

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE


July 1, 1997

MEMORANDUM

SUBJECT: Final Guidance on the Issuance of Administrative Orders
Under Section 311(c) and (e) of the
Clean Water Act

FROM: Barry Breen, Director
Office of Site Remediation Enforcement

TO: Addressees (See Below)



Enclosed is the final guidance document on the issuance of administrative orders under § 311(c) and (e) of the Clean Water Act ("CWA"), as amended by the Oil Pollution Act of 1990 ("OPA"). These provisions provide legal authority for the issuance of administrative orders for the cleanup and prevention of discharges and threatened discharges of oil and hazardous substances into navigable waters, adjoining shorelines, and certain other areas. Executive Order (E.O.) 12777 delegated this authority to EPA for discharges and threatened discharges in the inland zone, as defined in the National Contingency Plan.

While the guidance document discusses the separate use of each order authority, it recommends joint use of the § 311(c) and (e) enforcement authorities whenever possible because of the broader reach of orders issued under both authorities. Joint orders, as well as orders issued under the separate authorities, may be issued either unilaterally or by consent. The guidance does not discuss enforcement of § 311 orders or cost recovery. If there is a need for guidance on these issues, they can be addressed in a separate document.

The guidance document has been revised in response to comments on the September 5, 1996, draft guidance, which was circulated for review by EPA regional and headquarters OPA enforcement contacts, as well as the Department of Justice (DOJ) and the Coast Guard.

Interim language on consultation with DOJ under E.O. 12777

has been included in the guidance document. The Office of Site Remediation Enforcement (OSRE) and DOJ are currently working on the development of more detailed guidance on how DOJ will exercise its consultation role under the executive order. If further guidance is developed on this subject, the enclosed guidance document will be supplemented.

OSRE is also developing model § 311(c) and (e) orders to assist the regional offices in using these authorities more effectively. We hope to issue final versions of these model orders in the near future.

If you have any questions on this guidance document, please contact Bob Kenney of OSRE's Policy and Program Evaluation Division at (202) 564-5127.

Enclosure

Addressees

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Guidance on the Issuance of Administrative Orders Under Section 311(c) and (e) of the Clean Water Act

INTRODUCTION

The Oil Pollution Act of 1990¹ ("OPA") amended § 311 of the Clean Water Act ("CWA" or "the Act") by, among other things, rewriting the response provisions of § 311(c) and (e) of the Act.² Although the amended subsections are quite similar with respect to the authority to issue orders, they are not identical. This document provides guidance to enforcement personnel of the Environmental Protection Agency ("EPA" or "the Agency") on the application of the § 311(c) and (e) order authorities, and the appropriate means of issuing orders under each provision. Both types of orders may be issued either unilaterally or by consent.

In general, Agency enforcement personnel should use the § 311(c) and (e) authorities jointly whenever possible. Such joint use may not always be possible, however. Cases in which the issuance of joint orders may or may not be appropriate are discussed in the section on "Joint Section 311(c) and (e) Orders," below. A short checklist summarizing these subsections is provided as Attachment A. In addition, Attachment B describes the differences between the two types of order authorities. The Office of Site Remediation Enforcement (OSRE) is also developing model orders to assist the regional offices in using these authorities more effectively.

BACKGROUND

Section 311(c) of the CWA, entitled "Federal Removal Authority," provides broad authority to respond to discharges and threatened discharges of oil and hazardous substances. Section 311(c)(1)(A) requires the President to:

in accordance with the National Contingency Plan and any appropriate Area Contingency Plan, ensure effective and immediate removal of a discharge, and mitigation or

¹Pub. L. 101-380 (August 18, 1990).

²These statutory provisions are codified at 33 U.S.C. § 1321(c) and (e).

prevention of a substantial threat of a discharge, of oil or a hazardous substance--(i) into or on the navigable waters; (ii) on the adjoining shorelines to the navigable waters; (iii) into or on the waters of the exclusive economic zone; or (iv) that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.

Section 311(c)(1)(B) of the CWA provides (in relevant part) that:

In carrying out this paragraph, the President³ may--(i) remove or arrange for the removal of a discharge [of oil or a hazardous substance], and mitigate or prevent a substantial threat of a discharge, at any time; [and] (ii) direct or monitor all Federal, State, and private actions to remove a discharge [of oil or a hazardous substance]. . . .

In situations where such a discharge or the threat of such a discharge "is of such a size or character as to be a substantial threat to public health or welfare," § 311(c)(2)(A) of the Act provides that "the President *shall* direct all Federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of the discharge" (emphasis added).

Section 311(e)(1), entitled "Orders Protecting Public Health," is similar but not identical to the § 311(c) order authority. Section 311(e)(1) provides (in relevant part) that:

when the President⁴ determines that there may be an

³The President's authority under § 311(c) has been delegated to the EPA Administrator for discharges in the inland zone. See § 3 of Executive Order (E.O.) 12777, 56 FR 54757 (October 22, 1991). Under the Executive Order, this authority is exercised by the Coast Guard for discharges in the coastal zone. "Inland zone" and "coastal zone" are defined in the National Contingency Plan ("NCP"), 40 CFR Part 300.

⁴Pursuant to § 6(b) of E.O. 12777, the President's authority to issue orders under § 311(e)(1) has been delegated to the EPA Administrator for § 311 discharges occurring in the inland zone. This authority is delegated to the Coast Guard for discharges in the coastal zone.

imminent and substantial threat to the public health or welfare of the United States, including fish, shellfish, and wildlife, public and private property, shorelines, beaches, habitat, and other living and nonliving natural resources under the jurisdiction or control of the United States, because of an actual or threatened discharge of oil or a hazardous substance from a vessel or facility in violation of [§ 311(b)(3)], the President may . . . (B) after notice to the affected State, take any other action under this section, including issuing administrative orders, that may be necessary to protect the public health and welfare.

Agency orders issued pursuant to § 311(c) or (e) of the Act are enforceable in U.S. district court. Violators may be subject to a civil penalty of up to \$27,500⁵ per day of violation or "an amount up to 3 times the costs incurred by the Oil Spill Liability Trust Fund as a result of" a failure to comply.⁶ Section 311(b)(7)(B) and (E). Civil penalty actions may be brought against the owner, operator, or person in charge of a facility or vessel.

HOW TO USE SECTION 311 ORDER AUTHORITY

In General

⁵The statutory maximum statutory civil penalty of \$25,000 per day of violation was adjusted for inflation by the Agency to \$27,500 per day of violation, effective for violations that take place after January 30, 1997. 61 FR 69360 (December 31, 1996). See footnote 30 for additional information on maximum civil penalty adjustments by the Agency.

