

THE INFORMATION AGE: NO RIGHT TO REMAIN SILENT UNDER THE CLEAN AIR ACT

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One of the most troubling pieces of mail that an environmental manager or corporate official can receive is a Section 114 letter from the U.S. Environmental Protection Agency. What is Section 114? Simply put, it is a formal, written request for information from EPA regarding Clean Air Act-related activities at a facility or group of facilities - the environmental equivalent of an IRS audit. Recently, Section 114 requests have become more and more frequent in the Southeast and have been served on a variety of industry sectors. Although the process is conceptually simple, the ramifications of failing to submit an appropriate response are serious and far-reaching.

Responding to these requests in the appropriate manner and developing a concurrent investigation strategy are critical to successfully responding not only to the request itself, but also to any subsequent enforcement actions. This article will address the "nuts and bolts" of the Section 114 request and suggest a basic strategy that has proven successful in the past.

The genesis of EPA's information-gathering authority under the CAA is found under Section 114. Under that provision, EPA may require any person who owns or operates any emissions source to provide such information "as the Administrator may reasonably require." Even in a state authorized to implement the CAA requirements, EPA retains the power to enforce Section 114; and, cooperation with a state enforcement authority does not limit a person's liability to EPA under that section. However, Section 114 does not authorize EPA to direct a person to create new documents as part of the information request.

Such requests generally arise under two scenarios. In the first, EPA may be developing regulations to address a particular emissions activity at a specific industry type and is seeking information regarding the quantity and types of emissions associated with that industry. For example, prior to developing a best available control technology standard, EPA often will submit Section 114 requests to gain a better understanding of what pollution control devices are being used in a particular industry. In these cases, the Section 114 request is fairly innocuous.

The more difficult case is where a Section 114 request is being served as part of an enforcement investigation. These requests tend to focus on compliance with state and federal prevention of significant deterioration, new source review, new source performance standards, and asbestos demolition/renovation activities. In recent years, EPA, particularly Region 4, has focused on the following types of violations:

- failure to obtain prevention of significant deterioration permits prior to making "modifications"-a non-routine physical change or change in the method of operation that results in a net emissions increase-to existing emissions sources
- excess emissions at a facility that cannot be attributed to startup, shutdown or malfunction, such as exceedances caused by human error
- failure to report excess emissions events
- failure to get applicable permits for new equipment
- failure to maintain pollution control devices and/or continuous emissions monitors. Once the information is provided, a notice of violation may ensue, which may include a show-cause hearing. Failure to comply with a Section 114 request can subject a person to a penalty of up to \$25,750 per day of each violation.

What should you do if your company receives a Section 114 request? As a starting point, be aware that full disclosure of relevant information is mandatory. When an imposing highway patrolman pulls you over and asks to see your license, you generally don't hand him a library card and tell him that you feel that should be sufficient. Adopt a similar attitude in responding to 114 requests.

Responding to the request will take significant time and considerable effort from you, your employees and operators. This stage of the process often sets the tone for the rest of the interaction with EPA. Companies should immediately open discussions with the agency, let them know that they have received the request, ask for clarification where appropriate, and set realistic expectations of when the material can be provided. Where good working relationships are established early, EPA often will grant extensions if strict compliance with the scope of the request is not practical. Alternatively, EPA may settle for a representative sample of the requested information and determine at a later date whether full production will be necessary.

Don't wait for EPA to tell you if there is a violation. A successful Section 114 response strategy will include a concurrent internal investigation into potential liabilities at your facility and will identify any noncompliance issues long before EPA develops its case. Putting together an effective investigation team is vital early in the process. Ideally, the team should consist of representatives from corporate affairs, environmental management, and plant operations. It is also vital to include legal counsel on this team, so the results of investigations can be protected through the attorney-client privilege

and the attorney work-product doctrine. Protection of information gathered during this phase is critical, allowing company representatives to have frank, open discussions regarding environmental compliance without worrying whether those statements will be made available to EPA later.

The team should carefully analyze the requested information. If the request contains 10 questions about Boiler No. 2, you should focus on that piece of equipment, specifically why EPA is concerned about it. Some of the questions that should be asked when conducting an internal investigation include: what is their "theory" as to the source of the violation; has the boiler undergone a series of upgrades that have made it more efficient; are excess emission events at the boiler particularly frequent or large in quantity. It may also be valuable to determine whether other companies in your industry have received similar requests. EPA often launches many 114 requests if it believes a certain type of violation is common within a particular industry sector.

What information must be produced? As noted, EPA's information-gathering authority is very broad. However, case law indicates that EPA can request only that information which is: within the agency's statutory authority to request; not too "indefinite" or "unreasonably burdensome" to provide; related to the legislative purposes of the CAA; and directly related to the purpose of the request. Be aware that EPA may request information kept in the "normal course of business" that is not required to be maintained under the CAA. This information typically will include requests for purchase orders for emitting equipment, operation and maintenance budgets, and related financial information.

In addition to these potential limitations on the scope of EPA's Section 114 authority, the limits placed on discovery requests under the Federal Rules of Civil Procedure arguably apply to such requests, although neither the statute nor the regulations acknowledge this point. However, EPA guidance documents have recognized the validity of common-law protections such as the work-product doctrine and attorney-client privilege. Because the attorney-client privilege can be waived, it is important to ensure that no privileged documents are produced as part of the response.

In addition, a company may claim certain information as "confidential business information," which prohibits the release of such information to the public. Generally, a person must show that the disclosure of the information is likely to cause "substantial harm" to its "competitive position" in a given market. Although information characterized as CBI still must be provided to EPA, a CBI claim can limit further dissemination.

To recap, the keys to responding to Section 114 requests are to: provide a good faith response to the request, determine EPA's "theory" as to what activities may constitute a violation, develop a response strategy based upon EPA's theory of violation, conduct an internal investigation of potential violations, and evaluate applicable defenses. Although the process often is exhaustive and time-consuming, this approach should help minimize the major pitfalls associated with responding to these information requests.

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