ANALYSIS AND PERSPECTIVE

[Ed. note: This week's Anaylsis and Perspective section contains two articles on superfund Section 106 orders, one by David B. Graham and one by Richard H. Mays.]

RESPONDING TO UNILATERAL EPA ORDERS UNDER SECTION 106 OF THE SUPERFUND LAW

By David B. Graham *

The U.S. Environmental Protection Agency is empowered under Section 106 of the superfund law to issue unilateral orders to parties that require them to abate conditions the agency has determined pose an "imminent and substantial endangerment" to the public health, welfare or the environment because of an actual or threatened release of a hazardous substance from a facility.[1] After a brief overview of some of the more important legal points regarding Section 106 orders, I will discuss a number of situations in which my clients and other companies have responded to orders in a variety of ways. I am hopeful that these examples will provide food for thought if and when you are issued a unilateral order.

Any person who willfully violates or fails or refuses to comply with such an order "without sufficient cause" may be subject to fines of up to $25,000 per day in a judicial enforcement action.[2] Realizing somewhat belatedly the power of this enforcement tool (the Section 106 enforcement authority was included in the text of the original 1980 statute), EPA has begun a vigorous campaign to effectuate cleanup of sites through the use of unilateral orders.

A close examination of available options for responding to such orders is warranted prior to being issued, first because after the effective date of the order (often 10 days after receipt), the recipients of the order may be subject to the imposition of the aforementioned civil penalties. As if penalties of this magnitude were not sufficiently intimidating, owner/operators, generators and transporters (potentially responsible parties that may have liability under Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act) that are the recipients of Section 106 orders also may be subject to punitive damages of three times the amount of the cost incurred by the government in performing the remedial actions.[3]

The options available to the "respondent(s)" (the party or parties who receive the unilateral order) are (a) comply with the order; (b) refuse to comply and endeavor to build a record of "sufficient cause" for failing to comply; (c) refuse to comply and take no action; or (d) challenge the order in federal district court.

Overview Of Section 106 Orders

As a general rule, assuming you represent a party that is clearly likely to be found liable under Section 107 of CERCLA, the safest approach is to attempt to comply with the order. One must realize, however, that a price must be paid for compliance. Although a compliance approach should eliminate the possibility of civil penalties and punitive damages, one or more respondents will shoulder all the costs of performing the remedial action, a large percentage of which may have been the responsibility of other PRPs. The respondents will also run the risk that such costs will prove to be much higher than anticipated (a not infrequent occurrence when it comes to superfund remedial work).

Of course, some of the response costs may be recoverable in a subsequent contribution action brought under Section 107 of CERCLA by the PRPs that perform the remedial work required by the order against the nonparticipating PRPs.[4] It is also theoretically possible to recover certain costs from the Superfund if a party can convince EPA or a reviewing court that the EPA decision in selecting the response action ordered was arbitrary and capricious or not in accordance with law.[5] I am

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[1] See Section 106(a) of CERCLA.
[2] See Section 106(b)(1) of CERCLA.
[3] See Section 107(c)(3) of CERCLA.
[4] See Section 107(a)(4)(B) of CERCLA.
[5] See Section 106(b)(2)(D) of CERCLA. Although the actual language used is that a liable party can recover its reasonable costs of response to the extent it can "demonstrate, on the administrative record," that the EPA decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law, under the National Contingency Plan, EPA may define the term "administrative record" more narrowly than a court would be likely to do.

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not aware, however, of any PRP successes in this regard to date.

It is also worth noting that a recipient of an order who believes he can establish by a preponderance of the evidence that he is not liable has the option of complying with the order and then petitioning EPA for reimbursement from the Fund.[6] So long as he can persuade EPA that the costs for which he seeks reimbursement are reasonable in light of the action required by the order, he can obtain reimbursement. Not surprisingly, those receiving orders who have no liability are not generally interested in performing cleanup work. Nevertheless, this option presents a safe, conservative approach to responding to orders for those respondents with sufficient financial resources to undertake the remedial work and who do not wish to run any risk of EPA filing suit against them.

