U.S Environmental Protection Agency U.S. Department of Justice

MEMORANDUM

SUBJECT: Use of CERCLA § 106 to Address Endangerments That May Also Be Addressed Under Other Environmental Statutes

FROM: Barry N. Breen, Director
Office of Site Remediation Enforcement
Office of Enforcement and Compliance Assurance

Eric V. Schaeffer, Director
Office of Regulatory Enforcement
Office of Enforcement and Compliance Assurance

Bruce Gelber, Chief
Environmental Enforcement Section
Environment and Natural Resources Division
Department of Justice

TO: Regional Counsel, Regions I-X
Regional Enforcement Division Directors, Region I-X
Regional Enforcement Coordinators, Regions I-X

This memorandum discusses the use of Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9606 (CERCLA § 106), to address imminent and substantial endangerments ("ISE") that may also be addressed by other environmental statutes (hereafter, "cross-media situations"). For purposes of this memorandum, cross-media situations are ISE situations that: (1) call for action other than cleaning up abandoned hazardous waste sites (e.g., a cease and desist order, an order to install certain pollution control equipment, or an order to shut down an operating plant temporarily or permanently); or (2) call for cleanup, but at sites and/or under circumstances that may ordinarily be addressed by another statutory authority (e.g., cleanup at an operating RCRA-permitted facility). While we neither anticipate nor advocate using Section 106 in every situation, EPA and DOJ agree that we should not rule out using Section 106 in innovative ways to address cross-media situations where an informed, thorough analysis has been undertaken and such use is advantageous and warranted. This memorandum discusses the factors and considerations that should be analyzed when determining whether to use Section 106 in cross-media situations.

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First, this memorandum will provide a brief background regarding EPA's use of ISE authorities to address endangerments. Second, the memorandum will provide an analytical framework for determining whether it is appropriate to use CERCLA § 106 in a cross-media ISE situation. Third, the memorandum will discuss certain misconceptions sometimes associated with the use of CERCLA § 106. Fourth, because cross-media situations may in some circumstances call for the combined strengths of two or more ISE authorities, the memorandum will highlight some implementation issues that must be confronted when using Section 106 in conjunction with another ISE authority. Finally, the memorandum will describe the procedure EPA headquarters and DOJ have developed to assist the Regions to address complex ISE issues expeditiously, and will request that each Region establish its own internal procedure for doing so.

I. BACKGROUND

EPA is committed to promoting the effective use of its ISE authorities to address endangerments to human health and the environment. In August 1997, the Office of Regulatory Enforcement ("ORE") established a multi-office team to assist Regions in making the most effective use of ISE authorities. Because the Agency has historically had a media-based organizational structure, each media enforcement program has tended to look only to the statute with which it is most familiar when determining whether a situation presents an ISE and if it does, what remedies may be sought. In order to ensure the most effective use of our ISE authorities, we are promoting an analytical approach that transcends media boundaries.

To this end, we strongly believe that EPA and DOJ should follow a common sense approach to determining the most effective authority to address a particular endangerment. When determining how best to tackle a specific ISE, we should analyze the strengths and weaknesses of each potentially applicable ISE authority. In some cases, a single authority may be the most appropriate tool to effectively address an ISE. In other situations, a combination of two or more authorities may be appropriate. The analysis of the appropriate authority or authorities must be undertaken on a case-by-case basis and will, of course, be intensely fact-specific.[1] For example, if waste in water is presenting an ISE, EPA may choose to issue an order under Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (RCRA § 7003) under certain circumstances such as insufficient time to commence a civil action or seek a judicial order as required by Section 504 of the Clean Water Act, 33 U.S.C. § 1365 (CWA § 504). In order to be effective, this cross-media approach to addressing ISE will require close intra-Region coordination, particularly in Regions that are not organized on a multi-media basis. Non-Superfund attorneys or program personnel who wish to rely on CERCLA § 106 to address an ISE should obtain the approval of the Regional official to whom Section 106 authority has been delegated.

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[1] This memorandum is not intended to provide an overview of all ISE authorities. For a quick comparison of ISE authorities, *see* Chart entitled "Comparison of RCRA § 7003 to Other Enforcement and Response Authorities," Attachment 2 of "Guidance on the Use of Section 7003 of RCRA," S. Herman, Oct. 20, 1997, at Appendix A.

In encouraging this cross-media ISE approach, it has become evident that, because of its unique strengths and broad applicability, CERCLA § 106 is frequently looked to as an alternative or additional ISE authority. This has raised the need for guidance on what factors to weigh when considering the use of Section 106 outside the context of cleaning up abandoned hazardous waste sites. It is imperative that we build experience and good precedent under other, less-used ISE authorities. Thus, for example, where an ISE situation presents primarily air release issues and it appears that the CAA's primary regulatory or ISE authorities are capable of addressing the ISE, the CAA authorities should generally be used. Section 106 should not be used as a "default" ISE authority in cross-media situations. At the same time, however, EPA and DOJ recognize Section 106's unique strengths and encourage its use where appropriate, whether as a stand-alone authority or in conjunction with another ISE authority. An analytical framework for considering the use of Section 106 in cross-media situations is provided below.

