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ISSUANCE OFADMINISTRATIVE ORDERS FOR IMMEDIATE REMOVAL ACTIONS

U.S. ENVIRONMENTAL PROTECTION AGENCY
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NOTICE

Attachment VI

Issuance of Administrative Orders for Immediate Removal Actions

2/21/84

...TION AGENCY
WASHINGTON, D.C. 20460

FEB 21 1984

OFFICE OF
SOLID WASTE AND EMERGENCY RESPO

MEMORANDUM

SUBJECT: Issuance of Administrative Orders for Immediate Removal Actions

FROM: Lee M. Thomas
Assistant Administrator

TO: Regional Administrators, Regions I-X
Air & Waste Management Division Directors
Regions III, IV, VI, VII, VIII, X
Waste Management Division Directors, Regions I, V
Director, Office of Emergency and Remedial Response, Region
Toxics and Waste Management Division Director, Region IX
Environmental Services Division Directors, Regions I - X
Regional Counsel, Regions I - X

This memorandum sets forth guidance on issuing Administrative Orders for immediate removal actions under CERCLA. This guidance should be used in conjunction with the recently issued Guidance Memorandum on Use and Issuance of Administrative Orders under Section 106(a) of CERCLA dated September 8, 1983.

Since becoming the Assistant Administrator, OSWER, I have sought to implement a "balanced" CERCLA program which uses both the administrative and civil judicial enforcement provisions of the Act--as well as the Fund--to secure clean up of hazardous waste sites. One of my primary enforcement goals is to increase the use of Administrative Orders for immediate removals. Orders are particularly useful in immediate removal situations, since they can be issued quickly, can require discrete segments of work (e.g., surface cleanup) and carry the threat of additional damages and penalties in the event of non-compliance.

We estimate that Administrative Orders may be appropriate for a significant percentage of immediate removal situations. Increased resources will be provided to the Regions, and I expect the Regions to devote resources to accomplishing this goal of increased Administrative Orders for removals.

In addition, the Regions must develop a satisfactory organizational structure if the Administrative Order program is to succeed. The organization of enforcement personnel varies among the Regions. The majority of the Regions keep their "remedial" and "removal" personnel in different divisions. Since CERCLA enforcement has (until now) concentrated heavily on remedial sites, most regional technical enforcement personnel have been assigned to the remedial response units (generally, the Air and

Hazardous-Material Divisions). Personnel responsible for immediate and planned removals have usually been assigned to the Environmental Services Division which, as a general rule, has not been assigned enforcement personnel.

Obviously, the ability of a Region to implement this new policy requires both close coordination among the immediate response staff and their colleagues in the technical enforcement and regional counsel offices and an organizational structure capable of developing and issuing quality orders. Regions that do not currently dedicate technical enforcement staff to their immediate removal program should assure that appropriate personnel are in place in the technical enforcement office to implement this policy and to handle the workload.

I. BACKGROUND

CERCLA identifies two types of response actions for which the Fund can be used: removal actions and remedial actions. The National Contingency Plan (NCP) further refines the former category into "immediate" and "planned" removals and describes the process and procedures for proceeding with these forms of response. (See Federal Register 31180; July 16, 1982). Please refer to the attached appendix for an outline of the relevant CERCLA and NCP provisions regarding removal activity, Administrative Orders and enforcement.

Because of the large number of sites which pose a health hazard, the Office of Emergency and Remedial Response (OERR) defines the category of immediate removals according to the immediacy and severity of the hazard to the public health or environment. These categories establish a guide for the purpose of assessing the length of time within which the Agency must respond to the event. Agency response to situations which require immediate response (e.g., threats of fire, explosion or spills) normally takes place in a matter of hours or one or two days at the most; Agency response to other situations (e.g., rusting barrels that have not yet begun to leak, holding ponds that may overflow with the advent of the rainy season) normally takes place during a period which may range from a week to a month.

This guidance is most applicable to the latter situation; i.e., the Regions should consider issuing Administrative Orders in situations when there is at least one week between the time the On-Scene Coordinator (OSC) determines that an immediate removal is warranted and the time that actual on-site response must begin.

