



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

JAN 31 1990

MEMORANDUM

SUBJECT: Final Model Litigation Report and Complaint for CERCLA
Section 104(e) Enforcement Initiative

FROM: Glenn L. Unterberger *Glenn*
Associate Enforcement Counsel for Waste

Bruce M. Diamond, Director *Bruce*
Office of Waste Programs Enforcement

TO: Regional Counsels and Waste Division Directors,
Regions I-X

Please find attached the Final Model Litigation Report and Complaint for the CERCLA § 104(e) enforcement initiative. We extend our thanks to those of you who submitted comments on the Draft Model Litigation Report and Complaint. We look forward to working with you and your staff on implementation of the Agency's § 104(e) enforcement initiative.

Attachment

cc: Edward E. Reich, Deputy Assistant Administrator-Civil

David Buente, Chief
Environmental Enforcement Section, Department of Justice

Regional § 104(e) Contacts

MODEL CERCLA 104(e) COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF...

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.
)	
)	
Defendant.)	
)	
_____)	

COMPLAINT

Plaintiff, the United States of America, by authority of the Attorney General and acting at the request of the Administrator of the Environmental Protection Agency ("EPA"), alleges as follows:

NATURE OF THE CLAIMS

1. The claims in this complaint arise under section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA"), 42 U.S.C. § 9604(e), for failure to provide information requested by EPA concerning the identification, nature, and quantity of materials that have been generated, stored, treated, transported to and/or disposed of at the [FACILITY], the nature and extent of a release or threatened release of hazardous substances at or from the [FACILITY], and information relating to the ability of a person to pay for or

perform the cleanup of the [FACILITY]. The complaint seeks an injunction ordering the defendant, [NAME], to supply the requested information and civil penalties for defendant's failure to comply with EPA's duly authorized requests.

DEFENDANT

[USE A SEPARATE PARAGRAPH FOR EACH DEFENDANT. THE FOLLOWING PARAGRAPHS ARE MODELS FOR THE VARIOUS TYPES OF DEFENDANTS LIKELY TO BE ENCOUNTERED.]

2. Defendant [NAME] is a [STATE] corporation [DOING BUSINESS OR WITH ITS PRINCIPAL PLACE OF BUSINESS] at [ADDRESS]. [INCLUDE HERE ANY PARTICULARS RELATING TO MERGER WITH OTHER CORPORATIONS, DISSOLUTION, OR ANY OTHER LIKE INFORMATION.]

3. The defendants [NAME] and [NAME] are the trustees of the [NAME], a trust created by declaration of trust dated [DATE], and recorded with the [APPROPRIATE RECORDING OFFICE] at book ____, page ____, with its principal place of business at [ADDRESS].

4. The defendant [NAME] is an individual who resides at [ADDRESS].

5. The defendant [NAME] is a [STATE] [LIMITED] partnership with its principal place of business at [ADDRESS]

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action and over the parties under 42 U.S.C. § 9613(b) and U.S.C. §§ 1331, 1345 and 1355. Venue lies in this district under 28 U.S.C. § 1391 and 42 U.S.C. § 9613(b).

GENERAL ALLEGATIONS

4. Section 104(e)(2), 42 U.S.C. § 9604(e)(2), of CERCLA provides, in pertinent part:

Any officer, employee, or representative [of the President, duly designated by 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.

5. [NAME] is a "person" within the meaning of section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

6. [DESCRIPTION OF DEFENDANT'S INVOLVEMENT - I.E., WHETHER DEFENDANT WAS AN OWNER, OPERATOR, GENERATOR OR TRANSPORTER OF HAZARDOUS SUBSTANCES, OR OTHER PERSON WHO FAILED TO COMPLY WITH THE REQUEST, ETC. PROVIDE PARTICULARS.]

7. [DESCRIPTION OF THE SITE OR FACILITY; STATEMENT THAT SITE IS A "FACILITY" WITHIN THE MEANING OF SECTION 101(9) OF CERCLA, 42 U.S.C. § 9601(9).]

8. EPA has a reasonable basis to believe that there may be a release or threat of release of a hazardous substance or pollutant or contaminant at the facility, within the meaning of section 101(22) of CERCLA, 42 U.S.C. § 9601(22). [PROVIDE A

BRIEF EXPLANATION OF EPA'S KNOWLEDGE OF THE RELEASE OR THREAT OF RELEASE.]