II. ANALYTICAL FRAMEWORK FOR USE OF CERCLA § 106 IN CROSS-MEDIA SITUATIONS

The analysis of whether to use CERCLA § 106 in a cross-media situation consists of three steps. First, a case team must determine whether there is evidence to support each of CERCLA § 106's statutorily required elements. If not, then Section 106 should not be invoked. Second, if each required element of CERCLA § 106 is met, then the case team should consider Section 106's unique strengths and determine whether these strengths make it the appropriate authority, or one of the appropriate authorities, to use in a cross-media situation. Third, the case team must weigh whether there are special considerations peculiar to Section 106 that may make it inappropriate for use in lieu of or in conjunction with another ISE authority in a cross-media situation. Much of this analysis is also applicable to traditional CERCLA § 106 situations involving site cleanup.[2] Each step of this analysis is discussed further below.

A. Step 1: CERCLA § 106's Required Elements

[2] For guidance on the use of Section 106 in traditional cases, *see*, *e.g.*, "Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions," Don R. Clay, March 7, 1990, OSWER Directive No. 9833.0-1a; "Guidance on CERCLA Section 106 Judicial Actions," Edward E. Reich and J. Winston Porter, February 24, 1989, OSWER Directive No. 9835.7; "Issuance of Administrative Orders for Immediate Removal Actions," Lee M. Thomas, February 21, 1984, OSWER Directive No. 9833.1.

Section 106(a) provides that EPA may request judicial action when it finds that there may be an ISE to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility.[3] Although Section 106(a) does not explicitly impose the same requirements for administrative orders, EPA generally meets the same requirements for such orders. Therefore, in order to invoke Section 106, the Agency should have evidence of each of the following elements: (1) a possible imminent and substantial endangerment; (2) because of an actual or threatened release; (3) of a hazardous substance; (4) from a facility. Furthermore, the Agency must determine that it is seeking action under Section 106 from an appropriate person. Finally, before a Section 106 order ("unilateral administrative order" or "UAO") may be issued, the affected state must be notified. Each of these required elements is discussed further below.

(i) Possible Imminent and Substantial Endangerment

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[3] CERCLA § 106(a) provides:

> In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this Section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

In order to invoke Section 106, EPA should determine that conditions may present an ISE to public health or welfare or the environment. Generally, the Agency should rely on scientific evidence and documentation in order to demonstrate the existence of conditions that may present an ISE and should carefully tailor the relief requested to address the ISE. The Agency, however, has great latitude to determine when there may be an ISE. Courts have held that an "endangerment" is not necessarily an actual harm, but may be a threatened or potential harm. A risk of harm may suffice, and the risk need not be quantified. *B.F. Goodrich Co. v. Murtha,* 697 F. Supp. 89, 96 (D. Conn. 1988). Courts have also held that an endangerment may be "imminent" if factors giving rise to it are present, even though the harm may not be realized for years. *United States v. Conservation Chemical*, 619 F. Supp. 162, 193 (W.D. Mo. 1985). Courts have also interpreted "substantial" broadly, to mean a reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of a hazardous substance. *Id.* at 194. Finally, at least one court has also interpreted "public health or welfare or the environment" broadly, to include health, safety, recreational, aesthetic, environmental and economic interests. *Id.* at 192.[4]

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[4] For cases where courts have found ISE under CERCLA and other authorities, *see, e.g., United States v. Hardage*, 761 F. Supp. 1501 (W.D. Okla. 1990) (finding that hazardous substances in groundwater traveling toward an aquifer posed an ISE); *B.F. Goodrich Co. v. Murtha*, 697 F. Supp. 89 (D. Conn. 1988) (concluding that hazardous substances which posed a risk of migrating from a landfill through groundwater to nearby residential wells and brook qualified as an ISE); *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991) (finding that leachate from city landfill presented an ISE to the soil, groundwater, and surface waters under RCRA and CWA), *cert. granted in part*, 502 U.S. 1071 (1992)*, and rev'd in part on other grounds,* 505 U.S. 557 (1992); *United States v. Northeastern Pharmaceutical and Chemical Co. ("NEPACCO I")*, 579 F. Supp. 823 (W.D. Mo. 1984) (finding that small quantities of highly toxic hazardous substances that were reasonably likely to enter groundwater and contaminate drinking water supply posed an ISE), *aff'd in part, rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *United States v. Valentine*, 856 F. Supp. 621 (D. Wyo. 1993) (concluding that site of oil reclaiming facility posed an ISE under RCRA due to substantial risk of death and injury to wildlife); *United States v. Vertac*, 489 F. Supp. 870, 885 (E.D. Ark. 1980) (finding an ISE under RCRA and CWA based upon "acceptable but unproved theory" that dioxin, which was escaping from herbicide manufacturer's plant into navigable waters, created a "reasonable medical concern over the public health"). For additional cases discussing ISE, *see also* "Guidance on the Use of Section 7003 of RCRA," S. Herman, October 1997.

