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June 30, 1995

MEMORANDUM

SUBJECT: Transmittal of Sample Documents for More Effective
Communication in CERCLA §104(e)(2) Information Requests

FROM: Bruce M. Diamond, Director
Office of Site Remediation Enforcement

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

Attached are sample initial information request letters tailored to large businesses and small businesses or individuals, and sample instructions to recipients for responding to information request letters at a site. The attached documents supplement, but do not supersede, other guidance that EPA has issued. EPA's previous guidance on information requests ("Guidance on the Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas," OSWER #9834.4-A, August 1988) spells out methods for information gathering at a Superfund site.

PURPOSE

These documents are intended to address concerns raised by past recipients of information request letters to more effectively convey our initial information requests to the recipients. These documents are also intended to encourage a more complete response from the recipients of initial information request letters. Use of these documents continues to be at the **Regions' discretion**. However, the themes highlighted in bold in this memorandum reflect current Headquarters policy for preparing initial information request letters. In the future, OSRE plans

include tailoring other model letters such as the general and special notice letters and demand letter to categories of recipients in an effort to improve the quality of our communications with Potentially Responsible Parties (PRPs).

BACKGROUND AND CHANGES

Recipients of CERCLA information requests have often found the "tone" of these letters too blunt concerning potential liability, and too technical, using acronyms and complex legalistic language. Recipients have stated that the effect of such letters is fear of liability at the site and confusion as to how to fulfill the Agency's information request and avoid potential liability. **EPA is attempting to temper the tone of the information request letter, opting for "plain English" instead of complex legal language and acronyms extracted from the Superfund statute and regulations.** Simpler language should help small businesses and individuals understand the process clearly without detracting from conveying the importance of answering the questions to determine what happened at the site.

Recipients have also stated that the initial information requests were quite excessive concerning financial issues. As you will note in the sample letters, requests for financial information are not included in the initial information request. **A request for financial information is normally only appropriate once the potential liability of a party has been established.** Therefore, a request for financial information should be contained in the general notice letter. EPA should ask the recipient in the general notice letter to contact EPA if it believes it may have an inability to pay its share of the cleanup costs. EPA should then send appropriate financial questions to the PRP. In this way, recipients without ability to pay problems avoid having to answer financial questions and submit voluminous financial records, many of which will be regarded as confidential. Of course, financial information necessary to determine the PRP's financial ability to perform response work may also be requested when appropriate.

Small businesses and individuals often receive the same questionnaire as large businesses. Headquarters encourages Regions to tailor their information requests to the individual recipient or different categories of recipients (e.g., owner/operators, generators, transporters, or non-PRPs with relevant information, such as employees of operators, neighbors, and businesses that may retain records, such as accountants). Sample questions are not included at this time, but Headquarters will continue to work with the Regions to develop a pool of sample information request questions from which a set of questions could be pulled for each recipient or category of recipients.

EPA hopes to provide as much PRP search information to the public as possible ("Revised Policy on Discretionary Information Release Under CERCLA," OSWER Directive 9835.12-01a, March 31, 1993), including responses to information requests, in order to allow the public to identify additional PRPs. This should also provide all interested parties access to better understanding of the facts at the Superfund site. With regard to confidential business information (CBI), any portion of the response that contains CBI should be submitted to EPA in both redacted and non-redacted versions. The non-redacted version should be enclosed in a separate, clearly marked folder or envelope. This separation will help the Regions set up public repositories for the sites.

Full and accurate responses to information requests are critical to the enforcement process. EPA must follow up consistently with recipients who do not respond to information requests. Follow-up information requests to recipients who were non-responsive to the initial information request should contain language that clearly explains potential liability (e.g., penalties of up to \$25,000 per day for failure to respond fully and accurately). The attached sample instructions emphasize the need for recipients to respond fully and accurately based on court rulings. In 1991, EPA issued a memorandum encouraging the Regions to undertake enforcement actions against CERCLA non-settlers and non-compliers, particularly penalty actions against parties who fail to provide information or who provide ambiguous,

evasive or inaccurate information in response to our requests.¹ The Agency has begun and will continue to work with DOJ to consider §104(e) compliance methods that provide for optimal use of government and Agency resources.

