



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 14 2004

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

Subject: Transmittal of Guidance on Issuing CERCLA Section 104(e)(2) Information Requests to Federal Agencies at Privately-owned Superfund Sites"

From: Susan Bromm, Director *Elvitt Gilbey for*
Office of Site Remediation Enforcement

To: Office of Regional Counsel, Regions I-V, VII, IX and X
Office of Regional Counsel, Superfund Division, Region VI
Office of Enforcement, Compliance & Environmental Justice, Region VIII

With this memorandum, I am transmitting the "Guidance on Issuing CERCLA Section 104(e)(2) Information Requests to Federal Agencies at Privately-owned Superfund Sites". The purpose of the memorandum is to assist the Regions with managing Superfund cases that have Federal agency potentially responsible parties (Fed PRPs). In the development of this document, OSRE incorporated comments from the Regions, the Office of General Counsel, the Federal Facilities Enforcement Office, and the Department of Justice (both the Environment Enforcement Section and the Environmental Defense Section).

If you have any questions or comments regarding Federal PRP issues in general or specifically regarding the attached guidance, please contact Antoinette Powell Dickson at (202) 564-0967.

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SUBJECT: Guidance on Issuing CERCLA Section 104(e)(2) Information Requests to Federal Agencies at Privately-owned Superfund Sites¹

FROM: Susan Bromm, Director /s - EG for SB/
Office of Site Remediation Enforcement

TO: Office of Regional Counsel, Regions I-V, VII, IX and X
Office of Regional Counsel, Superfund Division, Region VI
Office of Enforcement, Compliance & Environmental Justice, Region VIII

Section 104 of CERCLA provides EPA with the explicit authority empowering EPA to seek the release of information for the purpose of undertaking response activities. The purpose of the 104(e) information request is to seek information from any person who has or may have information relevant to the site regarding the release or threat of release of hazardous substances. Effective private, as well as federal, potentially responsible parties (PRPs) searches are fundamental to EPA's enforcement strategies of obtaining maximum PRP involvement in conducting or financing response activities.

This guidance highlights the importance of sending Section 104(e)(2) Information Requests ("Information Requests") to "federal agencies"² that are Potentially Responsible Parties ("Fed PRPs") under CERCLA for privately-owned sites, including Formerly Used Defense Sites ("FUDS"), Formerly Utilized Site Remedial Action Program sites ("FUSRAP") and mixed

¹ The guidance document is located at <http://intranet.epa.gov/oeca/osre/documents/internal/104e-fed-prp.pdf>.

² Federal agencies herein means all departments, agencies and instrumentalities of the United States. The term "Fed PRP" herein includes any federal agency that is the recipient of an Information Request without regard to whether that agency is liable for, or merely believed to have information about, a site.

ownership sites. This guidance: (a) recommends practices to help promote timely and complete Fed PRP responses to such Requests; (b) discusses the reasonable steps Federal PRPs should take to search for and provide responsive information and documents; and (c) recommends **actions Regions may take to address problems related to Information Requests to Fed PRPs.**

In sum, this memorandum is intended to encourage the greatest possible disclosure, without compromising enforcement matters or violating legal prohibitions or privileges against such disclosure between federal agencies. As described below, the Region generally should follow a three-pronged process to promote Fed PRP compliance with EPA Information Requests:

- Send the Information Request to the appropriate recipients;
- Follow-up promptly, in writing as necessary, if the Region receives a deficient or no response; and
- Promptly elevate, or otherwise address, remaining problems.

1. Importance of Sending Information Requests to Fed PRPs

Pursuant to Section 104(e)(2) of CERCLA, the Administrator, as a “duly designated” officer, employee, or representative of the President may require any person – including the United States government³ – who has or may have information relevant to any of the following to furnish, upon reasonable notice, information or documents relating to:

- The identification, nature, and quantity of materials which have been generated, treated, stored, disposed or transported to a vessel or facility;.
- The nature or extent of a release or threatened release of a hazardous substance, pollutant or contaminant at or from a vessel or facility; or
- The ability of a person to pay for or to perform a cleanup.

Section (j)(2) of Executive Order 12580 delegates the President’s broad Section 104(e) information-gathering authority to EPA.⁴ Furthermore, Section 120(a)(1) of CERCLA provides that “[e]ach department, agency and instrumentality of the United States . . . shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any non-governmental entity . . .” Therefore, federal agencies are required to

³ CERCLA Section 101(21) defines “person” as including the “. . . United States Government . . .” 42 U.S.C. § 9601(21).

