



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

OSWER Directive
No. 9834.14

AUG 29 1980

MEMORANDUM

SUBJECT: Transmittal of Model Consent Decree for CERCLA
Section 104(e) Information Request Enforcement Actions

FROM: David B. Van Slyke *D. B. V. Slyke*
Acting Associate Enforcement Counsel for Superfund, OE

for Bruce M. Diamond, Director *Bruce M. Diamond*
Office of Waste Programs Enforcement, OSWER

TO: Regional Counsel, Regions I-X
Waste Division Directors, Regions I-X

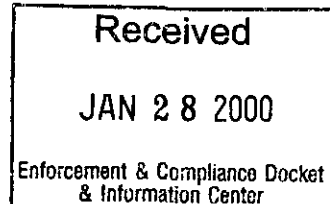
Please find attached a Model Consent Decree developed to further support the CERCLA § 104(e) Initiative. We appreciate your assistance in providing comments on the draft Model Consent Decree and hope that you and your staff will find this Model Consent Decree useful in the implementation of the Agency's § 104(e) enforcement initiative.

The attached document is intended solely as guidance to employees of EPA. Such guidance does not constitute rulemaking by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this guidance and its internal implementing procedures.

If you have any questions regarding the attached model, please contact Sally Mozley, Office of Enforcement, Superfund Division, at 382-3070.

Attachment

cc: James M. Strock, Assistant Administrator for Enforcement
Don Clay, Assistant Administrator for Solid Waste and
Emergency Response
Edward E. Reich, Deputy Assistant Administrator, OE
Scott C. Fulton, Senior Counsel-Civil, OE
Regional Counsel Hazardous Waste Branch Chiefs
Regional Section 104(e) Contacts
David Buente, Chief, Environmental Enforcement Section,
Environment and Natural Resources Division, DOJ



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____
DIVISION

| | | |
|--------------------------|---|-----------------|
| _____ |) | |
| UNITED STATES OF AMERICA |) | |
| |) | |
| Plaintiff, |) | |
| |) | CIVIL ACTION NO |
| v. |) | |
| |) | |
| _____ |) | |
| Defendant. |) | |
| _____ |) | |

CONSENT DECREE

I.

BACKGROUND

A. On [DATE], based on the United States Environmental Protection Agency's ("EPA's") reasonable belief that there may be a release or a threat of a release of a hazardous substance, pollutant or contaminant from the _____ Site, [NAME], a duly authorized representative of the President, mailed an information request (hereinafter "Information Request"), certified mail/return receipt requested, pursuant to Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, ("CERCLA"), 42 U.S.C. § 9604(e) [and Section 3007 of the Resource Conservation and Recovery Act, as amended, (RCRA) 42 U.S.C. § 6927] to [NAME OF RECIPIENT], hereinafter "Settling Defendant."

B. EPA issued the Information Request to determine the need for a response or choosing or taking any response action under CERCLA, or otherwise enforcing the provisions of CERCLA.

C. The Information Request required the Settling Defendant to furnish relevant information, upon reasonable notice, relating to one or more of the following categories:

(1) the identification, nature, and quantity of materials which have been or are generated, treated, stored, or disposed of at a facility;

(2) the nature or extent of a release or threatened release of a hazardous substance or pollutant or contaminant at or from a facility;

(3) information relating to the ability of a person to pay for or perform a cleanup;

[(4) information relating to the generation, treatment storage, or disposal of a hazardous waste.]

D. On [DATE], the United States of America ("United States"), on behalf of the Administrator of EPA, filed a Complaint in this matter pursuant to Section 104(e) of CERCLA [and Section 3007 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6927] to enforce the Information Request alleging that Settling Defendant has failed to comply with the requirements of the Information Request.

E. In its Complaint, the United States asks:

(1) that the Court issue an order, pursuant to Section 104(e)(5) of CERCLA, 42 U.S.C. § 9604(e) [and Section 3008(a) of RCRA, 42

U.S.C. § 6928(a)], directing the defendant to fully comply with the Information Request; (2) that the Court award the United States civil penalties pursuant to Section 104(e)(5) of CERCLA, 42 U.S.C. § 9604(B)(5) (and Section 3008(g) of RCRA, 42 U.S.C. § 6928(g)) not to exceed \$ 25,000 for each day of noncompliance; (3) that the Court award the United States its costs, including response costs (if this is averred) under Sections 104(b)(1) and 104(e) of CERCLA, 42 U.S.C. §§ 9604(b)(1) and 9604(e); and (4) such other relief as the Court finds appropriate.

F. The United States and Settling Defendant recognize, and the Court by entering this Consent Decree finds, that implementation of this Consent Decree will avoid prolonged and complicated litigation between the Parties, and that entry of this Consent Decree is in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

II.

