PNM 90

New Mexico Health and Environment Department

MEMORANDUM

TO: Kathleen Sisneros, Bureau Chief
Hazardous Waste Bureau

Elizabeth Gordon, Supervisor
Permit Section

Bruce Swanton, Supervisor
Inspection and Enforcement Section

FROM: JW Julie Wanslow, Water Resource Specialist III
Inspection and Enforcement Section

DATE: December 13, 1990

SUBJECT: Recommendation to compel PNM to initiate interim measures through an enforcement action

The plume at PNM threatens imminent and substantial endangerment to human health or the environment because the off-site plume contains hazardous constituents above drinking water standards (MCLs), the plume is located in a drinking water aquifer, there is potential of exposure of humans to this contaminated water via nearby water supply wells (25 water supply wells are located within a one mile radius and two Albuquerque well fields are located within 1.5 mile radius of the facility), and the groundwater velocities are high enough for us to suspect that the plume may be threatening substantial endangerment to nearby water supply wells in the immediate future. Based on the groundwater velocities, the plume may potentially extend 1.7 miles or 5.7 miles from the PNM waste tank area. One downgradient well is located approximately .87 miles downgradient of the PNM waste tank area. Additional downgradient wells may be threatened beyond a one mile radius of the site. However, we do not know the locations of these wells.

Interim measures are necessary to compel PNM to initiate a pump and treat program to prevent further migration of the plume. We may use the following orders to compel PNM Person Generating Station to initiate interim measures: 74-4-10.E. or 74-4-13.

— ENVIRONMENTAL IMPROVEMENT DIVISION —
Harold Runnels Building
1190 St. Francis Dr.
Santa Fe, New Mexico 87503

Section 74-4-10.E. Order

This order is equivalent with EPA's 3008(h) order. This order states that

> "Whenever on the basis of any information the director determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under Section 74-4-9 NMSA 1978, the director may issue an order requiring corrective action, including corrective action beyond a facility's boundaries or such other response measure as he deems necessary to protect human health or the environment, or may commence an action in district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction."

We may be able to use the 74-4-10.E. order if we interpret it as being applicable to any facility that was or is subject to the interim status regulations. In other words, we could use this authority to address corrective action at permitted facilities, permitted facilities that have had their permits terminated, loss of interim status facilities, or facilities that never received interim status but should have.

I discussed this interpretation with David Fagin from EPA Headquarters. He said that EPA Headquarters believes that the 3008(h) type authority can be used for facilities that had, have had, or should have had interim status. However, he says the language is not very clear regarding this. He said EPA is planning on revising the 7003 language to make it explicit. He said some courts have supported this interpretation and some courts have not. However, he said that it was very clear that if the facility lost interim status based on its own wrongdoing, then 3008(h) authority could definitely be used.

Section 74-4-13 Order

This order is equivalent with EPA's 7003 order. This order states that

> "Whenever the director is in receipt of evidence that the past or current handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste or the condition or maintenance of any underground storage tank may present an imminent and substantial endangerment to health and the environment, he may bring suit in the appropriate district court to immediately restrain any person, including any past or present owner or operator of a treatment, storage or disposal facility, who has contributed or is

contributing to such activity, to take such other action as may be necessary or both."

We have been told by our attorneys that we cannot use the 74-4-13 order for PNM because our attorneys do not believe that the threat is imminent enough. They seem to indicate that we cannot use this order unless we can prove that persons are currently exposed or will be exposed in the immediate future to contaminants at levels that could endanger their health. We feel that this interpretation is too restrictive.

We discussed the definition of "imminent" with Olga Moya of EPA Region VI, Regional Counsel. She said that she thinks that the situation at PNM is clearly "imminent". She said that we do not have to prove that there is an injury, we only have to prove that there is a risk or threat of an injury. She said there was case law supporting this interpretation: B.F. Goodrich-Murtha, 697-Fed. Supp. 89, and U.S. vs. Seymour Recycling Corp., 618 Fed. Supp. 1. In addition, she sent us a copy of the September 26, 1984, EPA guidance on 7003 orders titled "Issuance of Final Revised Guidance on the Use and Issuance of Administrative Orders Under Section 7003 of RCRA", see attachment. This guidance states that "the words <u>may present</u> an imminent and substantial endangerment indicate that Congress established a standard of proof that does not require a certainty. The evidence need not demonstrate that an imminent and substantial endangerment to public health or the environment definitely exists. Instead, an order may be issued if there is sound reason to believe that such an endangerment may exist...Evidence of actual harm is not required....When one is endangered, harm is threatened; no actual injury need ever occur". The guidance further states, "EPA could act if there exists a likelihood that contaminants might be introduced into a water supply which could cause damage after a period of latency". The guidance recommends judging the risk or likelihood of harm by "examining the factual circumstances, including, but not limited to: 1) nature and amount of the hazardous substance; 2) the potential for exposure of humans or the environment to the substance; and 3) the known or suspected effect of the substance on humans or that part of the environment subject to exposure to the substance."

We would like to define imminent and substantial endangerment as contamination or a situation that immediately <u>threatens</u> substantial endangerment to human health or the environment. We don't want to limit "imminent endangerment" to actual contamination or a harmful situation, we also want to include the immediate threat of contamination or a harmful situation. We recommend that we use this order to mitigate contamination or a situation which if left unaddressed, may substantially endanger human health or the environment.

