



## **Welcome to the CLU-IN Internet Seminar**

**CEC Training for OSCs...Access Fundamentals**

Sponsored by: EPA Office of Superfund Remediation and Technology  
Innovation

Delivered: November 18, 2013, 1:00 PM - 3:00 PM, EST (18:00-20:00 GMT)

*Instructors:*

- *Andrew Goldman, EPA Region 3 (goldman.andrew@epa.gov)*

*Moderators:*

- *Jean Balent, U.S. EPA Technology Innovation and Field Services Division (balent.jean@epa.gov)*

Visit the Clean Up Information Network online at [www.cluin.org](http://www.cluin.org)

# Seminar Homepage

The image shows a screenshot of a seminar homepage with three callout boxes pointing to specific features:

- Join the seminar online:** Points to a vertical sidebar on the left side of the page containing navigation links such as "Home", "About", "Contact", "Feedback", "Download Slides", and "Join the seminar online".
- Download Slides:** Points to a section in the main content area containing a list of presentation slides with titles and download icons.
- Feedback:** Points to a feedback form located at the bottom of the page, which includes a text input field and a submit button.

# Housekeeping

- Entire broadcast offered live via Adobe Connect
  - participants can listen and watch as the presenters advance through materials live
  - *Some materials may be available to download in advance, you are **recommended to participate live via the online broadcast***
- Audio is streamed online through by default
  - Use the speaker icon to control online playback
  - If on phones: all lines will be globally muted
- Q&A – use the Q&A pod to privately submit comments, questions and report technical problems
- This event is being recorded and shared via email shortly after live delivery
- Archives accessed for free <http://clu.in.org/live/archive/>



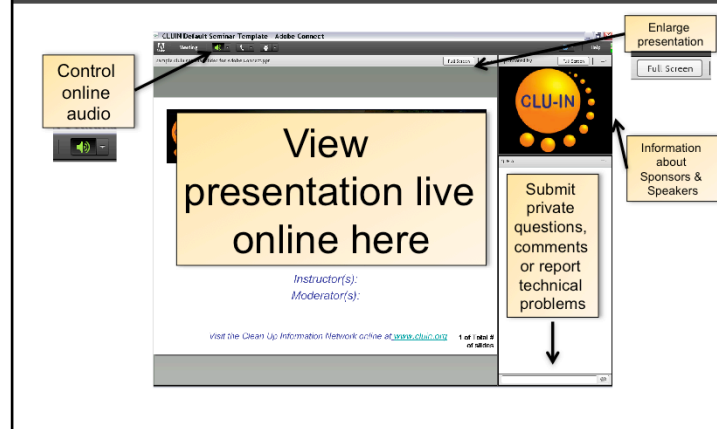
Although I'm sure that some of you have these rules memorized from previous CLU-IN events, let's run through them quickly for our new participants.

Please mute your phone lines during the seminar to minimize disruption and background noise. If you do not have a mute button, press \*6 to mute #6 to unmute your lines at anytime. Also, please do NOT put this call on hold as this may bring delightful, but unwanted background music over the lines and interrupt the seminar.

You should note that throughout the seminar, we will ask for your feedback. You do not need to wait for Q&A breaks to ask questions or provide comments. To submit comments/questions and report technical problems, please use the ? Icon at the top of your screen. You can move forward/backward in the slides by using the single arrow buttons (left moves back 1 slide, right moves advances 1 slide). The double arrowed buttons will take you to 1<sup>st</sup> and last slides respectively. You may also advance to any slide using the numbered links that appear on the left side of your screen. The button with a house icon will take you back to main seminar page which displays our agenda, speaker information, links to the slides and additional resources. Lastly, the button with a computer disc can be used to download and save today's presentation materials.

With that, please move to slide 3.

# New online broadcast screenshot



## Access and Other Legal Issues:

Protecting EPA's Interests and  
Avoiding Personal Liability



Andrew S. Goldman (EPA Region 3 ORC)  
EPA Webinar (November 18, 2013)

Click on Movie to Start



## Officials May Act Only If Authorized

1. Government officials may act only if authorized.
2. There are consequences to acting outside a government official's authority.



