

1 February 10, 1998

2 MEMORANDUM OF UNDERSTANDING
3 among the
4 ENVIRONMENTAL PROTECTION AGENCY,
5 UNITED STATES COAST GUARD,
6 DEPARTMENT OF COMMERCE,
7 DEPARTMENT OF THE INTERIOR,
8 DEPARTMENT OF AGRICULTURE,
9 DEPARTMENT OF DEFENSE,
10 DEPARTMENT OF ENERGY, and
11 DEPARTMENT OF JUSTICE
12 concerning
13 the exercise of authority under
14 Section 106 of the Comprehensive Environmental Response,
15 Compensation, and Liability Act.

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

21 I. INTRODUCTION

22 CERCLA confers on the President a range of authorities for responding to releases and
23 threatened releases of hazardous substances and for addressing consequent injuries to natural
24 resources. CERCLA also confers broad powers of delegation. *See* 42 U.S.C. 9615. After
25 Congress amended CERCLA in 1986, President Reagan delegated authority under the statute to
26 particular departments, agencies, and officials through Executive Order 12580. *See* 52 Fed.

1 Reg. 2923 (Jan. 23, 1987). ("EO 12580"). Under EO 12580, the President's delegation of
2 authority under CERCLA Section 106, which provides authority to issue orders or seek judicial
3 relief to address releases that may present an "imminent and substantial endangerment to the
4 public health or welfare or the environment," 42 U.S.C. 9606(a), was limited to the Administrator
5 of the Environmental Protection Agency (EPA) and the United States Coast Guard ("Coast
6 Guard"). *See* 52 Fed. Reg. at 2924.

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

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

¹ *See Improving Federal Facilities Cleanup: Report of the Federal Facilities Policy Group* (Council on Environmental Quality and Office of Management and Budget, Oct. 1995).

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

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

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

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26 This MOU is intended to fulfill that charge, and includes as signatories all of the federal
27 agencies that may be involved in implementation of EO 13016: the Departments of

1 Agriculture, Commerce within which the National Oceanic and Atmospheric Administration
2 resides, Defense, Energy, Interior, Justice, and Transportation within which the Coast Guard
3 resides, and the Environmental Protection Agency.

4 II. STATEMENT OF PURPOSE

5 The purpose of EO 13016 is to enhance protection of the public health, welfare, and the
6 environment, and to make more effective use of public resources, by ensuring performance of
7 response actions by responsible parties wherever appropriate. The authority conferred by EO
8 13016 should expedite performance of response actions, reduce the costs of response, and
9 discourage litigation over cleanup responsibility. In advancing these purposes, all agencies share
10 the goal of encouraging consensual agreements by responsible parties to perform response actions
11 wherever possible, whether under section 106 or other authority.

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

20 III. THRESHOLD CRITERIA

21 Under the terms of Executive Order 13016, a Federal Resource Manager may exercise
22 Section 106 authority to require the performance of response actions where the following
23 threshold criteria have been met:

- 1 1. There has been a release or threatened release of a hazardous substance affecting
2 either: a) natural resources under the Federal Resource Manager's trusteeship; or
3 b) a vessel or facility subject to the Federal Resource Manager's jurisdiction,
4 custody, or control;

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

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

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

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

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

- 18 6. At facilities where a state, local, or tribal agency has proposed, approved, or is
19 performing a response action, the Federal Resource Managers shall make best
20 efforts, consistent with their responsibility for protection of public health and
21 welfare and the environment, to work in a coordinated manner with the non-

1 federal agency to ensure that their authorities and resources are used in a
2 complementary, efficient, and non-duplicative manner.

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

9 IV. SCOPE OF AUTHORITY

10 A. Limitations

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

21 B. Role Determination

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

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

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

22 V. POTENTIALLY LIABLE FEDERAL RESOURCE MANAGERS

23 A. General Limitations

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

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

16 B. Specific Limitations

17
18 Federal Resource Managers agree not to exercise the authorities conferred by Section 106
19 in any case where either of the following circumstances obtain:

- 20 1. The response action addresses a release or threatened release, or
21 contamination resulting from a release or threatened release, that is directly
22 and primarily attributable to the operations or activities of the Federal
23 Resource Manager, other than the exercise of (or failure to exercise)
24 regulatory authority.

1 2. A contract or lease between the party that would be subject to the order
2 and the United States or any department, agency, or instrumentality thereof
3 expressly provides for or allows a claim for indemnification or other form
4 of reimbursement of the costs incurred by the party in implementing the
5 order.

