



**DIRECTIVE NUMBER:** 9870.1

**TITLE:** CERCLA Section 106 Unilateral RD/RA Enforcement:  
Accomplishments through 2nd Quarter and Strategy  
for the Remainder of FY 1989

**APPROVAL DATE:** July 11, 1989

**EFFECTIVE DATE:** July 11, 1989

**ORIGINATING OFFICE:** OWPE, OEM

☒ **FINAL**

☐ **DRAFT**

**LEVEL OF DRAFT**

☐ **A** — Signed by AA or DAA

☐ **B** — Signed by Office Director

☐ **C** — Review & Comment

**REFERENCE (other documents):**

---

**OSWER OSWER OSWER**  
**VE DIRECTIVE DIRECTIVE DI**

---

---

<div style="display: inline-block; vertical-align: middle; text-align: center;">             United States Environmental Protection Agency              Washington, DC 20460           </div>		<b>1. Directive Number</b>  9870.1
OSWER Directive Initiation Request		
2. Originator Information		
<b>Name of Contact Person</b> Glenn Hardcastle	<b>Mail Code</b> OS-510	<b>Office</b> OWPE
		<b>Telephone Code</b> 382-5617
<b>3. Title</b> CERCLA Section 106 Unilateral RD/RA Enforcement: Accomplishments through 2nd Quarter and Strategy for the Remainder of FY 1989		
<b>4. Summary of Directive (include brief statement of purpose)</b> The purpose of this directive is to: 1) summarize Section 106 unilateral RD/RA enforcement accomplishments in the first half of FY 1989; and 2) describe a strategy for the remainder of FY 1989 to enhance Section 106 enforcement consistent with the 90 Day Management Study of Superfund.		
<b>5. Keywords</b> Section 106; unilateral administrative orders; judicial actions; 90 Day Study		
<b>6a. Does This Directive Supersede Previous Directive(s)?</b> <div style="display: inline-block; margin-left: 20px;"> <input checked="" type="checkbox"/> No         </div> <div style="display: inline-block; margin-left: 20px;"> <input type="checkbox"/> Yes         </div> <div style="display: inline-block; margin-left: 20px;">         What directive (number, title)       </div>		
<b>b. Does It Supplement Previous Directive(s)?</b> <div style="display: inline-block; margin-left: 20px;"> <input checked="" type="checkbox"/> No         </div> <div style="display: inline-block; margin-left: 20px;"> <input type="checkbox"/> Yes         </div> <div style="display: inline-block; margin-left: 20px;">         What directive (number, title)       </div>		
<b>7. Draft Level</b> <div style="display: flex; justify-content: space-between; align-items: flex-start;"> <div> <input type="checkbox"/> A - Signed by AA/QAA         </div> <div> <input type="checkbox"/> B - Signed by Office Director         </div> <div> <input type="checkbox"/> C - For Review &amp; Comment         </div> <div> <input type="checkbox"/> D - In Development         </div> </div>		

<b>8. Document to be distributed to States by Headquarters?</b> <div style="display: inline-block; margin-left: 20px;"> <input type="checkbox"/> Yes         </div> <div style="display: inline-block; margin-left: 20px;"> <input checked="" type="checkbox"/> No         </div>
---

This Request Meets OSWER Directives System Format Standards.	
<b>9. Signature of Lead Office Directives Coordinator</b> <div style="font-family: cursive; font-size: 1.2em; margin-top: 10px;">         Darlene Williams       </div>	<b>Date</b> <div style="font-size: 1.2em; margin-top: 10px;">         7/12/89       </div>
<b>10. Name and Title of Approving Official</b>	<b>Date</b>

EPA Form 1315-17 (Rev. 5-87) Previous editions are obsolete.

OSWER	OSWER	OSWER	O
VE	D	D	D
DIRECTIVE	IRECTIVE	IRECTIVE	IRECTIVE



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

JUL 11 1989

OSWER Directive No. 9870.1

ENFORCEMENT CONFIDENTIAL ATTACHMENTS

MEMORANDUM

SUBJECT: CERCLA Section 106 Unilateral RD/RA Enforcement:  
Accomplishments through 2nd Quarter and Strategy for  
the Remainder of FY 1989

FROM: Jonathan Z. Cannon, Acting Assistant Administrator  
Office of Solid Waste and Emergency Response  
*[Signature]*  
Edward E. Reich, Acting Assistant Administrator  
Office of Enforcement and Compliance Monitoring

TO: Addressees

Purpose

The purpose of this memo is to: 1) provide you a summary of Section 106 unilateral RD/RA enforcement accomplishments in the first half of FY 1989; and 2) describe a strategy for the remainder of FY 1989 to enhance §106 enforcement consistent with the 90 Day Management Study of Superfund. The Administrator is firmly committed to building a credible Section 106 Program as stated in the 90 Day Management Study.