We would like to define substantial endangerment as a situation that could cause bodily injury or involves potential human exposure of contaminants whose levels are above the EPA MCLs (drinking water standards) or could cause one death per one million people or (10^{-6} risk factor), or potential environmental exposure of contaminants whose levels are above aquatic life standards or other appropriate environmental standards.

In the case of PNM, we would not have to prove that a specific water supply well is or will be contaminated in the immediate future (i.e., within two months). Instead, we would only have to document that the preponderance of evidence indicates that the plume threatens immediate and substantial endangerment. We believe that the plume threatens imminent and substantial endangerment because the off-site plume contains hazardous constituents above drinking water standards (MCLs), the plume is located in a drinking water aquifer, there is potential of exposure of humans to this contaminated water via nearby water supply wells (25 water supply wells are located within a one mile radius and two Albuquerque well fields are located within 1.5 mile radius of the facility), and the groundwater velocities are high enough for us to suspect that the plume may be threatening substantial endangerment to nearby water supply wells in the immediate future. Based on the groundwater velocities, the plume may potentially extend 1.7 miles or 5.7 miles from the PNM property boundary.

Details of the Plume:

Beginning in October 1989, the groundwater data from PNM Person Generating Station monitor well PSMW-8A indicated that a major plume of contamination was moving in an easterly direction beyond their property boundary. Lower concentrations of constituents have migrated beyond the northern and eastern boundaries in the past, however, a major "slug" is currently moving beyond the eastern boundary. There is potential to use this contaminated water for drinking water because the plume is located in a drinking water aquifer and there are 25 water supply wells within a one mile radius of the facility. In addition, the plume is located within 1.5 miles of Albuquerque water supply well fields. Based on groundwater velocity data and historical flow directions certain water supply wells could be affected by off-site contamination.

The plume contains perchloroethylene (PCE), 1,1-dichloroethene (DCE), 1,1,1-trichloroethane (TCA), and total chromium. All of these constituents are above the EPA MCLs or drinking water standards except for TCA. Two wells at PNM's property boundary evidence contamination: PSMW-8A and PSMW-6.

Historical groundwater flow directions indicate that the groundwater flowed south in the 1960's, and has gradually shifted to the east-southeast in the 1980's. The groundwater flows to the east at PSMW-8A and PSMW-6. The direction of groundwater flow shifts to the southeast toward the southern portion of the facility.

Pump tests have been conducted on monitor wells PSMW-1, 2, 3, 6, and 8A. However, in 1985 EID discounted this data and required PNM to install pump test wells in order to redetermine the hydraulic conductivity and velocity values. Two pump test wells were installed: PT-1 and PT-3. The PT-1 velocity values range from 4 feet per year to 73 feet per year and velocity values from PT-3 range from 347 feet per year to 2312 feet per year. PT-1 was located near the waste tank and PT-3 was located between PSMW-6 and 8A, and downgradient from the source of the plume, and 100 feet from the eastern boundary. The major portion of the plume appears to be moving toward and past PT-3. The velocity of the plume is lower near the PNM waste tank area and increases significantly in the downgradient direction toward the eastern boundary.

Camp Dresser McKee conservatively assumed in their 1985 Phase V Program Report that the groundwater at PNM has been contaminated since 1977. (We know that the PSMW-8A and PSMW-6 were contaminated when they were first sampled in early 1984.) We have no groundwater quality information from PT-1 or PT-3 because PNM never sampled these wells for hazardous constituents.
As a worst case or conservative scenario, if the groundwater is moving 2312 feet per year, then the plume has migrated 30,056 feet (5.7 miles) from the PNM waste tank area since 1977. A less conservative approach would be to average these velocities (4, 73, 347, and 2312 feet per year) to come up with an average velocity of 684 feet per year. Using the average velocity, the plume may have moved 8892 feet (1.7 miles) from the PNM waste tank area since 1977. The velocity of the groundwater probably increases toward the north and the east because the aquifer is known to be highly permeable and productive in these areas.

The closest well (Well P) is a domestic water supply well located approximately 600 feet south-southwest of the PNM waste tank area. Well P appears to be sidegradient of the plume and thus contamination of Well P appears unlikely. However, we do not know the extent of the plume to the west or southwest because there are no monitor wells located on the western property boundary and PSMW-4 which is located near the southwest corner of the facility is not being monitored. Additionally, contamination does not always follow the direction of groundwater flow, and the 1985 soil gas survey indicated soil gas contamination to the west

and south-southwest.

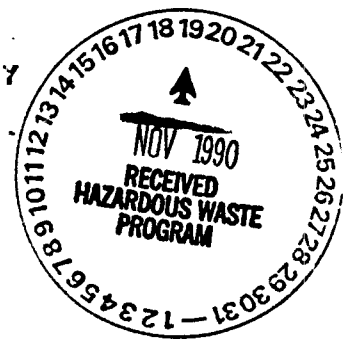
The closest downgradient wells which have the most potential for being affected by the plume are the PNM water supply wells. PNM did not include their water supply wells (#1,#3, #4, #5, #6) on the map that they submitted to EID, but these wells are indicated on maps supplied by the Camp Dresser McKee 1985 Phase V Report. However, the exact location of the PNM production well #5 and #6 is unclear. The Phase V Program Report includes different maps that alternately depict the same well as #5 and #6. PNM production wells #3, #4 and #6 appear to be located approximately 1400 feet east of the PNM waste tank area. Production wells #4 and #6 appear to be directly downgradient of the plume. Production Wells #1 and #5 appear to be located sidegradient of the plume near PNM's southern property boundary.

