

Access and Other Legal Issues

Protecting EPA's Interests and Avoiding Personal Liability

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- Tab 1: Presentation Slides
- Tab 2: Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9604(e)
- Tab 3: Section 300.400 of the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.400
- Tab 4: EPA Delegation 14-6 (Inspections, Sampling, Information Gathering, Subpoenas, and Entry for Response) (5/11/94); EPA Region 3 Delegation 14-06 (September 2005)
- Tab 5: "Entry and Continued Access Under CERCLA" (OSWER Directive No. 9829.2)(June 5, 1987); Memorandum from Kenneth Patterson to Regional Counsels, re:"Clarification of CERCLA Entry Policy" (March 3, 2010).
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Tab 1

Access and Other Legal Issues:

Protecting EPA's Interests and Avoiding Personal Liability



OSC Readiness Program 2013
Andrew S. Goldman (EPA Region 3 ORC)
March 2013
Orlando, Florida

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

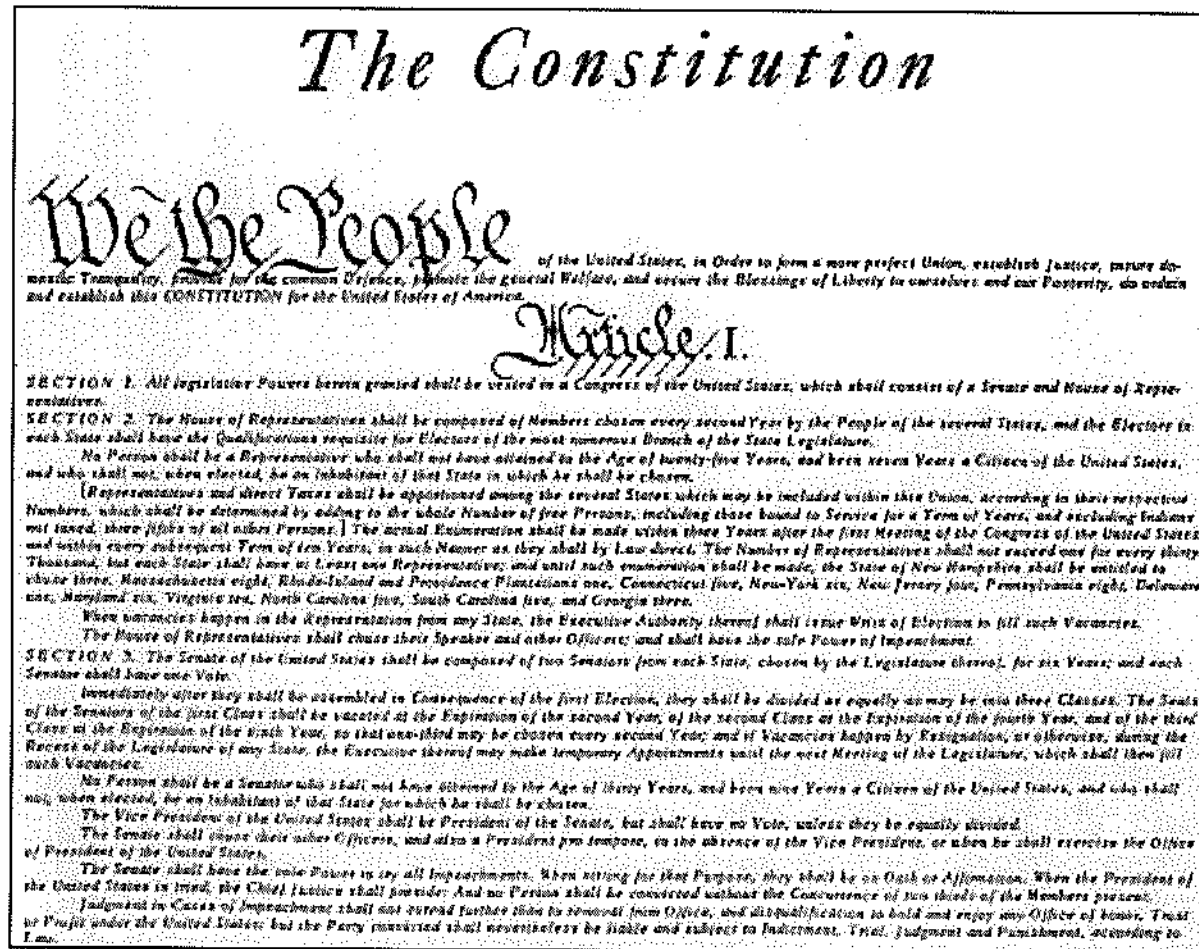
- Ability to Recover Costs May be Compromised.
- United States Subject to Counterclaims.
- Other Agency Actions Rendered Suspect and Subjected to Increased Scrutiny.
- Personal Liability.

Sources and Limitations on Authority

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

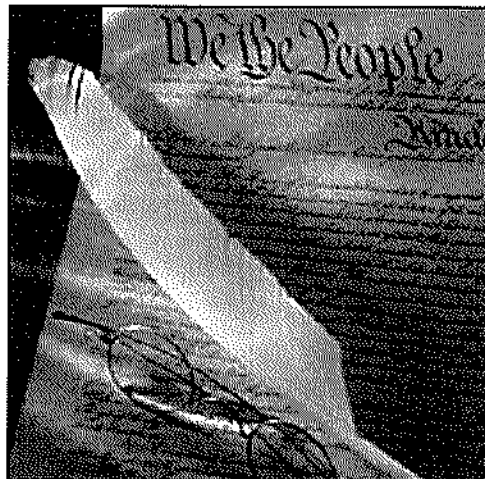
Sources and Limitations on Authority:

1. United States Constitution



4th 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 4th 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 each paragraph.

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"> • where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported from • from which or to which a hazardous substance or pollutant or contaminant has been or may have been released • where such release is or may be threatened • where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this subchapter <p>[§104(e)(3)]</p> <ul style="list-style-type: none"> • properties adjacent to the above <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"> • determining the need for response • choosing or taking any response action under this subchapter • otherwise enforcing the provisions of this subchapter. <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"> • where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported from • from which or to which a hazardous substance or pollutant or contaminant has been or may have been released • where such release is or may be threatened • where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this subchapter. <p>[§ 104(e)(3)]</p> <ul style="list-style-type: none"> • properties adjacent to the above <p>[§ 104(e)(1)]</p> <ul style="list-style-type: none"> • any location of suspected hazardous substance, pollutant or contaminant. <p>[§ 104(e)(4)]</p>	<p>For the purposes of</p> <ul style="list-style-type: none"> • determining the need for response • choosing or taking any response action under this subchapter • otherwise enforcing the provisions of this subchapter <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	Other Requirements
If consent is not granted regarding any request made by an officer, employee, or representative for entry or 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
<p>If consent is not granted regarding any request made by an officer, employee, or representative for entry or for inspections and sampling.</p> <p>[§104(e)(5)(A)]</p>	<p>The President.</p> <p>[§104(e)(5)(A)]</p>	<p>Ask the Attorney general to commence a civil action to compel compliance with a request or order.</p>	<p>Where there is a reasonable basis to believe there maybe a release or threat of a release of a hazardous substance or pollutant or contaminant . . . the court shall enjoin such interference or direct compliance with orders to prohibit interference with entry or inspection unless under 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.</p> <p>[§ 104(e)(5)(B)(i)]</p>

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."

AO 63 (Rev. 6/96) Search Warrant

United States District Court
SOUTHERN DISTRICT OF FLORIDA

In the Matter of the Search of
(Name, address or last designation of person or property to be searched)
RESIDENCE OF LAZARO GONZALEZ, LOCATED AT
2319 N.W. 2ND STREET, MIAMI, MIAMI-DADE
COUNTY, FLORIDA

SEARCH WARRANT
CASE NUMBER:

TO: SAs Mary A. Rodriguez, U.S. Insig. & Natl. Service and any Authorized Officer of the United States

Misdemeanor having been made before me by SAs Mary A. Rodriguez who file a return by

Sources and Limitations on Authority:

3. Delegations

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

14-6. Inspections, Sampling, Information Gathering, Subpoenas, and Entry for Response

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

- a. to enter any vessel, facility, establishment, place, property or location for the purposes of inspections, sampling, information gathering and response actions;
- b. to carry out inspections, sampling and information gathering;
- c. to require the production of information and documents (i.e., 104(e) letters);
- d. to issue subpoenas;
- e. to issue Compliance Orders for production of information and documents;
- f. to issue Compliance Orders for entry and inspection;
- g. to obtain and execute warrants, to support this authority, and
- h. 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(d)(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



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

JUN - 5 1987

MEMORANDUM

SUBJECT: Entry and Continued Access Under CERCLA

FROM: Thomas L. Adams, Jr.
Assistant Administrator

TO: Regional Administrators I-X
Regional Counsels I-X

I. INTRODUCTION

This memorandum sets forth EPA's policy on entry and continued access to facilities by EPA officers, employees, and representatives for the purposes of response and civil enforcement activities under CERCLA. In short, the policy recommends that EPA should, in the first instance, seek to obtain access through consent. Entry on consent is preferable across the full range of onsite activities. If consent is denied, EPA should use judicial process or an administrative order to gain access.

"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."

Sources and Limitations on Authority:

6. Site-Specific Documents

November 23, 1995

Carrie Deitzel
Community Involvement Coordinator
U. S. EPA
Region III
841 Chestnut Bldg.
Philadelphia, Pa., 19107-4431

Ms. Deitzel:

I found the attached (copy of) between my front door and storm door of my residence this morning.

This is to notify you that I take this as an act of illegal trespass on my property by an agency of an intrusive government.

You or any of your agencies have no permission to set foot on my property, even to deliver a "notice". For your convenience if you wish to contact me, my phone numbers are [REDACTED] and my unlisted home phone is [REDACTED]. My Beeper # is [REDACTED], my Fax # is [REDACTED] and my cellular phone # is [REDACTED]. In addition, my address is clearly printed above and you may contact me via the U. S. Mails.

In my opinion, you and your agency are simply wasting my money as a taxpayer and your agency is a clear example of intrusion, catastrophizing and power grabbing over the citizenry in order to perpetuate the present scam of a government to which this Republic has degenerated.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

FEB 28 2003

SAMUEL L. KAY, CLE
U. S. District & Bankruptcy
Southern District of West

IN THE MATTER OF:

TRACY GILKERSON PROPERTY,
POINT PLEASANT, WEST VIRGINIA

5:03-MC-0036

SECOND WARRANT AUTHORIZING ENTRY, INSPECTION, AND SAMPLING
PURSUANT TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE,
COMPENSATION, AND LIABILITY ACT OF 1980, AS AMENDED

TO: THE UNITED STATES MARSHALS FOR THE SOUTHERN DISTRICT OF
WEST VIRGINIA; EMPLOYEES OF THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGION III; AND/OR
THEIR AUTHORIZED REPRESENTATIVES (INCLUDING
CONTRACTORS, ATTORNEYS, AND REPRESENTATIVES OF ANY
OTHER AGENCY OF THE FEDERAL GOVERNMENT)

WHEREAS, application for a second warrant for entry,
inspection, and sampling at the property identified in the attached

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.
2. Make sure property where access is sought is described in CERCLA § 104(e)(1)(A).
3. Make sure purposes of entry are permitted by CERCLA § 104(e)(1)(A).
4. Identify persons with authority to consent to entry.
5. Identify time/duration for which entry is sought.