JURISDICTION

This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345; 42 U.S.C. §§ 9604, 9613(b). This Court also has personal jurisdiction over the Settling Defendant, which, solely for the purposes of this Consent Decree and the underlying Complaint, waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. The Complaint states claims

against the Settling Defendant upon which relief may be granted.

III.

PARTIES BOUND

This Consent Decree applies to and is binding upon the United States and upon the Settling Defendant, its employees, agents, successors and assigns. No change in the Settling Defendant's corporate or ownership status shall change the Settling Defendant's responsibility to comply with the terms and conditions of this Consent Decree. Settling Defendant hereby waives the defenses of res judicata, collateral estoppel, and claim splitting by the United States, with respect to any future action that may be filed by the United States regarding the Site.

IV.

DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA shall have the meaning assigned to them in the statute or its implementing regulations. Whenever the terms listed below are used in this Consent Decree or in the Exhibits or Appendices attached hereto or incorporated hereunder, the following definitions shall apply:

A. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 et seq.

B. Days shall mean calendar days.

C. "EPA" shall mean the United States Environmental Protection Agency.

D. "Parties" shall mean the United States and the Settling Defendant.

E. "Plaintiff" shall mean the United States.

[F. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 et seq., (also known as the Resource Conservation and Recovery Act).]

G. "Response Costs" shall mean those costs incurred by the United States with regard to this Information Request including but not limited to those costs incurred by the United States in drafting, producing, sending, overseeing and enforcing the Information Request.

H. "Settling Defendant" shall mean _____.

I. "United States" shall mean the United States of America.

V.

COMPLIANCE WITH THE INFORMATION REQUEST

[ALTERNATIVE A]

A. Settling Defendant hereby certifies that it has provided to EPA copies of all documents and information available to it as requested in the Information Request.

OR

[ALTERNATIVE B]

A. Settling Defendant shall, within thirty (30) days of the effective date of this Consent Decree, provide to EPA all of the

information and copies of all documents available to it as requested in the Information Request.

B. Settling Defendant may assert a claim of business confidentiality covering all or part of the information or documentation developed in connection with this Consent Decree in the manner described in 40 C.F.R. § 2.203(b). Such claims shall be supported by documentation when the assertion is made by the Settling Defendant, in accordance with the requirements of 40 C.F.R. § 2.204(e)(4). Sampling, analytical data or any other information specified in Section 104(e)(7)(F) of CERCLA, 42 U.S.C. § 9604(e)(7)(F), shall not be claimed confidential by the Settling Defendant. Information determined to be confidential by EPA will be made available to the public only in accordance with the procedures set forth in 40 C.F.R. Part 2, Subpart B. If no claim of business confidentiality accompanies the information when it is submitted to EPA, it may be made available to the public by EPA without further notice to the Settling Defendant.

C. Within ten (10) days of compliance with paragraph V.A., Defendant shall send to EPA an affidavit certifying that it has provided EPA with all information available to it in accordance with the Information Request and Consent Decree.

D. Settling Defendant shall be liable for stipulated penalties in the amounts set forth in this section for failure to provide the requested information in compliance with this Consent Decree. All penalties begin to accrue on the day that complete performance is due, and continue to accrue through the final day

of noncompliance.

E. All penalties owed to the United States under this section shall be payable within thirty (30) days of receipt of notice that the United States has not received the information in accordance with the requirements of the Consent Decree. Such payment shall be in the form of a certified check made payable to the "EPA Hazardous Substances Superfund," and reference CERCLA Number [Site/Spill Number] and DOJ Case Number _____. Settling Defendant shall send the certified check by certified mail, return receipt requested, to [Insert appropriate Regional Superfund Lockbox number and address].

F. If Settling Defendant fails to pay the stipulated penalties, the United States may institute proceedings to collect the penalties, as well as late charges and interest. However, nothing in this section shall be construed as prohibiting, or altering, or in anyway limiting the ability of the United States to seek any other remedies or sanctions available by virtue of Settling Defendant's violation of this Decree.

G. The following stipulated penalties shall be payable per day to the United States for failure to provide the information in accordance with the Consent Decree:

Penalty Per Violation

| <u>Per Day</u> | <u>Period of Noncompliance</u> |
|----------------|--------------------------------|
| \$ | 1st thru 14th Day |
| \$ | 15th thru 30th Day |
| \$ | 31st and beyond |

VI.

PENALTIES

A. Settling Defendant shall pay a civil penalty of \$____ within thirty (30) days of the effective date of this Consent Decree. This payment shall be in the form of a certified check made payable to "EPA Hazardous Substances Superfund," and referencing CERCLA Number [Site/Spill Number] and DOJ case Number____. Settling Defendant shall send the certified check by certified mail, return receipt requested, to [Insert appropriate Regional Superfund Lockbox number and address].

