



U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

ENVIRONMENT AND NATURAL RESOURCES DIVISION

DIRECTIVE No. 2016-10

Title: Procedures and Criteria For Department of Justice Concurrence in CERCLA Administrative Orders to Federal Agencies

Authority: This Directive is issued pursuant to the authority vested in me as Assistant Attorney General for the Environment and Natural Resources Division (ENRD) by 28 C.F.R. § 0.65 and Order No. 1258-88 (June 30, 1988).

Purpose: The purpose of this Directive is to identify the procedures and criteria by which the Attorney General (as delegated to the Assistant Attorney General for the Environment and Natural Resources Division) will implement his or her responsibilities under section 4(e) of Executive Order No. 12580 ("Superfund Implementation") (Jan. 23, 1987), as amended by Executive Order No. 13016 (Aug. 28, 1996) to review any administrative order ("AO") that one federal agency ("Issuing Agency") proposes to issue to another federal agency ("Recipient Agency") under section 104(e)(5)(A) or 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9604(e) (5)(A), 9606(a). The federal agencies with authority to be an Issuing Agency under these provisions of CERCLA are the Environmental Protection Agency (EPA), the Coast Guard (USCG), the Department of Agriculture (USDA), the Department of Commerce (DOC), the Department of Defense (DoD), the Department of Energy (DOE) and the Department of the Interior (DOI).

Relationship to Other Directives: This Directive supersedes and revokes the ENRD Directive titled "Procedures and Criteria for Department of Justice Concurrence in EPA Administrative Orders to Federal Agencies" (December 27, 1988).

Effective Date: This Directive shall become effective upon approval by the AAG.

Action:

I. PROCEDURE:

The Issuing Agency should submit the proposed AO and a referral letter to:

Assistant Attorney General
Environment and Natural Resources Division
Department of Justice
P.O. Box 7415
Washington, D.C. 20044

with a copy to:

Chief
Law and Policy Section
Environment and Natural Resources Division
Department of Justice
P.O. Box 7415
Washington, D.C. 20044

or by electronic means if agreed to by the Issuing Agency and DOJ.

The referral letter should include the following information:

1. A statement of the technical basis for the AO, including all necessary findings that support the existence of an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance (for an order issued pursuant to CERCLA §106(a)), or the basis for believing that there may be a release or threat of a release of a hazardous substance or pollutant or contaminant (for an order issued pursuant to CERCLA § 104(e)(5)(A));
2. A statement of the Issuing Agency's prior dealings with the Recipient Agency and the efforts that have been made to resolve the matter, including copies of any written communications;
3. A statement of the grounds or objections raised by the Recipient Agency in objecting to the issuance or the terms of the proposed AO and the Issuing Agency's response to those objections, including copies of any written communications;
4. A statement of whether there are non-federal PRPs or government contractors potentially liable under CERCLA, or otherwise responsible, at the facility and the status of any enforcement efforts against such persons;
5. Where the Issuing Agency is not EPA or USCG, a statement that EPA or USCG concurrence was obtained or is being concurrently sought as required by Section VII.B. of the February 10, 1998 Memorandum of Understanding among the Environmental Protection Agency, United States Coast Guard, Department of Commerce, Department of the Interior, , Department of Agriculture, Department of Defense, Department of Energy, and Department of Justice (1998 MOU);

6. A statement of the Issuing Agency's consultations with relevant State or Tribal response agencies, including copies of any written communications;
7. A statement of whether the situation underlying the AO constitutes an emergency or any other information as to the need for expedited review or the timeframe, if any, within which the AO must be issued for work to proceed as necessary;
8. A statement of whether the Issuing Agency informally consulted with any ENRD sections prior to making the referral and the contact information for the ENRD attorneys involved in such consultations; and
9. Contact information for attorneys within the Issuing Agency and Recipient Agency who are familiar with the site and prior dealings between the agencies.

Upon receipt, the Law and Policy Section ("LPS") will promptly review the proposed AO and advise the Issuing Agency contact if additional information will be required and whether in-person or phone meetings with the Issuing Agency and/or the Recipient Agency would be helpful to aid the Assistant Attorney General in reaching a decision on concurrence. Where LPS, in consultation with the appropriate ENRD sections and the affected agencies, determines that it may be productive to reaching a resolution of the matter, LPS may offer assistance to the agencies in mediating the dispute.

Once LPS, in consultation with the appropriate ENRD sections, determines that all the necessary information has been provided, and that no efforts at mediation are appropriate given the circumstances of the matter, it will evaluate the proposed AO according to the criteria listed in Section II below and prepare a recommendation for the Assistant Attorney General. LPS will then forward the proposed AO and its recommendation to the Assistant Attorney General for a decision:

The Assistant Attorney General will make his or her decision promptly upon receipt of LPS's recommendation, taking into consideration any information provided about the need for expedited review of the matter. The decision will be memorialized in a letter to the Issuing Agency official who referred the AO stating the Assistant Attorney General's concurrence, concurrence subject to conditions, or objection to the proposed AO. Any objection to the AO "shall be subject to the approval of the Deputy Attorney General," as set forth in Order No. 1285-88.

II. CRITERIA:

In deciding whether to concur in the issuance of the proposed AO, the Assistant Attorney General will consider the following factors:

- whether the proposed AO is consistent with the Issuing Agency's statutory authority;

- the extent of prior consultation between the Issuing Agency and the Recipient Agency at the appropriate levels of authority;
- whether any non-federal PRP has responsibility that affects the appropriateness of the issuance of an AO to the Recipient Agency;
- if the Issuing Agency is not EPA or USCG, the views of EPA or USCG, as appropriate;
- the views of any State or Tribal response agencies; and
- any other factors that may be relevant under the circumstances.

III. ENFORCEABILITY OF PROCEDURES

This Directive provides only internal guidelines for the Division. The guidelines do not create any rights, substantive or procedural, that are enforceable at law by any party. No limitations hereby are placed on otherwise lawful prerogatives of the Department.

IV. CONSULTATION

This Directive was developed in consultation with DAAGs Lisa Jones and Bruce Gelber, the Environmental Defense Section, the Environmental Enforcement Section and LPS. I hereby direct that this Directive be distributed as appropriate within the Division and that LPS make a copy of the original of this Directive available to all Division attorneys and other employees via user-friendly software technology such that it is indexed, searchable and accessible (*e.g.*, PDF format).


JOHN C. CRUDEN
Assistant Attorney General

December 20, 2016
DATE

Attachment: Order No. 1285-88