Before Seeking Access

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

Access Tools

	Advantages					Disadvantages			
	Fast?	Terms Memorialized?	Readily Modified?	Civil Penalties?	Court enforceable?	Revocable?	HQ Involvement?	DOJ Involvement?	Compromise Dealings w/Owner?
Oral Consent	✓		✓			✓			
Written Consent	✓	✓	✓			✓			
UAO	✓	✓	✓	✓	✓		✓		✓
Court Order (Article III)		✓			✓			✓	✓
Warrant		✓			✓			✓	✓

Oral Consent	Written Consent	UAO	Court Order	Warrant
<ul style="list-style-type: none"> • Contact person authorized to consent. • Advise of time, duration, personnel, locations, etc. • Document such contact in file. 	<ul style="list-style-type: none"> • Contact person authorized to consent. • Provide written document that advises of time, duration, personnel, locations, etc. • Collect authorized person's signature. 	<ul style="list-style-type: none"> • Document denial of consent. • Consult with OGC. • Draft order that advises of time, duration, personnel, locations, etc. (models are available). • Make sure order contains NJCP § 300.40(d)(4)(iv) provisions. • Affix EPA signature. • Await end of conference period (precedes effective date). 	<ul style="list-style-type: none"> • Document denial of consent. • Refer to DOJ. • Complaint filed. • Motions practice (e.g., Motion to Dismiss). • Discovery. • Motions practice (e.g., Summary Judgment). • Trial. • Verdict. • Post trial (motions for reconsideration, appeal, etc.). 	<ul style="list-style-type: none"> • Refer to Department of Justice (including affidavits). • U.S. Attorney applies for warrant. • Ex parte hearing with Magistrate. • Warrant signed. • Serve warrant. • Return of Warrant filed.

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
Insurance – 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.
Property Restoration	"EPA <u>intends</u> 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."
Advance Notice of Entry	"EPA <u>intends</u> to provide notice prior to its first entry under the consent provided herein by calling 555-1234."
Release of Liability	No.
Indemnity/Hold Harmless	No.
Owner Must Approve Sampling Plan or Locations	No.
Provide Sample Results	"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)."
Owner Must Accompany	"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		EPA
4	Firefighting		EPA
5	Emergency Management		EPA
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 4th 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.



Tab 2

to a cooperative agreement under this chapter shall be reimbursed for the share of costs of such actions for which the Federal Government is responsible under this chapter.

(2) If the President enters into a cost-sharing agreement pursuant to subsection (c) of this section or a contract or cooperative agreement pursuant to this subsection, and the State or political subdivision thereof fails to comply with any requirements of the contract, the President may, after providing sixty days notice, seek in the appropriate Federal district court to enforce the contract or to recover any funds advanced or any costs incurred because of the breach of the contract by the State or political subdivision.

(3) Where a State or a political subdivision thereof is acting in behalf of the President, the President is authorized to provide technical and legal assistance in the administration and enforcement of any contract or subcontract in connection with response actions assisted under this subchapter, and to intervene in any civil action involving the enforcement of such contract or subcontract.

(4) Where two or more noncontiguous facilities are reasonably related on the basis of geography, or on the basis of the threat, or potential threat to the public health or welfare or the environment, the President may, in his discretion, treat these related facilities as one for purposes of this section.

(c) Information gathering and access

(3) 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 under subsection (d)(1) of this section is also authorized to take such action. The authority of paragraphs (3) and (4) may be exercised only if there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant. The authority of this subsection may be exercised only for the purposes of determining the need for response, or choosing or taking any response action under this subchapter, or otherwise enforcing the provisions of this subchapter.

(2) Access to information

Any officer, employee, or representative described in paragraph (1) 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.

In addition, upon reasonable notice, such person either (i) shall grant any such officer, employee, or representative access at all reasonable times to any vessel, facility, establishment, place, property, or location to inspect and copy all documents or records relating to such matters or (ii) shall copy and furnish to the officer, employee, or representative all such documents or records, at the option and expense of such person.

(3) Entry

Any officer, employee, or representative described in paragraph (1) is authorized to enter at reasonable times any of the following:

(A) Any vessel, facility, establishment, or other place or property where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported from.

(B) Any vessel, facility, establishment, or other place or property from which or to which a hazardous substance or pollutant or contaminant has been or may have been released.

(C) Any vessel, facility, establishment, or other place or property where such release is or may be threatened.

(D) Any vessel, facility, establishment, or other place or property where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this subchapter.

(4) Inspection and samples

(A) Authority

Any officer, employee or representative described in paragraph (1) is authorized to inspect and obtain samples from any vessel, facility, establishment, or other place or property referred to in paragraph (3) or from any location of any suspected hazardous substance or pollutant or contaminant. Any such officer, employee, or rep-

representative is authorized to inspect and obtain samples of any containers or labeling for suspected hazardous substances or pollutants or contaminants. Each such inspection shall be completed with reasonable promptness.

(B) Samples

If the officer, employee, or representative obtains any samples, before leaving the premises he shall give to the owner, operator, tenant, or other person in charge of the place from which the samples were obtained a receipt describing the sample obtained and, if requested, a portion of each such sample. A copy of the results of any analysis made of such samples shall be furnished promptly to the owner, operator, tenant, or other person in charge, if such person can be located.

(5) Compliance orders

(A) Issuance

If consent is not granted regarding any request made by an officer, employee, or representative under paragraph (2), (3), or (4), the President may issue an order directing compliance with the request. The order may be issued after such notice and opportunity for consultation as is reasonably appropriate under the circumstances.

(B) Compliance

The President may ask the Attorney General to commence a civil action to compel compliance with a request or order referred to in subparagraph (A). Where there is a reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant, the court shall take the following actions:

(i) In the case of interference with entry or inspection, the court shall enjoin such interference or direct compliance with orders to prohibit interference with entry or inspection unless under 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.

(ii) In the case of information or document requests or orders, the court shall enjoin interference with such information or document requests or orders or direct compliance with the requests or orders to provide such information or documents unless under the circumstances of the case the demand for information or documents is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

The court may assess a civil penalty not to exceed \$25,000 for each day of noncompliance against

any person who unreasonably fails to comply with the provisions of paragraph (2), (3), or (4) or an order issued pursuant to subparagraph (A) of this paragraph.

(6) Other authority

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

(7) Confidentiality of information

(A) Any records, reports, or information obtained from any person under this section (including records, reports, or information obtained by representatives of the President) shall be available to the public, except that upon a showing satisfactory to the President (or the State, as the case may be) by any person that records, reports, or information, or particular part thereof (other than health or safety effects data), to which the President (or the State, as the case may be) or any officer, employee, or representative has access under this section if made public would divulge information entitled to protection under section 1906 of Title 18, such information of particular portion thereof shall be considered confidential in accordance with the purposes of that section, except that such record, report, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, or when relevant in any proceeding under this chapter.

(B) Any person not subject to the provisions of section 1906 of Title 18 who knowingly and willfully divulges or discloses any information entitled to protection under this subsection shall, upon conviction, be subject to a fine of not more than \$5,000 or to imprisonment not to exceed one year, or both.

(C) In submitting data under this chapter, a person required to provide such data may (i) designate the data which such person believes is entitled to protection under this subsection and (ii) submit such designated data separately from other data submitted under this chapter. A designation under this paragraph shall be made in writing and in such manner as the President may prescribe by regulation.

(D) Notwithstanding any limitation contained in this section or any other provision of law, all information reported to or otherwise obtained by the President (or any representative of the President) under this chapter shall be made available, upon written request of any duly authorized committee of the Congress, to such committee.

(E) No person required to provide information under this chapter may claim that the information is

Tab 3

(e) The funding of a response to a discharge from a federally owned, operated, or supervised facility or vessel is the responsibility of the owning, operating, or supervising agency if it is a responsible party.

(f) The following agencies have funds available for certain discharge removal actions:

(1) DOD has two specific sources of funds that may be applicable to an oil discharge under appropriate circumstances. This does not consider military resources that might be made available under specific conditions.

(2) Funds required for removal of a sunken vessel or similar obstruction of navigation are available to the Corps of Engineers through Civil Works Appropriations, Operations and Maintenance, General.

(3) USN may conduct salvage operations contingent on defense operational commitments, when funded by the requesting agency. Such funding may be requested on a direct cite basis.

(4) Pursuant to Title I of the OPA, the state or states affected by a discharge of oil may act where necessary to remove such discharge. Pursuant to 33 CFR part 136 states may be reimbursed from the OELTF for the reasonable costs incurred in such a removal.

Subpart E—Hazardous Substance Response

SOURCE: 55 FR 5336, Mar. 8, 1990, unless otherwise noted.

§ 300.400 General.

(a) This subpart establishes methods and criteria for determining the appropriate extent of response authorized by CERCLA and CWA section 311(c):

(1) When there is a release of a hazardous substance into the environment; or

(2) When there is a release into the environment of any pollutant or contaminant that may present an imminent and substantial danger to the public health or welfare of the United States.

(b) Limitations on response. Unless the lead agency determines that a release constitutes a public health or environmental emergency and no other person with the authority and capability to

respond will do so in a timely manner, a removal or remedial action under section 104 of CERCLA shall not be undertaken in response to a release:

(1) Of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found;

(2) From products that are part of the structure of, and result in exposure within, residential buildings or businesses or community structures; or

(3) Into public or private drinking water supplies due to deterioration of the system through ordinary use.

(c) Fund-financed action. In determining the need for and in planning or undertaking Fund-financed action, the lead agency shall, to the extent practicable:

(1) Engage in prompt response;

(2) Provide for state participation in response actions, as described in subpart F of this part;

(3) Conserve Fund monies by encouraging private party response;

(4) Be sensitive to local community concerns;

(5) Consider using treatment technologies;

(6) Involve the Regional Response Team (RRT) in both removal and remedial response actions at appropriate decision-making stages;

(7) Encourage the involvement and sharing of technology by industry and other experts; and

(8) Encourage the involvement of organizations to coordinate responsible party actions, foster site response, and provide technical advice to the public, federal and state governments, and industry.

(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

-01 Edition)

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(d)(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 generated, stored, treated, disposed of, or transported from;

(B) Any vessel, facility, establishment, or other place or property from which, or to which, a hazardous substance or pollutant or contaminant has been, or may have been, released or where such release is or may be threatened;

(C) Any vessel, facility, establishment, or other place or property where entry is necessary to determine the need for response or the appropriate response or to effectuate a response action; or

(D) Any vessel, facility, establishment, or other place, property, or location adjacent to those vessels, facilities, establishments, places, or properties described in paragraphs (d)(2)(i)(A), (B), or (C) of this section.

(ii) Once a determination has been made that there is a reasonable basis to believe that there has been or may be a release, 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), is authorized to enter all vessels, facilities, establishments, places, properties, or locations specified in paragraph (d)(2)(i) of this section, at which the release is believed to be, and all other vessels, facilities, establishments, places, properties, or locations identified in paragraph (d)(2)(i) of this section that are related to the response or are necessary to enter in responding to that release.

(3) The lead agency may designate as its representative solely for the purpose of access, among others, one or more potentially responsible parties, including representatives, employees, agents, and contractors of such parties.

EPA, or the appropriate federal agency, may exercise the authority contained in section 104(e) of CERCLA to obtain access for its designated representative. A potentially responsible party may only be designated as a representative of the lead agency where that potentially responsible party has agreed to conduct response activities pursuant to an administrative order or consent decree.