⁶Enforcement of § 311(c) and (e) orders and related issues (e.g., the availability of treble damages) are not addressed in this guidance document. Cost recovery under the CWA and the OPA is also not addressed in this document.

When the statutory requirements of both § 311(c) and (e) are met, the Agency should issue written orders under the authority of both provisions.⁷ A joint § 311(c) and (e) order is preferable to an order issued solely under § 311(e) because a joint order may, depending on the facts of the case, provide a broader and more appropriate response authority.

There may be circumstances, however, in which issuance of an order under only one authority is appropriate. For example, an On-Scene Coordinator ("OSC") may need to issue expeditiously a cleanup order, which the EPA delegations of authority permit him/her to do only under § 311(c) (and only when such authority is redelegated by the Regional Administrator). A § 311(c) order would also be appropriate, for example, if a discharge were of less than a reportable quantity of a CWA-listed hazardous substance.

Section 311(c) and (e) orders may be issued either unilaterally ("unilateral administrative order" or "UAO") or with the consent of the responsible party(ies) ("administrative order on consent" or "AOC"). The latter type of order is preferable, but either type may be issued at the discretion of the regional office.

Neither § 311(c) nor (e) specifies the parties to whom an administrative order may be issued. However, both order authorities contemplate a broad range of parties who may be directed or ordered to assist in a cleanup.

Several provisions in § 311(c) indicate that any "person" may be "direct[ed]" to remove a discharge. Section 311(c)(3)(A) requires the "owner or operator, or other person participating in

⁷Orders should also generally cite the authority of § 311(m) of the Act (which authorizes Agency personnel to enter and inspect regulated facilities and to establish record keeping, reporting and monitoring requirements for owners and operators of such facilities) and § 308 of the Act (which authorizes Agency personnel to enter and inspect "any premises in which an effluent source is located" or in which required records are maintained, and to require reporting, record keeping and monitoring needed to carry out § 311 of the Act).

efforts under this section . . ." (emphasis added) to act in accordance with the NCP or as directed by the President. Similarly, § 311(c)(4)(A) exempts from liability for removal costs or damages "[a] person" who acted consistently with the NCP or as otherwise directed by the President. Because § 311(c)(4)(B) and (c)(6) provide that this exemption does not apply to a "responsible party," as defined in § 1001 of OPA⁸, it is clear that § 311(c) orders may be issued to a broader group of "persons" than "responsible parties."

Section 311(e)(1)(B) authorizes issuance of administrative orders "that may be necessary to protect the public health and welfare." The companion provision in § 311(e)(1)(A) authorizes the Attorney General to secure relief from "any person, including the owner or operator of the vessel or facility" as necessary to abate an endangerment. Read together, these provisions strongly imply that a § 311(e) order may also be issued to "any person."

Section 311(b)(7)(B) limits civil penalties for violation of a § 311(c) or (e) order without sufficient cause to "any person described in subparagraph (A)." Section 311(c)(7)(A) in turn applies to "the owner, operator or person in charge of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged . . ." Therefore, if at all possible, a § 311 order should be issued to a person subject to civil penalties under § 311(b)(7)(B).

In appropriate cases, § 311(c) and/or (e) orders (including UAOs) may be issued to parties other than those specified in § 311(b)(7)(A) and (B), if actions by such parties are necessary to protect the public health or welfare. For example, an order may be issued to the owner of land adjoining the site of a discharge or threatened discharge, to obtain access. An order may also be issued to prevent a party not listed in § 311(b)(7)(A) and (B) from interfering with a response action. Each order issued under § 311(c) and/or (e) should recite the basis for issuing the order to a particular party.

⁸Section 1001(32) of OPA includes different definitions of "responsible party" for vessels, onshore facilities, offshore facilities, deepwater ports, pipelines, and abandoned vessels and facilities.

This section of the guidance will first address separately the use of each type of order authority, and will then address the issuance of joint orders.

Section 311(e) Orders

Issuing Official: In response to a discharge or threatened discharge that meets the requirements of § 311(e), the Agency may issue a written order under the authority of that statutory provision. EPA Delegation 2-85 governs the delegation of authority within the Agency to issue a § 311(e) order. This delegation provides that the Regional Administrator may issue such an order in all cases, and that this authority may be redelegated to the division director level. Delegation 2-85 also delegates the authority to issue orders in multi-regional or nationally significant cases to the Assistant Administrator ("AA") for Solid Waste and Emergency Response and the AA for Enforcement and Compliance Assurance, subject to consultation with the appropriate Regional Administrator(s) or their designee(s). The delegation of authority to these Headquarters officials may also be redelegated to the division director level.

Form: All orders issued under the § 311(e) authority should be in writing and signed by the appropriate EPA official (as discussed above, this will be a division director or higher-level official).

Covered Activity & Quantity of Discharge: A § 311(e) order should state that there is an actual or threatened discharge⁹ of

⁹"Discharge" is defined in § 311(a)(2) of the CWA as "includ[ing], but . . . not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping, but exclud[ing] (A) discharges in compliance with a permit under section 402 of this Act, (B) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of this Act, and subject to a condition in such permit, and (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 of this Act, which are caused by events occurring within the scope of relevant operating or treatment systems."

a reportable quantity of oil¹⁰ or a hazardous substance¹¹ from a facility or vessel in violation of § 311(b)(3) of the Act.

Protected Resources: Orders issued under § 311(e) should include, as a legal prerequisite, a finding that, because of the actual or threatened discharge, "there may be an imminent and substantial threat¹² to the public health or welfare of the

¹⁰"Oil" is defined in § 311(a)(1) of the CWA as "oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil."

¹¹"Hazardous substance" is defined in § 311(a)(14) of the CWA as "any substance designated pursuant to subsection (b)(2) of this section." Under authority of § 311(b)(2), EPA has promulgated a regulatory list of CWA § 311 hazardous substances at 40 CFR 116.4. The reportable quantities for these hazardous substances are listed at 40 CFR 117.3. Section 311 remedies are generally available only for oil and CWA-listed hazardous substances. Hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund") that are not also CWA-listed hazardous substances are not covered by § 311, but are instead subject to CERCLA enforcement authorities.

