



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

AUG 25 1988

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Transmittal of Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas

FROM: Thomas L. Adams, Jr. *Thomas L. Adams*  
Assistant Administrator

TO: Regional Administrators, Regions I - X  
Regional Counsel, Regions I - X  
Directors, Waste Management Divisions, Regions I - X

With this memorandum, I am transmitting guidance on the use and enforcement of EPA's information gathering authorities under CERCLA §§ 104(e) and 122(e)(3)(B). The attached guidance document replaces existing guidance entitled, "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).

Attachment

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Guidance on Use and Enforcement of CERCLA  
Information Requests and Administrative Subpoenas

**GUIDANCE ON USE AND ENFORCEMENT OF CERCLA INFORMATION REQUESTS  
AND ADMINISTRATIVE SUBPOENAS**

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I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), provides EPA with several methods of obtaining various types of information from a wide range of entities<sup>1</sup>. Section 104(e), entitled "Information Gathering and Access," grants EPA the authority to issue "information requests." Section 122(e)(3)(B), entitled, "Collection of Information," authorizes the use of administrative subpoenas. These information-gathering tools and enforcement powers represent a significant improvement in EPA's

<sup>1</sup> This guidance focuses solely on information gathering in the context of civil enforcement. In instances where a criminal enforcement action is contemplated or pending, Regional personnel should consult with OECM - Office of Criminal Enforcement, before proceeding with information gathering under CERCLA.

ability to obtain information. A full exercise of these authorities, including taking enforcement action when necessary, can aid considerably in the implementation of CERCLA, and the attainment of statutorily mandated goals.

This guidance <sup>2</sup> serves two purposes: 1) it gives an overview of the information-gathering tools under CERCLA §§104(e) and 122(e)(3)(B), and 2) it focuses on the steps to be taken throughout the information-gathering process to ensure that EPA is in the strongest possible position to enforce an information request or subpoena, <sup>3</sup> if necessary.

## II. BACKGROUND

### A. Prior Information-Gathering Authorities

Prior to the enactment of SARA, information regarding hazardous waste sites was gathered primarily under the pre-SARA provisions of CERCLA §104(e) and RCRA §3007. Section 104(e)(5), authorizing administrative orders, civil actions and penalties of up to \$25,000 for each day of noncompliance, now eliminates the need to incorporate RCRA §3007 solely for enforcement purposes. However, in appropriate circumstances where RCRA information gathering authorities are applicable, Regions may

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<sup>2</sup> This guidance replaces existing guidance entitled, "Policy on Enforcing Information Requests in Hazardous Waste Cases," dated September 10, 1984, to the extent that the previous guidance addressed information gathering under CERCLA §104(e).

<sup>3</sup> CERCLA §109(a)(5), as amended, also authorizes EPA to use administrative subpoenas "in conjunction with hearings" on Class I administrative penalties. This guidance does not specifically address the use of administrative subpoenas in that context.

still consider citing §3007 since RCRA provides the option of enforcement in a proceeding before an administrative law judge.<sup>4</sup>

The administrative subpoena authority in CERCLA §122 is new to CERCLA. However, it is similar to the authority contained in §11(c) of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2610(c).<sup>5</sup>

B. Administrative Information-Gathering Distinguished from Discovery

As an initial matter, a distinction must be drawn between an investigation conducted by an administrative agency such as EPA and the information-gathering that commonly takes place during the discovery phase of a civil action. An administrative investigation is related in some way to implementation of an agency's statutory responsibilities. The manner and extent of the investigations are prescribed by the authorizing statute. Such an investigation may ultimately lead to the filing of a civil action, (at which time both parties may be allowed discovery), or it may simply be related to an agency's ongoing oversight activities.

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<sup>4</sup> More extensive guidance on information-gathering under RCRA §3007 may be found in the guidance, "Policy on Enforcing Information Requests in Hazardous Waste Cases," OECM, September 10, 1984.

<sup>5</sup> The use of TSCA §11(c) subpoena authority was recently upheld by the Ninth Circuit in EPA v. Alyeska Pipeline Serv. Co., 836 F.2d 443, 446-48 (9th Cir. 1988). In that case, the Court upheld the use of a TSCA subpoena to gather information relevant to a lawful inquiry under TSCA, even though the Court recognized that other environmental statutes, specifically the Clean Water Act, may later prove to be a more appropriate means of addressing the environmental problem under investigation.

Discovery, on the other hand, is conducted after an action is filed in court. The Federal Rules of Civil Procedure govern the manner and scope of this type of information-gathering.<sup>6</sup>

During the course of both an administrative investigation and discovery, a party may be required to provide oral testimony or produce documents.<sup>7</sup> However, the information-gathering tools used in an administrative investigation, and discussed in this guidance, are not the legal or functional equivalents of the more familiar interrogatory, deposition or request for production of documents.<sup>8</sup>

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<sup>6</sup> Nonetheless the Agency is not precluded from using its administrative information gathering authority once a civil action is commenced. In re Stanley Plating Co., Inc., 637 F. Supp. 71 (D. Conn. 1986), United States v. Browning - Ferris Chemical Services, et al., No. 87-317-B (M.D. La., November 16, 1987).

<sup>7</sup> It should be noted that since there is no opportunity for cross-examination, testimony obtained by administrative subpoena might not be admissible at trial. If the Agency wishes to preserve a respondent's testimony for trial, rather than use it only to develop other admissible evidence, two options are available. First, when it becomes clear that the testimony is necessary for trial, the respondent's deposition can be taken in the usual course of discovery. Alternatively, if the Agency expects to bring an enforcement action and it is not likely that the respondent will be available later during the discovery phase of the case, it may be possible to preserve a witness' testimony pursuant to Fed.R.Civ.P. 27 either in lieu of issuing an administrative subpoena, or following the issuance of a subpoena. See, Petition of Gary Constr., Inc., 96 F.R.D. 432, 433 (D.Colo. 1983), Ash v. Cort, 512 F. 2d 909, 911-913 (3d Cir. 1975), In re Boland, 79 F.R.D. 665, 667 (D.D.C. 1978), Petition of Benjamin, 52 F.R.D. 407 (E.D. La. 1971).

<sup>8</sup> The Notes of the Advisory Committee on the Federal Rules of Civil Procedure explicitly state that the provisions of Fed.R.Civ.P. 45 (Subpoenas) do not apply to administrative subpoenas. Other Rules are less explicit but are  
(continued...)

In U.S. v. Morton Salt Co., 338 U.S. 632, 642-643 (1950), the Supreme Court described the difference between administrative investigatory power and a court's adjudicatory power in the following manner:

The only power that is involved here is the power to get information from those who can best give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

Limitations on this information seeking power do exist. However, the limitations themselves are narrow in scope.

Of course a governmental investigation ... may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power... But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. Id. at 652 (citations omitted).

Thus, there are three basic parameters which are relevant to a request for information or an administrative subpoena. It must be:

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<sup>8</sup>(...continued)

also, by their terms, inapplicable. For example, Fed.R.Civ.P. 26 (General Provisions Governing Discovery) contemplates an ongoing oversight role of the court. In administrative information gathering, the court has no role unless specifically petitioned by the government to enforce a subpoena or information request. See, Belle Fourche Pipeline Co. v. U.S., 751 F.2d 332, 334 (10th Cir. 1984), citing Reisman v. Caplin, 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964).



1. Within the underlying statutory authority of the agency;
2. Sufficiently definite/specific;
3. Reasonably relevant to the agency's basic inquiry.

In addition, it should be noted that courts may also consider whether a request is unduly burdensome.<sup>9</sup>

### III. DELEGATED AUTHORITY TO USE INFORMATION GATHERING TOOLS

On January 23, 1987, the President signed Executive Order 12580 delegating information-gathering authority in §§ 104(e) and 122 to the Administrator of EPA.<sup>10</sup> This authority was, in turn, delegated from the Administrator to the Assistant Administrator for Solid Waste and Emergency Response, the Assistant Administrator for Enforcement and Compliance Monitoring and the Regional Administrators by Delegation 14-6, "Inspections, Sampling, Information Gathering, Subpoenas and Entry for Response," signed on September 13, 1987.

Under Delegation 14-6, the authority of the Regional Administrator and the Assistant Administrator for Solid Waste and Emergency Response to issue compliance orders or subpoenas is limited by the requirement that they first consult with the Assistant Administrator for Enforcement and Compliance

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<sup>9</sup> See, e.g., F.T.C. v. Texaco, 555 F.2d 862, 882 (D.C. Cir. 1977), where the court stated,

the question is whether the demand is unduly burdensome or unreasonably broad. Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest.