(4)(i) If consent is not granted under the authorities described in paragraph (d)(1) of this section, or if consent is conditioned in any manner, EPA, or the appropriate federal agency, may issue an order pursuant to section 104(e)(5) of CERCLA directing compliance with the request for access made under § 300.400(d)(1). EPA or the appropriate federal agency may ask the Attorney General to commence a civil action to compel compliance with either a request for access or an order directing compliance.

(ii) EPA reserves the right to proceed, where appropriate, under applicable authority other than CERCLA section 104(e).

(iii) The administrative order may direct compliance with a request to enter or inspect any vessel, facility, establishment, place, property, or location described in paragraph (d)(3) of this section.

(iv) Each order shall contain:

(A) A determination by EPA, or the appropriate federal agency, that it is reasonable to believe that there may be or has been a release or threat of a release of a hazardous substance or pollutant or contaminant and a statement of the facts upon which the determination is based;

(B) A description, in light of CERCLA response authorities, of the purpose and estimated scope and duration of the entry, including a description of the specific anticipated activities to be conducted pursuant to the order;

(C) A provision advising the person who failed to consent that an officer or employee of the agency that issued the order will be available to confer with respondent prior to effective date of the order; and

(D) A provision advising the person who failed to consent that a court may impose a penalty of up to \$25,000 per

day for unreasonable failure to comply with the order.

(v) Orders shall be served upon the person or responsible party who failed to consent prior to their effective date. Force shall not be used to compel compliance with an order.

(vi) Orders may not be issued for any criminal investigations.

(e) *Permit requirements.* (1) No federal, state, or local permits are required for on-site response actions conducted pursuant to CERCLA sections 104, 106, 120, 121, or 122. The term *on-site* means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.

(2) Permits, if required, shall be obtained for all response activities conducted off-site.

(f) *Health assessments.* Health assessments shall be performed by ATSDR at facilities on or proposed to be listed on the NPL and may be performed at other releases or facilities in response to petitions made to ATSDR. Where available, these health assessments may be used by the lead agency to assist in determining whether response actions should be taken and/or to identify the need for additional studies to assist in the assessment of potential human health effects associated with releases or potential releases of hazardous substances.

(g) *Identification of applicable or relevant and appropriate requirements.* (1) The lead and support agencies shall identify requirements applicable to the release or remedial action contemplated based upon an objective determination of whether the requirement specifically addresses a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at a CERCLA site.

(2) If, based upon paragraph (g)(1) of this section, it is determined that a requirement is not applicable to a specific release, the requirement may still be relevant and appropriate to the circumstances of the release. In evaluating relevance and appropriateness, the factors in paragraphs (g)(2)(i) through (viii) of this section shall be examined, where pertinent, to determine whether a requirement addresses

problems or situations sufficiently similar to the circumstances of the release or remedial action contemplated, and whether the requirement is well-suited to the site, and therefore is both relevant and appropriate. The pertinence of each of the following factors will depend, in part, on whether a requirement addresses a chemical, location, or action. The following comparisons shall be made, where pertinent, to determine relevance and appropriateness:

(i) The purpose of the requirement and the purpose of the CERCLA action;

(ii) The medium regulated or affected by the requirement and the medium contaminated or affected at the CERCLA site;

(iii) The substances regulated by the requirement and the substances found at the CERCLA site;

(iv) The actions or activities regulated by the requirement and the remedial action contemplated at the CERCLA site;

(v) Any variances, waivers, or exemptions of the requirement and their availability for the circumstances at the CERCLA site;

(vi) The type of place regulated and the type of place affected by the release or CERCLA action;

(vii) The type and size of structure or facility regulated and the type and size of structure or facility affected by the release or contemplated by the CERCLA action;

(viii) Any consideration of use or potential use of affected resources in the requirement and the use or potential use of the affected resource at the CERCLA site.

(3) In addition to applicable or relevant and appropriate requirements, the lead and support agencies may, as appropriate, identify other advisories, criteria, or guidance to be considered for a particular release. The "to be considered" (TBC) category consists of advisories, criteria, or guidance that were developed by EPA, other federal agencies, or states that may be useful in developing CERCLA remedies.

(4) Only those state standards that are promulgated, are identified by the state in a timely manner, and are more stringent than federal requirements

Tab 4

DELEGATIONS MANUAL

1200 TN 350
5/11/94

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

14-6. Inspections, Sampling, Information Gathering,
Subpoenas, and Entry for Response.

1. **AUTHORITY.** Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, to render any vessel, facility, establishment, place, property or location for the purposes of inspections, sampling, information gathering and response actions; to carry out inspections, sampling and information gathering; to require the production of information and documents; 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.

2. **TO WHOM DELEGATED.** Assistant Administrator for Solid Waste and Emergency Response and Assistant Administrator for Enforcement and Compliance Assurance and Regional Administrators.

3. **LIMITATIONS.**

a. Regional Administrators and the Assistant Administrator for Solid Waste and Emergency Response or their delegates must consult with the Assistant Administrator for Enforcement and Compliance Assurance, or his/her designee, prior to issuing compliance orders regarding information gathering or compliance orders for entry and inspection, or issuing subpoenas, unless or until such consultation authority is waived by memorandum.

b. The Assistant Administrator for Solid Waste and Emergency Response or his/her designee must consult with the Assistant Administrator for Enforcement and Compliance Assurance or his/her designee prior to obtaining warrants.

c. The Assistant Administrator for Solid Waste and Emergency Response and the Assistant Administrator for Enforcement and Compliance Assurance or their delegates must consult with the appropriate Regional Administrator or his/her designee prior to exercising these authorities.

4. **REDELEGATION AUTHORITY.** This authority may be redelegated.

5. **ADDITIONAL REFERENCES.**

- a. Sections 104(e), 109(a), and 109(b) and 122(e) of CERCLA.
- b. National Contingency Plan, 40 CFR 300.

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

**14-6. Inspections, Sampling, Information Gathering,
Subpoenas, and Entry for Response**

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

- a. to enter any vessel, facility, establishment, place, property or location for the purposes of inspections, sampling, information gathering and response actions;
- b. to carry out inspections, sampling and information gathering;
- c. to require the production of information and documents (i.e., 104(c) letters);
- d. to issue subpoenas;
- e. to issue Compliance Orders for production of information and documents;
- f. to issue Compliance Orders for entry and inspection;
- g. to obtain and execute warrants, to support this authority; and
- h. to designate representatives of the Administrator to carry out inspections, sampling, information gathering and response actions.

2. TO WHOM DELEGATED.

a. The authorities in 1.a., 1.b. and 1.c. are delegated to the Director, Hazardous Site Cleanup Division (HSCD); Chief, Removal Branch; Chief, Remedial Branch; Chief, Enforcement and Federal Facilities Branch; Chief, Removal Response Section; Chief, Removal Enforcement and Oil Section; Chief, Eastern PA Remedial Section; Chief, Western PA Remedial Section; Chief, General Remedial Section; Chief, PRP Investigation and Site Information Section; Chief, Cost Recovery Section; Chief, Federal Facilities Section; Chief, Preparedness and Program Support Section, and Chief, Brownfields and Site Assessment Section, HSCD; Director, Waste and Chemicals Management Division (WCMD); Associate Division Director for Enforcement; Associate Division Director for RCRA; Chief, State Programs Branch; Chief, PA Operations Branch; Chief, General Operations Branch; Chief, RCRA Compliance and Enforcement Branch; Chief, Pesticides/Asbestos Programs and Enforcement Branch; and Chief, Toxics Programs and Enforcement Branch, WCMD; Director, Office of Enforcement, Compliance, and Environmental Justice (OECEJ); Chief, Enforcement and Compliance Assistance Branch, OECEJ; Director, Environmental Services

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

14-6. Inspections, Sampling, Information Gathering,
Subpoenas, and Entry for Response (Cont.)

2. TO WHOM DELEGATED. (Cont.)

Division (ESD); Chief, Office of Analytical Services and Quality Assurance; and Chief, Office of Environmental Programs, ESD.

b. The authorities in 1.a. and 1.b. are delegated to Remedial Project Managers (RPMs) located in the Federal Facilities, Eastern PA, Western PA, and General Remedial Sections, HSCD; On-Scene Coordinators (OSCs) located in the Removal Response and Removal Enforcement and Oil Sections, HSCD; Site Assessment Managers (SAMs) located in the Brownfields and Site Assessment Section, HSCD; Civil Investigators and Compliance Officers located in the Removal Enforcement and Oil Section, PRP Investigation and Site Information Section, Preparedness and Program Support Section, and Cost Recovery Section, HSCD; inspectors in OECEJ; and staff in ESD who perform CERCLA laboratory inspections or federal facility inspections.

c. The authority in 1.c. is delegated to the Regional Counsel (RC).

d. The authorities in 1.d., 1.e., 1.g. and 1.h. are delegated to the Director HSCD; Chief, Removal Branch, HSCD; Chief, Remedial Branch, HSCD; Chief, Enforcement and Federal Facilities Branch, HSCD; Director, WCMD; Associate Division Director for Enforcement, WCMD; Associate Division Director for RCRA, WCMD; Chief, State Programs Branch; Chief, PA Operations Branch; Chief, General Operations Branch; Chief, RCRA Compliance and Enforcement Branch; Chief, Pesticides/Asbestos Programs and Enforcement Branch; Chief, Toxics Programs and Enforcement Branch, WCMD; Director, OECEJ; Chief, Enforcement and Compliance Assistance Branch, OECEJ; Director, ESD; Chief, Office of Analytical Services and Quality Assurance; and Chief, Office of Environmental Programs, ESD.

e. The authority in 1.f. is delegated to the Directors of HSCD, WCMD, OECEJ, and ESD.

3. LIMITATIONS.

a. The delegates other than Regional Counsel (RC) must consult with the RC prior to exercising the authority in subparagraph 1.c.

b. The delegates must obtain the concurrence of the Regional Counsel or his/her designee prior to exercising the authorities in subparagraphs 1.d., 1.e., 1.f. and 1.g.

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

14-6. Inspections, Sampling, Information Gathering,
Subpoenas, and Entry for Response (Cont.)

3. LIMITATIONS. (Cont.)

c. The delegates must consult with the Regional Counsel or his/her designee prior to exercising the authority in subparagraph 1.h. in those instances where non-EPA employees or non-EPA contractors are designated as representatives of the Regional Administrator.

d. Regional Counsel or his/her designee must consult with the Assistant Administrator for Enforcement and Compliance Assurance or his/her designee prior to giving the delegates concurrence for the exercise of the authorities in subparagraphs 1.d., 1.e. and 1.f.

e. The OECEJ delegates may exercise these authorities only in multi-media cases.

f. The OECEJ delegates must consult with the HSCD and WCMD delegates before exercising these authorities.

g. The ESD delegates may exercise these authorities only in CERCLA laboratory inspections or federal facility inspections.

h. The WCMD and ESD delegates must consult with the HSCD delegates before exercising these authorities.

i. Executive Order 12580 requires EPA to obtain the concurrence of the Attorney General before issuing compliance orders, under authorities 1.e. and 1.f., to other Federal agencies. In cases where the delegates recommend issuing a compliance order to another Federal agency or agencies under 1.e. or 1.f., the delegates shall prepare a memorandum from the Regional Administrator to the Assistant Administrator for OECA requesting that the Agency initiate concurrence procedures with the Department of Justice.

