

"PAPERS, PLEASE" - RESPONDING TO AGENCY INFORMATION REQUESTS IN THE DIGITAL AGE

INDIANA CHAMBER OF COMMERCE CONFERENCE

OCTOBER 22, 2018

R. William Gardner
Taft/

Erik D. White, PE
UEG
CONSULTING-LLC

Michael Golando, Esq
Cargill

AGENDA

- Overview of Information Request Laws
- Practical Considerations
- Hypothetical Enforcement Scenario
- Hypothetical Rulemaking Scenario
- Questions/Discussion

UEG
CONSULTING-LLC

Taft/

Cargill

INFORMATION REQUEST LAWS

- Component of all major federal environmental acts
 - CERCLA Section 104(e)
 - Clean Air Act Section 114(a)
 - Clean Water Act Section 308
 - Resource Conservation and Recovery Act Section 3007
 - Toxic Substances Control Act Section 2610
 - Federal Insecticide, Fungicide, and Rodenticide Act Section 136(f)
- Separate state information request laws
 - Remedial Actions for Hazardous Waste Sites, I.C. 13-25-4-5



WHAT ARE AGENCY INFORMATION REQUESTS?

- Generally, but not always, a written request for submission of information to the agency
- In some cases tied to an agency inspection
- Seek historic information related to environmental laws
- Not a formal "subpoena," although agencies may seek a subpoena from a court or issue an enforcement action for failure to comply with the information request
- Typically the first step in an agency enforcement action



COMMON THEMES - PURPOSE

- Developing Rules
 - CWA: "Developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter"
 - CAA: "Developing or assisting in the development of any implementation plan ..., any standard of performance ..., any emission standard ..., or any regulation of solid waste combustion"
- Enforcement
 - CWA: "Determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance"
 - CAA: "Determining whether any person is in violation of any such standard or any requirement of such a plan"



RELEVANCE TO LAWFUL PURPOSE

- EPA requests documents about *future* projects that may affect emissions.

"The analysis should hinge on whether EPA's information requests, in this instance, *could* uncover an *existing or imminent* CAA violation. If the answer is "yes," then, pursuant to EPA's broad authority under the CAA, any information that is subpoenaed is relevant for a lawful purpose. Such is the case in this instance, and thus EPA's requests satisfy this prong of the analysis."

United States v. Xcel Energy, Inc., 759 F. Supp. 2d 1106, 1114 (D. Minn. 2010).



COMMON THEMES - APPLICABILITY

- CWA:
 - "Owner or operator of any point source"
- CAA:
 - "Any person who (1) owns or operates any emission source, (2) who manufactures emission control equipment or process equipment, who the Administrator believes may have information necessary for the purposes set forth in this subsection, or who is subject to any requirement of this chapter."
- RCRA:
 - "Any person who generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous wastes"



THE SCOPE OF APPLICABILITY IS BROAD

- Target of information request argues it is not required to provide information.

"Nor does Gurley's argument find support in the text of § 9604(e)(2), which states that the EPA may issue an information request to "any person who has or may have information"

United States v. Gurley, 384 F.3d 316, 323 (6th Cir. 2004).



COMMON THEMES – NOT JUST DOCUMENTS

- CWA
 - “Install, use, and maintain such monitoring equipment or methods”
 - “Sample such effluents”
 - Catchall Provision: “Provide such other information as [the Administrator] may reasonably require”
- CAA
 - “Install, use, and maintain such monitoring equipment, and use such audit procedures, or methods”
 - “Sample such emissions”
 - Catchall Provision: “Provide such other information as the Administrator may reasonably require”



REQUIRED MONITORING

“Section 308 of the Act grants EPA broad authority to require NPDES permittees to monitor, at such intervals as the Administrator shall prescribe, whenever it is required to carry out the objectives of the Act. 33 U.S.C. § 1318; 40 C.F.R. § 122.48. Petitioners contend that the Administrator erred by upholding the permits’ requirement that discharge be monitored for settleable solids once per day of discharge instead of once per day of sluicing. The Administrator’s decision that monitoring should take place once per day of discharge, however, is supported by substantial evidence.”

Ackels v. U.S. E.P.A., 7 F.3d 862, 866–67 (9th Cir. 1993).



