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Responding to a CERCLA Section 104(e) Request for Information

Counsel can assist their clients in cooperating cautiously with the EPA

The federal Environmental Protection Agency (EPA) has the power to obtain information from regulated parties under the authority of provisions that can be found in virtually all major environmental laws. One of the most widely used of these information-gathering provisions is Section 104 (e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.¹ For environmental attorneys or in-house counsel, the proper time to become familiar with a so-called Section 104 (e) request—including the procedural process under which it operates, the EPA's information request powers under the provision, and the procedural methods available to protect a client's interests while remaining responsive to the request—is before the EPA comes calling.

The current language of Section 104(e) provides that any person or entity that has or may have relevant information shall furnish it upon reasonable notice by the EPA. Inadequate responses can lead to substantial fines and even criminal penalties

for noncompliance.

Prior to the enactment of the Superfund Amendments and Reauthorization Act of 1986 (SARA),² information regarding hazardous waste sites was gathered under the provisions of Section 104 (e) of CERCLA and Section 3007 of the Resource Conservation and Recovery Act (RCRA).³ Since the enactment of SARA and the implementation of CERCLA Section 104 (e) (5), RCRA Section 3007 requests no longer need to be incorporated solely for enforcement purposes.⁴ The language in SARA was intended to clarify and strengthen the authority of the EPA to gain access to facilities and to collect the information that is necessary to achieve the goals of the Superfund.⁵ The SARA amendments authorizing access and information gathering by the EPA confirm the broad authority that Congress originally intended for the agency when Congress enacted CERCLA in 1980.⁶

The Section 104 (e) request occupies a significant place in the EPA's discovery and enforcement arsenal. It grants the EPA the authority to mount inspections and to collect information from persons and entities involved with hazardous materials and thus directly facilitates the EPA's ability

to battle suspected polluters. The Section 104 (e) request helps the EPA generate the information that is necessary to:

- Establish liability among potentially responsible parties (PRPs).⁷
- Encourage PRP participation in the settlement process.
- Verify existing information that the agency may already have on file.
- Prepare a waste list to assist in the allocation of liability and costs among PRPs.

The EPA is so eager for information that it occasionally serves requests that are overreaching, so counsel's participation in the review of and response to a Section 104(e) request is crucial. Early in the process, counsel should make sure that 1) clients only reveal information that is absolutely necessary, 2) all privileges are maintained, and 3) the EPA's standards regarding the elements of a responsive request are clarified and tested. Tailoring a client's responses is extremely important, not least because the responses will become an integral part of the administrative record that serves as the basis of an enforcement action if one is later brought.

The EPA's information requests typically are broad enough to cover information that may be protected from disclosure by the

attorney-client privilege or the work-product privilege, so the recipient must specifically list each privilege that is being asserted along with a justification in support of the assertion. To further protect the client's interests, counsel also may assert a claim of confidential business information (CBI) pursuant to Section 104(e)(7)(F) of CERCLA. The CBI rules provide that the information that the client is seeking to protect must still be disclosed to the EPA, but certain public disclosure protections will be provided if the CBI statutory criteria are met.⁸ The mere assertion of a CBI claim thus does not provide a guarantee of confidentiality.

An issue that must be resolved during the preliminary stages of the information-gathering process is whether counsel's potential representation of the Section 104 (e) request recipient poses an actual conflict of interest. What if, for example, the client is not the owner/operator of the site, but the firm represents the owner/operator? As a general policy, counsel should 1) obtain the list of other parties receiving Section 104(e) requests, 2) review the list of other parties receiving Section 104(e) requests against the firm's client list, and 3) inform the client if other clients exist that might pose a potential conflict.⁹

Complying with the Request

Section 104(e) requests generally are sent early in the PRP search process to aid in establishing liability as well as clarifying the universe of PRPs.¹⁰ To obtain information, the EPA issues a Section 104(e) request to an identified party. The request will include

a brief description of the Superfund site and a general statement setting forth the purpose of the Section 104(e) request.¹¹ The Section

104(e) request additionally seeks:

- Information regarding the relationship of the PRP to the site.
- Business records relating to the site — including but not limited to manifests, invoices, and record books.
- Any data or reports regarding environmental monitoring or environmental investigations at the site.
- Descriptions and quantities of hazardous substances transported to, or stored, treated, or disposed at, the site.
- Any arrangements made to transport waste material to the site.
- Names of any transporters used in connection with the site.
- Information relating to the ability to pay for or perform a cleanup—if financial viability is (or will be) at issue and the EPA is unable to make such a financial assessment through a review of publicly available data.¹²