The closest downgradient non-PNM well is Well R which is a domestic/sanitary and golf course irrigation well. Well R is located approximately 0.87 miles (4600 feet) northeast of the PNM waste tank area and appears to be directly downgradient of the plume.

According to a 1987 map, the closest Albuquerque water supply wells are located to the north and the north-northeast of the facility. The zone of well influence of the San Jose Well Field (San Jose wells #1, #4, #5) is located approximately 1.25 miles (6600 feet) to the north. The zone of well influence of the Miles Well Field (Miles well #1) is located approximately 1.50 miles (7920 feet) to the north-northeast.

Based on the groundwater velocities discussed above, EID needs to require PNM to identify all water supply wells within a two mile radius including their own production wells. In addition, EID needs to require PNM to sample the groundwater from Well P, Well R, and perhaps the PNM production wells east of the facility depending on the location and length of the screens.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460



SEP 21 1984

MEMORANDUM

SUBJECT: Issuance of Final Revised Guidance on the Use and Issuance of Administrative Orders Under Section 7003 of the Resource Conservation and Recovery Act (RCRA)

FROM: Courtney M. Price
Assistant Administrator for Enforcement
and Compliance Monitoring

Lee M. Thomas
Assistant Administrator for Solid Waste
and Emergency Response

TO: See Attached List

Attached is the Final Revised Guidance on the Use and Issuance of Administrative Orders Under Section 7003 of RCRA.

The responses to the drafts of this guidance were very positive. A considerable effort has been made to incorporate the comments received where appropriate. We greatly appreciate your involvement in the development of this important policy.

If you have any questions, please contact Susan Conti, of OECM-Waste, at FTS-382-3103.

Attachment

Regional Counsels, Regions I-X
Regional Administrators, Regions I-X
Hazardous Waste Coordinators, Regions I-X
RCRA Branch Chiefs, Regions I-X'

FINAL REVISED GUIDANCE MEMORANDUM ON THE USE AND ISSUANCE OF ADMINISTRATIVE ORDERS UNDER SECTION 7003 OF THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)

September 26, 1984

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I. INTRODUCTION

RCRA's administrative enforcement authority is an important component of the Agency's overall hazardous waste enforcement program. The effectiveness of EPA's enforcement program will be demonstrated as respondents implement site remedies in compliance with administrative orders, the Agency pursues enforcement actions vigorously against respondents who fail to comply with such orders, and the Agency defends aggressively judicial challenges to orders.

Section 7003 of the Resource Conservation and Recovery Act (RCRA) provides EPA with a broad and powerful enforcement tool that may be used to abate imminent hazards that are caused by the handling, storage, treatment, transportation or disposal of solid waste or hazardous waste. Under §7003, the Administrator may seek injunctive relief in the appropriate United States District Court or, after notice to the affected State, take appropriate action "including, but not limited to, issuing such orders as may be necessary to protect public health or the environment."

The §7003 administrative order authority provides strong incentives for respondents to expeditiously undertake response actions deemed necessary by EPA to ensure protection to public health or the environment. Therefore, the Regions are urged to consider the use of unilateral RCRA §7003 orders in appropriate cases wherever it is necessary to compel response action. It is essential that the RCRA enforcement program combines both administrative and judicial enforcement authorities to ensure protection of health and the environment from the improper handling of hazardous waste.

The following guidance has been prepared to assist the Regional offices in developing and issuing administrative orders pursuant to §7003. It supersedes the earlier Agency guidance issued on September 11, 1981, by Douglas MacMillan, Acting Director, Office of Waste Programs Enforcement, entitled "Issuance of Administrative Orders Under §7003 of the Resource Conservation and Recovery Act."

Since §7003 is similar in scope to §106 of the Comprehensive Environmental Response, Compensation, and Liability Act, the reader should consult the guidance issued on September 8, 1983, entitled "Guidance Memorandum on Use or Issuance of Administrative Orders Under §106(a) of

CERCLA." A fuller treatment of the following areas, common to both 7003 and 106, is found in the (1983) 106 Guidance: Necessity for Determination Based on Evidence; Necessity for Actual or Threatened Release; Necessity that Release or Threat of Release be from a facility (applicable in the case of joint 7003 & 106 orders); and Necessity for Existence of Imminent and Substantial Endangerment. Where joint orders under §§7003 and 106 are issued, the Regions should adhere to the requirements set out in both guidance memoranda. The reader should also consult the CERCLA §106 guidance, "Issuance of Administrative Orders for Immediate Removal Actions" (Lee Thomas, OSWER, February 21, 1984).

It should be noted that the reauthorization of RCRA by Congress may affect some aspects of §7003, regarding the participation of the public in the settlement of administrative orders and liability for past activities. If RCRA is amended, supplemental guidance will be provided as appropriate.

II. SCOPE OF RCRA §7003 */

In order to issue a §7003 order, the Administrator must possess evidence "that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment" (42 U.S.C. §6973). Additionally, §7003 requires that the Administrator provide notice to the affected State prior to issuance of the order. Each of these requirements is discussed in further detail below.

