UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MAR 7 1990

OSWER Directive Number 9833.0-1a

MEMORANDUM

SUBJECT: Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions

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TO: Regional Administrators,
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I. Introduction

This memorandum sets forth general principles governing the Agency's unilateral administrative order authority for remedial designs and remedial actions under section 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (CERCLA or Superfund).[1] Policies and procedures to be followed when issuing unilateral orders for remedial actions are provided.

The memorandum has the following sections:

- Introduction
- The Role of Unilateral Orders in the CERCLA Remedial Process

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[1]This memorandum and the forthcoming memorandum entitled "Guidance on the Issuance of CERCLA Section 106(a) Administrative Orders for Removal Actions," together supersede the September 8, 1983 "Guidance Memorandum on Use and Issuance of Administrative Orders under §106(a) of CERCLA" (OSWER Directive number 9833.0) and the February 21, 1984 guidance on "Issuance of Administrative Orders for Immediate Removal Actions" (OSWER Directive number 9833.1A). Changes to the guidances are the result of statutory amendments and evaluation of Agency experience.

- Legal Aspects of Section 106 Orders for Remedial Design/Remedial Action
  - Background Information about Section 106 Authorities
  - Statutory Requirements of Section 106 Administrative Orders
  - Judicial Review of Unilateral Orders
- Possible Recipients of Unilateral Orders
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- Elements of Unilateral Orders
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- Procedures Relating to Issuing Unilateral Orders
  - Special Notice Procedures
  - The Conference
- Specialized Forms and Use of Unilateral Orders
- Continued Negotiation After Issuance of an Order
- Noncompliance with Unilateral Orders
- Note on Purpose and Use of this Memorandum

Appendix A defines section 106 unilateral and consent orders, and their judicial counterparts.

This memorandum applies to all CERCLA section 106 unilateral orders, issued to compel Potentially Responsible Parties (PRPs) to conduct remedial designs and remedial actions.[2] For a discussion of settlement principles relevant to remedial actions, see the "Interim CERCLA Settlement Policy," dated December 5, 1984 (OSWER Directive number 9835.0), also published at 50 FR 5034, February 5, 1985).[3] A guidance on the issuance of CERCLA §106(a) administrative orders for removal actions is under development.

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[2]This guidance does not specifically address CERCLA remedial action at Federal facilities. See the "Federal Facility Compliance Strategy" (Office of External Affairs, November 1988) for information about CERCLA enforcement actions against Federal facilities, and the "Federal Facilities Negotiation Policy," (OSWER, August 1989).

[3]For information on CERCLA enforcement practices relating to municipalities, see the "Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes," (December 6, 1989) (OSWER Directive number 9834.13).

II. The Role of Unilateral Orders in the CERCLA Remedial Program

An objective of Superfund enforcement is to place ultimate responsibility for the costs of cleaning up Superfund sites on those who contributed to the problem. EPA prefers to obtain private-party response action through the negotiation of settlement agreements with parties willing to do the work. When viable private parties exist and are not willing to reach a timely settlement to undertake work under a consent order or decree, or prior to settlement discussions in appropriate circumstances, the Agency typically will compel private-party response through unilateral orders. If the PRPs do not comply with the order, EPA may fund the response or may refer the case for judicial action to compel performance and recover penalties.

Unilateral orders should be considered as one of the primary enforcement tools to obtain RD/RA response by PRPs. Unilateral orders can provide an incentive for PRPs to settle, can help to control settlement negotiation deadlines, and can be used to force commencement of work at the site when settlement cannot be reached. Unilateral orders can also help to encourage the organization and coalescence of disorganized PRPs. Because many PRPs promptly comply with unilateral orders, they also help to conserve the limited funds available for government-financed cleanup.

If PRPs do not comply with unilateral orders, the Agency has the flexibility to determine whether to perform a Fund-financed cleanup and seek to recover those costs from the PRPs through a judicial referral for cost recovery, punitive damages[4], and penalties.[5] The Agency also may prepare a referral for judicial enforcement action pursuant to section 106, to compel compliance and to exact penalties. Regardless of the route the Agency chooses to take upon noncompliance with a unilateral order, PRPs remain potentially liable for the response action. Federal courts can compel PRPs to conduct the response action and impose penalties. If the Agency chooses to clean up the site with the Fund, at a minimum the PRPs will be potentially liable for cost recovery of the funds expended. In addition, Federal courts can

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[4]CERCLA §107(c)(3) authorizes punitive damages from one to three times the costs incurred by the Fund.

[5]CERCLA section 106(b)(1) provides that "any person who, without sufficient cause, willfully violates, or fails or refuses to comply" with any order, may be fined up to $25,000 for each day in which the violation occurs or the failure to comply continues.

compel PRPs to pay penalties, as well as punitive damages of up to three times the costs incurred by the Fund.

Regions should incorporate issuance of unilateral orders into their site management plans consistent with the following general principles. First, in the context of orders for RD and/or RA, during the RI/FS, the Region should review the PRP search to ensure that it is complete.

Second, apart from liability, the development of the factual basis for the response action required in the order should begin during the RI/FS process. When reviewing deliverables during the RI/FS, a Region should always keep in mind that a unilateral order may need to be issued on the basis of the RI/FS. The Region should ensure that documents developed during the RI/FS contain enough information to support all the findings necessary to support issuance of a unilateral order, i.e., that because of an actual release or threat of release of one or more hazardous substances from a facility there may be an imminent and substantial endangerment to the public health or welfare or the environment. It is important to pay particular attention to the baseline risk assessment. Baseline risk assessments provide an evaluation of the potential threat to human health and the environment in the absence of any remedial action.[6] They provide a basis for determining whether or not remedial action is

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[6]Before a unilateral order is issued, the results of any health assessment issued by the Agency for Toxic Substances and Disease Registry (ATSDR) also should be reviewed for consistency with the order. Nonetheless, unavailability of, or the possibility of differences with, an ATSDR health assessment should not discourage issuance of a unilateral order. ATSDR's assessments and EPA's risk assessments are based on different methodologies, with different purposes. ATSDR's health assessments are preliminary assessments usually performed before the site remedial investigation has been completed. The main purpose of the ATSDR health assessment is to determine if there is a significant risk to human health requiring steps to reduce exposure such as providing alternate water supplies or relocating individuals. ATSDR also uses the results of the health assessment to determine if additional studies such as epidemiological studies or health surveillance programs should be performed. As a result, the ATSDR health assessment and EPA's risk assessment may reach different conclusions in some circumstances. Where an ATSDR health assessment (done before the decision document is signed) appears to be different from EPA risk assessment results, the difference should be addressed in the administrative record for the selection of the response action.

necessary and a justification for performing remedial action. They will also be used to support imminent and substantial endangerment findings in section 106 orders. In addition, a statement of work (SOW) may be included or referenced in the order.[7]

The third general principle to be followed is that the issuance of unilateral orders must be considered before a Fund-financed response can proceed at a site. Unilateral orders are typically to be issued at the end of the special notice period if settlement is not reached at a site, an extension of negotiations is not warranted, and the case meets statutory criteria and case specific considerations set forth in this guidance. Also, unilateral orders should be issued routinely before cases are referred to the Department of Justice (DOJ) under section 106.[8] Unilateral orders can be used to establish a case for seeking treble damages in the event of noncompliance by the PRP and where the Fund is used to clean up the site.

