the State is not delegated.

B. In those cases where EPA takes an enforcement action, the following protocol (except for imminent hazard) will be followed:

1. EPA shall give 30 day's written notice to TWC of its intent prior to initiating an enforcement action (except in the case of State referrals and State and local facility inspections).
2. TWC will provide access for EPA or its contractor to its files to obtain data for all case development at the time a case is referred* to EPA, when EPA initiates enforcement action itself or when EPA pursues Federal enforcement in those cases where State is not authorized, as appropriate under Texas State Law (i.e. open records laws).
3. EPA will coordinate the issuance of the enforcement action with TWC.
4. TWC will be given advance notice (notification to TWC at the same time the facilities are contacted) for "facts" meetings and settlement conferences. In the event TWC has a conflict with the settlement conference schedules, EPA will attempt to accommodate TWC so their representative can participate.
5. The TWC will assist EPA by reviewing documentation and reports submitted by the facilities, as required by an Order to the extent that the State has authorization for the activities addressed in the Order. For those cases where the State is not authorized by EPA to approve or disapprove documents/reports submitted by the facilities under an Order, TWC will assist in reviewing as resources allow. However, the EPA has the primary responsibility for reviewing any items requested in a Federal Order for the purposes of making determinations of compliance with such Orders.

C. Federal Facility Enforcement

Due to certain limitations on EPA's enforcement authorities at Federal Facilities, EPA's response to these facilities which are HPVs will be different from the State's.

1. Where a Federal Facility is determined to be a HPV or MPV, EPA will issue a Notice of Noncompliance (NON) as the initial enforcement action. The NON will specify the violations, remedy, and timeframe for implementing the remedy in the same manner that an Administrative Order would. The NON will be issued to HPVs within 90 days of violation discovery.

* EPA will not accept a case referred by the TWC until all case development data are provided and EPA has notified TWC that it has accepted the case. EPA is expected to pursue enforcement within 90 days from acceptance, unless there are unusual circumstances involved (e.g., bankruptcy, awaiting listing on National Priority List, violation of more than one environmental statute). Likewise, the TWC will not accept a case referred by EPA unless all case development data are provided and the TWC has notified that it has accepted the case. At that time, TWC has 90 days in which to pursue enforcement, unless there are unusual circumstances involved.

2. After the NON has been issued, EPA will work with the Federal Facility to develop a Federal Facility Compliance Agreement (FFCA) which will describe actions the Federal Facility will take in order return to compliance. If EPA, Region IV, is having difficulty in negotiating the FFCA and it appears that a FFCA will not be reached within 120 days, it will refer the areas of dispute to the Office of Federal Facilities in Headquarters.

The terms and conditions of the final FFCA will be enforceable through citizen suits, and State actions under citizen suit provisions. The requirements for economic sanctions against HPVs will not apply when EPA is the lead enforcement agency.

APPENDIX C

OVERSIGHT MEASURES: EPA RESPONSIBILITIES

- A. The EPA Enforcement Oversight coordinator assigned to TWC will review the status of compliance enforcement commitments and active enforcement cases, with State, on a monthly basis. TWC will provide the opportunity for a quarterly meeting of EPA and TWC to discuss progress on cases. During the meetings, EPA and TWC will discuss the status of enforcement to determine if TWC can or will meet the timeframes outlined in this MOU.
- B. On a quarterly basis, there will be a meeting of EPA and TWC managers to discuss both agencies ability to meet the criteria established in Enforcement Memorandum of Understanding.* At that time, a decision will be made concerning timely and appropriate enforcement and which agency can best meet the required timeframes.
- C. EPA will perform Midyear and End-of-Year performance evaluation of TWC's RCRA enforcement program using both quantitative and qualitative information.
- D. EPA will provide TWC written monthly status reports on any enforcement actions undertaken by EPA (except criminal). These updates will be provided by the 10th of each month to the TWC and will include the amount of penalty assessed, amount collected, any milestones in a final order or decree, and whether the milestones are being met.
- E. EPA will notify TWC of the issuance of any enforcement action in a phone call on the day of issuance. Also, it will be confirmed in a letter accompanied by a copy of the enforcement action.
- F. EPA will coordinate press releases with TWC. Copies will be provided to TWC prior to a formal release.
- G. Only TWC data submitted via HWDMS will be used by EPA for a statistical analysis of TWC accomplishments relative to the RCRA Enforcement MOU and RCRA Grant Workplan.