The Section 104(e) request also will contain a due date for either the recipient's response or the recipient's request for an extension that contains adequate justification for the recipient's inability to respond. The due date should reasonably reflect the type and volume of information that the agency anticipates will be responsive to its requests, but the EPA, in its guidance memorandum, has set 30 days as the norm.¹³

The scope of a Section 104(e) request may occasionally exceed the EPA's specific authority, in which case the recipient and counsel must negotiate with the EPA regarding the breadth of the request. Judicial review of a Sec-

tion 104(e) request in subsequent proceedings will be limited to the administrative record, so all correspondence reflecting the client's objections to specific requests should be kept as part of such a record.¹⁴

Once the Section 104(e) request is served, corporate counsel and senior management should become a part of the review and response process. Next, a person (or persons) within the firm with the requisite knowledge of the information being sought and its location should be designated. Then, if necessary, the EPA should be contacted for an extension as soon as it is determined that the requested information may take longer to compile than the time period specified in the information request. Under most circumstances, the EPA would prefer to provide a time extension rather than be forced into issuing a follow-up request or order.

Once information is designated as available or unavailable, the client then submits the response to the EPA in a manner that satisfies the agency's request but is also protective of confidential or privileged information. To avoid an assessment of a civil penalty, the response to the request must be adequate and complete, with the submission consisting of actual requested documents as well as a narrative or executive summary of the materials.¹⁵

When the deadline for responding to a Section 104(e) request expires and no response has been received, the EPA is required to send a reminder letter informing the unresponsive recipient of the possible actions that the agency is authorized to pursue and that Section 104(e) provides for a

penalty of up to \$27,500 per day for noncompliance.¹⁶ The EPA also must provide the recipient with an opportunity for consultation prior to the initiation of enforcement proceedings.¹⁷ The reminder letter specifies the final date after which a civil judicial or administrative enforcement action may be initiated.¹⁸ If the consultation takes place, EPA officials who participate generally will send a letter to the recipient summarizing the meeting and stating the EPA's position regarding any objections made by the recipient. If after the consultation the response to the EPA's request is still deemed unsatisfactory, the EPA may compel compliance either through an administrative or judicial action — just as it may even if a recipient takes advantage of the consultation but still fails to comply.¹⁹

Administrative Orders

The greatest mistake that the recipient of a Section 104(e) request can make is ignoring the request as well as the subsequent reminder letter. In doing so, a company faces the likelihood of an administrative order under CERCLA Section 104(e)(5)(A) or an enforcement action under CERCLA Section 104(e)(5)(B).

The EPA's first step in the enforcement process is likely to be an administrative order under Section 104(e)(5)(A) directing compliance with the Section 104(e) request. The order will generally include a finding by the EPA regional administrator that:

- The EPA has a reasonable basis to believe that there may be a release or threat of a release of a hazardous substance, pollutant, or contaminant at a given site.

- The EPA has issued the information request for the purpose of determining the need for a response, a response action, or the enforcement of CERCLA.
- The EPA has requested that the respondent provide information relating to one or more of the three categories of information identified in Section 104(e)(2)(A)-(C).
- The respondent did not comply with the request in a timely manner.²⁰

The order must also 1) state the date on which it becomes effective, 2) advise the recipient of the daily civil penalties that may be assessed, 3) indicate that an opportunity for consultation with the EPA was offered, and 4) include a summary of any and all contacts with the respondent.

Civil Enforcement Actions

If an administrative order does not lead to compliance with the Section 104(e) request, the EPA, through the Department of Justice, may commence a civil enforcement action under CERCLA Section 104(e)(5)(B), in which the EPA can seek injunctive relief and/or civil penalties of up to \$27,500 per day for inadequate responses to its information requests.²¹ The civil penalty provision under CERCLA Section 104(e)(5) applies to any person or entity that unreasonably fails to comply with a Section 104(e) request. The burden of proof requirement under Section 104(e)(5) provides that the government must only meet the standard of a "fair preponderance of the evidence." The government thus does not have to prove the defendant intended to act unreasonably — only that the defendant did so.