These documents are also designed to assist the implementation of the Superfund Administrative Reform pilot projects announced by the Administrator earlier this year (specifically, the PRP search pilot project). Other anticipated Administrative Reform recommendations may also assist in enhancing effective communication with information request recipients (e.g., using information-gathering interviews where practical to compliment information request letters; meeting with groups of recipients of information request letters to discuss facts about the Superfund site and why they received the letters; and, using recipient compliance with information requests as a factor in determining allocation shares).

The comments received from many Regional and Headquarters offices were very helpful in developing these documents. If you have any questions, please contact Steven Rollin (703-603-8934), or Yolaanda Walker (202-260-4460).

Attachment (3)

cc: Lisa Friedman, OGC
Bruce Gelber, DOJ
Linda Boornazian, PPED
Sandra Connors, RSD
Steve Luftig, OERR
Earl Salo, OGC
Superfund Remedial and Removal Branch Chiefs, Regions I-X
Superfund ORC Branch Chiefs, Regions I-X

¹EPA memorandum from Raymond Ludwiszewski and Don Clay, "Non-Settlor/Non-Complier Enforcement Initiative," June 1991.

attach. 1

Attachment —
Information Request
to [Name of small or large entity]

Instructions

1. Answer Every Question Completely. A separate response must be made to each of the questions set forth in this Information Request. For each question contained in this letter, if information responsive to this information request is not in your possession, custody, or control, please identify the person(s) from whom such information may be obtained.
2. Number Each Answer. Precede each answer with the corresponding number of the question and the subpart to which it responds.
3. Provide the Best Information Available. Provide responses to the best of Respondent's ability, even if the information sought was never put down in writing or if the written documents are no longer available. You should seek out responsive information from current and former employees/agents. Submission of cursory responses when other responsive information is available to the Respondent will be considered non-compliance with this Information Request.
4. Identify Sources of Answer. For each question, identify (see Definitions) all the persons and documents that you relied on in producing your answer.
5. Continuing Obligation to Provide/Correct Information. If additional information or documents responsive to this Request become known or available to you after you respond to this Request, EPA hereby requests pursuant to CERCLA Section 104(e) that you supplement your response to EPA.
6. Confidential Information. The information requested herein must be provided even though you may contend that it includes confidential information or trade secrets. You may assert a confidentiality claim covering part or all of the information requested, pursuant to Sections 104(e)(7)(E) and (F) of CERCLA, 42 U.S.C. §§ 9604(e)(7)(E) and (F), and Section 3007(b) of RCRA, 42 U.S.C. § 6927(b), and 40 C.F.R. § 2.203(b).

If you make a claim of confidentiality for any of the information you submit to EPA, you must prove that claim. For each document or response you claim confidential, you must separately address the following points:

1. the portions of the information alleged to be entitled to confidential treatment;
2. the period of time for which confidential treatment is desired (e.g., until a certain date, until the occurrence of a specific event, or permanently);
3. measures taken by you to guard against the undesired disclosure of the information to others;
4. the extent to which the information has been disclosed to others, and the precautions taken in connection therewith;
5. pertinent confidentiality determinations, if any, by EPA or other federal agencies, and a copy of any such determinations or reference to them, if available; and
6. whether you assert that disclosure of the information would likely result in substantial harmful effects on your business' competitive position, and if so, what those harmful effects would be, why they should be viewed as substantial, and an explanation of the causal relationship between disclosure and such harmful effects.

To make a confidentiality claim, please stamp, or type, "confidential" on all confidential responses and any related confidential documents. Confidential portions of otherwise nonconfidential documents should be clearly identified. You should indicate a date, if any, after which the information need no longer be treated as confidential. Please submit your response so that all non-confidential information, including any redacted versions of documents are in one envelope and all materials for which you desire confidential treatment are in another envelope.

All confidentiality claims are subject to EPA verification. It is important that you satisfactorily show that you have taken

reasonable measures to protect the confidentiality of the information and that you intend to continue to do so, and that it is not and has not been obtainable by legitimate means without your consent. Information covered by such claim will be disclosed by EPA only to the extent permitted by CERCLA Section 104(e). If no such claim accompanies the information when it is received by EPA, then it may be made available to the public by EPA without further notice to you.