4. REDELEGATION AUTHORITY. This authority may not be redelegated without formal amendment.

5. ADDITIONAL REFERENCES.

a. Sections 104(e), 109(a), 109(b) and 122(c) of CERCLA.

b. National Contingency Plan 40 CFR Part 300.

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

14-6. Inspections, Sampling, Information Gathering,
Subpoenas, and Entry for Response (Cont.)

5. ADDITIONAL REFERENCES. (Cont.)

c. Section 4(e) of Executive Order 12580

6. SUPERSESSION. Delegations Manual, Interim Delegation of Authority, CERCLA, Regional Delegation 14-6. Inspection, Sampling, Information Gathering, Subpoenas, and Entry for Response. 1200 TN RIII-134, (July 19, 1999).

Date 6/19/01

/s/
Thomas C. Voltaggio
Acting Regional Administrator

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

14-6. Inspections, Sampling, Information Gathering,
Subpoenas, and Entry for Response

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

- a. to enter any vessel, facility, establishment, place, property or location for the purposes of inspections, sampling, information gathering and response actions;
- b. to carry out inspections, sampling and information gathering;
- c. to require the production of information and documents (i.e., 104(e) letters);
- d. to issue subpoenas;
- e. to issue Compliance Orders for production of information and documents;
- f. to issue Compliance Orders for entry and inspection;
- g. to obtain and execute warrants, to support this authority; and
- h. to designate representatives of the Administrator to carry out inspections, sampling, information gathering and response actions.

2. TO WHOM DELEGATED.

a. The authorities in 1.a., 1.b. and 1.c. are delegated to the Director, Hazardous Site Cleanup Division (HSCD); Associate Director, Office of Preparedness and Response; Associate Director, Office of Superfund Site Remediation; Associate Director, Office of Enforcement; Associate Director, Office of Federal Facility Remediation and Site Assessment; Associate Director, Office of Brownfields and Outreach, Chief, Brownfields and Revitalization Branch; Chief, Eastern Response Branch; Chief, Western Response Branch; Chief, Preparedness and Support Branch; Chief, Oil and Prevention Branch; Chief, Cost Recovery Branch; Chief, Eastern PA Remedial Branch; Chief, Western PA/MD Remedial Branch, DE, VA, WV Remedial Branch, Chief, Site Assessment and Non-NPL Federal Facilities Branch, Chief, NPL/BRAC Federal Facilities Branch, HSCD; Director, Land and Chemicals Division (LCD); Associate Director, Office of Land Enforcement; Associate Director, Office of State Programs; Associate Director, Office of Pennsylvania Remediation; Associate Director, Office of Remediation; Chief, Pesticides and Asbestos Programs Branch; and Chief, Toxics Programs Branch, LCD; Director, Office of Enforcement, Compliance, and Environmental Justice (OECEJ); Chief, Enforcement and Compliance Assistance



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

14-6. Inspections, Sampling, Information Gathering,
Subpoenas, and Entry for Response (Cont.)

2. TO WHOM DELEGATED. (Cont.)

Branch, OECEJ; Director, Environmental Assessment and Innovation Division (EAID); Associate Director, Office of Analytical Services and Quality Assurance; and Associate Director, Office of Environmental Programs, EAID.

b. The authorities in 1.a. and 1.b. are delegated to Remedial Project Managers (RPMs) located in the NPL/BRAC Federal Facilities Branch, Site Assessment and Non-NPL Federal Facilities Branch, Eastern PA Remedial Branch, Western PA/MD Remedial Branch, DE, VA, WV Remedial Branch, HSCD; On-Scene Coordinators (OSCs) located in the Eastern Response Branch, Western Response Branch, Oil and Prevention Branch, HSCD; Site Assessment Managers (SAMs) located in the Brownfields and Revitalization Branch, NPL/BRAC Federal Facilities Branch and the Site Assessment and Non-NPL Federal Facilities Branch, HSCD; Civil Investigators and Compliance Officers located in the Oil and Prevention Branch, Cost Recovery Branch, Preparedness and Support Branch, Site Assessment and Non-NPL Federal Facilities Branch, HSCD; inspectors in OECEJ; and staff in EAID who perform CERCLA laboratory inspections or federal facility inspections.

c. The authority in 1.c. is delegated to the Regional Counsel.

d. The authorities in 1.d., 1.e., 1.g. and 1.h. are delegated to the Director HSCD; Associate Director, Office of Preparedness and Response, Associate Director, Office of Superfund Site Remediation, Associate Director, Office of Enforcement, Associate Director, Office of Federal Facility Remediation and Site Assessment; Chief, Cost Recovery Branch, HSCD; Director, LCD; Associate Director, Office of Toxics and Pesticides, LCD; Associate Director, Office of State Programs, LCD; Associate Director, Office of Pennsylvania Remediation, LCD; Associate Director, Office of Remediation, LCD; Associate Director, Office of Land Enforcement, LCD; Chief, Pesticides and Asbestos Programs Branch, LCD; Chief, Toxics Programs Branch, LCD; Director, OECEJ; Chief, Enforcement and Compliance Assistance Branch, OECEJ; Director, EAID; Associate Director, Office of Analytical Services and Quality Assurance; and Associate Director, Office of Environmental Programs, EAID.

e. The authority in 1.f. is delegated to the Directors of HSCD, LCD, OECEJ, and EAID.

3. LIMITATIONS.

a. The delegates other than Regional Counsel or his/her designee must consult with the Regional Counsel prior to exercising the authority in subparagraph 1.c.

b. The delegates must obtain the concurrence of the Regional Counsel or his/her designee prior to exercising the authorities in subparagraphs 1.d., 1.e., 1.f. and 1.g.

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

14-6. Inspections, Sampling, Information Gathering,
Subpoenas, and Entry for Response (Cont.)

c. The delegates must consult with the Regional Counsel or his/her designee prior to exercising the authority in subparagraph 1.h. in those instances where non-EPA employees or non-EPA contractors are designated as representatives of the Regional Administrator.

d. Regional Counsel or his/her designee must consult with the Assistant Administrator for Enforcement and Compliance Assurance or his/her designee prior to giving the delegates concurrence for the exercise of the authorities in subparagraphs 1.d., 1.e. and 1.f.

e. The OECEJ delegates may exercise these authorities only in multi-media cases.

f. The OECEJ delegates must consult with the HSCD and LCD delegates before exercising these authorities.

g. The EAID delegates may exercise these authorities only in CERCLA laboratory inspections or federal facility inspections.

h. The LCD and EAID delegates must consult with the HSCD delegates before exercising these authorities.

i. Executive Order 12580 requires EPA to obtain the concurrence of the Attorney General before issuing compliance orders, under authorities 1.e. and 1.f., to other Federal agencies. In cases where the delegates recommend issuing a compliance order to another Federal agency or agencies under 1.e. or 1.f., the delegates shall prepare a memorandum from the Regional Administrator to the Assistant Administrator for OECA requesting that the Agency initiate concurrence procedures with the Department of Justice.

4. REDELEGATION AUTHORITY. This authority may not be redelegated without formal amendment.

5. ADDITIONAL REFERENCES.

a. Sections 104(e), 109(a), 109(b) and 122(e) of CERCLA.

b. National Contingency Plan 40 CFR Part 300.

c. Section 4(e) of Executive Order 12580

14-6. Inspections, Sampling, Information Gathering,
Subpoenas, and Entry for Response (Cont.)

6. SUPERSESSON. Delegations Manual, Interim Delegation of Authority, CERCLA, Regional Delegation 14-6. Inspection, Sampling, Information Gathering, Subpoenas, and Entry for Response, 1200 TN RIII-146, (June 19, 2001).

Date: 9/1/05

/s/ James W. Newsom for
Donald S. Welsh
Regional Adminsitrator

Tab 5



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

JUN - 5 1987

9829.2

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Entry and Continued Access Under CERCLA

FROM: Thomas L. Adams, Jr.
Assistant Administrator

Thomas L. Adams

TO: Regional Administrators I-X
Regional Counsels I-X

I. INTRODUCTION

This memorandum sets forth EPA's policy on entry and continued access to facilities by EPA officers, employees, and representatives for the purposes of response and civil enforcement activities under CERCLA. ^{1/} In short, the policy recommends that EPA should, in the first instance, seek to obtain access through consent. Entry on consent is preferable across the full range of onsite activities. If consent is denied, EPA should use judicial process or an administrative order to gain access. The appropriate type of judicial process varies depending on the nature of the onsite activity. When entry is needed for short-term and non-intrusive activities, an ex parte, judicial warrant should be sought. In situations involving long-term or intrusive access, EPA should generally file suit to obtain a court order.

The memorandum's first section addresses the recently amended access provision in CERCLA. The memorandum then sets forth EPA policy on obtaining entry and the procedures which should be used to implement this policy, including separate discussions on consent, warrants, court orders, and administrative orders.

Received

JAN 28 2000

Enforcement & Compliance Docket
& Information Center

^{1/} This policy does not address information requests under Section 104(e)(2).

II. STATUTORY AUTHORITY

EPA needs access to private property to conduct investigations, studies, and cleanups. The Superfund Amendments and Reauthorization Act of 1986 (SARA) explicitly grants EPA 2/ the authority to enter property for each of these purposes. Section 104(e)(1) provides that entry is permitted for "determining the need for response, or choosing or taking any response action under this title, or otherwise enforcing the provisions of this title."

SARA also establishes a standard for when access may be sought and defines what property may be entered. EPA may exercise its entry authority "if there is a reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant." § 104(e)(1). SARA, however, does not require that there be a release or threatened release on the property to be entered. 3/ Places and properties subject to entry under Section 104(e) include any place any hazardous substance may be or has been generated, stored, treated; disposed of, or transported from; any place a hazardous substance has or may have been released; any place which is or may be threatened by the release of a hazardous substance; or any place where entry is needed to determine the need for response or the appropriate response, or to effectuate a response action under CERCLA. § 104(e)(3). EPA is also authorized to enter any place or property adjacent to the places and properties described in the previous sentence. § 104(e)(1).

EPA is granted explicit power to enforce its entry authority in Section 104(e)(5). Under that provision EPA may either issue an administrative order directing compliance with an entry request or proceed immediately to federal district court for injunctive relief. Orders may be issued where consent to entry is denied. Prior to the effective date of the order, EPA must provide such notice and opportunity for consultation as is reasonably appropriate under the circumstances. If EPA issues an order, the order can be enforced in court. Where there is a "reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant," courts are instructed to enforce an EPA request or order unless the EPA

2/ Although CERCLA and SARA confer authority upon the President that authority has been delegated to the EPA Administrator. Exec. Order No. 12580, § 2(g) and (i), 52 Fed. Reg. 1923 (1987).

3/ The House Energy and Commerce bill at one point contained this limitation. H.R. Rep. No. 99-253 Part 1, 99th Cong., 1st Sess., 158 (1985). This limitation, however, was dropped prior to introduction of the bill for floor debate. See H.R. 2817, 99th Cong., 1st Sess., 131 Cong. Rec. H10857 (December 4, 1985).

"demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." § 104(e)(5). The legislative history makes clear that courts should enforce an EPA demand or order for entry if EPA's finding that there is a reasonable basis to believe there may be a release or threat of release is not arbitrary and capricious. 132 Cong. Rec. S14929 (October 3, 1986) (Statement of Sen. Thurmond); 132 Cong. Rec. H9582 (October 8, 1986) (Statement of Rep. Glickman). See United States v. Standard Equipment, Inc., No. C83-252M (W.D. Wash. November 3, 1986). In addition, a penalty not to exceed \$25,000/day may be assessed by the court for failure to comply with an EPA order or the provisions of subsection (e).

