



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

JAN 8 1993

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Issuance of Interim Rule: "Disclosure of Confidential Data to Authorized Representatives of the United States and Potentially Responsible Parties." 58 Fed. Reg. 458-465, January 5, 1993 (40 CFR Part 2).

FROM: Francis J. Biros, Chief ^{FB}
Cost Recovery Branch, OWPE

TO: CERCLA Branch Chiefs, Regions I - X

On January 5, 1993, EPA issued an Interim Rule in the Federal Register addressing the disclosure of confidential data to authorized representatives of the United States and to potentially responsible parties (PRP) in the Superfund program. A copy of the Interim Rule is attached for your information.

The Interim Rule modifies certain portions of 40 CFR Part 2- Public Information, governing confidential business information. The Rule updates statutory references to CERCLA and corrects certain citations to CERCLA and the Clean Air Act. In addition, and most importantly, the Rule authorizes disclosure of confidential data submitted by contractors, pursuant to CERCLA §104, to authorized representatives of the United States (including EPA contractors and subcontractors) and to PRPs in CERCLA §107 actions for cost recovery under certain conditions. The Rule also authorizes disclosure of confidential data to contractors of other federal agencies.

The Rule is effective immediately. OWPE, Office of Enforcement-Superfund, and Office of General Counsel are cooperating in the preparation of implementation guidance concerning the Rule. The current schedule for issuing this guidance is late February, 1993.

Attachment

cc: Cost Recovery Program Contacts, Regions I - X
Cost Recovery ORC Contacts, Regions I - X
Cost Recovery Contacts, Finance Office, Regions I - X
Ika Joiner, SRO
Bill Cooke, FMD
John Fogarty, OE
Don Sadowsky, OGC



Tuesday
January 5, 1993

**Environmental
Protection Agency**

Part VI

**Environmental
Protection Agency**

40 CFR Part 2
Disclosure of Confidential Data; Interim
Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 2

[FRL-4552-1]

Disclosure of Confidential Data to Authorized Representatives of the United States and to Potentially Responsible Parties

AGENCY: Environmental Protection Agency.

ACTION: Interim rule with request for comments.

SUMMARY: The Environmental Protection Agency (EPA) is issuing interim regulations modifying certain of EPA's regulations at 40 CFR part 2, subpart B governing confidential business information. This rule updates statutory references to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) pursuant to changes made by the Superfund Amendments and Reauthorization Act of 1986, corrects erroneous citations to CERCLA and the Clean Air Act (CAA) in these regulations, authorizes disclosure of confidential data submitted by contractors, pursuant to CERCLA section 104, to authorized representatives of the United States and to potentially responsible parties (PRPs) in actions under CERCLA section 107 for recovery of EPA's response costs, and authorizes disclosure of confidential data to contractors of other Federal agencies.

DATES: This rule is effective January 5, 1993. Comments will be accepted until March 8, 1993.

ADDRESSES: Send or deliver written comments to Donald A. Sadowsky, Contracts, Information General Law Division (LE-132K), Office of General Counsel, Environmental Protection Agency, 401 M Street, SW., Washington, DC 24060.

FOR FURTHER INFORMATION CONTACT: Donald A. Sadowsky, Office of General Counsel, Telephone 202/260-5469.

SUPPLEMENTARY INFORMATION:

On May 20, 1975, EPA published in the Federal Register (40 FR 21987) a proposed rule concerning procedures for the treatment of confidential business information (CBI) submitted under various environmental statutes, including the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.* This rule was made final on September 1, 1976 (41 FR 36902), codified as 40 CFR part 2, subpart B.

On December 18, 1985, EPA published in the Federal Register (50

FR 51654) a rule establishing procedures for the treatment of confidential business information (CBI) submitted pursuant to section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9604. This rule was codified as 40 CFR 2.310.

A. Information Collected Pursuant to Sections 115 and 211 of the Clean Air Act

EPA's special rules governing CBI submitted pursuant to the Clean Air Act are codified at 40 CFR 2.301. Paragraph (B)(6) of § 2.301 provides that § 2.301 does not apply to information obtained under section 115(j) or 211(b) of the Clean Air Act, 42 U.S.C. 7415(j) or 7545(b). Both statutory references are inappropriate, and paragraph (b)(6) will therefore be eliminated, for the following reasons.

First, section 115(j) is no longer a part of the Clean Air Act. Second, EPA's intent with respect to section 211 was to effectuate the section's limitation on CBI claims for results of health and safety tests on fuels and additives performed pursuant to section 211(b)(2)(A). However, 40 CFR 2.301(b)(6) as currently written exempts information submitted under any part of section 211(b) from § 2.301 coverage. EPA is hereby correcting the regulation by eliminating paragraph (b)(6) and modifying § 2.301(e) (Substantive Criteria for Use in Confidentiality Determinations) to make clear that section 211(b)(2)(A) information is not entitled to confidential treatment.

B. Disclosure to Contracts of Other Federal Agencies

Under sections 114, 208 and 307(a) of the Clean Air Act (42 U.S.C. 7414, 7542, and 7607), sections 308 and 509(a) of the Clean Water Act (33 U.S.C. 1318, and 1369(a)), 1445(d) of the Safe Drinking Water Act (42 U.S.C. 3004-4), sections 3001(b)(3)(B), 3007(b), and 9005(b) of the Solid Waste Disposal Act (42 U.S.C. 6921(b)(3)(B), 6927(b), and 6995(b)), and section 104(e)(7) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9604(e)(7), EPA may disclose CBI to authorized representatives of the United States. Similarly, under section 10(e) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 1360(e)) and section 14(a)(2) of the Toxic Substances Control Act (15 U.S.C. 2613(a)(2)) EPA may disclose CBI to contractors with the United States.