<sup>10</sup> The Administrator's authority, however, is limited with regard to federal facilities. (See Sections 3(j)(1) and 3(b)(1) of Executive Order 12580.)

Monitoring or his/her designee. On November 19, 1987, the Assistant Administrator for Enforcement and Compliance Monitoring re delegated his consultation authority under Delegation 14-6 to the Associate Enforcement Counsel for Waste.

#### IV. SCOPE AND TIMING OF INFORMATION GATHERING PROCEDURES

##### A. Information Requests

The scope of investigation authorized by CERCLA §104(e) is broad. CERCLA §104(e)(2), as amended by SARA, provides:

Any [duly authorized] officer, employee, or representative [of the President]... may require any person who has or may have information relevant to any of the following to furnish, upon reasonable notice, information or documents relating to such matter:

(A) The identification, nature, and quantity of materials which have been or are generated, treated, stored, or disposed of at a vessel or facility or transported to a vessel or facility.

(B) The nature or extent of a release or threatened release of a hazardous substance or pollutant or contaminant at or from a vessel or facility.

(C) Information relating to the ability of a person to pay for or to perform a cleanup.

In addition, upon reasonable notice, such person either (i) shall grant any such officer, employee, or representative access at all reasonable times to any vessel, facility, establishment, place, property, or location to inspect and copy all documents or records relating to such matters or (ii) shall copy and furnish to the officer, employee, or representative all such documents or records at the option and expense of such person. (Emphasis added.)

Section 104(e)(1) provides:

The authority of this subsection may be exercised only for the purposes of determining the need for response, or choosing or taking any response action under this title, or otherwise enforcing the provisions of this title. (Emphasis added.)

Initial attempts to gather information about a given site commonly will be through the use of information requests issued under CERCLA §104(e). While an information request may be sent in advance of a general notice letter, as a component of the general notice letter, or after the general notice letter, as needed, <sup>11</sup> an effort should be made to issue initial information requests earlier rather than later in the PRP search process to aid in the process of establishing liability and clarifying the universe of PRPs. Initial information requests typically should seek the following types of information:

- 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;
- where financial viability is or will be at issue, and the Agency is unable to assess financial viability effectively through review of publicly available

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<sup>11</sup> For further information on notice letters, their timing, and content, see "Interim Guidance on Notice Letters, Negotiations and Information Exchange," 53 Fed. Reg. 5298 (Feb. 23, 1988).

data,<sup>12</sup> information relating to ability to pay for or perform a cleanup;<sup>13</sup>

Where financial viability is or will be at issue, information requests regarding insurance coverage should strike a balance between the need to make an initial determination about the extent of an insured's coverage and the need to avoid requiring an insured to construe the coverage of its policies. If a request is overly specific, and a party (the insured) fails to identify insurance that may afford coverage regarding a response action, the insurer may attempt to use that failure to identify the policy in the information request to avoid payment

<sup>12</sup> The ability to obtain financial information about a PRP from a source other than the PRP itself is limited by the Right to Financial Privacy Act, 12 U.S.C. 3401, et seq., which limits Government access to a customer's financial records at a financial institution in accordance with the provisions of the Act. In most cases, it will not be necessary to seek information about a PRP's assets from a financial institution. That information can be obtained from a PRP as a condition of negotiation if the PRP raises ability to pay as an issue. If circumstances arise where a Region believes that it is necessary to obtain information from a financial institution, it should first consult with Headquarters.

<sup>13</sup> Under CERCLA §104(e)(2)(c), EPA now has explicit authority to request information relating to the ability of a person to pay for or perform a cleanup. Before it was amended, CERCLA §104 authorized EPA simply to obtain "information relating to [hazardous] substances." EPA typically construed this language to include all information that EPA considered relevant to any aspect of enforcement. In U.S. v. Charles George Trucking Co., 624 F. Supp. 1185 (D. Mass.), aff'd on other grounds, 823 F.2d 685 (1st Cir. 1987), the court took issue with EPA's broad interpretation of "information relating to [hazardous] substances" and denied EPA's request for information relating to a defendant's ability to pay for or perform a cleanup. The court held that information about assets and insurance coverage "in no way informs EPA about the hazardous substances involved." 624 F. Supp. at 1188. This decision is no longer supported in light of CERCLA §104(e)(2)(c).

under the policy. Failure to identify the policy in a response to an information request may tend to show that the insured did not intend to address that type of liability with the policy in issue. Such subjective intent is often critical in litigation over the extent of coverage of insurance policies. The ultimate result might be that potentially fewer funds would be available for a response action, and the potential for settlement diminished.

Hence, requests for information about insurance policies should be as neutral as possible. Rather than seeking information about discrete periods of time during which it is suspected that a given party may be active at a site, the information request should cover the period from the first known instance of waste disposal to the present. Terms such as "pollution exclusion," "sudden," "non-sudden," or "accidental" should be avoided and the insured should not be asked to state whether its insurance contains such exclusions or coverage. Instead, the information request should simply ask the insured to provide a list of all property and casualty insurance (e.g. comprehensive general liability, environmental impairment and automobile liability insurance) and to specify the insurer, policy, effective dates, and per occurrence policy limits for each policy. In this way, the Agency obtains the information it needs to make an initial determination about insurance coverage, and the insured has not compromised any potential insurance coverage should it ultimately be liable for any response costs.

In the alternative, the insured may always be given the option of providing copies of the policies themselves. A similar, general request about directors' and officers' insurance may also be made in situations where personal liability of a corporation's directors or officers is or will be at issue.

Information requests should include a brief identification and description of the site, a citation to the statutory authority, and a general statement setting forth the purpose of the request and its relation to the overall case. An information request should also state the date by which the recipient must respond or adequately justify his inability to respond. This due date should reasonably reflect the type and volume of information that the agency anticipates will be responsive to the request. Thirty days is usually adequate. In addition, the information request should state that the respondent may have an opportunity for consultation with the Agency, and that failure to respond may give rise to a penalty. An information request should also require the recipient to indicate the types of files searched in response to the request, and ask the recipient to submit an affidavit describing his search efforts if the search does not disclose any of the information sought. <sup>14</sup>

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<sup>14</sup> Previous guidance, "Policy on Enforcing Information Requests in Hazardous Waste Cases", September 10, 1984, suggested that an affidavit be requested in a second, "reminder" letter. However, by including an affidavit request with a request for a description of the types of files searched in the initial information request, one can more quickly

(continued...)

A model information request, largely developed by Region I, is attached as Attachment 1.

B. Administrative Subpoenas

Section 122(e)(3)(B) gives EPA the power to issue administrative subpoenas requiring the attendance and testimony of witnesses (referred to as a subpoena ad testificandum) and the production of documents (referred to as a subpoena duces tecum). Such subpoenas may be issued as is "necessary and appropriate" for performing a non-binding preliminary allocation of responsibility (NBAR) "or for otherwise implementing" CERCLA Section 122.

Since the language of §122 is broad and permits the use of administrative subpoenas "for otherwise implementing [Section 122]," there is no requirement that EPA first decide to prepare an NBAR before issuing an administrative subpoena or that the information gathered by an administrative subpoena be used only for an NBAR.<sup>15</sup> Instead, an administrative subpoena may be used once the Agency has begun to implement the settlement process under §122 (e.g. through initiation of informal discussions or

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<sup>14</sup>(...continued)  
determine which information requests should be followed up with an enforcement action.

<sup>15</sup> Nonetheless, the factors that may be considered when preparing an NBAR are a useful outline of the types of information that may be reached, at a minimum, with an administrative subpoena. These factors are set forth in §122(e)(3) and include: "volume and toxicity of wastes, strength of the evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors."

formal negotiations with some or all affected PRPs, or where the Agency judges that available information points to favorable prospects for settlement). Since the use of administrative subpoenas may be judicially challenged, it is important to identify and document the reasons relied upon in deciding to use the authority in §122(e)(3)(B). In particular, it is important to be able to show how the subpoena's issuance either furthers the NBAR process or meets the criteria of "otherwise implementing this section."

Although there is no statutory prohibition against doing so, a subpoena generally should not be used in the first instance to gather information. Rather, a §104(e) information request is the preferred method of obtaining information.