(ii) an actual or threatened release

CERCLA § 101(22) defines "release" as any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. A release is usually observable in some manner, whether visually or through analysis showing the presence of hazardous substances in samples of soil, water, or air. Section 106 explicitly states that, in addition to actual releases, a *threat* of a release may pose an ISE (e.g., a surface impoundment about to overflow because of rain may present a threat of a release).

Although the definition of "release" under CERCLA is very broad, certain activities are excluded. For example, Section 101(22) excludes from the definition "any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons . . .; emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine. . . ; release of a source, byproduct, or special nuclear material from a nuclear incident . . ." and the normal application of fertilizer.

(iii) hazardous substance

CERCLA § 101(14) generally defines "hazardous substance" by referring to substances, wastes or pollutants designated in other environmental statutes.[5] Although this definition is very broad, there are some notable exceptions. For example, petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated, is not a hazardous substance. Also excluded from the definition of hazardous substance are natural gas and synthetic gas useable for fuel.

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[5] CERCLA § 101(14) provides:

> The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

(iv) facility

CERCLA § 101(9) defines facility as " any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or . . . any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel." When read in conjunction with CERCLA § 101(17) and (18), this definition includes any on-shore or off-shore sites, including land transportation facilities, from which releases or threats of releases may originate.

(v) appropriate order recipient

See also 40 C.F.R. §§ 300.5, 302.4.

Section 106 does not specify the persons from whom EPA may seek abatement action. EPA typically seeks judicial action against or issues orders under Section 106 to persons liable under Section 107(a): current owners and operators, owners and operators at the time of disposal, arrangers for disposal or treatment, and transporters. However, in appropriate cases, EPA may seek Section 106 action from persons other than those specified in Section 107(a), if actions by such persons are necessary to protect the public health, welfare, or the environment. For example, EPA has successfully issued a Section 106 order to the owner of land adjoining a site when it was necessary to obtain site access.[6] Where EPA plans to take action under Section 106 against persons who are not otherwise liable under Section 107(a), the Regions should generally consult with DOJ. Such DOJ consultation may not be necessary in emergent situations, however, where there is insufficient time to consult (e.g., time-critical removal actions). The concurrence of the Attorney General is required before a Section 106 order may be issued to an Executive department or agency. Exec. Order No. 12,580, 52 Fed. Reg. 2,923 (1987).

(vi) notice to the affected state

Finally, EPA must notify the affected state before issuing an order. CERCLA § 106(a). The Agency has interpreted "affected state" to be the state where the facility is located and in which the action ordered will be conducted. The required notice, which can be either in writing or oral, is usually given to the director of the state's pollution control agency.

B. Step 2: CERCLA § 106's Strengths

Assuming that there is evidence to support each of CERCLA § 106's required elements, a Regional case team should consider Section 106's unique strengths in order to determine whether the use of Section 106 authority would increase the United States' ability to obtain compliance with, or to enforce, the order. For example, Section 106 requires a showing that there "*may* be" an imminent and substantial endangerment. CERCLA § 106(a) (emphasis added).[7] It should be noted that other authorities, such as CWA § 504 and CAA § 303, require a showing that a source or combination of sources "*is* presenting" an ISE.[8]

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[6] EPA usually uses Section 104(e)'s access authority to obtain site access, but has also successfully invoked Section 106 for this purpose. *See B.F. Goodrich Co. v. Murtha*, 697 F. Supp. 89, 94 (D. Conn. 1988) (upholding use of Section 106 order to obtain site access, stating that Section 106 "is broadly worded to authorize all relief 'necessary to abate [the] danger or threat.'")

[7] RCRA § 7003 and CWA § 311(c) also require a showing that there *may* be an imminent and substantial endangerment.

[8] The "may present" language in CERCLA makes it a particularly effective ISE authority. However, it is the Agency's position that Congress did not intend to create less protection for the public or the environment by employing "is presenting" language in other ISE

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authorities. *See* Guidance on Section 303 of the Clean Air Act, E. Schaeffer, April 1, 1999, at 8. Case law and legislative history support the Agency's position. For example, the House Report on the CAA Amendments of 1977 provides: "In retaining the word 'imminent and substantial endangerment. . . ,' the committee intends that the authority of this section not be used where the risk of harm is completely speculative in nature or where the harm threatened is insubstantial. However, . . . the committee intends that this language be construed by the courts and the Administrator so as to give paramount importance to the objective of protection of the public health. Administrative and judicial implementation of this authority must occur early enough to prevent the potential hazard from materializing." H.R. Rep. No. 95-294 (1977). Further, courts evaluating claims under EPA's various ISE authorities generally view the judicial precedent under these laws as equally applicable in any given case. *See, e.g., United States v. Price*, 688 F.2d 204, 211 (noting the similarity in Congressional intent underlying RCRA § 7003 and SDWA § 1431); *United States v. Hooker Chems & Plastics Corp.*, 749 F.2d 968, 981-82 (2d Cir. 1984) (holding that "[t]he similarity between the CWA and the later enacted SDWA and RCRA leads us to read all three acts in a similar manner."); *NEPACCO I*, 579 F. Supp. at 846 (noting similarity of CERCLA § 106(a) and RCRA § 7003).