Finally, Section 104(e)(6) contains a savings provision which preserves EPA's power to secure access in "any lawful manner." This broad savings provision is significant coming in the wake of the Supreme Court's holding that:

When Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission.

. . . Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted.

Dow Chemical Co. v. United States, 90 L.Ed. 2d 226, 234 (1986). 4/ One lawful means of gaining access covered by this paragraph is use of judicially-issued warrants. See S. Rep. No. 99-11, 99th Cong. 1st Sess. 26 (1985).

In numerous instances prior to the passage of SARA, EPA obtained court rulings affirming its authority to enter property to conduct CERCLA activities. 5/ Following enactment of SARA,

4/ See also, Mobil Oil Corp. v. EPA, 716 F.2d 1187, 1189 (7th Cir. 1983), cert. denied, 466 U.S. 980 (1984) (EPA authority to sample effluent under Section 308 of the Clean Water Act broadly construed); CEDs, Inc. v. EPA, 745 F.2d 1092 (7th Cir. 1984), cert. denied, 471 U.S. 1015 (1985).

5/ United States v. Pepper Steel and Alloy, Inc., No. 83-1717-CIV-EPS (S.D. Fla. October 10, 1986); Bunker Limited Partnership v. United States, No. 85-3133 (D. Idaho October 21, 1985); United States v. Coleman Evans Wood Preserving Co., No. 85-211-CIV-J-16 (M.D. Fla. June 10, 1985); United States v. Baird & McGuire Co., No. 83-3002-Y (D. Mass. May 2, 1985); United States v. United Nuclear Corp., 22 ERC 1791, 15 ELR 20443 (D.N.M. April 18, 1985).

several courts have ordered siteowners to permit EPA access. United States v. Long, No. C-1-87-167 (S.D. Ohio May 13, 1987); United States v. Dickerson, No. 84-76-VAL (M.D. Ga. May 4, 1987); United States v. Standard Equipment, Inc., No. C83-252M (W.D. Wash. Nov. 3, 1986). Further, the one adverse ruling on EPA's right of access has been vacated by the Supreme Court. Outboard Marine Corp. v. Thomas, 773 F.2d 883 (7th Cir. 1985), vacated, 93 L. Ed. 2d 695 (1986).

III. EPA ACCESS POLICY

EPA needs access to sites for several types of activities, including:

- ° preliminary site investigations;
- ° removal actions;
- ° RI/FSs; and
- ° remedial actions.

Within each of these categories, the scope of the work and the time needed to complete that work may vary substantially. This memorandum sets Agency policy on what means should be used to gain access over the range of these various activities.

EPA may seek access through consent, warrant, administrative order, or court order. 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. In certain circumstances, however, the Region should consider obtaining judicial authorization or issuing an administrative order in addition to obtaining consent. For example, where uncertainty exists whether a siteowner will continue to permit access over an extended period, reliance on consent alone may result in a substantial delay if that consent is withdrawn.

When consent is denied, EPA should seek judicial authorization or should issue an administrative order. If the judicial route is chosen, EPA may seek an ex parte warrant or a court order. Warrants are traditionally granted for short-term entries. Generally, warrants should not be used when the EPA access will involve long-term occupation or highly intrusive activities. Clearly, warrants are appropriate for preliminary site investigations. On the other hand, because of the long, involved nature of remedial actions, access for such projects should be sought through a request for a court order. Neither removals nor RI/FSs, however, can be rigidly matched with a given judicial access procedure. Depending on the activities to be undertaken and the circumstances at the site, either a warrant or a court order may be appropriate.

In deciding whether to use a warrant or a court order when access is needed for a removal or to conduct a RI/FS, the following general principles should be considered. First, if the activity will take longer than 60 days a court order normally is appropriate. Second, even if the activity will take less than 60 days, when the entry involves removal of large quantities of soil or destruction of permanent fixtures, a court order may again be appropriate. Finally, warrants should not be used if EPA action will substantially interfere with the operation of onsite business activities. These issues must be resolved on a case-by-case basis.

If EPA needs to gain access for a responsible party who has agreed to undertake cleanup activities under an administrative order or judicial decree, EPA may, in appropriate circumstances, designate the responsible party as EPA's authorized representative solely for the purpose of access, and exercise the authorities contained in Section 104(e) on behalf of the responsible party. Such a procedure may only be used where the responsible party demonstrates to EPA's satisfaction that it has made best efforts to obtain access. A further condition on the use of this procedure is that the responsible party agree to indemnify and hold harmless EPA and the United States for all claims related to injuries and damages caused by acts or omissions of the responsible party. The responsible party should also be advised that the expenses incurred by the government in gaining access for the responsible party are response costs for which the responsible party is liable. Before designating any responsible party as an authorized representative, the Region should consult with the Office of Enforcement and Compliance Monitoring.

IV. ACCESS PROCEDURES

A. Entry on Consent

1. General Procedures

The following procedures should be observed in seeking consent:

Initial Contact. Prior to visiting a site, EPA personnel 6/ should consider contacting the siteowner to determine if consent will be forthcoming. EPA personnel should use this opportunity to explain EPA's access authority, the purpose for which entry is needed, and the activities which will be conducted.

6/ As used in this guidance, the term "EPA personnel" includes contractors acting as EPA's authorized representatives.

Arrival. EPA personnel should arrive at the site at a reasonable time of day under the circumstances. In most instances this will mean during normal working hours. When there is a demonstrable need to enter a site at other times, however, arrival need not be limited to this timeframe. Entry must be reasonable given the exigencies of the situation.

Identification. EPA personnel should show proper identification upon arrival.

Request for Entry. In asking for consent, EPA personnel should state the purpose for which entry is sought and describe the activities to be conducted. EPA personnel should also present a date-stamped written request to the owner or person-in-charge. A copy of this request should be retained by EPA. Consent to entry must be sought from the owner 7/ or the person-in-charge at that time.

If practicable under the circumstances, consent to entry should be memorialized in writing. A sample consent form is attached. Although oral consents are routinely approved by the courts, a signed consent form protects the Agency by serving as a permanent record of a transaction which may be raised as a defense or in a claim for damages many years later. If a site-owner is unwilling to sign a consent form but nonetheless orally agrees to allow access, EPA should document this oral consent by a follow-up letter confirming the consent.

Since EPA contractors often are involved in gaining access in the first instance, the Regions should ensure that their contractors are acquainted with these procedures.

2. Denial of Entry

If consent is denied, EPA personnel or contractors, before leaving, should attempt to determine the grounds for the denial. EPA personnel, however, should not threaten the siteowner with penalties or other monetary liability or make any other remarks which could be construed as threatening. EPA personnel may explain EPA's statutory access authority, the grounds upon which this authority may be exercised, and that the authority may be enforced in court.

7/ If EPA's planned site activities will not have a physical effect on the property, EPA generally need not seek consent from the owner of leased property where the lessee is in possession. The proper person in those circumstances is the lessee. But where EPA entry will have a substantial physical effect on the property, both the lessee and the property-owner should be contacted since in this instance interests of both will be involved.

3. Conditions Upon Entry

Persons on whose property EPA wishes to enter often attempt to place conditions upon entry. 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. The imposition of conditions of this nature on entry should be treated as denial of consent and a warrant or order should be obtained. See U.S. EPA, General Counsel Opinions, "Visitors' Release and Hold Harmless Agreements as a Condition to Entry of EPA Employees on Industrial Facilities," Gen'l and Admin. at 125 (11/8/72). If persons are concerned about confidentiality, they should be made aware that business secrets are protected by the statute and Agency regulations. 42 U.S.C. § 9604(e); 40 C.F.R. § 2.203(b). EPA personnel should enter into no further agreements regarding confidentiality.

B. Warrants

1. General Procedures

To secure a warrant, the following procedures should be observed:

Contact Regional Counsel. EPA personnel should discuss with Regional Counsel the facts regarding the denial of consent or other factors justifying a warrant and the circumstances which give rise to the need for entry.

Contact Department of Justice. If after consultation with Regional Counsel a decision is made to seek a warrant, the Regional Counsel must contact directly the Environmental Enforcement Section in the Land and Natural Resources Division at the Department of Justice. ^{8/} The person to call at the Department is the Assistant Chief in the Environmental Enforcement Section assigned to the Region. The Assistant Chief will then arrange, in a timely manner, for the matter to be handled by either an Environmental Enforcement Section attorney or a U.S. Attorney. The Region must send to the Environmental Enforcement Section, by Magnafax or other

^{8/} This procedure is necessary to comply with internal Department of Justice delegations of authority. Referral to a local U.S. Attorney's office is not sufficient for CERCLA warrants. The Environmental Enforcement Section of the Department of Justice must approve all warrant applications. (See Memorandum from David T. Buente, Jr. to All Environmental Enforcement Attorneys, "Procedures for Authorizing Applications for Civil Search Warrants Under CERCLA" (4/3/87) attached).

expedited means, a draft warrant application and a short memorandum concisely stating why the warrant is needed.

Prepare Warrant Application. The warrant application must contain the following:

- 1) a statement of EPA's authority to inspect;
(see § 11, supra)
- 2) a clear identification of the name and location of the site and, if known, the name(s) of the owner and operator of the site;
- 3) a statement explaining the grounds for a finding of a reasonable basis for entry (i.e., a reasonable basis to believe that there may be a release or threatened release of a hazardous substance or pollutant or contaminant) and the purpose for entry (i.e., determining the need for response, or choosing or taking any response action, or otherwise enforcing CERCLA);
- 4) affidavits supporting the asserted reasonable basis for entry and describing any attempts to gain access on consent, if applicable; and
- 5) a specific description of the extent, nature, and timing of the inspection;

Following preparation of the warrant application, the Justice Department attorney will file the application with the local U.S. Magistrate.

EPA may ask the Justice Department attorney to seek the assistance of the United States Marshals Service in executing the warrant where EPA perceives a danger to the personnel executing the warrant or where there is the possibility that evidence will be destroyed.

2. Reasonable Basis for Entry

A warrant for access on a civil matter may be obtained upon a showing of a reasonable basis for entry. This reasonable basis may be established either by presenting specific evidence relating to the facility to be entered or by demonstrating that the entry is part of a neutral administrative inspection plan.

A specific evidence standard is incorporated in SARA as a condition on EPA's exercise of its access authority: EPA must have "a reasonable basis to believe there may be a release or

threat of a release of a hazardous substance or pollutant or contaminant." § 104(e)(1). SARA's express specific evidence standard is consistent with how courts have formulated the specific evidence test in the absence of statutory guidance. E.g., West Point-Pepperell, Inc. v. Donovan, 689 F. 2d 950, 958 (11th Cir. 1982) (there must be a "showing of specific evidence sufficient to support a reasonable suspicion of a violation").