* Meeting will be arranged by mutual agreement.

APPENDIX D

RCRA FEDERAL, STATE AND LOCAL FACILITY ENFORCEMENT

The TWC will have the primary responsibility for responding to significant violations (as defined in Appendix A).

Protocol for TWC enforcement at Federal Facilities:

1. EPA will conduct lead inspections at all State and local government-owned treatment, storage, and disposal facilities. EPA will provide TWC with advance notification (quarterly schedule coordinated with TWC and one week notice to reconfirm by phone) prior to inspection and invite participation. (Note: TWC is not required to accompany EPA on their inspection.)
2. EPA will initiate any enforcement action warranted as a result of its inspection.
3. TWC will conduct lead inspections at Federally-owned TSD facilities. EPA may accompany the State during these inspection as a part of the oversight program.
4. TWC will initiate any enforcement action warranted as a result of its inspection.
5. If TWC cannot take enforcement action pursuant to the MOU, EPA will be notified in writing of the disposition of the case within five working days of that decision date. EPA will follow the guidelines in Appendix B.
6. The TWC, at a minimum, should issue orders against Federal Facilities which are HPVs. TWC may also be able to pursue other actions under its own authorities. TWC is expected to take appropriate enforcement actions within the timeframes set forth in this MOU.
7. Government-owned contractor-operated (GOCO) facilities should be treated the same as private facilities.
8. EPA believes the period for negotiating the final order should not exceed 120 days. EPA will monitor the case progress via HWDMS and/or monthly progress meeting, and may elect to pursue a concurrent action when the time period for negotiating the final order exceeds 120 days.

This action may include elevating the matter to Headquarters for resolution. The TWC will continue to update EPA via monthly meetings and/or HWDMS with respect to case status (i.e. issuance of final orders, violation resolution, etc.).
9. EPA, Region VI, will elevate to Headquarters for resolution any concurrent action it plans to pursue when the final order has not been agreed upon within 120 days of issuance of the initial enforcement action.

APPENDIX E

STATE REPORTING

TWC reporting performance will be monitored on the basis of both quantitative and qualitative information in HWDMS. TWC must report adequate data to ensure effective oversight. State data submitted via HWDMS will be used by EPA to statistically verify TWC accomplishments, relative to this MOU.

TWC specifically commits to:

1. Report via HWDMS the date of the referral and the date of the filing of a judicial complaint and the date of the issuance of an Administrative Order; and informal enforcement;
2. Report via HWDMS the compliance schedule dates in Order and court decrees and whether violator is meeting schedule;
3. Update HWDMS to show the compliance status of violations:
 - a. prior to escalation
 - b. after enforcement action
4. Report penalty assessments and collections, if any.

TWC also agrees to report to EPA Region VI, within a reasonable timeframe, and if within the resource constraints of the FY 89 Grant, such enforcement data which cannot be obtained from other data systems, and which the TWC can obtain reasonably to respond to EPA Headquarters, Congressional, and public inquiries.

TWC and EPA agree to exchange any correspondence relating to enforcement at all Federal facilities.