6 C. Department of Justice Concurrence

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

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

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

17 The Federal Resource Managers will exercise their Section 106 authorities in a manner
18 consistent with applicable guidances and policies issued by EPA and the Coast Guard. These
19 include, without limitation, the Superfund Administrative Reforms announced on October 2,
20 1995 and the policy articulated in the EPA memorandum dated August 2, 1996 and entitled
21 *Documentation of Reasons for Not Issuing CERCLA Section 106 Orders to All Identified PRPs*.
22 These guidances and policies shall apply to the Federal Resource Managers in the same manner
23 and to the same extent that they apply to EPA and the Coast Guard. The list of commonly

1 applicable guidances and policies is attached as Appendix B. EPA and the Coast Guard have
2 designated generally applicable guidance and policies that are available through electronic media
3 and will be available to advise the Federal Resource Managers as to the applicability of specific
4 guidance and policy on a site specific basis.

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

10 VII. COORDINATION WITH FEDERAL RESPONSE ACTION AGENCIES

11 A. Quarterly Consultations

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

19 The Federal Resource Managers further agree to provide notice of any release or
20 threatened release that they seek to address through the use of Section 106 authorities to the
21 regional office of EPA or the field office of the Coast Guard in whose region or district the
22 release or threatened release occurs or threatens to occur. The notice and consultation provided
23 by this Section shall encourage coordination for the purpose of achieving early

1 consensus, and facilitating concurrence, with respect to a Federal Resource Manager's exercise of
2 Section 106 authorities.

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

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

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

9 The Federal Resource Managers agree that they will provide to EPA or the Coast Guard,
10 as appropriate, notice of their intent to issue or amend any order, or of a request that the Attorney
11 General enter into a consent decree or seek a judicial order, under Section 106(a). Such notice
12 shall be provided to the individual(s) identified in Section IX(B), below, and shall be accompanied
13 by the following: a draft of the proposed order, amendment or request; a list of the PRPs;
14 documentation supporting the liability of the PRPs; documentation demonstrating coordination
15 with the relevant State or tribal entities; documentation of compliance with CERCLA § 104(b)(2);
16 and identification of the location of the administrative record supporting the Federal Resource
17 Manager's decision to issue the order, amendment, or request. From the time notice is given,
18 EPA and the Coast Guard shall have access to the administrative record and may obtain copies as
19 necessary. In the event the Federal Resource Manager has not compiled the complete
20 administrative record at the time such notice is given, the Federal Resource Manager will make
21 available all existing material that it expects to include in the administrative record. In addition to
22 this initial notice, the Federal Resource Managers further agree to provide promptly to EPA and
23 the Coast Guard, upon receipt, any

1 documented comments received from State or Tribal entities pursuant to Sections VIII (B) and
2 VIII (C) of this MOU. At those sites where the Federal Resource Managers provide notice to
3 EPA and/or the Coast Guard of intention to exercise 106 authority, and neither EPA nor the
4 Coast Guard is the lead federal agency at the site, EPA and or the Coast Guard agree to make
5 available to the Federal Resource Manager all information previously collected regarding the
6 hazardous substances at issue.

7 C. Concurrence in Proposed Section 106 Administrative Orders

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

18 EPA and the Coast Guard shall issue a written notice of concurrence within ninety (90)
19 calendar days after receipt of preliminary notice and the accompanying documentation identified
20 in Section VII (B), unless otherwise agreed to by the signatories. In the event of nonconcurrence,
21 EPA and the Coast Guard shall consult with the Federal Resource Managers and identify the
22 grounds for the decision. The relevant signatories may agree to expedite the time periods
23 identified in this section. A failure by EPA or the Coast Guard to respond in

1 writing to a Federal Resource Manager's notice of intent to issue an order within the 90 day
2 period shall not be deemed a concurrence, but shall result in immediate consultation among the
3 relevant signatories.

