Responding to EPA Information Request Letters: Mitigating Further Agency Scrutiny
Assessing Response Options, Meeting Confidentiality Requirements While Demonstrating Compliance with CERCLA, CWA, CAA and RCRA

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Today’s faculty features:
Freedom S.N. Smith, Esq., Ice Miller, Indianapolis

Douglas J. Steding, Partner, Miller Nash Graham & Dunn, Seattle

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Responding to EPA Information Request Letters: *Mitigating Further Agency Scrutiny*

Presented by:

Freedom Smith, Ice Miller LLP
freedom.smith@icemiller.com

Doug Steding, Miller Nash Graham & Dunn
douglas.steding@millernash.com
What is an Information Request?

• What is a Request?

• Parts of a Request
  – Recitation of EPA’s authority
  – General Instructions
  – Appendices:
    • Instructions for Confidential Business Information
    • More detailed instructions and definitions
    • Actual requests for information
    • Certificate of mailing
Scope of EPA Authority

• The EPA has authority to request substantial information from regulated businesses even in the absence of a lawsuit

• EPA's authority to request information exists under each of the major federal statutes
  – Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
  – Clean Air Act (CAA)
  – Resource Conservation and Recovery Act (RCRA)
  – Clean Water Act (CWA)
EPA Authority, cont.

• While the EPA generally does not have subpoena authority, it does have the authority to:
  – Issue administrative orders
  – Seek enforcement of those orders to permit inspections
  – Permit copying of requested documents
CERCLA “Section 104(e)Requests”

42 U.S.C. § 9604
CERCLA

• The EPA’s request for information regarding hazardous substances will generally be upheld where the:
  – Investigation is within the agency’s authority
  – Request is not too indefinite
  – Information requested is reasonably relevant

• Courts have, however, put some restraints on EPA’s information-gathering activities pursuant to CERCLA section 104(e)
  – Bunker Limited Partnership v. United States,
CERCLA Section 104(e) Scope

• “Officer, employee, or representative of the President”
• “Reasonable basis to believe” release or threat of release
• Authority limited to:
  – Determining need for response
  – Choosing or taking response action
  – “Otherwise enforcing provisions of this subchapter”
CERCLA Access to Information

• Information on materials generated, treated, stored, or disposed of at a vessel or facility or transported to a vessel or facility
• Nature and extent of release or threatened release
• Information on ability to pay
• *Failure to comply:* Up to $25,000 per day
CERCLA 104(e) Case Law

• Courts will not “second guess” investigatory judgment of EPA
  – Need to show request is arbitrary, capricious or abuse of discretion

• Parent company information can be requested under ability to pay provision (U.S. v. Pretty Products).
CERCLA 104(e) Case Law

• Information must somehow relate to hazardous substances:
  – Financial information that can assist EPA in cost recovery actions allowed post-SARA.
CERCLA 104(e) and CBI

• EPA has authority to make CBI determinations. 40 C.F.R. 2.310. Governed by 40 C.F.R. 2.208:
  – Asserted claim that has not expired, been waived or withdrawn
  – Taken measures to protect
  – Cannot be obtained by other means
  – No statute requires disclosure
  – Showing of cause of substantial harm, or voluntarily submitted with disclosure impairing Government’s ability to obtain information in the future
Clean Air Act
“Section 114 Requests”

42 U.S.C. § 7414
Overview of Section 114 Authority

• Section 114 gives EPA broad powers to require a source to, among other things:
  – Request information from a person who owns or operates an emission source or that manufacturers an emission control device
  – Request information from anyone that EPA believes can assist EPA in achieving its objectives under the CAA
  – Audit processes
  – Require the installation of emission monitoring equipment
  – Require emission testing
  – Require certification of compliance with CAA requirement
  – Provide such other information as the Administrator (as delegated to EPA Regions) may reasonably require
CAA Authority & Use, cont.