¹²The term "imminent and substantial threat" is not defined in the CWA, the OPA, or the regulations promulgated under either of these statutes. There is also no legislative history or case law explaining or interpreting the use of this phrase in § 311(e) of the CWA. However, case law interpreting the phrase "imminent and substantial endangerment" in § 106(a) of CERCLA may properly be relied on in the interpretation of the § 311(e) term because of the close relationship between CERCLA and the oil spill provisions in the CWA (e.g., adoption of the CWA § 311 liability standard in CERCLA § 101(32); common use of the National Contingency Plan under both statutes).

In light of CERCLA § 106(a) case law, § 311(e) of the CWA should be interpreted broadly as applying when there may be an imminent and substantial threat to: (1) human health; or (2) public welfare, including the environment. The phrase "imminent and substantial threat" itself should also be given a broad interpretation. "Threat" refers not only to actual harm, but to threatened or potential harm as well. In addition, the "threat" need not be immediate to be "imminent" as the latter term is used in § 311(e). See United States v. Conservation Chemical Comp., 619 F. Supp. 162 (D.C. Mo. 1985) for a thorough analysis of the phrase "imminent and substantial endangerment" under § 106(a) of CERCLA.

United States" based on a written description of the specific threat to the public health or welfare (e.g., a threat to any of the natural resources listed in § 311(e)).

Type of Response Action: To assure that it is carried out most effectively, the order should also clearly specify what actions the recipient is required to take relating to removal of the discharge, mitigation or prevention of the threat of a discharge, or other actions necessary for protection of the public health and welfare.

National Contingency Plan: Unlike § 311(c), § 311(e) does not contain an explicit requirement that actions taken under its authority be in accordance with the NCP. However, § 311(d)(4) provides that "removal of oil and hazardous substances and actions to minimize damage from oil and hazardous substance discharges shall, to the greatest extent possible, be in accordance with the [NCP]." Therefore, actions required to be taken under a § 311(e) order should, to the greatest extent possible, be in accordance with the NCP.

Penalties: The order should further state that, upon noncompliance, the responsible party may be liable under the CWA for up to \$27,500 per day in noncompliance penalties or treble the costs incurred by the United States.

Legal Review: For at least the first two § 311(e) orders issued by a regional office, the Office of Regional Counsel (ORC) (or other regional legal office) should be consulted concerning the legality of each order as to form and substance. After a regional office has had experience in the issuance of § 311(e) orders, it may establish its own policies on the scope of legal review and consultation. However, it is recommended that the ORC

(or other regional legal office) continue to review orders that raise legal issues that are novel, complex, or likely to be contested.

Notice to State: Notice to the affected State¹³ prior to issuance is required by § 311(e)(1)(B) of the Act. The affected State should generally be interpreted to be the State where the facility is located and in which the cleanup will be conducted.¹⁴ Unless some other official has been designated by a State, notice should be given to the director of the State's pollution control agency or to the State agency official responsible for oil spill responses. For a § 311(e) order, circumstances should generally allow for written notification to the State prior to issuance of the order. Such written notification may be in the form of a letter mailed or faxed to the State, which may include a copy of the order that the Agency intends to issue. If circumstances permit only oral notice to the affected State, a written memorandum memorializing the conversation in which such notice is provided should be prepared and retained in the case file. The regional office should also promptly send a follow up written notice to the affected State.

Section 311(c) Orders (In General)

As discussed elsewhere in this document, § 311(c) should generally be cited as additional authority when issuing an order under § 311(e). However, in situations where a quick response is needed, it may be more appropriate to issue an order solely under the § 311(c) authority.

Issuing Official: EPA Delegation 2-89 governs the authority

¹³Section 502(3) of the Clean Water Act defines "State" as "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands." It is EPA policy to give Indian tribes equivalent notice.

¹⁴Notice may also be given to other States whose resources may be affected by a discharge (or threatened discharge) or cleanup.

to issue § 311(c) orders. This delegation provides that the Regional Administrator may issue such an order, and that this authority may be redelegated to OSCs and should be exercised in accordance with the National Contingency Plan and Area Contingency Plans. The AA for Solid Waste and Emergency Response also has authority to issue § 311(c) orders. At this time, the AA for Enforcement and Compliance Assurance does not have delegated authority to issue § 311(c) orders.

Scope of Guidance: The statute provides that the appropriate EPA official may and, in certain circumstances shall, "direct . . . all Federal, State, and private actions to remove a discharge."¹⁵ Although the term "direct" is not defined in the statute or the NCP¹⁶, the authority to "direct" has been interpreted to include the authority to issue orders.¹⁷ This guidance discusses only the use of "direct" in the context of order issuance, and does not attempt to prescribe what other actions are authorized by the use of the term "direct" in the

¹⁵Section 311(c)(1)(B)(ii) and (c)(2)(A). Section 311(c)(1)(A) provides for the discretionary use of the authority to direct removal actions in order to "ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or a hazardous substance" into areas protected by the Act. Section 311(c)(2) *requires* the use of this authority if such a discharge, or threat of a discharge, "is of such a size or character as to be a substantial threat to the public health or welfare of the United States" Note that § 311(c)(2) requires only that the President "direct" a removal if the criteria of this provision are met.

¹⁶The preamble to the most recent revision of the NCP explains why the Agency is not defining or providing a more specific description of the term "direct." See 59 FR 47400 (Sept. 15, 1994).

¹⁷Paragraph 3.c of EPA Delegation 2-89 states that the authority to direct or monitor all Federal, state and private removal actions "includes issuance of orders." This authority is also implicit in the provision of penalties in § 311(b)(7)(B)(i) of the Act for violations of a § 311(c) "order."

statute.

National Contingency Plan: Section 311(c)(1)(A) requires that the federal removal authority be exercised "in accordance with the National Contingency Plan and any appropriate Area Contingency Plan." Section 311(c)(3)(A) provides that "[e]ach Federal agency, State, owner or operator, or other person participating in efforts under this subsection shall act in accordance with the National Contingency Plan or as directed by the President." In addition, § 311(c)(3)(B) provides that owners and operators participating in such efforts "shall act in accordance with the National Contingency Plan, and the applicable response plan required under subsection (j), or as directed by the President, except that the owner or operator may deviate from the applicable response plan if the President or the Federal On-Scene Coordinator determines that deviation from the response plan would provide for a more expeditious or effective response to the spill or mitigation of its environmental effects."¹⁸ Orders issued under § 311(c) should therefore require that actions taken are in accordance with the NCP and any appropriate area contingency plan. Orders issued to owners or operators should also require that actions be taken in accordance with any applicable § 311(j) facility or vessel response plan.