## Consequences of Acting Without Authority

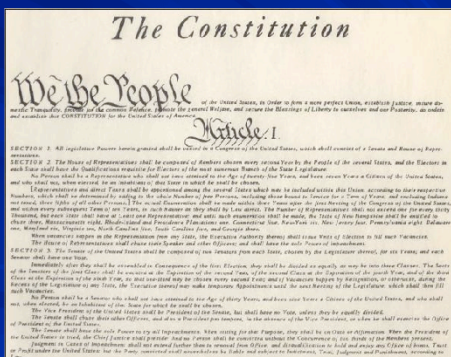
- Ability to Recover Costs May be Compromised.
- United States Subject to Counterclaims.
- Other Agency Actions Rendered Suspect and Subjected to Increased Scrutiny.
- Personal Liability.

## Sources and Limitations on Authority

- United States Constitution (and caselaw)
- CERCLA (and caselaw)
- Delegations
- NCP
- Policy/Guidance
- Site Specific Documents

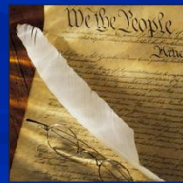
Sources and Limitations of Authority:

# 1. United States Constitution



## 4<sup>th</sup> Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."



## Johnson v. United States

333 U.S.10, 14 (1948)

"The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

With certain exceptions, to enter private property to perform Superfund work in a manner that is consistent with the 4<sup>th</sup> Amendment, you need either:

1. Consent of the owner/occupant, or
2. Judicial approval.

Sources and Limitations on Authority:

## 2. CERCLA

- **Entry:** CERCLA § 104(e)(1) & (3)
- **Inspections and Sampling:** CERCLA § 104(e)(1) & (4)
- **Compliance Orders and Actions:** CERCLA § 104(e)(5)
- **Other Entry Authority:** CERCLA § 104(e)(6)

**(e) Information gathering and access**

**(1) Action authorized**

Any officer, employee, or representative of the President, duly designated by the President, is authorized to take action under paragraph (2), (3), or (4) (or any combination thereof) at a vessel, facility, establishment, place, property, or location or, in the case of paragraph (3) or (4), at any vessel, facility, establishment, place, property, or location which is adjacent to the vessel, facility, establishment, place, property, or location referred to in such paragraph (3) or (4). Any duly designated officer, employee, or representative of a State or political subdivision, under a contract or cooperative agreement, and any



Entry to Property [CERCLA 104(e)(1) & (3)]				
Who Authorized	Where	When	Purpose	Other Requirements
<p>Any officer, employee, or representative of the President, duly designated by the President</p> <p>[§104(e)(1)]</p>	<p>Any vessel, facility, establishment, or other place or property</p> <ul style="list-style-type: none"> <li>• where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported from</li> <li>• from which or to which a hazardous substance or pollutant or contaminant has been or may have been released</li> <li>• where such release is or may be threatened</li> <li>• where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this subchapter.</li> </ul> <p>[§104(e)(3)]</p> <ul style="list-style-type: none"> <li>• properties adjacent to the above</li> </ul> <p>[§104(e)(1)]</p>	<p>At reasonable times.</p> <p>[§104(e)(3)]</p>	<p>For the purposes of</p> <ul style="list-style-type: none"> <li>• determining the need for response</li> <li>• choosing or taking any response action under this subchapter.</li> <li>• otherwise enforcing the provisions of this subchapter.</li> </ul> <p>[§104(e)(1)]</p>	<p>There must be a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant.</p> <p>[§104(e)(1)]</p>

Inspections and Sampling [CERCLA 104(e)(1) & (4)]			
Who Authorized	Where	Purpose	Other Requirements
<p>Any officer, employee, or representative of the President, duly designated by the President.</p> <p>[§104(e)(1)]</p>	<p>Any vessel, facility, establishment, or other place or property</p> <ul style="list-style-type: none"> <li>• where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported from</li> <li>• from which or to which a hazardous substance or pollutant or contaminant has been or may have been released</li> <li>• where such release is or may be threatened</li> <li>• where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this subchapter.</li> </ul> <p>[§104(e)(3)]</p> <ul style="list-style-type: none"> <li>• properties adjacent to the above</li> </ul> <p>[§104(e)(1)]</p> <ul style="list-style-type: none"> <li>• any location of suspected hazardous substance, pollutant or contaminant.</li> </ul> <p>[§ 104(e)(4)]</p>	<p>For the purposes of</p> <ul style="list-style-type: none"> <li>• determining the need for response</li> <li>• choosing or taking any response action under this subchapter</li> <li>• otherwise enforcing the provisions of this subchapter.</li> </ul> <p>[§ 104(e)(1)]</p>	<p>There must be a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant.</p> <p>[§104(e)(1)]</p> <p>Inspection must be completed with reasonable promptness.</p> <p>[§104(e)(4)(A)]</p> <p>Official must give owner, operator, tenant, or other person in charge a receipt describing samples obtained and, if requested, a portion of each sample.</p> <p>[§104(e)(4)(B)]</p> <p>Copy of results must be furnished promptly.</p> <p>[§104(e)(4)(B)]</p>

