UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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MEMORANDUM

SUBJECT: Guidance on CERCLA Section 106 Judicial Actions

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TO: Regional Administrators, Regions I - X
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I. Background

EPA must consider all available enforcement tools, including civil judicial actions, in its efforts to encourage PRPs to enter into negotiations and settlement agreements for cleanup of hazardous waste sites. Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides that "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 to secure such relief as may be necessary to abate such danger or threat." Such judicial enforcement actions have an important role to play in the Superfund cleanup process, and consideration of Section 106 judicial actions should be an integral part of Superfund case management planning.[1]

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[1] Section 106(a) Administrative Orders are also useful in encouraging settlements. OWPE is preparing separate guidance on the use of CERCLA Section 106(a) Administrative Orders.

This guidance provides criteria for consideration in selecting and initiating Section 106 judicial actions. The guidance also identifies and discusses issues that should be considered in preparation of a Section 106 referral.

II. Role of Section 106 in Superfund Enforcement

Section 106 judicial actions can be used as an effective enforcement tool against recalcitrant or other non-settling PRPS. EPA has found that many parties, when faced with the threat of an action for injunctive relief, have agreed to conduct response measures pursuant to a consent agreement. Section 106 judicial actions may be brought where either a group of PRPs refuse to participate in negotiations on the remedial action or where negotiations prove unsuccessful. In such cases, the Regions will need to decide whether to issue a Section 106 administrative order or whether to refer a Section 106 judicial action to the Department of Justice as alternatives to a Fund-financed response. (See Section IV below).

We realize that substantial resources are often needed to support Section 106 judicial actions. However, the passage of SARA has strengthened the government's position that judicial review of any issue concerning the adequacy of any selected response action is limited to the facts in the administrative record. Record review will make litigation of Section 106 cases more efficient, since, in reviewing the Agency's decisions, courts will not generally allow a party who challenges a decision to look beyond EPA's administrative record by permitting discovery, hearings, or additional fact finding. In particular, courts will not likely permit persons challenging EPA's response decision to depose Agency decision-makers, staff, or contractors on deliberations which lead to the decision.

III. Criteria for Bringing Section 106 Judicial Actions

A. Financial ability of PRPs to conduct the cleanup

The first criterion to consider in bringing a Section 106 judicial action is whether some or all identified PRPs have the financial means to conduct a response action. As part of the PRP search, the Regional office should assess whether the responsible parties can pay for a private party cleanup. In making this determination, the Region should, as early as possible, issue a Superfund Section 104(e) information request to all identified PRPs. The Region may also review the following sources of financial data:

- o Financial information obtained on PRPs during the initial PRP search;
- o Financial information obtained by NEIC;
- o Financial information contained in a RCRA permit application;
- o Financial information required by the Securities and Exchange Commission (SEC) regarding financial statements of publicly traded companies; and
- o Financial information obtained by EPA in conducting title searches of property owned by PRPs.

For a more complete description of the performance of financial assessments, the Regions should refer to the August 1987 guidance, Potentially Responsible Party Search Manual, (OSWER Directive 9834.6). Regional offices should additionally contact their Regional civil investigators for assistance in ascertaining the financial viability of individual PRPs.

B. Availability of Superfund for response actions

A Section 106 judicial action should be considered in a number of situations, including those where EPA may not be able to use the Superfund to finance a response action. Even in cases where the Agency might prefer to use the Fund and subsequently pursue cost recovery, it may be appropriate to use Section 106 judicial actions where EPA planned to conduct a remedial action, but may not be able to obtain state agreement to pay for the required share of the remedial action or where state funding for the particular site is not available. In addition, some sites will go without CERCLA Federal funding since only a limited number of NPL sites can be addressed with available Fund resources. Even where Fund money is available, the Regions should consider issuing Section 106 AOs and, where appropriate in light of the criteria set forth herein, filing Section 106 judicial actions.

C. Proof of PRP's Section 106 liability

To prove a Section 106 case against each PRP, there must be evidence that each such PRP named in the 106 action is liable under Section 106. Parties who are liable under Section 106 include but are not limited to those classes of

parties liable under Section 107. Before referring a Section 106 case, therefore, the Region must evaluate each PRP in light of the elements of Section 106 liability and the potential defenses that may be raised pursuant to Section 107(b).

D. Evidence of imminent and substantial endangerment

In a judicial action brought under Section 106, EPA must also be able to prove that, because of a release or threat of a release of a hazardous substance from a facility, an imminent and substantial endangerment may exist at that facility. In making this determination, the Regional Office should review the adequacy of the administrative record to support evidence of imminent and substantial endangerment. The record to support such a finding will likely include evidence obtained through inspections and investigations.

An endangerment assessment or risk assessment, which is part of the record, will provide documentation for proof of an imminent and substantial endangerment, and may serve as the basis for a Section 106 administrative order or Section 106 complaint. Where available, the assessment prepared by the Agency should consider the results of any health assessment prepared by ATSDR. For remedial actions, the risk assessment or public health evaluation conducted by EPA, the State, or PRPs at the site should generally be adequate to support the finding of imminent and substantial endangerment. The materials supporting the finding of an endangerment should be carefully reviewed and incorporated in the administrative record.

Case law on Section 106 imminent and substantial endangerment provides the following additional guidance:

- o Imminent and substantial endangerment may be to the public health or welfare or the environment;
- o "Endangerment" is not actual harm, but a threatened or potential harm;
- o "Endangerment" is imminent if factors giving rise to it are present, even though harm may not be realized for years.

o "Endangerment" is substantial if there is reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or threatened release of a hazardous substance if remedial action is not taken.

See Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) (en banc), cert. denied, 426 U.S. 941 (1976); B. F. Goodrich v. Murtha, Civil No. N-87-52 (D. Conn. Oct. 24, 1988); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D. N.H. 1985); United States v. Conservation Chemical Co., 619 F. Supp. 162 (W.D. Mo. 1985); United States v. Seymour Recycling Corp., 618 F. Supp. 1 (S.D. Ind. 1984).

E. Strength of administrative record

Under CERCLA, judicial review of response selection decisions should be based on the administrative record supporting the decision. Thus, it is essential that a complete, thorough administrative record in support of all pertinent Agency response decisions that will be subject to litigation be compiled prior to referral. See "Administrative Records for Decisions on Selection of CERCLA Response Actions," May 29, 1987, OSWER; Proposed National Oil and Hazardous Substances Pollution Contingency Plan, 53 Fed. Reg. 51,394 (1988) (Subpart I) (to be codified at 40 C.F.R. Part 300).

F. Identification of required response action

It will generally be more efficient to bring a Section 106 action where a ROD has identified a specific response action that the PRPs can implement. The Regional Office may not want to pursue a case where it anticipates substantial difficulties in describing in detail the activities necessary to carry out the selected remedy. For example, to enable EPA to request more specific relief in the referral, it may be appropriate for EPA to use Fund money for the remedial design (RD) prior to referring a Section 106 judicial action for remedial action (RA).

G. Relatively few responsible parties representing a substantial contribution

In deciding whether to refer a Section 106 case, it is generally preferable to refer a case which does not involve numerous PRPs, due to the complexities and resource implications of litigation with multiple parties.

However, where there are large numbers of PRPs involved, litigation may be manageable where similar issues or defenses would be raised by multiple PRPs. Thus, a large number of PRPs should not necessarily defeat further consideration of a Section 106 judicial action, particularly if the Region believes that a Section 106 action may encourage the PRPs to organize and coordinate a response action. It is also generally preferable to bring the Section 106 action against the group of PRPs whose contributions represent a substantial percentage of the quantities of hazardous substances at a site.

H. No circumstances indicating an immediate threat to public health, welfare, or environment

Emergency circumstances which present an immediate threat to health, welfare, or environment, such as a fire or explosion, should generally not be the subject of a Section 106 judicial action. These situations will likely arise where EPA determines that it must conduct time-critical removal actions. In some cases, however, EPA may still have sufficient time to issue an administrative order, and then decide to use the Fund if compliance is not achieved.

In addition, even where EPA has taken emergency action, a Section 106 action could be initiated later to compel remedial action. As noted above, OWPE is developing guidance on the use of Section 106 administrative orders.

IV. Issues to be Considered in Preparation of Section 106 Referrals

Once the Regional office has made a decision to prepare a Section 106 referral, it needs to review the following issues in particular: (1) which defendants to name in the action; (2) when to bring a Section 106 judicial action; and (3) the relation of Section 106 administrative orders to Section 106 judicial actions.

A. Parties Named in Section 106 Judicial Action

A Section 106 referral may be brought against some or all of the PRPs identified at a site. In determining which parties to name in a Section 106 judicial action, consideration should be given to the volume and nature of the waste contributed by each party, the involvement of parties such as prior owners, the financial position of each party, and the strength of liability evidence against each party. Where EPA has reached a settlement with some of the parties to perform a portion of the response action, EPA

will consider a Section 106 case to require the remaining non-settling parties to perform some of the response work. This process is sometimes referred to as a "carve-out" settlement.

B. Timing of Section 106 Judicial Actions

The Section 106 case to require PRPs to perform remedial work should generally be brought after the PRP search has been completed and after the ROD has been signed. A Section 106 complaint to require performance of a removal action should be filed after an adequate administrative record has been compiled to support the removal. The administrative record in support of all EPA response decisions should be completed prior to referral. In any case, a Section 106 action should generally not be referred until after PRPs have been given notice and an opportunity to perform removal or remedial actions themselves. In order to more fully integrate Section 106 judicial actions into the Superfund enforcement program, the Region should include a strategy for use of a Section 106 judicial action in its case management planning process.

C. Relation to Section 106 Administrative Orders

The Region should generally issue a Section 106 administrative order before referring a Section 106 civil judicial case. In drafting an order that may be enforced in the event of noncompliance, the Regions should consider who will be named in a judicial action. The order should be specific as to the action to be taken, and the Region should be prepared to defend the order in an enforcement proceeding.[2] A Section 106 administrative order will generally take less time to prepare and serve than referral and filing of a Section 106 complaint. Also, violation of a Section 106 order will set up a punitive damage action under Section 107 and/or a penalty action under Section 106. In addition, enforcing an order rather than seeking to compel injunctive action in the first instance should further support record review. In cases where it is very likely that a judicial action will follow the issuance of an order,

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[2] It has now been established that pre-enforcement review of such an order is impermissible. See Section 113(h) of CERCLA, 42 U.S.C. Section 9613(h); Solid State Circuits, Inc. v. EPA, 812 F.2d 383 (8th Cir. 1987); Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir 1986); Barnes v. U.S. District Court for the W.D. Wash., 800 F.2d 822 (9th Cir. 1986).

it may be worthwhile to plan in advance to prepare the order to be issued and the referral simultaneously.

Where EPA does not achieve compliance with the administrative order, it must decide whether to refer a Section 106 action to the Department of Justice for judicial action or to undertake a Fund-financed response and seek cost recovery, penalties and treble damages later. In making such a decision, the factors discussed in Section III above should be considered.

V. Disclaimer

This memorandum and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. It does not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this memorandum or its internal implementing procedures.

VI. Agency Contact

Please contact Belinda Holmes of OECM-Waste at (FTS) 382-2860 if you have any questions on this guidance.