A. Evidence

Because the recipient of a §7003 order may seek administrative or judicial review of the order, the Region must have all the evidence necessary to demonstrate that the

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*/ Note: the terms "hazardous waste" and "solid waste" in RCRA §7003 refer to the statutory definitions, §§1004(5) and 1004(27), of RCRA and not to the regulatory provisions promulgated pursuant to §3001 and codified at 40 CFR Part 261. These regulatory provisions are meant for application only in the Subtitle C regulatory program. As long as a waste meets the §1004 definition of solid or hazardous waste, it need not be listed in Part 261 or satisfy one of the characteristics specified in Part 261.

statutory criteria have been satisfied at the time the order is issued. The evidence must establish that the respondent has handled, treated, stored, transported or disposed of a solid or hazardous waste, and that such activity has resulted in a condition that may present an imminent and substantial endangerment to health or the environment. Necessary evidence may be documentary, testimonial, or physical and may be obtained from a variety of sources including inspections, investigations, or requests for production of documents or other data pursuant to RCRA §§3007, 3013 or CERCLA §104. The evidence must be sufficiently probative and reliable to enable a reasonable person to conclude that issuance of an order is appropriate. For example, an unsubstantiated citizen's complaint would normally not be sufficient to justify issuance of an order. If that complaint were supported by corroborating evidence, however, such as laboratory analyses, the complaint and corroboration could normally be considered a sufficient basis for issuance of the order.

B. What Constitutes Handling, Storage, Treatment, Transportation or Disposal.

It is undisputed that §7003 may be utilized to enjoin present conduct. Thus, persons who are presently handling, storing, treating, transporting or disposing of solid or hazardous wastes are potential recipients of a §7003 order. Whether §7003 may be used to abate present imminent hazards caused by past disposal practices is an issue that has been litigated repeatedly. The Agency has consistently maintained that §7003 applies to such past disposal. Although there has been some disagreement by courts considering this question, the prevailing view as expressed in U.S. v. Waste Industries, et al., No. 83-1320 (4th Cir., May 8, 1984) clearly supports the Agency's position. Thus, Regional Offices should consider the issuance of §7003 orders at presently inactive facilities, provided such issuance is consistent with this guidance.

C. Necessity for Existence of Imminent and Substantial Endangerment.

Evidence possessed to support the issuance of a RCRA §7003 order must show that the "handling, storage, treatment, transportation or disposal of any solid or hazardous waste may present an imminent and substantial endangerment to health or the environment." The words "may present" indicate that Congress established a standard of proof that does not require a certainty. The evidence need not demonstrate that an immi-

nent and substantial endangerment to public health or the environment definitely exists. Instead, an order may be issued if there is sound reason to believe that such an endangerment may exist.

Evidence of actual harm is not required. As the Court stated in Ethyl Corp. v. EPA, construing an endangerment provision in the Clean Air Act:

> The meaning of "endanger" is not disputed. Case law and dictionary definition agree that endanger means something less than actual harm. When one is endangered, harm is threatened; no actual injury need ever occur. 541 F.2d 1 at 13, footnotes omitted, original emphasis, D.C. Cir., cert. denied 426 U.S. 941 (1976).

It should also be noted that while the risk of harm must be imminent in order for the Agency to act under §7003, the harm itself need not be. (See the legislative history to the "imminent and substantial endangerment" provision of §1431 of the Safe Drinking Water Act, H. Rpt. 93-1185 at 3536.) For example, EPA could act if there exists a likelihood that contaminants might be introduced into a water supply which could cause damage after a period of latency. One must judge the risk or likelihood of the harm by examining the factual circumstances, including, but not limited to: 1) nature and amount of the hazardous substance; 2) the potential for exposure of humans or the environment to the substance; and 3) the known or suspected effect of the substance on humans or that part of the environment subject to exposure to the substance.

Legal analyses of the concept of imminent and substantial endangerment can also be found in Reserve Mining Co. v. EPA, 546 F.2d 492 (8th Cir. 1975); U.S. v. Vertac Chemical Co., et al., 489 F.Supp. 870 (E.D. Ark. 1980); U.S. v. Solvents Recovery Service, 496 F.Supp. 1127 (D. Conn. 1980); U.S. v. Midwest Solvent Recovery, 484 F.Supp. 138 (N.D. Ind. 1980); U.S. v. Diamond Shamrock Corp., 17 E.R. 1329, (N.D. Ohio 1981); U.S. v. Price, 688 F.2d 204 (3rd Cir. 1982); and, U.S. v. Reilly Tar and Chemical Corp., 546 F.Supp. 1100 (D. Minn. 1982).

The nature of the endangerment and the basis for the finding of an imminent and substantial endangerment must be set forth in the order. If sampling and analysis data are being relied upon, a summary of such data should ordinarily be set

forth in the order. At any rate, all evidence supporting the finding of any imminent and substantial endangerment in the order must be compiled into a single, concise document constituting the endangerment assessment. [An Endangerment Assessment Guidance is presently being prepared by the Office of Solid Waste and Emergency Response.]

D. Persons to Whom an Order May be Issued.

Section 7003 provides that an order may be issued to "any person" who contributed to conduct or lack of conduct that may present an imminent hazard. The term encompasses, if applicable, the present owners and operators of a site, including an inactive site. Similarly, the term includes persons whose ongoing conduct may result in the risk of an imminent hazard. Whether previous owners of a site or past non-negligent off-site generators are also covered by §7003 is an issue that has received much judicial attention.