Administrative Orders [CERCLA 104(e)(5)(A)]			
When Authorized	Who Authorized	Order What	Order Requirements
If consent is not granted regarding any request made by an officer, employee, or representative for entry of for inspections and sampling.	The President.	Compliance with the request	Order may be issued after such notice and opportunity for consultation as is reasonably appropriate under the circumstances.

Seek Court Orders [CERCLA 104(e)(5)(B)]			
When Authorized	Who Authorized	Do What	Direction to Court
If consent is not granted regarding any request made by an officer, employee, or representative for entry of for inspections and sampling.  [§104(e)(5)(A)]	The President.  [§ 104(e)(5)(A)]	Ask the Attorney general to commence a civil action to compel compliance with a request or order.	Where there is a reasonable basis to believe there may be a present or threat of a release of a hazardous substance or pollutant or contaminant... the court shall enjoin such interference or direct compliance with orders or prohibit interference with entry or inspection unless made in the circumstances of the case the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.  [§104(e)(5)(B)]

## CERCLA 104(e)(6) "Other Authority"

"Nothing in this subsection shall preclude the President from securing access or obtaining information in any other lawful manner."

U.S. DISTRICT COURT  
SEARCH WARRANT

United States District Court  
SOUTHERN DISTRICT OF FLORIDA

To Be Filled in by the Searcher at:  
NAME, ADDRESS OF THE PERSON OR OWNER OF PROPERTY TO BE SEARCHED  
RESIDENCE OF JAMES GONZALEZ, LOCATED AT  
2718 W. 72ND STREET, MIAMI, MIAMI-DADE COUNTY, FLORIDA

SEARCH WARRANT  
CASE NUMBER:

TO: SA Mary A. Rodriguez, U.S. Inspr. & Natl. Security and any Authorized Officer of the United States

SEARCHED Having been made known and by SA Mary A. Rodriguez after due return to

MADE THIS [ ] ON the person of SA [ ] in the presence of SA [ ] at the residence of JAMES GONZALEZ, LOCATED AT 2718 W. 72ND STREET, MIAMI, MIAMI-DADE COUNTY, FLORIDA.

Sources and Limitations on Authority:

### 3. Delegations

THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION,  
AND LIABILITY ACT (CERCLA)

146. Inspections, Sampling, Information Gathering,  
Subpoenas, and Entry or Access

1. AUTHORITY. Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) as amended:

- to enter any vessel, facility, establishment, place, property or location for the purpose of inspections, sampling, information gathering and response actions;
- to carry out inspections, sampling and information gathering;
- to require the production of information and documents (i.e., files) letters);
- to issue subpoenas;
- to issue Compliance Orders for production of information and documents;
- to issue Compliance Orders for entry and inspection;
- to obtain and execute warrants, to support this authority; and
- to designate representatives of the Administrator to carry out inspections, sampling, information gathering and response actions.

EO 12580, Delegation 14-6 (HQ/R3):

- Entry and inspection authority delegated down to OSCs, RPMs, and SAMs.
- Order authority delegated to Division Director, ORC must concur (ORC must consult with OECA prior to concurring).

Sources and Limitations on Authority:

## 4. NCP

(d) *Entry and access.* (1) For purposes of determining the need for response, or choosing or taking a response action, or otherwise enforcing the provisions of CERCLA, EPA, or the appropriate federal agency, and a state or political subdivision operating pursuant to a contract or cooperative agreement under CERCLA section 104(d)(1), has the authority to enter any vessel, facility, establishment or other place, property, or location described in paragraph (d)(2) of this section and conduct, complete, operate, and maintain any response actions authorized by CERCLA or these regulations.