9. On [DATE], EPA sent [NAME OF DEFENDANT] a request seeking information and documents, pursuant to section 104(e) of CERCLA, 42 U.S.C. § 9604(e). A true and accurate copy of this information request is attached as Exhibit A to this complaint and is incorporated by reference.

10. The [DATE] information request was authorized by [NAME], a duly designated employee and representative of the President under CERCLA, for the purpose of enforcing CERCLA. Authority under section 104(e), 42 U.S.C. § 9604(e), has been delegated to the Administrator of EPA by Executive Order No. 12580, 52 Fed. Reg. 2923 (January 29, 1987) and redelegated pursuant to CERCLA Delegation 14-6 (September 13, 1987) [and Regional Delegation ____ (DATE)].

11. [NAME OF DEFENDANT] received the [DATE] information request on [DATE] by certified mail, return receipt requested. Attached as Exhibit B is a true and accurate copy of the return receipt signed by ____ on behalf of [NAME OF DEFENDANT] evidencing that [NAME OF DEFENDANT] received the information request.

12. [NAME OF DEFENDANT] did not respond to the information request and did not provide EPA with any of the information or documents requested. [MODIFY AS APPROPRIATE.] Reasonable notice was given to [NAME OF DEFENDANT], as it was provided with

30 days in which to respond to EPA's information request.

[MODIFY AS REQUIRED.]

13. [NAME OF DEFENDANT] has never submitted to EPA any justification of its failure to respond to the information request. [MODIFY OR DELETE AS APPROPRIATE.]

[PARAGRAPHS 14 THROUGH 16 ARE OPTIONAL.]

14. On [DATE], EPA sent a second letter to [NAME OF DEFENDANT], care of [NAME OF ADDRESSEE], certified mail, return receipt requested pursuant to section 104(e)(1), 42 U.S.C. § 9604(e) stating that EPA had not received [NAME OF DEFENDANT]'s response to the information request of [DATE], and again requesting information relating to the [SITE]. A true and accurate copy of this letter is attached as Exhibit C to this complaint and is incorporated by reference.

15. [NAME OF DEFENDANT] received the [DATE] reminder letter on [DATE]. Attached as Exhibit D is a true and accurate copy of the return receipt signed by ____ on behalf of [NAME OF DEFENDANT] evidencing that [NAME OF DEFENDANT] received the reminder letter.

16. [NAME OF DEFENDANT] did not respond to the reminder letter and did not provide EPA with any information or documents requested. [MODIFY AS APPROPRIATE.]

17. [INCLUDE ANY OTHER PERTINENT FACTUAL INFORMATION SUCH AS TELEPHONE CONVERSATIONS.]

18. The purposes for which EPA sent the [DATE] information request were to enforce the provisions of CERCLA and to assist

in determining the need for response to the release of a hazardous substance. [MODIFY AS APPROPRIATE.] EPA's information request was in accordance with law and was neither arbitrary nor capricious nor an abuse of discretion.

CLAIM FOR RELIEF

19. Paragraphs 1 through 18 are incorporated by reference.

20. Section 104(e)(5)(B), 42 U.S.C. § 9604(e)(5)(B), of CERCLA authorizes the United States "to commence a civil action to compel compliance with a request" for information and documents issued pursuant to section 104(e), 42 U.S.C. § 9604(e).

21. Section 104(e)(5)(B) authorizes the Court to compel compliance with a request for information and documents; that section further authorizes a Court to "assess a civil penalty not to exceed \$25,000 for each day of noncompliance" with such a request for information and documents against any person who unreasonably fails to provide the information and documents requested.

22. EPA's demand for information and/or documents was not arbitrary or capricious or an abuse of discretion, and was issued in accordance with law. [NAME OF DEFENDANT] violated section 104(e), 42 U.S.C. § 9604(e) by unreasonably failing to provide the information and documents requested by the [DATE] information request.