Appendix F

Examples of Violation and Violator Classification

- | | |
|--|---------|
| ° Failure to carry out waste analysis (hazardous waste determination) for a waste stream (unless o/o is properly applying "knowledge-of-process"). | Class I |
| - When such failure results in mishandling of waste to cause serious environmental impairment or presents potential for serious personal injury or environment impairment | HPV |
| ° Operating without a permit or interim status. (Except where facility could qualify for 90-day exemption) | HPV |
| ° Failure to comply with 90 day storage limit by generator. (Failure to rectify upon notice elevates this to HPV.) | Class I |
| ° Commencing construction prior to permit approval at a new facility or new part of a facility where permit is required before such construction is commenced. | Class I |
| - Using such a unit would designate HPV status | HPV |
| ° Complete failure to respond to a 3007 request. | HPV |
| <hr/> | |
| ° Systematic failure of a generator or transporter to comply with the manifest system or substantial deviation from manifest requirements. [More routine manifest violations of a limited nature may not require HPV designation, such as where one manifest out of a large number was not signed (and the waste was properly handled and disposed of anyway). In such a case, a Class I violation is appropriate, however HPV designation is not <u>required</u> . The most minor manifest violation (e.g. omission of a generator ID number) may be a Class II.] | Class I |
| ° Where failure to use manifest leads to diversion of waste or unauthorized disposal or unaccounted waste. | HPV |
| ° Failure to satisfy manifest discrepancy reporting requirements. | Class I |
| - Where the manifest discrepancy involved a diversion for unauthorized disposal or unaccounted for waste. | HPV |
| ° Failure to prevent the unauthorized and unknowing entry of persons or into the waste management area of the facility. | HPV |
| - Failure to prevent the possibility of unauthorized entry. | Class I |
| ° Failure to properly handle ignitable, reactive, or incompatible wastes as required by 264 and 265.17(b) (1), (2), (3), (4), and (5), when such failure results in serious personal injury or environmental impairment or presents potential for serious personal injury or environmental impairment. | HPV |
| - Otherwise failure to properly handle | Class I |

- ° Disposal of hazardous waste in a regulated quantity at a non-regulated TSDF. HPV
- ° Improper disposal of waste in violation of the land disposal restrictions. HPV
- ° Mixing, solidifying, or otherwise diluting waste to circumvent land disposal restrictions. Class I
- ° Incorrectly certifying a waste for disposal/treatment in violation of the land disposal restrictions which could allow for illegal disposal to occur. HPV
- ° Failure to submit notifications/certifications as required by land disposal restrictions. Class I
 - Except in cases involving a high potential for improper land disposal HPV
- ° Deficient waste determination (land ban). Class I
- ° Failure of an o/o of a TSDF to have a closure or post-closure plan or cost estimates. HPV
 - Except for facilities which have multiple closure plans but have not included all required units in such plans, if the financial resources are sufficient for closure assurance. Class I
- ° Failure to maintain a copy of the closure plan or financial assurance documentation at the facility when it is maintained at the corporate headquarters and/or regional corporate office. (Failure to supply documentation upon request is a Class I violation.) Class II
- ° Minor deviations from timeframes set out for facility closure. (Except as related to requirements that o/o submit closure plan at least 180 days before beginning closure - Class I, possibly HPV depending upon deviation and potential impact.) Class II
- ° Failure to submit professional engineer's certification of closing to proper State or Federal official. Class I
- ° Failure to follow the approved closure plan or false certification. HPV
- ° Failure to establish or maintain financial assurance for closure and/or post closure care. HPV
- ° Failure of o/o to provide updated documentation for financial test for closure, post-closure, and/or liability insurance, within 90 days of the close of the company's fiscal year. Class I
 - In cases where monies remained sufficient to fund assurances. (Record viol. only). Class II
- ° Failure to submit an originally signed duplicate of the trust agreement to the RA. Class I
- ° Failure to submit biennial report. Class II