In drafting a warrant application, conclusory allegations regarding the specific evidence standard under subsection 104(e) will not suffice. Courts generally have refused to approve warrants where the application contains mere boilerplate assertions of statutory violations. Warrant applications have been granted, on the other hand, where the application contained detailed attestations by government officials or third-party complaints which have some indicia of reliability. Ideally, EPA warrant applications should contain an affidavit of a person who has personally observed conditions which indicate that there may be a release or threat of a release of a hazardous substance. If they are available, sampling results, although not required, should also be attached. Warrant applications based on citizen, employee, or competitor complaints should include details that establish the complainant's credibility. 9/

C. Court Orders

The provisions in CERCLA authorizing EPA access may be enforced by court order. To obtain a court order for entry, the Region should follow the normal referral process. If only access is required, the referral package can obviously be much abbreviated. If timing is critical, EPA HQ will move expeditiously and will refer the case orally if necessary. The Regions, however, should attempt to anticipate the sites at which access may prove problematic and should allow sufficient lead time for the referral process and the operation of the courts. The Regions should also not enter lengthy negotiations with landowners over access. EPA and DOJ are prepared to litigate aggressively to establish EPA's right of access.

9/ If information gathered in a civil investigation suggests that a criminal violation may have occurred, EPA personnel should consult the guidance on parallel proceedings. (Memorandum from Courtney Price to Assistant Administrators et al., "Policy and Procedures on Parallel Proceedings at the Environmental Protection Agency" (1/23/84)). Use of CERCLA's information-gathering authority in criminal investigations is addressed in separate guidance. (Memorandum from Courtney M. Price to Assistant Administrators et al., "The Use of Administrative Discovery Devices in the Development of Cases Assigned to the Office of Criminal Investigations" (2/16/84)).

Prior to seeking a court order, EPA should request access, generally in writing, and assemble the record related to access. The showing necessary to obtain a court order is the same as for obtaining a warrant: EPA must show a reasonable basis to believe that there may be a release or a threat of a release of a hazardous substance or pollutant or contaminant. An EPA finding on whether there is reason to believe a release has occurred or is about to occur must be reviewed on the arbitrary and capricious standard. § 104(e)(5) (B)(i). If the matter is not already in court, EPA must file a complaint seeking injunctive and declaratory relief. Simultaneous to filing the complaint, EPA may, if necessary, file a motion, supported by affidavits documenting the release or threatened release, requesting an immediate order in aid of access. If the matter is already in litigation, EPA may proceed by motion to seek an order granting access. 10/

In a memorandum supporting EPA's request for relief it should be made clear that by invoking judicial process, EPA is not inviting judicial review of its decision to undertake response action or of any administrative determinations with regard to the response action. Section 113(h) of SARA bars judicial review of removal or remedial action except in five enumerated circumstances. A judicial action to compel access is not one of the exceptions. Statements on the floor of the House and the Senate confirm that EPA enforcement of its access authority does not provide an opportunity for judicial review of response decisions. Senator Thurmond, chairman of the Judiciary Committee, remarked that when EPA requests a court to compel access "there is no jurisdiction at that time to review any response action . . .

10/ Parenthetically, it should be noted that the broad equitable power granted to courts in Section 106 can also be relied on to obtain a court order. An additional source of authority for courts in this regard is the All Writs Act, 28 U.S.C. § 1651. The Act authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions" 28 U.S.C. § 1651. This authority "extends under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing are in a position to frustrate the implementation of a court order" United States v. New York Telephone Co., 434 U.S. 159, 174 (1977). Thus, the All Writs Act may prove useful as a means of compelling persons not a party to a consent decree to cooperate with EPA and other settling parties in execution of the decree. The use of the All Writs Act, however, may be limited in light of the Supreme Court's interpretation of the Act in Pennsylvania Bureau of Correction v. United States Marshal Service, 88 L. Ed. 2d 189 (1985).

[T]he court may only review whether the Agency's conclusion that there is a release or threatened release of hazardous substances is arbitrary or capricious." 132 Cong. Rec. S14929 (October 3, 1986) (Statement of Sen. Thurmond); 132 Cong. Rec. 119582 (October 8, 1986) (Statement of Rep. Glickman); see United States v. Standard Equipment, Inc., No. C83-252M (W.D. Wash. Nov. 3, 1986).

D. Administrative Orders

If a siteowner denies an EPA request for access, EPA may issue an administrative order directing compliance with the request. § 104(e)(5)(A). Each administrative order must include a finding by the Regional Administrator that there exists a reasonable belief that there may be a release or threat of release of a hazardous substance and a description of the purpose for the entry and of the activities to be conducted and their probable duration. The order should indicate the nature of the prior request for access. Further, the order should advise the respondent that the administrative record upon which the order was issued is available for review and that an EPA officer or employee will be available to confer with respondent prior to the effective date of the order. The length of the time period during which such a conference may be requested should be reasonable under the circumstances. In deciding what is a reasonable time period, consideration should be given to the interference access will cause with onsite operations, the threat to human health and the environment posed by the site, and the extent of prior contacts with the respondent. The order should advise the respondent that penalties of up to \$25,000 per day may be assessed by a court against any party who unreasonably fails to comply with an order. § 104(e)(5). Following the time period for the conference and any conference, the issuing official should send a document to the respondent summarizing any conference, EPA's resolution of any objections, and stating the effective date of the order.

If, following issuance of an administrative order, the siteowner continues to refuse access to EPA, the order may be enforced in federal court. EPA should not use self-help to execute orders. Courts are required to enforce administrative orders where there is a reasonable basis to believe that there may be a release or threat of a release of a hazardous substance. EPA's determination in this regard must be upheld unless it is arbitrary and capricious. ~~§ 104(e)(5)(B)(i). EPA will seek penalties from those parties who unreasonably fail to comply with orders.~~

All administrative orders for access must be concurred on by the Office of Enforcement and Compliance Monitoring prior to issuance.

DISCLAIMER

The policies and procedures established in this document are intended solely for the guidance of government personnel. They are not intended, and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.

Attachments

Memorandum

9829.2



Subject

Procedures for Authorizing Application
for Civil Search Warrants Under CERCLA

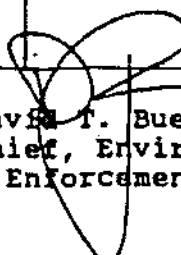
Date

April 3, 1987

To

All EES Attorneys

From


David T. Buente, Jr.
Chief, Environmental
Enforcement Section

Under § 104(e) of CERCLA, as amended by SARA, the United States may seek access by warrant, administrative order, or court order. If access is obtained by administrative order, the appropriate documents are issued by relevant client agencies. If access is to be obtained by court order, then the Assistant Attorney General of the Land and Natural Resources Division must approve the complaint, upon referral from the relevant client agency according to ordinary procedures. For access to be sought through application on a civil CERCLA warrant,¹ the instant memorandum will confirm the procedures to be used by the Department of Justice.

Under § 5.320-A-2 of the U.S. Attorney's Manual, application for warrant under CERCLA may not be handled unilaterally by the U.S. Attorneys. Applications for such warrants must be coordinated through the Environmental Enforcement Section.

Clearance through the Environmental Enforcement Section is important for a variety of reasons. First, the nature of the governmental activities involved under CERCLA civil warrants may be much broader and last considerably longer than an inspection under the other federal environmental regulatory statutes. Typically the latter require only a few days or weeks to conduct routine environmental sampling. Under CERCLA, access may be sought under a warrant for not only sampling, but even simple

¹ The memorandum does not cover procedures for seeking a criminal search warrant where a CERCLA violation may be involved. All such matters are to be referred to the Director, Environmental Crimes Unit, EES.

- 2 -

removal-type activity, e.g., security/fencing, limited drum removal. The greater relative complexity of the governmental activity involved can be expected to provoke more challenges to CERCLA civil warrants than those under other statutes and the issues raised by CERCLA warrants may be much more complex. Second, this is a relatively new and vital area of the law. We must ensure that maximum efforts are made to develop this critical area of the law in an excellent manner. EES lawyers must make all reasonable efforts to ensure that exercises of the civil warrant authority under CERCLA will be vindicated by the federal courts, through proper presentation of facts and legal arguments by Departmental attorneys with experience in this area. Finally, since our experience has shown that judicial challenges to civil CERCLA warrants tend to move very rapidly, sometimes on an emergency motion basis, EES needs to work closely with client agencies on these matters so that the Division's Appellate Section is advised and prepared with sufficient lead time to expeditiously address appellate proceedings.

Coordinating these warrant applications through EES must be done on an expedited basis so that client agencies' program objectives are achieved. Moreover, our resources must not be consumed by duplicative work. Balancing the needs for careful warrant application preparations with that for expeditious handling of these matters, we will use the following procedures:

1. The client agency will telephonically notify the relevant EES Assistant Chief or Senior Lawyer when the Agency plans to seek a civil warrant.
2. The client agency will follow-up the request by expeditiously transmitting a short memorandum concisely explaining why the warrant is needed with a draft copy of the warrant application and supporting affidavits.
3. Upon receipt of the telephonic notification or written request, whichever first occurs, the EES Assistant Chief or Sr. Lawyer will arrange for either an EES staff attorney or an AUSA to handle the review and prosecution of the application. Unless a dispute develops between EES/AUSA personnel and the client agency, the EES Assistant Chief or Sr. Lawyer may approve the application. If such a dispute develops, it must be brought to the attention of the Chief or Deputy Chief, EES for resolution.

4. Handling of these matters is to be afforded priority on our docket. Moreover, the Chief or Assistant Chief of the Appellate Section shall be advised of each application request by the EES Assistant Chief or Sr. Lawyer as soon as possible after notification by the client agency, so that Appellate can be prepared to handle expeditiously appeal matters.

5. All civil actions to enforce civil CERCLA warrants, by way of application for civil contempt or other judicial orders, shall be authorized in writing by the Assistant Attorney General. Such actions shall be afforded highest priority on the docket.

For general advice/guidance on handling CERCLA civil warrant matters, contact John Fleuchaus, ORCM-Waste, 382-3109.

Attachment

CONSENT FOR ACCESS TO PROPERTY

Name: _____

Address of Property: _____

I consent to officers, employees, and authorized representatives of the United States Environmental Protection Agency (EPA) entering and having continued access to my property for the following purposes:

[the taking of such soil, water, and air samples as may be determined to be necessary;]

[the sampling of any solids or liquids stored or disposed of on site;]

[the drilling of holes and installation of monitoring wells for subsurface investigation;]

[other actions related to the investigation of surface or subsurface contamination;]

[the taking of a response action including]

I realize that these actions by EPA are undertaken pursuant to its response and enforcement responsibilities under the Comprehensive Environmental Response, Compensation and Liability Act (Superfund), 42 U.S.C. § 9601 et seq.

This written permission is given by me voluntarily with knowledge of my right to refuse and without threats or promises of any kind.

Date_____
Signature



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

MAR 3 1988

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Clarification of CERCLA Entry Policy

FROM: Kenneth W. Patterson, Director
Regional Support Division
Office of Site Remediation Enforcement

A handwritten signature in dark ink, appearing to read "K. Patterson", is written over the typed name and title.

TO: Regional Counsels
Superfund Division Directors

This memorandum's purpose is to provide Regional Counsel with a clarification to EPA's Policy entitled "Entry and Continued Access Under CERCLA" (OSWER No. 9829.2) ("Policy"). The Policy was issued on June 5, 1987 by Thomas L. Adams, Jr., Assistant Administrator of the Office of Enforcement and Compliance Monitoring. The Policy guides EPA entry and access to facilities under CERCLA 104(e)(1) for the purposes of response and civil enforcement activities under CERCLA and identifies EPA's statutory entry authorities.

The Policy focuses on the practice of first attempting to gain access consensually for CERCLA activities at a particular location. If consent is not obtained or circumstances suggest that other means of access are more appropriate, the Policy recommends that EPA obtain access by means of an administrative order or judicially, either by a warrant or court order.

