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Use of CERCLA Section 106 Unilateral Enforcement for Remedial Design and Remedial Action: Strategy for Fiscal Year 1990

4. Summary of Directive (include brief statement of purpose)

Describes FY90 strategy for enhancing use of CERCLA Section 106 authorities, focusing significantly on UAOs for RD/RA

5. Keywords

Unilateral Administrative Orders (UAOs); CERCLA Section 106; RD/RA

6a. Does This Directive Supersede Previous Directive(s)?

☐ No

☒ Yes

What directive (number, title)
9870.1

b. Does It Supplement Previous Directive(s)?

☐ No

☒ Yes

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7. Draft Level

☐ A - Signed by AA/DAA

☒ B - Signed by Office Director

☐ C - For Review & Comment

☐ D - In Development

8. Document to be distributed to States by Headquarters?

☐ Yes

☒ No

This Request Meets OSWER Directives System Format Standards.

9. Signature of Lead Office Directives Coordinator

Darlene Williams

Date

2/14/90

10. Name and Title of Approving Official

Date

EPA Form 1315-17 (Rev. 8-87) Previous editions are obsolete.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

FEB 14 1990

Directive Number 9870.1A

MEMORANDUM

SUBJECT: Use of CERCLA Section 106 Unilateral Enforcement for Remedial Design and Remedial Action: Strategy for Fiscal Year 1990

FROM: Don R. Clay, Assistant Administrator
Office of Solid Waste and Emergency Response

James M. Strock, Assistant Administrator
Office of Enforcement and Compliance Monitoring

TO: Regional Administrators, Regions I - X

BACKGROUND AND PURPOSE

The Administrator's Management Review of Superfund emphasizes that the timely, routine and predictable use of unilateral administrative orders (UAOs) in the CERCLA enforcement process should help bring negotiations to a successful conclusion. The Review also views the timely use of UAOs, and subsequent judicial enforcement (through injunctive actions), as an integral component of the CERCLA cleanup process either prior to or as an alternative to proceeding with Fund-financed response.

The purpose of this memorandum is to describe a Fiscal Year 1990 strategy for enhancing the use of CERCLA Section 106 enforcement authorities, focusing on unilateral administrative orders for remedial design and remedial action (RD/RA), consistent with the Administrator's Management Review of Superfund. The Agency firmly believes that a credible CERCLA Section 106 enforcement program which provides strong incentives for PRP-conducted RD/RAs can be maintained through the use of and adherence to this strategy.

1 For a complete description of the recommendation for use of Section 106 enforcement authorities for RD/RA, see Chapter II of "A Management Review of the Superfund Program," June 1989, William K. Reilly, Administrator, U.S. EPA.

FISCAL YEAR 1990 NUMERICAL PROGRAM GOALS

The Agency's strategy for unilateral enforcement presumes generally that where there are viable PRPs, EPA will issue a UAO in the absence of a timely settlement agreement. As discussed during SCAP negotiations, approximately 37 sites were identified as candidates for UAOs in FY90. That number should be viewed as a minimum, because the entire thrust of this strategy is to make use of UAOs the preferred and predictable option whenever settlements are not achieved in a timely manner at candidate sites. In certain unusual situations, the Region may decide not to issue a UAO at a candidate site despite lack of settlement. For example, the necessary statutory requirements for unilateral enforcement may not be met, or strong policy considerations may exist for not issuing a UAO at a particular site. In all instances where orders are not issued, the Region is expected to issue a UAO at an appropriate alternate site, if one exists, in order to meet its annual target. Annual targets reflect minimum expectations. UAOs should be issued at all sites where appropriate.

We further expect that all Regions will take the necessary steps to follow up with judicial referrals wherever appropriate. Section 106 judicial enforcement can help in maintaining or increasing the pace of cleanups, particularly if there are sites that are not likely to receive funding due to limited RA funds. Judicial actions also help ensure that UAOs are taken seriously by PRPs. As noted in the Administrator's Management Review of Superfund, we will factor in these considerations when addressing individual cases where PRPs fail to comply with a UAO.