Administrative Orders are a useful enforcement tool in these types of immediate removals situations, for the following reasons. First, they encourage private party response, particularly since it

is OSWER policy to meet, if at all possible, with responsible partie after the Order is issued if a meeting is requested. The results of an OWPE analysis of 49 completed immediate removals indicate that the elapsed time between the request for funds and the start of site response ranged from eight days to more than three weeks for 24 of the sites. This clearly indicates that there is time to issue Administrative Orders in appropriate situations, and the process described in this memorandum can be implemented in as little time as a week, if necessary. Second, removals require discrete units of work (e.g., barrel or contaminated soil removal) which makes responsible party compliance and Agency compliance monitoring easier. Third, the costs of immediate removals are generally moderate; this increases the probability of private party compliance.

In the event of non-compliance with an Administrative Order, the Agency is prepared to quickly initiate a Fund-financed response and seek fines/treble damages from the responsible parties. Since the treble damages will be based on the Fund dollars expended, these situations are particularly amenable to establishing treble damage claims, which the Agency will seek to recover in its §107 cost recovery actions. (The average obligation for 110 prior immediate removals undertaken by the Agency was approximately $275,000). Issuance of Administrative Orders for these situations also may improve the equitable position of the Agency in subsequent cost recovery cases.

II. CRITERIA FOR ISSUING ADMINISTRATIVE ORDERS

First, of course, the Agency must meet the legal threshold that an imminent and substantial endangerment to public health or the environment may exist.[1] Information which can be used and evaluated by the OSC or his supervisor to make this determination include:

1. Notification in accordance with CERCLA §103 (a), (b) or (c)
2. Investigations by government authorities conducted pursuant to CERCLA §104 (e) or other statutory authority.

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[1]The Agency must be able to properly document and justify both its assertion that an immediate and significant risk of harm to human life or health or to the environment exists and its choice of the ultimate response action at a site in order to be able to oppose a challenge to the Order and to successfully litigate any subsequent cost recovery action. Adequate documentation consists of photographs samples, monitoring or other documented site analysis. The Agency should follow chain of custody procedures to maintain the integrity of samples taken at the site. Please refer to the Cost Recovery Guidance, issued August 26, 1983 for more detailed guidance. The Revised Superfund Removal Guidance to be issued in late February 1984 will also provide additional guidance on immediate removal assessments.

3. Notification of a release by a federal or state permit holder when required by the permit.
4. Inventory efforts or random/incidental observation by government agencies or the public.

If the facts reach the legal thresholds of CERCLA §106, several policy criteria for deciding whether to issue an Order for an immediate removal should be considered. The first of these is the amount of time available before site response must begin. This determination will usually be made by the OSC. An Order may be appropriate if there is a minimum of one week available for issuing the Order and meeting with the recipients (see further below) between the time of the decision to seek funds for the immediate removal and the initiation of on-site response. (Of course if an order can be issued in less than a week the Regions are not bound by the "one week minimum". However, the Regions should always attempt to have 48 - 72 hours available for the recipients to request and conduct a conference.)

A second policy criterion is the number of potential recipients of the Order and their financial viability. There should be a "manageable" number of responsible parties and they should be collectively capable of undertaking site response. The Regions will use their best judgement to decide what constitutes a "manageable" number of responsible parties and assess the capability of the parties to undertake the response for any individual immediate removal situation. (For a more lengthy discussion of criteria to consider when issuing an Administrative Order, please refer to the Administrative Order guidance.) When there is a large number of potentially responsible parties, Orders need not be issued to all of the parties. In this type of situation the Region should issue the Orders only to those parties most likely to comply. The Region, however, is not precluded from issuing Orders to all the parties if it so desires.

These criteria are to be used as general guidelines for determining whether an Administrative Order should be issued for an immediate removal. The varying factual circumstances presented in any potential removal action mandate that each Region conduct this necessary factual analysis to decide the appropriateness of an Order.