The Policy also recognizes a "savings provision" in Section 104(e)(6), which preserves EPA's power to secure access in "any lawful manner," alluding to the fact that there are other lawful means of securing access recognized by federal courts but not specifically identified in the Policy.

This memorandum explicitly confirms that the Policy permits use of any lawful means of securing access under Section 104(e)(6), as recognized by Federal Courts. Application of legal doctrines to a particular access situation will require fact-specific analysis by counsel. Attorneys in the Offices of Regional Counsel and Headquarters, in consultation with the Department of Justice as appropriate, should be consulted to provide advice regarding possible appropriate use of other lawful means of securing access in particular situations.

If you have any questions, please contact Heather Gray of Region 3 at (215) 814-2696, or Doug Dixon and David Smith-Watts of the Regional Support Division at (202) 564-4232 and (202) 564-4083, respectively.

cc: Superfund Legal Branch Chiefs, Regions I-X
Removal Program Branch Chiefs, Regions I-X
Removal Lead Region Workgroup Members
Dana Tulis, OEM

Tab 6

SAMPLE "CONSENT TO ENTER" FORM

A. Goldman (Office of Regional Counsel)

May 31, 2005

"Getting access" really means obtaining consent to enter property from persons authorized to provide such consent. Such consent is revocable and non-enforceable (*i.e.*, the owner can change his/her mind and we cannot sue to enforce the consent that was originally given). Consent to enter can be oral or written (if orally obtained, the OSC/RPM should document the consent provided in a memo to the file). Written consent is preferred because, among other things, it establishes a written record of the consent provided signed by the person authorizing the entry. The written consent document thus provides an opportunity to provide details that might be omitted from an oral request. Providing such details better enables the owner(s) to make an informed decision on consent and may avoid later revocation because of surprise (*e.g.*, "We didn't know you intended to dig up the entire front lawn!") Care should be taken, however, to avoid defining the entry too narrowly and limiting the responders' flexibility. While the language used in the document is therefore site- and work-specific, the goal of the document should always be to provide as much detail on the entry sought as possible without encumbering the responders. A "sample" mock entry document follows.

CONSENT TO ENTER PROPERTY

Property: 123 Smith Street
Anytown, Pennsylvania

The undersigned consents to entry to the above-described property ("Property") by the United States Environmental Protection Agency ("EPA") and the State and their employees, agents, contractors, and authorized representatives (collectively "Responders") for purposes of collecting surface water, groundwater, surface soil, and subsurface soil samples at the Property in connection with EPA's investigation of the XYZ Site in Anytown, Pennsylvania ("Response Activities"). The Response Activities will require, at a minimum, that the following personnel and equipment be brought onto the Property:

- 3-5 EPA personnel
- 2-4 State personnel
- 6-8 contractor/subcontractor personnel
- well drilling rig
- construction trailer
- 3-5 other vehicles

Use of the Property by the Responders shall include the parking of vehicles and equipment; excavation of test pits; installation of groundwater monitoring wells; extraction of samples from surface and subsurface soils, surface water, and groundwater; and other activities necessary to complete the Response Activities. Consent to enter is given for a period of seven (7) business days from the date this document is signed. The undersigned represents that he/she is authorized to sign this document on behalf of the owner of the Property and to consent to the entry provided herein.

[Signature]

Date

Print Name: _____

Tab 7

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103

Office of Regional Counsel

*Andrew S. Goldman
Direct Dial (215) 814-2487*

**VIA FIRST CLASS MAIL
& EMAIL**

JUL 26 2010

Richard G. Tuttle, Esquire
Archer & Greiner
One Liberty Place (32d Floor)
1650 Market Street
Philadelphia, PA 19103-7393

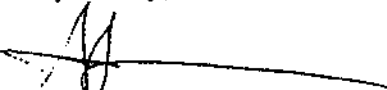
**Re: Tank Car Corporation Site, Oreland, Montgomery County,
Pennsylvania: Access to SEPTA Right-of-Way**

Dear Mr. Tuttle:

Enclosed please find two original Right of Entry Agreements signed by EPA. I will forward an electronic copy of the executed agreement to On Scene Coordinator Michael Towle, who has been deployed to the BP Oil Spill in the Gulf of Mexico and will return to Philadelphia on or about August 9. I anticipate that activities at the Tank Car Site, including coordination with SEPTA in advance of EPA's entry to the right of way, will occur during that week.

Thank you very much for your efforts in bringing this matter to closure. Please do not hesitate to contact me if you have any questions.

Respectfully,



ANDREW S. GOLDMAN
Sr. Assistant Regional Counsel

Enclosures

cc: Mike Towle (via email)

RIGHT OF ENTRY AGREEMENT

This Right of Entry Agreement ("Agreement") between the Southeastern Pennsylvania Transportation Authority ("SEPTA") and the United States Environmental Protection Agency ("EPA") provides as follows:

SEPTA hereby represents that it has authority to permit entry to a railroad right of way owned and/or controlled by SEPTA and located in Oreland, Montgomery County, Pennsylvania ("SEPTA Property"), which right of way is more fully described in Attachment A, and consents to entry by EPA and its employees, agents, contractors, and authorized representatives ("Response Team") to the SEPTA Property for the purposes identified in Attachment B (the "Work") in accordance with this Agreement.

ARTICLE 1 **DEFINITIONS AND ATTACHMENTS**

1.1 For purposes of this Agreement the terms set forth in this section, when capitalized in the Agreement, shall have the indicated meanings. When used in this Agreement the singular shall apply to the plural, the plural to the singular and the use of any gender shall apply to all genders.

- a. "Agreement" shall mean this Right of Entry Agreement and any attachments hereto, and any modifications to such documents as may be made in accordance herewith.
- b. "EPA" shall mean the U.S. Environmental Protection Agency and its employees.
- c. "Response Team" shall mean EPA and its employees, agents, contractors, and authorized representatives.
- d. "SEPTA" shall mean the Southeastern Pennsylvania Transportation Authority which is identified above and, where appropriate, any entity to which SEPTA has given a right to use, occupy, or operate on the SEPTA Property, such as a freight railroad that has a right to operate on the SEPTA Property or a public utility that occupies part of the SEPTA Property.
- e. "SEPTA Property" shall mean the property identified in Attachment A to this Agreement.
- f. "Work" shall mean the activities identified in Attachment B to this Agreement.

ARTICLE II
CONSENT FOR ENTRY

- 2.1 SEPTA consents to entry to the SEPTA Property solely for the purposes identified in this Agreement. SEPTA acknowledges that EPA may seek consent for entry to the SEPTA Property for other purposes at a later time.

ARTICLE III
TERM

- 3.1 Term of this Agreement. The effective date of this Agreement shall be the date on which EPA forwards a fully executed copy of this Agreement to:

Joseph J. Devanney, Esquire
Southeastern Pennsylvania Transportation Authority
Real Estate Department
1235 Market Street
10th Floor
Philadelphia, PA 19107

This Agreement shall remain in effect until the end of the working day on August 31, 2010, unless it is terminated before such date. The duration of this Agreement may be extended by written agreement of SEPTA and EPA.

- 3.2 No Property Right in the SEPTA Property. Under no circumstances shall this Agreement be construed as a grant to anyone of any right, title, or interest of any kind in the SEPTA Property or any other property of SEPTA.

ARTICLE IV
SUPPORT SERVICES AND COSTS

- 4.1 Reserved.

ARTICLE V
PERFORMANCE OF THE WORK

- 5.1 Commencement of the Work. The Response Team shall perform the Work in conformity with this Agreement. EPA shall notify the Chief Engineer at least ten (10) days in advance of entering the SEPTA Property to commence the Work under this Agreement, and the Response Team will provide reasonable advance notice of its intention to perform

Work on the SEPTA Property for each separate day that it intends to perform such Work, so that SEPTA's safety personnel may take appropriate steps to protect the Response Team during such Work. Such notices shall be provided to:

Mr. Marty Brunges
Manager
Occupational Safety and Environmental Compliance
1234 Market Street
6th Floor
Philadelphia, PA 19107
Tel: 215-580-8254

EPA agrees to take digital photographs of the SEPTA Property prior to commencement of the Work under this Agreement and will provide the Chief Engineer electronic copies of the digital photographs by forwarding a disc containing such files to the address indicated above or emailing such files to mbrunges@septa.org.

5.2 Non-Interference with SEPTA Operations. EPA intends to conduct the Work so as to minimize any interference with SEPTA's operations and facilities.

5.3 Flag Protection/Track Crossings. SEPTA has proposed and intends to provide protection for Response Team members at the SEPTA Property during the performance of any portion of the Work on SEPTA Property that has the potential to foul the active tracks (including Work on the inactive industrial siding leading from SEPTA's active track to the TCCA Site). EPA agrees, that if any such active track is protected by a flag person or other means of roadway worker protection, no member of the Response Team will cross or foul such active track on the SEPTA Property unless (a) the Response Team member has ascertained that no train or other rail equipment is approaching, and (b) said flag person (if one is provided) authorizes the crossing. The above-described crossing and fouling restrictions shall not apply to the inactive industrial sidings on the SEPTA Property. For purposes of this Section 5.3, the verb "foul" shall mean the placement of an individual or an item of equipment in such proximity to a track that the individual or equipment could be struck by a moving train or on-track equipment, or in any case within four feet of the outer edge of the active track that is nearest to the TCCA Property (as such property is shown on Figure 1 of Attachment A to this Agreement)..

5.4 Clearances and Utilities.

(a) At all times during performance of the Work the equipment and material of the Response Team shall be stored no less than 15 feet from the nearest rail of the active track closest to the place where the Work is being performed or will be performed. The previous sentence shall not preclude the use of equipment within that 15-foot buffer or anywhere else on the SEPTA Property. EPA intends to conduct the Work so that no part of any equipment or material used for such

purposes fouls an active track or transmission, communications, or signal line.

- (b) SEPTA agrees to identify and mark the location of all SEPTA-owned transmission, communication, signal lines, and buried utilities on the SEPTA Property no later than five business days before the date EPA first enters the SEPTA Property under this Agreement. EPA will cause its contractor to initiate a Pennsylvania One Call request to identify any non-SEPTA utilities on the SEPTA Property no later than five business days before the date EPA first enters the SEPTA Property under this Agreement.

5.5 Condition of the SEPTA Property. Except as otherwise provided herein, EPA intends to leave the SEPTA Property in the same condition it finds such property on the date EPA first enters the SEPTA Property under this Agreement. EPA anticipates that the following changes will be made to the SEPTA Property:

1. Sandblasting grit and soil will be removed to uncover the pipe suspected to be located on the SEPTA Property between the industrial siding and the TCCA Property; and
2. The grade leading to the invert of the pipe will be adjusted to promote the flow of water into the pipe or the pipe will be extended from the SEPTA Property onto the TCCA Property (whichever is determined to best promote the positive drainage of surface waters from the TCCA Site as determined by EPA).

5.6 Safety Rules. To the extent practicable, EPA intends to perform the Work in accordance with SEPTA's safety rules, regulations, and notices that apply to or are pertinent to the Property and which have been provided to EPA in advance of entry.

5.7 Safety Class. No member of the Response Team shall enter the SEPTA Property before attending whichever safety class is deemed pertinent by SEPTA to the Work and the SEPTA Property, provided (a) SEPTA has notified EPA of the pertinent safety class prior to executing this Agreement, (b) SEPTA has offered such class to the Response Team members at a mutually convenient time but no later than ten business days after the effective date of this Agreement, and (c) the safety class can be completed within a time frame EPA determines to be reasonable.