CERCLA § 106 may apply to a broader range of parties than other ISE authorities. For example, Section 106 could be used to require the current owner of a facility to take action at a site to address an ISE, if the United States may have difficulty otherwise taking action under RCRA § 7003. Unlike CERCLA, which defines current owners as per se liable parties pursuant to Section 107(a)(1), the authority of RCRA § 7003 is contingent on whether a person "has contributed to or is contributing to" the handling, storage, treatment, transportation or disposal leading to the endangerment.[9]

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[9] Some courts have found that current owners may have contributed to an ISE under RCRA because the waste was leaking while they owned the property, even though the waste was originally deposited by a previous owner. *See, e.g., Zands v. Nelson*, 779 F. Supp. 1254, 1264 (S.D. Cal. 1991) (denying defendants' summary judgment motion in suit brought under RCRA § 7002(a)(1)(B), stating that defendants who owned the land while gasoline allegedly leaked may be contributors under the statute); *United States v. Price*, 523 F. Supp. 1055, 1073 (D.N.J. 1994) (denying current owner defendants' summary judgment motion and noting that defendants were contributing to the disposal of wastes "merely by virtue of their studied indifference to the hazardous condition that now exists."), *aff'd*, 688 F.2d 204 (3rd Cir. 1982); *but see, e.g., First San Diego Properties v. Exxon Co.*, 859 F. Supp. 1313, 1315-16 (S.D. Cal. 1994) (holding current owner of previously contaminated property that took no or inadequate steps to mitigate/remediate the harm, but also did not affirmatively add wastes to the site, was not liable under RCRA
§ 7002(a)(1)(B)).

Section 106's reach is also very broad in terms of the endangerments it may address: endangerments to human health or welfare or the environment.[10] Some other ISE authorities may be more limited in this regard. For example, Section 1431 of the Safe Drinking Water Act, 42 U.S.C. § 300i (SDWA § 1431), may only be used to address endangerments to the health of persons or when necessary to protect an underground source of drinking water. Similarly, CWA § 311(c) and (e) and CWA § 504 may be used to address endangerments to public health or welfare, but do not explicitly address endangerments to the environment.

In addition, CERCLA § 106 does not limit the duration of administrative orders, unlike orders issued under CAA § 303.[11]

Further, CERCLA can provide more enforcement options in the event of noncompliance in comparison to some other ISE authorities. All ISE authorities enable EPA to seek judicial enforcement to compel compliance and exact penalties if order recipients do not comply with an order. Under CERCLA, however, if the respondent fails without sufficient cause to comply with the order, EPA may conduct the response action and then seek to recover its response costs,[12] and punitive damages up to three times the amount of its response costs,[13] and may also seek civil penalties up to $27,500 per day for a violation of the order.[14] The significant penalties

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[10] Similarly, CAA § 303 explicitly reaches endangerments to "public health or welfare or the environment."

[11] CAA § 303 orders are limited in duration to 60 days. If relief is required for more than 60 days, the United States must bring suit in district court, either as an initial action, or following the issuance of an administrative order.

[12] The availability of Fund money is not automatically assured, however, in the event of noncompliance, *see* discussion *infra* at 14-15.

[13] Pursuant to CERCLA § 107(c)(3), the agency may assess punitive damages of up to three times the amount of cleanup costs as a result of noncompliance. *See, e.g., United States v. Parsons*, 723 F. Supp. 757, 763 (N.D. Ga. 1989), *vacated on other grounds*, 936 F.2d 526 (11th Cir. 1991) (holding that treble damages are assessed in addition to the response costs for which a potentially responsible party ("PRP") is liable; therefore, a court may award the government four times its response costs).

[14] Pursuant to CERCLA § 106(b), EPA may fine order recipients who willfully violate or fail or refuse to comply with a UAO $27,500 for each day of noncompliance. Section 106 provides for penalties of $25,000 per day, however, this amount was adjusted to $27,500 per day for noncompliance that occurs subsequent to January 30, 1997, pursuant to EPA's Civil Monetary Penalty Inflation Adjustment Rule ("Inflation Adjustment Rule"), 40 C.F.R. § 19.4, (implementing the Debt Collection Improvement Act of 1996). *See* Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

for failure to comply with a CERCLA order make Section 106 a particularly effective enforcement tool, especially when compared to the penalties for noncompliance available under other ISE statutes.[15]

[15] For example, RCRA § 7003(b) provides that any person who willfully violates or fails or refuses to comply with a RCRA § 7003(a) order may be fined not more than $5,500 (as adjusted by the Inflation Adjustment Rule) for each day in which such violation occurs or the failure to comply continues. SDWA § 1431(b) provides that any person who violates or fails to comply with a SDWA § 1431(a) order may be subject to a civil penalty of not more than $15,000 for each day in which the violation occurs or failure to comply continues. Further, neither of these authorities provides for punitive damages.