Although Congress did not require that contractors which are authorized representatives of the United States

have a direct contractual relationship with EPA, the Agency so chose to limit its authority when it first proposed and promulgated regulations governing disclosure of CBI to contractors. See 40 FR 21990, 40 CFR 2.301(h)(2)(i). At the time it was not contemplated that there would be occasion to disclose CBI to contractors of other Federal agencies. (Special provision was later made in 40 CFR 2.306(j)(1) for disclosure to contractors of other agencies of CBI submitted pursuant to the Toxic Substances Control Act.)

However, the Agency may find it in the interests of the Government to enter into arrangements with another Federal agency where a contractor of that agency performs work to support the mission of EPA. Having clear authority to allow such access, EPA is hereby amending its regulations accordingly.

C. Information Obtained From Superfund Contractors

1. Applicability of 40 CFR 2.310

In the preamble to the rule promulgating 40 CFR 2.310, the Agency stated that § 2.310 was intended to be "applicable to information obtained under any provision of section 104 of (CERCLA)." 50 FR 51656. However, the rule as written did not apply to all information submitted under section 104. The rule applied "only to information provided to or obtained by EPA under section 104 of (CERCLA), 42 U.S.C. 9604, by or from any person who stores, treats, or disposes of hazardous wastes; or where necessary to ascertain facts not available at the facility where such hazardous substances are located, by or from any person who generates, transports, or otherwise handles or has handled hazardous substances." 40 CFR 2.310(b).

Section 2.310 as written does not cover contractor information submitted pursuant to section 104. Section 104(a)(1) authorizes EPA, *inter alia*, to respond to hazardous conditions at Superfund sites. In particular, the Government "is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to" hazardous substances at a site. CERCLA section 104(a)(1), 42 U.S.C. 9603(a)(1). The language in section 104(a)(1) ("remove or arrange for the removal"; "provide for remedial action") serves as authority for the Agency to enter into contracts for removal and remediation.

"Removal" is defined in CERCLA section 101(23) to include not only "the cleanup or removal of released hazardous substances" but also "such

actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances."

"Remedial action" is defined in section 101(24) to include "those actions consistent with the permanent remedy taken" and "any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment." Moreover, removal and remedial actions include related enforcement activities. CERCLA section 101(25). Thus, "removal" and "remedial action" are defined broadly enough to include all contracts at issue, and information submitted to EPA pursuant to these contracts constitutes information submitted under CERCLA section 104.

Therefore EPA is today modifying 40 CFR 2.310 to effectuate the original intent of the Agency, i.e., to make the rule applicable to all information submitted under CERCLA section 104.

2. Disclosure to Authorized Representatives

Information obtained by the Agency under CERCLA section 104 may be disclosed to authorized representatives of the United States. CERCLA section 104(e)(7). EPA regulations at 40 CFR 2.310(h) define authorized representative to include Agency contractors and subcontractors. Thus, this amendment to 40 CFR 2.310 makes clear that confidential information from a Superfund contractor may be disclosed to another Agency contractor.

EPA recognizes that information submitted to the Agency by its contractors can be of potential value to other businesses competing for contracts with EPA, other agencies, or the private sector. Contractors typically assert that information pertaining to costs such as labor, overhead and profit rates are entitled to confidential treatment because release of this information to the public would allow competitors to underbid that contractor in future procurements. EPA has generally accorded confidential treatment to these rates where public release of the information is likely to cause substantial competitive harm.

The Agency does not intend to disclose to the public sensitive information obtained from a contractor. However, the Agency needs to utilize authorized representatives to support various functions involved in the administration of CERCLA and, which involve access to contractor CBI, such as records management, data processing, and cost recovery.

By disclosing to an authorized representative information obtained from a Superfund contractor, EPA does

not compromise the confidentiality of the information. 40 CFR 2.310(h) provides procedures for the protection of confidential data submitted under CERCLA section 104. These include a bar from disclosure of confidential information to a contractor or subcontractor unless the contract or subcontract provides that:

a. The employees of the contractor or subcontractor shall use the information only for the purpose of carrying out the work required by the contract or subcontract;

b. The employees of the contractor or subcontractor shall refrain from disclosing the information to anyone other than EPA (or another Federal agency, as appropriate) without prior written approval of each affected business or of an EPA legal office;

c. The employees of the contractor or subcontractor shall return to EPA (or another Federal agency, as appropriate) all copies of such information (and any abstracts or extracts therefrom) upon request by the EPA program office, whenever the information is no longer required for performance of the work required under the contract or subcontract, or upon completion of the contract or subcontract;

d. The contractor or subcontractor shall obtain a written agreement to honor such terms of the contract from each of the contractor's or subcontractor's employees who will have access to such information, before such employee is allowed access; and

e. The contractor or subcontractor acknowledges and agrees that the contract or subcontract provisions concerning the use and disclosure of business information supplied to the contractor or subcontractor by EPA (or another Federal agency, as appropriate) under the contract or subcontract are included for the benefit of, and shall be enforceable by, both the United States Government and any affected business having an interest in information concerning the business.

In addition, before such disclosure is made, the Agency must notify the submitter (either by letter or via notice in the Federal Register of the information to be disclosed, the identity of the contractor or subcontractor, and the purposes to be served by the disclosure, and give the submitter an opportunity to comment on the disclosure. Moreover, because Superfund contractor information is submitted pursuant to CERCLA Section 104, persons outside the Federal Government who improperly disclose the information are subject to criminal prosecution under Section 104(e)(7)(B).

