



# CONSIDERATIONS IN HANDLING INFORMATION REQUESTS UNDER ENVIRONMENTAL STATUTES & ENVIRONMENTAL AUDITS

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(1) [EPA] may **require** any person who **owns or operates any emission source**, who **manufactures emission control equipment or process equipment**, who the Administrator believes **may have information necessary for the purposes set forth in this subsection**, or who is **subject to any requirement of this chapter** (other than a manufacturer subject to the provisions of section 7525(c) or 7542 of this title...) on a **one-time, periodic or continuous basis to—**

- (A) establish and maintain such **records**;
- (B) make such **reports**;
- (C) install, use, and maintain such **monitoring equipment**, and use such **audit procedures**, or **methods**;
- (D) **sample such emissions** (in accordance with such procedures or methods, at such locations, at such intervals, during such periods and in such manner as the Administrator shall prescribe);
- (E) keep records on control equipment parameters, production variables or other indirect data when direct monitoring of emissions is impractical;
- (F) submit **compliance certifications** in accordance with subsection (a)(3) of this section; and
- (G) provide such **other information as [EPA] may reasonably require**.

(2) the Administrator or his authorized representative, upon presentation of his credentials—

(A) shall have a **right of entry** to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and

(B) may at reasonable times **have access to and copy any records, inspect any monitoring equipment or method** required under paragraph (1), and **sample any emissions** which such person is required to sample under paragraph (1).

**Maintenance; monitoring equipment; entry; access to information.**

Whenever required to carry out the objective of [the CWA]...

- (A) [EPA] shall require the **owner or operator of any point source** to
- (i) establish and maintain such **records**,
  - (ii) make such **reports**,
  - (iii) install, use, and maintain such **monitoring equipment or methods** (including ... biological monitoring methods),
  - (iv) **sample** such effluents (... in such manner as [EPA] shall prescribe), and
  - (v) provide such **other information as [EPA] may reasonably require**

**Maintenance; monitoring equipment; entry; access to information.** Whenever required to carry out the objective of [the CWA]...

(B) [EPA] or [its] authorized representative

(i) shall have a **right of entry** to ... any premises in which an effluent source is located or in which any records required to be maintained ... are located, and

(ii) may at reasonable times **have access to** and **copy** any records, **inspect** any monitoring equipment or method required under clause (A), and **sample** any effluents which the owner or operator of such source is required to sample under such clause.

- CERCLA § 104(e), 42 U.S.C. § 9604(e)
- RCRA § 3007(a), 42 U.S.C. § 6927(a)

- Expert / Legal Assistance
- Analyze Potential Legal Basis For Request
- Litigation Hold
- Internal Steps
  - Evaluate and request extension
  - Brief company management
  - Internal interviews / discussions
  - Document collection / review
  - Obtain similar information requests

- Statutes authorize EPA to sample or require sampling
- Can be expensive and time consuming
- Understand applicable sampling protocols
- Potential to limit scope of sampling
- Potential to offer existing data



- Objecting to the request
- Confidential business information (CBI)
- Privilege concerns
- Scope of legal obligation – narrower than civil discovery
- Scope of request – defining the scope of information you intend to provide
- How can you use the response to your benefit?

# CERTIFICATION – CAA § 114 EXAMPLE

## STATEMENT OF CERTIFICATION

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment for knowing violations pursuant to section 113(c)(2) of the Act, and 18 U.S.C. §§ 1001 and 1341.

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Date)

- Maybe nothing
- Supplemental requests – additional information or expanded scope
- Enforcement

- Voluntary, systematic review of files and field operations
- Performed by an audit control group
- May include testing
- Audit report

- When?
  - Purchase of new assets
  - Shore up compliance/proactive approach
  - Regular schedule
- Why?
  - Penalty immunity/mitigation
  - For gravity-based penalties
  - Statute-based or policy based

- Systematic Discovery
- Voluntary Discovery
- Prompt Disclosure
- Independent Discovery
- Correction and Remediation
- Prevent Recurrence
- No Repeat Violations
- Some exclusions (e.g., environmental harm)
- Cooperation

- State Statutory Immunity – CO, TX, UT, WY, OH
- Penalty Mitigation Policy/Regulations – EPA, COGCC, PA, OK, NM
- Key Differences
  - Disclosure via systematic audit
  - Time to disclose
  - Pre-audit notice

- Identify the audit scope, timing, and resource commitment
- Identify the audit control group
- Consider retaining outside counsel and an outside consultant to work with in-house counsel and in-house subject matter experts



- Outside counsel's engagement of outside consultant
- Counsel will develop and implement communication protocols
- Counsel will manage attorney client/work product issues

- Team approach
- Clearly define scope, audit period, and objectives
- Reasonable schedule and budget
- Auditor qualifications and independence
- Template for documenting factual observations
- File room and field inspection logistics
- Protocols – sampling/analytical, optical gas imaging

- Facilitate regular audit control group communication
- Manage draft audit documentation (if any)
- Identify information gaps and scope creep
- Address legal nuances
- Review draft audit report
- Assist with self-disclosure if applicable

- Review key information before mobilization for site inspections
- Auditors accompanied by knowledgeable staff
- Customized site inspection checklists/forms
- Field observations – stick to the facts
- Photographs of site and individual equipment
- Record process data during sampling and OGI
- Daily communication between lead auditor and audit manager/counsel

- New e-disclosure portal due out this fall
- Reaffirms EPA's belief in the benefits of its Audit Policy
- New Federal Register notification regarding implementation of EPA Audit Policy and Small Business Compliance Policy
- Two-tiered approach to e-disclosure
  - Tier 1 includes most EPCRA disclosures
  - Tier 2 includes all other new disclosures (except those seeking benefits under the new owner policy)
- Disclosing party will receive acknowledgment letter or an electronic notice of determination
- Not designed to apply to the August 2008 New Owner Policy

- Mismanaged audit communications
- Inability to implement audit recommendations
- Agency disputes regarding audit policy/statute qualification
- Potential enforcement/penalties

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