Once a prima facie case of unreasonable activity is established, the burden of proof shifts to the defendant to rebut the government by proffering affirmative defenses.²² In either an action to enforce an information request, or an administrative order for compliance with an information request, the court's review is limited to considering whether the information request is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."²³

If the information requests are in any way ambiguous or overreaching, then the burden is on the party served with the requests to alert the EPA by answering those portions of the requests that are clear and not overly broad and noting objections in all instances in which they are appropriate. The advantage of counsel's maintaining contact with the EPA early on in the process is clear, particularly when the information required for the response may be unavailable or additional time is needed. By noticing the EPA of any potential problems in advance and proposing a reasonable time frame for submission of the response, counsel can seek to prevent the EPA and the Justice Department from moving forward with an enforcement action against the client.

Preemptive strategies by counsel on behalf of the client are particularly significant because the result of an EPA enforcement action can be severe. For example, in *United States v. Charles George Trucking*,²⁴ a 1987 case, the Justice Department, on behalf of the EPA, brought suit for civil penalties against owners of a hazardous waste dump for their alleged failure to respond to the EPA's written

request for information. The information requests were issued by the EPA under the dual authority of RCRA Section 3007 and CERCLA Section 104. The Justice Department sought 1) a finding that the defendants had violated RCRA and CERCLA, 2) an order ensuring compliance with the information request, and 3) the imposition of penalties.²⁵ The district court held that the defendants' failure to answer the information requests violated both RCRA and CERCLA, ordered the defendants to answer 19 of the 27 information requests, and assessed civil penalties of \$120,000 apiece for their failure to reply.

In *United States v. Crown Roll Leaf, Inc.*,²⁶ a 1989 case, the EPA, under CERCLA Section 104(e) and RCRA Section 3007, requested written responses to questions and the production of documents regarding hazardous disposal activities at four Superfund hazardous waste sites. The EPA had served defendant Crown with a request to provide information not only in connection with Crown's generation, handling, and disposal of hazardous materials but also its transactions with several individuals and corporations involved in hazardous waste disposal activities at the sites. Crown failed to provide the requested information, and the court imposed a \$142,000 civil penalty for Crown's bad faith failure to respond to the EPA's information request. In reaching the decision to impose the civil penalty, the court first concluded that Crown had been in violation of the EPA's Section 104(e) request for 630 days and the RCRA information request for 790 days. The court, noting that it was authorized to enforce the

maximum daily civil penalties — a total of \$35 million — chose to exercise its discretion and assess a penalty of \$100 per day for a total penalty of \$142,000.

More recently, in *United States v. Tannery*,²⁷ a 1992 case, the court awarded \$12 million — the maximum civil penalty for the defendant's noncompliance with an information request — in one of the largest penalty judgments ever rendered for a violation of a CERCLA information request. A large award also was a factor in *United States v. Gurley*,²⁸ a 1993 case, in which the owner of a refinery faced fines exceeding \$9 million for resisting efforts by the EPA to obtain information about the refinery. These substantial penalties should serve as a deterrent for those companies even considering ignoring a Section 104(e) request.

Determining the Amount of a Civil Penalty

Once the government has proven that the recipient has been nonresponsive, it is up to the trial court to determine the magnitude of the civil penalty.²⁹ The court, in exercising its discretion, usually will look first to the statute in question for guidance, but Section 104(e)(5), CERCLA's civil penalty provision, does not offer any help for assembling a civil penalty. The court in *United States v. M. Genzale Plating, Inc.*³⁰ looked for "guidance by analogy" to CERCLA Section 109(a)(3), which empowers the United States to impose civil penalties administratively. The test set forth in Section 109(a)(3) includes a consideration of:

- 1) The nature, circumstances, extent, and gravity of the violation

(or violations).

- 2) The violator's ability to pay.
- 3) The violator's history of prior violations.
- 4) The degree of culpability.
- 5) The economic benefit or savings resulting from the violation.
- 6) Other matters as justice may require.³¹

Since *Genzale*, several courts have applied a similar test to determine civil penalties under CERCLA for a defendant's failure to respond to EPA information requests, as well as in other environmental enforcement cases.³² The courts have generally concluded that the civil penalty must act as a deterrent and thus create an incentive for other potential violators to comply with EPA information requests.

The failure to respond to a Section 104(e) request can lead to liability not only for a business entity but also for corporate officers, directors, and management level personnel.³³ Practitioners can assist their clients throughout the Section 104(e) request process by maintaining a dialogue with the EPA's staff. Cautious cooperation with the EPA on behalf of a client is not only beneficial for ongoing negotiations but also builds a track record of cooperation with the agency. Setting a positive tone for future dealings with the EPA can only be in the best interest of all stakeholders.

1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§9601 *et seq.* [hereinafter CERCLA], as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 94-499, 100 Stat. 1728 (1986) [hereinafter SARA].