This rule is by its nature retroactive, in that it authorizes disclosure of information already obtained by EPA. The retroactivity is inherent in the authority granted by Section 104 to disclose information to authorized representatives and pursuant to a proceeding. Moreover, the public interest in efficient operation of the Agency weighs in favor of such a result, while the restrictions on further use and disclosure of the information discussed above ensure that there is no adverse effect on persons who have submitted confidential information to EPA.

D. Disclosure to Potentially Responsible Parties

CERCLA gives the United States authority to respond directly to releases or threats of releases of hazardous substances into the environment or releases or threats of releases into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare. CERCLA also authorizes EPA to recover response action costs from those responsible for releases or threats of releases of hazardous substances. Voluntary settlement of cost recovery cases with responsible parties under CERCLA enables the United States to recover the costs of response actions without engaging in lengthy and costly litigation.

Over the years, EPA has encountered a serious obstacle in attempting to release some of its contractor documents to responsible parties to encourage and expedite settlements. As discussed above, these documents may contain information that the contractors claim is entitled to confidential treatment.

Currently, before EPA releases to responsible parties information that may be entitled to confidential treatment, EPA seeks to obtain the consent of the submitter of the information pursuant to 40 CFR 2.209(f). EPA's experience is that it is extremely time-consuming and occasionally impossible to obtain the consent from its contractors to release their CBI to responsible parties in pre-litigation negotiations or under a protective order in litigation. It has taken as long as 18 months at one site for EPA to obtain the consent of all of its contractors to disclose information under a protective order and over a year at several other sites. The primary reason for this delay results from each contractor's desire to participate in preparing the scope of the protective order. With 35 or more contractors at a site, negotiating confidentiality agreements, stipulations, and protective orders has become a major impediment

in obtaining expeditious cost recovery settlements.

This regulation amends 40 CFR 2.310 to provide for limited releases of CBI to responsible parties under a contractual agreement in pre-litigation negotiations and under a stipulation and protective order during litigation. Generally, EPA would make a limited release to responsible parties of all CBI information maintained by EPA pursuant to 40 CFR 300.160 of the national contingency plan. This limited disclosure would be made without the prior consent of the contractors and applies to documents submitted to EPA since the inception of the Superfund program in 1980.

The basis for this regulation is found in Section 104 of CERCLA and promulgation of the regulation will assist EPA in implementing Sections 107 and 122 of the Act. Section 107 authorizes the recovery of federal costs expended on site cleanups financed by the Superfund. If the Agency elects to pursue these costs through litigation, EPA (through the Department of Justice) brings lawsuits against responsible parties in order to recover costs it has expended in cleaning up a site. In such lawsuits, responsible parties frequently make discovery requests for information which may be entitled to confidential treatment. EPA may ultimately be required by court order to release cost documents containing such information in response to these discovery requests. CBI, although not privileged under the Federal Rules of Civil Procedure, is routinely granted protection from unlimited disclosure through the use of a protective order. Accordingly, EPA will seek the entry of a stipulation and protective order before releasing CBI to defendants. (See Appendix B for a Model Stipulation and Protective Order).

EPA requires the discretion to make a limited release of CBI to responsible parties in pre-litigation negotiations, in order to recover the costs of site cleanups more efficiently and expeditiously. Such a release clearly furthers the goal, envisioned by Congress in section 107, of a Superfund replenished through successful cost recoveries.

Section 122 encourages the Agency to facilitate settlements where possible. EPA believes that the limited release of cost information, including information potentially entitled to confidential treatment, would greatly facilitate settlements in cost recovery cases. The regulation clarifies EPA's authority to release CBI during pre-litigation negotiations under a contractual agreement, and during litigation through

a stipulation and protective order. In doing so, the Agency will continue to afford protection to its contractors' information while at the same time facilitating settlements and minimizing litigation.

Congress recognized in section 104 that some trade secret information might need to be released "when relevant in any proceeding under this chapter." 42 U.S.C. 9604(e)(7)(A). Congress was willing to allow for the release of trade secret and confidential business information where the release would advance the purposes of the statute. Neither the statute nor the legislative history of CERCLA define "proceeding." A definition of "proceeding" can be found in the Administrative Procedure Act (APA), 5 U.S.C. 551.

The APA, 5 U.S.C. 551(12), defines "agency proceeding" as "an agency process as defined by paragraphs (5) [rulemaking], (7) [adjudication], and (9) [licensing] of this section." Paragraph (7) defines "adjudication" as an "agency process for the formulation of an order." "Order" is defined in paragraph (6) as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." In other words, an agency process which results in a final agency disposition may be considered adjudication, and thus a proceeding, under the APA.

Settlements under CERCLA section 107 or 122 fall into this definition of adjudication. The Agency negotiates a settlement with a PRP, and, after notice and comment, files the agreement in district court as a consent decree. CERCLA section 122. EPA thus reaches a disposition as to the appropriate liability of the PRP, and finalizes it through notice and comment and through entry as a consent decree, enforceable by the court against all parties.

The regulation published today amends the definition of "proceeding" in 40 CFR 2.310(a) to authorize EPA to release potential CBI to appropriate persons that EPA has determined to be PRPs at a particular site. This would not be a public release of information. The regulation allows a limited release of confidential business information to a discrete group with a need to review the information if EPA believes the release would encourage and expedite settlement. This limited disclosure would not subject this information to release under the Freedom of Information Act (FOIA), 5 U.S.C. 552. EPA would continue to deny all FOIA requests for information in cost

documents that EPA determines to be CBI pursuant to exemption 4 of FOIA.