7. Disclosure to EPA Contractor. Information which you submit in response to this Information Request may be disclosed by EPA to authorized representatives of the United States, pursuant to 40 C.F.R. 2.310(h), even if you assert that all or part of it is confidential business information. Please be advised that EPA intends to disclose all responses to this Information Request to one or more of its private contractors for the purpose of organizing and/or analyzing the information contained in the responses to this Information Request. If you are submitting information which you assert is entitled to treatment as confidential business information, you may comment on this intended disclosure within fourteen (insert # of days) days of receiving this Information Request.

[Optional, example format for listing contractors being used by EPA: EPA may contract with one of the following independent contracting firms to review the documentation, including documents which you claim are confidential business information ("CBI") which you submit in response to this information request, depending on available agency resources. The contractor will be filing, organizing, analyzing and/or summarizing the information for agency personnel. EPA's contractors are: Booz-Allen & Hamilton, Inc. (subcontractors to Booz-Allen & Hamilton, Inc. are: CDM-Federal Programs Corporation, Dynamac Corporation, PRC Environmental Management, Inc., CACI, Inc., Hydraulic & Water Resources Engineers, Inc., Investigative Consultant Services, Inc., Northeast Investigation, and Tri-State Enterprises), CH2MHill, Black & Veatch Waste Science and Technology Corporation, TetraTech, Inc., Ecology & Environment, Inc., Halliburton NUS Corporation (formally known as Halliburton NUS Environmental Corporation), Environmental Technology, Inc., and Roy F. Weston, Inc. operating under contract numbers 68-W4-0010, 68-W8--0091, 68-W8-0092, 68-W8-0085, 68-W80037, 68-S2-3002, and

68-WO-0036, respectively. These contractors have signed a contract with EPA that contains a confidentiality clause with respect to CBI that they handle for EPA. Section 104 of the Superfund law, and EPA's regulations at 40 C.F.R. Section 2.310 provide that EPA may share such CBI with contractors. If you have any objections to disclosure by EPA of documents which you claim are CBI to any or all of these entities, then you must notify EPA at the time you submit such documents.

8. Personal Privacy Information. Personnel and medical files, and similar files the disclosure of which to the general public may constitute an invasion of privacy should be segregated from your responses, included on separate sheet(s), and marked as "Personal Privacy Information."

9. Objections to Questions. If you have objections to some or all the questions within the Information Request letter, you are still required to respond to each of the questions.

Definitions

The following definitions shall apply to the following words as they appear in this Supplemental Information Request.

1. The term "you" or "Respondent" shall mean [name of individual or small business]. [language for small business': The term "you" also includes any officers, managers, employees, contractors, trustees, successors, assigns, and agents of [name of small business] Company.
2. The term "person" shall include any individual, firm, unincorporated association, partnership, corporation, trust, or other entity.
3. The term "Site" shall mean the [insert the site name] Superfund Site located at [insert the address of the site].
4. The term "waste" or "wastes" shall mean and include trash, garbage, refuse, by-products, solid waste, hazardous waste, hazardous substances, and pollutants or contaminants, whether solid, liquid, or sludge, including but not limited to containers for temporary or permanent holding of such wastes.

5. 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 mixtures of hazardous substances with petroleum products or other nonhazardous substances.

6. The term "identify" means, with respect to a natural person, to set forth: (a) the person's full name; (b) present or last known business and home addresses and telephone numbers; (c) present or last known employer (include full name and address) with title, position or business.

7. With respect to a corporation, partnership, or other business entity (including a sole proprietorship), the term "identify" means to provide its full name, address, and affiliation with the individual and/or company to whom/which this request is addressed.

9. The term "documents" includes any written, recorded, computer generated, or visually or aurally reproduced material of any kind in any medium in your possession, custody, or control or known by you to exist, including originals, all prior drafts, and all non-identical copies.

10. The term "arrangement" means every separate contract or other agreement between two or more persons, whether written or oral.

11. The term "material" or "materials" shall mean any and all objects, goods, substances, or matter of any kind, including but not limited to wastes.

12. The term "real estate" shall mean and include, but not be limited to the following: land, buildings, a house, dwelling place, condominium, cooperative apartment, office or commercial building, including those located outside the United States.