Accomplishments through 2nd Quarter FY 1989

Eight Section 106 Unilateral Administrative Orders (UAOs) for RD/RA were issued through 2nd Quarter of the fiscal year (Attachment 1) against the annual SCAP target of 17. This is an increase over last year's total of 2 UAOs issued for this same period; a total of 14 UAOs for RD/RA were issued last fiscal year. Like last year, most of the orders issued this year are reported to be in compliance.

No Section 106 judicial referrals for unilateral enforcement action for RD/RA were referred during the first half of the fiscal year against the SPMS mid-year commitment of 3. This

-2-

appears to be primarily the result of 1) the high rate of initial compliance reported for the UAOs issued; 2) inability to yet determine the final compliance status of some of these orders due their issuance late in 2nd Quarter; and 3) settlements at some of the identified candidate sites. The national annual SPMS commitment in this area is 9.

#### Strategy for the remainder of FY 1989

The Strategy for the remainder of FY 1989 consists of four major components: 1) attainment of numerical Program goals for unilateral enforcement; 2) use of effective procedures to control negotiation deadlines and to obtain PRP conduct of RD/RA; 3) identification of candidates for unilateral enforcement; and 4) consideration of making funding for RD/RA contingent upon using enforcement as appropriate. This strategy will serve as a transitional one to full implementation of the recommendations of the 90 Day Study discussed below.

#### Numerical Program Goals

As noted in the previous section, the minimum Agency goal in FY 1989 is to undertake the SPMS commitment of nine Section 106 Referrals Without Settlement or UAOs in Compliance for RD/RA activities and the SCAP Congressional "Add-on" target of 17 additional Section 106 Unilateral Orders for RD/RA. Accomplishments and resource utilization in this area will be heavily scrutinized by Congress and others. For each additional commitment, a Region received 0.7 FTE in this area. If settlements are not achieved at the identified candidate sites, Regions must follow up with UAOs and judicial referrals as planned. If a settlement is achieved at a candidate site, a Region is expected to take steps necessary to issue a UAO at an alternate site where appropriate in order to meet its annual target. Unless we can show progress in this area, we will perpetuate the impression of a weak enforcement program and Congress may not be as willing to provide additional resources in the future. To report accomplishments in these areas, we are relying on CERCLIS. To ensure regional and Agency credit for these accomplishments, the Regions must continue to make sure these accomplishments are properly and routinely entered in CERCLIS.

#### Use of Effective Procedures

This section outlines procedures for unilateral enforcement that should be followed for the remainder of FY 1989. These procedures are consistent with the recommendations of the

-3-

Settlement Incentives/Disincentives workgroup last July. Detailed draft guidance on the use of Section 106 unilateral administrative orders will be available this summer for your review. Final substantive guidance on §106 judicial actions was issued February 24, 1989.

Regions should use UAOs in appropriate cases as a tool to control negotiation deadlines and to compel implementation of RD/RA where settlements are not obtained. We would expect most cases to be appropriate for issuance of a UAO in the situations outlined below where the liability and financial viability of the PRPs have been established. While adequate regional resources need to be available for development of the UAO and oversight of its implementation, as noted in the previous section, adequate resources were provided for attainment of the Agency's goal for UAOs. This goal should therefore be met or exceeded.

To control negotiation deadlines, Regions should indicate to the PRPs in writing a deadline for completion of negotiations and indicate that a UAO may be issued or the remedial design funded if the negotiations are not resolved by that time. In appropriate cases, UAOs with delayed effective dates may be issued after the expiration of the first 120-day special notice moratorium if a negotiation extension has been granted. The effective date of the UAO should coincide with the new deadline date for completion of negotiations. At sites where special notice is not issued and Section 122(a) letters are issued, Regions may issue UAOs with delayed effective dates when negotiations do not appear to be progressing toward settlement by the specified deadline for completion of negotiations. The Agency anticipates establishing more specific timelines for the issuance of UAOs as part of the 90 Day Study implementation.

At sites where a negotiation deadline is reached, a UAO has not yet been issued, and negotiations are unresolved, Regions should take one of the following three actions:

1. If the negotiations appear close to resolution, Regions may continue to negotiate without issuance of a UAO; negotiations should be rapidly resolved, however, and issuance of a UAO reconsidered if negotiations become or are threatening to become protracted. Deadline management procedures must be complied with.
2. If the negotiations do not appear to be close to resolution and the case is appropriate for a UAO, a UAO should be issued.

-4-

3. If negotiations do not appear to be close to resolution and the case is not appropriate as defined above for a UAO, the remedial design should be promptly funded without issuance of a UAO.

In all cases where settlement is not obtained and the Region is not anticipating issuance of a UAO, the Regions must first consult with the Director, CERCLA Enforcement Division (or the Director, OWPE or his deputy) prior to funding of the remedial design. This consultation will be done informally, by telephone, to prevent any delay in moving appropriate sites to Fund-financed cleanup. More specific procedures for consultation and for documentation of the basis for not issuing a UAO will be developed for implementation in FY 1990.

