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

DEC 19 1994

MEMORANDUM

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

SUBJECT: Criteria and Process For Denial of Requests
to Import Waste to a U.S. Facility

FROM: Elaine G. Stanley, Director
Office of Compliance

Elaine G. Stanley

TO: Waste Management Division Directors, Regions I-X

This guidance will identify the criteria which EPA should consider in deciding whether to object to a notification of intent to import foreign hazardous wastes to a U.S. facility. In addition, it will establish procedures for U.S. facilities to respond to a denial of their request to import that waste.

The hazardous waste import/export notification program, which has been transferred to the Office of Compliance as part of the Headquarters Enforcement program reorganization, is now responsible for, among other duties, processing notices of intent to import hazardous waste from foreign countries. This process applies to all regulated hazardous wastes imported into the U.S. that are covered by bilateral agreements with Canada and Mexico, the Organization for Economic Cooperation and Development (OECD) Council Decision for the transboundary movement of hazardous wastes for recovery operations, and any other relevant international agreement, bilateral agreement or treaty to which the U.S. is a party. In the course of administering this program, EPA has concluded that it would be helpful to provide guidance on criteria for objecting to imports of hazardous waste. This will help assure fair treatment of all U.S. facilities contracting to receive waste from foreign sources and ensure that waste entering the U.S. is managed properly and safely.

The policies set out in this memorandum are intended solely as guidance. They are not intended, nor can they be relied upon to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the guidance provided in this memorandum, or to act at variance with the guidance, based on an analysis of specific circumstances. EPA also reserves the right to change this guidance at any time without public notice.



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I. CRITERIA AND BASIS FOR OBJECTION²

When foreign entities contract to export wastes to U.S. facilities under the aforementioned international agreements, EPA must receive from the foreign government's competent authority a notification of intent to import (NOI)³. EPA Headquarters (HQ) and the appropriate Region review the notification in order to ascertain whether to consent or object to the imports based upon various factors such as the nature of the waste and the U.S. receiving facility. One of the primary purposes of the objection criteria is to ensure that U.S. receiving facilities can properly and safely manage the waste. (This guidance does not affect or diminish in any way EPA's authority to take enforcement actions against brokers, agents or any other persons acting as importers.) Any one of the criteria may be sufficient to deny proposed shipments of imported hazardous waste. If, after EPA has already consented, evidence appears that the criteria for objection may apply, EPA may withdraw its consent to the NOI. The following objection criteria will guide the Regions in recommending to HQ whether EPA should object to specific imports of hazardous waste.

1. The NOI does not provide all of the information required under 40 CFR § 262.60, Article 3(b) of the U.S./Canadian bilateral agreement or Article III of Annex III of the La Paz Agreement between the U.S. and Mexico and/or provisions under the Organization for Economic Cooperation and Development (OECD) Council Decision for the transboundary movement of hazardous wastes for recovery operations, or any other relevant international agreement, bilateral agreement or treaty to which the U.S. is a party.

² EPA may designate other instances when an objection could be made, such as when the receiving facility has not filed an accurate or timely TSD notification with the Region or authorized state four weeks in advance of an impending shipment pursuant to the requirements set forth in 40 C.F.R. § 264.12 and 40 C.F.R. § 265.12. The objection criteria listed above do not constitute the only basis for objection. In addition, EPA may object in other instances where there is harm or the threat of harm to human health or the environment.

³Notification of Intent to Import (NOI) refers to a notification EPA receives from a foreign government pursuant to a relevant international agreement, bilateral agreement or treaty to which the U.S. is a party.

2. The import of such waste is prohibited under other Federal statute(s), such as the ban on importing/exporting substances with ≥ 50 ppm PCBs under The Toxic Substances Control Act or restrictions on importing CFCs under the Clean Air Act.
3. The U.S. importing facility seeks to import regulated hazardous wastes that are not included in the facility's permit or interim status authorization.
4. The U.S. importing facility is not in interim status or is operating without a required RCRA permit.
5. The U.S. importing facility's owner, operator, or parent corporation has been convicted under the criminal provisions of any environmental statute within a year of notification, when such recent criminal activity calls into question the ability of the facility to properly and safely manage the waste. The term "within a year of notification" means a year prior to and a year post notification. When a criminal conviction occurs post notification, EPA will rescind the consent by notifying the parties in the same manner as any other objection, i.e., putting them on notice that no further shipments are allowed to proceed.
6. EPA has received information that demonstrates that the U.S. importing facility cannot properly and safely manage the intended waste import (e.g., a leak in the intended storage facility poses an imminent and substantial endangerment).

II. THE IMPORT NOTIFICATION AND OBJECTION PROCESS

The following procedures should generally be followed for responding to NOIs when EPA proposes to object to shipments of hazardous waste.

