



Idaho National Engineering and Environmental Laboratory  
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September 25, 2001

Michael F. Gearhard, Director  
Environmental Cleanup Office, ATTN: ECL-113  
U.S. Environmental Protection Agency Region 10  
1200 Sixth Ave.  
Seattle, WA 98101

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REQUEST FOR INFORMATION PURSUANT TO SECTION 104 OF CERCLA FOR  
INEEL—EPA LETTER RECEIVED 27 AUGUST 2001—MDO-62-01

Dear Mr. Gearhard:

I am sending this letter to you in my capacity as Managing Counsel for Bechtel BWXT Idaho, LLC (BBWI), which operates the Idaho National Engineering & Environmental Laboratory (INEEL) under contract to the Department of Energy, Idaho Operations Office (DOE-ID). Your agency mailed to our company a letter, which was received on 27 August 2001, entitled "Request for Information Pursuant to Section 104 of CERCLA for Idaho National Engineering and Environmental Laboratory in Idaho Falls, Idaho, hereinafter referred to as 'the Site'." I understand that an almost identical letter was received from EPA by DOE-ID the same day.

It is my understanding that DOE is requesting an extension to respond to EPA's letter by November 16, 2001, because those persons with knowledge of the Waste Area Group 7 and Pit 9 remedial process are currently fully engaged in supporting the current efforts of the DOE-ID Site Manager, EPA Region 10 Administrator, and the Director of the Idaho Department of Environmental Quality (DEQ) to resolve their dispute over the extension of milestones for the Pit 9 (Operable Unit 7-10) Interim Remedial Action.

Pursuant to express terms of BBWI's contract with DOE-ID, the records BBWI and its predecessor have generated on these matters are DOE-ID's records. As a result, the EPA request for DOE-ID information also encompasses the information in BBWI's possession. Under DOE-ID's direction, BBWI will be preparing copies of the DOE-ID records in its possession for DOE-ID transmittal to EPA. Since the EPA request to BBWI is therefore duplicative of the EPA request to DOE-ID, and since DOE-ID will be providing the requested information to EPA with BBWI support, BBWI believes that DOE's response fulfills the EPA request to BBWI for this information. BBWI, therefore, joins with DOE-ID in requesting that EPA withdraw its separate letter to BBWI. Because EPA's request threatened civil penalties against BBWI, we request that EPA provide us with written notice withdrawing the letter to BBWI as soon as possible.

Nevertheless, in the event that EPA declines to withdraw the separate request to BBWI, we would appreciate a statement from EPA as to the rationale for such refusal, and guidance from EPA explaining how each of the questions addressed to BBWI differs in substance from the corresponding questions directed to DOE-ID. We would also appreciate it if you would help us to respond to your request for information by providing to us a written clarification of the issues we have identified in the enclosure to this letter. We would also, in that event, request an extension of time until December 14, since BBWI's WAG 7 and Pit 9 staff will be occupied until November 16 in supporting both DOE-ID's negotiations with EPA and DOE-ID's response to EPA's request for information.

Please address any further correspondence related to this matter to Raymond T. Swenson, Senior Counsel for BBWI, at the following address: Bechtel BWXT Idaho, LLC, P.O. Box 1625, Idaho Falls, ID 83415-3940. His telephone number is 208-526-4579, and fax number is 208-526-8632.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark D. Olsen". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Mark D. Olsen  
Managing Counsel

Enclosure:    Requests for Clarification by EPA

cc:            Lisa Castanon, Office of Regional Counsel, EPA Region 10  
                Brett R. Bowhan, Office of Chief Counsel, DOE-ID

## Requests for Clarification by EPA Concerning Section 104 Request

In the event that EPA rejects BBWI's contribution to DOE's submittal of information as fulfilling the EPA request to BBWI, and refuses to withdraw the request to BBWI, BBWI would appreciate EPA's clarification of several issues, which will assist us in preparing a response to EPA's letter to BBWI:

- (1) What is the purpose of the separate request addressed to BBWI?
  - (a) Since all of the questions and requests for information addressed to BBWI are a paraphrase of the questions and requests addressed to DOE-ID, what is the specific scope of information being requested of BBWI that is not already covered by the request addressed to DOE-ID, and which cannot be obtained through DOE-ID?
  - (b) Since BBWI is not itself a potentially responsible party for the INEEL NPL Site, but manages records for and on behalf of DOE-ID, and is under contract to DOE-ID to perform such work and provide such information as DOE-ID directs, what is EPA's purpose in directing BBWI to make a separate but duplicative submission of information?
  - (c) Since BBWI cannot, under our contract with DOE-ID and the Freedom of Information Act, disclose DOE-ID records and information without specific DOE-ID direction, what is EPA's purpose in threatening enforcement action against BBWI, when EPA has not threatened any civil enforcement lawsuit against DOE-ID, particularly in light of the fact that DOE-ID is the real party in interest and would be an indispensable party to any civil enforcement suit against BBWI?

