

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

MAR 31, 1993

MEMORANDUM

SUBJECT: Revised Policy on Discretionary Information Release
Under CERCLA (OSWER Directive 01a)

FROM: Bruce X. Diamond, Direct
Office of Waste Programs Enforcement

William A. White, Enforcement Counsel for Superfund
Office of Enforcement

TO: Hazardous Waste Division Directors, Regions I - X
Regional Counsels, Regions I - X

This memorandum transmits the Revised Policy on Discretionary Information Release Under CERCLA, OSWER Directive 9835.12-01a. The draft policy was issued for review and comment on September 3, 1992.

OSWER Directive 9835.12-01a revises Releasing Information to Potentially Responsible Parties at CERCLA Sites, OWPE and OECM Waste, March 1, 1990, OSWER Directive 9835.12. In addition, the Directive is consistent with Guidance on Preparing and Releasing Waste-in Lists and Volumetric Rankings to PRPs Under CERCLA, OWPE, February 22, 1991, OSWER Directive 9835.16. Finally, the Directive supersedes all other previous policy and guidance on the question of discretionary information release under CERCLA.

We are confident that this revised policy will help to streamline and expedite the CERCLA settlement process. In addition, we believe that the policy will send a clear message to the PRP community that the Agency endeavors to administer the Superfund enforcement program in as fair and equitable a manner as practicable.

We would like to thank your staffs for the assistance they provided in developing this policy. Questions concerning implementation of the policy may be addressed to Bruce Gruenewald in the Office of Waste-Programs Enforcement (OS-5502G/FTS 703603-8935) or Patricia Sims in the office of Enforcement (LE-134S/FTS 202-260-2860).

Attachment

Superfund Branch Chiefs, Regions I - X
Regional Counsel Branch Chiefs, Regions I - X
PRP Search Chiefs, Regions I -
Revised Policy on Discretionary
Information Release Under CERCLA
OSWER Directive 9835.12-01a

OSWER Directive 9835.12-01a revises Releasing Information to Potentially Responsible Parties at CERCLA Sites, OWPE and OECM Waste, March 1, 1990, OSWER Directive 9835.12. In addition, the Directive is consistent with Guidance on Preparing and Releasing Waste-in Lists and Volumetric Rankings to PRPs Under CERCLA, OWPE, February 22, 1991, OSWER Directive 9835.16. Finally, the Directive supersedes all other previous policy and guidance on the question of discretionary information release under CERCLA.

Information release is an important means by which the Agency can facilitate PRP organization and coalescence. This serves the Agency's interests by helping to streamline and expedite settlements with PRPs. The purpose of this revised CERCLA information release policy is to minimize potential impediments to facilitating PRP organization and coalescence.

Consequently, information on PRP waste contribution at CERCLA sites normally should be made available to all PRPs as soon as practicable, preferably well before special notice is issued. Regions should consider releasing information through PRP meetings or directly to PRPs or PRP steering committees.

Information on PRP waste contribution at CERCLA sites, including that developed by EPA, can consist of manifests, waste tickets, logbooks, billing records, canceled checks, process engineering information, waste-in lists, volumetric rankings, and responses to section 104(e) information requests. Generally, information on PRP waste contribution should be released to PRPs and not withheld, nor should such information be made available only through Freedom of Information Act (FOIA) requests.

If information on PRP waste contribution is potentially subject to claims of privilege or FOIA exemptions, there nonetheless should be a preference in favor of release. Information subject to privileges or exemptions should be withheld only if a case-specific determination is

made by program personnel and legal counsel (and briefly noted in the case file) that an important purpose is served by withholding the information from the PRPs or the public. However, documentation concerning the exercise of prosecutorial discretion, such as which parties will be noticed or pursued in litigation, normally would not be releasable. When releasing information, the Agency must, however, ensure that disclosure of information that may be entitled to confidential treatment is made pursuant to section 104(e)(7) of CERCLA and 40 CFR Part 2.11

In addition, under Agency policy, documents falling within Exemptions 7 (C) (privacy information) and 7 (D) (confidential informants) of FOIA are subject---to mandatory withholding. Sometimes, however, information falling within these exemptions will be contained in otherwise releasable records, and this information must be redacted prior to release.

The Agency also should make reasonable efforts to assist de minimis parties and parties unfamiliar with Superfund in the coalescence process by providing them with additional Superfund program information. De minimis parties can be small businesses or others with little or no previous Superfund experience. The Agency can implement this aspect of the policy by distributing Superfund background information prior to PRP meetings, and by holding special meetings for parties who are new to the program or who lack experience in the CERCLA settlement process.

This guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. Such guidance and procedures do not constitute rulemaking by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this guidance and its internal implementing procedures.