



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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

PRIVILEGED/CONFIDENTIAL/DO NOT RELEASE UNDER FOIA

July 3, 2001

MEMORANDUM

SUBJECT: Enhancing the Effectiveness of Information Requests in Regulatory Enforcement Matters

FROM: Eric V. Schaeffer /s/
Director, Office of Regulatory Enforcement

TO: Regional Counsel
Regional Enforcement Coordinators
Regional Enforcement Division Directors

Over the past several years, many of you have participated in comprehensive investigations of serious and potential violations of federal environmental law by certain companies. These often depend on the effective use of our authority to request relevant information that is essential to determining compliance. This memorandum outlines several issues to consider when issuing formal written information requests either to individual companies or to many companies within a regulated community. It is designed to help ensure that responses will be on time and valuable to the investigation, and to reduce transaction costs for both the government and the responding party. While the points made below are consistent with common practice and do not conflict with existing Agency guidance, this memorandum may serve as a useful reminder, as well as a quick reference for new employees. As always, you should be familiar with any related media-specific guidance documents.

1) Proper Authorization and Issuance: Information requests should always cite the relevant statutory authority, and be signed by an individual with the delegated responsibility to issue such requests. Although informal oral requests for information (*e.g.*, photocopies of facility records) are common and may be appropriate when done very carefully during onsite inspections in several media programs, under no circumstances should a formal written information request be left onsite during an inspection unless it has been reviewed by all appropriate Agency personnel and approved and signed by an authorized individual. You will, of course, need to confirm receipt of such formal information requests (*e.g.*, through registered mail), thereby making hand delivery generally inappropriate unless delivery by mail has been refused or otherwise has been unsuccessful.

2) Compliance With the PRA: The Paperwork Reduction Act (PRA) requires EPA to obtain OMB approval before collecting information by means of identical questions posed to more than nine persons. The PRA does not apply to the collection of information during the conduct of an agency's administrative action or investigation involving potential violations by specific individuals or entities. This exemption "applies during the entire course of the investigation, audit, or action, whether before or after formal charges or complaints are filed or formal administrative action is initiated, but only after a case file or equivalent is opened with respect to a particular party." 5 C.F.R. § 1320.4(c). Although not required by the PRA, we urge you to open a separate physical or electronic case file with respect to *each* individual party under investigation.

When seeking to apply this exemption, it is also important for you to have done prior research (*e.g.*, review of commercial data, permit files, citizen complaints or prior inspection reports) sufficient to justify opening a case file or its investigative equivalent. Obviously, you do not need to be certain that there is a violation. Moreover, it is EPA's position that near certainty of a violation is not required under the PRA's administrative investigation exemption or under longstanding Agency policies and practices. Although this guidance does not attempt to interpret or summarize the precise *legal* boundaries of the investigative case file exemption, *as a matter of Agency practice* your prior research should be sufficient to determine that for each recipient there is some basis for believing that the facility may be in violation (*e.g.*, where our research shows that some -- but not all -- elements of liability have been met). Once such data are developed, you should open and maintain an enforcement case file with the data used to support your information request. The attached letter from the Office of Management and Budget confirming that EPA's Section 114 requests to numerous electric utilities were exempt from the PRA, may provide useful background.

3) Coordination With Other Information Sources and Affected Media Offices: Please remember to factor in other appropriate programs and existing sources of information before sending out requests for information. This should include determining whether existing Agency information, or information requests pending in other media programs, eliminates the need to ask for certain information. In addition to eliminating potentially redundant requests, coordinating with other appropriate offices in the Regions or Headquarters will allow such offices to raise any possible concerns in a timely manner. This coordination is particularly important in multimedia investigations, but it is no less important for single-media investigations where the Agency already has in its possession general facility information such as ownership or geographic data, financial information, similarly broad demographic data, or extensive compliance history information.

4) Reasonable Time to Respond and Tone of Requests: Of course, the time allowed to respond should be stated clearly and reasonably should reflect the effort required to identify and gather the data requested. Information request letters should identify an EPA person to contact to discuss any issues concerning the request and should provide a clear opportunity to meet to discuss additional time that may be appropriate to respond. In general, the tone of information requests should be polite, and should thank the respondent in advance for its cooperation.