III. PROCESS FOR ISSUING ADMINISTRATIVE ORDERS

The timely development and issuance of Administrative Orders for immediate removals will require effective coordination among the OSC, technical enforcement personnel and the legal counsel in both the Regions and Headquarters. OSWER will not dictate how the Regions must organize or adjust personnel in order to accomplish this task, but it will expect the Regions to have a system in place which is capable of implementing an administrative order program for immediate removals.

The procedures for developing and issuing orders follow:

The decision by the OSC or his superior to request funds for an immediate removal also triggers the process for deciding whether to issue an Administrative Order.

The OSC will inform the technical enforcement branch (or other appropriate enforcement personnel if no separate branch exists) and the Regional Counsel that a request for a Fund-financed immediate removal is being developed. Appropriate personnel in OERR and OWPE should also be informed of this action. While the OSC and his staff prepare the 10-point document,[2] technical enforcement personne and the Regional Counsel should begin to identify responsible parties and assess their financial ability to conduct site cleanup.

The OSC or the Regional Counsel will attempt to orally contact (with written follow-up) potentially responsible parties in order to secure private-party response in lieu of the Fund. While previo Agency policy was to proceed with Fund-financed response if the responsible parties refused to act, the Agency will now issue administrative orders in appropriate circumstances before initiating Fund action, so long as the site does not pose an unreasonable risk of harm to the public health, welfare or the environment.

Regardless of whether a responsible party agrees or not to undertake the removal, development of the 10-point document should proceed as usual. However, the OSC and technical enforcement staff (in consultation with the Regional Counsel) shall apply the criteria outlined in Part A (above) to recommend to the Regional Administrato whether to issue an Administrative Order. The decision to issue the order rests with the Regional Administrator, subject to the current delegations.

If the Regional Administrator decides to issue an Administrative Order, the Order will be drafted by technical enforcement personnel with the advice of the Regional Counsel. The technical information contained in the 10-point document will normally provide the basis for the Order's "Findings of Fact" while the Agency's intended response actions will serve as the remedy the recipient is required to implement.

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[2] Requests for less than $250,000 can be approved by the Regional Administrator while requests for more than $250,000 require the approval of OERR. (It is anticipated that within the month, the Regional Administrators will be delegated the authority to obligate up to $1 million for removal actions.) The ten point document itself must justify its cost estimates and be consistent with the NCP. With the issuance of the Revised Superfund Removal Guidance, the 10 point document will become an Action Memorandum.

Since Administrative Orders will normally be issued in situations in which site response is not required for at least one week, OSWER policy is to provide recipients when possible an opportunity to meet with Agency personnel to discuss the terms of the Order and the means for compliance. Therefore, the Order should include the following provisions:[3]

1. A statement of the imminent and substantial danger pursuant to §106 of CERCLA and the risk of harm under §300.65 of the NCP.
2. A statement of the authority of the issuing official (normally the Regional Administrator) to issue the Order and why the recipient is liable under §107.
3. The steps the recipient must take to comply with the order, (following the provisions of the ten-point document in order to be as specific as possible).
4. A mandatory timetable for performing and completing the response. (The timetable should include at least one short term interim deadline so the Agency will have the ability if necessary, to demonstrate non-compliance before the project completion date.)
5. A provision informing the recipient that his duty to obe the terms of the order takes effect 72 hours after he receives the order.
6. A provision informing the recipient that he may orally contact the Agency to request a conference on the Order. The recipient must follow up his oral request in writing.
7. A provision specifying a date certain by which responses (either oral or written) to the Order must be received.
8. A provision which states that EPA reserves the right to undertake the action if emergency circumstances dictate such action and that such action in no way relieves the parties of responsibility for the costs of such actions.
9. A provision which requires: proper chain of custody procedures to be followed for any testing and sampling, adequate recordkeeping of activities (so records may be used as evidence in any future enforcement case), cooperation from employees of any contractor who engages in site activity, and availability of such employees to the U.S. in preparation and trial of a subsequent enforcement case.

[3] Refer to the general Administrative Order Guidance for examples of model orders and conference procedures.

Under a separate delegations memorandum to the Regions, the concurrence requirement will be waived for all Administrative Orders for immediate removals with obligations of $1,000,000 or less. Within two weeks of issuance of the Order, the Regions are to send a copy of the final Order to OWPE.