#### V. SERVICE OF INFORMATION REQUESTS AND SUBPOENAS

Information request letters are a formal means of obtaining information, and consequently should be served by registered or certified mail, return receipt requested. (Note that when serving any document by registered or certified mail, post office box addresses should be avoided.)

Service of a subpoena can be effectuated in a number of ways depending upon the circumstances of the investigation. Whenever possible, personal service is preferable, especially when it is likely that the subpoena may be ignored or challenged. When personal service is not practical, a subpoena can be served by registered or certified mail, return receipt requested. Regardless of the method of service, the correct



person **must be served**. Service upon a domestic corporation, or upon a partnership or other unincorporated association, should be made by personal service or certified mail to an officer, partner, managing or general agent, or to any other person authorized by law to receive service of process. The person serving the subpoena, including the person who actually mails the subpoena when that method of service is used, must complete an affidavit of service at the time of service. (See Attachment 2 for a model subpoena and affidavit of service.)

The statute places no explicit limit on the distance that a witness may be required to travel to appear in response to a subpoena. Potential locations for such an appearance include an EPA regional office, EPA Headquarters, a local U.S. Attorney's office, a court reporter's office, or any other location considered appropriate under the circumstances.

## VI. GENERAL DUE PROCESS CONSIDERATIONS IN INVESTIGATIVE PROCEEDINGS PURSUANT TO AN ADMINISTRATIVE SUBPOENA

### A. Agency Adjudications and Investigations Distinguished

When an agency such as the EPA orders a person to appear at an agency proceeding, the procedural rights of the person ordered to appear vary depending upon whether the agency's purpose is to adjudicate or to investigate. Examples of EPA adjudication include the issuance of compliance orders or the assessment of civil penalties under §3008(a) of RCRA. Before the Agency may issue a compliance order or assess civil penalties under RCRA §3008(a), the person against whom the Agency is taking action is accorded the procedural rights set

forth in 40 CFR Part 22.<sup>16</sup> These rights are similar to those of a defendant in a civil trial and include the right to notice, to submit evidence, and to cross-examine.

In contrast, when an agency issues an administrative subpoena pursuant to §122(e)(3)(B), its purpose is only to investigate or gather information and "it is not necessary that the full panoply of judicial procedures be used." Hannah v. Larche, 363 U.S. 420, 442 (1960).

[W]hen...agencies are conducting nonadjudicative, fact-finding investigations, rights such as appraisal, confrontation, or cross-examination generally do not obtain. Id. at 446.

Despite this limitation, a witness may nonetheless invoke his Fifth Amendment privilege as to particular questions presenting a threat of self-incrimination. U.S. v. Malnik, 489 F.2d 682, 685 (5th Cir. 1974).

B. Role of Witness' Counsel at Administrative Subpoena Proceedings

The practical effect of the fact that witnesses have limited procedural rights during information-gathering under an administrative subpoena is that the role of a witness' counsel is limited. Although §555(b) of the Administrative Procedure Act (APA) provides a person with the right to counsel at any

<sup>16</sup> Part 22 procedures do not apply to compliance orders issued under CERCLA §104(e)(5). Due process is assured under §104(e)(5) by the statutory requirements that the respondent have an opportunity to confer with the Agency prior to issuance of the order (discussed below) and that orders be enforced by commencing a civil action. Similarly, Part 22 procedures do not apply to the assessment of penalties under §104(e) as that can only be accomplished by commencing a civil action.

agency proceeding at which he is compelled to appear, "representation" under the APA "varies in meaning depending upon the nature of the function being exercised." F.C.C. v. Schreiber, 329 F.2d 517,526 (9th Cir. 1964).

[W]hile counsel may, as a matter of right, object and argue objections on the record, just as he may, as a matter of right, cross-examine and call witnesses in a trial-type adjudicatory proceeding, these rights do not exist in the fact-finding, nonadjudicative investigation unless specifically provided by statute or duly promulgated rules. The right to object and argue objections on the record is not to be implied, here, from use of the word "represented" [in the Administrative Procedure Act.]  
Id.

Thus, although subpoena proceedings under CERCLA are recorded, and the witness is under oath and may have an attorney present for consultation, counsel for the witness is not allowed to "speak to the record," to cross-examine, to aid in developing testimony, or to otherwise "coach" the witness. Furthermore, other parties potentially affected by the investigation do not have a right to be present during the questioning.

## VII. ENFORCEMENT OF INFORMATION REQUESTS AND SUBPOENAS

### A. Information Requests

#### 1. Initial Steps

When the deadline for responding to an information request has passed, a reminder letter should be sent to the unresponsive information request recipient, 1) informing the recipient that §104(e) provides for a penalty of up to \$25,000 per day for noncompliance, and 2) stating the date after which a civil judicial or administrative enforcement action may be initiated.

The reminder letter should also provide an opportunity for consultation.<sup>17</sup> This will fulfill the requirement of §104(e)(5)(A) if enforcement by administrative order is contemplated and should also fulfill any due process requirements for record review. (See Section VII.A.4., "Scope of Judicial Review," below.) Whenever a recipient takes advantage of an opportunity for consultation, the issuing official should send a letter to the recipient summarizing any contacts with the recipient, and stating EPA's resolution of any objections. If there is no response or if the response to a request is still unsatisfactory after the reminder letter deadline has passed, EPA may compel compliance with the request through either an administrative or judicial action.

## 2. Administrative Orders to Compel Compliance

Under CERCLA §104(e)(5)(A), EPA can issue an administrative order directing compliance with an information request. Each administrative order should include a finding by the Regional Administrator that there exists a reasonable belief that there may be a release or threat of release of a hazardous substance and a description of the purpose for which the information request was issued. The order should state the date on which it becomes effective and also advise the respondent that penalties

The statute leaves the decision whether to provide notice and opportunity for consultation to the discretion of the Agency. However, the Agency believes that it is in the best interests of all concerned to provide an opportunity for consultation whenever possible, particularly prior to the issuance of an administrative order.

of up to \$25,000 per day may be assessed by a court against any party who unreasonably fails to comply with the order.

In addition, the order should note that an opportunity for consultation was provided and should briefly summarize any contacts with the respondent. <sup>18</sup>

### 3. Civil Actions to Compel Compliance

Alternatively, or in the event that an administrative order does not lead to compliance, EPA, through DOJ, can commence a civil action under §104(e)(5)(B). <sup>19</sup> In that civil action, EPA can seek injunctive relief and/or civil penalties not to exceed \$25,000 per day for each day of noncompliance.