In cases where the Region decides not to issue a unilateral order, prior to commencing a Fund-financed response, the Region must prepare a written justification explaining the decision not to issue a unilateral order.[9] A copy of the justification must be kept in the Region's enforcement files. Examples of instances where adequate justification may exist include those cases which

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[7]In such instances, the SOW is an integral part of a unilateral order because it provides the detailed requirements for the development of the RD/RA workplans and reporting requirements.

[8]See "Guidance on CERCLA Section 106 Judicial Actions," February 24, 1989 (OSWER Directive number 9835.7).

[9]The Region should notify Headquarters in writing at least two weeks prior to obligation of funds with the reasons for not proceeding with a unilateral order. The written explanation should describe in general terms the reasons for not going forward with the order. 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 Regions should also send a copy to the Associate Enforcement Counsel, OECM-Waste. Additional information on procedures to follow where a Region decides not to issue a unilateral order prior to commencing a Fund-financed response may be issued periodically. See "Use of CERCLA Section 106 Unilateral Enforcement for Remedial Design and Remedial Action: Strategy for Fiscal Year 1990," February 14, 1990 (OSWER Directive number 9870.1A.)

do not meet the statutory criteria, or where case specific considerations for not issuing a unilateral order exist. Statutory criteria are discussed in section III of this guidance; case specific considerations are discussed in section V.[10]

The site management plan should anticipate possible noncompliance with the order, and include a course of action that may be followed. In determining whether to enforce the unilateral order, Regions should 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.

III. Legal Requirements of Section 106 Orders for Remedial Design/Remedial Action

A) Background Information about Section 106 Authorities

Two types of administrative orders under section 106 of CERCLA may be issued. Consent orders may be issued to formalize removal and RI/FS settlements. Unilateral orders may be issued to compel a party to undertake conventional removal actions, RI/FS activities,[11] or RD/RA work where a settlement was not reached. Consent orders are not within the scope of this guidance.[12] See Appendix A for more detail on when consent orders under section 106 may be used.

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[10]This guidance should not be construed as limiting in any way EPA's enforcement discretion to issue §106 orders.

[11]Agency policy favors use of consent orders for RI/FSs. See the "Administrative Order on Consent for Remedial Investigation/ Feasibility Study," (OSWER Directive number 9835.19).

[12]CERCLA §122(d)(1)(A) requires that Agency agreements entered into under §122 with respect to remedial action must be in the form of a consent decree, entered in the appropriate United States district court. Other vehicles, including orders, may be used for remedial design. See "Initiation of PRP-financed Remedial Design in Advance of Consent Decree Entry," (November 18, 1988) (OSWER Directive number 9835.4-2A).

B) Statutory Requirements of Section 106 Administrative Orders

CERCLA section 106(a) provides as follows:

> In addition to any other action taken..., 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....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.

Consistent with the statute, administrative orders issued under section 106 may be issued if a release or threat of a release of a hazardous substance from a facility may present an imminent and substantial endangerment to public health, welfare, or the environment. The order must include findings on the hazardous substance(s), the nature of the release or threat of a release, the location of the release [i.e., the location is a "facility"], the nature of, and basis for the finding of, a possible imminent and substantial endangerment.

It is important that the link between the release, the possible endangerment, and the response action to abate the possible endangerment mandated by the order, be clearly presented in the order. The findings of fact section should describe the problem at the site and state that "the actions specified in the ROD and required by this order will protect the public health, and welfare, and the environment."

Finally, before an order may be issued, the affected State must be notified.[13] The statutory requirements of a section 106 order are described in more detail below.

1) Evidence of a Release or Threatened Release of a Hazardous Substance

A "hazardous substance" is generally defined in CERCLA section 101(14) as any substance, waste or pollutant designated

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[13]Section 106(a) requires notice to the affected State before issuing an administrative order. See additional discussion in this section, at B(4).

pursuant to sections 307(a) and 311(b)(2)(A) of the Clean Water Act, section 112 of the Clean Air Act, or section 102 of CERCLA, any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act, or any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act....[14] See 40 C.F.R. Part 302 for a list of hazardous substances.[15]

Under CERCLA section 101(22), "release" is defined as any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).[16] The determination of whether there is an actual or threatened release depends upon several considerations. An actual release usually should be observable in some form, whether visually or through analysis showing the presence of contaminants in samples of soil, water, or air. The threat of a release, however, involves releases that have yet to occur or find their way into the environment. A surface impoundment that is about to overflow because of rain is an example of a threatened release.

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[14]CERCLA §101(14) excludes from the definition of hazardous substance: "...petroleum, including crude oil or any fraction thereof which is not otherwise specially listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and...natural gas, natural gas liquids, liquified natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas").

[15]Note that this list is not the exclusive list of hazardous substances. Some RCRA [characteristic] wastes may not be listed in 40 C.F.R. 302, but would still be hazardous substances if they meet any of four characteristic criteria under 49 C.F.R. §261.20.

[16]The statute excludes some activities from the definition of a release. CERCLA §101(22) excludes from the definition of release "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 source, byproduct, or special nuclear material from a nuclear incident..."

For RD/RA, the release or threat of a release will have been documented during the RI/FS.[17] This information must be identified in reasonable detail in the order.

2) Evidence that the Release or Threatened Release is from a Facility

The release or threat of a release must be from a "facility." A facility is broadly defined in CERCLA section 101(9) as:

> (A) 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 (B) 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 together with CERCLA section 101(17) and (18), this definition includes any on-shore or off-shore sites, not to exclude land transportation facilities, from which releases or threats of releases may originate. The administrative order must specify the physical location of the release. This establishes that the release was from a facility.

3) Evidence of a Possible Imminent and Substantial Endangerment

An endangerment is a threatened or potential harm. An endangerment is imminent if the conditions that give rise to it are present, even though the harm might not be realized for years.[18] An endangerment is substantial if there is reasonable

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[17]Information relevant to the release or threat of release documented during the RI/FS should be referenced in the order, and included in the administrative record for selection of the response action.

[18]B. F. Goodrich Co. v. Murtha, 697 F. Supp. 89 (D. Conn. 1988); United States v. Conservation Chemical Co., 619 F. Supp. 162 (W.D. Mo. 1985); United States v. Ottati and Goss, Inc., 630 F. Supp. 1361 (D. N.H. 1985); United States v. Northeastern Pharmaceutical and Chemical Co. ("NEPACCO"), 579 F. Supp. 823 (W.D. Mo. 1984), aff'd in part and rev'd in part on other grounds, 810 F.2d 726 (8th Cir. 1986), cert. den., 484 U.S. 1008 (1987); United States v. Reilly Tar & Chemical Corp., 546 F.

cause to believe that someone or something may be exposed to a risk of harm from a release or threatened release.[19] This statutory element has been judicially interpreted to require only a limited showing. The mere threat of harm or potential harm to public health, public welfare, or the environment is sufficient.[20] The endangerment need not be immediate to be imminent.