A very important opinion with regard to Section 106 administrative orders that should not be overlooked if a number of PRPs receive an order was rendered in the *Stringfellow* case.[7] There the court noted that:

> Insofar as plaintiffs may intend to ask the Court to compel certain actions on the part of defendants, i.e., not merely to restrain all defendants but to force the undertaking of positive steps, the Court concludes that such orders would have to state with specificity the steps to be taken and the party to take them . . . In sum, the Court sees no role under section 106(a) of CERCLA for what plaintiffs describe as 'joint and several liability to abate.'[8]

Thus, for example, if EPA issued Section 106 orders to 20 PRPs to undertake a $50 million site cleanup without specifying which PRPs were to undertake different portions of the cleanup, the PRPs might well find themselves relying on this opinion if EPA sought to hold all of them jointly and severally liable for the entire cleanup.

Perhaps one of the most important points I can make is to bear in mind that the attitude, personalities, and approach taken by the negotiators for the parties and EPA personnel may have a significant effect on the remedial action that is ultimately required and the cost thereof. If the respondent takes a constructive attitude toward solving the site problem EPA faces, the company is more likely to find that EPA will try to resolve differences that may exist in determining exactly what work must be done. That having been said, however, there are many company representatives as well as agency personnel who have little interest or ability to see the "other side's" point of view in problems presented by superfund sites. Thus, orders often prove to present difficult situations in which to reach accord because of the attitude and personalities of the players in addition to the nature, extent, and cost of the remedial work.

[6] See Section 106(b)(2)(A)-(C) of CERCLA.
[7] *U.S. v. Stringfellow*, 20 ERC 1905, 2 TXLR 665 (C.D. Cal. 1984).
[8] *Id.* at 1910.

RESPONSE OPTIONS TO SECTION 106 ORDERS

Site No. 1
Comply with the Order

After several hundred parties received a PRP letter and a Section 104(e) "information request" on the type and amount of waste sent to a recycling facility, they were informed by EPA that a fund-financed Remedial Investigation/Feasibility Study was underway and would be completed a year to 18 months later. Realizing that it was only a matter of time before EPA would be knocking at their doors, a number of the larger volume parties began the process of organizing themselves in order to see if EPA's PRP list was accurate, whether PRPs had inadvertently been left off the list by EPA, and whether the group could take steps to try to participate in the RI/FS.

Without warning, however, a few of the PRPs received an order requiring them to take immediate remedial action to clean up drums and contaminated soil at the site. With only 10 days to respond, the PRPs set up a conference call for the week following receipt of the order to discuss hiring a consultant to visit the site to develop an assessment of the work needed to comply with the order and a cost estimate for doing so. A couple of the PRPs then called the EPA attorney to explain the action they were taking and to seek a short extension of the effective date of the order to give them time to meet with the consultant immediately after his site visit and just prior to the requested conference date (EPA makes only a feeble gesture toward incorporating due process considerations into their Section 106 orders by providing an "opportunity to confer" on the order prior to it becoming effective if a party requests such a meeting).[9] The EPA attorney agreed to the extension request, in all probability because he realized that the PRP group was taking action consistent with complying with the order.

Shortly after the site visit, the PRPs met with the consultant and developed a proposed plan by which they would respond immediately to problems, such as the need for overpacking and disposing of leaking drums and securing the site. The PRPs proposed a second phase of work to remedy certain conditions that required further study and/or could not be accomplished quickly because of winter conditions. This plan of action was presented to EPA the following day and was sufficiently well received that EPA extended the effective date of the order a couple of weeks to enable the PRPs and EPA to determine how to address the site problems in a cooperative fashion. A joint site visit with EPA was scheduled a few days later to clarify the nature of the remedial action that would be taken immediately, and the following

[9] ERA makes no real claim that these conferences satisfy due process requirements. For further insight, see *Interim CERCLA Hazardous Waste Enforcement Policy*, 50 Fed. Reg. 5034 (1985); *guidance on use and Issuance of Administrative Orders under §106(a) of CERCLA* and the discussions in *Wagner Electric Corp. v. Thomas*, 612 F.Supp. 736 (D.C. Kan. 1985) and *Solid State Circuits Inc. v. EPA*, 812 F.2d 383, 3 TXLR 1312 (8th Cir. 1987).

week, a draft work plan was developed and submitted to the agency.