EPA believes that the use of contractual agreements and protective orders would maintain the confidential nature of the information and adequately protect it from improper release and misuse. Courts routinely afford this type of protection in other contexts and find it to be sufficiently protective. In addition, as noted above, because Superfund contractor information is submitted pursuant to CERCLA section 104, persons outside the Federal Government who improperly disclose the information are subject to criminal prosecution under section 104(e)(7)(B). (Federal employees are similarly subject to the Trade Secrets Act, 18 U.S.C. 1905.) Absent the applicability of a privilege or other litigation consideration to the disclosure, EPA believes that a limited release is necessary in order to fulfill its responsibility to expeditiously recover the costs of site cleanup. See section B, above, for a discussion of retroactivity.

The regulation does not address the release of information subject to the Privacy Act of 1974, 5 U.S.C. 552(a). EPA regulations at 40 CFR part 16 govern information that is subject to the Privacy Act and Part 16 would not be affected by the proposal.

Appendices to the preamble of today's rule set forth model documents, for illustrative purposes, that provide for the limited disclosure of certain business information that may be entitled to confidential treatment. They detail the protections EPA contemplates providing to contractors' CBI.

If a case has not been filed in federal district court, the "Agreement Regarding Confidentiality of Information" would apply (Appendix A). This document would also be appropriate for use in negotiations leading to administrative settlements with responsible parties. If an action has been filed in federal District Court, the government would seek entry by the court of the "Stipulation and Protective Order" (Appendix B). In this document defendants would stipulate that the documents released to them may contain information entitled to confidential treatment and agree to specified procedures to maintain confidentiality.

All documents released under the agreement or order would be used only in preparation for either settlement negotiations or trial. All persons to whom the information is subsequently disclosed would have to agree to be bound by the terms of the agreement or order by signing the "Confidentiality Agreement" annexed to the above

agreement and protective order. EPA and the submitter of the information would receive copies of all executed "Confidentiality Agreements" five days prior to the disclosure.

E. Statutory References to CERCLA Section 104

The Superfund Amendments and Reauthorization Act of 1986 (SARA) added several paragraphs to section 104 of CERCLA which pertain to information gathering. Subparagraph (e)(2) of section 104 was redesignated by SARA as subparagraph (e)(7). This rule amends the statutory references in 40 CFR 2.310 accordingly.

F. Correction of Citation to 40 CFR 2.310

40 CFR 2.211 requires contractors who are furnished business information by EPA to properly safeguard such information. Paragraph (d) of 2.211 erroneously cites § 2.310(i) as the provision authorizing disclosure to authorized representatives of information collected pursuant to CERCLA section 104; the correct reference is to § 2.310(h). This regulation corrects that reference.

Waiver of Notice of Proposed Rulemaking and Delay in Effective Date

With respect to the changes affecting CERCLA CBI and CAA CBI, this rule is interpretive in nature, as opposed to legislative. As such it may be promulgated without prior opportunity for notice and comment, pursuant to the Administrative Procedures Act, 5 U.S.C. 553(b)(1), and may be made effective immediately, without a 30-day delay, pursuant to section 553(d)(2). With respect to information disclosed to contractors of other Federal agencies, I find that prior notice is unnecessary and that good cause exists for making the rule effective immediately, for the following reason: contractors of other Federal agencies will be required by regulation and contract to have the same protections against unauthorized use and disclosure of CBI as are EPA contractors, so that the rights of CBI submitters are unaffected.

Executive Order 12291

Executive Order (E.O.) 12291 requires the preparation of a regulatory impact analysis for major rules, defined by the order as those likely to result in:

- (1) An annual effect on the economy of \$100 million or more;
- (2) A major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic industries; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

EPA has determined that this regulation does not meet the definition of a major rule under E.O. 12291 and has therefore not prepared a regulatory impact analysis.

Paperwork Reduction Act

Information collection requirements in a rule must be submitted for approval to the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. No reporting or recordkeeping requirements are included as part of this regulation. Therefore, no Information Collection Request document has been prepared.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities. The rule authorizes the disclosure to authorized representatives of the United States of confidential information and disclosure pursuant to a proceeding. The persons receiving the confidential information are bound by agreement, court order, or criminal statute not to disclose the information except where authorized or to use the information for unauthorized purposes. These restrictions ensure that such disclosure does not affect the competitive position of the submitters of the information. Thus, there is no economic impact on small entities.

List of Subjects in 40 CFR Part 2

Administrative practice and procedure, Confidential business information, Courts, Freedom of information, Government employees.

Dated: December 23, 1992.

William K. Reilly,
Administrator.

Therefore EPA amends 40 CFR part 2 as follows:

PART 2—[AMENDED]

1. The authority citation for part 2 is revised to read as follows:

Authority: 5 U.S.C. 301, 552 (as amended), 553; secs. 114, 205, 208, 301, and 307, Clean Air Act, as amended (42 U.S.C. 7414, 7525, 7542, 7601, 7607); secs. 308, 501 and 509(a), Clean Water Act, as amended (33 U.S.C. 1318, 1361, 1369(a)); sec. 13, Noise Control Act of 1972 (42 U.S.C. 4912); secs. 1445 and 1450, Safe Drinking Water Act (42 U.S.C.

300f-4, 300j-9); secs. 2002, 3007, and 9005, Solid Waste Disposal Act, as amended (42 U.S.C. 6912, 6927, 6995); secs. 6(c), 11, and 14, Toxic Substances Control Act (15 U.S.C. 2607(c), 2610, 2613); secs. 10, 12, and 25, Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136h, 136i, 136w); sec. 408(f), Federal Food, Drug and Cosmetic Act, as amended (21 U.S.C. 346(f)); secs. 104(f) and 108, Marine Protection Research and Sanctuaries Act of 1972 (33 U.S.C. 1444(f), 1445); secs. 104 and 115, Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9604 and 9615); sec. 505, Motor Vehicle Information and Cost Savings Act, as amended (15 U.S.C. 2005).

