



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

AUG 30 1991

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Recommendations Concerning the Use and Issuance of
Administrative Subpoenas under CERCLA Section 122

FROM: William A. White *WAW*
Enforcement Counsel for Superfund

TO: Regional Counsel
Regions I - X

It has come to my attention that the Agency does not often exercise its administrative subpoena authority under CERCLA Section 122(e)(3)(B) in the course of prosecuting and settling enforcement cases. This provision gives EPA broad authority to issue subpoenas administratively to require the attendance and testimony of witnesses and the production of documents. Because subpoenas may be used both for gathering information about a party's contributions of waste to a site as well as for "otherwise implementing" Section 122, they may be issued in connection with or prior to formal negotiations with PRPs, or where the Agency judges that available information points to favorable prospects for settlement. I strongly encourage the use of this underutilized information gathering mechanism.

As a practical matter, subpoenas may and should be issued whenever responses to Section 104(e) information requests indicate that a person is connected to a site as a potentially responsible party, and that settlement may be an appropriate resolution of the matter. In addition, because responses to Section 104(e) information requests are sometimes oblique, further investigation using the Section 122 subpoena authority is an efficient manner in which to determine whether a 104(e) recipient has fully provided all relevant information about its contributions to and connections with a site. In addition, the subpoena may be used to gather other information relevant to issues for settlement purposes. See United States v. Northside Sanitary Landfill, Inc., Misc. No. 89-85 (S.D. Ind. May 4, 1990) (use of CERCLA subpoena to gather financial information upheld, over recipient's objection).

The August 25, 1988 "Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas" (which is being re-transmitted with this Memorandum as Attachment 1) discusses some of the Agency's administrative information gathering authorities in more detail, and should be consulted when considering and drafting any subpoenas to be issued pursuant to Section 122(e)(3)(B). While this 1988 document has proven to be effective and useful guidance, the model subpoena included as Attachment 2 omits a statement notifying the recipient of the treatment of Confidential Business Information (CBI). The omission of a CBI notice does not render the subpoena invalid or unenforceable; however, the failure to inform a party that it may claim certain information as CBI may complicate and delay the use of information that is gathered pursuant to Section 122. To eliminate this as an issue in enforcement cases, administrative subpoenas should clearly state that the recipient may claim certain information confidential pursuant to the Agency's regulations in 40 C.F.R. Part 2. This oversight is remedied in the revised model subpoena attached to this memorandum (see Attachment 2).

In addition, to minimize the opportunity for challenges to administrative subpoenas issued under Section 122, the following safeguards should be observed:

The subpoena should --

- o Identify clearly the site name and location, and the issuing Regional Office.
- o Include a statement of the Agency's authority to issue the subpoena and the purpose for which the information is sought.
- o Describe and/or identify as specifically as possible the information required to be provided by the recipient. As specific a listing of the documents or areas of inquiry (either as an attachment or within the body of the subpoena) is strongly recommended.
- o Identify with certainty the person to whom it is issued. In the case of a corporation, partnership, or other organization, the subpoena must be directed to an officer, partner, agent, or other person authorized by law to receive service of process.
- o Be delivered by personal service or certified mail (return receipt requested). The use of Post Office Boxes for service by certified mail is discouraged, but permissible where no better address is available. A certificate of service should be executed and maintained to accompany the

issuance of every subpoena, even when delivery is by certified mail, as a regularly maintained business record of the Agency.

- o Advise the recipient of the potential sanction for the failure to comply with the subpoena.
- o Advise the recipient of the right to claim certain information as confidential.
- o Specify a time and place for attendance of the witness and/or for the delivery of documents.
- o Provide the name and telephone number of a person whom the recipient can contact for consultation or questions concerning the subpoena. It is recommended that the designated Agency contact be the Assistant Regional Attorney assigned to the case.
- o Specify the date that the subpoena is issued, and be signed by the Regional Administrator (or his delegatee).
- o Be accompanied by a cover letter to the recipient explaining that the subpoena requires them to appear at the time and place specified, and the purpose for the subpoena. The letter should also include a brief statement identifying the information sought.

