February 10, 1998

MEMORANDUM OF UNDERSTANDING
among the
ENVIRONMENTAL PROTECTION AGENCY,
UNITED STATES COAST GUARD,
DEPARTMENT OF COMMERCE,
DEPARTMENT OF THE INTERIOR,
DEPARTMENT OF AGRICULTURE,
DEPARTMENT OF DEFENSE,
DEPARTMENT OF ENERGY, and
DEPARTMENT OF JUSTICE
concerning
the exercise of authority under
Section 106 of the Comprehensive Environmental Response,
Compensation, and Liability Act.

This Memorandum of Understanding ("MOU") is intended to govern federal agency implementation of the authority under Sections 106 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9606(a) et seq., as further delegated by Executive Order 13016, which President Clinton signed on August 28, 1996. 61 Fed. Reg. 45871-2 (Aug. 30, 1996).

I. INTRODUCTION

CERCLA confers on the President a range of authorities for responding to releases and threatened releases of hazardous substances and for addressing consequent injuries to natural resources. CERCLA also confers broad powers of delegation. See 42 U.S.C. 9615. After Congress amended CERCLA in 1986, President Reagan delegated authority under the statute to particular departments, agencies, and officials through Executive Order 12580. See 52 Fed.
Reg. 2923 (Jan. 23, 1987). (“EO 12580”). Under EO 12580, the President’s delegation of authority under CERCLA Section 106, which provides authority to issue orders or seek judicial relief to address releases that may present an “imminent and substantial endangerment to the public health or welfare or the environment,” 42 U.S.C. 9606(a), was limited to the Administrator of the Environmental Protection Agency (EPA) and the United States Coast Guard (“Coast Guard”). See 52 Fed. Reg. at 2924.

In addition to EPA and the Coast Guard, other federal agencies have significant responsibilities and substantial programs for responding, or requiring others to respond, to releases and threatened releases of hazardous substances. These responsibilities and programs arise from either of two distinct stewardship roles that the Departments of Agriculture, Commerce, Defense, Energy, and Interior (hereafter referred to as “Federal Resource Managers”) may have with respect to land and natural resources. First, these Federal Resource Managers may have jurisdiction, custody or control of particular lands or other facilities that may be affected by a release or threatened release of hazardous substances. Second, Federal Resource Managers have trust responsibilities under CERCLA and a variety of other laws for natural resources that may be affected by a release or threatened release of hazardous substances from a facility. In these cases, the agency with the greatest expertise concerning response at the relevant facility, and the agency that can most efficiently perform or seek performance of a response action, often may be the Federal Resource Manager rather than EPA or the Coast Guard.

There has been a longstanding concern among federal agencies, affected communities, state and local government agencies, and Indian tribes about the pace of response by responsible parties at many of these two types of facilities.¹ In their efforts to reform and accelerate the pace of their response programs, the Federal Resource Managers repeatedly have

identified circumstances in which a release or threatened release may present an imminent and substantial threat to public health or welfare or the environment, and where response could more quickly, more efficiently, and more equitably be performed by compelling the person responsible for the release or threatened release to perform the response action at the facility. In these circumstances, however, neither EPA nor the Coast Guard has had, or will in the foreseeable future have, the resources needed to respond at these facilities. The Federal Resource Managers have lacked the authority to compel responsible parties to perform a response action in a timely manner. Without this authority, the response actions needed to address imminent and substantial threats may be delayed for years, pending the outcome of litigation or negotiation of consensual cleanup agreements.

To address this problem, EO 13016 amended EO 12580 by delegating Section 106 authority to the Federal Resource Managers. Where there are releases that may present an imminent and substantial threat to public health or welfare or the environment, these Federal Resource Managers now have the authority under Section 106 to issue administrative orders or seek judicial relief with respect to a release or threatened release of a hazardous substance affecting either natural resources under a Federal Resource Manager’s trusteeship, or a vessel or facility subject to the Federal Resource Manager’s jurisdiction, custody, or control.

To ensure consistency, EO 13016 requires the Federal Resource Managers to obtain EPA or the Coast Guard’s concurrence before each use of Section 106 authority. Federal Resource Managers also are prohibited from using this authority at any vessel or facility where EPA or the Coast Guard is the lead federal agency for the conduct or oversight of a response action. Moreover, by its express terms, EO 13016 requires the authority thus delegated to be “exercised in a manner to ensure interagency coordination that enhances efficiency and effectiveness.” 61 Fed. Reg. at 45871.