CERCLA generally precludes judicial review of a Section 106 administrative order at the time it is issued. A court may review Section 106 orders only in specific, limited circumstances.[16] This explicit bar to pre-enforcement review is another asset that makes Section 106 more advantageous than some of the other ISE authorities.[17]

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[16] CERCLA § 113(h) provides that Section 106 UAOs may be challenged only during:

1. a cost recovery or contribution action under Section 107;
2. an action by EPA to enforce the UAO and/or to recover penalties for noncompliance;
3. an action by an order recipient for reimbursement under § 106(b)(2)(B);
4. a citizen suit action alleging that a remedial or removal action taken under section 104 or secured under section 106 was in violation of CERCLA;
5. an action by EPA under section 106 to compel remedial action.

[17] Although RCRA § 7003 does not explicitly address pre-enforcement review, courts have held that Section 7003 orders are also generally not subject to pre-enforcement review. *See, e.g., Mohave County v. United States Environmental Protection Agency*, Case No. 99-CIV-1329-PCT-RGS (D. Ariz., Sept. 26, 2000) (holding that there is no pre-enforcement review of RCRA § 7003 orders); *Ross Incineration Services, Inc. v. Browner*, 118 F. Supp.2d 837 (N.D. Ohio, 2000) (same holding); *see also United States v. Valentine*, 856 F. Supp. 621 (D. Wyo., 1994) (rejecting defendant's argument that it was denied due process because it was not provided with the opportunity for a hearing prior to the issuance of a Section 7003 order); *United States v. Mobil Oil Corp.*, Civ. No. 96-CV-1432, 1997 WL 1048911 (E.D.N.Y. Sept. 11, 1997) (focusing on pre-enforcement review of Section 3013 orders and concluding that Congress intended RCRA to preclude pre-enforcement judicial review. "The statutory approach to the problem of hazardous waste is inconsistent with the delay that would accompany pre-enforcement review. . . ." (quoting *Lone Pine Steering Committee v. EPA*, 777 F.2d 882, 886-87 (3d Cir. 1985)). In addition, the legislative history of CAA § 303 indicates that Section 303 orders are not subject to pre-enforcement review: "Several courts have specifically considered whether Section 307(b)(1) provides pre-enforcement review of administrative orders. As noted in Sen. Rpt. 101-228, at 367, the Second, Third, and Eighth Circuits have already resolved this issued [sic] and, as such, except with respect to judicial review of administrative penalty assessments and orders, there is no opportunity for preenforcement review and no new statutory language addressing the issue is necessary." 136 Cong. Rec. S16953 (daily ed. Oct. 27, 1990).

When the validity of a Section 106 order is properly before a court, Section 113(j)(1)[18] provides that judicial review of any issues concerning the adequacy of any response action is limited to the administrative record. CERCLA § 113(j)(2)[19] provides that the court must uphold the Agency's decision in selecting a response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law. This explicit standard of judicial review, the most deferential to Agency action, is another reason Section 106 is such a powerful ISE authority.[20]

C. Step 3: Unique CERCLA § 106 Considerations

Assuming that there is evidence to support each of Section 106's statutorily required elements and that the analysis of Section 106's strengths leads the Region to believe it would be an effective ISE authority to use in a cross-media situation, the Region must next analyze whether there are special considerations peculiar to Section 106 that may make it inappropriate for use in lieu of or in conjunction with another ISE authority in a cross-media situation. In particular, the Region must consider the vulnerability of the Fund, the applicability of the NCP and the risk of generating unfavorable precedent for the United States under Section 106.

(i) Risk to the Fund

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[18] CERCLA § 113(j)(1) provides:

> In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

[19] CERCLA § 113(j)(2) provides:

> In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

[20] EPA and DOJ maintain that the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, mandates record review under other environmental statutes, e.g., RCRA, which, unlike CERCLA, are silent on this issue. Section 706 of the APA provides for review of Agency actions, including Agency orders, and generally limits review of Agency action to review of the administrative record compiled by the Agency. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414-417 (1971). *See also United States v. Seafab Metal Corp.,* 18 Envtl. L. Rep. 21024 (W.D. Wash. 1988).

Significantly, Section 106 is the only ISE authority that allows parties to seek reimbursement of their costs of complying with an order. CERCLA § 106(b) allows parties that have complied with a Section 106 order to petition for reimbursement of reasonable costs of complying with an order from the Fund.[21] The vulnerability of the Fund is a factor unique to CERCLA that must be analyzed carefully when considering the use of Section 106 in a cross-media situation. The case team considering using Section 106 must assess the likelihood that an order recipient will file and prevail on a Section 106(b) petition for reimbursement before deciding to use Section 106.

In order to prevail on a Section 106(b) petition, the petitioner must either establish by a preponderance of the evidence that it is not a CERCLA § 107 liable party, or demonstrate, on the administrative record, that the selected response action was arbitrary and capricious, or was otherwise not in accordance with law. CERCLA § 106(b)(2)(C), (D). [22]

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[21] CERCLA § 106(b) provides in relevant part:

> Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest.