- (2) The EPA letter states in its first sentence that

The United States Environmental Protection Agency ("EPA") is currently investigating the source, extent, and nature of the release or threatened release of hazardous substances, pollutants, or contaminants, or hazardous wastes on or about the Idaho National Engineering and Environmental Laboratory in Idaho Falls, Idaho (the Site)

- (a) Is EPA in fact conducting such an investigation? It has been our understanding that the investigation of hazardous substance releases at the INEEL Site, which is listed on the National Priorities List, has been since 1980, and continues to be, conducted by DOE-ID pursuant to its delegation of authority under various provisions of CERCLA through presidential executive order (most recently EO 12580, 1987) and in accordance with the National Contingency Plan (40 CFR Part 300), which designates DOE as the lead agency for all response actions at DOE federal facilities (40 CFR § 300.5, § 120(c), § 175(b)(5)). It is further our understanding that DOE-ID and EPA executed a Federal Facility

Agreement (FFA/CO) in 1991 which “integrates U.S. DOE’s CERCLA response obligations and RCRA and HWMA corrective action obligations at INEEL” (FFA/CO § 5.1) and seeks to “eliminate potentially duplicative or uncoordinated requirements” (FFA/CO § 7.4), and that response actions have been carried out by DOE-ID at INEEL continuously since that time. It is further our understanding that, pursuant to that authority, DOE-ID has contracted since 1 October 1999 with BBWI to perform site investigation and response actions as directed by DOE-ID.

(b) Is EPA referring to another release of hazardous substances other than those at the INEEL Site? The INEEL Site is in fact not “in Idaho Falls, Idaho” but is some 40 miles west of the city limits of Idaho Falls and comprises portions of three counties. If EPA is in fact referring to a release within the city limits of Idaho Falls, we would appreciate the clarification, since we are not aware of such a release and are not currently involved with response actions for any such release.

(3) The EPA letter states in its second sentence that

This investigation requires inquiry into the ability of the Department of Energy, Idaho Operations Office and its contractors to perform cleanup activities pursuant to the December 1991 Federal Facility Agreement and Consent Order (hereinafter “FFA/CO”).

(a) Is EPA considering directly undertaking the performance of response actions at the INEEL Site? Unless EPA is considering having some entity other than DOE-ID perform response actions at the INEEL site, we are unable to understand the relevance of any question about DOE-ID’s “ability . . . to perform cleanup activities” to any decision that can be made by EPA. In particular, our understanding of the law is that the performance of “cleanup activities” at the INEEL, as a federal facility under the jurisdiction and control of DOE-ID, has been assigned to DOE-ID by EO 12580, and that EPA is prohibited from directly performing remedial actions at a federal facility due to the statutory prohibition on expenditure of funds from the Superfund on federal facility response actions (CERCLA § 111(e)(3)).

(b) Please explain how the “Questions” are related to the limited purposes of CERCLA § 104(e). It is not clear to us that the information requested in the “Questions” is related to the purposes of § 104(e), since it does not involve “the identification . . . of materials . . . disposed of at . . . a facility” (§ 104(e)(2)(A)) or “the nature or extent of a release” (§ 104(e)(2)(B)), but rather addresses the execution of response actions and the conduct of specific feasibility studies for alternative remedial actions.

(4) The third sentence and second paragraph of the EPA letter states that

Pursuant to the authority of Section 104 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9604, as amended, you are hereby requested to respond to the Information Request set forth in Enclosure A, attached hereto.

The third paragraph of the EPA letter threatens

enforcement action by EPA pursuant to Section 104(e) of CERCLA, 42 U.S.C. [no section cited]. This statute permits EPA to seek the imposition of penalties.

- (a) Does EPA in fact have authority under § 104 or to carry out enforcement action under § 104(e) with respect to the INEEL Site? We are aware that EPA agreed in the 1991 FFA/CO that both EPA and DOE were entering into the FFA/CO pursuant to EO 12580 (FFA/CO §§ 1.1, 1.3) and that "Nothing in this Agreement shall alter U.S. DOE authority . . . pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, as provided by Executive Order 12580." Our understanding of EO 12580 is that Section 2(j) assigns the authority to DOE to issue requests for information under CERCLA § 104(e), and to enforce such requests, with respect to all DOE facilities<sup>1</sup>, and not to EPA with respect to such facilities.
- (5) The last sentence of the third paragraph in the EPA letter advises that statements submitted in response to the letter are subject to criminal enforcement under 18 U.S.C. § 1001.