Courts have held that there may be an imminent and substantial endangerment when:

- Numerous hazardous substances are present at, and being released into the environment from a site that is accessible to humans and wildlife;[21]
- A relatively small quantity of hazardous substances that are toxic at low dosage levels are substantially likely to enter the groundwater and result in human and environmental exposure;[22]
- Contaminated groundwater flows in the direction of a subdivision using well water;[23]
- Numerous hazardous substances have reached private drinking water wells and have contaminated the groundwater and surface waters;[24]

Supp. 1100 (D. Minn. 1982).

[19] Conservation Chemical, at 195-96.

[20] Conservation Chemical, at 175, 193-94; Ottati & Goss, at 1394.

[21] Conservation Chemical, at 175, 196-97.

[22] NEPACCO, 579 F. Supp. at 846.

[23] United States v. Seymour Recycling Corp., 618 F. Supp. 1 (S.D. Ind. 1984).

[24] United States v. Hardage, 18 Env't Rep. Cas. (BNA) 1685 (W.D. Okla. 1982).

- Numerous hazardous substances are migrating from a facility and have contaminated the soil and groundwater.[25]

The above list is far from exhaustive.

For RD/RA unilateral orders, the endangerment should have been documented in the baseline risk assessment. This risk assessment should also be used to support the determination of a possible imminent and substantial endangerment.[26] No additional resources should be required to support the finding of a possible imminent and substantial endangerment.

The possible imminent and substantial endangerment must be set forth in the order. It is useful to include findings in the order which describe the potential or actual risk from the concentration levels detected in the release. However, such information is not required in the order itself to establish a possible imminent and substantial endangerment.

4) Notice to Affected States

CERCLA section 106(a) authorizes the Agency to issue such orders as may be necessary to protect public health and welfare and the environment, after giving notice to the affected State.[27] The affected State is interpreted to be the State where the facility is located, and in which the cleanup will be conducted. Notice is usually given to the Director of the State's pollution control agency. For the RD/RA, circumstances generally permit written notification to the State prior to issuing the unilateral

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[25]See Ottati and Goss, 630 F. Supp. 1361.

[26]See the guidance "Risk Assessment Guidance for Superfund." As updated, this guidance presently consists of the following two volumes: the "Human Health Evaluation Manual," (October 1989) (OSWER Directive number 9285.7-01a), and the "Environmental Evaluation Manual," March 1989 (OSWER Directive number 9285.7-02) [EPA/540-1-89/001]. See also the "Interim Final Guidance on Preparing Superfund Decision Documents," June 1989, (OSWER Directive number 9355.3-02).

[27]CERCLA §101(27) defines State to include "the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction." It is EPA policy to give Indian tribes equivalent notification.

order. In the event that verbal notice is given, a telephone conversation log should be retained.

C) Judicial Review of Unilateral Orders

CERCLA precludes PRPs from initiating court proceedings to challenge a unilateral order upon receipt. Under CERCLA section 113(h), courts may review section 106 orders only when the Agency seeks to enforce the order, the Agency seeks penalties for violation of the order, or the PRPs seek reimbursement from EPA of response costs incurred after compliance with the order.[28] Therefore, if PRPs refuse to comply with a unilateral order, the Agency may use the Fund to clean up the site, without first defending its actions in court.

Once in a court proceeding where the validity of the order is properly at issue, section 113(j)(1) of CERCLA provides that judicial review of any issues concerning the adequacy of any response action is limited to the administrative record. The Agency already will have compiled the administrative record for the selection of the remedy. This record will include information on the release, the possible endangerment, and the response action required.

IV. Possible Recipients of Unilateral Orders

CERCLA section 106 does not specify the parties to whom an order may be issued. Under section 107(a), parties liable under CERCLA are:

> (1) the owner and operator of a vessel or a facility; (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of; (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment of hazardous substances...; and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person....

These parties may receive a section 106 order. However, section 106 does not limit issuance of orders to these PRPs. In appropriate cases, unilateral orders may be issued to parties other than those specified in section 107(a), if actions by such

[28]Section 113(h) also allows judicial review in the context of §107 cost recovery actions, §310 citizen suits, and §106 injunctive action.

parties are necessary to protect the public health, welfare, or the environment. For example, a unilateral order may be issued to the owner of land adjoining the site, to obtain site access.[29] A unilateral order also may be issued to prevent a non-PRP from interfering with a response action.[30]

The order generally should specify that each of the PRPs named as respondents is jointly and severally liable to carry out all obligations imposed by the order unless there is a clear divisibility of harm at a site. The Agency typically will not allocate work required by the unilateral order among the respondents. For example, an order can require multiple PRPs to perform all activities required by the order, as well as require the submission of one consolidated work plan from all respondents. The order should specify that the failure of one or more of the respondents to comply with all or any part of the order shall not in any way excuse or justify noncompliance by any other respondent. In the limited context of mixed work or carve-out orders (see section IX of this guidance), it may be appropriate for certain parts of a response action to be included in a settlement and other parts of a response action to be included in an order.

V. Case Specific Considerations

A. Decision Whether to Issue an Order

In addition to the statutory requirements of unilateral orders described above, additional factors need to be considered. When the statutory requirements for issuing unilateral orders are present, unilateral orders should be issued to parties who meet the following criteria.[31]

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[29]Usually, the Agency uses the broad access authority in §104(e), but has also been successful under §106 as well. See B.F. Goodrich Co. v. Murtha, 697 F. Supp. 89 (D. Conn. 1988). (The court upheld EPA's use of a 106(a) order to obtain site access, stating that section 106 "is broadly worded to authorize all relief 'necessary to abate [the] danger or threat.' There is no express restriction on the nature of the relief authorized except as equity and the public interest may require.") 697 F. Supp. at 94.

[30]Note, however, that much of this guidance pertains to PRPs and may be inapplicable to orders issued to non-PRPs.

[31]Not all of the criteria apply to parallel unilateral orders, which are described generally in section IX.

1) Evidence that the Parties are Liable[32]

Unilateral orders should be issued based upon adequate evidence of the PRP's liability.[33] Evidence sufficient to support the liability of each PRP named as a respondent needs to be in EPA's possession. PRP searches, including section 104(e) information requests, should establish PRP liability prior to the RD/RA stage.[34] The PRP search should be supplemented as needed during the RI/FS. A unilateral order may be amended to include additional PRPs after further evidence has been developed.

2) PRPs are Financially Viable

The financial viability of PRPs should be considered before an order is issued.[35] EPA should have a reasonable belief that the PRPs collectively have adequate financial resources before the Agency issues an order that directs them to conduct the remedial action. Once a decision to issue an order is made, it may include PRPs who have modest means or an unclear financial posture, especially where such PRPs contributed considerable amounts of hazardous substances to the site. Generally, the order should not include PRPs that lack any substantial resources, unless the activities required of those persons do not involve expenditures of money (e.g., providing access).