- ° Failure to meet general inspection requirements (265.15) for developing a written inspection plan. Class I
 - When such failure results in serious or present potential for serious environmental impairment. HPV
- ° Failure to designate the facility emergency coordinator. Class I
- ° Failure to follow emergency procedures contained in the response plan which have the potential to result in serious harm. HPV
 Therefore, failure to carry out the following types of activities during an emergency would be considered a Class I violation and indicate a HPV: Response activities include: activating alarm and/or notifying appropriate emergency officials; assessing extent and seriousness of release; reporting findings of spills outside a facility; containing hazardous waste; monitoring any shut-down operations; properly treating, storing and disposing of the spill; and cleaning up completely after the accident.
- ° Storage of waste in a container that is not in good condition. Class I
 - When such failure results in serious or presents potential for serious environmental impairment. HPV
- ° Failure to attempt to give police, fire department, and hospitals information that will be needed if there is an emergency at the facility. Class I
 - Where harm occurred. HPV
- ° Failure to label a hazardous waste drum with required information. Class I
 - When such failure results in serious or presents potential for serious environmental impairment. HPV
- ° Failure to date containers/tanks with accumulation date. Class I
 - Chronic or widespread failure. HPV
- ° Failure to placard or incorrectly placarding a vehicle carrying hazardous waste. Class I
 - Multiple placard violations, past similar problems or occurrence of a spill or accident during transportation, which and this results in inappropriate response. HPV
- ° Failure to conduct adequate personnel training. Class I
 - Failure to maintain complete records. Class II
- ° Deviations from export rule requirements. Class I
 - Substantial failure to comply with export rule. HPV

EXHIBITS

- EXHIBIT A: NATIONAL CRITERIA FOR A QUALITY HAZARDOUS WASTE MANAGEMENT PROGRAM UNDER RCRA (JULY 1986)
 - EXHIBIT B: FY 89 RCRA IMPLEMENTATION PLAN (RIP)
 - EXHIBIT C: ENFORCEMENT RESPONSE POLICY DATED DECEMBER 21, 1987
 - EXHIBIT D: POLICY FRAMEWORK FOR STATE/FEDERAL ENFORCEMENT AGREEMENT (REVISED AUGUST 1986)
 - EXHIBIT E: FEDERAL FACILITY COMPLIANCE STRATEGY
 - EXHIBIT F: GUIDANCE FOR THE FY 1989 STATE/EPA ENFORCEMENT AGREEMENTS PROCESS
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TEXAS WATER COMMISSION

ATTACHMENT 1

COMPLIANCE MONITORING AND ENFORCEMENT
HWDMS OMEL DATA MANAGEMENT PROCEDURES

1. The OMEL is submitted with an inspection report from the District office.
2. The Field Operations central office provides quality control of all the solid waste inspection reports.
3. The OMELS are submitted to the Reports and Information Management Unit for additional quality control and data entry.
4. The OMELS are reviewed and entered into HWDMS by the seventh working day of the month.
5. HWDMS is updated every Tuesday and Thursday or as needed.
6. A error listing is routed from EPA Region VI to the TWC. The TWC reviews the error listing to check for data errors. The errors are corrected at this time.
7. On the 8th working day the TWC will run the following reports:
 1. HWDMS Notification
 - A. Alpha listing of RCRA Handlers
 - B. Numeric listing of RCRA Handlers

Distribution: Reports & Information Management Unit
Compliance Assistance Unit
Field Operations Division
 2. Compliance Monitoring Enforcement Log (OMEL)
 - A. Full HWDMS OMEL
 - B. HWDMS OMEL by TWC Enforcement Coordinator
 - C. HWDMS OMEL by TWC District

Distribution: Reports & Information Management Unit
Enforcement Section
Field Operations Division
District Offices
8. EPA Region VI will run the audit reports on the closest Tuesday after the seventh (7th) working day and mail to TWC. The audit reports will be used to evaluate TWC for a 95% accuracy rate required under the RCRA workplan. EPA will focus on the TSD Universe to measure the percentage of errors.
9. TWC will review the audit reports and make appropriate changes by the 7th working day of the next month.

10. The TWC Enforcement Response Timeline (ERT) data base is used to track HPVs and MPVs. The results from the screening committee are entered within three working days and a tickler report is routed to the Enforcement Section each Friday.
11. Other HWIMS reports are available as required, including the EPA Headquarters OPWE menu, Region VI reports and TWC reports.