4 D. Concurrence in Proposed Amendments to Section 106 Administrative Orders

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

22 E. Grounds for Nonconcurrence

23 In the event a Federal Resource Manager decides to issue a Unilateral Administrative
24 Order ("UAO") for the performance of a response action, to submit an Administrative Order on
25 Consent ("AOC") for performance of a response action, or to amend such a UAO or AOC,

1 EPA or the Coast Guard, as appropriate, shall either concur or identify the grounds for
2 nonconcurrence. The grounds for nonconcurrence are the following:

- 3 (a) the Federal Resource Manager has failed to provide EPA or the Coast Guard with
4 timely and sufficient information to determine if the order or amendment is in
5 accordance with law under Section 106;
- 6 (b) the Federal Resource Manager has failed to comply with the terms of this MOU;
- 7 (c) issuance of the order or amendment presents an unreasonable risk of a successful
8 claim for reimbursement from the Hazardous Substance Trust Fund (“the
9 Superfund”) or, in the case of an AOC, the AOC does not contain a provision
10 pursuant to which the respondent agrees not to assert any direct or indirect claim
11 for reimbursement from the Superfund based on CERCLA or any other provision
12 of law;
- 13 (d) the Federal Resource Manager is potentially liable for the response action, and
14 issuance of the order or amendment would be inconsistent with Section V, above;
- 15 (e) the proposed order or amendment is in conflict with an existing or proposed EPA
16 or Coast Guard response action;
- 17 (f) the proposed order or amendment does not conform to standards for
18 implementation defined under Section VI;
- 19 (g) EPA or the Coast Guard determines that the proposed response action is not
20 protective of public health or welfare or the environment;

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(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

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

6 VIII. CONSULTATION WITH STATES AND TRIBES

7 A. In General

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

13
14 B. Response Agencies

15 Federal Resource Managers will provide the notice required under Section VII (B) to the
16 relevant State or Tribal response agency at the same time and with the same supporting
17 information as provided to EPA or the Coast Guard pursuant to Section VII (B), provided that
18 the Federal Resource Manager has adequate assurances that confidentiality and any applicable
19 privileges will be protected. Federal Resource Managers shall allow the State and Tribal response
20 agencies at least thirty (30) calendar days to review the notice and provide comments. Any
21 comments received from a State or Tribal agency will be made available to EPA and the Coast
22 Guard and made part of the administrative record. Federal Resource Managers shall respond to
23 all such comments, either orally or in writing, as appropriate to the circumstances.
24 Notwithstanding the foregoing, EPA or the Coast Guard and the Federal

1 Resource Manager may agree that exigent circumstances requires expedited action. In such
2 cases, the Federal Resource Manager will notify the State or Tribal response agency of these
3 circumstances and any related changes to this notice and comment process. The appropriate State
4 response agencies are identified in the Regional Contingency Plans developed in accordance with
5 the NCP.

6 C. Natural Resource Agencies

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

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

24
25 IX. RE-DELEGATIONS

1 A. Section 106 Authorities

2 Each Federal Resource Manager may re-delegate all or part of its Section 106 authority,
3 but only to one headquarters official, at the level of Deputy Assistant Secretary or above, until
4 two years have elapsed from the date this MOU becomes effective. At that time, the signatories
5 shall consider the re-delegation of a Federal Resource Manager's Section 106 authority to other
6 Federal Resource Manager agency officials. Upon making or changing any delegation of Section
7 106 authority, each Federal Resource Manager will promptly notify all other signatories of the
8 name(s) and positions of the designated individual(s).

1 The Federal Resource Managers have designated the following persons to exercise
2 delegated Section 106 authorities:

3 Department of Commerce

4 General Counsel, National Oceanic and Atmospheric Administration

5 Department of the Interior

6 Solicitor, United States Department of Interior

7 Department of Agriculture

8 General Counsel, United States Department of Agriculture

9 Department of Defense

10 Deputy Under Secretary of Defense (Environmental Security)

11 Department of Energy

12 General Counsel, Department of Energy

13 B. Concurrence Authorities

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

19 Environmental Protection Agency

20 Assistant Administrator for Enforcement and Compliance Assurance

1 The Coast Guard has designated the following office chief to exercise concurrence authority:

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

5 X. FEDERAL RESOURCE MANAGER ENFORCEMENT OF SECTION 106 ORDERS

6 A. In General

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

14 B. Limitations

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

20 As a matter of enforcement discretion, if a Federal Resource Manager elects to perform a
21 response action in lieu of a person who has received, but not complied, with an order issued
22 pursuant to Section 106 authority exercised by a Federal Resource Manager, the Federal

1 Resource Manager shall not seek daily civil penalties pursuant to Section 106(b) that may accrue
2 after the Federal Resource Manager has completed performance of the response action.

3 C. Effect on Other Actions

4 Work performed in accordance with an order or consent decree issued pursuant to Section
5 106 authority exercised by a Federal Resource Manager shall be deemed consistent with the NCP
6 as if the order or decree had been issued or requested by EPA or the Coast Guard.

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

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

17 XI. EFFECTIVE DATE

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

19 XII. MODIFICATION AND TERMINATION

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

3 XIII. NOTICES

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

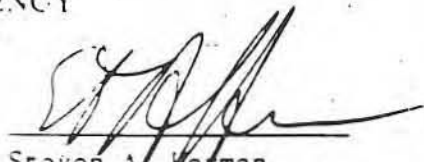
11 XIV. EFFECT OF THIS MOU

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

ENVIRONMENTAL PROTECTION

AGENCY

By



Steven A. Herman
Assistant Administrator for Enforcement
and Compliance Assurance

2/10/94

DATE

1 UNITED STATES COAST GUARD

2 By: 

R. C. North
Rear Admiral, U.S. Coast Guard
Assistant Commandant for Marine
Safety and Environmental Protection

3 February 13, 1998

4 DATE

DEPARTMENT OF COMMERCE

2 By: Monica Medina

Monica Medina
General Counsel

NOAA

3 2/17/98

4 DATE

1 DEPARTMENT OF THE INTERIOR

2 By: 

John Leshy
Solicitor

3 Feb. 6, 1998

4 DATE

DEPARTMENT OF AGRICULTURE

2

By:

Dan Glickman

Dan Glickman
Secretary

3

3/23/98

4

DATE

1 DEPARTMENT OF DEFENSE

2 By: *[Handwritten Signature]*

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

4 Feb. 17, 1958

DATE

DEPARTMENT OF ENERGY

2

By: 

Eric Fygi
Acting General Counsel

3

2/6/98

4

DATE

1 DEPARTMENT OF JUSTICE

2 By: *L. Schiffer*

Lois Schiffer
Assistant Attorney General
Environment & Natural Resources Division

3 Feb. 2, 1998

4 DATE

1 APPENDIX A

2 CONFIDENTIALITY AGREEMENT

- 3 1. Except as provided below or otherwise provided herein, the Parties shall treat
4 all designated privileged documents generated, and designated privileged
5 communications, by, between or among the Parties as privileged attorney-client
6 communications, attorney work product or protected by other applicable
7 privileges such as the deliberative process privilege (or as a combination
8 thereof), and shall protect such documents and communications from disclosure
9 to the maximum extent possible under applicable Federal and State law. A
10 "designated privileged communication" is one which occurs with an expectation
11 of confidentiality and includes, but is not limited to, communications between
12 the Governments' attorneys or their staff, agents, and/or experts in anticipation
13 of litigation, in the seeking or giving of legal advice, and/or in the context of
14 pre-decisional government deliberations. Similarly, a "designated privileged
15 document" is a document which is drafted with an expectation of
16 confidentiality, and includes, but is not limited to, communications between the
17 Governments' attorneys or their staff, agents, and/or experts in anticipation of
18 litigation, in the seeking or giving of legal advice, and/or in the context of pre-
19 decisional government deliberations.
- 20 2. The transmittal of a designated privileged document to, or a designated
21 privileged communication between or among any of the Parties or state response
22 action agencies or state or tribal trustees (and their counsel, representatives,
23 contractors and consultants) does not waive, or imply any waiver, of any
24 privilege or right which the transmitting government may assert with respect to
25 that document or communication.

1 3. Unless otherwise specifically provided, the Parties shall each be entitled to
2 assert an applicable privilege with respect to any document or communication
3 jointly transmitted, prepared, or funded by the Parties. Each Party shall be
4 entitled to assert an applicable privilege with respect to any document or
5 communication transmitted, prepared, or funded solely by that Party.

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

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

23 6. Nothing herein in any way affects or limits the authority of any signatory to
24 waive any privilege and release any documents, information, analyses, opinion,
25 conclusion, or advice that are subject to privileges held exclusively by that
26 signatory.

- 1 7. Designated privileged documents shall be maintained in such a manner as to
2 insure that no intentional or unintentional disclosure is made which would
3 compromise any asserted privilege, including segregating designated privileged
4 documents in files that are identified as containing privileged documents that are
5 not to be disclosed publicly or in response to a discovery request in any
6 litigation that may result in connection with the Parties' exercise of their Section
7 106 authority.
- 8 8. At the request and option of any Party, designated privileged documents shall
9 be returned to the originating Party or destroyed, subject to the provisions of
10 the Federal Records Act, 44 U.S.C. §§ 2901, et seq.
- 11 9. In the event a state or Indian tribe is trustee for natural resources affected by the
12 release or threat of release that is the subject of a Federal Resource Manager's
13 proposed Section 106 Order, the Parties agree that they may disclose designated
14 privileged documents or communications to the state or tribal response action
15 agency or state or tribal trustee if said Party has executed a confidentiality
16 agreement with respect to such documents and communications.