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[32]Unilateral orders may also be issued to parties other than those listed in §107(a). See discussion in section IV.

[33]The order should state the facts relating to PRP liability. The extent of detail necessary may be determined on a case-by-case basis by the Region. (It should also be noted that liability of a particular person is not required for the Agency to issue an order to that person. An example of this is an order to obtain access. See discussion in Section IV above.)

[34]It is important that the early requests for information concerning PRPs be developed fully to support liability under §107 of CERCLA. See the "PRP Search Supplemental Guidance for Sites in the Superfund Remedial Program," June 29, 1989 (OSWER Directive number 9835.7).

[35]See the February 24, 1989 "Guidance on CERCLA Section 106 Judicial Actions," (OSWER Directive number 9835.7) for a listing of sources that may be consulted when determining the financial capability of PRPs.

3) The Response Action Is Specifically Identified

Unilateral orders should specifically define the response action required, to the maximum extent possible. A specifically identified response action is required for implementation by the PRPs, for the Agency to determine compliance, and for the order to be legally enforceable. For RD/RA actions, the order should reference the ROD and specify a schedule of deliverables. Often, the order should also include a statement of work.

4) PRPs have Technical Capability and Agency Oversight is Feasible

The technical difficulty of response actions should be considered before issuing unilateral orders. In certain circumstances, EPA may conclude that the PRPs are unlikely to properly perform the RD or RA, even with good oversight. In this context, it may be appropriate to fund the design. In addition, in some instances EPA may fund the remedial action.

B) Determining the Identity of the Respondents

In general, present owners and operators and viable past owner(s) and operator(s) of the site at the time of disposal should be named as respondents. At a minimum, the present owners and operators must provide access. The Agency will also generally consider naming parties who arranged for disposal or treatment of hazardous substances. When there are multiple PRPs, the Agency may consider the aggregate volume (percentage of total) and aggregate financial viability of all the PRPs to be named.[36] When evaluating whether to name an individual PRP in an order, the PRP's contribution to the site (volume and nature of substances), and financial viability should be considered. The Agency should consider naming the largest manageable number of parties. Relevant evidentiary concerns must also be considered when deciding which PRPs to name in an order. In addition, consideration should be given to whether potential

[36]Where there are multiple PRPs, the fact that they have formed some type of PRP organization will not affect their individual liability.

respondents will have a valid "sufficient cause" defense[37] or a section 107(b) defense.[38] Parties who would clearly have a valid defense to an EPA action following the parties' failure to comply should not be named in the unilateral order.

VI: Elements of Unilateral Orders

The following elements should be included in unilateral orders. The contents of several key provisions are discussed below.[39]

- o Introduction and Jurisdiction
- o Findings of Fact
- o Conclusions of Law and Determinations
- o Notice to the State
- o Order
- o Definitions
- o Notice of Intent to Comply
- o Parties Bound
- o Work to Be Performed
- o Failure to Attain Performance Standards
- o EPA Periodic Review
- o Endangerment and Emergency Response
- o EPA Review of Submissions
- o Progress Reports
- o Quality Assurance, Sampling and Data Analysis
- o Compliance with Applicable Laws
- o Remedial Project Manager

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[37]More information about the sufficient cause defense will be discussed in the forthcoming Interim Guidance on Enforcement of CERCLA Section 106(a) Administrative Orders Through Section 107(c)(3) Treble Damages and Section 106(b)(1) Penalty Actions.

[38]CERCLA 107(b) lists several defenses to CERCLA liability for a PRP who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance was caused solely by (1) an act of God; (2) an act of war; (3) an act or omission of a third party other than that which occurred in connection with a contractual relationship, if due care was exercised and certain precautions against foreseeable acts or omissions taken; or (4) a combination of these defenses.

[39]A §106 model unilateral order for remedial designs and remedial actions is under development. See the "Model Unilateral Administrative Order for Remedial Design and Remedial Action," (OSWER Directive number 9833.0-1a).

- o Access to Site Not Owned By Respondent(s)
- o Site Access and Data/Document Availability
- o Record Preservation
- o Delay in Performance
- o Assurance of Ability to Complete Work
- o Reimbursement of Response Costs (Optional)
- o United States Not Liable
- o Enforcement and Reservations
- o Administrative Record
- o Effective Date and Computation of Time
- o Opportunity to Confer
- o Termination and Satisfaction

The "introduction and jurisdiction" section of the order should set forth EPA's authority under CERCLA section 106 to issue unilateral orders. It should reiterate the delegation of this authority to the EPA Regional Administrator, and, if the order is signed by a subordinate, delegation from the RA to that subordinate.

The "findings of fact" section should identify and describe the conditions at the site in detail to support the finding of release or threatened release from a "facility." It should identify the hazardous substances at the site to the extent known.

This section should also describe the underlying factual basis for the conclusion that there may be an imminent and substantial endangerment because of a release or threatened release of those substances.[40] To support this conclusion, the findings of fact section should contain a brief summary of data from the remedial investigation which shows the extent of contamination at the site and exposure pathways and establishes the predicate for the response action. The data regarding contamination at the site and risk assessment should be contained in the administrative record for the selection of remedy. This information should be summarized in the ROD. Both of these documents should be referenced in the order.

The findings of fact section should also state factual information to support the elements of liability alleged. If a PRP is to be included in the order under a "successor," "alter ego," or other complex liability theory, the findings of fact section should explain the factual basis to support those theories.

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[40]The risks should be set forth in the baseline risk assessment and ROD. A toxicologist should be consulted in regard to this portion of the order.

The "conclusions of law and determinations" section of the order, together with the "notice to the State", should include conclusions that meet the statutory requirements for a unilateral order. The conclusions of law section should additionally establish that the parties are appropriately subject to section 106 authority, as described in sections III and IV above.

The "notice of intent to comply"[41] section should require each respondent to provide written notice to EPA, no later than five days after the effective date of the order, of the respondent's unconditional intent to comply with the terms of the order. The order should also specify that failure to respond by this deadline will be considered noncompliance, and may trigger an Agency decision to file a judicial action or start Fund-financing. The "notice of intent to comply" section should require the respondent to provide notice of and the basis for any sufficient cause defense which may be available to a respondent and which the respondent will pursue to contest liability for complying with the order. To the extent that the respondent's sufficient cause defense is based on an allegation that the response action ordered was inconsistent with CERCLA or the NCP, the Agency believes that the respondent may rely only on the administrative record for the response action. This is because section 113(j) provides that "in any judicial action under this Act" the validity of response actions shall be adjudicated "on the administrative record". The order should specify that all information relating to a sufficient cause defense must be submitted in writing, at the same time that the respondent's notice of intent to comply is provided.