• Failure to respond subjects you to fines for each day of violation

• EPA often utilizes Section 114 of the Clean Air Act (CAA) to request information from companies in assessing whether there have been violations of the Prevention of Significant Deterioration (PSD) program, New Source Performance Standards, or other CAA requirements
Authority employed broadly, typically requesting many categories of documents generated over many years

– Indeed, a source receiving a broad 114 Request may find itself burdened with searching for and reviewing decades of records and many thousands of pages of documents.
CAA Authority

• The EPA’s request for information will generally be upheld where the:
  – Investigation is within the agency’s authority
  – Request is not too indefinite
  – Information requested is reasonably relevant

• EPA can ask for information reasonably related to future projects if related to needed permits
CAA 114 and CBI

• EPA has authority to make CBI determinations. 40 C.F.R. 2.301. Governed by 40 C.F.R. 2.208.
  – Emissions data, standards and limitations are not entitled to CBI treatment. CAA § 114(c); 40 C.F.R. § 2.301(a) and (f).
RCRA Requests

42 U.S.C. § 6927
Resource Conservation and Recovery Act Sections 3007 & 3008

• Narrower scope than CERCLA 104(e):
  – EPA or state delegated agency (not delegate of President)
  – Information related to generation, treatment, transportation, disposal or handling of hazardous wastes
  – Access to and copies of records related to wastes
• Civil ($25,000) and criminal penalties for non-compliance
• Broad public disclosure requirement
RCRA Case Law

• No need to prove release from facility. Nat'I-Standard Co. v. Adamkus, 881 F.2d 352, 353 (7th Cir. 1989)

• Interplay of RCRA public records requirement and classified information:
  – Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998)
RCRA and CBI

• Burden is on producing party to prove that information is confidential consistent with 18 § U.S.C. 1905
  – Information can still be used for civil or criminal enforcement actions by United States
Clean Water Act
Section 308 Requests

33 U.S.C. § 1318
Section 308 Requests

• Section 308 grants the EPA Administrator broad authority to require the owner or operator of a point source to:
  – Maintain records
  – Make reports
  – Perform monitoring and sampling
  – Provide information to EPA as is “reasonably” required to carry out the purposes of the Act
Section 308 Requests, cont.

• Section 308 also gives EPA the ability to enter and inspect facilities of an “effluent source,” along with its records. 33 U.S.C. § 1318 (emphasis added)

• **Keep in Mind:** EPA typically engages in focused enforcement activity under the Clean Water Act (CWA), 33 U.S.C. §§ 1251, *et seq.*, on an industry sector basis, starting with the largest companies in a particular sector
Interpretive Case law

• Courts have interpreted EPA’s section 308 authority broadly:
  – “The breadth of this statutory grant of authority is obvious. In our view, the statute’s sweep is sufficient to justify broad information disclosure requirements relating to the Administrator’s duties, as long as the disclosure demands which he imposes are ‘reasonable.’” NRDC v. EPA, 822 F.2d 104, 119 (D.C. Cir. 1987)

• Requests must pass the threshold test of reasonableness
Interpretive Case Law

• Other Cases to Review:
  – U.S. v. Charles George Trucking Co., 823 F.2d 685 (1st Cir. 1987) (Discussing failure to comply under Section 308 and objections to request)
  – Texas Mun. Power Agency v. EPA, 836 F.2d 1482 (5th Cir. 1988) (EPA can require monitoring of internal waste streams pursuant to section 308 authority)
  – Mobil Oil Corp. v. EPA, 716 F.2d 1187 (7th Cir. 1983) (EPA has authority to sample untreated wastewater)
CWA 308 and CBI

• EPA has authority to make CBI determinations. 40 C.F.R. 2.302. Governed by 40 C.F.R. 2.208.
  – Effluent data, standards, or limitations are not entitled to CBI treatment. CWA § 308(b); 40 C.F.R. § 2.302(a) and (f).
Common Concerns and Issues

• A request is the beginning of a potentially long and adversarial process, and a source should not respond to the information request without considering the implications of the materials provided in the response
  – Where a single information request has been received, others may follow—It is not unusual for EPA to issue multiple, overlapping information requests (particularly CAA) to what it considers a single source
  – Do not respond without adequate technical and legal review
Common Concerns, cont.

• The request for information may precede or follow a notice of noncompliance
  – These requests for information are typically styled in the same manner as civil discovery requests are often an indication of substantial governmental scrutiny
  – Receipt of a request should be taken as if it were in litigation with responses likely to be deemed admissions
Common Concerns, cont.