B. Copies of check(s) sent pursuant to this Section and any accompanying transmittal letter(s), shall be sent simultaneously to the United States as provided in Paragraph IX (Notices and Submissions).

C. In the event that the payments required by this Section are not timely made, the Settling Defendant shall pay interest on the unpaid balance at the rate established by the Department of Treasury pursuant to 31 U.S.C. § 3717 and 4 C.F.R. § 101.13. Settling Defendant shall further pay (1) a handling charge of one (1) percent at the end of each thirty-day late period, and (2) a six (6) percent per annum penalty charge, to be assessed if Settling Defendant has not paid in full within ninety (90) days after the payment is due. Payments made under this paragraph shall be in addition to such other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to make timely payments under this Section.

VII.

REIMBURSEMENT OF RESPONSE COSTS

A. Within thirty (30) days of the entry of this Consent Decree, the Settling Defendant shall:

a. Pay to EPA \$ _____ in the form of a certified check or checks made payable to "EPA Hazardous Substances Superfund," and referencing CERCLA Number [Site/Spill ID Number] and DOJ Case Number _____, in reimbursement of response costs incurred by EPA regarding this matter. The certified check(s) shall be sent by certified mail, return receipt requested to [Insert appropriate Regional Superfund Lockbox number and address].

B. Copies of check(s) paid pursuant to Section VII and any accompanying transmittal letter(s), shall be sent simultaneously to the United States as provided in Paragraph IX (Notices and Submissions).

C. In the event that the payments required by this Section are not timely made, the Settling Defendant shall pay interest on the unpaid balance from the date such payment(s) is/are due at the rate specified for interest on investments of the Hazardous Substances Superfund. Payments made under this paragraph shall be in addition to such other remedies or sanctions available to Plaintiff by virtue of any failure of Settling Defendant to make timely payments under this Section.

VIII.

EFFECT OF SETTLEMENT

A. The United States and the Settling Defendant agree to entry of the Consent Decree to settle the claims made by the United States against Settling Defendant in the complaint filed in this action on [DATE].

B. The United States shall have the right to reopen this Consent Decree or, if it deems it appropriate, to institute a new and separate action to recover additional Response Costs for the claims made in the complaint in this matter if the United States obtains evidence that the information or representations of the Settling Defendant as described in said affidavit is false or, in any material respect, inaccurate. The right shall be in addition to all other rights and causes of action, civil or criminal, the United States may have under law or equity in such event.

IX.

NOTICES AND SUBMISSIONS

Whenever, under the terms of this Consent Decree, written notice is required to be given or a submission is required, the notice or submission shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give written notice of a change to the other parties by certified mail, return receipt requested. Written notice to the individuals at the addresses specified below shall constitute complete satisfaction of any written notice requirement of the

Consent Decree with respect to the United States, EPA, and the Settling Dendant.

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: DOJ # _____

[Name]
Assistant Regional Counsel
United States Environmental Protection Agency
Region _____

As to EPA:

Director, Waste Management Division
United States Environmental Protection Agency
Region _____

[Name]
EPA Project Coordinator
United States Environmental Protection Agency
Region _____

As to the Settling Defendant:

[Name]
Settling Defendant's Project Coordinator
[Address]

X.

EFFECTIVE DATE

The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court. The provisions of this Consent Decree shall terminate and be deemed satisfied upon the Settling Defendant's receipt of written notice from the United States that the Settling Defendant has demonstrated to the satisfaction of the United States that all the terms of this Consent Decree have been completed and response costs and penalties have been paid.

XI.

RETENTION OF JURISDICTION

This Court will retain jurisdiction for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms.

XII.

MODIFICATION

No modification shall be made to this Consent Decree without written agreement of the Parties and approval of the Court. No oral modification of this Consent Decree shall be effective. Nothing in this paragraph shall be deemed to alter the Court's power to supervise this Consent Decree.

SIGNATORIES

The undersigned representative of the Settling Defendant and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Settling Defendant and the United States, respectively, to this document.

FOR THE UNITED STATES OF AMERICA

Date: _____

[Name]
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

[Name]
Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

[Name]
Assistant United States Attorney
District of _____
U.S. Department of Justice
[Address]

[Name]
Regional Administrator, Region ___
U.S. Environmental Protection
Agency
[Address]

[Name]
Assistant Regional Counsel
U.S. Environmental Protection
Agency
Region ___
[Address]

FOR COMPANY, INC.

[Name, Position, Address]

SO ORDERED THIS _____ DAY OF _____, 19__.

United States District Judge