PART 2—PUBLIC INFORMATION

§ 2.211 [Amended]

2. In section 2.211(d), remove "contractor or subcontractor with EPA" and substitute "contractor or subcontractor with the United States Government".

3. In § 2.211(d) revise "2.310(i)" to read "2.310(h)".

4. Section 2.301(b)(6) is removed.

5. Section 2.301 is amended by revising the first sentence of paragraph (e); and by revising paragraphs (h)(2)(i), (h)(2)(ii)(A) and (h)(2)(ii)(C) to read as follows:

§ 2.301 Special rules governing certain information obtained under the Clean Air Act.

§ 2.208 [Amended]

(e) * * * Section 2.208 applied to information to which this section applies, except that information which is emission data, a standard or limitation, or is collected pursuant to section 211(b)(2)(A) of the Act is not eligible for confidential treatment. * * *

(h) * * *

(2)(i) A person under contract or subcontract to the United States government to perform work in support of EPA in connection with the Act or regulations which implement the Act may be considered an authorized representative of the United States for purposes of this paragraph (h). Subject to the limitations in this paragraph (h)(2), information to which this section applies may be disclosed:

(A) To a contractor or subcontractor with EPA, if the EPA program office managing the contract first determines in writing that such disclosure is necessary in order that the contractor or subcontractor may carry out the work required by the contract or subcontract; or

(B) To a contractor or subcontractor with an agency other than EPA, if the EPA program office which provides the

information to that agency, contractor, or subcontractor first determines in writing, in consultation with the General Counsel, that such disclosure is necessary in order that the contractor or subcontractor may carry out the work required by the contract or subcontract.

(ii) * * *

(A) That the contractor or subcontractor and the contractor's or subcontractor's employees shall use the information only for the purpose of carrying out the work required by the contract or subcontract, shall refrain from disclosing the information to anyone other than EPA without the prior written approval of each affected business or of an EPA legal office and shall return to EPA all copies of the information (and any abstracts or extracts therefrom) upon request by the EPA program office, whenever the information is no longer required by the contractor or subcontractor for the performance of the work required under the contract or subcontract, or upon completion of the contract or subcontract (where the information was provided to the contractor or subcontractor by an agency other than EPA, the contractor may disclose or return the information to that agency);

(B) * * *

(C) That the contractor or subcontractor acknowledges and agrees that the contract or subcontract provisions concerning the use and disclosure of business information are included for the benefit of, and shall be enforceable by, both the United States government and any affected business having an interest in information concerning it supplied to the contractor or subcontractor by the United States government under the contract or subcontract.

6. Section 2.306 is amended by revising the second sentence of paragraph (j)(1); and by adding paragraphs (j)(1)(i) and (ii) to read as follows:

§2.306 Special rules governing certain information obtained under the Toxic Substances Control Act.

(j). * * * (1) * * * Subject to the limitations in this paragraph (j), information to which this section applies may be disclosed:

(i) To a contractor or subcontractor with EPA, if the EPA program office managing the contract first determines in writing that such disclosure is necessary for the satisfactory performance by the contractor or subcontractor of the contract or subcontract; or

(ii) To a contractor or subcontractor with an agency other than EPA, if the EPA program office which provides the information to that agency, contractor, or subcontractor first determines in writing, in consultation with the General Counsel, that such disclosure is necessary for the satisfactory performance by the contractor or subcontractor of the contract or subcontract.

7. Section 2.310 is amended by revising the section heading; by revising paragraphs (a)(1), (a)(6), (b), (g)(1), (g)(3), (g)(4), (h)(1), and (h)(4); and by adding paragraphs (g)(5) and (g)(6), to read as follows:

§2.310 Special rules governing certain information obtained under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

(a) * * *

(1) Act means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, including amendments made by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 9601, et seq.

(6) *Proceeding* means any rulemaking or adjudication conducted by EPA under the Act or under regulations which implement the Act (including the issuance of administrative orders under section 106 of the Act and cost recovery pre-litigation settlement negotiations under sections 107 or 122 of the Act), any cost recovery litigation under section 107 of the Act, or any administrative determination made under section 104 of the Act, but not including determinations under this subpart.

(b) *Applicability.* This section applies only to information: provided to or obtained by EPA under section 104 of the Act, 42 U.S.C. 9604, by or from any person who stores, treats, or disposes of hazardous wastes; or where necessary to ascertain facts not available at the facility where such hazardous substances are located, by or from any person who generates, transports, or otherwise handles or has handled hazardous substances, or by or from any person who performs or supports removal or remedial actions pursuant to section 104(a) of the Act. Information will be considered to have been provided or obtained under section 104 of the Act if it was provided in response to a request from EPA or a representative of EPA made for any of the purposes stated in section 104, if it was provided pursuant to the terms of

a contract, grant or other agreement to perform work pursuant to section 104, or if its submission could have been required under section 104, regardless of whether section 104 was cited as authority for any request for the information or whether the information was provided directly to EPA or through some third person.

(g)(1) Under section 104(e)(7)(A) of the Act (42 U.S.C. 9604(e)(7)(A)) any information to which this section applies may be disclosed by EPA because of the relevance of the information in a proceeding under the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Disclosure of information to which this section applies because of its relevance in a proceeding shall be made only in accordance with this paragraph (g).