PRAYER FOR RELIEF

WHEREFORE, plaintiff United States of America prays for the following relief:

1. That the Court issue an order, pursuant to section 104(e)(5) of CERCLA, 42 U.S.C. § 9604(e)(5), directing [NAME OF DEFENDANT] to comply fully with the information request of [DATE];
2. That the Court award the United States civil penalties pursuant to section 104(e)(5) of CERCLA, 42 U.S.C. § 9604(e)(5), not to exceed \$25,000 for each day from [DATE of FIRST VIOLATION] until the date when the information is finally and completely provided;
3. That the Court award the United States its costs, including response costs, under sections 104(b)(1) and 104(e) of CERCLA, 42 U.S.C §§ 9604(b)(1) and 9604(e); and
4. That the Court grant such further and other relief as it may deem appropriate.

Respectfully submitted,

Richard B. Stewart
Assistant Attorney General
Land and Natural Resources Division

[NAME]
Attorney, Environmental Enforcement
Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20044

[NAME]
Assistant United States Attorney

OF COUNSEL:

[LIST NAMES OF EPA HQ AND REGIONAL ATTORNEYS]

MODEL LITIGATION REPORT
CERCLA Section 104(e)(2) Actions

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

January 12, 1990

MODEL LITIGATION REPORT

CERCLA Section 104(e)(2) Actions

- I. Cover Page
- II. Table of Contents
- III. Synopsis of the Case (Executive Summary)
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- XII. Litigation Strategy

[This is attorney work
product prepared in
anticipation of
litigation.]

MODEL LITIGATION REPORT
CERCLA Section 104(e)(2) Actions

I. Cover Page

- A. Region, statute(s) involved and judicial district.
- B. Name of defendant(s) by category (e.g., owners, operators, generators, transporters, or other persons who have failed to comply with the request).

Include names, addresses and telephone numbers of all proposed defendants in an appendix to the litigation report. List all other § 104(e) defendants for this site that the Region is contemplating pursuing, with addresses (where available).

- C. Name, address and EPA ID Number of facility or facilities that is/are the subject of the information request where available.

Include name, address and telephone number (if available) of all facilities/sites subject to the referral.

D. Regional contacts.

Include names, addresses and telephone numbers of regional contacts who prepared the report.

E. Stamp date of referral on cover page.

II. Table of Contents

Include headings, subheadings and page numbers.

III. Synopsis of the Case (Executive Summary)

This should be a concise summary describing the site, the status of the site in the Superfund program, enforcement history to date, proposed defendants, particulars of the violations (i.e., failure to respond or inadequate response, date of request, date of any follow up requests), significance of the case and relief sought.

IV. Statutory Basis of Referral

A. Applicable Statute and Elements of Proof

(1) General

This Model Litigation report focuses on § 104(e). EPA also has authority under RCRA § 3007 to issue and enforce information requests. The Regions may elect to invoke RCRA as well as CERCLA in judicial actions to enforce such authority.

Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), authorizes EPA to require that information be provided to it by any person for the purposes of determining the need for response, choosing or taking any response action under CERCLA, or enforcing the provisions of CERCLA (CERCLA Section 104(e)(1)).

This information must relate to: (1) the identification, nature and quantity of materials generated, treated, stored, or disposed of at a facility or transported to a facility, (2) the nature of extent of a release or threatened release of hazardous material from a facility, or (3) the ability of a person to perform or for a cleanup (CERCLA Section 104(e)(2)).

Section 104(e)(5)(B) authorizes EPA to commence a civil action to compel compliance with a request or administrative order, and to assess penalties.

(2) Elements of Proof

Reference should be made to the "Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas" (August 25, 1988) to ensure that all proper steps have been followed in making the information requests. (See pp. 7-17.) This Guidance also discusses the nature of the evidence required to support a 104(e) action, including:

1. That the information request was issued by an authorized person (see EPA Delegation 14-6, September 13, 1987);
2. That U.S. EPA has a "reasonable basis to believe that there may be a release or threat of release of a hazardous substance, pollutant or contaminant" at a site or vessel;
3. That the information request was issued for determining the need or 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;

4. That the respondent was requested to provide information relating to one or more of the categories of information identified above (see, Section 104(e)(2) (A) through (C));
5. That the respondent did not fully comply with the request or comply in a timely manner (see, pp. 18-20 of the "Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas" (August 25, 1988)).

B. Enforcement Authority; Jurisdiction and Venue

United States District Courts have jurisdiction to enforce Section 104(e). See, 42 U.S.C. § 9613(b). Venue may be determined with reference to 28 U.S.C. §§ 1391(b) and (c) and 42 U.S.C. § 9613(b).