[22] CERCLA § 106(b)(2)(C) provides:

> Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

CERCLA § 106(b)(2)(D) provides:

> A petitioner who is liable for response costs under section 9607(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

Because there is limited experience, guidance, and case law on Section 106 orders not dealing with site cleanup, it may be particularly difficult to assess the risk to the Fund posed by such orders. If there is a risk that the response action could ultimately be found to be arbitrary and capricious or otherwise not in accordance with law, or if the PRP can establish that it is not a liable party, then the risks to the Fund may outweigh the other benefits that Section 106 may bring to the United States' case. This risk/benefit analysis must be undertaken on a case-by-case basis.[23]

(ii) The NCP

Before deciding to use Section 106 in a cross-media situation, the Region must consider the applicability of the National Contingency Plan ("NCP"), 40 C.F.R. § 300 *et seq.* The NCP provides a blueprint for how to select and carry out response actions. Compliance with the NCP is not necessarily an impediment to using Section 106; rather, it is a requirement that must be factored into the analysis of whether and how to use Section 106 in a cross-media situation, whether as a stand alone or additional ISE authority.

The NCP provides methods for evaluating and responding to releases or threats of releases from facilities which pose substantial danger to the public health or the environment. CERCLA § 105(a). By its terms, the NCP applies to "response actions." 40 C.F.R. § 300.2.[24] The NCP also states that it applies to releases of hazardous substances into the environment "which may present an imminent and substantial danger to the public health or welfare." 40 C.F.R. § 300.3(a)(2).

(iii) Precedent

Although this consideration is not unique to CERCLA § 106, a case team should assess

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[23] Regions must obtain Office of Site Remediation Enforcement concurrence on substantive pleadings pertaining to Section 106(b) petitions before the Environmental Appeals Board. "Revised Procedures to Strengthen Enforcement Program's Advocacy in Environmental Appeals Board Matters," S. Herman, Aug. 7, 2000, at 10. In addition, OGC has a formal concurrence role on all EAB matters involving CERCLA § 106(b) petitions. *Id.* at 2.

[24] CERCLA § 101(25) defines "response action" as follows:

> The terms "respond" or "response" means remove, removal, remedy, remedial action; all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

40 C.F.R. § 300.5 refers to the definition in CERCLA § 101(25). The terms "remove," "removal," "remedy," and "remedial action" are further defined in CERCLA §§ 101(23) and 101(24).

the likelihood that the use of Section 106 in the cross-media situation at hand could generate unfavorable precedent for the United States. Given the generally favorable case law to date upholding the Agency's broad authority under CERCLA § 106, Regions should be sensitive to the importance of maintaining Section 106 as a credible enforcement threat to parties causing endangerments.

Finally, as stated previously, Regions should be mindful of the Agency's desire to develop experience under other, less-used ISE authorities. Therefore, as stated above, where an ISE situation presents, for example, primarily air release issues and it appears that the CAA's regulatory or ISE authorities are capable of addressing the ISE, the CAA authorities should generally be used. CERCLA § 106 should not necessarily be used in all cross-media situations, but only in those cases where there are limitations to the use of another ISE authority as applied to a particular set of facts, or where the analysis of Section 106's unique strengths and special considerations leads to the conclusion that it will be either useful or necessary to achieve EPA's goals in a particular case.

III. POTENTIAL MISCONCEPTIONS ASSOCIATED WITH USE OF CERCLA § 106

This section addresses certain misconceptions sometimes associated with the use of CERCLA § 106. First, it should not be assumed that citing Section 106 in an order or complaint ensures access to Fund money in the event of noncompliance. Second, using Section 106 in conjunction with another ISE authority does not mean that Superfund resources or personnel will be necessary or available to address the ISE. These potential misconceptions are explored further below.

A. Access to Fund Money

The existence of the Fund and EPA's ability to use Fund money to conduct site cleanups makes CERCLA a particularly potent tool. As previously indicated, if an order recipient fails or refuses to comply with an order, EPA may choose to conduct the ordered actions using Fund money, and to subsequently file an action against the recalcitrant parties to recoup its response costs and up to three times that amount in damages. The Agency's ability under CERCLA to act expeditiously to address an ISE in the event of noncompliance with an order greatly contributes to the effectiveness of Section 106 as an ISE authority. The Fund, however, is a limited resource which must be used judiciously.

In an effort to prioritize the use of this limited resource, Regions are required to submit certain requests for Fund money to the National Prioritization Panel ('the Panel"). The Panel reviews requests for new Fund-lead remedial action starts.[25] It also reviews requests for new

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[25] The panel also reviews requests for: (1) mixed work settlements, pursuant to which EPA performs part of the response action using Fund money, and PRPs perform the rest of the response action; and (2) pre-authorized mixed funding settlements, pursuant to which PRPs

Fund-lead removal starts that the Region cannot address with its existing budget for removals. The panel assigns a score, based primarily on the risk posed by the particular site, to each request. The Office of Emergency and Remedial Response ("OERR") and the Office of Site Remediation Enforcement ("OSRE") take the Panel's scores into consideration in deciding how to allocate Fund monies. These headquarters offices also consider the potential loss of deterrence that might result from a failure to provide Fund monies for an EPA-lead cleanup in the face of recalcitrant PRPs.