The "work to be performed" section should clearly order respondent to implement the ROD[42] (and the RD if completed), and toward that end, to implement the statement of work (SOW).[43] This section of the order should describe the content of and schedule for the work plan, sampling and analysis plan, and site health and safety plan, and should specifically require the respondent's performance to implement these plans following EPA's

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[41]A PRP's notice of intent to comply applies to all of the requirements of the order, beginning from the effective date and continuing through all of the deliverables and activities required by the order.

[42]As modified by an Explanation of Significant Differences document, or ROD amendment, if applicable.

[43]Where a statement of work is used, it must be attached and incorporated by reference into the order.

approval or modification. This section of the order should also specify major deliverables. Listing the major deliverables and providing a performance schedule in the unilateral order should help to minimize the submission of late or inadequate products. Clearly delineating the major deliverables and due dates will also assist in subsequent enforcement of these provisions of the order.

The "work to be performed" section should also require the respondent to provide prior written notification to the receiving state of any off-site shipments of hazardous substances.[44]

Regions should schedule delivery of the work plan as soon as reasonably possible after the order's effective date. This promptly initiates the work and serves as an early indication of a PRP's actual compliance with the order.

The "delay in performance" section should require the respondent to provide written notification to EPA in the event of any delay or anticipated delay in complying with the order.

The "United States Not Liable" section explains that the United States, by issuing the order, does not assume any liability for any injuries or damages to persons or property resulting from acts or omissions by respondent(s), or its employees, agents, successors, assigns, contractors or consultants in carrying out any action or activity pursuant to the order. In addition, this section should state that neither EPA nor the United States is to be construed as a party to any contract entered into by the respondent in carrying out any action required by the order.

The "enforcement and reservations" section of the order should reiterate the Agency's ability to clean up the site with Fund money, or seek judicial enforcement. The unilateral order should expressly reserve the Agency's takeover rights as including, but not being limited to, the following circumstances: (1) the PRPs fail to indicate a willingness to comply with the unilateral order by the response date; (2) the period for compliance with any requirement of the order expires without such compliance; (3) PRPs perform inadequately or submit unsatisfactory deliverables, or (4) the immediacy of the threat is such that a Fund-financed response, or a judicial order to ensure compliance, becomes necessary. This section should also

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[44]See "Notification of Out-of-State Shipments of Superfund Site Wastes," (September 14, 1989) (OSWER Directive number 9330.2-07).

preserve EPA's right to take any additional action, including modification of the order or issuance of additional orders.

The "administrative record" section of the order should state that upon EPA's request, if there are any documents generated by the respondent which relate to the selection of the response action, the respondent should submit these documents to EPA for possible inclusion in the administrative record.[45]

Generally, the "effective date and computation of time" provision of a unilateral order for the RD/RA should provide that the order is effective on a date that follows the opportunity for a conference and that all times for performance of ordered activities shall be calculated from this effective date. This type of order becomes effective without further action.

Where it appears likely that negotiation of a consent decree can be concluded in a relatively short period of time, it may be useful to issue a unilateral order with a delayed effective date. The conference and response date of unilateral orders with delayed effective dates typically should precede the effective date by no more than 20 to 30 days. See section VIII of this guidance for further explanation of unilateral orders with delayed effective dates.

The "opportunity to confer" section should explicitly give PRPs an opportunity to confer with EPA. The scope of the conference is limited to issues of implementation of the response actions required by the order, and the extent to which the respondent intends to comply with the order. The order should provide a deadline for requesting the conference. PRPs may be given ten calendar days from the date the order is mailed to request a conference. The order should indicate that the conference may be forfeited if not requested by this date. The order may specify the date of the conference, if respondents elect to take advantage of this opportunity. The conference is discussed in greater detail in section VIII of this guidance. The conference request date should precede the effective date of the order and allow time for a conference before the date by which recipients must indicate their willingness to comply with the order (response date). The timing of the conference request date shall not be permitted to extend the effective date or any of the deadlines required by the order.

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[45]It is possible that information generated during RD/RA will meet the criteria of §300.825 of the NCP relating to the addition of documents to the record after the decision document is signed.

The "termination" section should provide for a clear termination point of the order. This section should indicate that respondent shall provide EPA with written certification that it has completed all of the terms of the order, including any additional tasks which EPA has determined necessary. EPA shall provide respondent with a notice that the order is terminated, based upon EPA's present information and belief that respondent has fully complied with the requirements of the order. EPA's notice shall be expressly conditioned on the accuracy of the representations contained in respondent's certification. This section is not equivalent to a release or a covenant not to sue, nor should it be phrased in a manner which could be interpreted as a release or covenant not to sue and the order should specifically so state. Further, the order shall provide that if EPA determines that additional response activities are necessary to meet applicable Performance Standards, EPA may notify respondent that additional response actions are necessary.

VII. Modification of Unilateral Orders

The Agency may decide to modify the terms of the unilateral order for any reason, including information received during the response action. All such information should be documented in writing. The unilateral order may only be modified in writing by the Agency official who signed the order, i.e., the Regional Administrator or his or her delegate.[46] Agency decisions to modify the unilateral order should be communicated promptly to the PRPs. Verbal notification of EPA's intent to modify the terms of the order may be appropriate if followed by a mailed copy of the modified unilateral order to the PRPs. The verbal modification takes effect upon issuance of the modified unilateral order to the PRPs.

VIII. Procedures Relating to Issuing Unilateral Orders

A) Special Notice Procedures

Section 122(e) of CERCLA gives EPA discretion to utilize the special notice procedures if EPA determines that a period of negotiation would facilitate an agreement with PRPs and would expedite remedial actions. Special notice procedures give PRPs an opportunity to negotiate a settlement with the Agency, before the Agency takes an enforcement action against them or conducts

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[46]This does not preclude issuance of an order that incorporates by reference a document that is subsequently approved by another EPA official consistent with the order. An example of this is the Regional Project Manager's (RPM) approval of the workplan.

the response action itself. Special notice letters will be issued prior to almost all orders for RD/RA.[47] Special notice procedures may affect timing of issuance of unilateral orders.[48] The special notice moratorium for remedial action lasts from 60 to 120 days, depending upon whether respondents submit a good faith settlement offer by the 60th day.[49] If the Agency receives a good faith offer for the remedial action within the first 60 days of the moratorium, the Agency may not take any action for a total of 120 days from respondents' receipt of the special notice letter. If special notice has been issued, Regional offices should be prepared to issue unilateral orders at the conclusion of the special notice moratorium, consistent with the following principles.

The Agency may issue unilateral orders immediately upon expiration of the special notice moratorium. Therefore, if a good faith settlement offer is not received by the 60th day, the Agency normally should issue a unilateral order shortly thereafter, if such an order is appropriate.