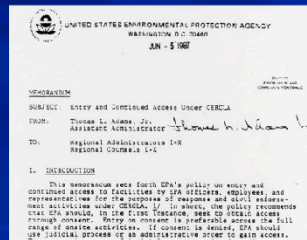
(2)(i) Under the authorities described in paragraph (d)(1) of this section, EPA, or the appropriate federal agency, and a state or political subdivision operating pursuant to a contract or cooperative agreement under CERCLA section 104(c)(1), may enter:

(A) Any vessel, facility, establishment, or other place or property where any hazardous substance or pollutant or contaminant may be or has been

NCP § 300.400(d):

- Tracks statutory language with some variations.
- Lead agency may designate others (including PRPs, where they have agreed to conduct work pursuant to AO or CD) as its representative solely for purposes of access.
- EPA may issue order under §104(e)(5) if consent has been conditioned in any way.
- Contents of access orders spelled out (NCP § 300.400(e)(4)(iv)).

Sources and Limitations on Authority:  
**5. Policy/Guidance**



**"Entry and Continued Access Under CERCLA" (June 5, 1987):**

- "Consent is the preferred means of gaining access for all activities because it is consistent with EPA policy of seeking voluntary cooperation from responsible parties and the public."
- "If consent is denied . . . [EPA] should attempt to determine the grounds for denial. EPA personnel, however, should not threaten the siteowner with penalties or other monetary liability or make other remarks which could be construed as threatening."
- "EPA personnel should not agree to conditions which restrict or impede the manner or extent of an inspection or response action, impose indemnity or compensatory obligations on EPA, or operate as a release of liability."



Contact Counsel When  
Authority is in Doubt



## Before Seeking Access

1. Identify reasonable basis to believe there may be a release or threatened release of a hazardous substance or pollutant or contaminant.
3. Make sure property where access is sought is described in CERCLA § 104(e)(1)(A).
5. Make sure purposes of entry are permitted by CERCLA § 104(e)(1)(A).
7. Identify persons with authority to consent to entry.
9. Identify time/duration for which entry is sought.

## Before Seeking Access

6. Identify persons (positions) for whom entry will be sought.
8. Identify areas for which entry will be sought.
10. Identify activities to be performed.
12. Identify equipment to be brought on the property.
13. Check to see if EPA already has access for the work you need to perform.

# Access Tools

I	Advantages					Disadvantages			
	Fast?	Time Memorized?	Readily Modified?	Civil Penalties?	Cost enforceable?	Reversible?	HQ Involvement?	DOJ Involvement?	Consequences (Litigation/Cases)?
Oral Consent	✓		✓			✓			
Written Consent	✓	✓	✓			✓			
UAO	✓	✓	✓	✓	✓		✓		✓
Court Order (Article III)		✓			✓			✓	✓
Warrant		✓			✓			✓	✓

Oral Consent	Written Consent	UAO	Court Order	Warrant
<ul style="list-style-type: none"> <li>• Contact person authorized to consent</li> <li>• Address of, time, duration, personnel, location, etc.</li> <li>• Document oral consent in file</li> </ul>	<ul style="list-style-type: none"> <li>• Contact owner authorized to consent</li> <li>• Provide address, duration, address of, time, duration, personnel, location, etc.</li> <li>• Collect authorized person's signature.</li> </ul>	<ul style="list-style-type: none"> <li>• Document denial of consent</li> <li>• Consent with (B)(3)</li> <li>• Draft order that is based on time, duration, personnel, location, etc. (no collection available)</li> <li>• Make sure rule contains BCR (5, 200-400(c)-(iv)) provisions</li> <li>• Affix EP's signature</li> <li>• Avoid oral or enforceable period periods of discovery date</li> </ul>	<ul style="list-style-type: none"> <li>• Document denial of consent</li> <li>• Refer to J.J.</li> <li>• Complaint filed</li> <li>• Refiling practice (e.g., Motions to Dismiss)</li> <li>• Discovery</li> <li>• Motion practice (e.g., Summary Judgment)</li> <li>• Trial</li> <li>• Verdict</li> <li>• Post trial (motions for reconsideration, appeal, etc.)</li> </ul>	<ul style="list-style-type: none"> <li>• Refer to Department of Justice (including e-track)</li> <li>• If U.S. Attorney applies for consent</li> <li>• Ex parte dealing with litigation</li> <li>• Warrant signed</li> <li>• Serve warrant</li> <li>• Return of Warrant Filed</li> </ul>

## Which Tool Should I Use?

- How quickly do you need access?
- What type of work and for how long?
- Will the work scope and/or area change?
- Can a person authorized to consent be found?
- How "reliable" will consent be?
- Consequences of revocation?