Form: Orders issued solely under § 311(c) may be issued at the scene of the discharge or from a regional office. If the order must be issued on the scene, an OSC with delegated authority may issue the § 311(c) order either orally or in writing. The OSC should issue an oral order only if necessary to protect public health or the environment, and only if there is no time to reduce the order to writing without significantly increasing the risk to human health or the environment. In any other circumstance, § 311(c) orders should be issued in writing by the OSC or other authorized official.

Oral Section 311(c) Orders

If an OSC issues an oral § 311(c) order, he should take the

¹⁸The clause in § 311(c)(3)(B) that begins with "except" was added to the statute by § 1144 of the Coast Guard Authorization Act of 1996, Pub. L. 104-324 (October 19, 1996).

following important precautions to assure that the responsible party understands the formality of the order and to support the legal sufficiency and enforceability of the order:

- * If possible without unduly delaying a response action, the oral order should be issued to the owner, operator or person in charge¹⁹ of the facility or vessel at which the discharge or threatened discharge occurred. As discussed above, these are the parties to whom civil penalties may apply under § 311(b)(7)(B) in the case of a failure to comply with a § 311(c) order.
- * The OSC should tell the party receiving the oral order of the OSC's finding that there is a discharge or a substantial threat of a discharge of oil or a CWA-listed hazardous substance to an area protected by § 311 of the CWA (as described in CWA § 311(c)(1)). If the discharge or threatened discharge also meets the

¹⁹Section 311(a)(6) of the Act defines "owner or operator" as "(A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment." The term "person in charge" is not defined in the Act or in the NCP. However, case law under § 311 suggests that the term "person in charge" includes natural persons who occupy positions of responsibility and power at a facility (as opposed to "mere employees") or who are responsible for the operation of a facility. See United States v. Mobil Oil Corp., 464 F.2d 1124, 1128 (5th Cir. 1972); and Apex Oil Co. v. United States, 530 F.2d 1291, 1294 (8th Cir.), cert. denied, 429 U.S. 827 (1976). These cases held that "person in charge" also includes a corporation. In addition, the term "person in charge of a facility" in § 103 of CERCLA has been interpreted to include a natural person who exercised supervisory control over a vehicle that transported a hazardous substance or over the area to which the substance was released, even if such person was not the sole person in charge of the vehicle or area. See United States v. Carr, 880 F.2d 1550 (2d Cir. 1989).

criteria described in § 311(c)(2) (i.e., a discharge or threatened discharge of such a size or character as to be a substantial threat to the public health or welfare)²⁰ and the § 311(c)(2) authority is required for implementation of the order, the OSC should also inform the responsible party of this determination.

- * The OSC should tell the responsible party that a failure or refusal to comply with the order may subject the party to treble costs for oil cleanup (if the United States has to spend monies as a result of a failure to comply) or to other civil penalties.
- * If at all possible, the OSC should ensure that the oral order is witnessed by other government personnel.
- * The order itself, along with its findings, should be as simple as possible to avoid misunderstandings, and its scope should be limited to problems that must be addressed immediately.

²⁰The § 311(c)(2) authority should only be used in appropriate cases. The OPA conference report makes clear that this provision was intended to be used in the case of spills like those from the *Exxon Valdez* in Prince William Sound, Alaska, and from the *American Trader* in California's coastal waters, and the spill and substantial threat of a larger spill from the *Mega Borg* in the Gulf of Mexico. H.R. Rep. No. 653, 101st Cong., 2d Sess. 145-6, reprinted in *Oil Pollution Deskbook* at 101. Furthermore, the OPA conference report states that the authority provided in § 311(c)(2) is the same as that in § 311(c)(1) except that under the former provision the President: (1) must direct the response; and (2) may exercise this authority without regard to federal contracting procedures and personnel employment requirements. This exemption from normal procedures and requirements "is intended to facilitate emergency response and is not intended to apply to long-term removal actions." *Id.* at 146. Because § 311(c)(2) was intended to be used for spills of the actual or potential impact described in the legislative history, characterizing a site that is not of similar impact as these cases as meeting the criteria of this provision could set an undesirable precedent.

- * Finally, the OSC should reduce to writing at the time of the order, or as soon as possible thereafter, the components and requirements of the order.²¹ As soon as possible after the issuance of the oral order, the OSC should send a letter to the recipient of the order confirming the issuance and content of the oral order. In order to assure the enforceability of the original order and the adequacy of the confirming letter, an ORC attorney should be consulted prior to issuance of the letter.

Written Section 311(c) Orders

The following guidance applies to written orders issued under the authority of § 311(c).

Covered Activity, Quantity of Discharge & Protected

Resources: Written orders that rely on the authority of § 311(c) should include, as a legal prerequisite, a written finding that there is a discharge or substantial threat of a discharge of oil or a hazardous substance to an area protected by § 311(c) of the Act, as described in § 311(c)(1). The discharge need not be of a reportable quantity of oil or a hazardous substance. In addition, when this criterion is met, the order should indicate that the discharge or substantial threat of a discharge "may pose a substantial threat to public health or welfare," as described in § 311(c)(2).²² Such findings should be based on a written description of the existing factual situation concerning the actual or threatened discharge. In addition to the recitation of the findings of fact, the order should state that it is issued pursuant to § 311(c) of the Act.

Type of Response Action: The order should specify what actions the recipient is required to take relating to removal of the discharge, or to mitigation or prevention of the threat of

²¹Statements of any witnesses corroborating issuance of the oral order should also be obtained, if possible. The date, time and place that the oral order was issued should also be documented.

²²See footnotes 14 and 19, above.

the discharge. The order should be written in clear and understandable language, and should be signed and dated by the Agency official issuing the order.

Penalties: The order should state that if the recipient fails or refuses to comply with the order, he may be liable under the CWA for treble costs or up to \$27,500 per day of violation in civil penalties.

Legal Review: For at least the first two § 311(c) orders issued by a regional office, the ORC (or other regional legal office) should be consulted concerning the legality of each order as to form and substance. After a regional office has had experience in the issuance of § 311(c) orders, it may establish its own policies on the scope of legal review and consultation. However, it is recommended that the ORC (or other regional legal office) continue to review orders that raise legal issues that are novel, complex, or likely to be contested.

Notice to State: Unlike an order issued under § 311(e), notice to the affected State is not required for an order issued under the authority of § 311(c).

Model Order: OSRE is also issuing a model § 311(c) administrative order to assist EPA regional offices in the issuance of such orders.