⁴ E.O. 12580 Section 2(j)(2) delegates the President’s Section 104(e) authority to “the heads of Executive Departments and Agencies in order to carry out their functions under this Order or [CERCLA]”. Within EPA, Section 104(e) authority has been redelegated by the Administrator to the Assistant Administrator for Enforcement and Compliance Assurance, and Regional Administrators. See *Delegation 14-6, Inspections, Sampling, Information Gathering, Subpoenas and Entry for Response* (May 11, 1994). Typically, this authority has been further delegated within the Regions. Please check appropriate Regional delegations.

comply with Information Requests issued pursuant to Section 104(e).

Sending Information Requests to all PRPs, including federal agencies, is important for the development of thorough and accurate information about a site. Demanding timely, complete and accurate responses to such requests from all PRPs is critical to EPA's enforcement fairness policy.⁵ Regions should hold Fed PRPs to the same standards applicable to private PRPs, subject only to certain distinctions that result from legal requirements and limitations applicable solely to federal agencies.⁶ Accordingly, as with any other PRP, if at any time the Region believes that a federal agency has or may have information relevant to a site, the Region should send a Request to the Fed PRP even if enforcement activities for the site are at an advanced stage.

2. Sending Information Requests

a. Appropriate Recipients

The appropriate recipient of a Section 104(e) Request differs depending upon which Fed PRP is involved. In every instance, however, the Region should send a copy of the Information Request (and any follow-up letters) to the appropriate agency contact as identified in Attachment A⁷, with a copy to the appropriate staff attorney(s) in the U.S. Department of Justice Environmental Defense Section ("EDS") and Environmental Enforcement Section ("EES"). If no staff attorney has been assigned, send the documents to the appropriate Assistant Section Chiefs in EDS and EES.

Where a Department of Defense ("DoD") instrumentality is the Fed PRP, the Region should direct the Information Request to (a) the Point of Contact identified by DoD for that instrumentality; and (b) if the U.S. Army Corps of Engineers ("Corps") has assumed responsibility to address contamination at a FUDS, or FUSRAP site then also direct a courtesy copy request to the appropriate officials within the Corps' headquarters and field offices. See Attachment A (Fed PRPs Point of Contact for CERCLA Section 104(e) Information Requests).

Each Information Request should state clearly that if the Request has been sent to the wrong addressee within the federal agency, the person who received the Request should immediately call

⁵ See e.g., EPA's Interim CERCLA Settlement Policy, dated December 5, 1984 (OSWER Directive Number 9835.0); this policy was reiterated in the memorandum "Documentation of Reason(s) for Not Issuing CERCLA §106 UAOs to All Identified PRPs", signed August 2, 1996.

⁶ See EPA's "Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas", dated August 25, 1988 (OSWER Directive Number 9834.4A); this policy replaced the guidance document "Policy on Enforcing Information Requests in Hazardous Waste Cases", dated September 10, 1984, to the extent that the earlier guidance addressed information gathering under CERCLA §104(e); EPA's "Guidance on Practices for Addressing the Cleanup Liability of Federal Entities for Privately-Owned Sites", Barry Breen, May 22, 2002.

⁷ For an up to date contact list see <http://intranet.epa.gov/oeca/osre/documents/internal/104e-fed-prp-contacts.pdf>.

the EPA regional staff identified as the contact in the 104(e) letter, so that the Request can be redirected to the appropriate person.

Each Fed PRP to which an Information Request is directed has an independent obligation to provide responsive information and documents it has or may have in its possession or control. Where multiple federal agencies receive Information Requests regarding the same site, agencies should be encouraged to coordinate their responses to avoid submission of duplicative information. Avoiding submissions of duplicative information, however, does not mean that a Fed PRP may refuse to respond to an Information Request. Rather, the Fed PRPs should coordinate their efforts.

b. Contents of Information Request Letter

EPA has not issued a model Section 104(e) Information Request letter for Fed PRPs. Typically, Regions modify the Information Request letter developed for private PRPs so that they are appropriate for a governmental (rather than corporate) entity.⁸

c. Fed PRPs' Duty to Search and Supplement Responses

Pursuant to CERCLA § 104(e)(2), EPA may require that "any person" provide EPA with information or documents related to, among other things: (1) the identification, nature, and quantity of material generated, treated, disposed or transported to a facility; (2) the nature or extent of a hazardous substance release or threatened release at or from a facility; and (3) a person's ability to pay for or perform cleanup.

The recipient of an EPA Information Request is required to take any reasonable steps necessary in preparing its response. In *United States v. Ponderosa Fibres*,⁹ the District Court of New York, held that a private PRP was subject to civil penalties for unreasonably failing to respond to EPA's information request regarding the presence and release of hazardous substances, pollutants and contaminants at the Superfund site and failed to provide supplemental information to remedy responses later discovered to be inaccurate. The court held this to be true even if the PRP had a good faith belief that its responses were complete and accurate.