## 4th Amendment “Warrant Exceptions”

- “Open Fields”
- “Exigent Circumstances”
- “Community Caretaking”



Do Not Use Except Under Advice of  
Counsel!!!

## Common Requests/Recommended Responses

Request	Recommended Response
<b>Insurance</b> – Additional/different insurance – Naming owner as additional insured	Government is self-insured, contractors required by law to carry certain insurance (we can provide insurance certificates [must clear under CBI] but not policies). Make no representations regarding coverage. Do not agree to name owner as additional insured.
<b>Property Restoration</b>	"EPA <b>intends</b> to leave the property in the condition it finds it when first entering under the consent provided herein, subject to the availability of appropriated funds. Nothing herein shall be interpreted as or constitute a commitment or requirement that the United States obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341."
<b>Advance Notice of Entry</b>	"EPA <b>intends</b> to provide notice prior to its first entry under the consent provided herein by calling 555-1234."
<b>Release of Liability</b>	No.
<b>Indemnity/Hold Harmless</b>	No.
<b>Owner Must Approve Sampling Plan or Locations</b>	No.
<b>Provide Sample Results</b>	"EPA intends to provide owner with a copy of the results of any analyses of samples taken under the consent provided herein as required by 42 U.S.C. § 9604(e)(4)(B)."
<b>Owner Must Accompany</b>	"The owner or his/her representative may accompany EPA and its contractors on the property during work performed under the consent provided herein."

## Entry to Railroads [And Other Dangerous Places]

### ■ Safety Issues (may be ok if worded acceptably)

- Ⓢ Paying for/obeying flag persons
- Ⓢ Paying for review of plans
- Ⓢ Restrictions on track crossings (e.g., rubber tires)
- Ⓢ Restrictions on equipment placement
- Ⓢ Pre-entry coordination with railroad personnel
- Ⓢ Compliance with reasonable health/safety requirements if notified in advance

### ■ Financial/Liability Issues (EPA should not accept)

- Ⓢ Indemnity/Hold Harmless
- Ⓢ Additional insurance policies/naming railroad as additional insured
- Ⓢ Payment of "processing" or "application" fees
- Ⓢ Release of liability/"EPA will conduct work at its own expense"
- Ⓢ Submit to jurisdiction of a court for enforcement

## Access in Support of Disaster Response: The Stafford Act

- 1988 law intending “to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from [ ] disasters.”
- Accomplished by
  - revising and broadening existing relief programs
  - encouraging States/local governments to develop comprehensive disaster plans and preparedness capabilities
  - improving coordination and responsiveness
  - encouraging acquisition of insurance
  - encouraging hazard mitigation measures
  - providing Federal assistance programs for public and private losses sustained in disasters

## Access in Support of Disaster Response: The Stafford Act

- Presidential disaster declaration at the request of a State Governor triggers Federal Government's authority to provide financial and physical assistance.
- The President's authority to provide assistance and relief has been delegated to the Federal Emergency Management Agency (FEMA).
- FEMA decides what assistance/relief will be provided and by whom.
- FEMA makes these decisions using the National Response Framework (NRF).
- NRF groups Federal assistance into 15 functional areas called "Emergency Support Functions."

ESF #	Support Function	Primary	Support
1	Transportation		
2	Communications		
3	Public Works & Engineering		
4	Firefighting		
5	Emergency Management		
6	Mass Care, Emergency Assistance, Housing & Human Services		
7	Logistics Management & Resources Support		
8	Public Health & Medical Services		
9	Search & Rescue		
10	Oil & Hazardous Materials Response		
11	Agriculture & Natural Resources		
12	Energy		
13	Public Safety & Security		
14	Long-Term Community Recovery		
15	External Affairs		