Joint Section 311(c) and (e) Orders

As discussed previously, § 311 orders should generally be issued under the authority of both § 311(c) and (e) whenever possible. Such joint orders should only be issued, however, if the statutory and administrative requirements for issuance under both authorities are met. This section of the guidance document summarizes the requirements for issuance of a joint § 311(c) and (e) order.

Issuing Official: A joint § 311(c) and (e) order should be issued by the lowest-ranking EPA official to whom both authorities have been delegated. For example, if the § 311(c) authority has been delegated to OSCs and the § 311(e) authority has been delegated to a division director (i.e., both authorities have been delegated to the maximum extent allowed by Delegations

2-85 and 2-89), a joint order should be issued by the division director.

Form: A joint § 311(c) and (e) order should be issued in written form. If there is a need to issue a cleanup order expeditiously, an oral order should be issued under § 311(c).

Covered Activity: A joint § 311(c) and (e) order should be issued if there is a discharge or "substantial threat" of a discharge. If there is no discharge and the threat of a discharge is not "substantial," any order should be issued under § 311(e).

Quantity of Discharge: A joint § 311(c) and (e) order should be issued if the discharge is of a reportable quantity of oil or CWA-listed hazardous substance, or if the substantial threat of a discharge is expected to be of such a quantity (see footnotes 11 and 12, above). If the quantity of the discharge (or threatened discharge) does not meet this threshold, any order should be issued under § 311(c). As a factual matter, it is anticipated that almost any discharge of oil will meet the reportable quantity threshold set forth in 40 CFR § 110.3 (e.g., a "film or sheen" of oil on a water surface).

Protected Resources: A joint § 311(c) and (e) order should be based on a discharge (or substantial threat of a discharge) that impacts a type of protected resource or interest that is specified in both § 311(c)(1)(A) and (e)(1)(B). This requirement should be relatively easy to meet for most, if not all, actual or threatened discharges for which a response action is needed. For example, an oil spill into a river will most likely meet both statutory requirements of being "into or on the navigable waters" (§ 311(c)(1)(A)(i)) and of posing an "imminent and substantial threat to the public health or welfare of the United States, including fish, shellfish, . . . shorelines, beaches, habitat . . ." (§ 311(e)(1)(B)). If a discharge or threatened discharge impacts a type of protected resource or interest that is specified in only one of these provisions, the order should be issued under the authority of the appropriate subsection.

Type of Response Action: A joint § 311(c) and (e) order may require the recipient to take any of the types of response actions listed in § 311(c)(1)(B) (e.g., removal of a discharge),

since such response actions also meet the broad scope of "any action . . . that may be necessary to protect the public health and welfare" allowed under § 311(e)(1)(B). If an order requires only types of response actions that are not listed in § 311(c)(1)(B), the order should be issued under the broader authority of § 311(e).

National Contingency Plan: A joint § 311(c) and (e) order should require that actions taken be in accordance with the NCP and any appropriate area contingency plan. When a joint order is issued to an owner or operator, it should also generally require that actions taken be in accordance with any applicable § 311(j) facility or vessel response plan (except where deviation from such response plan is determined by the President or OSC to "provide for a more expeditious or effective response to the spill or mitigation of its environmental effects").

Penalties: A joint § 311(c) and (e) order should state that, upon noncompliance, the responsible party may be liable under the CWA for up to \$27,500 per day in civil penalties or treble the costs incurred by the United States.

Legal Review: For at least the first two joint § 311(c) and (e) orders issued by a regional office, the ORC (or other regional legal office) should be consulted concerning the legality of each order as to form and substance.

Notice to State: Prior notice of issuance of a joint § 311(c) and (e) order to the affected State is required by § 311(e)(1)(B).

Model Order: OSRE is also issuing a model joint § 311(c) and (e) administrative order to assist the regional offices in the issuance of such orders.

CONSULTATION

Consultation with Headquarters: The Assistant Administrator for Enforcement and Compliance Assurance has established a requirement for the regional offices to consult with OSRE when an order issued under section 311(c) and/or 311(e) significantly deviates from written Agency policy or breaks new ground in an

important sensitive area.²³ Consultation with OSRE is also encouraged in other cases where it would benefit the regional office and foster national consistency. For OSRE consultation, the regional office should initially contact the Regional Support Division (RSD) staff person assigned to OPA issues (currently Amy Legare, (202) 564-4256). [If Amy is unavailable, please contact the OSRE/PPED contact person for OPA issues (currently Bob Kenney, (202) 564-5127).]

The regional office should e-mail or fax to the OSRE contact a copy of the proposed order together with a short memorandum containing the following information: (1) the proposed timing of issuance of the order, including whether the order addresses an emergency situation; (2) a brief summary of the factual background; and (3) a brief explanation of the issue(s) requiring consultation. The OSRE contact will elevate the issue(s), as necessary, to the Director of OSRE and will provide a response to the regional office within seven days. The response may be provided by telephone, but will be followed up with a confirming memorandum. In emergency situations, OSRE will expedite its review and depart from the process stated above as needed given the exigencies of the situation.

Consultation with Department of Justice: Section 10(d) of E.O. 12777 states that, "The Attorney General, in his discretion, is authorized to require that, with respect to a particular oil spill, an agency refrain from taking administrative enforcement action without first consulting with the Attorney General." In addition, section 9 of E.O. 12777 contains a general consultation provision related to the Department of Justice (DOJ): "Authorities and functions delegated or assigned by this order shall be exercised subject to consultation with the Secretaries of departments and the heads of agencies with statutory responsibilities which may be significantly affected, including, but not limited to, the Department of Justice." If an EPA regional office receives notification from DOJ that it is

²³See May 19, 1995, memorandum from OECA Assistant Administrator Steven A. Herman, "Office of Enforcement and Compliance Assurance and Regional Roles in Civil Judicial and Administrative Site Remediation Enforcement Cases" (Required RCRA/OPA/LUST Consultations Category 1.a).

exercising its authority under section 10(d) of E.O. 12777 concerning a particular oil spill, that office should refrain from issuing a subsequent administrative order under section 311(c) and/or (e) of the CWA for that spill until it has first consulted with DOJ. In these cases, notice of the consultation with DOJ is requested to the OSRE contact identified above.

DOCUMENTATION

The Agency office issuing a written order under § 311(c) and/or 311(e) should keep a copy (or a duplicate original) of the order for its own files.²⁴ An unilateral administrative order does not have to be signed by the responsible party for the order to be legal and enforceable. If time allows, orders should be sent by certified mail (return receipt requested) to ensure a record of receipt by the responsible party. If timely delivery is not possible by certified mail, orders may initially be sent by facsimile (faxed) or hand-delivered, but these means of delivery should be followed by certified mail delivery. If an order is faxed, the regional office should retain confirmation of delivery information generated by its fax machine. If an order is hand-delivered, the regional office should obtain a receipt from the person receiving the order.