As the parties made progress on reaching agreement on the technical work to be done at the site, both the PRPs and EPA realized that the order needed to be modified to reflect the two-stage approach to addressing the site conditions. At this point, the PRPs encouraged EPA to add other generators and former owner/operators to the order in order to give additional PRPs incentive to join in the cleanup process rather than an incentive to refuse to take any role in the hope that the Agency would continue to focus on only a few PRPs. Happily for the original recipients of the order, these arguments did not fall on deaf ears and EPA doubled the number of PRPs on the order when it issued a revised order reflecting the adoption of the two-phase approach to the remedial work to be done at the site.

Site No. 2
Refuse To Comply With The Order With "Sufficient Cause" (I)

Again, late in the calendar year, in the rush to issue orders apparently to enhance the agency's enforcement statistics for 1988, EPA issued Section 106 orders to three parties ordering them to clean up a vacant piece of property on which chemical contaminants had been found. The agency alleged that one of the PRPs was a generator, one a former owner, and one an owner/operator. The three PRPs had no idea prior to receipt of the order that EPA believed an "imminent and substantial endangerment" existed at the site, their only notice of the site being a combination PRP letter/Section 104(e) information request six months earlier.

The agency ordered the parties to clean up all contaminants found on the 600-acre site to what could easily have been interpreted to be background levels since no cleanup levels were stated. Further, no delineation of the limits of the contamination to be addressed was provided. Thus, there was a genuine concern that an agency remedial project manager could determine it would be necessary to perform a comprehensive sampling and analysis program over much of the site in order to determine the appropriate cleanup required.

The order presented a real dilemma to the three PRPs. The waste materials from the alleged generator could have come from one of its manufacturing plants because they closely resembled wastes that the company generated, but EPA offered no proof of the fact. The former owner of the property had sold it nearly 20 years ago, and it did not appear that waste was disposed of during the time of his ownership. The alleged owner/operator had neither held title to the property nor operated it during the time of disposal.

The three PRPs requested an extension on the effective date of the order in order to try to gather information quickly in preparation for the conference provided in the order. The agency responded that the alleged immediate threat presented by the site was such that no extension would be granted. The PRPs were told that if they did not comply with the order, the agency would immediately dispatch contractors to begin implementing the remedial action.

The conference proved unproductive, EPA remaining unyielding on the need to comply with the order as written and the PRPs remaining steadfast to their position that they had been presented with no evidence of their alleged liability for site contamination.

Within days after the conference, the three PRPs developed letters that they sent to EPA setting forth the basis for their refusal to comply with the order, thus explaining that they did not refuse to comply "without sufficient cause." Shortly thereafter, EPA's contractors initiated the cleanup work set forth in the order.

In the above situation, the PRPs did not believe they were liable for site conditions and were further constrained not to take affirmative action even if they believed they were because of the open-ended scope of cleanup and cost of the remedial work required by the order. Thus, they followed the best course available to them of presenting well-documented arguments in the record outlining their reasons for not complying with the order.

Site No. 3
Refuse To Comply With The Order With "Sufficient Cause" (II)

In this scenario, EPA undertook initial removal actions at a landfill several years ago. Its first action against PRPs at the site was in the form of a cost recovery action. Although it had identified many PRPs at this site, as is the case in many large multi-party sites, EPA instituted action against only a limited number of these companies that had sent the largest volumes or most toxic wastes to the site. Those companies in turn, however, filed third party complaints against hundreds of other companies, many of whom had little or very questionable connection with the site. The large number of parties now involved in this site has repeatedly complicated efforts to reach settlement. However, despite the presence of many more parties, the main defendants have generally been able to control settlement discussions with EPA, since these PRPs are the most significant contributors to the site and thus, the parties expected to pay the largest share of the costs.

EPA has taken action at this site in phases. All earlier response or remedial action at the site has been taken by EPA and followed by cost recovery action against the main defendants sued by EPA. In the latest phase, however, EPA issued a unilateral Section 106 order to undertake certain remedial work and, for the first time, included both the original defendants and about half of the third party defendants, based on their volume contribution to the site.