Because of the statutory moratorium, different rules apply if PRPs submit a good faith settlement offer within 60 days of the special notice. In that case, unilateral orders may not be

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[47]The "Interim Guidance on Notice Letters, Negotiations, and Information Exchange," 53 Fed. Reg. 5298 (February 23, 1988) (OSWER Directive number 9834.10) provides the following examples of circumstances where it would generally not be appropriate to issue special notice letters: 1) where past dealings with the PRPs strongly indicate that they are unlikely to negotiate a settlement; 2) where EPA believes the PRPs have not been negotiating in good faith; 3) where no PRPs have been identified at the conclusion of the PRP search; 4) where PRPs lack the resources to conduct response activities; 5) where there are ongoing negotiations; or 6) where notice letters were already sent prior to the reauthorization of CERCLA and ongoing negotiations would not benefit by issuance of a special notice. For information on special notice letters and municipalities, see the "Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes," (OSWER Directive number 9834.13).

[48]If a special notice letter is not issued, the statutory moratorium is not triggered, and the Agency can issue a §106 unilateral order immediately.

[49]See the "Interim Guidance on Notice Letters, Negotiations, and Information Exchange," 53 Fed. Reg. 5298 at 5307 (1988) (OSWER Directive number 9834.10).

issued for a total of 120 days from issuance of the special notice letter.[50]

Where there has been a good faith offer, but settlement is not reached as of the 120th day after issuance of the special notice letter, the Agency should be prepared to issue unilateral orders. Only if settlement is likely in the very near future may unilateral orders be delayed.[51] Unilateral orders with delayed effective dates may be issued, for example, at the onset of a negotiations extension. They should become effective on the expiration date of the extended negotiations.

Unilateral orders with delayed effective dates should be viewed as encouraging the successful conclusion of negotiations. However, unilateral orders with delayed effective dates are not to be considered "draft" orders, and their terms are not negotiable. These orders indicate the Agency's commitment to the response action, and the desire to secure its timely implementation. When used in this manner, unilateral orders with delayed effective dates serve as a form of deadline management.

B) The Conference

It is the Agency's policy to provide PRPs with an opportunity to discuss with the Regional office issuing the order, implementation of the response actions required by the order, and the extent to which the respondent intends to comply.[52] EPA will not participate in the conference for the

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[50]Unilateral orders may not be issued during the moratorium. This includes the issuance during the moratorium of unilateral orders with delayed effective dates, even if they become effective after the moratorium. An additional three days for transmission of the mail may be allowed in addition to the 120 day period.

[51]See procedures described in the Interim Guidance entitled "Streamlining the CERCLA Settlement Decision Process," dated February 12, 1987 (OSWER Directive number 9835.4).

[52]Apart from implementation, the two major concerns that the PRPs may have relate to their liability and to EPA's selection of the response action. During the course of information exchange and PRP notice (see "Interim Guidance on Notice Letters, Negotiations, and Information Exchange," 53 Fed. Reg. 5298 (1988) (OSWER Directive number 9834.10), PRPs generally will have had an opportunity to assert that they are not liable. EPA also provides PRPs opportunities to participate in the selection of the remedial action. PRPs are provided with an opportunity to

purpose of resuming settlement negotiations or negotiating the terms of the order. The conference is not an evidentiary hearing. The opportunity to confer does not give PRPs the right of pre-enforcement review.[53] The conference is not intended to be a forum for discussing liability issues or whether the order should have been issued. Instead, the conference is designed to ensure that the order is based on complete and accurate information, and to facilitate understanding of implementation.

The Agency will not create an official stenographic record of the conference, although a written summary may be prepared. Following the conference, a written summary of significant issues raised may be prepared and signed by the Agency employee who conducted the conference. Significant issues raised concerning implementation should promptly be brought to the attention of the official who signed the order.

Respondents may appear in person or by an attorney or other representative. PRPs will have the opportunity to ask questions and present their views through legal counsel or technical advisor.[54]

Within five days of the conference, the respondent may submit a written summary of any arguments it presented at the conference. At this time, in addition to this summary, the respondent may submit any written argument or evidence of a sufficient cause defense or any issues relating to factual determinations set forth in the order.

The conference normally will be held at the EPA Regional office. The RPM, the regional counsel attorney, and any other

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comment and provide information concerning the remedial action plan, an opportunity for a public meeting, and a response to each of their significant comments, criticisms, and new data submitted (See CERCLA §§ 113(k), 117.) Since EPA already will have considered these concerns, the conference shall not be a forum for reassertion of the PRP's views on these issues.

[53]The timing of judicial review of §106(a) orders is governed by §113(h) of CERCLA. Also, PRPs may obtain judicial review after they have fully complied with the unilateral order through a reimbursement petition filed under §106(b) of CERCLA, wherein PRPs may contest issues of liability or the selection of remedy.

[54]Attendance at the conference should be limited to EPA and the respondent, and the respondent's attorney and/or technical advisor.

appropriate Regional officials, should attend. The conference schedule and agenda will be at the discretion of the EPA employee leading the conference consistent with this guidance. It is in the Region's discretion who presides at the conference. The supervisor of the RPM assigned to the site would be an appropriate person. The assigned regional counsel attorney should not conduct the conference although he or she may attend. In addition, the attorney should not prepare a summary, due to the possibility that this may put the attorney in the position of being a witness in subsequent litigation.

IX. Specialized Forms and Use of Unilateral Orders

Specialized forms of unilateral orders may serve as a settlement incentive for cooperative PRPs, and may also serve as a disincentive for non-settlors. There are different forms of unilateral orders which may serve as settlement inducers. Generally, in drafting unilateral orders, the order should direct the PRPs to conduct the entire remedial action. In limited instances, however, the Agency may settle with some PRPs and issue "carve-out" unilateral orders to recalcitrant parties to compel them to conduct a discrete portion of the work at the site. The Agency also may issue "parallel" unilateral orders to recalcitrants ordering them to coordinate and cooperate with the settlors in conducting the response action. Carve-out and parallel orders are explained in more detail below.

During settlement negotiations, the Agency may set aside a portion of the cleanup for non-settlors, and may verbally indicate its present intent to issue unilateral orders for that portion of the work to all PRPs who do not sign the settlement agreement. This is referred to as a "carve-out" settlement.[55] Work that may appropriately be carved out includes portions of operable units that constitute independent tasks. To prevent any possibility of delaying the remainder of the response action, only independent, discrete tasks should be the subject of a carve-out order. Otherwise, the entire process may hinge upon the non-settlors timely compliance with the carve-out order. Separate tasks that may be carved out may include removals of contaminated soil in separate areas, or removal of specified tanks or drums.

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[55]A "carve-out settlement is a form of mixed work. For information on the types of mixed funding arrangements such as mixed work, which may be used as incentives to settlement, see "Superfund Program; Mixed Funding Settlements," (OSWER Directive number 9834.9) 53 Fed. Reg. 8279 (March 14, 1988).

Due to the uncertainties of when and how the work allocated to non-settlors will be completed and of how many PRPs will choose to settle, before a carve-out order to non-settlors is proposed during settlement negotiations, the Regions should consider the possibility of having to pursue the non-settlors or fund the work.[56] In appropriate cases, the settlement agreement should provide for a delayed schedule for the settlors to perform the carved-out work. By use of a delayed schedule, the Agency may later seek the work from the settlors, if the non-settlors do not comply with the carve-out order. Second, the Region should consider the possibility of undersubscription or oversubscription to the settlement. If there is oversubscription to the settlement, there might be too few PRPs to which the carve-out order could be issued.