13. The term "release" shall mean 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.

14. The term "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations; except that the term "pollutant or contaminant" shall not include petroleum.

104(e) Initial Letter for small entities (e.g. individuals, small businesses, employees, and citizens)

PROMPT REPLY NECESSARY

CERTIFIED MAIL: RETURN RECEIPT REQUESTED

[Date]

[Name - Please note: The name you use in this place will define what individual, small business, employee, or citizen is the "respondent" for purposes of all questions. If you want the respondent to answer for more than one business at the same address, put that name here or in the definitions section]

Re: Request for Information Pursuant to Section 104 of CERCLA
for [Site Name] in [Site Location]

Dear [Name of Contact Person],:

This letter seeks your cooperation in providing information and documents relating to the contamination of the [Site Name] Superfund Site in [Site Location] ("Site"). A Superfund site is a site contaminated with high levels of hazardous substances that may present a threat to human health or the environment.

We encourage you to give this matter your immediate attention and request that you provide a complete and truthful response to this Information Request and attached questions (Attachment __) within [insert # of days] days of your receipt of this letter.

The United States Environmental Protection Agency ("EPA") is investigating the release or threat of release of hazardous substances, pollutants, or contaminants at the Site. EPA is seeking to obtain information concerning the generation, storage, treatment, transportation, and disposal methods of such substances that have been or threaten to be released from the Site. EPA will study the effects of these substances on the environment and public health. In addition, EPA will identify activities, materials and parties that contributed to contamination at the Site. EPA believes that you might have information which may assist the Agency in its investigation of

the Site.

Insert a brief summary (minimum use of acronyms) of Site background and remedial or removal activities conducted to date.

We encourage the Region to use explicit information. Example:

In the early 1980's, EPA determined that the presence of hazardous substances discovered at the --- Superfund Site ("Site") posed a threat to human health and the environment. There were contaminated soils and contaminated groundwater at the Site. In early 1989, EPA excavated the most highly contaminated soils from the Site. Most of the Site was paved to serve as a temporary cap to protect humans from direct contact with contaminated soil and minimize contaminant leaching.

A preliminary site assessment conducted by EPA determined that contamination of the groundwater aquifer at the Site presented an imminent hazard to human health and the environment because there are residents located within a one mile radius who drink water from public and private wells installed in the deep drinking water aquifer. Therefore, EPA addressed the groundwater contamination as an interim measure (or "operable unit," as defined in Superfund regulations). EPA used (or is currently using) public funds to perform the site investigation.

Description of Legal Authority

The federal "Superfund" law (the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601, et seq. commonly referred to as "CERCLA" and "Superfund") gives EPA the authority to, among other things: (1) assess contaminated sites, (2) determine the threats to human health and the environment posed by each site, and (3) clean up those sites in the order of the relative threats posed by each.

Information Request

[Note: This information could be contained in an enclosure for letters sent to employees and citizens]

Under Section 104(e) (2) of CERCLA, 42 U.S.C. Section 9604(e) (2), EPA has broad information gathering authority which allows EPA to require persons to furnish information or documents relating to:

- (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.

While EPA seeks your cooperation in this investigation, compliance with the Information Request is required by law. Please note that false, fictitious, or fraudulent statements or representations may subject you to civil or criminal penalties under federal law.

Some of the information EPA is requesting may be considered by you to be confidential. Please be aware that you may not withhold the information upon that basis. If you wish EPA to treat the information confidentially, you must advise EPA of that fact by following the procedures outlined in Attachment __, including the requirement for supporting your claim for confidentiality.

If you have information about other parties who may have information which may assist the Agency in its investigation of the Site or may be responsible for the contamination at the Site, that information should be submitted within the timeframe noted above.

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

Instructions on how to respond to the questions in Attachment __ to this document are described in Attachment __. Your response to this Information Request should be mailed to:

U.S. Environmental Protection Agency
[Name of Civil Investigator, RPM, OSC, or Section Chief]
[Section Name]
[Regional Address]

If you have additional questions about the history of the Site, the nature of the environmental conditions at the Site, or the

status of cleanup activities, please contact [RPM or ORC name]. However, if you have specific questions about the Information Request please contact [ORC], [or leave a message on the EPA Superfund [] Hotline voice mail at 1-800-xxx-xxxx and EPA will promptly return your call.]