This MOU is intended to fulfill that charge, and includes as signatories all of the federal agencies that may be involved in implementation of EO 13016: the Departments of
Agriculture, Commerce within which the National Oceanic and Atmospheric Administration resides, Defense, Energy, Interior, Justice, and Transportation within which the Coast Guard resides, and the Environmental Protection Agency.

II. STATEMENT OF PURPOSE

The purpose of EO 13016 is to enhance protection of the public health, welfare, and the environment, and to make more effective use of public resources, by ensuring performance of response actions by responsible parties wherever appropriate. The authority conferred by EO 13016 should expedite performance of response actions, reduce the costs of response, and discourage litigation over cleanup responsibility. In advancing these purposes, all agencies share the goal of encouraging consensual agreements by responsible parties to perform response actions wherever possible, whether under section 106 or other authority.

The purpose of this MOU is to ensure that implementation of EO 13016 advances these purposes, and that the signatories exercise the authority conferred by EO 13016 in a cooperative and integrated fashion. The guidance provided by this MOU is further intended to ensure that implementation of this authority by the Federal Resource Managers is fair to all affected persons, while meeting the specific charge in EO 13016 that the authority be "exercised in a manner to ensure interagency coordination that enhances efficiency and effectiveness." Fed. Reg. at 45871. The express terms of this MOU should be applied and interpreted in a manner that comports with these purposes.

III. THRESHOLD CRITERIA

Under the terms of Executive Order 13016, a Federal Resource Manager may exercise Section 106 authority to require the performance of response actions where the following threshold criteria have been met:
1. There has been a release or threatened release of a hazardous substance affecting either: a) natural resources under the Federal Resource Manager’s trusteeship; or b) a vessel or facility subject to the Federal Resource Manager’s jurisdiction, custody, or control;

2. Neither EPA nor the Coast Guard has lead responsibility for the conduct or oversight of a response action at the facility, as determined in accordance with Section IV, below;

3. The Federal Resource Manager receives concurrence from either EPA or the Coast Guard, as appropriate.

In addition to these threshold criteria, the signatories recognize that certain further limitations that are not required by the terms of EO 13016 should be adhered to in the exercise of discretion:

4. Federal Resource Managers that share concurrent jurisdiction agree to select a lead Federal Resource Manager to exercise 106 authority with respect to the same release or natural resource;

5. Federal Resource Managers that may be potentially liable parties at a vessel or facility will exercise Section 106 authority in accordance with the limitations set forth in Section V, below;

6. At facilities where a state, local, or tribal agency has proposed, approved, or is performing a response action, the Federal Resource Managers shall make best efforts, consistent with their responsibility for protection of public health and welfare and the environment, to work in a coordinated manner with the non-
federal agency to ensure that their authorities and resources are used in a complementary, efficient, and non-duplicative manner.

7. Where the Federal Resource Manager’s action is unilateral, the Federal Resource Manager’s exercise of Section 106 authority to compel the performance of a response action is limited to those circumstances where the release or threatened release may present an imminent and substantial endangerment to the public health or welfare or the environment.

IV. SCOPE OF AUTHORITY

A. Limitations

The authority delegated to the Federal Resource Managers under EO 13016 includes authority to issue unilateral administrative orders ("UAOs") or administrative orders on consent ("AOCs") and authority to request that the Department of Justice ("DOJ") enter into a consent decree or seek a judicial order under Sections 106 and 122 of CERCLA. The Federal Resource Managers agree to exercise their authorities pursuant to EO 13016 exclusively for the performance of response actions, as that term is defined and interpreted under CERCLA. Federal Resource Managers agree that they will not use this authority to compel the performance of natural resource damage assessment or restoration activities, to the extent those activities are outside the definition of response action. They further agree that the calculation of economic damages associated with natural resource injuries will not be deemed a “response action.”

B. Role Determination
Each Federal Resource Manager will determine whether the threshold criteria described in
Section III are met, after consultation with EPA or the Coast Guard, as applicable, and DOJ.