ADMINISTRATIVE RECORD

Although EPA is not legally required to compile an administrative record for an order issued under § 311(c) and/or (e), the regional offices are strongly encouraged to compile an

²⁴ A copy of the order should also be sent to the Policy and Program Evaluation Division (PPED) of the OECA Office of Site Remediation Enforcement (OSRE) for its files. If possible, the copy should be sent electronically or on a diskette (preferably in Word Perfect format). A centralized file of § 311 orders will be a useful resource for the regional offices in drafting their own orders, and will facilitate a response to Freedom of Information Act (FOIA) requests. Information on the order should also be submitted to the National Civil Enforcement DOCKET, as called for in the May 9, 1995, memorandum from Elaine Stanley of the OECA Office of Compliance entitled "Clarification of Administrative Order Tracking Requirements."

administrative record that lists the materials considered by the Agency in deciding whether to issue the order. Unless the exigencies of the situation require otherwise, the regional offices are also strongly encouraged to compile the administrative record before issuing a § 311(c) and/or (e) order. The list of materials considered by the Agency, as well as copies of the materials themselves, should be maintained in an administrative record file by the office that issues the order.

A carefully compiled administrative record will facilitate any negotiations with the party(ies) to whom the order is issued and will serve as the basis for any judicial review action. A complete, accurate, and contemporaneous listing of the materials relied upon for issuing a § 311 order will allow the government to argue both for limiting any judicial review to the administrative record that supports the decision to issue the order and for limiting such review to the arbitrary and capricious standard, i.e., even if a court would have ruled otherwise, if there was a reasonable basis in the record for the Agency's order it must be upheld as a matter of law.

APPLICABILITY OF THE EDIBLE OIL REGULATORY REFORM ACT

The Edible Oil Regulatory Reform Act²⁵ requires most federal agencies to differentiate between, and establish separate classes for (1) animal fats and oils and greases, fish and marine mammal oils, and oils of vegetable origin, and (2) other greases and oils, including petroleum, when issuing or enforcing any regulation or establishing any interpretation or guideline relating to the transportation, storage, discharge, release, emission, or disposal of a fat, oil or grease. EPA has determined that no differentiation between these classes of oil is necessary for this guidance. This document only sets forth guidance to assist EPA regional offices in the issuance of administrative cleanup orders under § 311(c) and (e) of the Act, as amended by OPA, in response to discharges and threatened discharges of oil. It does not impose any substantive requirements on the regulated community that do not otherwise already exist. Where appropriate, EPA personnel take into account the different classes of oil, along with other facts and

²⁵Pub. L. 104-55 (Nov. 20, 1995).

circumstances related to a discharge or threatened discharge of oil, in deciding whether to issue a cleanup order under § 311 of the Act.

RELATIONSHIP TO OTHER ENFORCEMENT AND RESPONSE AUTHORITIES

The regional offices should evaluate whether statutory authorities other than CWA § 311(c) and/or (e) are available to require needed actions by responsible parties, and whether it would be appropriate to use such authorities in lieu of, or in combination with, the CWA § 311 provisions. CWA § 311 contains elements that are similar to those of other statutory provisions which allow the Agency to respond to the release or threatened release of materials that may harm the public health or welfare or the environment.

Attachment C is a chart that summarizes the general purpose, triggering activity, materials and persons covered, response authority, and penalty provisions contained in the following statutory provisions enforced by EPA (in addition to a summary of such information for CWA § 311(c) and (e)): Sections 7003(a), 3008(h), 3013, 9003(h) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6973(a), 6928(h), 6934, and 6991b(h); Sections 104 and 106(a) of CERCLA, 42 U.S.C. §§ 9604 and 9606(a); Section 504 of the CWA, 33 U.S.C. § 1364; Section 1431 of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300i; and Section 303 of the Clean Air Act ("CAA"), 42 U.S.C. § 7603. The regional offices should consult this chart, along with applicable policy and guidance documents, when considering which enforcement authority(ies) might be the most appropriate for their particular situation.

CONCLUSION

This guidance is intended to assist the regional offices in the issuance of administrative cleanup orders under § 311 of the CWA, as amended by the OPA. If you have any questions concerning this guidance or any additional guidance needs, please contact Bob Kenney of OSRE/PPED at (202) 564-5127.

Attachments

* * * * *
* NOTICE: The policies set out in this memorandum are not
* final agency action, but are intended solely as guidance.
* They are not intended, nor can they be relied upon, to
* create any rights enforceable by any party in litigation
* with the United States. EPA officials may decide to follow
* the guidance provided in this memorandum, or to act at
* variance with the guidance, based on an analysis of specific
* site circumstances. The Agency also reserves the right to
* change this guidance at any time without public notice.
* * * * *

**ATTACHMENT A: SUMMARY OF
SECTION 311(c) AND (e) PROVISIONS**

	§ 311(c)	§ 311(e)
LOWEST REGIONAL REDELEGATION ALLOWED	On-Scene Coordinator	Division Director
FORM OF ORDER	Oral or written	Written only
DISCHARGES AND THREATENED DISCHARGES COVERED	Any quantity of oil or CWA hazardous substance	Reportable quantity of oil or CWA hazardous substance
PROTECTED RESOURCE	(1) Navigable waters (2) Adjoining shorelines (3) Exclusive economic zone (4) U.S. natural resources; and, (if "substantial threat"): Public health or welfare, including fish, shellfish, wildlife, other natural resources, beaches and shorelines	If imminent and substantial threat, public health and welfare, including fish, shellfish, wildlife, public and private property, shorelines, beaches, habitat, living and nonliving U.S. natural resources
RESPONSE AUTHORITY	(1) Administrative removal order (2) Direct removal, mitigation, or prevention of a discharge (3) Removal or destruction of vessel (4) Monitor removal actions	(1) Any action, including administrative orders, to protect U.S. public health and welfare; or (2) Refer abatement action to DOJ

ORDER VIOLATION PENALTIES	Civil penalties or treble costs	Civil penalties or treble costs
STATE NOTICE	Not required	Required

**ATTACHMENT B:
DIFFERENCES BETWEEN SECTION 311(c) AND 311(e) ORDERS**

There are several differences between the § 311(c) and (e) order authorities, including differences related to the quantity of discharge, endangerment threshold, National Contingency Plan, and notice to affected states. These differences are described in this attachment.