PRACTICAL CONSIDERATIONS

WHAT DO YOU DO WHEN YOU GET A SECTION 114 INFORMATION REQUEST?

1. Contact your legal counsel
2. Determine the basis for the request
3. Develop a response timeline
4. Develop an action plan and response team
5. Should the response be developed under privilege?
6. Sources for response information
7. Is there potential exposure?
8. Written response



HOW DO I PAY FOR THIS?

- Developing responses to information requests can cost tens of thousands of dollars in some cases and is often the first step of enforcement. Talk to your lawyer about whether the information request triggers a duty to defend from your insurers.

"The Insurers argue that the 104(e) letter is not a "suit" under Oregon law. But, we have previously held that a 104(e) letter is a "coercive information demand[]" that is "an attempt to gain an end through legal process," and is therefore a "suit" under Oregon law. *Anderson Bros., Inc. v. St. Paul Fire & Marine Ins. Co.*, 729 F.3d 923, 932–33, 935 (9th Cir.2013)."

Ash Grove Cement Co. v. Liberty Mut. Ins. Co., 649 F. App'x 585, 587–88 (9th Cir. 2016).



HYPOTHETICAL ENFORCEMENT SCENARIO – CERCLA 104(E)

SCENARIO SET-UP

- 10/1/2018 - Registered Agent Receives
- 10/5/2018 - RA Forwards to Corporate
- 10/8/2018 - Corporate Forwards to Legal
- Response Deadline: 10/30/2018
- Letter sent to ABC Co. asking about PCB transformers sent to landfill in Alabama decades ago by XYZ Corp.



BASIC QUESTIONS

- Name and address of respondent
- Location of respondents' facilities
- Description of operations
- Who owned and operated business
- Who has prepared these responses



REQUESTS THAT CALL FOR A LEGAL CONCLUSION

- “Provide a list of all predecessors in interest to ABC Co. that sent wastes to the Landfill.”
 - The determination as to who is a predecessor to ABC Co. is a complex legal determination and would likely be one of the central issues in any litigation with EPA or other PRPs. Be very careful before answering questions like this as your response may be used against you in future litigation. It may be prudent to simply object to this type of question.



OVERLY BROAD QUESTIONS

- “Provide any and all records or information regarding wastes generated by ABC Co. and its predecessors in interest, including, but not limited to, XYZ Corp. from 1950 to the present.”
 - Time period of 1950 to present is not reasonably tailored to the PCB waste at issue.
 - “All records or information regarding wastes” is overly broad. Should be tailored to wastes at issue (PCBs). What does “all records or information” even mean as a practical matter?
 - Again this request calls for a legal conclusion.



CREATE NEW INFORMATION

- Prepare an Excel spreadsheet that lists all wastes sent to the Landfill from 1950 to present in chronological order, including the invoice number, date the waste was sent, date the waste was received, and the amount of waste.
 - It is clear that PRPs are required to give EPA pertinent records related to an enforceable issue, but can EPA dictate the form in which the information must be provided? Case law is not clear, so it would likely come down to whether the request is reasonable.
 - How burdensome would it be to create the document?
 - How many documents must be categorized and how many hours would that take?
 - Does the potential expenditure of resources justify pushing back and requesting that the agency narrow the request?



INFORMATION OUTSIDE YOUR POSSESSION

- “Where did XYZ Corp. send its hazardous wastes for treatment, storage or disposal in 1985?”
 - Current ABC Co. staff and management have no idea how hazardous wastes were managed in 1985. The former XYZ Corp. plant manager is retired, but plays golf once a month with the new ABC Co. plant manager. He may know the answer to this question. Does ABC Co. have a duty to ask the former XYZ Corp. plant manager for information to respond to the agency's request?
 - While there is no case law addressing this question, it seems very unlikely that ABC Co. would be required to obtain information from former employees of a predecessor company.
 - The information requests are addressed to the “respondent,” which is typically defined as the company and its employees, etc.—not former employees.
 - Former employees would also not appear to fall under the applicability section of the information request statute.



COMPLIANCE CERTIFICATION

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all documents submitted herewith; that, to the best of my knowledge and belief, the submitted information is true, accurate, and complete; and that all documents submitted herewith are complete and authentic, unless otherwise indicated. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment.