Like private PRPs, Fed PRPs should make a reasonable effort to search for responsive

⁸ See, e.g., "Disk Repository of Current CERCLA Section 104(e) Questions" (Feb. 29, 1996) at <http://intranet.epa.gov/oeca/osre>; "Sample Documents for More Effective Communication in CERCLA Section 104(e)(2) Information Requests" (June 30, 1995) at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/sample-doc-cercla-mem.pdf>; and "Guidance on the Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas," OSWER #9834.4-A, at Attachment # 1 (model Information Request)(Aug. 25, 1988) at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cercla-infreq-mem.pdf>.

⁹ 178 F. Supp. 2d 157 (N.D.N.Y. 2001) (PRP failed to respond until ninety-seven days after expiration of thirty day response period, information provided was incomplete and inaccurate).

information and documents that the federal agency “has or *may have*”¹⁰ – including looking for records that the agency may have in public archives and repositories. It is also important that, in accordance with EPA’s Information Request, federal agencies supplement their responses if any additional information relevant to the matters addressed in the Request becomes known or available to them.

An Information Request to a Fed PRP may give rise to a dispute regarding the federal agency’s obligation to look for records claimed to be in publicly available places.¹¹ This is an unresolved area of controversy between the agencies for which the Region should promptly utilize elevation or other management mechanisms to resolve disputes. See Section 3, below. The Region should contact the appropriate RSD Fed PRP Group member (identified below) to discuss dispute resolution options. Nevertheless, where a Fed PRP is aware of responsive materials that it claims are not within its custody or control, EPA expects the Fed PRP at a minimum to provide all information it does have regarding the location and how to access the responsive materials. The Fed PRP should not await resolution of the disputed issue before providing this information.

d. Protected Material

An Information Request to a Fed PRP also may give rise to a dispute regarding the federal agency’s obligation to provide EPA information and/or documents the federal agency claims as confidential and/or privileged by reason of privacy laws, national security considerations, or other reasons (herein, collectively, “Protected Material”).¹² As discussed above, the Region should contact its RSD Fed PRP Group member (below) to discuss dispute resolution options.

EPA gathers and controls a vast amount of Protected Material. Regardless of the manner by which information comes into possession of EPA, the agency has numerous responsibilities that attend to the custody and control of such information. CERCLA itself provides that the information gathered by EPA under 104(e) must be kept confidential if divulging the information would violate 18 U.S.C. § 1905 (prohibiting federal agents from disclosing any income return or any information relating to business operations, etc.). A Federal agency may assert a claim of confidentiality covering part or all of the information requested that might be covered under Section 104(e)(7), utilizing the procedures set forth in, Sections 104(e)(7)(E) and (F) of CERCLA, and 42 U.S.C. Section 6927(b), and 40 C.F.R. Section 2.203(b).

¹⁰ CERCLA §104(e)(2)(emphasis added).

¹¹ The Region should anticipate that a Fed PRP may cite to DOJ’s position in litigation that, in responding to discovery, an agency has no legal obligation to search or obtain documents from publicly accessible repositories like the National Archives, but would have to search any non-publicly accessible federal repositories. As noted, as a matter of inter-agency policy outside of litigation, this question is unresolved.

¹² Such information can also include Confidential Business Information that the Fed PRP has obtained in a regulatory capacity from a private party. This memorandum does not discuss the legal standard for claims of confidentiality or privilege.

Further, Section 104(e)(7)(F) states that certain information with respect to any hazardous substance at the facility shall not be entitled to protection under the confidentiality provisions, including the hazards posed by the substance, the disposal location of any waste stream, any monitoring data or analysis of monitoring data pertaining to disposal activities, any hydrogeologic or geologic data, and any groundwater monitoring data.

In EPA's view, factual information is not in and of itself protected, and EPA is entitled to receive copies of (rather than merely view) such material. Also, EPA maintains that a Fed PRP must provide EPA with any purely technical documents (e.g., sampling reports) and any other responsive material notwithstanding the Fed PRP's assertions that the items are Protected Material. EPA recognizes, however, that disputes may arise regarding documents that a Fed PRP (or DOJ) believes constitute Protected Material. Where such a dispute arises and a Region believes the information is important to EPA's enforcement or cleanup program, it should request that the Fed PRP provide the Protected Material. The Region should confirm that it will take all reasonable and necessary steps to maintain the confidentiality of, or privilege relating to, information being claimed as Protected Material and will not disclose the existence of or release such Material without the agreement of the Fed PRP (and DOJ where a litigation privilege is at issue). Until a decision is made to release the information being claimed as Protected Material, the Material should not be included or identified in EPA's publicly-available indices or records.

The burden of identifying Protected Material and the basis for its protected status is on the Fed PRP. If a claim of protected status is made for any of the information submitted to EPA, the Fed PRP must clearly identify the materials that are subject to the agency's assertion of protected status, provide redacted and non-redacted copies of documents containing both protected and non-protected material, segregate such documents from other non-protected materials, and provide a written explanation of the legal basis for the protected status, including a description of how the agency has protected the information from disclosure, and the harm alleged to result from disclosure.

In accordance with EPA regulations, when a citizen request for EPA records encompasses records of another Federal agency that were provided to EPA pursuant to a Section 104(e) request and claimed to be Protected Material, EPA shall either: (a) respond to the request after consulting with and obtaining the consent of the originating agency or (b) promptly transfer responsibility for responding to the request to the originating agency provided that the other agency is subject to the FOIA.¹³ EPA shall then notify the requestor of the transfer.

3. Follow-up on Late or Incomplete Responses, or if No Response

In resolving disputes concerning Information Requests to Fed PRPs, it is very important that the Region be able to show its attempts to obtain prompt and complete responses by, for example, having directed (or copied) Information Requests and follow-up communications to all appropriate parties.

¹³ 40 C.F.R. § 2.111(d).

a. Follow-up Letters

If a Fed PRP does not respond to EPA's Information Request in a timely manner, the Region should send the Fed PRP a follow-up letter reminding the federal agency of its obligation to respond and, again, requesting a response within a specified number of days. Similarly, if a Fed PRP does not submit a complete response, the Region should send the Fed PRP a follow-up letter identifying how the response is incomplete and requesting a completed response by a specified deadline. Again, the Region should copy the appropriate EES and EDS attorneys on any follow-up correspondence to a federal agency. If no staff attorney has been assigned, send any follow-up correspondence to the Assistant Section Chiefs in EDS and EES.

b. Elevation

Where a follow-up letter fails to elicit a prompt and/or complete response, the Region should promptly inform its RSD Fed PRP Group member (identified below), and the assigned EES and EDS staff attorneys (or appropriate Assistant Section Chiefs if no staff attorney has been assigned). Regions should provide a description of their attempts to obtain a response from the Fed PRP. These contacts will work with the Region to elevate the matter to the appropriate-level managers within OSRE, and the Fed PRP (and EES and EDS where appropriate) to resolve the problem. Generally, elevation requires only that a matter be vetted orally among progressively higher level personnel within EPA, the Fed PRP, EES, and EDS until agreement is reached.

DOJ/EPA Regional Docket meetings and inter-agency coordination meetings between EPA and Fed PRPs may also serve as an appropriate forum to raise any outstanding Information Requests and problems related to tardy and incomplete responses. The Region, however, need not await the next Regional Docket meeting before commencing elevation and other informal means of dispute resolution.

c. Other Approaches

Where follow-up letters, calls and elevation do not result in EPA's receipt of a complete Fed PRP response, the Region may consider pursuing formal enforcement approaches, consistent with the Region's practice with non-cooperative private PRPs, such as the issuance of a Unilateral Administrative Order ("UAO") pursuant to CERCLA Section 104(e)(5)(A).¹⁴ The Region also may issue an information request pursuant to Section 3007 of the Resource Conservation and Recovery Act ("RCRA") 42 U.S.C. § 6927.¹⁵

¹⁴ DOJ concurrence on such orders to Fed PRPs is required by Executive Order No. 12580, §4(e), 52 Fed. Reg. 2,923 (Jan. 29, 1987).

¹⁵ If a Fed PRP does not comply with the terms of an information request issued pursuant to RCRA Section 3007, EPA may issue a RCRA Section 3008 Compliance Order with penalties and the Fed PRP's non-compliance with the Information Request may be resolved by an EPA Administrative Law Judge. 40 C.F.R. Part 22.

4. OSRE-Regional Interface

As noted above, OSRE encourages discussion of Section 104(e)(2) Information Requests to Fed PRPs as a standing item for every DOJ/EPA Regional Docket meeting. The Region may request that the appropriate RSD Fed PRP Group member (identified below) participate in these discussions. RSD's Fed PRP personnel are also available for individual consultation with the Regions, and to help steward any elevation activities.

RSD's Fed PRP Contact Persons are as follows:

Contact	For Regions	Telephone
Benjamin Lammie	Branch Chief	(202) 564 - 7126
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Robert Roberts	Regions 3, 7 and 9	(202) 564 - 4267
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Attachment A

FPRPs Points of Contact for CERCLA Section 104(e) Information Requests

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