This latest Section 106 order came in an "end of the quarter" action typical of EPA. That is, EPA had to decide whether to commit EPA funds for the remedial response by the end of a certain quarter of its fiscal year, and, therefore, issued the Section 106 order immediately prior to this date. Because of the impending fiscal deadlines, EPA gave the recipients only a couple of days

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within which to request a conference on the order. Many of the recipients never even received notice of the order until after the period for requesting a hearing. However, at the request of several parties who had received "timely" notice, EPA did hold a conference on the order.

At the conference EPA announced that it was not interested in hearing any comments on or challenges to the order's applicability or appropriateness to any particular recipient, but rather only comments on the overall substance of the order. EPA also wanted a written commitment from the group to undertake the remedial action by the date EPA had to choose whether to commit its own funds. Approximately half of the recipients, including the original main defendants, committed within EPA's time deadline to undertake the remedial work.

Those recipients of the order who refused to participate in the funding of the remedial work did so for several reasons. First, all companies believed they had strong defenses: either that they had not in fact sent material to the site or that materials sent to the site by their companies were not hazardous substances under CERCLA. Second, even if these companies' wastes were considered hazardous substances, in most cases they were of extremely low toxicity. However, all allocations to date had been controlled by the main defendants who had repeatedly refused to consider toxicity of the waste in any allocation decisions. Even where legitimate defenses exist, it is often more cost efficient to settle in order to avoid the expense of litigation. However, here the percentage of the overall costs that was being assigned to each of the non-participating PRPs was exorbitant and clearly inequitable in relation to their contribution to the site.

In letters to EPA, the non-participating PRPs thoroughly explained their reasons for choosing not to join in a settlement to undertake the remedial action. In addition, they questioned EPA's legal authority to issue a Section 106 order that purported to impose joint and several liability. They also questioned EPA's factual basis for determining that an "imminent and substantial endangerment" existed to justify the order, particularly at a site where action had been slowly ongoing for years and discussions for the current phase of work ongoing for months.

The non-settling PRPs also made an independent offer of settlement to EPA for amounts that were more commensurate with their contribution to the site. This offer took into consideration the nature and low toxicity of these PRPs' materials sent to the site. EPA rejected this offer, most likely because it feared upsetting its settlement with the participating PRPs. As with the above example, the non-participating PRPs followed the best course available to them of presenting well documented arguments and explanations of their reasons for not complying with the Section 106 order, including here, a separate offer of settlement.

Site No. 4
Refuse To Comply And Take No Action

Not having represented a client who has elected to follow this course of action after having been issued a unilateral order, I will discuss an actual case where the agency filed a cost recovery complaint and a motion for partial summary judgment in a situation that appeared well-suited for the issuance of an order. If an order had been issued, the setting also would have appeared promising for EPA seeking and collecting treble damages if the agency (in accordance with *Stringfellow*) had specifically designated what remedial action each PRP was to undertake and the defendants failed (as they did in the following case) to take remedial action without sufficient cause.

In the *Northernaire Plating* case,[10] a metal electroplating business owned by Northernaire Plating Co. was located on property owned by a man by the name of Meyer. Another man, Garwood, was the sole shareholder Northernaire and he operated the plant on a day-to-day basis, including directing the handling of hazardous substances.

In an inspection of the site, EPA and the Michigan Department of Natural Resources found that cyanide, cadmium, and other heavy metals had been discharged and had seeped into the ground. Luckily for Northernaire Plating Co., Meyer, and Garwood, EPA asked them to undertake the cleanup rather than issuing them a Section 106 order to do so. When they refused, EPA performed the cleanup and filed a cost recovery complaint against the three.

Each of the defendants argued in its pleadings that the other defendants were responsible for any environmental harm at the plant but failed to use affidavits to support their contentions and alleged defenses. Not surprisingly, the court noted that parties cannot create issues of fact by relying on conclusory and unsupported allegations.

In order to establish a *prima facie* case of liability, the court stated that the government had to prove four things:

(1) That the plant was a "facility" as defined in Section 101(9) of CERCLA;

(2) That a "release" or "threatened release" of a "hazardous substance" had occurred;

(3) That said release had caused the government to incur "response costs;" and

(4) That Northernaire, Meyer, and Garwood were "persons" as defined in Section 107(a)(1)(3).