Unilateral orders may also serve as a settlement incentive when the Agency has reached a complete settlement at the site with fewer than all PRPs. When a complete settlement agreement is reached for conduct of the remedial action with fewer than all PRPs, the Agency may agree to issue "parallel" unilateral orders to the liable non-settlors. Parallel unilateral orders direct the non-settlors to coordinate and cooperate with the settlors' cleanup activities, as described in the consent decree.[57] The requirements of a parallel unilateral order match the response action requirements set forth in the consent decree settlement. Where the response action is properly conducted by the settlors, nonsettling recipients of parallel unilateral orders may be liable for daily civil penalties if they failed to contribute to the settlors' efforts by, for example, payment of money or "in-kind" contribution. Parallel unilateral orders benefit the settlors because non-settlors may contribute to the PRP cleanup revenues upon receipt of the unilateral order. Alternatively, if recipients of unilateral orders fail to financially, or

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[56]Factors to consider when deciding whether to propose a mixed work settlement include the strength of the liability case against settlors and any non-settlors. This includes litigative risks in proceeding to trial against settlors, and the nature of the case remaining against non-settlors after the settlement. Mixed work settlements should be avoided where there is a significant potential for delays in cleanup due to inadequate coordination or potential conflicts. See the Mixed Funding Settlements guidance cited above.

[57]Regions must consider the implications of the possibility of non-compliance with such an order.

otherwise, assist the settlors, unilateral orders may assist settlors to bring contribution actions against the non-settlors.

X. Continued Negotiation after Issuance of An Order

Upon receipt of a unilateral order, PRPs may indicate a preference for conducting the response action under a consent decree. This will generally only be considered when it is possible that the agreement will be reduced to a decree promptly. Except where quick agreement on a consent decree is likely, negotiations normally should not be resumed since the PRPs presumably were given a full opportunity to settle with the Agency prior to receipt of the unilateral order. Alternatively, during negotiations, PRPs may indicate that they will not sign a consent decree, but may comply with a unilateral administrative order. In this situation, the Region can decide whether it is appropriate to issue a unilateral order.

The Agency may benefit from PRP conduct of a response action under a unilateral order. Such benefits may include early initiation of the response action through the absence of prolonged negotiations and an expedited review process.[58] While certain other benefits may accrue to the Agency under a consent decree rather than a unilateral order, in the interest of early initiation of the response action, the Agency may choose to require PRP conduct of a response action under a unilateral order in lieu of a consent decree.[59]

XI. Noncompliance with Unilateral Orders

In the event that PRPs do not submit their notice of intent to comply letter by the date required, or do not adequately comply with a unilateral order, the Agency must decide whether to immediately seek judicial enforcement of the order, or to assume the lead on the project and conduct the RD and/or the RA with Fund money. Agency funding of the project may be followed by a judicial referral, at a minimum, for cost recovery, penalties and damages. Regional offices have discretion to choose either funding or litigation, based upon: the availability of funds

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[58]Administrative orders do not require judicial approval or public comment. These procedures apply to consent decrees entered under §122. See §122(d)(2).

[59]Under a unilateral order, PRPs will be subject to §106(b) daily penalties instead of stipulated penalties, and they are ineligible for contribution protection or covenants not to sue. Past costs typically will be recovered by EPA through a demand letter and/or a §107 cost recovery lawsuit.

including State-cost share funds for the RA; the urgency presented by the site; the amount of available enforcement resources; and the degree to which the case fits the criteria for judicial enforcement. Regions also should consider the need for EPA to maintain a credible section 106 enforcement presence in the Superfund program. See the "Guidance on CERCLA Section 106 Judicial Actions," for a discussion of the appropriate criteria for a judicial referral.

The primary focus in referring a case to DOJ is generally the Agency's prospect for successful litigation and the need to ensure remedial action at a site. Once the Government decides to bring a section 106 action against the PRPs, it will pursue the largest manageable number of potentially liable parties, based on considerations such as the volume and nature of their contribution, their relationship to the site (such as owners and operators), their financial viability, and their recalcitrance in the settlement process. In selecting defendants, the Agency should consider whether, based on information obtained after issuance of the unilateral order, any of the respondents have a "sufficient cause" defense or a section 107(b) defense.

XII. Note on Purpose and Use of this Memorandum

The policy and procedures set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity by any person. The Agency may take any action which is at variance with the policies or procedures contained in this memorandum, or which is not in compliance with internal office procedures that may be adopted pursuant to these materials.

If you have any questions concerning any material contained herein, please call Deborah J. Hartman (FTS)/(202) 382-2034 of the Office of Waste Programs Enforcement. The contact at the Office of Enforcement and Compliance Monitoring is Patricia L. Winfrey at (FTS)/(202) 382-2860.

APPENDIX A

ADMINISTRATIVE AND JUDICIAL SETTLEMENT AND UNILATERAL ENFORCEMENT AUTHORITIES

I. Administrative Settlement and Unilateral Enforcement

A. Sections 122 and 106 Consent Administrative Orders

Prior to SARA, the Agency based its consent administrative orders for both removals and the RI/FS on section 106 of CERCLA. The RI/FS settlement agreement is now typically based upon CERCLA sections 104 and 122. In these cases, a finding of imminent and substantial endangerment is no longer required for RI/FS agreements. RA settlements under section 122 are embodied in consent decrees.[60] Unilateral orders for conventional removals continue to be issued pursuant to section 106.

Penalties available for non-compliance with consent administrative orders include stipulated penalties, section 109 monetary penalties, and section 106(b) daily civil penalties and possibly treble damages where the Fund takes over.

B. Section 106 Unilateral Administrative Orders

Section 106 unilateral administrative orders may be used to compel PRPs to conduct removals, RI/FSs[61], remedial designs or remedial actions. If unilateral orders have the desired effect PRPs will comply with the terms of the orders, or they may decide to settle with the Agency. If they agree to settle on favorable terms, the unilateral order may be followed by a consent administrative order for removals and RI/FSs, or a consent decree for RD/RA.

If PRPs do not comply with the unilateral order "without sufficient cause," daily civil penalties may be imposed by a court under section 106(b)(1). Under section 107(c)(3), punitive damages also are available for noncompliance without sufficient cause with a section 106 administrative order in an amount up to three times that incurred by the Fund to perform the response work required by the order.

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[60]See section II(A), below.

[61]Note that if a §106 unilateral order is used to compel PRPs to conduct an RI/FS, a finding of a possible imminent and substantial endangerment must be made before the preparation of the baseline risk assessment. However, unilateral orders are generally not recommended for ordering conduct of an RI/FS.