Although the case law is unsettled, two courts have upheld EPA's position that previous owners of a site may be held liable under §7003. U.S. v. Price, 688 F.2d 204; U.S. v. Reilly Tar and Chemical Co., 546 F. Supp. 1100. Thus, if otherwise appropriate, Regions should consider issuing §7003 orders to previous owners of a site, even an inactive one, in cases where the previous owner's conduct may have caused or contributed to conditions at the site which may present an imminent hazard and substantial endangerment.

liable under 1984 RCRA Amendments

To date, the courts have been unwilling to include past, non-negligent, off-site generators within the scope of §7003. See, U.S. v. Wade, 546 F. Supp. 785 (E.D. Pa., 1982); U.S. v. NEPACCO, 579 F. Supp. 823 (W.D. Mo., 1984) [U.S. filed cross-appeal June 29, 1984; decision pending]. It is recommended, therefore, that the Regional Offices utilize CERCLA §106 to order such generators to perform necessary cleanup work. While an early decision was unfavorable, the majority and all recent decisions have held that §106 does apply: U.S. v. Wade, 546 F. Supp. 785 [held §106 is not applicable to past, non-negligent generators]; U.S. v. Price, 577 F. Supp. 1103 (D. N.J., 1983) [held §106 does apply to past, non-negligent generators]; U.S. v. NEPACCO, 579 F. Supp. 823 [held §106 does apply to past, non-negligent generators]; U.S. v. Conservation Chemical Company, No. 82-0983-CV-W-5, Order (W.D. Mo., Feb. 3, 1984) [held §106 does apply to past, non-negligent generators]; and U.S. v. A&F Materials, et al., No. 83-3123 (S.D. Ill., Jan. 20, 1984) [held §106 does apply to past, non-negligent generators]. The Agency's position is that §106 does apply to past, non-negligent, off-site generators.

E. Notice to Affected States

Finally, before an Order may be issued, the "affected state" must be given notice of the Agency's intention to issue the Order.

The Agency is not held to a statutory period of time for notice. Normally, written notification to the state should precede federal action by at least one week. Circumstances may arise, however, where a more rapid response at a site is necessary. In such cases, issuance of an order may follow an abbreviated notice period or even a telephone call made by EPA to the director of the agency responsible for environmental protection in the affected state. Written confirmation must follow such telephone notice. In some cases, the draft order may be subject to a State's Freedom of Information Act prior to issuance of the order by EPA. If this situation arises, the Agency may delay notice to the affected state(s) until (no later than) one week before issuance of the final order. It is unlikely that a state FOIA request would result in early disclosure of the draft order during that short period of time.

As indicated above, the notification should be directed to the director of the state agency having jurisdiction over hazardous waste matters. A suggested form for a notification letter is attached to this memorandum as the Appendix. This form also provides the format for oral notice.

An "affected state" is a state in which the conduct or condition which may present an imminent and substantial endangerment is occurring or is located, and in which the response activity required by the proposed order will be taken. In some cases, this may involve more than one state, such as where a facility is located near the border of a state and the hazardous wastes have migrated from the facility into another state(s). In those cases, all of the states in which the hazardous wastes are found and in which response activity may be performed pursuant to the order should be notified. (Note: Consult the following guidance for more information on the State/Federal relationship: "Implementing the State/Federal Relationship in Enforcement: State/Federal Enforcement Agreements", OECM, June 6, 1984.)

III. SELECTING ENFORCEMENT OPTION

Although §7003 administrative orders are a potent enforcement tool, there will be instances when it will be more appropriate for the Agency to use other enforcement options, including a RCRA §7003 judicial action, a CERCLA §106 adminis-

trative or judicial action, or a Superfund financed cleanup of a hazardous waste site. The Regions should examine each of these options and select the option which will result in the most efficient use of limited enforcement resources and Superfund monies while still quickly abating the threat. (See also, the memorandum on "Issuance of Administrative Orders for Immediate Removal Action", supra, for additional guidance on selecting enforcement options.)

A. Administrative Order or Civil Referral

Initially, the Agency must determine whether it is more appropriate to use administrative or judicial enforcement action; each has definite advantages and drawbacks. An administrative order has the benefit of being a relatively speedy method of enforcement. The Agency can issue an order that establishes a timetable for compliance, unilaterally or on consent, in a short period of time. A judicial action, on the other hand, is usually a more time-consuming process. The referral of a case to the Department of Justice and filing of a complaint may delay the initiation of remedial activities. Even though a judicial action can be time-consuming, any resulting judicial order or consent decree can be more quickly enforced in the event of noncompliance since the Court already has jurisdiction of the matter, and an additional referral to DOJ generally is not needed.

Because AO's can be issued quickly, the general rule is that an administrative order, whether issued unilaterally or on consent, is appropriate absent some indication that the respondent will not comply with its terms. Where noncompliance is anticipated, Regions should prepare a civil referral. Should immediate remedial action be necessary, EPA should consider requesting a preliminary injunction or temporary restraining order.

B. Use of RCRA or CERCLA

Once a decision has been made to proceed administratively, the Region must then decide whether an order under RCRA §7003 or CERCLA §106 is more appropriate. Upon examination, both statutory provisions appear quite similar. When faced with the need to abate an imminent hazard, the Agency can often use a joint order if the RCRA "hazardous waste" is also a CERCLA "hazardous substance." [Consult the CERCLA §106 (1983) guidance for a discussion of the issuance of joint orders.]

