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

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

OSWER DIRECTIVE #9541.00-1

August 22, 1986

MEMORANDUM

SUBJECT: Effect on State Authorization of HSWA Section 3006(f): Availability Of Information

FROM: J. Winston Porter
Assistant Administrator

TO: Addressees

Section 3006(f) of the Hazardous and Solid Waste Amendments of 1984 (HSWA or the Amendments) provides that:

> So State program may be authorized by the Administrator under this section unless (1) such program provides for the public availability of information obtained by the State regarding facilities and sites for treatment, storage and disposal of hazardous waste; and (2) such information is available to the public in substantially the same manner, and to the same degree, and would be the case if the Administrator was carrying out the provisions of this subtitle in such State.

This statutory requirement was incorporated into EPA's State authorization regulation by the RCRA Codification Rule, 50 FR 28754 (July 15, 1985), 40 CFR 271.17(c).

This document expands on the discussion of Section 3006(f) in the preamble to the RCRA Codification Rule and explains how EPA intends to determine whether States have satisfied the Section 3006(f) standards.

EPA regards Section 3006(f) as the cornerstone of a meaningful public participation program. As such, States must be aware that noncompliance with these provisions will be regarded as grounds for, denial or withdrawal of authorization.

Demonstrating Compliance with §3006(f)

This provision requires that States provide for public availability Of information regarding facilities and sites for the treatment, storage and disposal of hazardous waste in accordance with two standards:

- information must be made available to the public "in substantially the same manner" as EPA makes information available, and

- information must be made available to the public "to the same degree" as EPA makes information available.

EPA has interpreted the first standard to refer to the procedures used by EPA employees in disclosing or withholding information under the Freedom of Information Act (FOIA). Because the phrase "in substantially the same manner" (emphasis added) is used in the first standard, EPA believes than a certain amount of flexibility is allowable in comparing the State and Federal programs. In order to allow this flexibility, EPA has set forth procedures derived from EPA's public information regulations and from existing policies and procedures followed by EPA in handling public information requests.

EPA's regulations implementing FOIA and Section §3007(b) of RCRA and those governing the treatment of confidential business information are set forth at 40 CPR Part 2, Subparts A and B, and 40 CFR §§260.2 and 270.12. (Note that some parts of 40 CFR Part 2, Subparts A and B were amended on December 18, 1985, 50 FR 51654, effective January 17, 1986.)

Although the guidance cites specific Part 2 regulations, the State need not adopt the entire cited Provision. The Agency has reviewed its public information regulations and extracted basic procedural requirements in order to ensure compliance with §3006(f). Various Part 2 provisions were excluded from the guidance because the provisions are minor, pertain only to EPA or do not directly affect the availability of information to the public. The State need only adopt the procedural requirements summarized below to satisfy the first standard in §3006(f).

EPA has interpreted the second standard to refer to the type and quantity of information available under FOIA. Since the word "substantially" is not used in the second standard, EPA interprets this to mean there is less flexibility, and that the same information EPA makes available must be made available by a State. The Agency sets forth below substantive requirements concerning the information made available by EPA. These requirements are based on the FOIA and are embodied in the Part 2 regulations.

The FOIA and EPA's regulations do not, by themselves, ensure that the same documents that would be made available by EPA would be made available by the State. Therefore, in addition to the principles set forth below, this guidance provides lists of documents that EPA would generally release to the public under §3007 of RCRA. The information relates to permitting, compliance and enforcement, and includes information gathered under RCRA §3007(a)

(or a State analog). See 50 FR 28730 and 28753 (July 15, 1985). As part of its authorization application, the Attorney General of a State would be required to certify that the State's statutes, regulations and relevant case land would provide for release of the same information that would be released by EPA.

The remainder of the guidance has four parts. The first part lists the procedures which States adopt or agree to implement. The second part states the substantive requirements which the State must agree to adopt and to which the Attorney General must certify. The third part contains a discussion of the requirements a State must adopt to protect requestors if it has a program to protect confidential business information. The fourth part discusses oversight of this portion of the State program.