We appreciate and look forward to your prompt response to this information request.

Sincerely,

[Division Director or individual delegated signature authority]

Enclosure

104(e) Initial Letter for large entities

PROMPT REPLY NECESSARY

CERTIFIED MAIL: RETURN RECEIPT REQUESTED

[Date]

[Name - Please note: The name you use in this place will define what large entity is the "respondent" for purposes of all questions. If you want the respondent to answer for more than one business at the same address, put that name here or in the definitions section]

Re: Request for Information Pursuant to Section 104 of CERCLA for [Site Name] in [Site Location]

Dear [Name of Contact Person]:

This letter seeks your cooperation in providing information and documents relating to the contamination of the [Site Name] Superfund Site in [Site Location] ("Site"). We encourage you to give this matter your immediate attention and that you provide a complete and truthful response to this Information Request and attached questions (Attachment __) within [insert # of days] days of your receipt of this letter.

The United States Environmental Protection Agency ("EPA") is investigating the release or threat of release of hazardous substances, pollutants or contaminants at the Site. EPA is seeking to obtain information concerning the generation, storage, treatment, transportation, and disposal methods of these substances on the environment and public health and identify activities, materials and parties that contributed to contamination at the Site. EPA believes that you might possess information which may assist the Agency in its investigation of the Site.

Insert a brief summary (minimum use of acronyms) of Site background and remedial or removal activities conducted to date.

Example: In the early 1980's, EPA determined that the presence

of hazardous substances discovered at the --- Superfund Site ("Site") posed a threat to human health and the environment. There were contaminated soils and contaminated groundwater at the Site. In early 1989, EPA excavated the most highly contaminated soils from the Site. Most of the Site was paved to serve as a temporary cap to protect humans from direct contact with contaminated soil and minimize contaminant leaching.

A preliminary site assessment conducted by EPA determined that contamination of the groundwater aquifer at the Site presented an imminent hazard to human health and the environment because there are residents located within a one mile radius who drink water from public and private wells installed in the deep drinking water aquifer. Therefore, EPA addressed the groundwater contamination as an interim measure (or "operable unit," as defined in Superfund regulations). EPA used (or is currently using) public funds to perform the site investigation.

Under Section 104(e)(2) of CERCLA, 42 U.S.C. §9604(e)(2), EPA has broad information gathering authority which allows EPA to require persons to furnish information or documents relating to:

(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.

While EPA seeks your cooperation in this investigation, compliance with the Information Request is required by law. In addition, providing false, fictitious, or fraudulent statements or representations may subject you to criminal penalties under 18 U.S.C. Section 1001. The information you provide may be used by EPA in administrative, civil or criminal proceedings.

Some of the information EPA is requesting may be considered by you to be confidential. Please be aware that you may not withhold the information upon that basis. If you wish EPA to treat the information confidentially, you must advise EPA of that fact by following the procedures outlined in Attachment __,

including the requirement for supporting your claim for confidentiality.

If you have information about other parties who may have information which may assist the Agency in its investigation of the Site or may be responsible for the contamination at the Site, that information must be submitted within the timeframe noted above.

Section 104 of CERCLA, 42 U.S.C. Section 9604, authorizes EPA to pursue penalties for failure to comply with that section or for failure to respond adequately to requests for submissions of required information.

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

Instructions on how to respond to the questions in Attachment ____ to this document are described in Attachment _____. Your response to this Information Request should be mailed to:

U.S. Environmental Protection Agency
[Name of Civil Investigator, RPM, OSC, or Section Chief]
[Section Name]
[Regional Address]

If you have questions about the history of the Site, the nature of the environmental conditions at the Site, or the status of cleanup activities, please contact [RPM or ORC]. However, if you have specific questions about the Information Request please contact [ORC], [or leave a message on the EPA Superfund Hotline voice mail at 1-800-xxx-xxxx and EPA will promptly return your call.]

We appreciate and look forward to your prompt response to this information request.

Sincerely,

[Division Director or individual delegated signature authority]

Enclosure