If a Federal Resource Manager wishes to use Section 106 authority with respect to a
vessel or facility, EPA or the Coast Guard, as applicable, will determine whether it is the lead
Federal agency, consistent with the National Contingency Plan, 40 C.F.R. Part 300.5 ("NCP") and
E.O. 12580, for the conduct or oversight of the response action at the vessel or facility. Another
federal agency may: (1) make a lead agency determination consistent with 40 C.F.R. Part 300.5
of the NCP where a release is on or the sole source of a release is from a vessel or facility under
the jurisdiction, custody, or control of such an agency; or (2) participate in the lead agency
determination at sites where more than one such agency may be the lead under the NCP.
Notwithstanding these provisions, EPA or the Coast Guard may determine that it is not the lead
federal agency with respect to a defined portion of a facility, even though it is conducting or
overseeing a response action at another portion of the facility or at an adjoining facility.

The Federal Resource Manager that has jurisdiction, custody, or control over a
facility may use Section 106 authority with respect to a release or threatened release affecting the
facility that may present an imminent and substantial endangerment to the public health or welfare
or the environment, unless EPA or the Coast Guard is the lead federal agency for the conduct or
oversight of a response action with respect to the release or threatened release. No Federal
Resource Manager may use the authority delegated by EO 13016 with respect to a facility under
the jurisdiction, custody, or control of another Federal Resource Manager without the other
Federal Resource Manager's concurrence.

V. POTENTIALLY LIABLE FEDERAL RESOURCE MANAGERS

A. General Limitations
The signatories recognize that the issuance of a unilateral administrative order ("UAO") to respond to a release or threatened release of a hazardous substance by a Federal Resource Manager that itself may be potentially liable for the release or threatened release raises equitable concerns. A Federal Resource Manager who is a potentially responsible party ("PRP") with respect to a release or threatened release of a hazardous substance at a facility should not seek to issue a UAO to avoid responsibility for its likely equitable share of response costs. Further, consistent with EPA and Coast Guard practices, the Federal Resource Managers will not seek to shift responsibility among PRPs in a manner that results in unfairness. The Federal Resource Managers acknowledge that the issuance of a UAO at a facility does not change the Federal Resource Manager’s ultimate responsibility for response costs.

Within the bounds established by these principles, however, circumstances are likely to arise where a Federal Resource Manager is potentially liable for the release or threatened release of a hazardous substance at a facility and issuance of a UAO under Section 106 of CERCLA to another PRP is the most expeditious, practical, and fair means of achieving prompt cleanup at the facility.

B. Specific Limitations

Federal Resource Managers agree not to exercise the authorities conferred by Section 106 in any case where either of the following circumstances obtain:

1. The response action addresses a release or threatened release, or contamination resulting from a release or threatened release, that is directly and primarily attributable to the operations or activities of the Federal Resource Manager, other than the exercise of (or failure to exercise) regulatory authority.
2. A contract or lease between the party that would be subject to the order and the United States or any department, agency, or instrumentality thereof expressly provides for or allows a claim for indemnification or other form of reimbursement of the costs incurred by the party in implementing the order.

C. Department of Justice Concurrence

In any case in which the Federal Resource Manager anticipates that the recipient of a proposed order will claim that the order is inconsistent with the terms of this section, the Federal Resource Manager will secure the concurrence of DOJ, in addition to that of EPA or the Coast Guard, before issuing the order.

VI. STANDARDS FOR FEDERAL RESOURCE MANAGER USE OF SECTION 106 AUTHORITY

The Federal Resource Managers agree that they will exercise Section 106 authorities to seek, secure, or order response actions. Any exercise of Section 106 authority will be in accordance with applicable provisions of the NCP, 40 C.F.R. Part 300, including, but not limited to, NCP provisions requiring public participation.

The Federal Resource Managers will exercise their Section 106 authorities in a manner consistent with applicable guidances and policies issued by EPA and the Coast Guard. These include, without limitation, the Superfund Administrative Reforms announced on October 2, 1995 and the policy articulated in the EPA memorandum dated August 2, 1996 and entitled Documentation of Reasons for Not Issuing CERCLA Section 106 Orders to All Identified PRPs. These guidances and policies shall apply to the Federal Resource Managers in the same manner and to the same extent that they apply to EPA and the Coast Guard. The list of commonly
applicable guidances and policies is attached as Appendix B. EPA and the Coast Guard have
designated generally applicable guidance and policies that are available through electronic media
and will be available to advise the Federal Resource Managers as to the applicability of specific
guidance and policy on a site specific basis.