Courts have jurisdiction to review section 106(a) administrative orders only in the following instances: (1) an action is brought under section 107 to recover response costs or damages or for contribution; (2) a judicial action is brought to obtain injunctive relief under section 106; (3) penalties are sought for noncompliance with the administrative order; (4) PRPs petition for reimbursement under section 106(b)(2) after compliance with the order; (5) or a citizen suit is brought pursuant to section 310. See CERCLA section 113(h).

II. Judicial Settlement and Unilateral Enforcement

A. Consent Decrees

The remedial action component of the RD/RA, if settlement is reached under section 122, is required to be implemented in a consent decree under section 122(d)(1)(A). A removal, RI/FS under section 122(d)(3), or remedial design settlement agreement may be embodied in either a consent administrative order or a consent decree. Consent administrative orders are typically used for removals and RI/FS agreements because they do not involve the judicial process and often may be obtained more quickly than consent decrees. Consent decrees, on the other hand, are judicial documents that must be submitted to a court by the Department of Justice (DOJ) and approved by the court. Penalties available for noncompliance include stipulated penalties, section 109 statutory penalties, section 106(b) daily civil penalties, and treble damages where the PRP's noncompliance with an administrative order leads to Fund-financed action.

B. Section 106 Judicial Actions

If PRPs refuse to comply with a section 106 unilateral order directing them to conduct a removal or a remedial activity, the case may be referred to DOJ for judicial enforcement.[62] Referrals to DOJ are necessary whether penalties and/or compliance with the terms of the order are sought.

In a section 106 judicial action, the Government may seek to collect daily civil penalties from any person who, without sufficient cause, willfully violates, or fails or refuses to comply with a section 106 unilateral order. In addition, in a section 107 cost recovery action, the Government may seek treble damages from PRPs for their failure to comply with an administrative order. However, there is one procedural

[62]Some orders are enforceable by administrative penalty. See section 109(a)(1)(D), (E), (b)(4)(5), and section 122(1).

difference between securing PRP conduct of the response action and obtaining monetary penalties from the PRPs. Administrative orders are a necessary precondition for obtaining the desired relief when monetary penalties are sought. PRPs must have failed to comply with administrative orders before monetary penalties may be obtained. Daily civil penalties or treble damages may then be secured through a judicial action.

On the other hand, unilateral orders are not the only alternative if PRP conduct of the response action is desired. If settlement negotiations break down over the removal or remedial action, and the Agency wishes to compel PRP cleanup, the case may also be referred directly to DOJ. As previously mentioned, PRP cleanup can be compelled through a section 106 judicial action. Unilateral orders are therefore an option if the Agency wishes to compel PRP conduct of the response action.

United States Environmental Protection Agency | Office of Solid Waste and Emergency Response | Publication 9833.0-1aFS May 1991

EPA

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Summary of "Guidance on CERCLA Section 106(a) UAOs for RD/RA"

Office of Waste Programs Enforcement
CERCLA Enforcement Division/GEB/OS-510

Quick Reference Fact Sheet

Unilateral Administrative Orders (UAOs) require Potentially Responsible Parties (PRPs) to undertake a cleanup which they would not agree to undertake under a consent order. If PRPs do not comply with a UAO, EPA may fund the response and seek to recover response costs and punitive damages up to three times the costs incurred by the Fund through a judicial referral. Judicial enforcement of a UAO can also compel performance and recover penalties.

When issuing a UAO, Regions must ensure that the PRP search is complete and that documents developed during the Remedial Investigation/Feasibility Study (RI/FS) support all the findings necessary to support the issuance of a UAO.

This summary is intended for use only as a supplement, not a replacement, to the official "Guidance on Section 106(a) Unilateral Orders for Remedial Design and Remedial Action," OSWER Directive #9833.0-1a, March 7, 1990.

Statutory Requirements of Section 106 Orders

Section 106(a) of CERCLA gives EPA the authority to issue a UAO if an actual or threatened release presents "an imminent and substantial endangerment to public health, welfare, or the environment." The order must clearly describe the connection between the nature and location of the release or threat of release, the possible endangerment, and the response action. The affected state must be notified before an order is issued.

Courts may review section 106 orders only when the Agency seeks to enforce the order, when the Agency seeks penalties for violation of the order, or when the PRPs seek reimbursement from EPA of response costs incurred after complying with the order. Judicial review of the adequacy of any response action is limited to the administrative record for the selection of the response action.

Possible Recipients of Unilateral Orders

Recipients of orders are not limited to liable parties under section 107 of CERCLA. In limited circumstances, other parties, such as adjacent landowners, can receive 106 orders.

Case-Specific Considerations

Criteria for the decision to issue an order include:

- evidence sufficient to support liability of each PRP (except as indicated above);
- reasonable belief that PRPs are financially viable;
- well defined response action; and
- evidence that PRPs can technically perform response action with EPA oversight.

In identifying the respondents, EPA should consider each PRP's contribution to the site and the PRPs' financial viability. The Agency should name the largest manageable number of parties but should not name any parties who would have a valid defense against an EPA action.

Procedures for Issuing Unilateral Orders

Special notice procedures for Remedial Design/ Remedial Action(RD/RA) invoke a 60 day moratorium following issuance of the notice letter. If the respondent submits a good faith offer within the first 60 days, the Agency may not issue a UAO for 120 days after the issuance of the notice letter. If no settlement is reached by the 120th day, the Agency is authorized to issue a UAO.

The Agency gives PRPs an opportunity to confer with EPA, limiting the scope of the conference to the implementation of the response action and the extent to which the respondent intends to comply.

Specialized Forms and Use of Unilateral Orders

Different forms of UAOs may provide settlement incentives.

In "carve-out" orders, the Agency sets aside a portion of the cleanup for non-settlers, and may orally indicate its intent to issue UAOs for that portion of the work to all PRPs who do not sign a settlement agreement. The Regions should consider judicial enforcement or a Fund- financed response before proposing a carve-out order to non-settlers.

In "parallel orders," when the Agency has reached a complete settlement at a site with some, but not all, of the PRPs, the Agency may issue "parallel" orders to the non-settlers. A parallel order directs the non- settlers to coordinate and cooperate with the settlers' cleanup activities, as described in the consent decree. Under a parallel order, non-settlers may be liable for penalties if they fail to contribute equally to the response action.

Continued Negotiation After Issuance of an Order

Even after a UAO is issued, PRPs may indicate a desire to settle under a consent decree. The Regions should not enter into further negotiations unless it is likely that the PRPs will sign a consent decree promptly.

The Agency may prefer that PRPs conduct response actions under a UAO, rather than a consent decree. Response actions can be implemented more promptly under a UAO, and prolonged negotiations that might occur under a consent decree are avoided.

Noncompliance with Unilateral Orders

If the PRPs do not comply with the UAO, the Agency may either seek judicial enforcement or perform a Fund-financed response action. The decision to choose funding or litigation is based on the availability of funds for the RA, the urgency represented by the site, the amount of available enforcement resources, and the degree to which the case fits the criteria for judicial enforcement.

For more information or questions about this document, please contact Paul Connor, Office of Waste Programs Enforcement, Guidance and Oversight Branch, at FTS 475-6770.