1 APPENDIX B

2 COMMONLY APPLICABLE EPA GUIDANCES/POLICIES ON CERCLA CLEANUP
3 ORDERS

4 I. PRIMARY GUIDANCES/POLICIES

- 5 1. "Guidance on CERCLA section 106(s) Unilateral Administrative Orders for Remedial Design
6 and Remedial Actions", OSWER Directive # 9833.0-1a; (March 13, 1990).
- 7 2. "Model Unilateral Administrative Order for Removal Response Activities", OSWER
8 Directive 9833.07, March 16, 1993.
- 9 3. "Model Unilateral Administrative Order for Remedial Design/Remedial Action" 9833.0-2b
10 (March 3, 1990).
- 11 4. "Final Guidance on Administrative Record for Selection of CERCLA Response Actions",
12 OSWER Publications 9833.3A-1, (December 3, 1990), PB91-139121/CCE.
- 13 5. "Guidance on CERCLA Section 106 Judicial Actions," OSWER Directive 9835.7 (February
14 24, 1989).
- 15 6. Evaluation of , and Additional Guidance on Issuance of Unilateral Administrative Orders
16 (UAOs) for RD/RA, OSWER Directive # 9833.2c (June 20, 1991).
- 17 7. Documentation of Reason (s) for Not Issuing CERCLA Section 106 UAOs to All Identified
18 PRPs, August 2, 1996.

1 8. "Model Administrative Order on Consent for Remedial Investigation/Feasibility Study",
OSWER Directive # 9835.3-1A (March 3, 1990).

3 9. "Administrative Order on Consent for Remedial Investigation/Feasibility Study", OSWER
4 Directive 9835.19 (February 5, 1990).

5 10. "Guidance on Use and Enforcement of CERCLA Information Requests and Administrative
6 Subpoenas", August 25, 1988.

7 11. "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" OSWER
8 Publication 9834.10, October 19, 1987, PB91-139253/CCE.

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

11 A. Removal Actions

12 1. "Superfund Removal Procedures-Action Memorandum Guidance" OSWER Publication
13 9360.3-01, (December 1990), EPA/540/P-90/004, PB90-274473.

14 2. "Superfund Removal Procedures-Public Participation Guidance for On-Scene Coordinators:
15 Community Relations and the Administrative Record" OSWER Publication 9360.3-05, (June
16 1992), PB92-963416.

17 3. "Superfund Removal Procedures-Removal Enforcement Guidance for On-Scene
18 Coordinators" OSWER Publication 9360.3-06, April 1992, PB92-963409.

19 4. "Superfund Removal Procedures-Removal Response Reporting: POLREPs and OSC Reports"
OSWER Publication 9360.3-03, (June 1994), EPA-540/R-94/023, PB93-963421.

- 1 5. "Superfund Removal Procedures-Guidance on the Consideration of ARARs During Removal
2 Actions" OSWER Publication 9360.3-02, (August 1991), PB92-963401/CCE.
- 3 6. "Consideration of ARARs During Removal Actions" OSWER Publication 9360.3-02/FS,
4 (March 1992), PB92-963410.
- 5 7. "Guidance on Conducting Non-Time-Critical Removal Actions under CERCLA" OSWER
6 Publication 9360.0-32, (August 1993), EPA/540-R-93-057, PB93-963402.
- 7 8. "Policy on Management of Post-Removal Site Control", (December 3, 1990), PB91-
8 921326/CCE.
- 9 9. "Quality Assurance/Quality Control Guidance for Removal Activities-Sampling QA/QC Plan
10 and Data Validation Procedures (Interim Final)" OSWER Publication 9360.4-01, (April 1990),
11 EPA/540/G-90/004, PB90-274481.
- 12 10. "Removal Program-Representative Soil Sampling Guidance" OSWER Publication 9360.4-
13 10, (November 1991), PB92-963408.
- 14 11. "Removal Cost Management manual" OSWER Dir. 9360.0-2B, April 1988
- 15 12. "Determining When LDRs Are Applicable to CERCLA Response Actions" OSWER
16 Publication 9347.3-05/FS, (July 1989), PB90-274366.
- 17 13. "CERCLA Compliance with other Laws Manual, Part I (Interim Final)" OSWER
18 Publication 9234.1-01, (August 1988), EPA/540/G-89/006, PB90-272535.