To report accomplishments in this area, we will continue to rely on CERCLIS. The Region must continue to make sure that these accomplishments are properly and routinely entered in CERCLIS. Headquarters has prepared and will issue quarterly standard reports for tracking and communicating enforcement results under this strategy. These reports will track the following items in FY90:

- o For RD/RAs, number of settlements forwarded to DOJ; number of UAOs issued; number of unilateral Section 106 referrals; percentage of new starts by PRPs; dollar value of PRP commitments; and number of negotiations meeting and exceeding planned timeframes.
- o For removals, number of administrative orders (unilateral and on consent); number of unilateral Section 106 referrals; and dollar value of PRP commitments.

In addition, Headquarters will continue to use monthly conference calls with the Regions for tracking progress of RD/RA settlement negotiations and unilateral enforcement.

PROCEDURES FOR SECTION 106 UNILATERAL ENFORCEMENT

This section outlines procedures the Region should follow for unilateral enforcement under Section 106 of CERCLA during FY90. EPA will make every effort to pursue unilateral enforcement in a timely manner, as consistent as possible with the goals set out in the forthcoming "Integrated Superfund Timeline."

Early Planning and Communication of the Use of UAOs for RD/RA

During FY90, the Region should employ two valuable tools in ensuring early planning for RD/RAs: site management plans and pre-referral litigation reports. The use of these planning tools should help quicken the pace of achieving settlements. To the extent that settlement cannot be reached in a timely manner, advance planning should assure satisfactory progress of cases to unilateral enforcement. Therefore, a site management plan coupled with the information in a pre-referral litigation report developed for each site with viable PRPs (regardless of whether a FY90 candidate for a UAO) should clearly articulate whether and when a UAO will be issued and any factors that may prevent the site from being a candidate for a UAO. At sites with viable PRPs a planning goal should be to issue special notice by the signature of the Record of Decision (ROD). At a minimum, the Region should be prepared to issue a UAO if the PRPs fail to provide a good faith settlement offer by the end of the first 60 days of the special notice moratorium, or if it is clear that no settlement will be achieved in the negotiation timeframe allowed. In addition, unless an extension of the negotiation period beyond the 120 day moratorium is justified by an agreement in principle and substantial progress in finalizing a consent decree, a planning goal should be to issue a UAO promptly after the 120 day moratorium expires. Special attention should also be given to how the Region will proceed in the event that there is non-compliance with the UAO.

Site management plans and pre-referral litigation reports will be routinely developed by the Regional Waste Management Division in conjunction with Office of Regional Counsel. It is critical that Regional Counsel be involved in a timely manner and focus specifically on the strategy for issuing and following up on UAOs. The Region should not issue a UAO until the site is thoroughly discussed with Regional Counsel, especially regarding whether all statutory requirements will be met as outlined in the forthcoming "Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions."

Fund-financed RAs Planned for Initiation in FY 90

In FY90, a number of sites may have a Fund-financed RD completed where Fund monies for the RA may not be available. Headquarters has therefore conducted an RA Prioritization for FY90. Because it is extremely important to fully use our limited FY90 RA funds and to avoid having unfunded sites that lack viable PRPs, the Office of Waste Programs Enforcement (OWPE) and Office of Emergency and Remedial Response (OERR) conducted Regional conference calls during December 1989 to identify enforcement issues that may affect Fund-financing of sites queued by the Regions. The discussions from the conference calls will continue to be refined.

Review of Sites With Ongoing Fund-financed RDs not Scheduled for RA Initiation in FY 90

There are a number of sites with an ongoing Fund-financed RD not scheduled for Fund-financed RA initiation in FY90 (e.g. some FY87 or FY88 RODs). If these sites were not subject to a UAO prior to Fund-financing the RD, the Region should re-evaluate them for possible issuance of a UAO for the RA. To assist in this re-evaluation, the Region should complete any necessary additional case development (such as additional PRP search) prior to the completion of the RD. For sites where PRPs are identified as a result of a supplemental search, the Region should issue general notice, or a letter pursuant to Section 122(a) waiving special notice where appropriate, prior to issuing a UAO. For sites where PRPs were previously noticed and upon re-evaluation meet the criteria for issuing UAOs, a UAO should be issued for the RA. It is usually not appropriate for additional negotiations to occur if the PRPs declined to settle in previous negotiations for RD/RA. The only exception may arise where such negotiations will not cause delay and are clearly in the best interest of the government. However, the Region may advise PRPs, by letter, of relevant design documents and the possibility of a UAO as the Region begins preparation of the order. This may provide the PRPs with an additional incentive to settle with the Agency. However, it should not be intended as an opportunity to negotiate the UAO.