When HQ receives a NOI for hazardous waste destined for a U.S. facility, HQ reviews the NOI for completeness. If the NOI does not have the required information, HQ requests a completed NOI from the foreign competent authority or foreign exporter. If the NOI lists wastes banned from import to the U.S., HQ immediately sends an objection back to the foreign competent authority. If the NOI is complete and does not list banned wastes, HQ forwards the NOI via pouch mail to the Region in which the facility is located for review. Upon the Region's receipt of the NOI, the Regional import/export coordinator, in conjunction with the State as appropriate:

- 1) Reviews the NOI and makes a recommendation, considering the criteria outlined above, whether EPA should object to the NOI; and

2) Provides the reason for any objection with substantiating documentation to the HQ import/export processing office within 21 days of HQ receipt, via FAX. EPA's policy is to respond to NOIs within 30 days from date of receipt of a complete NOI in HQ; this time frame includes Regional review and HQ response to the foreign competent authority and U.S. importing facility. For certain agreements, i.e., the U.S./Canadian bilateral and the OECD (for amber wastes), if EPA fails to object or consent within 30 days, this "silence" constitutes tacit consent by the U.S. to the proposed import.⁴ Therefore, to assure timeliness under all circumstances, any recommendation of objection should be sent to HQ by the 21st day after HQ's receipt of the NOI unless additional time for review is required.

In a majority of cases, minor discrepancies in NOIs are resolved by EPA's review of additional information from the foreign competent authority or foreign exporter and/or the U.S. facility that has contracted to receive the waste. In these instances, EPA may request additional information by issuing a "Notice of Deficiency" letter (NOD). HQ will issue the NOD for deficient NOIs and the 30-day time clock will not start until a completed NOI is received at HQ. The NOD will convey to the foreign exporter the outstanding or additional information necessary for EPA to determine the admissibility of shipments. When EPA receives the additional information, EPA may then consent or object to the completed NOI.

Barring those conditions where written consent is mandatory, a foreign country may request written consent; such requests will be forwarded to the HQ import/export processing office which, in turn, will provide the foreign exporter or foreign competent authority with a written notice of consent based upon the Region/State review.

If the Region recommends objection, HQ will review the Region's determination taking into consideration the objection criteria in this memorandum. If HQ concurs with the Region's recommendation, HQ will notify the competent authority of the country of export and the U.S. importing facility of EPA's decision to object.

HQ must give these objection notices to the foreign competent authority (via FAX) and the U.S. importing facility

⁴ However, in extenuating circumstances EPA may ask for an extension of the time from the exporting country's competent authority for further investigation. The Region should notify HQ immediately if further review time is needed so HQ can request an extension before tacit consent is invoked.

within the 30-day time frame so as not to trigger the 30-day tacit consent mentioned previously. The U.S. facility will receive, via certified mail, along with the notice of objection, written instructions informing the facility that it may respond in writing to the HQ import/export processing office stating reasons why the EPA should rescind the objection.

III. U.S. FACILITY'S AND EPA'S RESPONSE TO AN OBJECTION

Although EPA's position is that a review process is not required, EPA considers such a process to be helpful to ensure consistent decisions based on complete information. Therefore, the U.S. importing facility may respond in writing to the HQ import/export processing office within 30 days of the facility's receipt of the notice of objection.⁵ The objection will be final unless the facility can demonstrate as set forth in this guidance that EPA's reason for objection is in error. If the facility fails to respond by day 30, the objection will become final.

Upon receipt of a timely response by the U.S. importing facility, a neutral EPA decisionmaker will review both EPA's decision to object and the U.S. facility's written response. Within 45 days of receiving these documents, the decisionmaker will respond with a written decision that is sent through EPA HQ to the U.S. facility. HQ will forward a copy to affected Regions and, if appropriate, States. The decision should state its rationale with reasonable specificity and whether the facility has provided any information to alter EPA's decision to object.

The decisionmaker will be an impartial individual within EPA HQ who is knowledgeable about RCRA. No person who has participated in the decision to object may serve in this capacity. The informed decision of the EPA neutral decisionmaker shall be final and is not subject to further review within EPA.

If the decisionmaker decides that EPA's original objection is inappropriate, HQ will notify the exporting country's competent authority by mail or FAX, followed by mail, that EPA will rescind its original objection. A copy of this notice will be provided to the Region and/or State as appropriate. Renotification by the foreign exporter is not necessary unless information contained in the original NOI has since changed (e.g., shipment dates).

⁵ A written review is considered an appropriate and efficient method which will not unreasonably delay imports and by which the affected facility has the opportunity to ensure that EPA has the most current information on the relevant issues. A full evidentiary hearing is not necessary for this purpose.

In the case of an objection where a related RCRA enforcement action⁶ is already underway,⁷ the opportunity for review by the neutral EPA decisionmaker in response to an EPA objection will not apply. Rather, the U.S. facility would have the opportunity to challenge the basis for the objection within the context of the litigation. This abbreviated process is appropriate in such cases so as not to bifurcate the same matter in two different fora while still allowing the affected facility an opportunity to respond to the import objection.

If you have any questions, please call me or have a member of your staff call Karen Milne at (202) 564-5028.

cc: Regional Counsels

⁶ E.g., if the objection was under Criteria 4 (failure to have interim status or a permit), a related RCRA enforcement action would be a pending enforcement action against the facility for operating without interim status or a permit.

⁷ An "action underway" is defined as an administrative or judicial complaint having been served and the matter is before a Federal or State judge or an ALJ.