There are three situations where a joint order is not available, more specifically, where a RCRA §7003 order can be used but a CERCLA §106 order cannot.

The first situation would result when the imminent hazard is caused by a RCRA "solid waste" but not a "hazardous waste." RCRA §7003 orders can be used to abate imminent hazards presented by "solid wastes" (RCRA §1004(27)) as well as "hazardous wastes" (RCRA §1004(5)). By contrast, CERCLA §106 orders are limited to abating imminent hazards presented by "hazardous substances" (CERCLA §101(14), CERCLA §101(14)(c) defines "hazardous substances" as including "hazardous wastes" under RCRA §3001, but not RCRA "solid wastes" under §1004(27). Therefore, when an imminent hazard is caused by a RCRA "solid waste", which is not a RCRA "hazardous wastes" (or CERCLA hazardous substance) RCRA §7003 orders can be issued, whereas CERCLA §106 orders cannot.

The second situation would result when a waste meets the definition of "hazardous wastes" under §1004(5) of RCRA but does not qualify as a "hazardous waste" under 40 CFR Part 261. The term "hazardous waste" in §7003 refers to the broad statutory definition (§1004 (5)) of RCRA and not to the more narrow regulatory provisions promulgated pursuant to §3001 and codified at 40 CFR Part 261. These regulatory provisions are meant to be applied only in the Subtitle C regulatory program. Because the CERCLA definition of "hazardous substances" (§101 (14)) includes "hazardous wastes" under RCRA §3001 but not under RCRA §1004(5), a CERCLA §106 order could not be used in the above situation.

The third situation would result when the waste involved is excluded from regulation under CERCLA because it is a petroleum product. [See, CERCLA §101(14) for the definition of "hazardous substances"]. Gasoline is not a listed "hazardous waste" or commercial chemical product under RCRA regulations (40 CFR 261 Subpart D). Residues of a spill or a release of gasoline are not automatically listed as hazardous. Even so, gasoline leaking from underground storage tanks can be controlled under RCRA as a "solid waste". As stated earlier, §7003 can be used to address wastes that satisfy the statutory definition of "hazardous waste" under RCRA §1004(5) even if they are not listed or do not exhibit a RCRA hazardous waste characteristic under 40 CFR Subpart C. Orders have been issued under RCRA §7003 to owners of underground storage tanks that were leaking gasoline or other petroleum products.

C. Deciding to Use a §7003 Order

This section discusses factors to consider when deciding whether or not to use a §7003 order. These factors include:

- financial status of the respondents
- number of potential respondents
- specificity of the necessary response action

As a general proposition, a §7003 order should be issued only in those situations in which compliance with the terms of the order is feasible, i.e., where the respondents are in a position to perform the ordered response actions within specified time periods. This does not mean that EPA must make a pre-issuance determination that respondents will comply with an order, but rather that compliance is practicable. If the Agency anticipates non-compliance with an order it is considering issuing, the use of the order mechanism may serve only to delay initiation of an injunctive action under §7003 or, if appropriate, a Fund-Financed response. In addition, it is an inefficient use of resources.

1) Respondent's Financial Status

Before an administrative order requiring remedial work is issued, the Agency should assess, to the extent possible, whether the responsible party has sufficient financial resources to comply with the order. This assessment is only a factor to be considered in the decision to issue an order when the necessary information is available. Financial information may be available from several sources:

- Agency files may contain financial information collected as part of the identification of parties responsible for the hazards posed by sites on the National Priorities List.

- The Securities and Exchange Commission (SEC) requires publicly traded companies to submit detailed financial statements. This information is publicly available. (Consult NEIC's manual entitled "Identifying Responsible Parties" for additional information on obtaining SEC filings.)

- Responsible parties may submit financial information to the Agency during discussions or negotiations held prior to the issuance of an Order.

- The Agency collects financial data as part of the RCRA permitting process.

In addition, NEIC can provide further financial information on respondents who are publicly held companies or companies previously the subject of EPA action(s).

2) Number of Respondents Subject to the Order

The Agency's position that §7003 provides for joint and several liability has been challenged by U.S. v. Stringfellow, No. 83-2501 - MML (C.D. Cal., April 5, 1984). That decision held that neither RCRA §7003 nor CERCLA §106 provides for joint and several liability. In the case of a multiple party administrative order, the Stringfellow Court stated that "...such would have to state with specificity the steps to be taken and the party to take them. If steps were ordered taken jointly, the Court would have to prescribe the participation of each defendant". (Slip. op. at 12.)

At present, the Agency has not changed its position on §7003 and joint and several liability. Even so, the Stringfellow decision may affect future §7003 orders issued to multiple respondents without an allocation of individual responsibilities.

Some factors to consider before issuing a RCRA §7003 order to multiple parties are as follows:

i) Coordination of Response Action

An order issued to multiple respondents who are jointly and severally liable generally will not allocate individual clean up responsibilities. */ Instead, the order will require the same response action to be conducted by each responsible party. Multiple parties must organize and coordinate their response to ensure compliance with the order's requirements. Thus, compliance with orders may depend upon group agreement on each member's share of the response cost. In a large group of responsible parties, it may be difficult for the group to develop a consensus on individual liability and perform response activities as quickly as necessary to

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*/ However, the Agency may issue an order to a respondent requiring a response to a discrete, separable aspect of the hazard at a site, notwithstanding the existence of other responsibile parties or other less divisible problem areas.

abate imminent hazard conditions at a site. Accordingly, issuing Orders to all responsible parties may not be appropriate where there are a large number of parties who are unlikely to agree on a concerted response. Instead, the Agency will pursue judicial remedies or consider issuing Orders to a selected subset of responsible parties.