(3) In connection with any proceeding involving a decision by a presiding officer after an evidentiary or adjudicatory hearing, except with respect to litigation conducted by a Federal court, information to which this section applies which may be entitled to confidential treatment may be made available to the public, or to one or more parties of record to the proceeding, upon EPA's initiative, under this paragraph (g)(3). An EPA office proposing disclosure of information under this paragraph (g)(3) shall so notify the presiding officer in writing. Upon receipt of such a notification, the presiding officer shall notify each affected business that disclosure under this paragraph (g)(3) has been proposed, and shall afford each such business a period for comment found by the presiding officer to be reasonable under the circumstances. Information may be disclosed under this paragraph (g)(3) only if, after consideration of any timely comments submitted by the business, the EPA office determines in writing that, for reasons directly associated with the conduct of the proceeding, the contemplated disclosure would serve the public interest, and the presiding officer determines in writing that the information is relevant to a matter in controversy in the proceeding. The presiding officer may condition disclosure of the information to a party of record on the making of such protective arrangements and commitments as he finds to be warranted. Disclosure to one or more parties of record, under protective arrangements or commitments, shall not, of itself, affect the eligibility of

information for confidential treatment under the other provisions of this subpart. Any affected business shall be given at least 5 days notice by the presiding officer prior to making the information available to the public or to one or more of the parties of record to the proceeding.

(4) In connection with any proceeding involving a decision by a presiding officer after an evidentiary or adjudicatory hearing, except with respect to litigation conducted by a Federal court, information to which this section applies which may be entitled to confidential treatment may be made available to one or more parties of record to the proceeding, upon request of a party, under this paragraph (g)(4). A party of record seeking disclosure of information shall direct his request to the presiding officer. Upon receipt of such a request, the presiding officer shall notify each affected business that disclosure under this paragraph (g)(4) has been requested, and shall afford each such business a period for comment found by the presiding officer to be reasonable under the circumstances. Information may be disclosed to a party of record under this paragraph (g)(4) only if, after consideration of any timely comments submitted by the business, the presiding officer determines in writing that:

(i) The party of record has satisfactorily shown that with respect to a significant matter which is in controversy in the proceeding, the party's ability to participate effectively in the proceeding will be significantly impaired unless the information is disclosed to him; and

(ii) Any harm to an affected business that would result from the disclosure is likely to be outweighed by the benefit to the proceeding and the public interest that would result from the disclosure.

The presiding officer may condition disclosure of the information to a party of record on the making of such protective arrangements and commitments as he finds to be warranted. Disclosure to one or more parties of record, under protective arrangements or commitments, shall not, of itself, affect the eligibility of information for confidential treatment under the other provisions of this subpart. Any affected business shall be given at least 5 days notice by the presiding officer prior to making the information available to one or more of the parties of record to the proceeding.

(5) In connection with cost recovery pre-litigation settlement negotiations under sections 107 or 122 of the Act (42 U.S.C. 9607, 9622), any information to

which this section applies that may be entitled to confidential treatment may be made available to potentially responsible parties pursuant to a contractual agreement to protect the information.

(6) In connection with any cost recovery proceeding under section 107 of the Act involving a decision by a presiding officer after an evidentiary or adjudicatory hearing, any information to which this section applies that may be entitled to confidential treatment may be made available to one or more parties of record to the proceeding, upon EPA's initiative, under this paragraph (g)(6). Such disclosure must be made pursuant to a stipulation and protective order signed by all parties to whom disclosure is made and by the presiding officer.

(h) * * * (1) Under section 104(e)(7) of the Act (42 U.S.C. 9604(e)(7)), EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

(h)(4) At the time any information is furnished to a contractor, subcontractor, or state or local government under this paragraph (h), the EPA office furnishing the information to the contractor, subcontractor, or state or local government agency shall notify the contractor, subcontractor, or state or local government agency that the information may be entitled to confidential treatment and that any knowing and willful disclosure of the information may subject the contractor, subcontractor, or state or local government agency and its employees to penalties in section 104(e)(7)(B) of the Act (42 U.S.C. 9604(e)(7)(B)).

Note: The remainder of text will not appear in the Code of Federal Regulations.

Appendix A to Preamble—Agreement Regarding Confidentiality of Information and Annexes

These documents would provide for limited disclosure of certain business information pertaining to costs that may be entitled to confidential treatment pursuant to 40 CFR part 2 in the situation where the Department of Justice has notified an action on behalf of EPA in a United States District Court. The documents would also apply in circumstances where EPA is negotiating with responsible parties outside of a litigation context using CERCLA section 122 administrative settlement authorities.

Agreement Regarding Confidentiality of Business Information

EPA and the potentially responsible party (PRP) hereby agree that settlement of the Government's claim concerning the

Superfund site will involve the production of documents which have been submitted to the United States Environmental Protection Agency (EPA) by various contractors (listed in Annex 1) (hereinafter "submitters") containing certain information which may be entitled to confidential treatment under 40 CFR part 2. Furthermore, the parties herein agree that the limitation on the disclosure of the documents subject to this Agreement is necessary in order to protect the interests of the submitters in the confidentiality of their business information.

The terms of the Agreement Regarding Confidentiality of Business Information (hereinafter "Agreement") are as follows:

1. EPA shall provide the document(s) containing information which may be entitled to confidential treatment to the PRP and such document(s) shall be handled in accordance with the terms of this Agreement.
2. As used in this Agreement, the term "confidential information" means trade secrets or commercial or financial information submitted by a person to EPA and which may be entitled to confidential treatment under 40 CFR part 2. This information has not been determined by EPA under 40 CFR part 2, subpart B not to be entitled to confidential treatment.

