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**Linwood A. Watson, Jr.,**

*Deputy Secretary.*

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## ENVIRONMENTAL PROTECTION AGENCY

[FRL-7415-8]

### Inquiry to Learn Whether Businesses Assert Business Confidentiality Claims Covering Information Contained in Notifications of Intent to Export Hazardous Waste From the United States, or Notifications Under 40 CFR Part 262, Subpart H, Manifests for Shipments of Hazardous Waste From the United States and Other Documents Containing the Same Information; Notice of Opportunity To Comment

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency has received Freedom of Information (FOIA) requests for the Hazardous Waste Export Data System and documents contained therein pertaining to the export of hazardous waste from the United States. The purpose of this notice is to contact affected businesses other than those who furnished the documents sought in the FOIA requests and to provide notice to those businesses of the opportunity to submit comments to EPA regarding whether the information sought in those FOIA requests is entitled to treatment as confidential business information.

**DATES:** You must ensure that your comments are postmarked or hand delivered to the EPA office designated below by January 2, 2003. The period for submission of comments may be extended if, before the comments are due, you make a request for an extension of the comment period and it

is approved by the EPA legal office. Except in extraordinary circumstances, the EPA legal office will not approve such an extension without the consent of any person whose request for release of the information under 5 U.S.C. 552 is pending.

**ADDRESSES:** Comments concerning this inquiry and notice should be submitted to Joseph F. Schive, Enforcement Planning, Targeting and Data Division (MC 2222A), Office of Compliance, Office of Enforcement and Compliance Assurance, Environmental Protection Agency, Room 5146A, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

#### FOR FURTHER INFORMATION CONTACT:

Joseph F. Schive, 202-564-4156.

**SUPPLEMENTARY INFORMATION:** The three types of documents subject to the document requests are the notification of intent to export (NOI) (part 262, subpart E) or notification (part 262, subpart H), submitted to EPA in accordance with 40 CFR 262.53 and 262.83, respectively; the manifest,<sup>1</sup> a copy of which is given to the United States Customs Service on leaving the United States, in accordance with 40 CFR 263.20(g)(4), and is then forwarded by Customs to EPA; and the annual report, submitted to EPA in accordance with 40 CFR 262.56 or 262.87(a).<sup>2</sup>

For the purposes of this notice, submitters of NOIs, notifications, manifests and annual reports shall be referred to as "submitters," and non-submitters which might be expected to assert a claim of business confidentiality because their information also is contained in the database or the requested documents shall be referred to as "other affected businesses." The types of businesses which comprise the category of submitters are the primary exporters<sup>3</sup> (NOI and annual report) and

notifiers<sup>4</sup> (notification and annual report), and the generators<sup>5</sup> (manifest). The two types of businesses included in the category of other affected businesses are the transporters<sup>6</sup> of hazardous waste; and the consignees<sup>7</sup> (and alternate consignees) under subpart E, or consignees<sup>8</sup> and recovery facilities<sup>9</sup> under subpart H. The latter are located outside the United States, in the receiving or importing countries. Thus, affected businesses may include foreign business entities, as well as domestic businesses.

The submitters of the documents sought in the FOIA requests did not assert a claim of business confidentiality covering part or all of that information. As set forth in the Resource Conservation and Recovery Act (RCRA) regulations, at 40 CFR 260.2(b), "if no such claim accompanies the information when it is received by EPA, it may be made available to the public without further notice to the person submitting it." Moreover, as EPA pointed out in the preambles to the proposed and final RCRA export rules, 51 FR 8744 (March 13, 1986) and 51 FR 28644 (August 8, 1986), respectively, EPA does not believe that notification information and also manifest information generally are entitled to treatment as confidential business information. Nevertheless, EPA is mindful of the fact that the cited provision must be read in conjunction with the protection which the FOIA regulations afford other affected businesses.

<sup>4</sup> Section 262.81 defines "notifier" as "the person under the jurisdiction of the exporting country which has, or will have at the time the planned transfrontier movement commences, possession or other forms of legal control of the wastes and who proposes their transfrontier movement for the ultimate purpose of submitting them to recovery operations. When the United States (U.S.) is the exporting country, notifier is interpreted to mean a person domiciled in the U.S."

<sup>5</sup> Section 260.10 defines "generator" as "any person, by site, whose act or process produces hazardous waste identified or listed in part 261 of this chapter or whose act first causes a hazardous waste to become subject to regulation."

<sup>6</sup> Section 260.10 defines "transporter" as "a person engaged in the offsite transportation of hazardous waste by air, rail, highway or water."

<sup>7</sup> Section 262.51 defines "consignee" for purposes of subpart F as "the ultimate treatment, storage or disposal facility in a receiving country to which the hazardous waste will be sent."

<sup>8</sup> Section 262.83 defines "consignee" for purposes of subpart H as "the person to whom possession or other form of legal control of the waste is assigned at the time the waste is received in the importing country."

<sup>9</sup> Section 262.83 defines "recovery facility" as "an entity which, under applicable domestic law, is operating or is authorized to operate in the importing country to receive wastes and to perform recovery operations on them."

<sup>1</sup> Section 260.10 defines "manifest" as "the shipping document EPA form 8700-22 and, if necessary, EPA form 8700-22A, originated and signed by the generator in accordance with the instructions included in the appendix to part 262."

<sup>2</sup> Other documents contained in the database, including renotifications (40 CFR 262.53(c)), transit notifications, acknowledgments of consent (*id.* § 262.53(f)), and exception reports (*id.* §§ 262.56 and 262.87(b)), also involve the same parties and some of the same types of information. To the extent the parties and information overlap, this inquiry and notice will provide the opportunity to claim confidential business information treatment for these documents as well.