Although it should be clear that the information request is being issued pursuant to EPA's statutory authority, in exercising your discretion you may decide that citation to statutory penalties for failure to respond is not always necessary, *e.g.*, where you anticipate cooperation from the respondent.

This is not meant to encourage or suggest that information requests generally should *not* cite to the statutory penalties, but simply is intended to reiterate that you should use your best judgment in deciding whether it is appropriate in all circumstances. For example, in addition to considering whether the respondent is likely to cooperate with the request, it may be appropriate to consider whether citation to statutory penalties is necessary in an initial request to a smaller entity that has little or no experience with EPA regulatory authorities, particularly where the potential violations do not present a serious immediate threat and there is time for a followup request that can recite such penalties, if necessary. Also consider whether it is possible to discuss EPA's information needs with the respondent in advance, to refine the request as necessary. You should be careful to document such discussions, however, and to follow up with a more formal request to avoid misunderstanding or delays in obtaining needed information.

5) Time For Review: In drafting your questions, consider the length of time the government may need to review the response. Lengthy delays in reviewing responses may make violations stale once they are finally identified, and otherwise compromise the integrity of any future enforcement action. Investigations of certain serious violations may require in-depth review of corporate records, where compliance cannot be determined from available monitoring or permit data, or ordinary inspection reports. In such cases, it may save time and be more effective to focus on a few threshold questions initially, and use the response to further refine the inquiry. Of course, we should avoid asking questions that have already been answered. This can ease the burden for both the government and the respondent, but also ensure that short-term deadlines are taken seriously and are easier to enforce.

6) Multi-State Investigations: If you are working on a multi-state, corporate investigation, it is important to coordinate with Headquarters and your regional colleagues to avoid duplicative requests. Large investigations can benefit from case management plans that establish short-term and long-term goals, establish timetables, and otherwise improve efficiency for both EPA and responding parties. Where multi-regional investigations are involved, OECA can work with the Department of Justice to help establish procedures for document control and quick distribution of responses to information requests to the appropriate EPA staff.

7) Phased Information Requests: Where your prior research indicates that a large number of regulated entities may be in violation, consider focusing your initial information request on a smaller subset of respondents. This may be particularly appropriate where your initial analyses suggest that there may be some question about certain issues necessary to establish liability. Such phasing can allow you to revise your query based on the initial response, *e.g.*, by eliminating or revising questions where initial responses indicate an unexpected regulatory exemption. This can improve the quality of our information requests, make our review more efficient, and reduce burdens for both EPA and the respondent. Also, please keep in mind that even though providing such identical requests initially to fewer than ten entities may be an appropriate way to phase such requests under certain circumstances, sending the initial requests to greater than nine entities may be appropriate and will not necessarily pose a PRA concern provided the administrative investigation exemption applies.

8) Other Legal Requirements and Agency Guidance: Please keep in mind the requirements of existing law and the guidance contained within existing agency policy documents, neither of which are superseded by this memorandum. For example, 40 C.F.R. Part 2 provides that EPA must give notice as to certain procedural rights in information requests that are likely to be regarded as seeking confidential business information (CBI). 40 C.F.R. § 2.203. Also, under the August 31, 1999 *“Revised Final Guidance on Disseminating EPA’s SBREFA Information Sheet to Businesses at the Time of an Enforcement Activity,”* EPA gives small businesses certain information at the initial enforcement contact with the business, which may occur at the information request stage. Finally, please keep in mind that this memorandum applies only to regulatory enforcement matters and does not apply to remedial cases or investigations that are subject to existing OSRE guidance and oversight.

If you have any questions, please do not hesitate to contact me, or Gary Jonesi at 202-564-4002. In the meantime, thank you for your continued efforts to enforce the laws that protect our environment.

Attachment

cc: Bruce Gelber, DOJ/ENRD/EES
Walker Smith, DOJ/ENRD/EES
Ben Fisherow, DOJ/ENRD/EES
Barbara Pace, OGC
ORE Division Directors and Deputy/Associate Directors