EPA information requests: Discovery without boundaries

By Terry J. Satterlee and Thomas J. Grever

You've heard stories about them. Maybe you've read about them in the news. But you always thought your company would never get one. After all, your company has a sterling record of environmental compliance, a crack staff of experienced and responsible compliance managers, thorough internal compliance maintenance systems, and productive relationships with the local environmental permitting agencies and neighbors.

But still, there it sits: Your company has received a "Request for Information" from the Environmental Protection Agency demanding you provide within 30 days: (1) everything under the sun, (2) the kitchen sink, and (3) everything that was not provided in response to (1) and (2).

EPA has asked you to jump, and "How high?" seems like the appropriate response.

Unlike many federal regulatory agencies, EPA enjoys nearly unfettered statutory authority to investigate company records. Failure to respond completely, timely and accurately can lead to significant penalties for non-compliance.

Accordingly, your company will need to act fast and devote significant resources to the response. But with proper planning and management, the inevitable pain of the process can be minimized as much as possible, and your company may be able to limit just how "high" is high enough.

Below are some suggestions on how to handle an EPA investigation.

Consider the source

You need to consider the source, and understand the purpose behind the request. Congress has vested the EPA with extremely broad investigative powers under most of its environmental protection programs, including the air, water, waste, Superfund, and toxic substances programs.

These requests are known in the vernacular as "Section 114 Requests" under the Clean Air Act; "Section 308 Requests" under the Clean Water Act; "Section 3007 Orders" under the Resources Conservation and Recovery Act (regulating hazardous waste disposal); and "Section 104(e) Requests" under the Comprehensive Environmental Response, Compensation and Liability Act (better known as CERCLA, or Superfund).

While there are some differences in EPA's investigative authority under these statutes, generally the Agency can request not only documents regarding past or events, but may also require that new documents be created, new data be generated, and new testing and analysis be performed.

Typically, information sought includes both paper and electronic information, much like litigation discovery. The EPA uses the information to sue the entity for environmental violations disclosed or developed as a result of their request.

A proper response starts with understanding what type of violation or liability EPA is trying to prove, and what evidence EPA typically uses to prove it.

Don't ignore the request

Do not ignore the Request, even if you know you did not do anything wrong. Your company may have acted in full compliance with the law at all times and even have had the blessing of state and federal regulators throughout its operations, but EPA still has the statutory right to ask you to provide your records.

The Request is not a criminal search warrant or a civil discovery request – it's worse. Unlike criminal search warrants, there is no requirement for "probable cause" or "reasonable suspicion" before the EPA targets your company or facility.

Unlike with civil discovery requests, there is no judge to intervene, or rules to rely on, to resolve disputes over the breadth and burden of the requests. In short, there is no opportunity to formally challenge the request.

Nonetheless, counsel should treat the EPA's request like a litigation discovery request, because it essentially *is* a discovery request, intended to support the EPA's efforts to find a violation at the facility.

Accordingly, counsel must carefully supervise and coordinate the response effort, and not simply hand it off to an environmental manager to respond. Counsel should also alert the company to withhold destruction of potentially responsive documents that might otherwise be destroyed through the company's standard records retention policies.

Often, outside counsel is hired to coordinate the assembling and response to the request. This allows discussions and strategies for responding to be protected by the attorney-client privilege doctrine and other potentially available privileges, such as the attorney work-product privilege. Outside counsel can also assist in identifying potentially responsive information that is privileged, such as attorney-client communications.

Counsel and company personnel must also review which if any information should be identified as "confidential business information" (CBI), as provided in the EPA's regula-

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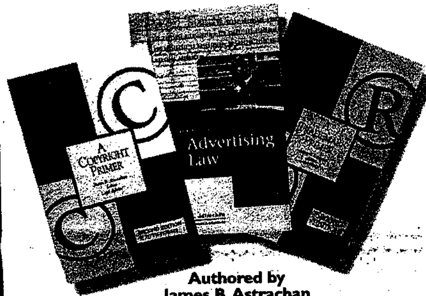

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EPA information requests

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tions. Beware that the information provided to the EPA may still be released to the public upon request if it ultimately finds the information does not qualify as CBI.

It is also important to get someone involved who is familiar with the EPA Request process and the statute's investigative authority, and who will coordinate with an in house person who understands the technical aspects, the environmental compliance issues as well as the financial systems.

Don't delay contacting the EPA

Contact the EPA soon after receiving the Request to discuss the scope and timing of the company's response. The breadth of the requests, and the time frame for submitting responses, usually can be negotiated with the EPA, as long as you immediately contact it and the request to negotiate is made in good faith.

In most instances, the company will need more time to respond than the 30 days typically demanded in the Request.

The EPA's recent Clean Air Act enforcement initiatives provide perfect examples of the breadth of some requests. For instance, in its current enforcement efforts against the cement industry, the EPA has recently asked a number of companies to identify every capital expenditure made at the facilities dating back to 1980, and provide *all* documents related to those capital expenditures, including notes, memos, reports, discussion records, and the like.