<sup>3</sup> Section 262.51 defines "primary exporter" as "any person who is required to originate the manifest for a shipment of hazardous waste in accordance with 40 CFR part 262, subpart B, or equivalent State provision, which specifies a treatment, storage or disposal facility in a receiving country as the facility to which the hazardous waste will be sent and any intermediary arranging for the export."

## 1. Other Affected Businesses

EPA regulations regarding FOIA requirements, at 40 CFR 2.204(c)(1), require an EPA office which is responsible for responding to a request under 5 U.S.C. 552 for the release of business information (EPA office) "to determine which businesses, if any are affected businesses (*see* § 2.201(d)) \* \* \* "Affected business" is defined at § 2.201(d) as

"\* \* \* with reference to an item of business information, a business which has asserted (and not waived or withdrawn) a business confidentiality claim covering the information, or a business which could be expected to make such a claim if it were aware that disclosure of the information to the public was proposed."

EPA has furnished, to those persons whose request for release of information is pending under 5 U.S.C. 552, a determination (in accordance with 40 CFR 2.113) that the information may be entitled to confidential treatment under this subpart and 5 U.S.C. 552(b)(4), that further inquiry by EPA pursuant to this subpart is required before a final determination on the request can be issued, that the persons' requests are therefore initially denied, and that after inquiry a final determination will be issued by an EPA legal office. 40 CFR 2.204(d)(1)(ii).

## 2. The Purposes of This Notice

This notice encompasses two distinct steps in the process of communication with other affected businesses: the preliminary inquiry and the notice of opportunity to comment.

### *a. Inquiry to Learn Whether Other Affected Businesses Assert Claims Covering the Information*

Section 2.204(c)(2) provides:

If the examination conducted under paragraph (c)(1) of this section discloses the existence of any business which, although it has not asserted a claim, might be expected to assert a claim if it knew EPA proposed to disclose the information, the EPA official shall contact a responsible official of each such business to learn whether the business asserts a claim covering the information.

### *b. Notice of Opportunity To Submit Comments*

Sections 2.204(d)(1)(i) and 2.204(e) require that written notice be provided to businesses stating that EPA is determining under this subpart whether the information is entitled to confidential treatment, and affording the businesses an opportunity to comment.

## 3. The Use of Publication in the Federal Register

Section 2.0204(e)(1) requires that this type of notice be furnished by certified mail (return receipt requested), by personal delivery, or by other means which allows verification of the fact and date of receipt. EPA, however, has determined that in the present circumstances the use of a **Federal Register** notice is the only practical and efficient way to contact other affected businesses and to furnish the notice of opportunity to submit comments. Its determination to follow this course was made in recognition of the large number of businesses included in the pertinent universe. EPA estimates that there are approximately 400 other affected businesses, including approximately 100 transporters, 150 consignees and alternate consignees under subpart E, and 150 consignees and recovery facilities under subpart H. Employment of publication in the **Federal Register** also dispenses with orally informing a responsible representative of the business that it should expect to receive a written notice, and requesting the business to contact the EPA office if the written notice has not been received within a few days, so that EPA may furnish a duplicate notice. 40 CFR 2.204(e)(3).

## 4. Submission of Your Response in the English Language

All responses to this notice must be in the English language.

## 5. The Effect of Failure To Respond to This Notice

In accordance with 40 CFR 2.204(e), EPA will construe your failure to furnish timely comments as a waiver of the business's claim.

## 6. What To Include in Your Comments

If you feel that some or all of the information contained in the two types of documents which are subject to FOIA requests is entitled to confidential treatment, please specify which portions of the information you consider confidential. Information not specifically identified as subject to a confidentiality claim will be disclosed to the requestor without further notice to you.

For each item or class of information that you identify as being subject to your claim, please answer the following questions:

1. For what period of time do you request that the information be maintained as confidential? If the occurrence of a specific event will eliminate the need for confidentiality, please specify that event.

2. Information submitted to EPA becomes stale over time. Why should the information you claim as confidential be protected for the time period specified in your answer to question no. 1?

3. What measures have you taken to protect the information claimed as confidential?

Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose the information further?

If so, why should the information still be considered confidential?

4. Has any governmental body made a determination as to the confidentiality of the information? If so, please attach a copy of the determination.

5. Is the information contained in any publicly available material such as promotional publications, annual reports, articles, *etc.*? Is there any means by which a member of the public could obtain access to the information?

6. For each category of information claimed as confidential, discuss with specificity why release of the information is likely to cause substantial harm to your competitive position. Explain the nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. How could your competitors make use of this information to your detriment?

7. Do you assert that the information is "voluntarily submitted" as defined at 40 CFR 2.201(i)? If so, explain why, and how disclosure would tend to lessen EPA's ability to obtain similar information in the future.

8. Any other issue you deem relevant.

Please note that *you bear the burden of substantiating your confidentiality claim* pursuant to 40 CFR 2.208(e). Conclusory allegations will be given little or no weight in the determination. If you wish to claim any of the information in your response as confidential, you must mark the response "CONFIDENTIAL" or with a similar designation, and must bracket all text so claimed. Information so designated will be disclosed by EPA only to the extent allowed by, and by means of the procedures set forth in 40 CFR part 2. If you fail to claim the information as confidential upon submission it may be made available to the public without further notice to you.

Dated: November 22, 2002.

**Michael M. Stahl,**

*Director, Office of Compliance.*

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