V. Description of the Site

Include a brief discussion of the site location and site description. Status of the NPL listing and a general description

of the environmental problem posed by the site should also be included.

VI. Enforcement History and Related Litigation

Where applicable, the following information should be discussed:

1. All contacts (written and oral) with potential defendants pertaining to the information request.
2. Involvement (with regard to the Site) of State, local agencies or citizens.
3. Related administrative or judicial actions, and their status. (Note, however, that pre-existing litigation is not a prerequisite for filing a 104(e) action nor does Section 104(e) require that information requests be issued pursuant to a pending adjudicatory proceeding.)

VII. Description of Proposed Defendants

The following information should be included in the report, with respect to each proposed **defendant**:

1. A brief description of the relationship of the proposed defendant to the site. (For additional guidance, see, "Model Litigation Report for CERCLA Sections 106 and 107 and RCRA Section 7003," June 21, 1989.)
2. State of incorporation/principal place of business. (Include name changes and changes in corporate form.)
3. Agent for service of process. (Include name, address and telephone number.)
4. Legal counsel, if known. (Include name, address and telephone number.)
5. Identity of any parent or successor corporations, if applicable and information available.
6. If defendant is a corporate officer and addressee, discuss issues of personal liability, if any (i.e., corporate officers/managers' personal involvement).
7. Description and evidence of financial viability. (Where financial viability of a potential defendant is an issue, financial information will be important.)

VIII. Description of Violations

State with particularity all information requests and follow-up letters sent to or telephone calls made to each proposed defendant and each reply, written or oral, received from each proposed defendant. Include copies of letters, mail receipts and telephone/meeting records as attachments. For each defendant, describe the nature of the violations, including:

1. Evidence supporting a prima facie case (see, elements in IV.A.2.)
2. The number of days that defendant has been in violation. Explain the basis for calculating that number of days unless they are calculated from the due date of the first request letter.
3. The number of violations for each defendant;
4. The extent and/or materiality of the omissions or inaccuracies in any partial response;
5. Evidence of bad faith; and
6. Whether the failure to **respond** caused identifiable

harm (such as delaying or impeding settlement negotiations or enforcement actions, or withholding information about a hazardous substance or conditions that might be useful to EPA in making remedial decisions);

(See, Memo from Edward E. Reich to Regional Administrators, "CERCLA Section 104(e) Enforcement Initiative," dated September 26, 1989.)

IX. Anticipated Defenses

Discuss any anticipated legal or equitable defenses that may arise in connection with this action, even if they appear to lack merit, and proposed responses to such alleged defenses. (Your assessment of the strength of the defense should be stated in a brief narrative.) Examples of possible defenses that may be raised include the following:

1. Privilege claims (attorney-client, or work product exclusion).
2. Confidentiality claims under § 104(e)(7). This is **not** a proper ground for objection, since EPA will treat as confidential any information subject to a proper confidentiality claim (see Section 104(e)(7)).

3. Constitutional defenses: 5th Amendment and denial of equal protection. (Note that 104(e) does not require that U.S. EPA seek information from all PRPs.)
4. The request for information or documents is arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law.
5. A good faith effort was made to comply with the information request.
6. The information requested is not relevant to the investigation.

This list is not intended to suggest that these defenses are viable ones.

X. Relief Sought

Both civil penalties and injunctive relief typically **will be** sought in an action filed under Section 104(e)(5)(B). Civil penalties of up to \$25,000 per day for each day of noncompliance may be assessed by a court for failure to adequately respond to an information request letter. The complaint should seek **the** full statutory amount for each **defendant**. Where appropriate,

complaint should seek an injunction, including an order to provide the required information. To the extent possible, the referral should propose the appropriate relief and penalty amount to accept in settlement and the basis for these recommendations.

XI. Significance of Referral/Major Issues

Any issues of precedential significance should be raised in this section, as well as the importance of obtaining the information to any related litigation. For example, if defendants' refusal to provide the information requested may frustrate settlement discussions with other PRPs, this should be noted.

XII. Litigation Strategy

Questions of strategy should be raised in this section, including the proposed course of action should the defendant comply with the information request during the pendency of the action. Recommendations regarding the timing of filing of a summary judgment motion, as well as settlement potential, should also be addressed.