3. Any information to be produced by EPA pursuant to this Agreement shall be stamped conspicuously with the word "CONFIDENTIAL" by EPA on the top of each page of each document prior to production to the PRP. The transmittal of information designated as confidential shall be done by letter from EPA stating that the information designated as confidential is subject to this Agreement.

4. Information designated as confidential under this Agreement shall not be used or disclosed by the PRP or any other person subject to paragraph 7 below for any purpose other than the preparation for negotiation of a settlement.

5. The PRP and PRP's counsel who obtain information designated as confidential hereunder, and any nonparty subject to this Agreement, shall not disclose or permit disclosure of this information to any other person, including without limitation any officer, director, employee, agent, or representative of the PRP, the PRP's counsel, or any nonparty, except in the following circumstances:

- a. Disclosure may be made to employees of the PRP or of the PRP's counsel who have responsibility for settlement negotiations involving the Superfund site. Any employee to whom disclosure is made shall be advised of, and become subject to, the provisions of this Agreement prior to such disclosure by executing the Confidentiality Agreement (Annex 2) annexed hereto. Employees do not include persons, firms or corporations engaged by the PRP or the PRP's counsel on a contract basis, who shall be subject to the requirements of subparagraph (b) of this paragraph.
- b. Disclosure may be made to consultants, witnesses, experts, or employees of experts

("Expert(s)") employed or otherwise engaged by the PRP or PRP's counsel to assist in the preparation for negotiations. Prior to disclosure to any Expert, the Expert must agree to be bound by the terms of this Agreement by executing the Confidentiality Agreement annexed hereto. A copy of each executed Confidentiality Agreement shall be furnished to EPA and submitter not less than five (5) business days prior to disclosure to the Expert of the business information.

6. The PRP, PRP's counsel and any other person subject to this Agreement who obtains information designated as confidential hereunder, shall take all necessary and appropriate measures to maintain the confidential nature of the information, shall share such information only with persons authorized to receive it pursuant to this Agreement, and shall retain the information in a secure manner. Except as provided in paragraph 5 above, no other person shall be permitted access to the information.

7. Any person who obtains access to information designated as confidential under this Agreement may make copies, duplicates, extracts, summaries, or descriptions of the information or any portion thereof only for the purpose of preparation for settlement negotiations for cost recovery at the Superfund site. All copies, duplicates, extracts, etc. shall be subject to terms of this Agreement to the same extent and manner as original documents.

8. Any unauthorized disclosure of information designated as confidential under this Agreement shall not result in a waiver of any submitter's claim of confidentiality.

9. Within 60 days after termination of negotiations, or as determined by EPA, any person who obtained information designated as confidential under this Agreement shall assemble and return such information to EPA, including all copies, extracts, summaries, or descriptions of the information or portions thereof. Such return shall be certified in writing by the person who obtained the information from EPA. All such information covered by this Agreement which constitutes the work product of counsel or the PRP shall be destroyed. However, if before the expiration of the 60 days the United States has filed in Federal court a cost recovery action for the

Superfund site, naming the PRP as a party, the PRP may retain the information. Such retention shall be governed by the provisions of this Agreement until entry of a protective order governing the information.

Dated: _____

For the PRP

Dated: _____

For EPA

Annex 1—List of Contractors

Annex 2—Business Information Confidentiality Agreement

The undersigned is currently working at _____ which is located at _____. During the past year the undersigned has been employed or otherwise engaged as a consultant or contractor by the following

companies located at the corresponding address:

- (1) _____
(2) _____

The undersigned hereby acknowledges that he/she has read the foregoing Agreement Regarding Confidentiality of Business Information ("Agreement") executed by the attorneys for the parties involved in settlement of the Government's claim concerning the Superfund site, understands the terms thereof, and agrees to be bound by such terms. The undersigned understands that disclosure of information which has been designated as confidential by the submitter of that information may cause substantial harm to the affected business' competitive position. Accordingly, among other responsibilities, the undersigned shall only share such information with persons specifically authorized to receive the information pursuant to the Agreement, shall retain the information in a secure manner, and shall use such information only for the purposes authorized by the Agreement. The undersigned understands that the pledge of confidentiality under this Confidentiality Agreement continues after any lawsuit associated with the settlement negotiations is over. Furthermore, the undersigned understands that a breach of the Agreement may subject him/her to civil claims for damages and to criminal prosecution under 42 U.S.C. 9604(e)(7)(B).

Dated: _____
Signed: _____

Appendix B to Preamble—Stipulation and Protective Order and Annexes

These documents would provide for limited disclosure of certain business information pertaining to costs that may be entitled to confidential treatment pursuant to 40 CFR part 2 after the Department of Justice has filed an action on behalf of EPA and the matter is subject to the jurisdiction of a United States District Court.

In The United States District Court

For the District of _____

United States of America, Plaintiff, v.

Defendant. Civil Action No. _____

Stipulation and Protective Order

Plaintiff, United States of America, on behalf of the United States Environmental Protection Agency (EPA), and Defendant (name) have hereby stipulated that discovery in this case will involve the production of documents which have been submitted to EPA by various contractors (listed in Annex 1) (hereinafter "submitter(s)") containing information which may be entitled to confidential treatment. In view of this stipulation, the Court finds that good cause exists for issuance of an order requiring limited disclosure of such information. Upon consideration of the joint motion for such an order filed by the parties hereto and pursuant to Rule 26(c), Federal Rules of Civil Procedure, It is Hereby Ordered:

1. Plaintiff shall submit the document(s) containing information which may be entitled to confidential treatment to the

Defendant and such document(s) shall be handled in accordance with the terms of this Stipulation and Protective Order ("Protective Order")

2. As used in this Protective Order, the term "confidential information" means trade secrets or commercial or financial information submitted by a person to Plaintiff and which may be entitled to confidential treatment under 40 CFR part 2. This information has not been determined by Plaintiff under 40 CFR part 2, subpart B not to be entitled to confidential treatment.