A referral to DOJ for an inadequate response or no response

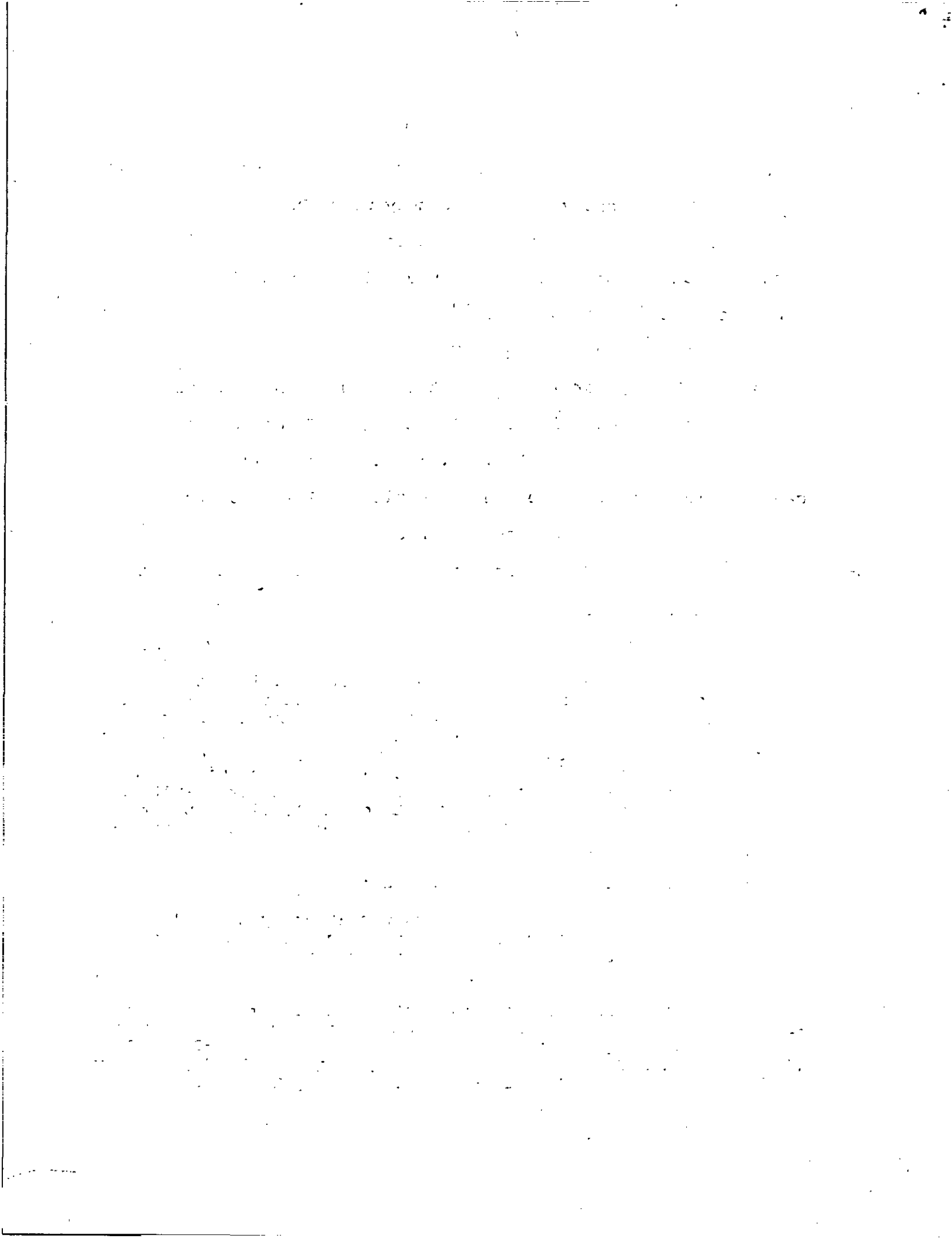
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<sup>18</sup> Normally, the consultation requirement will be fulfilled by offering the recipient an opportunity to contact the EPA with questions or objections, in the information request itself or in any subsequent reminder letter. Given this prior opportunity for consultation and the narrow scope of the order, it generally will not be productive to delay the order and offer another opportunity for consultation. However, if it is likely that additional discussion will lead directly to compliance, and the extra delay does not result in an unreasonable threat to human health or the environment, the Region may provide another opportunity for consultation prior to issuance of the order.

<sup>19</sup> Section 104(e)(5)(B) states:

The President may ask the Attorney General commence a civil action to compel compliance with a request or order referred to in subparagraph (A).

EPA's ability to commence a civil action without first issuing an administrative order to compel compliance under §104(e) was upheld in U.S. v. Charles George Trucking Co., No. 85-2463-WD (1st Cir. March 31, 1988). See also, U.S. v. Northside Sanitary Landfill, Inc., No. IP 88-172-C, (S.D. Ind. April 12, 1988).



at all should include all evidence needed to support the case. This includes evidence or findings that:

(1) 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 or vessel;

(2) the information request was issued for the purpose of determining the need for a response or choosing or taking any response action under CERCLA Title I, or otherwise enforcing CERCLA Title I, with respect to the site or vessel;

(3) the respondent was requested to provide information relating to one or more of the three categories of information identified in §104(e)(2)(A)-(C);

(4) respondent did not comply with the request in a timely manner.

(5) where appropriate, respondent should pay a civil penalty, recommended at \$\_\_\_ . (See Section VII.A.5., "Penalties," below.)

In addition, the referral should include proof of service and should address possible defenses, such as that a good faith effort was made to comply, or that the request for information or documents is arbitrary and capricious, unduly burdensome, an abuse of discretion or otherwise not in accordance with law.

The decision to either issue an administrative order or initiate a civil action must be made on a case-by-case basis. Where there is reason to believe that an administrative order will not bring immediate compliance, a civil action should be

avored. For example, if the recipient of an information request has made little or no effort to respond to the request, or has a history of disregarding requests for information or delaying responses to requests, issuing an administrative order may serve little purpose. While an administrative order typically can be issued within a shorter period of time than a complaint can be filed, the overall duration of the enforcement action may well be extended if the administrative order is disregarded since enforcement of the order will be through the referral and filing of a civil judicial action.

#### 4. Scope of Judicial Review

In 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."

§104(e)(5)(B)(ii).<sup>20</sup> This clearly limited review should not serve as an opportunity to review other aspects of the case,

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Judicial review is not thusly limited when the amount of the penalty is the issue before the court.



such as remedy selection or liability. <sup>21</sup> (Cf. U.S. v. Western Processing, Inc., No. C83-252M (W.D. Wash. February 19, 1986).

In cases where the Agency has provided an opportunity for consultation regarding the administrative order, and has created an administrative record reflecting the parameters and elements noted on pages 6 and 19, above, the Government may argue that judicial review of the administrative order should be limited to an administrative record. This argument is based upon the language in §104(e)(5)(B) that provides for judicial review under the arbitrary and capricious standard. The success of obtaining record review hinges on providing and documenting adequate procedural due process administratively. <sup>22</sup>

#### 5. Penalties

Under §104(e)(5)(B)(ii) of CERCLA, civil penalties may be assessed against any person who unreasonably fails to comply

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<sup>21</sup> Related to the scope of judicial review is the degree to which a defendant may engage in discovery once an enforcement action is initiated. Discovery generally is restricted in enforcement proceedings involving administrative subpoenas (see n. 27, *infra*) and similarly, should be restricted in actions brought under §104(e) of CERCLA. If discovery is allowed at all in a given action, the Government's position is that its scope should be limited to addressing the parameters for administrative investigations noted on page 6.

<sup>22</sup> It may also be possible to seek record review of an information request without first issuing an administrative order since CERCLA §104(e)(5)(B)(ii) provides for review of both information requests and administrative orders under an arbitrary and capricious standard. Before seeking record review of an information request, the Agency would first have to provide sufficient procedural due process, including an opportunity for consultation, and an administrative record would have to be created reflecting the parameters and elements noted on pages 6 and 19, above.

with the initial information request or subsequent compliance order. The question of whether to seek penalties may arise in two situations: 1) where injunctive relief is sought to compel the respondent to answer the information request and penalties are sought in addition to injunctive relief, and 2) where the respondent has answered the information request, albeit not in a timely manner, and penalties are the only relief sought. <sup>23</sup>

In both situations, to support penalties, the evidence must demonstrate: 1) that the information request is enforceable, <sup>24</sup> and 2) that the respondent's conduct was unreasonable. To assess the reasonableness of a respondent's conduct, and thus determine whether to seek penalties, Regional personnel should consider factors such as the respondent's good faith or lack of good faith efforts to comply with the information request, and

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<sup>23</sup> In information request enforcement actions, penalties can be assessed against a respondent even if he eventually complies with the information request. See e.g. U.S. v. Liviola, 605 F. Supp. 96 (N.D. Ohio 1985); U.S. v. Charles George Trucking Co., 823 F.2d 685 (1st Cir. 1987).

<sup>24</sup> For an information request to be enforceable, it must conform to the basic parameters noted above on page 6. Any issue of the reasonableness of the information request itself is subsumed by these parameters. Thus, once it is determined that an information request is enforceable, the focus in terms of liability for penalties is limited to the respondent's conduct. The statute provides that a civil penalty may be imposed "against any person who unreasonably fails to comply with" an Agency request or administrative order. Failure to respond adequately to an information request is presumptively unreasonable, and the recipient of the request bears the burden of proving that noncompliance with that request is in fact reasonable.

any willfulness or negligence associated with the respondent's actions. 25

B. Subpoenas

1. Jurisdiction and Venue

If a respondent to an administrative subpoena refuses to appear to testify or provide documentary evidence, or refuses to answer any or all of the questions put to him, the Agency may commence enforcement proceedings in U.S. district court. 26

CERCLA §122(e)(3)(B) states:

In the event of contumacy or failure or refusal of any person to obey any such subpoena, any district court of the United States in which venue is proper shall have jurisdiction to order any such person to comply with such subpoena. Any failure to obey such an order of the court is punishable by the court as contempt thereof.

Venue for such an action "shall lie in any district court in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office." CERCLA §113(b).