As a matter of policy, in order to increase the likelihood of compliance, the Agency encourages the convening of a conference with the recipients of an Administrative Order. Since Administrative Orders will generally be issued for immediate removal situations which do not require response in less than one week, the Agency will normally attempt to hold a meeting with the recipien if requested by the recipient. The conference should be convened on an expedited basis (e.g., within 72 hours after the Order is issued) if the recipient orally requests the conference. However, the Agency retains the right to "waive" a conference if immediate response is warranted because of deteriorating condition at the site. The Regional Administrator shall have the authority to decide whether to eliminate the conference prior to or following the issuance of the Administrative Order. If the Regional Administra waives the opportunity for a personal conference, a regional representative, must at least give the parties an opportunity to be heard by telephone before the effective date of the Order. In general, conferences concerning removal actions should be used to clarify the requirements of the Order rather than as an opportunity to negotiate the requirements.

The Agency must create a good administrative record of its meetings with the recipient of an Order for either enforcement of the Order or cost recovery after a Fund-financed cleanup. The Agency participants should prepare a written summary of the conference containing:

1. The date and participants.
2. A summary of the significant issues raised and arguments/ data used by the recipient to contest the Order.
3. The result of the conference (e.g. agreements reached with the recipient, indication from the recipient of an unwillingness to comply with the Order)

The presiding official, (designated by the Regional Administrator) must also prepare a statement which addresses any significant arguments raised by the recipient and recommends whether any modifications to the Order are warranted. (See the September 8, 1983 Administrative Order Guidance for a complete discussion of the procedures and "ground rules" for conducting the conference and the time frames for holding them.)

If the recipient agrees to undertake the stipulated response measures, the agreement may be in the form of a Consent Order. The OSC will monitor compliance with the Order and recommend additional enforcement action if the terms of the Consent Order are breached. If the recipient does not agree to undertake the measures contained in the Order, the Agency will generally not refer a case to the Department of Justice to force compliance because of the time constraints presented by the emergency. Rather, the Fund will be used for site response and the recipient(s) will be sued for cost recovery--including punitive damages in appropriate cases.

IV. USE OF THE FUND WHILE THE ADMINISTRATIVE ORDER IS BEING ISSUED

Normally, once an Order has been deemed appropriate for an immediate removal situation, the CERCLA Fund shall not be used to undertake a federally-funded immediate removal during the time period in which the Agency develops the Order, issues it to the responsible party, and conducts the conference.

However, if site conditions deteriorate-- presenting a corresponding increase in the threat that the site presents-- the Fund can be used for response while the Administrative Order process continues. In such instances, the Regional Administrator can approve the use of Funds below $250K and request the Assistant Administrator, OSWER, to release funds if the response work will be greater than $250K.[4] The Administrative Order process should continue since the parties may undertake site response at the next convenient break in activity.

Thus, if there are deteriorating conditions at the site, the OSC should continue all steps necessary for undertaking a Fund-financed response while the Order is being developed. The 10-point document should be prepared and receive the concurrence of all officials up through the Regional Administrator or the Director, OERR.

However, no actual obligation of Funds for site response will normally occur until after the Order has been issued and the conference has been held. Since the Order will only be issued in situations where an immediate response can be delayed, there will normally be time to see the Administrative Order process through to conclusion. The conference must be held within the time period specified in the Order (which will correspond to the time the Agency has before the response activity needs to begin). Since

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[4] If deteriorating conditions require the Fund to respond while the Order is still being issued, OSWER assumes that the Fund will take all response actions necessary at the site (e.g., remove all barrels, not merely those that may be about to leak).

the timing of the obligation will vary according to the estimated time needed to mobilize equipment and personnel, the OSC should work closely with the technical enforcement and Regional Counsel staff during the drafting of the Order to assure that the time period established for issuing the Order is synchronized with the time requirements for site response.

If the conference does not result in private party response--or if changing conditions at the site require accelerated response--the Fund-financed immediate removal will take place. If Fund-financed activity does begin, the Order may be written to require the potential responsible parties to undertake site activity at the next convenient break point in activity. If the parties still fail to undertake the site response activity, enforcement efforts will emphasize cost recovery with the additional imposition of fines/penalties as appropriate.

