



COMMONWEALTH of VIRGINIA

DEPARTMENT OF TRANSPORTATION
1401 EAST BROAD STREET
RICHMOND, VIRGINIA 23219 2000

Gregory A. Whirley
Acting Commissioner

June 15, 2010

MEMORANDUM

TO: Malcolm Kerley, P.E.

FROM: Richard Walton, Jr. 

SUBJECT: Hazardous Waste Co-Generator Policy

- Periodically, during the course of negotiations on Public-Private Partnership (P3) projects, concerns are expressed by industry that they cannot assume liability attached to being classified as "generators" of Hazardous Waste¹. Such waste might be encountered as pre-existing contaminated soil and/or groundwater that must be excavated or dewatered to support construction. The stated basis of this concern is either corporate policy that prevents the company from assuming such liability or similar concerns raised by their bonding companies.

EPA defines a hazardous waste "generator" as "any person, by site, whose act or process produces hazardous waste identified or listed in Part 261 of this chapter whose act first causes a hazardous waste to become subject to regulation"². In context of Owner (VDOT) and Contractor (Concessionaire) relationships, this definition can be applied to the Concessionaire, and/or its subcontractors, who will be performing the excavation or dewatering activities and to VDOT as the property owner and contractee for the project. In such situations, EPA refers to the Concessionaire, and/or its subcontractors, and VDOT as "co-generators" and thus all are jointly and severally liable for complying with the generator standards³. VDOT has no control over EPA's designation of the Concessionaire or its subcontractors as a generator(s). It is a legally, not contractually, defined status. EPA prefers that co-generators mutually agree (by contract or other means) who will perform the duties of the generator on behalf of the other co-generator(s). However, EPA reserves the right to hold all parties liable for violation of the regulations. Since the Concessionaire is responsible for all aspects of design, construction and subsequent waste management, VDOT should, as a matter of Policy, require that the Concessionaire assume the functional generator responsibilities.

¹ Hazardous waste as defined in 40 CFR Part 261, Subparts C and D

² 40 CFR §261.10

³ See 45 FR 72026 and EPA's November 18, 1980 response to Julie R. Cooper-Mobay Chemical Corporation – RCRA Online Number 11005

While VDOT could contractually agree to accept the generator responsibilities, such assignment would be impractical from a coordination standpoint and offer no additional liability protection to the Concessionaire and/or its subcontractors.

This Memorandum of Policy is extended to cover Design-Build as well Bid-Build Contracts (although the specifications for Bid-Build contracts currently addresses this requirement).