Quantity of Discharge. By its language, § 311(e) authority is limited to responses to threatened or actual reportable quantity²⁶ discharge violations of § 311(b)(3)²⁷. Section 311(c), however, establishes EPA's authority to respond to threats from oil or a CWA hazardous substance even when there is a discharge or threat of a discharge of less than a reportable quantity of oil or a CWA hazardous substance that may affect a navigable water of the United States, adjoining shoreline, exclusive

²⁶As used in this guidance, the phrase "reportable quantity" is shorthand for the statutory term in § 311(b)(3) relating to "such quantities as may be harmful as determined by the President" under § 311(b)(4) of the Act, and later codified in EPA regulations.

²⁷In relevant part § 311(b)(3) of the Act declares:

"The discharge of oil or hazardous substances . . . into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or . . . which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States . . . in such quantities as may be harmful as determined by the President under paragraph (4) of this section, is prohibited"

Under the authority of § 311(b)(4) of the Act and E.O. 12777, the Agency has issued harmful quantity regulations at 40 CFR 110.3, 110.4, 110.5, and 117.3.

economic zone, or U.S.-managed natural resources.²⁸

If there is a potential for a CWA-listed hazardous substance to reach a § 311(c) protected area, EPA can issue a § 311(c) order without demonstrating that the quantity of the discharge or threat of a discharge will meet or exceed the reportable quantity level for that substance within a 24-hour period. Unlike § 311(e), § 311(c) response authority is not tied to a violation of § 311(b)(3) of the Act, which establishes this threshold.

Endangerment Threshold. Section 311(c)(2) and (e)(1) have similar (although not identical) endangerment thresholds. Under § 311(c)(2), orders can be issued to parties when a discharge or a substantial threat of a discharge of oil or a CWA-hazardous substance poses a "substantial threat to the public health or welfare of the United States . . ." Under § 311(e)(1), EPA can issue orders to parties when an actual or threatened discharge of oil or a CWA-hazardous substance poses an "imminent and substantial threat to the public health or welfare of the United States . . ." No such finding of a threat to the public health or welfare (whether it is simply "substantial" or "imminent and substantial") is needed prior to issuing an order to a party under § 311(c)(1).

National Contingency Plan. Section 311(c) contains requirements that actions taken under its authority be in accordance with the NCP, while § 311(e) does not contain any such explicit requirement. However, § 311(d)(4) requires that "removal of oil and hazardous substances and actions to minimize damage from oil and hazardous substance discharges shall, to the greatest extent possible, be in accordance with the [NCP]."

State Notice. Prior notice to the affected state is required only under § 311(e).

Under most factual circumstances, the Agency should issue a written order citing the authority of both § 311(c) and § 311(e),

²⁸As used in this guidance, the phrase "U.S.-managed natural resources" refers to the statutory descriptions in § 311 of "natural resources belonging to, appertaining or under the exclusive management authority of the United States."

with the required findings for each section, as described above. The advantage to this approach is the somewhat broader reach of a joint § 311(c) and (e) order.

ATTACHMENT C:

COMPARISON OF CWA § 311 TO OTHER ENFORCEMENT AND RESPONSE AUTHORITIES²⁹

	General Purpose	Triggering Activity	Materials Covered	Persons Covered	Response Authority	Additional Notes
CWA § 311(c)	Ensure removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or a hazardous substance	Discharge or substantial threat of discharge of oil or hazardous substance	Oil as defined in CWA § 311(a)(1) or hazardous substance as defined in CWA § 311(a)(14)	Includes owners and operators	Perform or direct actions to remove the discharge or to mitigate or prevent the threat of a discharge Remove and, if necessary, destroy a discharging vessel	Guidance on CWA § 311(c) and (e) describes resources protected by CWA § 311(c) Civil penalty for failure to carry out removal under § 311(c) order without sufficient cause: Maximum of \$27,500 ³⁰ per day of violation or up to 3 times costs incurred by Oil Spill Liability Trust Fund (OSLTF)

²⁹This table does not provide an exhaustive list or description of every statutory authority that may be available to EPA to address endangerments, hazards, releases, etc. Rather, it summarizes significant aspects of several authorities that are similar to CWA § 311.

³⁰The Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Pub. L. 101-410, enacted October 5, 1990; 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 ("DCIA") (31 U.S.C. 3701 note; Pub. L. 104-134, enacted April 26, 1996; 110 Stat. 1321), requires each Federal agency to issue regulations adjusting for inflation the maximum civil monetary penalties that can be imposed pursuant to the agency's statutes. Under this authority EPA increased almost all of its maximum civil penalty amounts by 10% (except for new maximum civil penalty amounts that were part of the 1996 amendments to the Safe Drinking Water Act). These increased maximum civil penalty amounts apply to violations that take place after January 30, 1997. See 61 FR 69360 (December 31, 1996), as corrected by 62 FR 13514 (March 20, 1997) (to be codified at 40 CFR Part 19).

	General Purpose	Triggering Activity	Materials Covered	Persons Covered	Response Authority	Additional Notes
CWA § 311(e)	Require action to abate an imminent and substantial threat to public health or welfare	Actual or threatened discharge of reportable quantity of oil or hazardous substance poses imminent & substantial threat to public health or welfare	Oil as defined in CWA § 311(a)(1) or hazardous substance as defined in CWA § 311(a)(14)	Includes owners and operators	Commence a civil action to secure any relief necessary to abate the endangerment Take any other action, such as issuing an administrative order, necessary to protect public health and welfare	Guidance on CWA § 311(c) and (e) describes resources protected by CWA § 311(e) Civil penalty for failure to comply with § 311(e) order without sufficient cause: Maximum of \$27,500 per day of violation or up to 3 times costs incurred by OSLTF