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25      The decision to seek penalties should also include consideration of the Supreme Court's recent decision in Tull v. United States, 481 U.S. \_\_\_, 107 S.Ct. \_\_\_, 95 L.Ed. 2d 365 (1987), which provided for a 7th Amendment right to a jury trial in the context of a Clean Water Act enforcement case, where civil penalties were sought by the Government.

26      All proceedings in the U.S. district court must be initiated by the Department of Justice on behalf of EPA. The court lacks jurisdiction to review the propriety of an administrative subpoena upon motion of a respondent. Belle Fourche Pipeline Co. v. U.S., 751 F.2d 332 (10th Cir. 1984). If a respondent wishes to challenge a subpoena, he may refuse to cooperate and force the Government to initiate an enforcement action.

## 2. Procedures for Enforcing Subpoenas

Enforcement proceedings are begun by submitting a petition to any appropriate federal district court seeking an order that the respondent show cause why he should not be ordered to comply with the subpoena. (See Attachment 3, model petition.) Although Fed.R.Civ.P. 81(a)(3) states that the Federal Rules of Civil Procedure apply to administrative subpoena enforcement proceedings "unless otherwise provided by statute or by rules of the district court or by order of the court in the proceedings," courts have consistently held that subpoena enforcement proceedings are summary, and that discovery is generally inappropriate given the scope of the issues before the court. 27

To prevent a respondent from attempting to engage in discovery prior to the show cause hearing, the petition may include a request that Rules 26-37 and 45 be suspended unless specifically reinstated by the court following the hearing.

The petition, accompanied by affidavits and legal memoranda, must demonstrate that the subpoena was issued for a lawful

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27      The court, in its discretion, may order discovery, but only where the defendant meets the "heavy burden of showing extreme circumstances that would justify further inquiry..." U.S. v. REB Petroleum, Inc., 703 F.2d 528, 533 (Temp. Emerg. Ct. App.) [quoting U.S. v. Juren, 687 F.2d 493, 494 (Temp. Emerg. Ct. App. 1982).] This burden is not a "meager one...[the defendant] must come forward with facts suggesting that the subpoena is intended solely to serve purposes outside the purview of the jurisdiction of the issuing agency." N.L.R.B. v. Interstate Dress Carriers, 610 F.2d 99, 112 (3d Cir. 1979) (emphasis added citations omitted). See also U.S. v. McGovern, 87 F.R.D. 590 (M.D. Pa. 1980), Lynn v. Biderman, 536 F.2d 820, 825 (9th Cir.) cert. denied sub nom. Biderman v. Hills, 429 U.S. 920 (1976).

purpose and is relevant to an agency investigation. At the show cause hearing, the burden is on the respondent to show that the subpoena is unenforceable in some respect.

At the conclusion of the show cause hearing, the court may order compliance, deny enforcement or modify the subpoena. Subsequent failure of the respondent to comply with the court's order may result in contempt proceedings against the respondent.

### C. Referrals

Referrals to the Department of Justice of cases to enforce information requests and administrative subpoenas will be handled in accordance with the procedures set forth in the January 14, 1988 memorandum from the Assistant Administrator for Enforcement and Compliance Monitoring entitled, "Expansion of Direct Referral of Cases to the Department of Justice." In time-critical situations, the procedures outlined in the the April 15, 1988 memorandum from the Acting Associate Enforcement Counsel for Waste entitled, "OECM-Waste Procedures for Processing Oral and Other Expedited Referrals" should be followed.

A referral to enforce an information request will not differ significantly from a referral to enforce most other sections of CERCLA. However, due to the summary nature of an action to enforce an administrative subpoena, a referral to enforce an administrative subpoena should contain certain additional elements not commonly included in other referrals.

A referral to enforce an administrative subpoena should consist of a draft petition for an order to show cause, a draft memorandum of points and authorities in support of the petition, and a draft order to accompany the petition. The memorandum of points and authorities should briefly set out the facts of the case and apply the legal standards for enforcement to those facts. In addition, the memorandum should address any arguments or defenses that the respondent is likely to raise.

The referral should also contain all necessary exhibits in support of the petition, including an affidavit of service, a copy of the subpoena, an affidavit supporting the facts alleged in the petition from a person with knowledge of those facts, and any other relevant material which serves as the administrative record documenting the subpoena process.

#### VIII. DISCLAIMER

This memorandum and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this memorandum or its internal implementing procedures.

MODEL Information request  
CERTIFIED MAIL [OR DHL]  
RETURN RECEIPT REQUESTED

Attachment 1  
[Note: No certified or express  
mail to P.O.Boxes]

[Date]

[PRP Name]  
[PRP Address]

Re: Request for Information Pursuant to Section 104 of  
CERCLA [and Section 3007 of RCRA,] for [Site Name]  
in [Site location] hereinafter referred to as "the Site"

Dear Sir or Madam:

The United States Environmental Protection Agency (EPA) is currently investigating the source, extent and nature of the release or threatened release of hazardous substances, pollutants or contaminants, or hazardous wastes on or about the [Site Name] in [Site Location] (the Site). This investigation requires inquiry into the identification, nature, and quantity of materials that have been or are generated, treated, stored, or disposed of at, or transported to, the Site and the nature or extent of a release or threatened release of a hazardous substance or pollutant or contaminant at or from the Site. EPA also is seeking information relating to the ability of a person to pay for or to perform a cleanup of the Site.

Pursuant to the authority of Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9604, as amended, [and Section 3007 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6927,] you are hereby requested to respond to the Information Request set forth in Attachment A, attached hereto.

Compliance with the Information Request set forth in Attachment A is mandatory. Failure to respond fully and truthfully to the Information Request within [insert reasonable number of days to respond, spell out number and put number in parentheses, e.g., thirty (30)] days of receipt of this letter, or adequately to justify such failure to respond, can result in enforcement action by EPA pursuant to Section 104(e) of CERCLA, as amended, [and/or Section 3008 of RCRA.] [Each of these statutes/ This statute] permits EPA to seek the imposition of penalties of up to twenty-five thousand dollars (\$25,000) for each day of continued non-compliance. Please be further advised that provision of false, fictitious, or fraudulent statements or representations may subject you to criminal penalties under 18 U.S.C. § 1001 or Section 3008(d) of RCRA.

This Information Request is not subject to the approval requirements of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501, et seq.

Your response to this Information Request should be mailed to:

U.S. Environmental Protection Agency  
[Name of Program Person]  
[Section Name]  
[Address]

Due to the legal ramifications of your failure to respond properly, EPA strongly encourages you to give this matter your immediate attention and to respond to this Information Request within the time specified above. If you have any legal or technical questions relating to this Information Request, you may consult with the EPA prior to the time specified above. Please direct legal questions to [Name of ORC Person] of the Office of Regional Counsel at (XXX) [XXX-XXXX]. Technical questions should be directed to [Name of Program Person], at the above address, or at (XXX) [XXX-XXXX].

Thank you for your cooperation in this matter.

Sincerely,

[Name]  
Waste Management Division

Attachment

cc. [Case attorney name], Office of Regional Counsel  
[Case program person name], Waste Management Division  
[Name], Director, Office of Waste Programs Enforcement  
[Name], Director, Office of Emergency and Remedial Response  
[State program staff person name, as appropriate]  
[State Assistant Attorney General, as appropriate]



[NAME OF SITE]

ATTACHMENT A

[Insert number, e.g., FIRST] INFORMATION REQUEST

## Instructions

1. Please provide a separate narrative response to each and every Question and subpart of a Question set forth in this Information Request.
2. Precede each answer with the number of the Question to which it corresponds.
3. If information or documents not known or not available to you as of the date of submission of a response to this Information Request should later become known or available to you, you must supplement your response to EPA. Moreover, should you find, at any time after the submission of your response that any portion of the submitted information is false or misrepresents the truth, you must notify EPA of this fact as soon as possible and provide EPA with a corrected response.
4. For each document produced in response to this Information Request indicate on the document, or in some other reasonable manner, the number of the Question to which it responds.
5. The information requested herein must be provided even though the Respondent may contend that it includes possibly confidential information or trade secrets. You may, if you desire, assert a confidentiality claim covering part or all of the information requested, pursuant to Sections 104(e)(7)(E) and (F) of CERCLA, as amended by SARA, 42 U.S.C. §§ 9604(e)(7)(E) and (F), Section 3007(b) of RCRA, 42 U.S.C. 6927(b), and 40 C.F.R. 2.203(b), by attaching to such information at the time it is submitted, a cover sheet, stamped or typed legend, or other suitable form of notice employing language such as "trade secret," or "proprietary" or "company confidential." Information covered by such a claim will be disclosed by EPA only to the extent, and only by means of the procedures set forth in statutes and regulation set forth above. If no such claim accompanies the information when it is received by EPA, it may be made available to the public by EPA without further notice to you. You should read the above cited regulations carefully before asserting a business confidentiality claim, since certain categories of information are not properly the subject of such a claim.