In situations where PRPs do not comply with a UAO, enforcement of the order through a judicial referral for injunctive relief should be considered. A case is considered appropriate for judicial referral where the criteria for bringing §106 judicial actions specified in the February 24, 1989 guidance on §106 judicial actions are favorably met, and adequate resources are available for development of the referral and processing of the case. As with the UAOs, adequate resources have been provided and the Agency goal in this area should be met or exceeded.

In other situations where PRPs do not comply with a UAO and a judicial referral for injunctive relief is not appropriate, penalties and treble damages must be considered in conjunction with cost recovery.

#### Identification of New Candidates

As previously mentioned, we will be holding conference calls or meetings with you or your staff to review the progress of the remaining "good" candidates identified during the FY 1988 Initiative, as well as to identify new good candidates for UAOs or judicial referral in FY 1989. The sites we will focus on during the calls and visits are listed in Attachments 2 and 3.

The potential candidates include sites with ongoing RDs where UAOs have not been issued. However, we do not want review of any sites with an ongoing RD to cause delay in moving toward targeted RA Starts for FY 1989. Therefore, discussion of any sites in this category will be clearly in the context of what is feasible, given our resource constraints.



-5-

We will be calling you or your staff within the next week to arrange these calls and meetings. Please be prepared to discuss the quality of each case, any legal or factual issues that may affect potential enforcement actions, settlement and litigation strategy, schedules, and any outstanding resource needs to support successful processing of these cases. From our joint review, we hope to identify new candidates to supplement the existing list.

### 90 Day Study

The recommendation from the 90 Day Study states: "Before Fund-financed response can proceed at a site, a Region must issue an administrative order, or provide a justification for its decision not to issue an order. If the PRPs do not comply with the order, the Regions should have the flexibility to determine whether to proceed with Fund-financed response or judicial enforcement action to compel compliance and exact penalties. Regions will consult with Headquarters where PRPs do not comply with an administrative order. In determining whether to enforce the order, EPA will consider the importance of maintaining section 106 judicial enforcement as a credible threat to PRPs, as well as the availability of funds for Agency response".

Headquarters will be developing an implementation plan to address this recommendation. Regions in the meantime should be guided by the recommendation, issue UAOs for RD/RA to the extent practicable, and anticipate discussions with HQ on site-specific candidates. The activities discussed earlier for the balance of FY 1989 are intended to give us a good headstart on fuller implementation of the 90 Day Study recommendations in FY 1990.

### Summary

An aggressive unilateral enforcement effort is an essential component of a successful Superfund program and is consistent with the Program's statutory mandate, the intent of Congress, and the 90 Day Study. Given the limited availability of remedial action funds, use of unilateral enforcement is critical to ensure funds are available for clean-up of sites where no PRPs have been identified and to ensure the Program's credibility with the public. Continued improvement is extremely important and should be ensured by successful implementation of the strategy outlined above.

-6-

Please address any questions to Glenn Hardcastle (382-5617) of the Compliance Branch in the Office of Waste Programs Enforcement or to Belinda Holmes (382-2860) of the Office of Enforcement and Compliance Monitoring, Waste Division. If there are questions about coding the information in CERCLIS please call Jerry Lappan (475-8259) of the Compliance Branch.

**Attachments**

**Addressees:** Regional Administrators, 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  
Director, Hazardous Waste Division, Region X  
Regional Counsels, Regions I-X

**cc:** CERCLA Enforcement Branch Chiefs, Regions I-X  
Office of Regional Counsel RCRA/CERCLA Branch Chiefs  
CERCLA IMCs, Regions I-X  
David Buente, DOJ  
Henry Longest, OERR



**Unilateral Administrative Orders  
Issued for RD/RA  
in FY 1989**

<u>Region</u>	<u>Site</u>	<u>Date Issued</u>	<u>Value of Remedy (\$M)</u>	<u>Status</u>
I	-	-	-	-
II	Marathan Battery, NY	3/26/89	0.95	Compliance status to be determined
	Upjohn Facility, PR	3/30/89	4.95	Compliance status to be determined
III	-	-	-	-
IV	-	-	-	-
V	9th Ave Dump, IL	1/13/89	25.0	In compliance
	Allied Chem. & Ironston Coke, OH	3/09/89	13.0	In compliance
	Fields Brook, OH	3/22/89	7.0	In compliance; for RD and supplemental RI/FS only
VI	Compass Ind. (Avery)	3/29/89	12.0	Compliance status to be determined
VII	-	-	-	-
VIII	California Gulch, CO	3/29/89	23.8	In compliance
IX	Tucson Airport, AZ	1/24/89	6.5	In compliance, may convert to consent decree settlement
X	-	-	-	-

Source: CERCLIS as of 4/10/89

Note: Table excludes UAO amendments

Attachments 2 and 3 contain  
Enforcement Confidential information  
and have been omitted from this copy.