Consultation on RD Starts Planned for FY90 Where a UAO May Not Be Issued

Most sites where a ROD has been signed and the RD has not begun (e.g., some FY88 and most FY89 RODs) should be resolved in a timely manner through a consent decree or should be addressed by a UAO. To this end, careful consideration should be given to the special notice procedures as discussed in the forthcoming "Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions." However, at some sites no viable PRPs can be found or there may be a limited number of sites where statutory requirements may not be met or strong policy

considerations may exist for not issuing UAOs. At sites with RD planned for FY90 and no anticipated UAO, a consultation process between Headquarters and the Region must occur prior to Fund-financing the RD. The Region should notify Headquarters in writing at least two weeks prior to obligation of funds with the reasons for not proceeding with a UAO. The written explanation, which should be stamped "FOIA Exempt - Enforcement Sensitive - Deliberative Process," should describe the reasons for not going forward with a UAO. These should be based on available information and should not preclude additional case development (e.g., liability). The written explanation should come from the Regional Waste Management Division Director (after consultation with the Office of Regional Counsel) to the Director, OWPE. The Region should also send a copy to the Associate Enforcement Counsel, OECM-Waste. Headquarters will also routinely notify DOJ's Environmental Enforcement Section.

OWPE's Compliance Branch of the CERCLA Enforcement Division, after consultation with OECM-Waste, will respond orally to the Regional Waste Management Division prior to the date for obligation of funds as to whether any problems or issues exist that need to be addressed. However, Fund-financing of the RD will not be delayed if Headquarters does not orally respond to a Region (which has provided timely written notice) prior to the date of obligation of funds. To assure proper closure of the consultation process, the oral response will be followed up with a short memorandum from the appropriate Section Chief in OWPE's Compliance Branch to the appropriate Regional Section Chief verifying that the consultation was completed (with a cc to the Regional Branch Chief and Division Director). Again, the Region can proceed with Fund-financing prior to receipt of the closeout memorandum. OERR and OECM-Waste will also receive a copy for their information.

If the Compliance Branch, in consultation with OECM-Waste, disagrees with the Region's decision, expedited resolution of any problems or issues will be sought through conference call at the Section Chief level (and promptly elevated if necessary) prior to the date of obligation of funds. It is anticipated that the regular communication that takes place between Headquarters Regional Coordinators and Regional Project Managers (and their Headquarters and Regional legal counterparts), and advance discussion of sites during the monthly conference calls of sites in the queue for RD, will limit the number of cases where such conference calls may be necessary.

Notification to Headquarters of Non-Compliance With a UAO

Situations will arise where PRPs do not comply with a UAO. In these cases, enforcement of the order via a Section 106 judicial referral for injunctive relief and penalties should be considered by the Region. In other situations, Fund-financing, followed by judicial referral for Section 107 cost recovery and, wherever

possible, penalties and treble damages, may be appropriate. The Region ~~should~~ consider the factors outlined in the "Guidance on CERCLA Section 106 Judicial Actions," February 24, 1989 (OSWER Directive Number 9835.7), availability of Fund monies for the RA, and the benefits of establishing credibility in EPA's ability and willingness to use the Section 106 judicial enforcement mechanism to determine which approach would be the most appropriate. Either action should take place on a timetable consistent with the goals in the forthcoming "Integrated Superfund Timeline."

If the decision is made to proceed with Fund-financing of the RD and/or RA, OWPE and OECM-Waste must be informed of the decision at least ten days prior to obligation of funds to allow for any needed consultation. The Region will be expected to vigorously pursue cost recovery, and include a demand for all costs and seek treble damages and penalties unless such demand would be manifestly inappropriate. The notification sent to Headquarters must include the Region's timetable for such cost recovery action.