The purpose of the Panel is to ensure that sites posing the greatest risks receive priority for Fund money, recognizing that there are many more sites posing endangerments than there is Fund money to address these sites. Even if a site presents an ISE under CERCLA, it may not be a priority for the use of Fund money when compared to other sites competing for Fund money. This does not mean that there is a higher ISE standard under CERCLA than under other ISE authorities. Rather, it may mean that a particular site, when compared to other sites posing greater or more immediate danger, does not warrant the use of limited Fund money. Thus, when there is a significant likelihood that an order recipient will refuse or be unable to comply with an order (e.g., because of a history of recalcitrance or lack of adequate financial resources), and the case team anticipates that a Fund-financed action will ultimately be necessary, the team should consult early with Regional Superfund program personnel and, as necessary, OERR and OSRE personnel, regarding the procedures for requesting funding and the likelihood of obtaining it.

The Region should carefully consider the consequences of possibly not having Fund money available to address an ISE after citing Section 106 and later discovering that the order recipient is unable to perform the required action. As noted above, one of the qualities that makes Section 106 a particularly effective enforcement tool is that if an order recipient does not comply, the Agency may undertake the action itself and then sue the order recipient to recover the costs of its response, penalties, and punitive damages. It is important to preserve Agency action in the face of noncompliance as a credible threat. Of course, EPA could always seek judicial enforcement of the order under Section 106 as well.

B. Access to Other Superfund Resources

Regions should also be aware that exercising the authority of Section 106 in conjunction with another ISE authority does not mean that other Superfund resources or personnel (e.g., attorneys, on-scene coordinators, remedial project managers, investigators) will be necessary or available to address the ISE. In the event that the action required by the joint authority order is one that could be required by the non-Superfund authority alone, it may be most appropriate and cost effective for the other media office to finance and staff the Agency's role in overseeing the order recipient's implementation of the required actions. In the event that the action ordered or taken (or part thereof) is one that can only be required or taken pursuant to CERCLA, then it may

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conduct the response action and EPA agrees to allow the PRPs to bring a claim against the Fund for a portion of their costs.

become necessary for Superfund staff to become involved or take the lead, or for applicable delegations currently delegating to Superfund personnel the President's authority to oversee and/or conduct response actions to be modified to allow delegation to personnel in the other media program. Where any staff, Superfund or non-Superfund, are involved in issuing or enforcing a Section 106 order, and when Superfund resources are involved, Regions should ensure that appropriate Superfund accounts are charged. Similarly, DOJ expenses should be charged appropriately between Superfund and other media accounts.

IV. USE OF SECTION 106 WITH OTHER ISE AUTHORITIES: IMPLEMENTATION CONSIDERATIONS

If, after conducting the three-step analysis outlined above, a Region determines that CERCLA § 106 should be used in conjunction with another ISE authority to address an endangerment in a cross-media situation, the Region will need to address a number of implementation issues. This section highlights some of these issues.

A. NCP Applicability

As discussed above, Regions must consider the applicability of the NCP when using Section 106 in a cross-media situation. The applicability of both the particular provisions of the NCP and the procedural, due process, and guidance requirements of the other ISE authority of a joint authority order will depend on a number of factors, such as the type of action being ordered. For example, if a Region wishes to issue a joint CERCLA § 106 and RCRA § 7003 order, the Region would be required to follow the NCP administrative record requirements, even though these procedures are mandated only under CERCLA. While no such requirements are expressly stated under RCRA, the Region should still compile an administrative record when using RCRA § 7003 to facilitate review of the order on the record under the Administrative Procedure Act. Similarly, the NCP requirement[26] that an on scene coordinator (OSC) oversee PRP actions at a site may not present an obstacle to using Section 106 with another ISE authority because OSCs may designate capable persons from federal, state or local agencies to act as their on-scene representatives.[27] Therefore, if it makes more sense for an engineer or environmental scientist from the Regional water enforcement division to oversee actions at the site, for example, the OSC could designate that person to be his representative on site.

B. Pre-Enforcement Review

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[26] 40 C.F.R. § 300.120(a).

[27] 40 C.F.R. § 300.135(d).

As discussed above, pursuant to CERCLA § 113(h), no challenge to a removal or remedial action or Section 106 order may occur prior to the completion of the cleanup, except in limited circumstances. *Alabama v. EPA*, 871 F.2d 1548, 1557 (11th Cir. 1989); *Schalk v. Reilly*, 900 F.3d 1091 (7th Cir. 1990). Courts have held that Section 113(h) precludes any challenges to CERCLA removal or remedial actions, not simply those brought under the provisions of CERCLA itself.[28] Courts have barred the pre-enforcement review of orders issued under other ISE authorities as well.[29] Issuance of an order under the joint authority of Section 106 and other statutes may raise novel questions regarding judicial review, which should be considered before the order is issued.