## Definitions

The following definitions shall apply to the following words as they appear in this Attachment A:

1. The term "you" or "Respondent" shall mean the addressee of this Request, the addressee's officers, managers, employees, contractors, trustees, partners, successors, assigns, and agents.

2. The term "person" shall have the same definition as in Section 101(21) of CERCLA: an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

3. The terms "the Site" or "the facility" shall mean and include the property on or about the [Name of owner(s)/operator(s)] property that is bounded by [roads, streams, etc.] in [city or town and state], and is also known as [common name, if any, e.g., the PSC Resources Site].

4. The term "hazardous substance" shall have the same definition as that contained in Section 101(14) of CERCLA and includes any mixtures of such hazardous substances with any other substances, including petroleum products.

5. The term "pollutant or contaminant," shall have the same definition as that contained in Section 101(33) of CERCLA, and includes any mixtures of such pollutants and contaminants with any other substances. Petroleum products mixed with pollutants and contaminants are also included in this definition.

6. The term "hazardous waste" shall have the same definition as that contained in Section 1004(5) of RCRA.

7. The term "solid waste" shall have the same definition as that contained in Section 1004(27) of RCRA.

8. The term "materials" shall mean all substances that have been generated, treated, stored, or disposed of or otherwise handled at or transported to the Site, including but not limited to all hazardous substances, pollutants and contaminants, hazardous wastes and solid wastes, as defined above and, [(list specific chemicals of concern at Site)]

9. The term "hazardous material" shall mean all hazardous substances, pollutants or contaminants, and hazardous wastes, as defined above.

10. The term "non-hazardous material" shall mean all material as defined above, excluding hazardous substances, pollutants and contaminants, and hazardous waste.

11. The term "identify" means, with respect to a natural person, to set forth the person's name, present or last known business address and business telephone number, present or last known home address and home telephone number, and present or last known job title, position or business.

12. The term "identify" means, with respect to a corporation, partnership, business trust or other association or business entity (including a sole proprietorship) to set forth its full name, address, legal form (e.g. corporation, partnership, etc.), organization, if any, and a brief description of its business.

13. The term "identify" means, with respect to a document, to provide its customary business description, its date, its number if any (invoice or purchase order number), the identity of the author, addressor, addressee and/or recipient, and the substance or the subject matter.

14. The term "release" has the same definition as that contained in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), and includes any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, including the abandonment or discharging of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant.

15. The terms "document" and "documents" shall mean any object that records, stores, or presents information, and includes writings of any kind, formal or informal, whether or not wholly or partially in handwriting, including by way of illustration and not by way of limitation, any invoice, manifest, bill of lading, receipt, endorsement, check, bank draft, cancelled check, deposit slip, withdrawal slip, order, correspondence, record book, minutes, memorandum of telephone and other conversations including meetings, agreements and the like, diary, calendar, desk pad, scrapbook, notebook, bulletin, circular, form, pamphlet, statement, journal, postcard, letter, telegram, telex, report, notice, message, analysis, comparison, graph, chart, interoffice or intraoffice communications, photostat or other copy of any documents, microfilm or other film record, any photograph, sound recording on any type of device, any punch card, disc or disc pack; any tape or other type of memory generally associated with computers and data processing (together with the programming instructions and other written material necessary to use such punch card, disc, or disc pack, tape or other type of memory and together with printouts of such punch card, disc, or disc pack, tape or other type of memory); and (a) every copy of each document which is not an exact duplicate of a document which is produced, (b) every copy which has any writing, figure or notation, annotation or the like on it, (c) drafts, (d) attachments to or enclosures with

any document and (e) every document referred to in any other document.

16. The terms "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of this Information Request any information which might otherwise be construed to be outside its scope.

17. The term "arrangement" means every separate contract or other agreement between two or more persons.

18. The terms "transaction" or "transact" mean any sale, transfer, giving, delivery, change in ownership, or change in possession.

19. Words in the masculine shall be construed in the feminine, and vice versa, and words in the singular shall be construed in the plural, and vice versa, where appropriate in the context of a particular question or questions.

20. All terms not defined herein shall have their ordinary meaning, unless such terms are defined in CERCLA, RCRA, 40 CFR Part 300 or 40 CFR Parts 260 - 280, in which case the statutory or regulatory definitions shall apply.

#### [FINANCIAL BACKGROUND DEFINITIONS]

21. The term "property interest" means any interest in property including but not limited to, any ownership interest, including an easement, any interest in the rental of property, any interest in a corporation that owns or rents or owned or rented property, and any interest as either the trustee or beneficiary of a trust that owns or rents, or owned or rented property.

22. The term "asset" shall include the following: real estate, buildings or other improvements to real estate, equipment, vehicles, furniture, inventory, supplies, customer lists, accounts receivable, interest in insurance policies, interests in partnerships, corporations and unincorporated companies, securities, patents, stocks, bonds, and other tangible as well as intangible property.

#### QUESTIONS

#### [QUESTIONS FOR ALL PRPS]

#. Identify the person(s) answering these Questions on behalf of Respondent.

#. For each and every Question contained herein, identify all persons consulted in the preparation of the answer.

#. For each and every Question contained herein, identify all documents consulted, examined, or referred to in the preparation of the answer or that contain information responsive to the Question and provide true and accurate copies of all such documents.

#. List the EPA RCRA Identification Numbers of the Respondent, if any, and identify the corresponding units, facilities or vessels assigned these numbers.

#. Describe the acts or omissions of any persons, other than your employees, agents or those persons with whom you had a contractual relationship, that may have caused the release or threat of release of hazardous substances at the Site.

In addition:

a. Describe all precautions that you took against foreseeable acts or omissions of any such third parties [including, but not limited to insert names if known, e.g., of prior owners, etc.] and the consequences that could foreseeably result from such acts or omissions.

b. Describe the care you exercised with respect to the hazardous substances found at the Site.

#. Identify all persons, including Respondent's employees, who have knowledge, information or documents about the generation, use, purchase, treatment, storage, disposal or other handling of materials at or transportation of materials to the Site.

#. Describe all arrangements that Respondent may have or may have had with each of the following persons: [names of persons suspected to be involved with the Site, e.g., PRPs].

#. For each and every current owner, operator, lessor or lessee of any portion of the Site:

a. Identify such person and the nature of their operation at the Site.

b. Describe the portion of the Site owned, operated, leased by each such person and state the dates during which each portion was owned, operated or leased.

c. Provide copies of all documents evidencing or relating to such ownership, operation or lease, including but not limited to purchase and sale agreements, deeds, leases, etc.

#. Describe the physical characteristics of the Site including but not limited to the following:

- a. Surface structures (e.g., buildings, tanks, etc.).
- b. Ground water wells, including drilling logs.
- c. Past and present storm water drainage system, sanitary sewer system, including septic tank(s) and subsurface disposal field(s).
- d. Any and all additions, demolitions or changes of any kind to physical structures on, under or about the Site, or to the property itself (e.g., excavation work) and state the dates on which such changes occurred.

#. For each and every prior owner, operator, lessor or lessee of any portion of the Site known to you:

- a. Identify such person and the nature of their operation at the Site.
- b. Describe the portion of the Site owned, operated, leased by each such person and state the dates during which each portion was owned, operated or leased.
- c. Provide copies of all documents evidencing or relating to such ownership, operation or lease, including but not limited to purchase and sale agreements, deeds, leases, etc.
- d. Provide all evidence that hazardous materials were released or threatened to be released at the Site during the period that they owned the Site.

#. Provide all existing technical or analytical information about the Site, including but not limited to data and documents related to soil, water (ground and surface), geology, geohydrology, or air quality on and about the Site, [and list specific documents you want].