As a matter of policy, the Federal Resource Managers will encourage and promote
consensual agreements and administrative orders on consent wherever possible. Consistent with
this approach, Federal Resource Managers are encouraged to provide an opportunity for
negotiations wherever the Federal Resource Manager determines such negotiations would
facilitate and expedite performance of response actions.

VII. COORDINATION WITH FEDERAL RESPONSE ACTION AGENCIES

A. Quarterly Consultations

The signatories will consult on a quarterly basis regarding all identified releases or
threatened releases of a hazardous substance that may be addressed by a Federal Resource
Manager through the exercise of Section 106 authorities. Such quarterly consultations shall occur
at headquarters and regional levels and shall involve early identification of appropriate guidances
as provided under Section VI and any concerns regarding implementation of this MOU. The
signatories shall provide for the mutual exchange of information between headquarters and the
relevant regional office.

The Federal Resource Managers further agree to provide notice of any release or
threatened release that they seek to address through the use of Section 106 authorities to the
regional office of EPA or the field office of the Coast Guard in whose region or district the
release or threatened release occurs or threatens to occur. The notice and consultation provided
by this Section shall encourage coordination for the purpose of achieving early
consensus, and facilitating concurrence, with respect to a Federal Resource Manager's exercise of
Section 106 authorities.

Each person identified in Section IX below will promptly supply, upon designation or a
change in designation, the name(s) of the individual designated by such person to represent the
party at the quarterly consultation.

The initial quarterly consultation shall occur no later than 60 days after the effective date
of this MOU. Thereafter, consultations will occur at least once during each calendar quarter.

B. Notice by Federal Resource Manager of Intent to Exercise Section 106 Authority

The Federal Resource Managers agree that they will provide to EPA or the Coast Guard,
as appropriate, notice of their intent to issue or amend any order, or of a request that the Attorney
General enter into a consent decree or seek a judicial order, under Section 106(a). Such notice
shall be provided to the individual(s) identified in Section IX(B), below, and shall be accompanied
by the following: a draft of the proposed order, amendment or request; a list of the PRPs;
documentation supporting the liability of the PRPs; documentation demonstrating coordination
with the relevant State or tribal entities; documentation of compliance with CERCLA § 104(b)(2);
and identification of the location of the administrative record supporting the Federal Resource
Manager's decision to issue the order, amendment, or request. From the time notice is given,
EPA and the Coast Guard shall have access to the administrative record and may obtain copies as
necessary. In the event the Federal Resource Manager has not compiled the complete
administrative record at the time such notice is given, the Federal Resource Manager will make
available all existing material that it expects to include in the administrative record. In addition to
this initial notice, the Federal Resource Managers further agree to provide promptly to EPA and
the Coast Guard, upon receipt, any
documented comments received from State or Tribal entities pursuant to Sections VIII (B) and VIII (C) of this MOU. At those sites where the Federal Resource Managers provide notice to EPA and/or the Coast Guard of intention to exercise 106 authority, and neither EPA nor the Coast Guard is the lead federal agency at the site, EPA and or the Coast Guard agree to make available to the Federal Resource Manager all information previously collected regarding the hazardous substances at issue.

C. Concurrence in Proposed Section 106 Administrative Orders

Except as provided in Section VII (D), below, EPA and the Coast Guard agree to provide to the Federal Resource Manager preliminary notice of any issues of concern in the Federal Resource Manager’s proposed order under Section 106(a) no later than forty-five (45) calendar days after receipt of notice of the Federal Resource Manager’s intent to issue the order as required by section VII (B) of this MOU and the accompanying documentation identified in Section VII (B), unless otherwise agreed to by the relevant signatories. Such preliminary notice shall identify any major defects in the proposed order. If EPA or the Coast Guard advises the Federal Resource Manager of any reservations with respect to issuance of the proposed order, the relevant signatories will consult to address and resolve, as quickly as possible, any potential grounds for nonconcurrence.

EPA and the Coast Guard shall issue a written notice of concurrence within ninety (90) calendar days after receipt of preliminary notice and the accompanying documentation identified in Section VII (B), unless otherwise agreed to by the signatories. In the event of nonconcurrence, EPA and the Coast Guard shall consult with the Federal Resource Managers and identify the grounds for the decision. The relevant signatories may agree to expedite the time periods identified in this section. A failure by EPA or the Coast Guard to respond in
writing to a Federal Resource Manager’s notice of intent to issue an order within the 90 day period shall not be deemed a concurrence, but shall result in immediate consultation among the relevant signatories.