1. Requests for Information - Procedural Requirements

The procedural requirements are expressed in terms of 11 principles which a State must adopt or agree to. In many cases, these principles must be em died in statutes and/or regulations. In the authorization application, the Attorney General must certify that any State statutes, regulations, and relevant State law cited provide the requisite authority. For certain of the procedural requirements, States may use a Memorandum of Agreement (MOA) between the State and EPA. In any instance where an MOA is used the State must agree to follow the specified procedures and the Attorney General must certify that the State has the authority to enter into and carry out the MOA provision and that no State statute (such as a State administrative procedures act) requires notice and comment or promulgation of regulations for the MOA procedures to be binding. In addition, the State must agree to make the MOA procedures publicly available and to include them as appropriate in correspondence with the public. We have indicated, below, which principles may be incorporated in the State program through an MOA rather than by statute or regulation (assuming the Attorney General can make the required certification).

- The scope of records subject to State requests must be at least as broad as the scope of records as defined by EPA (Statute/Regulation). (See 40 CFR §2.100(b).)

- As required under the Federal FOIA, 5 U.S.C. 552(a)(2), certain materials must, be routinely available without a formal FOIA request (such as in a public reading room). Examples of these materials are final opinions or orders in case adjudications, State regulations, statements of Agency policy, and administrative staff manuals affecting the public, in addition, records prepared for routine public distribution must also be made available. Examples of such records are press releases, copies; of speeches, pamphlets, and educational materials (MOA). (See 40 CFR §2.109(b).)

- The State Agency will make reasonable efforts to assist a requester in identifying records being sought, and helping the requester formulate his or her request (MOA). (See 40 CFR §2.109(b).)

- The State Agency must respond to a request within 20 days after it is received. Failure to do so constitutes final Agency action which authorizes the requester to seek appropriate administrative review, if available, or judicial review (Statute/Regulation). (See 40 CFR §2-112.)

- If the request in denied, the requestor must be provided the basis for the denial and notified of State judicial or administrative appeal procedures, including statutes of limitations (MOA). (See 40 CFR §§2.113(f) and 2.114(a).)

- Some States have administrative appeal procedures which deny a requester judicial appeal because of an untimely filing. In those States, the requester must have at least 30 days from receipt of the initial determination to file a "timely" appeal. In States where no such denial of a judicial appeal exists, the State may provide less than 30 days (Statute/Regulation).

- The decision on the administrative appeal must be made either within 30 days of filing or by the next meeting of the appellate body after the 30-day period (Statute/Regulation). (See 40 CFR §2.117.)

- Failure to make a decision on an appeal within the prescribed time period constitutes final Agency action giving the requestor the right to judicial review (Statute/Regulation). (See 5 U.S.C. 552(a)(6)(c).)

- There must be an opportunity for judicial review of any final agency action to deny a request, including a review of any determination that the requested records are exempt from disclosure (Statute/Regulation). (See 40 CFR §2.116.)

- The State need not charge a fee to provide copies of information. However, if the State does charge a fee, a reduction or waiver of fees shall be considered in connection with each request from a representative of the press or other communication medium, or from a public interest group. The State shall reduce or waive the fee if it determines that a reduction or waiver of the fee is in the public interest because furnishing the information can be considered as primarily benefitting the general public (MOA). (See 40 CFR §2.120(d).)

- Reasonable attorney's fees and other litigation costs reasonably incurred may be assessed by the reviewing court against the State if the requester, substantially prevails on judicial review (Statute/Regulation). (See 5 U.S.C. §552(a)(4)(E).)

2. Requests for Information - Substantive Requirements

In the State's application to be authorized for Section 3006(f), the Attorney General must certify that under State law, regulations and relevant case law:

- All records shall be available to the public unless they are exempt from the disclosure requirements of the Federal POIA,, 5 U.S.C. 552.

- All nonexempt records will be available to the public upon request regardless of whether any justification or need for such records has been shown by the requester.