• A governmental agency sometimes will issue a letter notifying a company that a preliminary determination of apparent noncompliance has been made, sometimes called a “finding of violation,” other times a “compliance inquiry letter,” and still other times a “notice of violation”
  – This is the first formal step in the enforcement process
  – The beginning of the formal violation process typically brings into the discussion an EPA lawyer
    • Businesses should be prepared to respond accordingly
    • Statements made in settlement conferences or in other discussions may be used as admissions in later proceedings
Common Concerns, cont.

- EPA regularly chooses to handles enforcement internally, utilizing the tools and authority granted in the various statutes
  - Those tools include administrative compliance orders and administrative penalties
  - Invocation of administrative penalty authority and collects civil penalties
- Settlements with State Regulators—not a full defense
Strategic Considerations for Counsel Before Responding to an EPA Request Letter

• Act strategically and involve appropriate personnel
  – Engage early
  – Form a response team
  – Have a documentation strategy

• Do not respond to verbal requests
Strategic Considerations Before Responding, cont.

• Assess and address compliance issues
• Impact on other client facilities/operations
  – Audits/self-disclosure issues
    • Small Business Policy or Audit Policy
• Extent of EPA’s authority versus what’s in the requests
• Insurance coverage?
  – Request equivalent to a “suit” under relevant law?
What Other Requests Are Out There?

• Check with Industry Groups
  — Ethanol Industry
  — CAA 112

• What other requests are out there that are easily available?
  — For CERCLA, EPA compiled into 36 categories sample questions for information request letters tailored to the:
    • type of site (e.g., chemical plants, dry cleaners),
    • sophistication of the recipient (e.g., individual, small business, large corporation),
    • recipient's involvement with the site (e.g., owner, operator, transporter),
    • nature of the information sought
    • insurance coverage, and
    • Superfund Recycling Equity Act (SREA)
What Other Requests Are Out There?

• What other requests are out there that are easily available?
  — These sample questions are used at the Regions' discretion.
    • [http://www2.epa.gov/enforcement/superfund-104e-information-request-questions-category](http://www2.epa.gov/enforcement/superfund-104e-information-request-questions-category)
National Enforcement Initiatives

• Relation to National Enforcement Initiatives
• For period fiscal years 2017-2019, comments ended 10/14/15
  – https://federalregister.gov/a/2015-23056
  – Comments at www.regulations.gov, identified by Docket ID No. EPA-HQ-OECA-2015-0628; FRL-9933-77-OECA
Next Generation Enforcement
Next Generation Enforcement, cont.

- On 9/24/2015 EPA issued the final NPDES Electronic Reporting Rule for publication in the Federal Register
  - Rule will replace most paper-based CWA NPDES permitting and compliance monitoring reporting requirements with electronic reporting
  - This final rule requires that NPDES regulated entities electronically submit the following permit and compliance monitoring information instead of using paper reports:
    - Discharge Monitoring Reports (DMRs)
    - Notices of Intent to discharge in compliance with a general permit
    - Program reports
Next Generation Enforcement, cont.

- **NPDES Electronic Reporting Rule, cont.**
  - Authorized NPDES programs will also electronically submit NPDES program data to EPA to ensure that there is consistent and complete reporting nationwide, and to expedite the collection and processing of the data, thereby making it more accurate and timely.
  - EPA will phase in the requirements of the rule over a five year period following the effective date of the final rule.
    - EPA’s position is that the rule does not increase the amount of information required from NPDES regulated entities facilities under existing regulations, only the method of reporting.
Do’s and Don’ts of Responding

• Timing
• Privileges and confidentiality
• Voluntary compliance vs. litigation
• Managing scope of the request
• Preparing for production
• Drafting narrative response
Consider Resources

• Insurance coverage?
  – 104(e) request may trigger defense obligation under old CGL policies
  – Specialized policies
    • Environmental insurance
    • Spill policies
Timing

• Response time generally set out in request
  – Generally in one of the appendices to the request
  – In many cases, it ranges from 15 – 45 days, with 30 days being common

• Contact EPA Early
  – The response time and scope can usually be negotiated
  – Be able to articulate your reasons for objecting to the scope and/or timing of the requests
Privileges and Confidentiality