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ESF #	Support Function	Primary	Support
1	Transportation		
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6	Mass Care, Emergency Assistance, Housing & Human Services		
7	Logistics Management & Resources Support		
8	Public Health & Medical Services		EPA
9	Search & Rescue		
10	Oil & Hazardous Materials Response	EPA	
11	Agriculture & Natural Resources		EPA
12	Energy		EPA
13	Public Safety & Security		
14	Long-Term Community Recovery		EPA
15	External Affairs		

## Access in Support of Disaster Response: The Stafford Act

- Section 403 authorizes the President (delegated to FEMA) to provide assistance essential in meeting immediate threats to life and property, including

“[p]erforming on public or private lands or waters any work or services essential to saving lives and protecting and preserving property or public health and safety”

including debris removal; search and rescue; road clearance; demolition of unsafe structures; dissemination of public information and assistance regarding health and safety measures; provision of technical advice to State and local governments; reduction of immediate threats to life, property, and public health and safety; etc.

## Access in Support of Disaster Response: The Stafford Act

- Section 407(a)(1) (Debris Removal):

"The President is authorized, through use of Federal departments, agencies, and instrumentalities, to clear debris and wreckage resulting from a major disaster from publicly and privately owned lands and waters"

- Section 407(b) (Debris Removal):

"No authority under this section shall be exercised unless the affected State or local government shall first arrange an unconditional authorization for removal of such debris or wreckage from public and private property, and, in the case of removal of debris or wreckage from private property, shall first agree to indemnify the Federal Government against any claim arising from such removal."

## Access in Support of Disaster Response: The Stafford Act

- FEMA Regulations: 44 C.F.R. § 206.208 (Direct Federal Assistance)

(a) When the State and local government lack the capability to perform or to contract for eligible emergency work and/or debris removal, under sections 402(4), 403 or 407 of the Act, the Grantee may request that the work be accomplished by a Federal agency.

(b) All requests for direct Federal assistance shall be submitted by the Grantee to the RD and shall include:

(1) A written agreement that the State will:

(i) Provide without cost to the United States all lands, easements and rights-of-ways necessary to accomplish the approved work;

(ii) Hold and save the United States free from damages due to the requested work, and shall indemnify the Federal Government against any claims arising from such work;

## Summary

- Officials acting outside authority may cause unintended consequences.
- Look to US Constitution (+ caselaw), statutes (+ caselaw), delegations, regulations, policy/guidance, and site-specific documents for sources/limitations on authority.
- Entry/inspection under Superfund invokes (a) US Constitution's 4<sup>th</sup> amendment; (b) CERCLA §§ 104(e)(1), (3), and (4); (c) Executive Order 12580/Delegation 14-6; (d) NCP § 300.400(d); and (e) access guidance documents.
- Gather key information before seeking access.
- Access can be secured via oral consent, written consent, administrative order, Article III court order, or warrant.
- Contact counsel if you are uncertain regarding your authority to enter.



## Certificates

- If you are interested in receiving a certificate for participating in this training, please send an email to Austin Oelschlager, Tetra Tech, at [austin.oelschlager@tetrattech.com](mailto:austin.oelschlager@tetrattech.com)
- An electronic certificate will be emailed to you within 30 days

## New Ways to stay connected!

- [www.cluin.org](http://www.cluin.org)
- Follow CLU-IN on Facebook, LinkedIn, or Twitter

 <https://www.facebook.com/EPACleanUpTech>

 <https://twitter.com/#!/EPACleanUpTech>

 <http://www.linkedin.com/groups/Clean-Up-Information-Network-CLUIN-4405740>

# Resources & Feedback

- To view a complete list of resources for this seminar, please visit the [Additional Resources](#)
- Please complete the [Feedback Form](#) to help ensure events like this are offered in the future

The screenshot shows a feedback form from the EPA Technology Innovation Program. The form includes a header with the EPA logo and program name. Below the header, there is a message: "We would like to receive any feedback you might have that would make this website more valuable. Please take the time to fill out this form before leaving the site." The form contains several input fields: "FIRSTNAME:" with a text box, "LASTNAME:" with a text box, "EMAIL:" with a text box, and "PHONE NUMBER:" with a text box. At the bottom of the form, there is a checkbox labeled "I would like to receive future emails from EPA about this program." and a "SUBMIT" button. A red box highlights the checkbox area, and an arrow points from the text to the right towards this area.

Need confirmation of your participation today?

Fill out the feedback form and check box for confirmation email.