CONCLUSION

The aggressive use of unilateral enforcement will continue to be an essential component of a successful Superfund program². EPA's evolving "enforcement first" philosophy as embodied in the Administrator's Management Review of Superfund contemplates a significantly broadened use of these legal authorities. The timely use of these powerful enforcement tools should be focused through careful consideration of the requirements, criteria and other factors pertinent to their use.

If your staff has any questions on the strategy, please call Tony Diecidue of the Compliance Branch, OWPE (FTS-382-7790) or Pat Winfrey of the CERCLA Response Policy and Litigation Branch, OECM-Waste (FTS-382-2860). Any questions related to the coding of information in CERCLIS should be directed to Jerry Lappan of the Compliance Branch (FTS-475-8259).

cc: Deputy Regional Administrators, Regions I - X
 Regional Counsels, Regions I - X
 Directors, Waste Management Division
 Regions I, IV, V, VII and VIII
 Directors, Hazardous Waste Management Division
 Regions III and VI
 Director, Emergency and Remedial Response Division
 Region II
 Director, Toxics and Waste Management Division
 Region IX

² See Appendix for a list of other key FY90 activities related to Section 106 unilateral enforcement.

Director, Hazardous Waste Division
Region X
Regional CERCLA Enforcement Branch Chiefs
Office of Regional Counsel RCRA/CERCLA Branch Chiefs
Regional CERCLA IMCs
Henry Longest, OERR
David Buente, DOJ

APPENDIX

OTHER KEY FISCAL YEAR 1990 ACTIVITIES RELATED TO SECTION 106 UNILATERAL ENFORCEMENT

Consistent with the Administrator's Management Review of Superfund, Headquarters is working on a number of projects that will enhance the timely and effective use of the CERCLA Section 106 enforcement authorities. These projects will all provide significant opportunity for Regional participation, including the following:

1. Integrated Superfund Timeline: EPA will issue a timeline defining ideal timeframes to use as goals for conducting activities necessary to move a Superfund site through the remedial response pipeline, including timeframes for employing CERCLA Section 106 enforcement authorities.
2. Guidance on Using Unilateral Administrative Orders (UAOs): EPA will issue a final guidance on considerations pertinent to using UAOs to require performance of the remedial design and remedial action (RD/RA) by PRPs. This will include a Model RD/RA UAO.
3. Model RD/RA Consent Decree (CD): EPA and DOJ will issue a Model RD/RA CD which the United States will use as a guideline for defining acceptable terms for RD/RA settlements.
4. Strategy for Tracking and Pursuing Non-Settlers: EPA will issue a refined strategy for pursuing non-settlers to help reinforce incentives for early settlements. The strategy will include development of a refined management information system for tracking non-settlers and their enforcement status.
5. System for Tracking Administrative Order (AO) and CD Non-Compliance: EPA will issue guidance and provide assistance for the establishment of systems for tracking RD/RA AO and CD non-compliance and follow-up enforcement to ensure that PRPs are following through on response actions as required in these legally enforceable documents.
6. Guidance on Enforcing RD/RA UAOS: EPA will issue guidance on initiating and settling cases to enforce RD/RA UAO requirements, including the use of civil penalty and punitive damage authorities, so as to help deter UAO violations.
7. Special Litigation Support: EPA will issue a strategy for providing "special litigation support," possibly in the form of dollars or FTE, to help meet the special resource demands of CERCLA Section 106 unilateral enforcement.

8. Communications Strategy: EPA will complete a strategy for communicating to the public and specific constituency groups at the national level information on key CERCLA Section 106 enforcement plans and accomplishments. This will help support reasonable public expectations and evaluation of these accomplishments, and reinforce enforcement themes for the PRP community.

Consistent with the Deputy Administrator's charge to the Superfund Management Review's Steering Committee, we request that you take whatever initiative you can to pursue appropriate enforcement activities in these identified areas even in advance of forthcoming national direction.