The EPA will likely not allow leeway to a company that cannot articulate its limitations and bases for objections to the scope and timing of the requests. Accordingly, preparation for negotiating with EPA is essential. Usually, this will require significant investigation of the company's existing records just to get to a point where it can negotiate with EPA over the scope of the questions.

While there are several judicial opinions placing some fairly broad restrictions on EPA's authority under certain programs, these do not always offer crystal clear guidance as to what a company may or may not have to produce. Objections can and should be made where appropriate, but objections may not eliminate the company's statutory obligation to respond.

The discovery rules in the federal rules of civil procedure may be used as a guide for framing objections and responses, but they are not binding on this EPA's investigatory process. While the company and the EPA often use the principles of the federal discovery rules in negotiating the timing and scope of responses, the EPA's authority to seek information does not have the same limitations that a private litigant would have under the federal rules.

Counsel should be particularly aware of the significant new amendments to the federal discovery rules that will address electronic discovery, which could be used as a basis for the parties to frame the scope of production of electronic data, e-mails, and other records.

Details, details

As with any discovery request, pay utmost attention to details. Know exactly what you are providing to the EPA, and maintain records of your company's responses.

If your company is required to provide the same information in subsequent litigation, such as through a discovery request, any discrepancies in the responses can and will be used against the company.

It is not uncommon for citizen groups to compare responses a company provides to them in discovery against submittals the company has made to the EPA, and to exploit any differences in litigation against the company.

Avoid complacency

Finally, don't rest easy, no matter how quiet it gets. Once the information is submitted, the EPA can ask for follow-up information.

Your company may be under a continuing obligation to avoid destroying new information gathered that might be responsive. The EPA can take months or even years to bring an enforcement action, or you may never hear from them again.

Nonetheless, your company can respond to an EPA Request without a significant disruption of the workplace, while at the same time minimizing legal exposure for failure to properly respond.

However, you need proper preparation through good recordkeeping and document management practices, as well as effective teamwork and company support, and early development of a response strategy.

Case Law For In-House Counsel

Case Law -Continued from page 21

ERISA

Store employees not entitled to 'promise' of severance benefits

Even though a department store employer promised additional severance benefits to employees in the event of a take over and the employees brought claims under the Employees Retirement Income Security Act after they were denied the additional benefits following an internal consolidation, the letter promising the benefits was neither a faulty summary plan description as held by the district court nor a free-standing promise of benefits, and the court's award of benefits is reversed.

Antolik, et al. v. Saks, Inc. Docket No. 06-1046. Decided Sept. 14, 2006.

Insurance

Contractor's personal injury claim barred by pollution exclusion clause

Where an independent contractor who was injured at a work site sued the subcontractor claiming the injuries were caused by excessive carbon monoxide, declaratory judgment in favor of the subcontractor's insurer was proper because coverage was barred by an unambiguous absolute pollution exclusion.

Continental Casualty Co. v. Advance Terrazzo & Tile Company, Inc. Docket No. 05-3594. Decided Aug. 30, 2006.

Products Liability

Expert testimony on necessity of warning properly excluded

Where plaintiffs sued an auto manufacturer and rental car company after an accident killed four passengers in a rented Nissan Pathfinder, the district court did not abuse its discretion in excluding opinion testimony from plaintiff's expert on the necessity of warnings that the vehicle was unsafe at highway speeds because the testimony did not meet the proper standards for reliability and insufficient evidence supported the claim that the vehicle was defective. There was no duty to warn of the alleged defect.

Smith v. Cangieter, et al. Docket No. 05-3902. Decided Sept. 11, 2006.

Summary judgment on design defect claim reversed

Where a plaintiff whose arm was crushed as she cleaned an industrial laminator sued the manufacturer for design defect and failure to warn, the district court erred in granting summary judgment to the manufacturer on the design defect claim because the plaintiff presented evidence showing the cause and foreseeability of her injury.

Thompson v. Hirano Tecseed Co. Docket No. 05-2813. Decided Aug. 1, 2006.

10th Circuit

Attorney's Fees

Attorneys' fees award in telecommunications case properly denied

The district court properly denied attorney's fees to defendants in a dispute over telemarketing business practices, but an award for costs related to the letter of credit is reversed.

Federal Trade Commission v. Kuykendall. Docket No. 05-6047. Decided Sept. 29, 2006.

Contracts

Forum selection clause must be interpreted under law chosen by parties

In a dispute arising from international business transactions, where an international commercial agreement has both choice-of-law and forum-selection provisions, the forum selection provision must be interpreted under the law chosen by the parties, and the district court's judgment is reversed and remanded.

Yavuz v. 61 MM, Ltd. Docket No. 04-5152. Decided Sept. 12, 2006.

Copyright

Court adopts test distinguishing claims under federal and state law

Where a software company appealed a district court decision compelling arbitration of a dispute arising under a licensing agreement, the court adopts the Second Circuit's analysis to distinguish between state-law claims alleging breach of a contract involving copyrighted matters and those asserting an actual controversy under the federal Copyright Act for purposes of federal jurisdiction.

Image Software, Inc. v. Reynolds & Reynolds Co. Docket No. 04-1533. Decided Aug. 24, 2006.