#. Do you know or have reason to know of any on-going or planned investigations of the soil, water (ground or surface), geology, hydrogeology or air quality on or about the Site? If so:

- a. Describe the nature and scope of these investigations;
- b. Identify the persons who are undertaking or will undertake these investigations;
- c. Describe the purpose of the investigations;

- d. State the dates of such investigations;
- e. Describe as precisely as possible the locations at the Site where such investigations are taking or will take place.
- #. Identify all persons, including you, who may have given, sold, transferred, or delivered any material or item, including [list materials or items of concern, e.g., TCE or lab packs] to [list PRPs]. In addition:
- a. State the dates on which each such person may have given, sold, transferred, or delivered such material;
- b. Describe the materials or items that may have been given, sold, transferred, or delivered, including type of material, quantity, chemical content, physical state, quantity by volume and weight, and other characteristics.
- c. Describe the intended purpose of each sale, transfer, or delivery of materials.
- d. Describe the source of or process that produced the materials that may have been sold, transferred, or delivered.
- e. Describe all efforts taken by such persons to determine what would actually be done with the materials that may have been sold, transferred or delivered after such materials had been sold, transferred or delivered.

[OWNER/OPERATOR QUESTIONS]

- #. Did you acquire any portion of the Site(s) after the disposal or placement of the hazardous substances on, in, or at the Site? Describe all of the facts on which you base the answer to this question.
- #. At the time you acquired the parcels of the Site(s), did you know or have reason to know that any hazardous substance was disposed of on, in, or at the facility? Describe all investigations of the Site you undertook prior to acquiring the Site and all of the facts on which you base the answer to this question.
- #. Did you acquire the facility by inheritance or bequest? Describe all facts on which you base the answer to this question.
- #. Describe all leaks, spills or releases or threats of releases of any kind into the environment of any hazardous materials that have occurred or may occur at or from the Site, including but not limited to:

- a. **When** such releases occurred or may occur.
  - b. **How** the releases occurred or may occur.
  - c. What hazardous materials were released or may be released.
  - d. What amount of each such hazardous material was so released.
  - e. Where such releases occurred or may occur.
  - f. Any and all activities undertaken in response to each such release or threatened release.
  - g. Any and all investigations of the circumstances, nature, extent or location of each such release or threatened release including, the results of any soil, water (ground and surface), or air testing that was undertaken.
  - h. All persons with information relating to subparts a. through g. of this Question.
- #. If any release or threatened release identified in response to Question [#.] , above, occurred into any subsurface disposal system or floor drain inside or under any buildings located on the Site, further identify:
- a. Where precisely the disposal system or floor drains are and were located.
  - b. When the disposal system or floor drains were installed.
  - c. Whether the disposal system or floor drains were connected to pipes, and if so, the purpose of such pipes.
  - d. Where such pipes are or were located.
  - e. When such pipes were installed.
  - f. **How** and when such pipes were replaced, repaired, or otherwise changed.

# Identify all persons, including you, who may have manufactured, given, sold, transferred, delivered, or otherwise handled, [describe what was found at the site, e.g., barrels marked "Dupont" or TCE, etc.]. In addition:

- a. Describe in complete detail all arrangements pursuant to which such persons may have so handled such items or materials.



b. State the dates on which such persons may have handled each such item or material;

c. State the amounts of such items or materials that may have been so handled on each such date;

d. Identify the persons to whom such items or materials may have been given, sold, transferred, or delivered;

e. Describe the nature, including the chemical content, characteristics, physical state (e.g., solid, liquid) and quantity (volume and weight) of all [describe what was found at the Site, e.g., "lab packs"] and describe all tests, analyses, and results of such tests and analyses concerning such items or materials.

f. State whether any of the materials identified in subpart e. exhibit any of the characteristics of a hazardous waste identified in 40 CFR §261 Subpart C.

g. State whether any of the materials identified in subpart e. are listed in 40 CFR §261 Subpart D.

h. [Insert additional specialized questions to determine whether any hazardous substances at the Site are RCRA hazardous wastes.]

i. Describe the nature of the operations that were the source of the [list what was found at the Site, e.g., lab packs].

j. Provide copies of all documents (including but not limited to invoices, receipts, manifests, shipping papers, customer lists and contracts) which may reflect, show or evidence the giving, sale, transfer or delivery, or other arrangements under which the giving, sale, transfer, or delivery of any materials to the Site took place.

k. Describe the type, condition, number, and all markings on the containers in which the materials were contained when they were handled.

[QUESTIONS FOR POTENTIAL TRANSPORTERS]

#. Identify all persons, including you, who may have transported materials to the Site. Such persons will hereinafter be referred to as "Transporters."

#. For each such Transporter, state whether it accepted materials including municipal solid waste from a municipality or arranged with a municipality by contract or otherwise to accept materials from any source. If so, describe the nature, quantity

and source of all materials accepted and transported to the Site.

- #. For each such Transporter, further identify:
  - a. In general terms, the nature and quantity of all non-hazardous materials transported to the Site.
  - b. The nature of the hazardous materials transported to the Site including the chemical content, characteristics, and physical state (e.g., solid, liquid).
  - c. Whether any of the hazardous materials identified in subpart b exhibit any of the characteristics of a hazardous waste identified in 40 CFR §261 Subpart C.
  - d. Whether any of the hazardous materials identified in subpart b are listed in 40 CFR §261 Subpart D.
  - e. [Insert additional specialized questions to determine whether any hazardous substances at the Site are RCRA hazardous wastes.]
  - f. The persons from whom the Transporter accepted hazardous materials including, but not limited to, [insert potential generators].
  - g. Every date on which the Transporter transported the hazardous materials to the Site.
  - h. The owners of the hazardous materials that were accepted for transportation by the Transporter.
  - i. The quantity (weight and volume) of hazardous materials brought by the Transporter to the Site.
  - j. All tests, analyses, analytical results and manifests concerning each hazardous material accepted for transportation to the Site.
  - k. The precise locations at the Site to which each hazardous material was transported.
    - l. Who selected the location to which the Transporter would take each hazardous material.
    - m. Who selected the Site as the location to which the Transporter would take each hazardous material.
    - n. The amount paid to each Transporter for accepting the hazardous materials for transportation, the method of payment, and the identity of the persons who paid each Transporter.

o. Where the persons identified in g., above, intended to have such hazardous materials transported and all documents of other information (oral or written) evidencing their intent.

p. All locations through which such hazardous materials were trans-shipped, or were stored or held, prior to their final treatment or disposal.

q. What activities transpired with regard to the hazardous materials after they were transported to the Site (e.g. treatment, storage or disposal).

r. The final disposition of each of the hazardous materials brought to the Site.

s. The measures taken by the persons who gave the hazardous materials to the Transporters to determine what the Transporters would actually do with the hazardous materials they accepted.

t. The type, number and condition of containers in which the hazardous materials were contained when they were accepted by the Transporters and when they were left at the Site and any other labels, numbers or other markings on the containers.

[QUESTIONS FOR POTENTIAL GENERATORS]

#. Identify all persons, including you, who may have:

a. disposed of or treated materials at the Site;

b. arranged for the disposal or treatment of materials at the Site; or

c. arranged for the transportation of materials to the Site (either directly or through transshipment points) for disposal or treatment. Such persons will hereinafter be referred to as "generators."

#. For each and every instance in which a generator performed any of the actions specified in parts a. - c. of the previous question:

a. Identify the generator;

b. Identify the persons with whom the generator made such arrangements including, but not limited to [insert list of suspected transporters].

c. Identify all persons who may have directly or indirectly transported or otherwise brought any materials, [including municipal solid waste,] to the Site.

d. State every date on which each Generator made such arrangements.

e. Describe the nature, including the chemical content, characteristics, physical state (e.g., solid, liquid) and quantity (volume and weight) of all hazardous materials involved in each such arrangement.

f. State whether any of the hazardous materials identified in subpart e. above exhibit any of the characteristics of a hazardous waste identified in 40 CFR §261 Subpart C.

g. State whether any of the hazardous materials identified in subpart e. are listed in 40 CFR §261 Subpart D.

h. [Insert additional specialized questions to determine whether any hazardous substances at the Site are RCRA hazardous wastes.]

i. In general terms, describe the nature and quantity of the non-hazardous materials involved in each such arrangement.

j. [Describe the nature and quantity of any municipal solid waste involved in any such arrangement.]

k. Identify the owner of the hazardous materials involved in each such arrangement.

l. Describe all tests, analyses, analytical results or manifests concerning each hazardous material involved in such transactions.

m. Describe as precisely as possible any and all of the locations at which each hazardous material involved in such transactions actually was disposed or treated.

n. Identify the persons who selected the location to which the hazardous materials were to be disposed or treated.

o. Identify who selected the Site as the location at which hazardous materials were to be disposed or treated

p. State the amount paid in connection with each such arrangement, the method of payment, and the identity of the persons involved in each arrangement.

q. Describe where the persons identified in subparts l. and m. of this Question intended to have the hazardous materials involved in each arrangement treated or disposed and all documents or other information (written or oral) evidencing their intent.

r. Describe all intermediate sites to which the hazardous materials involved in each arrangement were trans-shipped, or at which they were stored or held, any time prior to final treatment or disposal.

s. Describe what was done to the hazardous materials once they were brought to the Site.

t. Describe the final disposition of each of the hazardous material involved in each arrangement.

u. Describe the measures taken by the generator to determine how and where treatment or disposal of the hazardous materials involved in each arrangement would actually take place.

v. Describe type, condition and number of containers in which the hazardous materials were contained when they were disposed, treated, or transported for disposal or treatment and describe any labels, numbers or other markings on the containers.