5.8 EPA intends to take all steps to ensure that its contractors and subcontractors comply with this Agreement during performance of the Work on the SEPTA Property.

ARTICLE VI
INSURANCE/RESERVATION OF RIGHTS

- 6.1 EPA's contractor has in place insurance coverage as identified in Attachment C to this Agreement. Moreover, EPA's contract(s) with its response contractor(s) require it (them) to maintain third party liability insurance in accordance with Federal Acquisition Regulation and the Environmental Protection Agency's Acquisition Regulation.
- 6.2 SEPTA retains all of its rights and causes of action against all persons entering the SEPTA Property under this Agreement for any losses, injury (including death), or damage arising out of, in whole or in part, Response Team activities on the SEPTA Property under this Agreement. EPA retains all of its rights and authorities under applicable law, and in no way waives any of said rights by entering into this Agreement.
- 6.3 SEPTA may elect to cause EPA's principal contractor for the Work to be added by endorsement as an additional insured under SEPTA's Railroad Protective Liability insurance policy which covers contractors who work for SEPTA on SEPTA-owned rights-of-way. EPA will assist SEPTA as reasonably necessary and consistent with its contracts in obtaining information from such contractor as necessary to bind such insurance.

ARTICLE VII
ENVIRONMENTAL ISSUES

- 7.1 The Work will be limited to those activities identified in Attachment B. A copy of the results of any analyses made of samples taken from the SEPTA Property under this Agreement shall be furnished promptly to SEPTA at the following address:

Mr. Marty Brunges
Manager
Occupational Safety and Environmental Compliance
1234 Market Street
6th Floor
Philadelphia, PA 19107
Tel: 215-580-8254

- 7.2 EPA does not intend to release, manufacture, refine, produce, store, or dispose of any "hazardous substances," as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), on the SEPTA Property during performance of the Work. EPA does not intend to violate any federal, state, or local law, statute, ordinance, or regulation during performance of the Work under this Agreement.

ARTICLE VIII
EARLY TERMINATION

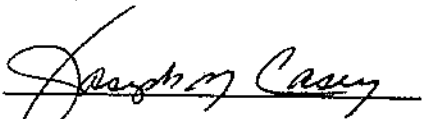
8.1 At any time that

- a. SEPTA determines that the Response Team has failed to act in conformity with this Agreement;
- b. SEPTA determines that the Work is interfering with or may interfere with SEPTA's need to use the SEPTA Property for public transit or railroad purposes;
- c. SEPTA determines the Work may jeopardize public safety;
- d. SEPTA determines an emergency has occurred;

SEPTA may, at its election, terminate this Agreement by giving written notice to EPA of such termination. Such written notice shall be provided to:

Michael Towle (3HS31)
U.S. Environmental Protection Agency
1650 Arch Street
Philadelphia, PA 19103
towle.michael@epa.gov

SEPTA:



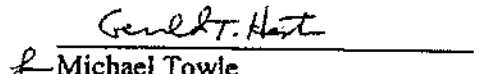
By: Joseph M. Casey

Title: General Manager


7/27/10
Date

APPROVED AS TO FORM:

EPA:


Michael Towle
On Scene Coordinator
U.S. Environmental Protection Agency
Region 3

7/26/10
Date

BY:  ESQ.
GENERAL COUNSEL'S OFFICE
July 21, 2010

ATTACHMENT A

SEPTA operates the R5 Lansdale-Doylestown commuter rail line along a right-of-way that passes, and is adjacent to, property at and around 1725 Walnut Avenue in Oreland, Montgomery County, Pennsylvania, upon which the Tank Car Corporation of America operated a railroad tank car rehabilitation business from approximately 1921 through 2002 ("TCCA Property"). There are two active rails and an industrial siding between the active rails and the TCCA Property at this location. As used in this Agreement, "SEPTA Property" shall mean all portions of this right-of-way which contain hazardous substances which have, or may have, migrated from the TCCA Property. The SEPTA Property is generally depicted in Figure 1, below.



Figure 1

ATTACHMENT B

The work to be conducted on the SEPTA Property under this Agreement consists of the following:

- (1) **Soil Borings:** Completion of as many as seven (7) soil borings, to a maximum depth of five (5) feet, no closer than 10 feet from the outer rail of the active tracks (this limitation does not apply to sidings). The borings will be completed by direct push technologies using a model 6610DT, or similar, Geoprobe® direct push rig. Prior to conducting the work, underground utilities will be cleared and marked by SEPTA and a temporary high-visibility fence will be installed by EPA at a distance of 10 feet from the outer active rail line. The soil borings will be approximately 2 inches in diameter and will extend from ground surface to approximately five (5) feet below ground surface. Soil borings will be backfilled with soil and bentonite and their locations recorded using a global positioning system. Exhibit 1 shows the approximate location of the soil borings.
- (2) **Pipe Investigation:** Investigation to locate the end of a pipe believed to be located on the SEPTA Property between an industrial siding and the TCCA Property and which is believed to have conveyed liquids under the tracks. The area to be searched ("Search Area") is generally identified on the drawing attached as Exhibit 2. The search will involve use of hand augers and shovels. In the event this method is unsuccessful in locating the pipe, a backhoe (e.g., Case 580 or equivalent) will be used to remove approximately one (1) foot of soil in the Search Area. If located, the end of the pipe will be left uncovered. Sandblasting grit and soil will be removed to uncover the pipe. The grade leading to the invert of the pipe will be adjusted to promote the flow of water into the pipe or the pipe will be extended from the SEPTA Property onto the TCCA Property (whichever is determined to best promote the positive drainage of surface waters from the TCCA Site as determined by EPA).
- (3) **Documentation of Work and Work Area.** Documentation of the above activities and of the SEPTA Property using still photography, video, or other means.

Attachment B, Exhibit 1

Ⓢ PROPOSED SOIL BORING (APPROX. 5' DEEP)

THE TANK CAR CORP. OF AMERICA

14 1/4

ROAD

16627572
L-2366
LMA-29

Paint Shop

TO ORELAND

3191

Driveway

ACME COPPERSMITHING & MACHINE CO.

OFFICE

PUBLIC

Attachment B, Exhibit 2

CAR CORP. OF AMERICA

SEARCH AREA

ROAD

**CLARK
&
REPAIR SHOP.**

Driveway

STOWE

Dr. W. W. W.

Paint Shop

16627571
1-13642
1-13642

Driveway

SMITHING & MACHINE CO.

QTP4C01

PUBLIC

Exhibit 2

ATTACHMENT C



CERTIFICATE OF LIABILITY INSURANCE

DATE (mm/dd/yyyy)
07/07/2010

PRODUCER

MARSH USA INC.
TWO LOGAN SQUARE
PHILADELPHIA, PA 19103
Attn: Philadelphia.certs@Marsh.com Fax: 212-848-0380

THIS CERTIFICATION IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

J25387-ALL-GAWUC-10-11

INSURED

WESTON SOLUTIONS, INC.
ATTN: SUSAN HIPP-LUDWICK, RISK MANAGER
1400 WESTON WAY
WEST CHESTER, PA 19380

INSURERS AFFORDING COVERAGE

NAIC #

INSURER A: Commerce And Industry Ins Co	18410
INSURER B: Liberty Insurance Corporation	42404
INSURER C: N/A	N/A
INSURER D: American International Specialty Lines Ins Co	26883
INSURER E: Liberty Mutual Fire Ins Co	23035

COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

REMARKS LTR INSRD	TYPE OF COVERAGE	POLICY NUMBER	POLICY EFFECTIVE DATE (mm/dd/yyyy)	POLICY EXPIRATION DATE (mm/dd/yyyy)	LIMITS
A	<input checked="" type="checkbox"/> GENERAL LIABILITY	GL 3778410	01/15/2010	01/15/2011	EACH OCCURRENCE \$ 1,000,000
	<input type="checkbox"/> COMMERCIAL GENERAL LIABILITY				DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 1,000,000
	<input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR				MED EXP (Any one person) \$ 10,000
	GENERAL AGGREGATE LIMIT APPLIES PER				PERSONAL & ADV INJURY \$ 1,000,000
	<input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PRO <input type="checkbox"/> LOC				GENERAL AGGREGATE \$ 2,000,000
	<input type="checkbox"/> PRODUCTS - COMPOH AGG				\$ 2,000,000
E	<input checked="" type="checkbox"/> AUTOMOBILE LIABILITY	A32-Z31-477180-040	01/15/2010	01/15/2011	COMBINED SINGLE LIMIT (Ea accident) \$ 1,000,000
	<input checked="" type="checkbox"/> ANY AUTO				BODILY INJURY (Per person) \$
	<input type="checkbox"/> ALL OWNED AUTOS				BODILY INJURY (Per accident) \$
	<input checked="" type="checkbox"/> SCHEDULED AUTOS				PROPERTY DAMAGE (Per accident) \$
<input checked="" type="checkbox"/> HIRED AUTOS					
<input checked="" type="checkbox"/> NON-OWNED AUTOS					
	<input type="checkbox"/> GARAGE LIABILITY				AUTO ONLY - EA ACCIDENT \$
	<input type="checkbox"/> ANY AUTO				OTHER THAN EA ACC \$
	<input type="checkbox"/> EXCESS / UMBRELLA LIABILITY				AUTO ONLY: AGG \$
	<input type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE				EACH OCCURRENCE \$
	<input type="checkbox"/> DEDUCTIBLE				AGGREGATE \$
	<input type="checkbox"/> RETENTION \$				\$
B E	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY	WC7-Z3D-477160-010 (AOS)	01/15/2010	01/15/2011	<input checked="" type="checkbox"/> WC STAT <input type="checkbox"/> OTH-PA
	ANY PROPRIETOR/PARTNER/EXECUTIVE Y/N	WC2-Z31-477180-050 (OR)	01/15/2010	01/15/2011	E.L. EACH ACCIDENT \$ 1,000,000
	OFFICER/EMBER EXCLUDED? <input type="checkbox"/> N				E.L. DISEASE - EA EMPLOYEE \$ 1,000,000
	(Mandatory in NJ) if yes, describe under SPECIAL PROVISIONS HERE				E.L. DISEASE - POLICY LIMIT \$ 1,000,000
D	CONTRACTORS POLLUTION/ PROFESSIONAL	COPS3779570	01/15/2010	01/15/2011	EACH OCCURRENCE 1,000,000 AGGREGATE 1,000,000

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENTS/SPECIAL PROVISIONS

RE: CONTRACT # EP-S3-10-05, TOD# WS01-10-07-001 THROUGH JUNE 30, 2011 (MCGLADE-PM)

U.S. ENVIRONMENTAL PROTECTION AGENCY IS INCLUDED AS ADDITIONAL INSURED (EXCEPT FOR WORKERS COMPENSATION AND PROFESSIONAL LIABILITY) AS REQUIRED BY WRITTEN CONTRACT.

CERTIFICATE HOLDER

CLE-002586352-03

CANCELLATION

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION III
ATTN: MIKE TOWLE
1650 ARCH STREET
PHILADELPHIA, PA 19103

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE
of Marsh USA Inc.
Dorcas Clampt

ACORD 25 (2008/01)

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IMPORTANT

If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

DISCLAIMER

This Certificate of Insurance does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder, nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon.