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OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

AUG 11 1988

Mr. Phillip C. McGuire
Associate Director, Law Enforcement
Department of the Treasury
Bureau of Alcohol, Tobacco, and Firearms
Washington, DC 20226

Dear Mr. McGuire:

This letter is in response to the issues raised recently by the Bureau of Alcohol, Tobacco, and Firearms (BATF) with respect to compliance with the Resource Conservation and Recovery Act (RCRA). Specifically, your staff has requested EPA guidance for two situations: (1) when a BATF agent is called to a location where there is an immediate safety threat, and (2) when explosives or explosive related materials that do not present an immediate safety threat are stored in BATF secured lockers for analysis and possible use in law enforcement proceedings.

The guidance given below for these two situations is based on the federal RCRA program as administered by EPA pursuant to 40 CFR Parts 260-271. In authorized States (which are 43 in number), EPA has delegated the hazardous waste program to the States pursuant to statutory provisions in RCRA. Although each authorized State program must be consistent with and at least as stringent as the Federal program, a State is free to be more stringent. Hence, any guidance given below must be followed up by a BATF analysis of any different provisions that an authorized State may have chosen to enact.

1. Explosives That Present an Immediate Safety Threat

According to our discussions, this scenario involves identification by a trained BATF agent of explosives that create an immediate safety threat, removal of those explosives from the original location to a safe area (often a local law enforcement agency's bomb disposal site or a nearly military installation), and immediate destruction, normally by detonation or open burning.

Under current RCRA regulations (40 CFR Sections 264.1(g)(8), 265.1(e)(l)(i), and 270.1(c)(3)), all activities taken in immediate response to a discharge of hazardous waste, or an imminent and substantial threat of discharge of a hazardous waste, are exempt from the RCRA permitting and substantive requirements. Since the explosives in question would be hazardous by virtue of their reactivity and ignitability, any BATF actions taken to eliminate the imminent and substantial danger would qualify under this exemption. If the response actions involve transportation to a remote site for destruction, then the transportation as well as the destruction would be exempt. However, the transportation is exempt only to the extent necessary to respond to the immediate threat. Hence, we expect the transportation would normally cover a relatively short distance.

Should there be any question about the exempt or nonexempt status of the BATF action, the RCRA emergency permit regulations (Section 270.61) can be used for destruction activities. As these regulations provide, an emergency RCRA permit can be issued by an EPA Regional Office or by an authorized State official via telephone or in writing. These permits may be issued when the Region or State finds that an imminent and substantial endangerment to human health or the environment exists, according to the requirements of Section 270.61. This permit can address both treatment and storage of hazardous waste. (Under RCRA, open detonation or burning of explosives waste qualifies as thermal treatment.) If necessary, transportation can also be authorized by a provisional identification number, obtainable by telephone. To reiterate, however, no permit is necessary when a BATF agent determines that an immediate safety threat exists.

2. Explosives Material Storage During Analysis and Law Enforcement Proceedings

When a hazardous material (such as explosives and certain types of explosives-related material) is discarded, it becomes a hazardous waste and therefore subject to RCRA. Although the situation may vary, we believe that explosives and explosive material become waste when the court (or BATF) no longer has any use for them (i.e., when no longer needed for evidence, referred to as "judicial forfeiture" by your staff in our discussions). When explosives are stored pending judicial proceedings, they are not subject to the hazardous waste regulations. However, when

they are to be discarded, they become waste. At that point, RCRA requirements pertaining to waste generation, transportation, and treatment, storage, and disposal (40 CFR Parts 260-271) become applicable.

Under 40 CFR Section 262.11, generators of solid waste must determine if their wastes are hazardous. "Generator" is defined by person and by site. Thus, for example, each of your storage locker areas would be generator site. Except for generators who meet the conditional exemption in Section 261.5, generators of hazardous waste are subject to all applicable Sections of Part 262. [In the case where a BATF field office generates less than 100 kilograms (kg) per month, Section 261.5 allows the disposal of the explosive waste at a permitted or interim status hazardous waste facility, or at a facility permitted, licensed or registered by a State to manage municipal or industrial solid waste.] Among other requirements, generators of hazardous waste must have EPA ID numbers (40 CFR Section 262.12). Each BATF field office must apply for an EPA ID number for each site at which hazardous waste is generated in excess of 100 kilograms per calendar month. This is a simple process involving the submittal of one short form for each generator site. These forms can be obtained from EPA Regional Offices or we at Headquarters will be glad to supply them to you.

We note that, under 40 CFR Section 262.34, hazardous waste may be stored in tanks or containers without a permit for up to 90 days. So, even after a material becomes a waste (i.e., an intent to discard is present), the generator has 90 days to make necessary arrangements for transportation, treatment, or disposal, according to applicable regulations in 40 CFR Section 262.34, and Parts 264, 265, 266, 268, and 270. As a general matter, we believe the Bureau should consider a policy that would require removal of explosive material stored in BATF lockers within 90 days from the time the material becomes a waste. Otherwise, RCRA storage permits may be required.

BATF may transport hazardous waste explosives themselves, or may hire a transporter. In either case, the transportation is subject to the requirements in 40 CFR Parts 262 and 263. Transportation of hazardous waste off the site of generation is subject to manifest requirements (40 CFR Section 262.20). The generator must designate on the manifest a facility that has the proper RCRA permit or interim status to receive the waste.

In general, destruction of explosive waste by open detonation/open burning is thermal treatment that must be conducted at a RCRA interim status or permitted facility in compliance with Parts 264, 265, and 270. In the event that the destruction is being done under court order or under directions from the U.S. Attorney's office, RCRA is not automatically waived. The Bureau should therefore locate facilities nearest to its field offices that have the appropriate RCRA permits or interim status for open detonation/open burning of explosives wastes. Some of the military facilities already used by the Bureau may have the necessary permits or interim status, and these facilities may accept BATF explosives wastes, under the terms of their permit or under the provisions of Part 270, Subpart G, without any special permission from EPA. Other facilities with RCRA permits or interim status could handle the open detonation/open burning of BATF explosive materials via permit modifications (Section 270.41-270.42) or changes during interim status (Section 270.72). In those cases where a permit modification or change during interim status is needed by a facility that agrees to manage BATF wastes, these must be approved by the appropriate State agency (or EPA Regional office) in advance of the initial receipt of the BATF wastes.

Finally, we understand that stored explosives material sometimes deteriorates to the point where a safety hazard exists. In this type of situation, the discussion on emergency response activities in Section 1., above, would apply.

I trust that this letter provides you with guidance helpful to the Bureau's efforts to comply with RCRA requirements. I understand that my staff has provided BATF with a list of facilities that may have the appropriate permits or interim status and a list of EPA Regional contacts for your field offices. If you need additional assistance, please do not hesitate to call me or have your staff call Michael Petruska (475-9888).

Sincerely,

Original Document signed

Sylvia K. Lowrance, Director
Office of Solid Waste