V. COST RECOVERY

The Agency will normally not initiate a civil action in the event of non-compliance with an Order but instead will seek to recover costs and damages after a Fund-financed response. Therefore, while enforcement personnel are carrying out the Administrative Order process, they should also be aware of the requirements for a successful cost recovery action. They must be able to document the following factors (some of which are the same ones necessary for the issuance of the Administrative Order itself).

1. The need for the immediate removal (evidence of an imminent and substantial endangerment or threat of endangerment to public health, welfare or the environment)
2. Liability of the responsible parties (evidence to support the contention that the parties meet the liability standard of §107)
3. Proof that the Fund-financed response activity was "not inconsistent" with the requirements of the NCP.
4. Documentation of all eligible costs for site-specific Fund expenditures.

Enforcement personnel must assure sufficient documentation of these factors from the period in which the 10-point document is developed and Funds are obligated through the actual clean up of the site. These cost recovery requirements must be met regardless of whether there will be a simple cost recovery action (if no Administrative Order is issued) or an action for response costs plus damages (if the Order is not complied with). The Agency must assure that evidence is preserved for any subsequent enforcement action. Proper chain of custody procedures must be used for any

sampling or testing, and adequate records of site activity must be kept. Employees of any contractor used for site activity must cooperate with and be made available to the U.S. in preparation and trial of any subsequent enforcement action. Enforcement, program and legal offices should work together throughout the case development.

VI. FOLLOW-UP

This guidance represents a substantial departure from prior practice; and I expect that it will take some time to implement. For these reasons, I will be reviewing all immediate removals referred to Headquarters for compliance with this guidance. In addition, for immediate removals under $250,000, I will ask the Directors, OWPE and OERR to review the compliance with this guidance quarterly, and to advise me accordingly.

Appendix

cc: Gene Lucero, OWPE
William Hedeman, OERR
Kirk Sniff, OECM
Dan Berry, OGC

APPENDIX

Authority/Requirements/Enforcement of Administrative Orders for Removal Actions under CERCLA

Under §106(a) of CERCLA:

If, EPA, acting on behalf of 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

may, after notice to the affected state,

issue such orders as may be necessary to protect public health and welfare and the environment.

Under §106(b) of CERCLA:

EPA may take action in the appropriate U.S. district court, against any person who willfully violates or fails or refuses to comply with any Order issued under §106(a), to enforce such order and

may fine such person not more than $5,000 for each day such violations occur or such failure to comply continues.

Under §107(c)(3) of CERCLA:

Any person who is liable for a release or threat of release of a hazardous substance that:

fails without sufficient cause to properly provide removal action upon order of the President pursuant to §106

may be liable to the United States for punitive damages in an amount at least equal to and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action.

Civil action may be commenced against any such person to recover the punitive damages. These punitive damages shall be in addition to any costs recovered from such person pursuant to §112(c).

Any monies received in punitive damages shalL be deposited in the Fund.

National Contingency Plan Requirements for Immediate Removals

Under §300.65 of the NCP:

Immediate Removal action is appropriate when the lead agency determines that:

the initiation of the removal action will prevent or mitigate immediate and significant risk of harm to human life or health or to the environment from such situations as:

1. Human, animal, or food chain exposure to acutely toxic substances
2. Contamination of drinking water supply
3. Fire and/or explosion
4. Similarly acute situations

Immediate removal action may include but are not limited to:

1. Collecting and analyzing samples to determine the source and dispersion of the hazardous substance
2. Providing alternative water supplies
3. Installing security fencing or other measures to limit access
4. Controlling the source of the release
5. Measuring and sampling
6. Moving hazardous substances off-site for storage, destruction, treatment or disposal
7. Placing physical barriers to deter the spread of the release
8. Controlling the water discharge from an upstream impoundment
9. Recommending to the appropriate authorities the evacuation of threatened individuals
10. Using chemicals and other materials in accordance with Supart H to restrain the spread of the substance and mitigate its effects
11. Executing damage control or salvage operations

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