Even in situations where Orders are issued to a large number of parties, Agency policy, which should be reflected in the terms of the Order, is that each Respondent is individually liable for compliance with the Order's requirements.

ii) Supervision

After an order is issued, the Agency conducts compliance monitoring at the site to ensure that responsible parties comply with the terms of the order. Although no specific number of responsible parties can be considered ideal, it is clear that the Agency's oversight responsibility is most effective when there are a limited number of responsible parties or a single contractor (hired by the responsible parties) doing the work at the site.

3) Specificity of the Necessary Response Action

In order to minimize the potential for confusion between Respondents and the Agency concerning the required response action, orders should be used in situations where the nature of the required response action is relatively precise. Orders are particularly useful to require that respondents cease any ongoing activity that is causing the imminent hazard. When remedial work is required, an order may best be used to mandate discrete tasks such as the erecting of fences to secure the site and the removal of drummed wastes. Orders can be inappropriate in cases where the abatement will be very complex, cost more than several million dollars, or take more than a few years to complete. These are offered as factors to consider and not criteria to be rigidly followed.

A RCRA §7003 order, or succession of orders, may be used to require response action throughout the entire cleanup process. It is entirely appropriate to use §7003 to order immediate sampling or testing programs as part of a broader set of proposed response activities. For example, where it is important to respond immediately to an imminent hazard, a §7003 order may be used to determine the full extent of site contamination and to require immediate security and clean up action in response to hazards that have already been established.

Monitoring, sampling, analysis and reporting can, of course, also be required through use of a RCRA §3013 order. A §3013 order may be issued absent a finding of an imminent hazard although it does require a finding that the presence of, or release from a site of, hazardous waste "may present a substantial hazard to human health or the environment." RCRA §3013(a)(1)&(2). [See, Issuance of Administrative Orders Under Section 3013 of RCRA, issued September 1984.]

IV. ELEMENTS OF AN ORDER

All §7003 orders should contain the following elements:

- a statement of the statutory basis for the order.
- a statement of the agency's authority to issue the order and the liability that may be incurred if the respondent fails to comply.
- a specific determination supported by findings or reference to a separate endangerment assessment that states that the Agency has determined that an imminent and substantial endangerment may exist. Such an explicit finding is necessary even if the Respondent is willing to consent to the issuance of the order. Should EPA need to seek judicial enforcement of the order, even one issued on consent, it should be able to demonstrate that it acted within its statutory authority in issuing the order.
- the company is a facility as defined under CERCLA §101(9). (Note: required only when the A.O. is also based on CERCLA §106).
- a finding that the substances are solid or hazardous wastes.
- statements as to the liability of the respondents, i.e., that the responsible party is or has been engaged in the activities described in §7003.
- a compliance schedule that clearly sets forth the tasks to be performed, the time frames for performance, and quality and performance standards for tasks. Such specificity enhances the

operator's ability to comply and the Agency's ability to enforce the order judicially should the respondent violate its terms. A specific order provides the court with Agency articulated standards by which to judge the respondent's noncompliance.

- EPA authority to be on site during work, obtain split samples and other information generated, and stop work if an emergency arises.

- sampling and analytical procedures.

- health and safety procedures.

- notice to affected States. A statement should be included, where possible, that notice to the affected state(s) has been given.

- an opportunity to confer if the order is unilateral. Agency policy is to offer recipients of §7003 orders an opportunity to confer with the Agency concerning the appropriateness of its terms and its applicability to the recipient. (Note: The administrative record containing EPA's evidence should be available for the recipient to examine.) The conference will help EPA ensure that it has based its order on complete and accurate information and ensure that both sides have a common understanding of the work to be performed. Another benefit to such a conference is that it may reveal the unwillingness of the respondents to take necessary action. In this case, EPA can be better prepared to take necessary remedial action itself or seek judicial remedies. (See also, Conference Procedures, infra p. 14).

- an effective date of the order. Each order should specify the date on which it becomes effective. Because a §7003 order by definition addresses an imminent hazard, it should ordinarily become effective within 10-14 days of receipt by the respondent. In emergency situations the effective date may be shortened to as little as 48 hours. Any situation that requires an

affirmative response in less than 48 hours should be addressed under §104 of CERCLA as a fund-financed emergency removal. [See: Issuance of Administrative Orders for Immediate Removal Actions, supra, p. 2 (discussion of the timing of A.O.'s).]

- indemnification of EPA. The order should exempt the Agency from liability for damages, even if the damages occurred pursuant to an EPA enforced order.
- a public comment period for consent orders.
- a civil penalties section for unilateral orders and a stipulated penalties section for consent orders.
- EPA authority to take additional enforcement action if the respondent does not comply with the terms of this order.