The court quickly concluded that each of these criteria were met, that none of the statutory defenses set forth in Section 107(b)(3) [11] was available, and that because the injury at the site was indivisible, all three defendants were jointly and severally liable. (Presumably, had EPA

[10] *U.S. v. Northernaire Plating Co.*, 28 ERC 1494 (W.D. Mich. 1987)

[11] The three statutory defenses are: 1) an act of God, 2) an act of war, and 3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant if the defendant establishes by a preponderance of the evidence that he exercised due care with respect to the hazardous substance and he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

been seeking judicial enforcement of a Section 106 order rather than having filed a cost recovery case, the court would have followed *Stringfellow* and not imposed joint and several liability.)

In granting the government's motion for partial summary judgment, the court noted that contribution actions are permitted among parties held jointly and severally liable. The court endorsed the U.S. Court of Appeals for the Fourth Circuit's view, expressed in the *South Carolina Recycling and Disposal* case, however, that "questions of determining 'equitable shares of the liability' with respect to an indivisible injury are appropriately resolved in an action for contribution after plaintiff has been made whole." [12]

The fact situation in *Northernaire* would have appeared favorable for the issuance of a Section 106 order.[13] As the government becomes more aggressive in the use of Section 106 administrative orders, be alert to situations where your company may be unable to build a record for sufficient cause not to comply with an order if you elect not to do so.

Litigation Option

Although one other "option" exists, i.e., challenge the administrative order in federal district court, for all practical purposes, this option is only available after EPA files a judicial action a) to enforce the order; b) to recover a penalty for violation of an order; c) to seek reimbursement under Section 106(b)(2); or d) to compel a remedial action.[14] The only other possible opportunity for challenging the order in federal district court would be in an unusual situation where a suit could be filed in conjunction with a "citizen suit" filed under Section 310, where the plaintiffs allege that the removal or remedial actions taken under Section 106 were "in violation of any requirement" of CERCLA.[15] Such an action may not be brought with regard to a removal, however, where a remedial action is to be undertaken at the site.

Conclusion

In the final analysis, a PRP should only decide not to comply with an order if he believes he has a reasonable basis for asserting that he has "sufficient cause" for not doing so.

In considering what constitutes "sufficient cause," some of the best guidance available can be found in the legislative history of the Superfund Amendments and Reauthorization Act:

The amendment contemplates that the phrase "sufficient cause" will continue to be interpreted to preclude the assessment of penalties or treble damages when a party can establish that it had a reasonable belief that it was not liable under CERCLA or that the required response action was inconsistent with the National Contingency Plan. The court must base its evaluation of the defendant's belief on the objective evidence of the reasonableness and good faith of that belief. Given the importance of EPA orders to the success of the CERCLA program, courts should carefully scrutinize assertions of "sufficient cause" and accept such a defense only where a party can demonstrate by objective evidence the reasonableness and good faith of a challenge to an EPA order.

The amendment also contemplates that courts will continue to interpret "sufficient cause" to encompass other situations where the equities require that no penalties or treble damages be assessed.[16]

Considering the possibility of treble damages and daily penalties, the decision on whether to comply with an order should be very carefully considered. If noncompliance is the course one elects to follow, fully document the decision and reasons in the event EPA seeks treble damages penalties at a later date.

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[12] *U.S. v. South Carolina Recycling and Disposal Inc.*, 858 F.2d 160, 3 TXLR 12 (4th Cir. 1988).

[13] There have been very few cases thus far discussing the issue of what constitutes "sufficient cause" for not complying. Several courts have ruled that a party must have an "objectively reasonable belief" that an order was invalid as to him; e.g., see *Solid State Circuits*, 812 F.2d at 389, n. 9; one court has referred to a "subjective" belief: see *Aminoil Inc. v. EPA*, 646 F. Supp. 294 (C.D. Cal. 1986). As EPA has only recently begun to issue Section 106 orders in large numbers, the case law on "sufficient cause" may be expected to develop at a greater pace in the next few years.

[14] See Section 113(h) of CERCLA.

*** * * NOTE TO READERS * * ***

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