Finally, under CERCLA Delegation 14-6, Headquarters must be consulted prior to the issuance of a Section 122 administrative subpoena. While consultation is not a legal prerequisite to enforcement of a subpoena, our experience has confirmed the value of the consultation requirement. Consultation consists of Headquarters review of the draft subpoena, cover letter to the recipient, and certificate of service, and a brief discussion with the Regional attorney to review the facts and circumstances surrounding issuance of the subpoena. The consultation process allows the issuing Region to draw on the experience gained from the issuance of subpoenas nationwide, and provides assurance that the subpoena satisfies the minimum legal requirements for enforceability.

The time necessary for a prior consultation between the Regional and Headquarters delegatee is not long, and is usually completed within 24 hours of the request (often on the same day). To further expedite the process, it is recommended that the draft subpoena be telefaxed to Headquarters (FTS 260-3069) before calling to consult. The Headquarters attorney designated by me for consultation is John Fogarty (FTS 260-8865) (See the companion memorandum issued today entitled "Consultation with OE under CERCLA Delegation 14-6"). If John is unavailable, please contact Michael Northridge (FTS 260-3586).

cc: Don Clay, Assistant Administrator
for Solid Waste and Emergency Response
Bruce Diamond, Director, OWPE
Sally Mansbach, Acting Director, CERCLA Enforcement
Division, OWPE
Regional Administrators, Regions I - X
Regional Waste Management Division Directors, Regions I - X

Attachment 2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION []
[Street Address]
[City, State, Zip Code]

IN THE MATTER OF:) [No. _____]
)
[Site Name]) SUBPOENA DUCES TECUM AND
[Site Address]) SUBPOENA AD TESTIFICANDUM
[City, State])
_____)

TO: _____
_____, RESPONDENT:

Pursuant to the authority of Section 122(e)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (CERCLA), the United States Environmental Protection Agency (U.S. EPA) is issuing this subpoena for the purpose of determining liability and otherwise implementing Section 122 of CERCLA by collecting information relating to [INSERT DESCRIPTION OF THE INFORMATION SOUGHT AND THE SITE NAME].

YOU ARE HEREBY COMMANDED TO APPEAR IN PERSON at the following place and time:

TIME AND DATE: _____
PLACE: _____

At the above time and place, the U.S. EPA will take the statement of [NAME OF RESPONDENT], regarding hazardous substances at the [NAME OF SITE], upon oral examination before a court reporter or other officer authorized by law to take sworn statements.

YOU ARE COMMANDED FURTHER TO TESTIFY THEN AND THERE UNDER OATH, GIVE ORAL AND TRUTHFUL RESPONSES to all lawful inquiries and

questions put to you on behalf of the U.S. EPA, and TO REMAIN IN ATTENDANCE until expressly excused by the attorney conducting the proceeding for the U.S. EPA.

YOU ARE COMMANDED FURTHER TO BRING WITH YOU, at the time and place stated above, and then and there produce for inspection and/or copying, all documents and/or records in your possession which relate to the [INSERT NAME AND LOCATION OF SITE], including, but not limited to those items identified and described [INSERT "below:" OR "on the attached page(s)."].

You are entitled to claim confidentiality over the information provided to U.S. EPA, in accordance with 40 C.F.R. Part 2.

FAILURE TO COMPLY WITH THIS SUBPOENA MAY SUBJECT YOU TO A CIVIL ENFORCEMENT ACTION.

Issued at [CITY, STATE] this _____ day of _____, 199_.

[NAME OF RA OR DELEGATEE]
[TITLE]
U.S. EPA REGION []

Any questions concerning this subpoena should be directed to [INSERT NAME OF ASSISTANT REGIONAL COUNSEL, ADDRESS, AND TELEPHONE NUMBER]