V. CONFERENCE PROCEDURES

The conference will normally be held at the appropriate EPA Regional office and will be presided over by the Regional Administrator's designee. However, other arrangements may be agreed to for the sake of convenience to the parties. At any time after the issuance of the order and particularly at the conference, EPA should be prepared to provide the Respondent with information sufficient to explain the basis for the Order and to promote constructive discussions. (NOTE: The administrative record containing EPA's evidence must be available for the recipient to examine.) The Respondent will have the opportunity to ask questions and present its views through legal counsel or technical advisors. The schedule and agenda for the conference will be left to the discretion of the EPA official leading the conference, as long as the Respondent receives a reasonable opportunity to address relevant issues.

Following the conference, a written summary of the proceeding must be prepared and signed by the Agency official who presided over the conference. The written statement should contain:

- A statement of the date(s) and attendees of any conference(s) held; and
- A description of the major inquiries made and views offered by the Respondent contesting the terms of the order.

The presiding official must prepare a statement which addresses the significant arguments raised by the respondent, recommends how the order should be modified, if at all, and contains the reasons for the changes or revisions.

VI. MODIFICATIONS, REVOCATION, OR STAY OF THE ORDER

Based on a review of the file (on which the order was based) any probative information or argument made by the respondent (following receipt of the order) or by recommendation of the presiding official, the issuing official may modify or revoke the order. Any modification to the order must be communicated to the respondent as part of a copy of a written statement containing the elements listed in Section V above. The original should be kept in the Agency files along with the evidence supporting the order, copies of written documents offered in rebuttal by the respondent during the conference, and a copy of the request for a conference.

The issuing official may also stay the effective date of the order if the conference process could not be completed within the specified time period.

VII. NEGOTIATION OF ADMINISTRATIVE ORDERS

Although EPA recognizes that recipients of unilateral §7003 orders should be given an opportunity to confer, the Agency will not engage in lengthy negotiations with recipients after an order is issued. Limited negotiations, before or after issuance of an order, are useful in that they give EPA an opportunity to assess the likelihood that the respondents will perform the tasks set forth in the order. If negotiations look unpromising EPA must decide whether to issue an order unilaterally, refer a §7003 civil action or initiate a Fund-Financed response (if this option exists). EPA should not compromise its authority to secure necessary action simply to obtain an order on consent.

Should negotiations result in an agreement, the resulting order must contain all of the requirements set forth above; these requirements are necessary to ensure that the order is enforceable should the respondent decide not to comply. The same requirements apply even if the respondent has voluntarily begun cleanup efforts. In general, the negotiated order should set out specifically what each respondent must do to comply.

VIII. DELEGATIONS OF AUTHORITY

At the present time, the authority to issue RCRA §7003 administrative orders is delegated to the Assistant Administrator for Solid Waste and Emergency Response and the Regional Administrators. The Regional Administrator must consult with the Assistant Administrator for Enforcement and Compliance Monitoring or the designee and must obtain the advance concurrence of the Assistant Administrator for Solid Waste and Emergency Response or delegatee. The Assistant Administrator for the Office of Solid Waste and Emergency Response's authority to issue §7003 orders and to give advance concurrence has been redelegated to the Director, Office of Waste Programs Enforcement.

The RCRA Delegations of Authority are being revised and should be issued in the near future. The draft §7003 delegations which are found in Chapter 8, Section 22 of the draft delegations manual are divided into three parts: determination of imminent and substantial endangerment; abatement through a unilateral order; and, abatement through an order on consent.

According to the draft delegations, the Regional Administrator (RA) must consult with the Office of Regional Counsel before issuance of either a RCRA §7003 unilateral order or order on consent. Regarding Headquarters, the RA must consult with the Office of Solid Waste and Emergency Response (OSWER) prior to issuing RCRA §7003 orders to determine an imminent and substantial endangerment and to abate such an endangerment through a unilateral order. The RA is not required to consult with the Offices of Enforcement and Compliance Monitoring (OECM) or the Office of General Counsel (OGC) to issue the above. For orders on consent under §7003, the RA must obtain advance concurrence of OSWER or a waiver of such concurrence by advance memorandum, before issuance of such an order. The RA does not have to consult with or procure concurrence from OECM or OGC prior to issuance of §7003 Orders on consent. Consultation with OECM and OGC is recommended in relatively new areas such as the use of a RCRA §7003 order for underground gas tanks and where there are other novel legal issues involved.

Appendix

STATE NOTIFICATION LETTER

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. R. Jones
State Agency
Division of Environmental Control

Dear Mr. Jones:

Enclosed for your information is a copy of an order [stamped "DRAFT" and "CONFIDENTIAL"] that the Agency intends to issue on or after [date], to the XYZ Company, pursuant to Section 7003 of the Resource Conservation and Recovery Act (42 U.S.C. §6973). The order requires certain activities to be taken at the company's site located at [location]. Please refer to the enclosed copy of the proposed order for the specific actions required of the company and the time within which such actions must be taken. If you have any comments or questions concerning the order, please contact [EPA official] at [office].

Sincerely yours,

Assistant Administrator for
Solid Waste and Emergency Response

[or]

Regional Administrator

[or their designees]

Enclosure

cc: Honorable J. Smith, Governor

Kathy

In August of this year the program was going to require PNM to do corrective action and amend their Post-Closure Care Permit accordingly. I guess that option has been dropped in lieu of statutory authority. Contamination exists and we need to undertake some type of activity to eliminate or at least start to eliminate an environmental problem. I'm not sure which option would be best. ~~and~~ Will statutory useage ~~will~~ ~~to~~ force the facility to violate the permit we have issued?

Boyd