

SUPERFUND COMPLIANCE PROGRAM

FREQUENTLY ASKED QUESTIONS

(1) What responsibility do recyclers have if we sell a load to a broker company that will not disclose the delivery address?

This is a common question and concern of ISRI members. The Superfund law is a zero tolerance, strict liability law that attaches to the property. If your materials are found to have been shipped to a contaminated property, you could be liable for partial clean-up costs UNLESS you fit within the SREA exemption. It does not matter if the materials arrived at that property as a result of a broker transaction.

You have 2 options when dealing with brokers ---

(1) You get the address of the property to which the broker is shipping your scrap and you make the reasonable inquiry into the compliance status of that property.

(2) You get the broker to give you a legally-binding indemnification that it did the necessary due diligence required under SREA, thus indemnify you of any subsequent liability. This option is very problematic because you will likely not find a broker willing to take upon itself that kind of liability. If you were able to get an indemnification from the broker, it is questionable as to whether such an indemnification would hold up in the court.

ISRI members using brokers to ship scrap materials cannot escape Superfund liability by fact of using a broker. Superfund liability cannot be contracted away and continues from cradle to grave. Under SREA, recyclers shipping scrap materials must conduct due diligence on the facility at which their scrap is processed. The law does not address the use of brokers.

If the broker has a physical processing location and is processing the scrap before sending it to another destination, ISRI members may be able to request a SREA report on the broker's processing location. However, if it can be reasonably ascertained as to where the scrap then will be further processed, additional due diligence on the location down the line may be required. If it cannot be ascertained where the scrap goes after the broker processes, one might argue that it is not "reasonable" to have a due diligence requirement that goes beyond the broker.

However, if the broker is simply a pass through and does not process the scrap, ISRI recommends the ISRI member should inquire of the broker where the scrap is going and then order a SREA report on that location. Conducting due diligence on an address of a location that does not process scrap (including broker's offices) will not provide SREA protection, and if an ISRI report on that location is ordered, could be subject to a penalty fee under the terms and conditions of the ISRI SREA Reasonable Care Compliance program. If the broker refuses to provide the location, the ISRI member can either refuse to use the broker or demand a legally-binding indemnification letter attesting that the broker conducted the due

diligence required under SREA --- however, this document may not hold up in court and may only provide a means to recover from the broker the fines assessed under Superfund.

(2) If I want a SREA report and information on a company that has multiple locations, do I request a report on all the locations or only the facility where I send my material?

You should likely order reports on all locations. SREA liability attaches to the property, not the company. Therefore, if your materials are found to have moved to a location that ended up being a superfund site, you could be held responsible unless you show that you did your due diligence. ISRI cannot tell you what the courts or EPS consider to be acceptable due diligence because there is no guidance at this time, it is likely that if you had reason to know your materials were headed to a different location, you would be responsible for checking into that location. It would be wise to cover all possibilities.

(3) Do I request a SREA compliance report on the company or the location where my material goes?

SREA reports are completed on the PHYSICAL address, not the company. A location may have had several owners and the SREA compliance report will list who the owners of that parcel of land were/are. The report does not combine information from other parcels of property owned by the same company. (See answer to question #2 above)

(4) SREA compliance reports were purchased last year on the consuming facilities that our material is shipped. Do we have to purchase reports again this year?

Yes. ISRI has consulted with numerous environmental consultants, legal professionals and the ISRI Board to try and determine what would be reasonable for the court to require you make inquiry at least every 12 months. As such, it is necessary for you to request updated SREA reports annually.

(5) Why do the compliance reports have a 12 month shelf life?

The legal standard is "reasonable care" and the question is how often this standard requires you to make the appropriate inquiry. Neither the courts nor EPA has given an answer. See response to #4 above.

(6) We plan to ship material to a new customer. When do I need to order a compliance report on this consuming facility?

The law requires you to conduct due diligence **BEFORE** you ship. Any shipments you have made to this new customer without having record of due diligence inquiries, will not be covered by the exemption. You must document that you made inquiries.

(7) When can I order a compliance report?

ISRI has “open season” every year that enables its members to reserve reports on all consuming facilities to which material is shipped. During “open season”, you may request a report on any facility listed in the inventory. If you do not find the name and address of the facility in inventory, there is a form available to be completed for a new facility.

(8) What if I need a report after “open season”?

SREA reports on consuming facilities ordered by ISRI members are available for purchase during the year. If a compliance report is not in inventory, you may request a report at a cost determined by ISRI’s vendor.

(9) Am I required to obtain a Superfund report on consuming facilities outside the U.S.?

No. The Superfund law is a US Law so SREA doesn’t apply to sites on Canada, Mexico or other international countries. As such, the ISRI Compliance Program does not include reports on facilities on these locations.