	General Purpose	Triggering Activity	Materials Covered	Persons Covered	Response Authority	Additional Notes
RCRA § 7003(a)	Abate conditions that may present an imminent and substantial endangerment to health or the environment	Handling, storage, treatment, transportation, or disposal of solid or hazardous waste	Any solid waste as defined in RCRA § 1004(27), including petroleum, or hazardous waste as defined in RCRA § 1004(5)	Any person (including any past or present generator, transporter, owner, or operator), who has contributed or is contributing to any covered activity	Commence a civil action to restrain from handling, storage, treatment, transportation or disposal, or to take other necessary action Take other action, such as issuing an administrative order, necessary to protect public health and the environment	Penalty for willful violation of, or failure or refusal to comply with, § 7003 order: Maximum of \$5500 per day of violation
RCRA § 3008(h)	Require corrective action or other response measure at any unpermitted treatment, storage, or disposal facility that has or should have had interim status, and some facilities that had interim status but no longer do	Release of hazardous waste from facility covered by RCRA § 3008(h)	Hazardous waste as defined in RCRA § 1004 (5) EPA interprets to cover hazardous constituents	EPA interprets to include the owner or operator of the facility	Issue an administrative order to require corrective action, suspend or revoke interim status authorization, or require other necessary response measure Commence a civil action for appropriate relief	Civil penalty for failure to comply with § 3008(h) order: Maximum of \$27,500 per day of noncompliance

	General Purpose	Triggering Activity	Materials Covered	Persons Covered	Response Authority	Additional Notes
RCRA § 3013	Require monitoring testing, analysis, and reporting at hazardous waste, treatment, storage, or disposal facility or site to address substantial hazard to human health or the environment	Presence or release of hazardous waste	Hazardous waste as defined in RCRA § 1004(5)	Current owner or operator Most recent previous owner or operator who could be expected to know about the presence and potential release of the hazardous waste, but only if the current owner or operator could not be expected to know	Issue an administrative order to require monitoring, testing, analysis, and reporting	Legislative history indicates that the standard for substantial hazard is lower than the standard for imminent and substantial endangerment If EPA conducts monitoring, testing, analysis, or reporting, it may order the owner or operator to reimburse it for its costs Civil penalty for failure or refusal to comply with § 3013 order: Maximum of \$5500 per day of violation
RCRA § 9003(h)	Require corrective action with respect to any release of petroleum from an underground storage tank (UST)	Actual release of petroleum from an UST	Petroleum as defined in RCRA § 9001(8)	Operator of the UST In the case of an UST in use on 11/8/84 or brought into use after that date, the owner of the UST In the case of an UST in use before 11/8/84 but no longer in use on that date, the owner of the UST immediately before the discontinuation of its use	Issue an administrative order or commence a civil action to require corrective action	Owner/operator is liable for the costs of EPA's enforcement action Recipient of § 9003(h) order may request a public hearing Civil penalty for failure to comply with § 9003(h) order: Maximum of \$27,500 per day of continued noncompliance

	General Purpose	Triggering Activity	Materials Covered	Persons Covered	Response Authority	Additional Notes
CERCLA § 104	<p>Respond to actual or substantial threat of release of hazardous substance</p> <p>Respond to actual or substantial threat of release of pollutant or contaminant which may present an imminent and substantial endangerment to public health or welfare</p>	<p>Actual or substantial threat of release of hazardous substance</p> <p>Actual or substantial threat of release of pollutant or contaminant</p>	<p>Hazardous substance as defined in CERCLA § 101(14), including hazardous substances designated under CWA § 311(b)(2)(A), but not petroleum</p> <p>Pollutant or contaminant as defined in CERCLA § 101(33), but not petroleum</p>	<p>Current owners or operators, owners or operators at time of disposal, generators, and transporters</p>	<p>Perform or require removal or remedial action or any other response measure consistent with the National Contingency Plan</p>	<p>EPA can seek reimbursement of response costs & collect up to 3 times EPA's costs due to noncompliance with the order as punitive damages under CERCLA § 107</p> <p>Civil penalty for failure to comply with § 104 AOC, per CERCLA § 109: Maximum of \$27,500 per day for first violation and maximum of \$82,500 per day for second or subsequent violation</p>

	General Purpose	Triggering Activity	Materials Covered	Persons Covered	Response Authority	Additional Notes
CERCLA § 106(a)	Abate imminent and substantial endangerment to public health or welfare or the environment	Actual or threatened release of hazardous substance	Hazardous substance as defined in CERCLA § 101(14), including hazardous substances designated under CWA § 311(b)(2)(A), but not petroleum	Current owners or operators, owners or operators at time of disposal, generators, and transporters	Commence a civil action to obtain such relief as may be necessary to abate the danger or threat Take other action, such as issuing an administrative order, to protect public health and welfare and the environment	EPA risks a claim against the Hazardous Substance Superfund if the PRPs believes that they are not liable or that EPA was arbitrary and capricious EPA can seek reimbursement of response costs & up to 3 times EPA's costs incurred due to noncompliance with order under CERCLA § 107 Penalty for willful violation or failure or refusal to comply without sufficient cause with § 106(a) order: Maximum fine of \$27,500 per day of violation or failure to comply

	General Purpose	Triggering Activity	Materials Covered	Persons Covered	Response Authority	Additional Notes
CWA § 504	Abate imminent and substantial endangerment to the health or welfare of persons	Pollution source presents an imminent and substantial endangerment	Pollution source or a combination of sources	Any person causing or contributing to the pollution	Commence a civil action to restrain any person causing or contributing to the pollution to stop the discharge of pollutants or to take other necessary action	“Welfare of persons” means the livelihood of such persons
SDWA § 1431	Abate conditions that may present an imminent and substantial endangerment to the health of persons	Presence of contaminant in, or likelihood that contaminant will enter, a public water system or underground drinking water source	Contaminant as defined in SDWA § 1401(6)	Includes persons causing or contributing to the endangerment	Take action, such as issuing an administrative order, necessary to protect human health, or commencing a civil action for appropriate relief	EPA may act if the appropriate state and local authorities have not acted to protect human health Civil penalty for violating or failing or refusing to comply with § 1431 order: Maximum of \$15,000 ³¹ per day of violation or failure to comply

³¹The maximum civil penalty of \$15,000 for violating or failing or refusing to comply with a SDWA § 1431 order was not increased by the Agency in its inflation adjustment under the DCIA because this penalty provision was enacted into law in 1996. See 62 FR 13514, 13515 (March 20, 1997).

	General Purpose	Triggering Activity	Materials Covered	Persons Covered	Response Authority	Additional Notes
CAA § 303	Abate imminent and substantial endangerment to public health or welfare or the environment	Emission of air pollutants	Pollution source or combination of sources (including moving sources)	Any person causing or contributing to the pollution	Commence a civil action to restrain any person causing or contributing to the pollution from emitting air pollutants to stop the emission or to take other necessary action Issue an administrative order necessary to protect public health or welfare or the environment	EPA may issue an administrative order if initiating a civil action is not practicable to assure prompt protection Civil penalty for violation of § 303 order: Maximum of \$27,500 per day of violation