[FINANCIAL BACKGROUND QUESTIONS FOR ALL PRPS WHERE FINANCIAL VIABILITY IS OR WILL BE AT ISSUE AND THE AGENCY IS UNABLE TO ASSESS FINANCIAL VIABILITY EFFECTIVELY THROUGH REVIEW OF PUBLICLY AVAILABLE DATA]

#. Provide a list of all property and casualty insurance policies (e.g. Comprehensive General Liability, Environmental Impairment Liability and Automobile Liability policies) [and Directors and Officers policies] for the period from [date disposal site first became disposal site] through the present. Specify the insurer, policy, effective dates, and state per occurrence policy limits for each policy. Copies of policies may be provided in lieu of a narrative response.

#. Provide copies of all financial documents, including income tax returns sent by you to the federal Internal Revenue Service and [the State IRS] in the last five years.

#. Provide copies of financial statements, reports, or projections prepared by, for or on behalf of the Respondent for the past five years, whether audited or unaudited, including, but not limited to, all those filed with the Securities and Exchange Commission, State agencies, and all financial institutions such as banks.

[FINANCIAL BACKGROUND QUESTIONS FOR ALL CORPORATE PRPS]

#. Identify the parent corporation and all subsidiaries of Respondent.

#. Identify all persons who may be responsible for the liabilities of Respondent arising from or relating to the release or threatened release of hazardous substances at the Site, including but not limited to successors and individuals.

#. Provide a copy of the most current Articles of Incorporation and By-laws of Respondent.

#. Identify the officers, managers and majority shareholders of Respondent and the nature of their management duties and amount of shares held, respectively.

#. [For additional PRP questions, see ORC case attorney.]

[FINANCIAL BACKGROUND QUESTIONS FOR PARTNERSHIP PRPS]

#. Identify all partners comprising [Name of Partnership] and the nature of their partnership interests.

#. [For additional Partnership PRP questions, see ORC case attorney.]

[FINANCIAL BACKGROUND QUESTIONS FOR TRUST PRPS]

#. Identify all trustees and all beneficiaries of the [Name of Trust].

#. [For additional Trust PRP questions see ORC case attorney.]

[CONCLUDING QUESTIONS FOR ALL RPS]

#. If you have reason to believe that there may be persons able to provide a more detailed or complete response to any Question contained herein or who may be able to provide additional responsive documents, identify such persons and the additional information or documents that they may have.

#. For each and every Question contained herein, if information or documents responsive to this Information Request are not in your possession, custody or control, then identify the persons from whom such information or documents may be obtained.

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Address:

IN THE MATTER OF:

No. \_\_\_\_\_

SUBPOENA DUCES TECUM AND  
SUBPOENA AD TESTIFICANDUM

TO: \_\_\_\_\_

\_\_\_\_\_, RESPONDENT(S):

YOU ARE HEREBY COMMANDED, pursuant to Title 42, United States Code, section 9622(e)(3)(B) [Comprehensive Environmental Response, Compensation, and Liability Act section 122(e)(3)(B)] TO APPEAR IN PERSON at the following place and time.

TIME AND DATE: \_\_\_\_\_

PLACE: \_\_\_\_\_

YOU ARE COMMANDED FURTHER TO TESTIFY THEN AND THERE under oath and GIVE TRUTHFUL ANSWERS to all lawful inquiries and questions then and there put to you on behalf of the United States Environmental Protection Agency, and TO REMAIN IN ATTENDANCE until expressly excused by the attorney(s) conducting the proceeding for the 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, those items identified and described on the ATTACHED PAGE(S).

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

Issued at [City, State] this \_\_\_\_\_ day of \_\_\_\_\_, 198\_\_.

Attorney Contact:  
[Asst. Regional Counsel]  
[Address and Telephone]

\_\_\_\_\_  
Regional Administrator, EPA Region \_\_\_\_





UNITED STATES DISTRICT COURT  
FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_

IN THE MATTER OF:	)	
	)	
UNITED STATES of AMERICA, Petitioner	)	
	)	
v.	)	
	)	
_____	)	
Respondent	)	
	)	
_____	)	

MISC. NO.

PETITION FOR ENFORCEMENT OF AN ADMINISTRATIVE SUBPOENA  
ISSUED BY THE ENVIRONMENTAL PROTECTION AGENCY

The United States of America, through the Attorney General, and at the request of the Regional Administrator, United States Environmental Protection Agency (EPA) Region \_\_\_\_, hereby petitions the Court for an Order to Show Cause why the Respondent should not be ordered to comply forthwith with the administrative subpoena previously served upon him.

In support of this Petition, the Petitioner alleges as follows:

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§1331 and 1345, and 42 U.S.C. §9622(e)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

2. \_\_\_\_\_, the Regional Administrator of Region \_\_\_\_ of the EPA, [city], [state] has requested that the Attorney General commence this action.

3. The Respondent, \_\_\_\_\_, is [short description, e.g. "former owner of a waste transporting and disposal business." Be sure to identify as an owner or corporation.]

4. Section 122(e)(3)(B) of CERCLA, as amended, 42 U.S.C. 9622(e)(3)(B), grants the President the authority to issue administrative subpoenas to gather information necessary to implement §122 (Settlements). Such information includes, inter alia, the nature and extent of contamination at the site, possible remedies and the identities of potentially responsible parties.

5. The President delegated the authority to issue administrative subpoenas under CERCLA to the Administrator of the EPA on January 23, 1987 by Executive Order 12580 (52 Fed. Reg. 2923, January 29, 1987). This authority was, in turn, delegated from the Administrator to the Regional Administrators by Delegation 14-6, "Inspections, Sampling, Information Gathering, Subpoenas and Entry for Response," signed September 13, 1987. (Attached)

6. In conjunction with the investigation at [site], and pursuant to §122(e)(3)(B) of CERCLA, as amended, 42 U.S.C. 9622(e)(3)(B), Petitioner issued an administrative subpoena on [date], directing the Respondent to [provide certain information.] The subpoena is attached and incorporated herein as Exhibit A. An affidavit of service is attached as Exhibit B.

[7. By letter dated \_\_\_\_\_, Respondent requested Petitioner to extend the return date of the subpoena. Respondent's letter is attached as Exhibit C.]

[8. By letter dated \_\_\_\_\_, Petitioner denied Respondent's request and reaffirmed the subpoena date \_\_\_\_\_. Petitioner's letter is attached as Exhibit D.]

9. On \_\_\_\_\_, the return date specified in the subpoena, [Respondent failed to appear to testify; failed to answer certain questions put to him; failed to provide the information requested by subpoena.] [Note: Where a Respondent has failed to answer specific questions, or has not provided certain documents, those questions or documents should be specified.]

WHEREFORE, the Petitioner respectfully prays that:

1. This Court enter an Order to Show Cause directed to the Respondent, ordering the Respondent:

(a) to appear expeditiously and Show Cause why the subpoena should not be enforced against him, and

(b) to file expeditiously a written response to the allegations in the Petition by a date certain.

2. This Court enter an Order at the conclusion of these proceedings enforcing the EPA subpoena and requiring the Respondent to comply fully with the terms of the EPA subpoena.

3. This Court render such other and further relief as is just and proper.

Dated:

Respectfully submitted,

\_\_\_\_\_  
Attorney for \_\_\_\_\_