• The attorney-client privilege and the work-product doctrine are not absolute privileges
  — Does the application of the privilege/doctrine further the legitimate ends of our justice system?
  • Where the answer is no, courts have recognized exceptions
  — Generally, if the communication was the result of the client’s lawfully seeking and the attorney’s lawfully rendering legal services, the privilege applies
• Confidential Business Information (CBI) is subject to unique rules
Three Privilege Contexts to Keep in Mind

• Corporate counsel
• Use of crime-fraud exception to attorney-client and work-product doctrine
• Attorney contact with former corporate employees
Voluntary Compliance vs. Litigation

• Consider Scope of Authority
• Costs
Managing the Scope of the Request

• Common to ask EPA to limit the scope of a request

• Possible reasons for limiting request:
  – Statute of limitations
  – Regulations may limit record retention to two (2) years
  – Company document retention policy may be limited to certain years
  – Too burdensome to compile all the information requested

• Can also try to limit the equipment subject to the request
Preparing for Production

• Litigation/Investigation Hold

• Set up a Team
  – Staff (operations, management, in-house or outside technical, legal)
  – Designate point person

• Create a file/folder for each request and subpart (Internal folder/production folder)
  – Internal—keep notes/memo noting:
    • Logic behind response (what was or was not produced and why)
    • How response compiled
Production Issues

• Confidential Business Information (CBI) is subject to unique rules
  – CBI: Trade secrets, proprietary, company confidential, personal privacy information
  – Make sure each page of all documents are clearly marked CBI
  – Generally produced on a separate disc/flash drive than other documents
  – EPA may require that you substantiate your claim later
Production Issues, cont.

- Keep a copy of any production
- EPA generally requires production in a searchable electronic format (PDF) or specified Excel documents
- Specify what documents are responsive to each request
  - Common for EPA to request a Table of Contents
  - Some prefer to Bates Stamp produced documents
Production Issues, cont.

• Your responses, and documents, will need to be submitted with a certification.
  
  – **Example:** I certify under penalty of law that I have examined and am familiar with the information in the enclosed documents, including all attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are, to the best of my knowledge and belief, true and complete. I am aware that there are significant penalties for knowingly submitting false statements and information, including the possibility of fines or imprisonment pursuant to Section 113(c)(2) of the Clean Air Act and 18 U.S.C. §§ 1001 and 1341.
The Narrative Response

• General objections:
  – Exceeds EPA authority
  – Requests privileged information
  – Continuing production obligation
  – Not enough time to respond

• Objections to specific questions:
  – Failure to define unclear terms
  – Client used best effort to reasonably interpret terms in the absence of specific definitions in a manner consistent with your internal practices and industry standards
Objections

• Definitions in requests differ from those in statute
  – X objects that the definition of “release” is inconsistent with the definition of the term under CERCLA

• X further specifically objects to the request as unreasonable in breadth and scope and overbroad because they are unlimited in time
  • May call for legal conclusions
  • May seek the production of information protected by the attorney-client privilege, the attorney work product doctrine, or other applicable privilege
The Written Response

• Define terms in the response the way you would commonly understand them
• Responses should explain:
  – Unique issues with data or processes
  – The bases for any defenses you might have to an assertion of a violation
  – Any understanding with state regulators
• Identify persons consulted for each response
The Written Response, cont.

- Be clear and concise
- Be complete
  - Answer all questions
- Stay in communication with EPA
  - If you need more time, ask
  - If you have questions about a request, ask
Summary Tips

• Assess insurance coverage and resources
• Prepare an enforcement action strategy
  – Understand some of the long term legal implications of the client’s response and whether there are vulnerabilities under the statute
• Consider having your attorney hire a qualified environmental consultant
  – Goal is to work within the protections of the attorney-client privilege
  – Consultant with an understanding of the relevant statute(s) and requests can assist with gathering and identifying responsive material, as well as identifying areas of vulnerability
Summary Tips, cont.

• Document hold
• Promptly respond to EPA to acknowledge receipt of the request
  – Request additional time (and articulate reasons for the extension)
• Respond timely
• Continue to evaluate your response and prepare for potential negotiations