- 1 14. "CERCLA Compliance with other Laws Manual, Part II: Clean Air Act and Other
Environmental Statutes and State Requirements" OSWER Publication 9234.1-02, (August 1989),
3 EPA/540/G-89/009, PB90-148461.
- 4 15. "Guide to CERCLA Compliance with Other Laws Manual" OSWER Publication 9234.2-
5 02/FS, (September 1989), PB90-274242.
- 6 16. "CERCLA Compliance with Other Laws Manual: Summary of Part 2, CAA, TSCA and
7 Other Statutes" OSWER Publication 9234.2-07/FS, (April 1990), PB90-272550.
- 8 17. "Determining When LDRs Are Relevant and Appropriate to CERCLA Response Actions"
9 OSWER Publication 9347.3-08/FS, (December 1989).
- 10 18. "Obtaining a Soil and Debris Treatability Variance for Removal Actions" OSWER
Publication 9347.3-06B/FS, (September 1990).
- 12 19. "ARARs Q's and A's: Compliance with Federal Water Quality Criteria" OSWER
13 Publication 9234.2-09/FS, (June 1990), PB90-274267.
- 14 20. "Superfund Guide to RCRA Management Requirements for Mineral Processing Wastes"
15 OSWER Publication 9347.3012/FS, (January 1991), PB91-921318.

16 **B. Remedial Actions**

- 17 1. "Superfund Remedial Design/Remedial Action Guidance", 9355.0-04A (June 1, 1986).
- 18 2. "Interim Final Guidance on EPA Oversight of RD/RAs Performed by PRPs (February 1990).

1 3. "Reduced Oversight for Capable and Cooperative PRPs", Directive #9200.4-15 (July 31,
2 1996).

1 APPENDIX C

2 NOTICES AND COMMUNICATIONS

3 1. ENVIRONMENTAL PROTECTION AGENCY

4 Assistant Administrator for
5 Enforcement and Compliance Assurance
6 U.S. EPA
7 401 M Street S.W.
8 Mail Code 2201A
9 Washington, D.C. 20460

10 2. UNITED STATES COAST GUARD

11 Commandant (G-MOR)
12 Chief, Office of Response
13 United States Coast Guard
14 2100 2nd St., S.W.
15 Washington, D.C. 20593

16 3. DEPARTMENT OF COMMERCE

17 National Oceanic and Atmospheric Administration
18 General Counsel
19 Herbert C. Hoover Building, Room 5128
20 14th and Constitution Avenue, N.W.
21 Washington, D.C. 20230

1 4. DEPARTMENT OF THE INTERIOR

2 Solicitor

3 U.S. Department of the Interior

4 1849 C St. N.W.

5 MS 6352

6 Washington, D.C. 20240

7 5. DEPARTMENT OF AGRICULTURE

8 a. General Counsel

9 United States Department of Agriculture

10 Room 107W

11 Jamie L. Whitten Federal Building

12 1400 Independence Ave., S.W.

13 Washington, D.C. 20250

14 b. Under Secretary for Natural Resources and Environment

15 United States Department of Agriculture

16 Room 217E Jamie L. Whitten Federal Building

17 1400 Independence Ave., S.W.

18 Washington, D.C. 20250

19 c. Deputy Assistant General Counsel for Pollution Control

20 Office of the General Counsel

21 United States Department of Agriculture

22 Room 4620 South Building

23 1400 Independence Ave., S.W.

24 Washington, D.C. 20250

1 d. Field Coordinator/Agency Liaison
United States Department of Agriculture
3 324 25th Street
4 Ogden, UT 84401

5 6. DEPARTMENT OF DEFENSE
6 Office of the Deputy Under Secretary of Defense (Environmental Security)
7 3400 Defense Pentagon
8 Washington, D.C. 20301

9 7. DEPARTMENT OF ENERGY
10 General Counsel
11 United States Department of Energy
12 1000 Independence Ave., S.W.
Washington, D.C. 20585

14 8. DEPARTMENT OF JUSTICE
15 Assistant Attorney General for Environment and Natural Resources
16 Department of Justice
17 950 Pennsylvania Ave., N.W.
18 Washington, D.C. 20530