3. Any information to be produced by Plaintiff pursuant to this Protective Order shall be stamped conspicuously with the word "CONFIDENTIAL" by the Plaintiff on the top of each page of each document prior to production to the Defendant. The transmittal of information designated as confidential shall be done by letter from the Plaintiff stating that the information designated as confidential is subject to this Protective Order.

4. Information designated as confidential under this Protective Order shall not be used or disclosed by the Defendant or any other person subject to Paragraph 7 below for any purpose other than the preparation for, and trial of, this action and any appeal therein.

5. The Defendant and Defendant's counsel who obtain information designated as confidential hereunder, and any nonparty subject to this Protective Order, shall not disclose or permit disclosure of this information to any other person, including without limitation any officer, director, employee, agent, or representative of Defendant, Defendant's counsel, or any nonparty, except in the following circumstances:

a. Disclosure may be made to employees of Defendant or of Defendant's counsel who have responsibility for the preparation and trial of this action or any appeal therein. Any employee to whom disclosure is made shall be advised of, and become subject to, the provisions of this Protective Order prior to such disclosure by executing the Confidentiality Agreement annexed hereto. Employees do not include persons, firms or corporations engaged by Defendant or Defendant's counsel on a contract basis, who shall be subject to the requirements of subparagraph (b) of this Paragraph.

b. Disclosure may be made to consultants, witnesses, experts, or employees of experts ("Expert(s)") employed or otherwise engaged by any party or counsel to any party to assist in the preparation and trial of this litigation. Prior to disclosure to any Expert, the Expert must agree to be bound by the terms of this Protective Order by executing the Confidentiality Agreement annexed hereto. A copy of each executed Confidentiality Agreement shall be furnished to the Plaintiff and submitter not less than five (5) business days prior to disclosure to the Expert.

6. Defendant, Defendant's counsel, and any other person subject to this Protective Order who obtains information designated as confidential hereunder, shall take all necessary and appropriate measures to maintain the confidentiality of the information, shall share such information only with persons authorized to receive it

pursuant to this Protective Order, and shall retain the information in a secure manner. Except as provided in Paragraph 5 above, no other person shall be permitted access to the information.

7. Any person who obtains access to information designated as confidential under this Protective Order may make copies, duplicates, extracts, summaries, or descriptions of the information or any portion thereof only for the purpose of preparation for litigation in this matter. All copies, duplicates, extracts, etc. shall be subject to the terms of this Protective Order to the same extent and manner as original documents.

8. Any information designated as confidential under this Protective Order shall be filed with the Court in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption of this litigation, an indication of the nature of the contents of such sealed envelope or container, the word "CONFIDENTIAL", and a statement substantially in the following form:

"This envelope, containing documents which are filed in this case by _____ ("the producing party") is not to be opened and the contents are not to be displayed or revealed except by order of the Court or consent of the producing party."

In addition, if such documents have been sealed and filed with the Court, the submitter shall be informed of this by the filing party at the time of filing.

9. Any unauthorized disclosure of information designated as confidential under this Protective Order shall not result in a waiver of any submitter's claim of confidentiality.

10. If Plaintiff desires to add contractors to the list in Annex 1, Plaintiff may file written notice with the Court and the Defendant of the identities of such contractors. If the

Defendant does not object within three days of receipt of such notice, the contractors will be added to Annex 1.

11. Within 60 days after termination of this action by judgment, settlement or otherwise, or as may be determined by the court or EPA:

a. Any person who obtained information designated as confidential hereunder shall assemble and return such information to Plaintiff, including all copies, duplicates, extracts, summaries, or descriptions of the information or portions thereof. Such return shall be certified in writing by the person who obtained the information from EPA. All such information covered by this Protective Order which constitutes the work product of counsel for the Defendant shall be destroyed, and.

b. The Clerk of the Court shall maintain under seal all papers filed under seal until the Court orders otherwise.

Dated: _____

For: Defendant(s)

Dated: _____

For: United States of America

So Ordered this _____ day of _____, 199_____.

United States District Court Judge
_____ District of _____

Annex 1—List of Contractors

Annex 2—Stipulation and Protective Order Confidentiality Agreement

The undersigned currently working at _____ which is located at _____ During the past year the undersigned has been employed or otherwise engaged as a consultant or contractor by the

following company located at the following address:

The undersigned hereby acknowledges that he/she has read the foregoing Stipulation and Protective Order ("Protective Order") executed by the attorneys of record for the parties in the action presently pending in the U.S. District Court for the District of _____, entitled *United States v. _____*

(name), understands the terms thereof, and agrees, upon threat of penalty of contempt, to be bound by such terms. The undersigned understands that disclosure of information which has been designated as confidential by the submitter of that information may cause substantial harm to the affected business' competitive position. Accordingly, among other responsibilities, the undersigned shall only share such information with persons specifically authorized to receive the information pursuant to the Protective Order, shall retain the information in a secure manner, and shall use such information only for the purposes authorized by the Protective Order. The undersigned understands that the pledge of confidentiality under this Agreement continues after the lawsuit is over. Furthermore, the undersigned understands that a breach of the Protective Order may subject him/her to civil claims for damages and to criminal prosecution under 42 U.S.C. 9604(e)(7)(B).

Dated: _____

Signed: _____

[FR Doc. 93-71 Filed 1-4-93; 8:45 am]

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