2. SARA, *supra* note 1.

3. Resource Conservation and Recovery

Act, 42 U.S.C. §§6901 *et seq.* [hereinafter RCRA].

4. In appropriate circumstances, however, when RCRA information-gathering authorities are applicable, each regional office of the EPA may still consider citing RCRA §3007, since RCRA provides the option of enforcement in a proceeding before an administrative law judge.

5. H.R. 99-253(I), 99th Cong., 2d Sess. (1986).

6. S. 99-11, *accompanying* S. 51, at 26 (Mar. 18, 1985).

7. A PRP will generally fall under one of the categories defined

as a "person" under CERCLA §101(21):

[A]n individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, [the U.S.] [g]overnment, [s]tate municipality, commission, political subdivision of a [s]tate, or any interstate body.

8. The rules that the EPA has promulgated, which are derived from CERCLA §104(e) (7), prevent the release to the general public of confidential information gathered by the agency. Under 40 C.F.R. pt 2, subpt B, businesses are allowed to assert a claim of confidentiality covering all or part of the material subject to disclosure under a CERCLA §104(e) information request. This confidentiality claim does not shield a business from complying with the EPA's request — unlike a CBI claim, 40 C.F.R. §2.205(e), which, if approved, prevents the EPA from disclosing confidential materials to competitors or other entities that have requested release of the information in accordance with the EPA's disclosure policies contained in 40 C.F.R. §2.101.

9. 4 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7, cmt. 1.

10. Memorandum from Thomas L. Adams, Jr., Assistant Administrator, to Regional Administrators, Regional Counsel, and Directors of Waste Management Divisions, Transmittal of Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas (Aug. 25, 1988) [hereinafter EPA Guidance Memorandum].

11. *Id.* at 5.

12. *Id.* at 4.

13. *Id.* at 5.

14. *Id.*

15. *United States v. Barkman*, 784 F. Supp. 1181 (E.D. Pa. 1992).

16. EPA Guidance Memorandum, *supra* note 10, at 10. The reminder letter satisfies the EPA's administrative obligations to

pursue enforcement proceedings under CERCLA §104(e)(5)(A) as well as any due process requirements for record review.

17. EPA Guidance Memorandum, *supra* note 10, at 10.

18. *See* RCRA §3008(g), 42 U.S.C. §6928(g), *and* CERCLA §104(e)(5), 42 U.S.C. §9604(e)(5). Both provide, in pertinent part, that the court may assess a civil penalty not to exceed \$27,500 for each day of noncompliance against any person who is in violation of a CERCLA or RCRA information request.

19. EPA Guidance Memorandum, *supra* note 10, at 5.

20. *Id.* at 8.

21. *United States v. Barkman*, 784 F. Supp. 1181 (E.D. Pa. 1992).

22. EPA Guidance Memorandum, *supra* note 10, at 9.

23. CERCLA §104(e)(5)(B)(ii), 42 U.S.C. §9607 (e)(5)(B)(ii).

24. *United States v. Charles George Trucking*, 823 F. 2d (1st Cir. 1987).

25. *Barkman*, 784 F. Supp. 1181.

26. *United States v. Crown Roll Leaf, Inc.*, 20 *Env'tl. L Rep.* 20297 (D. N.J. 1989).

27. *United States v. Tannery*, No. 4-91-693-A (D.C. N. Tex., Dec. 1992).

28. *United States v. Gurley*, No. 93-2755 (D.C. W. Tenn., Aug. 27, 1993).

29. *See United States v. M. Genzale Plating, Inc.*, 807 F. Supp. 937, 938 (E.D. N.Y. 1992) (citing *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 229 (1975)).

30. *Id.*

31. CERCLA §109(a)(3), 42 U.S.C. §9609(a)(3).

32. *See, e.g., United States v. Barkman*, 784 F. Supp. 1181, 1189

(E.D. Pa. 1992); *United States v. Crown Roll Leaf, Inc.*, 20 *Env'tl. L Rep.* 20297 (D. NJ. 1989); *see also United States v. Vineland Chem. Co.*, 31 E.R.C. 1720, 1990 WL 157509 (D. NJ. 1990); *United States EPA v. Env'tl. Waste Control Inc.*, 710 F. Supp. 1172, 1242 (N.D. Ind. 1989), *aff'd*, 917 F. 2d 327 (7th Cir. 1990); *United States v. TasBrass & Bronze Works, Inc.*, 681 F. Supp. 314, 322 (D. S.C. 1988.).

33. *See* SARA, *supra* note 1.