D. Concurrence in Proposed Amendments to Section 106 Administrative Orders

The Federal Resource Managers agree that they will seek and obtain the written concurrence by EPA or the Coast Guard on any material amendment to a Section 106 administrative order. The Federal Resource Managers will seek such concurrence in accordance with subsection B of this section. The Federal Resource Managers will submit all amendments, irrespective of materiality, to EPA or the Coast Guard for review. EPA or the Coast Guard will notify a Federal Resource Manager within twenty (20) calendar days of receipt of the proposed amendment (and any necessary documentation required pursuant to subsection B of this section) whether it considers the proposed amendment to constitute a material amendment. Amendments will be deemed approved and non-material if EPA or the Coast Guard does not comment on the proposed amendment within twenty (20) calendar days of receipt of the amendment (and any necessary documentation required pursuant to subsection B of this section). If EPA or the Coast Guard notifies a Federal Resource Manager within twenty (20) calendar days of receipt of the proposed amendment (and any necessary documentation required pursuant to subsection B of this section) that it considers the proposed amendment to constitute a material amendment, EPA or the Coast Guard will provide to the Federal Resource Manager notice of its intent to concur or will identify any issues of concern on the proposed amendment in accordance with subsection C and E of this section.

E. Grounds for Nonconcurrence

In the event a Federal Resource Manager decides to issue a Unilateral Administrative Order ("UAO") for the performance of a response action, to submit an Administrative Order on Consent ("AOC") for performance of a response action, or to amend such a UAO or AOC,
EPA or the Coast Guard, as appropriate, shall either concur or identify the grounds for nonconcurrence. The grounds for nonconcurrence are the following:

(a) the Federal Resource Manager has failed to provide EPA or the Coast Guard with timely and sufficient information to determine if the order or amendment is in accordance with law under Section 106;

(b) the Federal Resource Manager has failed to comply with the terms of this MOU;

(c) issuance of the order or amendment presents an unreasonable risk of a successful claim for reimbursement from the Hazardous Substance Trust Fund (“the Superfund”) or, in the case of an AOC, the AOC does not contain a provision pursuant to which the respondent agrees not to assert any direct or indirect claim for reimbursement from the Superfund based on CERCLA or any other provision of law;

(d) the Federal Resource Manager is potentially liable for the response action, and issuance of the order or amendment would be inconsistent with Section V, above;

(e) the proposed order or amendment is in conflict with an existing or proposed EPA or Coast Guard response action;

(f) the proposed order or amendment does not conform to standards for implementation defined under Section VI;

(g) EPA or the Coast Guard determines that the proposed response action is not protective of public health or welfare or the environment;
(h) the Federal Resource Manager has failed to provide required notice to the relevant State or Tribal entities, or has failed to consider concerns that have been raised by a State or Tribal response or natural resource agency; or

(i) EPA or the Coast Guard has identified other policy or legal grounds that make issuance of the order or amendment inappropriate.

F. Concurrence in Requests for Judicial Orders

In the event a Federal Resource Manager decides to request that DOJ enter into a consent decree or request a judicial order for relief under Section 106, the Federal Resource Manager will seek concurrence in the requested relief from EPA or the Coast Guard. The Federal Resource Managers will submit a request for concurrence prior to taking formal enforcement action or referring the matter to DOJ for enforcement. There shall be appropriate consultation with DOJ to assure that the concurrence in such relief required by EO 13016 is obtained before the request for injunctive relief is filed with the court.

G. Confidentiality

To effectively exercise their Section 106 authorities, the signatories, their counsel, employees and consultants may wish to exchange among themselves or with state or tribal response action agencies or state or tribal trustees, documents and information including draft reports, analyses, opinions, conclusions, and advice prepared in anticipation of litigation. In order to preserve any claim of privilege that may apply to such materials, the signatories will comply with the provisions set forth in Appendix A to this MOU.

H. Concurrence of the Attorney General
Pursuant to Section 4(e) of Executive Order 12580, the Federal Resource Managers will seek the concurrence of the Attorney General before issuing an order for the performance of a response action to an Executive department or agency. The Federal Resource Managers agree to provide notice to the Attorney General concurrent with their notice to EPA or the Coast Guard as set forth in paragraph B above.

VIII. CONSULTATION WITH STATES AND TRIBES

A. In General

The Federal Resource Managers recognize the critical importance of consulting with relevant State and Tribal entities prior to issuing any order or request for judicial relief concerning a response action. Federal Resource Managers are encouraged to develop additional policies and procedures beyond those expressly required in this MOU to enhance consultation and coordination among Federal Resource Managers and relevant State and Tribal entities.

B. Response Agencies

Federal Resource Managers will provide the notice required under Section VII (B) to the relevant State or Tribal response agency at the same time and with the same supporting information as provided to EPA or the Coast Guard pursuant to Section VII (B), provided that the Federal Resource Manager has adequate assurances that confidentiality and any applicable privileges will be protected. Federal Resource Managers shall allow the State and Tribal response agencies at least thirty (30) calendar days to review the notice and provide comments. Any comments received from a State or Tribal agency will be made available to EPA and the Coast Guard and made part of the administrative record. Federal Resource Managers shall respond to all such comments, either orally or in writing, as appropriate to the circumstances. Notwithstanding the foregoing, EPA or the Coast Guard and the Federal
Resource Manager may agree that exigent circumstances requires expedited action. In such cases, the Federal Resource Manager will notify the State or Tribal response agency of these circumstances and any related changes to this notice and comment process. The appropriate State response agencies are identified in the Regional Contingency Plans developed in accordance with the NCP.

C. Natural Resource Agencies

Federal Resource Managers will provide the notice required under Section VII (B) to the relevant State and Tribal natural resource agencies at the same time and with the same supporting information as is provided to EPA or the Coast Guard pursuant to Section VII (B), provided that the Federal Resource Manager has adequate assurances that confidentiality and any applicable privileges will be protected. Federal Resource Managers shall allow the State and Tribal natural resource agencies at least thirty (30) calendar days to review the notice and provide comments. Any comments received from these agencies will be made available to EPA and the Coast Guard and made part of the administrative record. Federal Resource Managers shall respond to all such comments, either orally or in writing, as appropriate to the circumstances. Notwithstanding the foregoing, EPA or the Coast Guard and the Federal Resource Manager may agree that exigent circumstances require expedited action. In such cases, the Federal Resource Manager will notify the State or Tribal natural resource agency of these circumstances and of any related changes to this notice and comment process.

If a Trustee council has formed at a site, Federal Resource Managers may satisfy the requirements of this subsection by providing the notice required by section VII(B) to the members of the Trustee council. For purposes of this subparagraph, a Trustee council shall be a council that consists solely of designated Federal, State, or Tribal natural resource trustees.

IX. RE-DELEGATIONS
A. Section 106 Authorities

Each Federal Resource Manager may re-delegate all or part of its Section 106 authority, but only to one headquarters official, at the level of Deputy Assistant Secretary or above, until two years have elapsed from the date this MOU becomes effective. At that time, the signatories shall consider the re-delegation of a Federal Resource Manager's Section 106 authority to other Federal Resource Manager agency officials. Upon making or changing any delegation of Section 106 authority, each Federal Resource Manager will promptly notify all other signatories of the name(s) and positions of the designated individual(s).
The Federal Resource Managers have designated the following persons to exercise delegated Section 106 authorities:

Department of Commerce
General Counsel, National Oceanic and Atmospheric Administration

Department of the Interior
Solicitor, United States Department of Interior

Department of Agriculture
General Counsel, United States Department of Agriculture

Department of Defense
Deputy Under Secretary of Defense (Environmental Security)

Department of Energy
General Counsel, Department of Energy

B. Concurrence Authorities

EPA and the Coast Guard agree that they each will delegate concurrence authority to a single person at the headquarters level until two years have elapsed from the date this MOU becomes effective. After that time, EPA and the Coast Guard may delegate concurrence authority to the regional level or field level if they so choose. EPA has designated the following person to exercise concurrence authority:

Environmental Protection Agency
Assistant Administrator for Enforcement and Compliance Assurance
The Coast Guard has designated the following office chief to exercise concurrence authority:

Coast Guard
Chief, Office of Response
Commandant (G-MOR)

X. FEDERAL RESOURCE MANAGER ENFORCEMENT OF SECTION 106 ORDERS

A. In General

In the event a respondent has not complied or is not complying with an order issued by a Federal Resource Manager using the authority delegated by EO 13016, any Federal Resource Manager that had authority to issue the order or the party that concurred in the order (EPA or the Coast Guard) may request that the Attorney General bring an action to enforce the order or to impose a civil penalty under Section 106(b)(1) of CERCLA. Before requesting that the Attorney General bring such an action, the requesting agency shall consult with each party that had authority to issue or that concurred in enforcement of the order.

B. Limitations

Consistent with the express limitations in EO 13016 regarding use of the Superfund, the Federal Resource Managers shall not seek treble damages under Section 107(c)(3) of CERCLA if the recipient of an order issued by a Federal Resource Manager receives and fails to comply with such an order. Nothing in this subsection limits EPA’s or the Coast Guards’s enforcement discretion with respect to orders issued by those agencies.

As a matter of enforcement discretion, if a Federal Resource Manager elects to perform a response action in lieu of a person who has received, but not complied, with an order issued pursuant to Section 106 authority exercised by a Federal Resource Manager, the Federal
Resource Manager shall not seek daily civil penalties pursuant to Section 106(b) that may accrue after the Federal Resource Manager has completed performance of the response action.

C. Effect on Other Actions

Work performed in accordance with an order or consent decree issued pursuant to Section 106 authority exercised by a Federal Resource Manager shall be deemed consistent with the NCP as if the order or decree had been issued or requested by EPA or the Coast Guard.

D. CERCLA 106 (b)(2) Reimbursement Petitions

Recipients of orders issued by Federal Resource Managers may, pursuant to 106(b)(2) of CERCLA, petition the President for reimbursement from the Hazardous Substance Trust Fund (the Superfund) to the same extent as if the orders had been issued by EPA or the Coast Guard. As provided for in Section VII (E), the Federal Resource Managers will exercise their 106 authorities in a manner that ensures the issuance of orders that do not present unreasonable risks of successful claims for reimbursement from the Hazardous Substance Trust Fund (the Superfund). All agencies that are party to the MOU agree to the objective of minimizing adverse impacts on the Superfund. The parties commit to developing a process to cooperatively address any 106(b)(2) petition arising from a Federal Resource Manager’s order.

XI. EFFECTIVE DATE

This MOU is effective upon the date signed by the last of the signatories.

XII. MODIFICATION AND TERMINATION
This MOU may be modified or terminated only upon the agreement of all signatories. The
signatories agree to review the substance and effectiveness of the MOU within 24 months.

XIII. NOTICES

Notices provided under Sections VII (B) and (C) of the MOU shall be provided to the
official designated in Section IX. Additionally, each signatory shall identify by title and address
other person(s) or office(s) that should receive notices and other communications under this
MOU. Different persons or offices may be designated to receive such notices and other
communications by region or other clearly defined geographic area. The list or lists of such
designated recipients of notices and other communications shall be attached to this MOU as
Appendix C. The signatories shall update and correct Appendix C annually by March 31.

XIV. EFFECT OF THIS MOU

This MOU is intended only to improve the internal management of the Executive Branch
with respect to implementation of EO 13016. It shall not be deemed to create any right, benefit,
or trust obligation, either substantive or procedural, enforceable by any person, or entity in any
court against the United States, its agencies, its officers, or any other person. Consequently,
neither this MOU nor the deliberative processes or products resulting from the implementation of
this MOU shall be treated as establishing standards or criteria that constitute any basis for review
of the actions of the Executive Branch. Compliance with this MOU shall not be justiciable in any
proceeding.
ENVIRONMENTAL PROTECTION

AGENCY

By

Steven A. Herman
Assistant Administrator for Enforcement and Compliance Assurance

DATE 2/10/95
By:
R. C. North
Rear Admiral, U.S. Coast Guard
Assistant Commandant for Marine Safety and Environmental Protection

February 13, 1998

DATE
DEPARTMENT OF COMMERCE

By: Monica Medina
Monica Medina
General Counsel
NOAA

DATE 2/17/98
DEPARTMENT OF THE INTERIOR

By: John Leshy
Solicitor
F.W. 6, 1998

DATE
DEPARTMENT OF DEFENSE

By: ________________________________

Sherri W. Goodman
Deputy Under Secretary of Defense
(Environmental Security)

DATE 12/1998
CONFIDENTIALITY AGREEMENT.