Signature _____

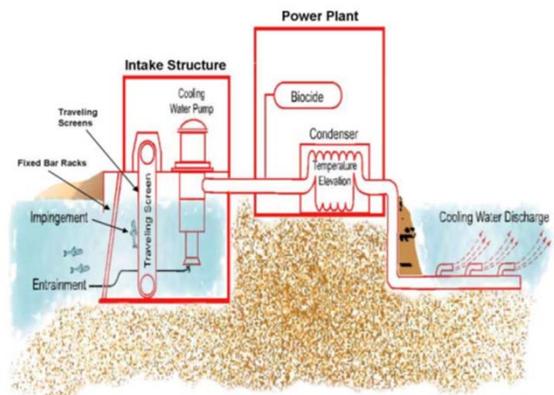
- Responding to information requests may require input from dozens of people and thousands or tens of thousands of records. In such cases, no one person is going to be “personally” familiar with all of the documents and information. In such cases, you will need to modify the certification to reflect such limitations.
- The information in already generated documents may not be “accurate.” Again, you may need to modify the certification language.



HYPOTHETICAL RULEMAKING SCENARIO – 316(B)

RULE OVERVIEW

- Applicability:
 - Design Intake Flow > 2 MGD
 - > 25% Cooling Water
 - NPDES Permit Program
- Relevant Rule Dates:
 - October 14, 2014 (rule effective date)
 - July 14, 2018 (information submittal)



HYPOTHETICAL RULEMAKING SCENARIO – 316(B)

SCENARIO SET-UP

- Date is 2010
- EPA requests site visit to review intake
- EPA shows up unannounced
- EPA shows up with EPA subcontractors
- EPA requires follow-up information to be submitted



HYPOTHETICAL RULEMAKING SCENARIO – 316(B)

PRACTICAL CONSIDERATIONS

- Can you refuse?
 - EPA?
 - Subcontractors?
- Is the plant personnel available?
- Are there safety requirements at your plant?
- Can you limit how long they are on your site?
- Can you refuse based on confidentiality concerns?



HYPOTHETICAL RULEMAKING SCENARIO – 316(B)

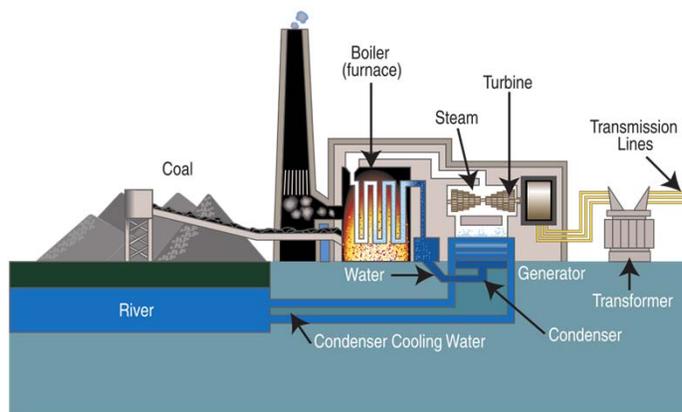
FOLLOW-UP INFORMATION REQUIREMENTS

- Can you be forced to hire someone to compile the information?
- Can you push back on the information request schedule?
- How do you handle confidential information?
- Could additional information be requested other than information related to intakes?
- Do you have the ability to argue at higher levels of EPA?



HYPOTHETICAL RULEMAKING SCENARIO – 316(B)

BOUNDARY CONCERNS



QUESTIONS?

Will Gardner / Attorney
Taft Stettinius & Hollister LLP
One Indiana Square, Suite 3500
Indianapolis, Indiana 46204-2023
Tel: 317.713.3500 • Fax: 317.713.3699
Direct: 317.713.3562
www.taftlaw.com / WGardner@taftlaw.com

Mike Golando / Regional Environmental Manager
Starch, Sweeteners, Texturizers, North America
Cargill, Incorporated
1100 Indianapolis Blvd.
Hammond, Indiana 46320
Direct: 219.473.2567
www.Cargill.com / Michael_Golando@Cargill.com

Erik D. White / President
UEG Consulting, LLC
65 Union Street, Unit 34
Montclair, New Jersey 07042
Direct: 312.498.6980
www.uegconsulting.com / ewhite@uegconsulting.com