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<sup>1</sup> § 2(j)(1). The functions vested in the President by § 104(e)(5)(A) are delegated to the heads of Executive Departments and agencies; with respect to releases or threatened releases where either the release or the sole source of the release is from any facility or vessel under the jurisdiction, custody or control of those departments and agencies, to be exercised with the concurrence of the Attorney General.

§ 2(j)(2): Subject to . . . paragraph (1) of this subsection, the functions vested in the President by § 104(e) are delegated to the heads of Executive department and agencies in order to carry out their functions under this Order or Act. [Emphasis added]

The functions assigned to DOE "under this Order" include the authority under CERCLA §104(b)(1) to "undertake such investigations . . . and other information gathering as he [the President] may deem necessary . . . [and] undertake such . . . studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter." The "functions vested in the president by § 104(e)" are intended to "carry out" the functions under § 104(b)(1), and are therefore likewise delegated to the same federal agency that has been delegated to carry out § 104(b)(1), which in this case is DOE. This is consistent with the explicit delegation to DOE of the sole authority to issue a § 104(e) enforcement order related to INEEL.

(a) If EPA lacks authority to issue or enforce a request for information under CERCLA § 104(e) with respect to the INEEL, is there a basis for invoking 18 U.S.C. § 1001 in this case?

(6) The attachment to the EPA letter entitled "Instructions" states at paragraph 1 "Respond to each and every Question for the time period between October 1, 1997 through February 26, 2001." However, under the attachment to the EPA Letter entitled "Questions," at paragraph 1 it states "These questions cover the time period of October 1998 through February 26, 2001."

(a) Since BBWI did not begin to perform work under contract to DOE-ID until 1 October 1999, was it in fact EPA's intent to have BBWI address the time period from that date until February 26, 2001? It would be presumptive, if not impossible, of BBWI to provide answers with respect to the period when other companies were acting under contract with DOE-ID.

(7) The "Instructions" numbers 2 and 3 ask us to refer to "the number of the Question to which it corresponds," but the "Questions" have two separate items number "1" and two separate items numbered "2."

(a) Is it permissible to refer to the first two items under "Questions" as questions A.1 and A.2, and the following items as questions B.1 through B.5?

(8) "Instructions" number 6 states that "The information requested herein must be provided even though Respondent may contend that it includes confidential information or trade secrets."

(a) Does EPA assert that the request for information requires disclosure to EPA of information which is covered by the deliberative process privilege, attorney-client communication privilege, attorney work product privilege, or other privileges recognized under the Freedom of Information Act (FOIA, 5 USC § 552(a))? If so, please explain why.

(9) Item 7 of "Instructions" asks BBWI to include with the information submitted a "certification" with a prescribed text and a notarized signature of an individual making the certification.

(a) What is the authority for EPA to require such a notarized certification? There is no language in § 104(e) of CERCLA or in the National Contingency Plan that refers to a requirement that information or documents submitted be certified, nor is the content of a certification prescribed.

(10) Item 5 under "Definitions" attached to the EPA letter states that "The term 'U.S. Department of Energy' or 'Energy' shall include its officers, managers, employees, contractors, trustees, partners, successors, assigns, and agents."

(a) Since BBWI is a contractor of DOE-ID, is BBWI therefore encompassed within the term "Energy" for purposes of Questions B.1 through B.5? Was it EPA's intent to reach communications which were internal to BBWI rather than communications made to DOE-ID?

(11) Paragraph A.2. of the EPA "Questions" states:

Describe and provide all documents concerning acts or omissions of any persons, including your employees, agents, or those persons with whom you have or had a contractual relationship, that may have caused delay or non-compliance with the terms of the FFA/CO, critical path schedules, and/or performance requirements as applies to remedial activities at the Radioactive Waste Management Complex (RWMC), Subsurface Disposal Area (SDA).

Due to the sweeping nature of this request, immediately followed as it is by similar and somewhat more specific questions, are we correct in our understanding that this item is, like item A.1, a general guide referring to the specific questions in B.1. through B.5.?

(12) Since the official abbreviation for Bechtel BWXT Idaho, LLC, is "BBWI," reflecting its nature as a joint enterprise of multiple entities, including a consortium of universities, we request that any further references in official correspondence either state the name of our company in full or use its official abbreviation. Use of other terms could be misleading.