C. Penalties

When Section 106 is used in conjunction with another ISE authority that calls for different penalty amounts in the event of noncompliance, it is the Agency's position that the penalties accrue separately for violations of each statutory authority. EPA and DOJ may decide, however, to combine these penalties (seeking the higher one, perhaps) for purposes of settlement.

D. Delegations

Regions will also have to consider the issue of delegations in the event that they decide to use Section 106 in conjunction with another ISE authority (or authorities). The authority to take and/or order certain actions has been delegated to different people under different ISE authorities, sometimes making it necessary for multiple people to sign an order. This is compounded by the fact that different delegations are in effect in different Regions. Thus, for example, in one Region the division director may be responsible for signing Section 106 orders, whereas a branch chief may be responsible for signing RCRA § 7003 orders. Particularly where there is a disagreement between these two offices regarding the wisdom of using both authorities, or the particulars of how to accomplish various goals under the order, the delegations issue may present an obstacle to taking action under more than one ISE authority. For this reason, such orders should generally be approved by consistent levels of management for each medium involved.

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[28] *See, e.g., McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995) (holding that "Section 113(h) withholds federal jurisdiction to review any of plaintiff's claims, including those made in citizen suits and under non-CERCLA statutes, that are found to constitute 'challenges' to ongoing CERCLA cleanup actions."); *Arkansas Peace Center v. Arkansas Dept. of Pollution Control and Ecology*, 999 F.2d 1212 (8th Cir. 1993) (holding that challenge to remedial action, although brought under RCRA, was barred by Section 113(h)), *cert. denied*, 511 U.S. 1017 (1994); *United States v. Colorado*, 990 F.2d 1565, 1577 (10th Cir. 1993) ("the plain language of [Section 113(h)] bars federal courts from exercising jurisdiction, not only under CERCLA, but under any federal law to review a challenge to a CERCLA remedial action.").

[29] *See* Footnote 17, *supra*.

The Regional ISE contact should shepherd the order through the concurrence process on an expedited basis and a high-ranking Regional official with authority over all media programs (e.g., the Regional Counsel, Deputy Regional Administrator, or Regional Administrator) should oversee the resolution of complex delegations issues and ISE controversies at the Regional level.

E. Deviation from Models and Policies

We recognize that Regions must have some flexibility to deviate from model settlement agreements, orders and policy documents if they are to combine ISE authorities effectively. Frequently, a hybrid of the model agreements or orders applicable to the two or more authorities being used may need to be developed. Regions should consult with the appropriate contact on the Office of Enforcement and Compliance Assurance (OECA) ISE workgroup[30] regarding orders that deviate significantly from Agency models or that break new ground in an important, sensitive area.[31]

V. HEADQUARTERS PROCEDURES FOR ISSUE RESOLUTION

EPA headquarters and DOJ are committed to assisting the Regions to use ISE authorities effectively and to resolve complex ISE issues expeditiously. At EPA headquarters, the OECA ISE workgroup managed by the RCRA Enforcement Division will serve as a point of contact for the Regions to assist in the analysis of whether to use one or more authorities and to work through any complex implementation issues that may arise. In the Regions, Regional case teams should first contact the Regional ISE contact for assistance. Then the Regional ISE contact may bring the matter to the attention of the OECA ISE workgroup contact who will circulate the issue presented to the relevant workgroup members for resolution. Regional case teams may contact any member of the OECA ISE workgroup for assistance, and that workgroup member will ensure that the appropriate persons are involved in the analysis and resolution of any issues, and that any necessary headquarters consultation and concurrence requirements are fulfilled. The names and telephone numbers of OECA ISE workgroup members are listed in Appendix B.

At DOJ, Regions should consult either the Senior Attorney assigned to the case or the Assistant Section Chief for that Region. Alternatively, Regions should contact Matthew Morrison (202-514-3932) or Anna Thode (202-514-1113).

It is critical that each Region also establish a formal procedure for resolving ISE issues.

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[30] *See* Appendix B for OECA ISE workgroup members.

[31] The current models for CERCLA § 106 UAOs are: *Model Unilateral Administrative Order for Removal Response Activities,"* B. Diamond, Mar. 16, 1993, OSWER Dir. No. 9833.07; "*Model Unilateral Administrative Order for Remedial Design and Remedial Action Under Section 106 of CERCLA*," B. Diamond, Mar. 30, 1990, OSWER Dir. No. 9833.0-2(b).

As stated above, part of that procedure may involve the resolution of inconsistent delegations that present obstacles to using ISE authorities jointly when such orders are appropriate.

VI. USE AND PURPOSE OF THIS MEMORANDUM

This memorandum is intended exclusively as guidance for employees of EPA and DOJ. It is not a rule and does not create any legal rights or obligations. Whether and how EPA and DOJ apply the guidance set forth in this memorandum in any particular case will depend on the facts.

Attachments