1. Except as provided below or otherwise provided herein, the Parties shall treat all designated privileged documents generated, and designated privileged communications, by, between or among the Parties as privileged attorney-client communications, attorney work product or protected by other applicable privileges such as the deliberative process privilege (or as a combination thereof), and shall protect such documents and communications from disclosure to the maximum extent possible under applicable Federal and State law. A "designated privileged communication" is one which occurs with an expectation of confidentiality and includes, but is not limited to, communications between the Governments' attorneys or their staff, agents, and/or experts in anticipation of litigation, in the seeking or giving of legal advice, and/or in the context of pre-decisional government deliberations. Similarly, a "designated privileged document" is a document which is drafted with an expectation of confidentiality, and includes, but is not limited to, communications between the Governments' attorneys or their staff, agents, and/or experts in anticipation of litigation, in the seeking or giving of legal advice, and/or in the context of pre-decisional government deliberations.

2. The transmittal of a designated privileged document to, or a designated privileged communication between or among any of the Parties or state response action agencies or state or tribal trustees (and their counsel, representatives, contractors and consultants) does not waive, or imply any waiver, of any privilege or right which the transmitting government may assert with respect to that document or communication.
3. Unless otherwise specifically provided, the Parties shall each be entitled to assert an applicable privilege with respect to any document or communication jointly transmitted, prepared, or funded by the Parties. Each Party shall be entitled to assert an applicable privilege with respect to any document or communication transmitted, prepared, or funded solely by that Party.

4. If a subpoena, discovery request, or other request in any form for a designated privileged document or information provided under this MOU is received by any Party, a copy of the subpoena or request will be immediately forwarded to counsel for the Party or Parties to which the privilege applies and to the government representative(s) who originally generated the document or communication requested. The Party who receives such a request shall also provide a draft of the Party’s intended response to such request not less than ten (10) days prior to the date that the Party intends to issue its response. To the extent that applicable law may require a response more promptly than consistent with the above temporal requirement, the Parties agree to act in good faith to meet any such requirements.

5. Only by specific written agreement among the Parties or pursuant to Court Order shall disclosure of a designated privileged document or communication be made public or disclosed to a non-Party, other than a state or tribal response action agency or state or tribal trustee. Such agreement shall not be construed as a waiver of privilege or confidentiality regarding any other documents or communications:

6. Nothing herein in any way affects or limits the authority of any signatory to waive any privilege and release any documents, information, analyses, opinion, conclusion, or advice that are subject to privileges held exclusively by that signatory.
7. Designated privileged documents shall be maintained in such a manner as to insure that no intentional or unintentional disclosure is made which would compromise any asserted privilege, including segregating designated privileged documents in files that are identified as containing privileged documents that are not to be disclosed publicly or in response to a discovery request in any litigation that may result in connection with the Parties' exercise of their Section 106 authority.

8. At the request and option of any Party, designated privileged documents shall be returned to the originating Party or destroyed, subject to the provisions of the Federal Records Act, 44 U.S.C. §§ 2901, et seq.

9. In the event a state or Indian tribe is trustee for natural resources affected by the release or threat of release that is the subject of a Federal Resource Manager's proposed Section 106 Order, the Parties agree that they may disclose designated privileged documents or communications to the state or tribal response action agency or state or tribal trustee if said Party has executed a confidentiality agreement with respect to such documents and communications.
APPENDIX B

COMMONLY APPLICABLE EPA GUIDANCES/POLICIES ON CERCLA CLEANUP
ORDERS

I. PRIMARY GUIDANCES/POLICIES


7. Documentation of Reason(s) for Not Issuing CERCLA Section 106 UAOs to All Identified PRPs, August 2, 1996.


II. EPA GUIDANCES/POLICIES RELEVANT TO DECISIONS TO ISSUE CERCLA ORDERS

A. Removal Actions


8. “Policy on Management of Post-Removal Site Control”, (December 3, 1990), PB91-921326/CCE.


17. "Determining When LDRs Are Relevant and Appropriate to CERCLA Response Actions" OSWER Publication 9347.3-08/FS, (December 1989).

18. "Obtaining a Soil and Debris Treatability Variance for Removal Actions" OSWER Publication 9347.3-06B/FS, (September 1990).

19. "ARARs Q’s and A’s: Compliance with Federal Water Quality Criteria" OSWER Publication 9234.2-09/FS, (June 1990), PB90-274267.


B. Remedial Actions


NOTICES AND COMMUNICATIONS

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