In addition, the State Attorney General must certify that under prevailing State statutes and regulations, the same types of records would be available to the public from the State as would be available from EPA. In making this certification, the Attorney General should be aware of the types of documents EPA generally releases under the FOIA, subject to valid claims of business confidentiality:

- Permit applications and modifications

- Biennial reports

- Closure plans

- Notification of a facility closure

- Contingency plan incident reports

- Delisting petitions and other petitions for variances or waivers

- Financial responsibility instruments

- Environmental monitoring data (note that exemption 5 U.S.C. §552(b)(9) of the FOIA generally applies to such wells as oil and gas, rather than ground-water wells)

- Transporter spill reports

- International shipment reports

- Manifest exception, discrepancy and un-manifested waste reports

- EPA Facility identification numbers

- General correspondence with the facility

- Enforcement orders Inspection reports

- Results of corrective action investigations

The State must agree in the MOA to make the fullest possible disclosure of records to the public subject to any of the exemptions under the Federal FOIA recognized by the State. Under EPA regulations, exemptions U.S.C. §552(b)(2), (b)(5), or (b)(7) of the Federal FOIA are discretionary. The State may, in its discretion, release requested records despite the applicability of one or more of exemptions 5 U.S.C. §552(b)(2), (b)(5), or (b)(7) of the Federal FOIA. In addition, disclosure of records which could be exempt under exemptions (b)(2), (b)(5) or (b)(7) of the Federal FOIA is encouraged if important purpose would be served by withholding the records.

3. Confidentiality of Business Information

Although EPA considers the protection of confidential business information a very important safeguard for the business community, the focus of §3006(f) is on the public's right to information, not the protection of confidential business information (CBI). Further, while Section 3007(b) generally requires EPA to protect CBI, Section 3009 allows States to impose more stringent requirements than those in Section 3007(b). Thus, for both reasons, States are not required to protect CBI to satisfy §3006(f). However, if a State does extend protection to confidential business information, it must be done in a manner consistent with the public's right to information. A State cannot restrict the release of information that EPA would require to be disclosed. Therefore, if a State does protect confidential business information, the following protections for the public are also necessary:

- Confidential business information cannot be defined any more broadly than it is in 40 CFR Part 2, Subparts A and B (Statute/Regulation). (See 40 CFR §§2.201(e), 2.208.)

- If a business does not assert a claim of business confidentiality at the first opportunity provided by the State, the State must be able to release the information without further notice to the business. In addition, in the case of any information submitted in connection with a permit, permit application, or interim status under the State’s equivalent to 40 CFR Parts 260, 265, and 270, any business confidentiality claim must be asserted at the time of submission of the information to the State (Statute/Regulation). (See 40 CFR §270.12.)

- If a claim of confidentiality is asserted and cannot be resolved in the time period provided for an agency response to a request, the requester must be notified of the confidentiality claim within the maxim 20-day time limit provided for an agency response. In addition, the requester must be told that the State has denied the request in order to resolve the business confidentiality claim (MOA). (See 40 CFR §2.204(d)(1)(ii).)

4. Oversight

EPA routinely conducts reviews of authorized State programs to ensure that they are administering a quality RCRA program. As States are authorized for Section 3006(f) of RCRA,

this part of the program will be reviewed along with other aspects of the RCRA program that are currently being examined. States must agree in the MOA to keep a log of denials of requests, or if they prefer, a file containing copies of the denial letters sent to requesters, which will be made available to EPA during the State review.

Each State agrees in the authorization MOA to keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities. (See 40 CFR 271.21(a)). This agreement applies to Section 3006(f).

Addressees:

Regional Waste Management Division Directors, Regions I-X
Hazardous Waste Branch Chiefs, Regions I-X
Office of Regional Counsel RCRA Team Leaders, Regions I-X
State Hazardous Waste Program Directors Associate Enforcement Counsel for Waste
Associate General Counsel for Solid Waste and Emergency Response OSWER Office Directors