



Background paper for the
"Seminar on Strengthening the Enforcement and Administration
of Environmental law in North America."
Panel 2.- Procedural and evidentiary challenges for effective
environmental law enforcement. (d) - Urgent Situations.
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I. Introduction

Environmental agencies are often faced with situations that call for a quick response given the threat they pose to human health or the environment. For example, a raw sewage pipeline overflows into the public waterways or the improper removal of asbestos near a school or playground. In order to address these urgent situations, imminent and substantial endangerment authorities allow environmental agencies to issue orders requiring immediate action to avert threats to the environment or public health. These orders, which are enforceable in court, may dictate a specific course of action or restrain the activity responsible for the hazard.

This article provides a broad overview of the various imminent and substantial endangerment authorities that exist in the United States, Canada and Mexico. During the seminar, the panelists will provide a more in-depth discussion of some, or all, of these legal instruments.

A. The United States

In the United States, the Environmental Protection Agency has a variety of statutory authorities to address urgent situations. These provisions are included in environmental statutes and were broadly drafted by Congress to give EPA the right to seek judicial relief or take appropriate and immediate action to eliminate threats to human health and the environment.

Imminent and Substantial endangerment authorities are found in the Resource Conservation and Recovery Act,¹ the Comprehensive Environmental Response, Compensation, and Liability Act², the Clean Water Act,³ the Safe Drinking Water Act,⁴ the Clean Air Act,⁵ and the Toxic Substances Control Act.⁶ These authorities have strong similarities and may be combined by EPA to abate multi-media emergencies.

¹ Section 7003 of RCRA, 42 U.S.C. § 6973.

² Section 106 of CERCLA, 42 U.S.C. § 9606(a).

³ Sections 504(a) and 311(c) and (e) of the CWA, 33 U.S.C. §§ 1364(a), 1321(c) and (e).

⁴ Section 1431 of the SDWA, 42 U.S.C. § 300i(a).

⁵ Section 303 of the CAA, 42 U.S.C. § 7603(a).

⁶ Section 8 of TSCA, 15 U.S.C. § 2606(b).



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a. Resource Conservation and Recovery Act

The Resource Conservation Recovery Act's (RCRA) goals are to protect human health and the environment from the potential hazards of waste disposal, to conserve energy and natural resources, to reduce the amount of waste generated, and to ensure that wastes are managed in an environmentally sound manner.

Under Section 7003 (a) of RCRA, whenever the EPA Administrator receives evidence that past or present improper handling of hazardous waste⁷ may present an "imminent and substantial endangerment" to health or the environment, the Administrator may issue an administrative order or initiate a judicial action to restrain any person from handling, storing, treating, transporting or disposing of hazardous waste.⁸ The Administrator may also order such person to clean-up or take other corrective action as may be necessary to contain the hazard.

An "endangerment" has been defined by the courts to be an actual, threatened, or potential harm to health or the environment.⁹ The words may present in the statute require that only a risk of harm exist, no proof of actual or immediate harm is required. An "imminent" endangerment exists when the present conditions indicate that there may be a future risk to health or the environment even if the risk does not materialize for many years.¹⁰ A "substantial" endangerment exists when there is a reasonable cause for concern that health or the environment may be at risk.¹¹

RCRA Section 7003 authority may be used, for example, when a facility is found to be improperly handling hazardous waste. In such a situation, the facility may be ordered to immediately stop the receipt of additional hazardous waste until compliance with the terms of an order detailing corrective action is achieved. Failure to comply with any order issued under Section 7003(a) of RCRA may also result in a financial penalty.¹²

⁷ Hazardous waste to mean a solid waste, or combination of solid wastes, which because of its . . . characteristics may (A) cause or significantly contribute to an increase in mortality or . . . serious . . . illness; or (B) pose a substantial present or substantial hazard to human health or the environment when improperly . . . managed." RCRA § 1004(5).

⁸ "Person" includes any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage or disposal facility).

⁹ United States v. Valentine, 856 F. Supp. 621, 626 (D. Wyo. 1994).

¹⁰ Id. See also, United States v. Conservation Chemical II, 619 F. Supp. 162, 194 (W.D. Mo. 1985) and Dague v. City of Burlington, 935 F. 2d 1343, 1356.

¹¹ Conservation Chemical, 619 F. Supp. At 194.

¹²42 U.S.C. § 6973(b)



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b. Comprehensive Environmental Response, Compensation, and Liability Act

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) gives the federal government broad authority to clean-up contaminated sites. Section 106 of CERCLA is a broadly written provision which differs from RCRA Section 7003 in that it authorizes judicial action or issuance of an administrative order when there is an actual or threatened imminent and substantial endangerment to the public health, welfare or the environment.¹³

Under Section 106, the President, upon determining that there may be an imminent and substantial endangerment to the public health or welfare or the environment from an actual or threatened release of hazardous material, may bring judicial action to obtain relief as may be necessary to abate the hazard or threat. The President may also issue administrative orders, which are enforceable in court, to compel cleanup, obtain access to and inspect facilities or vessels, obtain samples, enforce requests for information or any other actions as may be necessary to stop the danger. For example, the discovery of dumped drums full of leaking hazardous materials may result in the owner of the site having to retain a qualified contractor to conduct the necessary activities to avert the threat of the leaking drums, submit to EPA a plan and schedule for the response operations and submit weekly reports of the work. Failure to comply with a 106 order may result in a penalty in addition to possible fines and punitive damages.

EPA has used CERCLA Section 106 authorities to issue the majority of its emergency power administrative orders.

c. Clean Water Act

The purpose of the Clean Water Act is to protect and provide for pollution control activities in waterways. The CWA has two provisions to abate dangers, Section 504 and Section 311.

Section 504 of the CWA is the only imminent and substantial endangerment authority which requires a judicial action for relief and does not allow for administrative orders. Under this authority, the EPA Administrator "upon receipt of evidence that a pollution source . . . is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such

¹³ In *Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1111 (D. Minn. 1982), the court found that "the imminent hazard provisions of §106(a) are even broader than those articulated in § 7003."



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persons, may bring suit . . . in the appropriate district court to immediately restrain any person causing. . . the alleged pollution to stop the discharge of pollutants . . . or to take such other action as may be necessary."¹⁴ Because the CWA has the authority to issue compliance orders and assess penalties administratively in other sections, Section 504 is used seldomly. However, it is a useful provision to address long term threats to the health or welfare of persons. For example, harm to the tourist industry caused by polluted waters or sediments may impact people's livelihoods and therefore be subject to action under Section 504.

Section 311 of the Clean Water Act is also known as the Oil Pollution Act (OPA). The purpose of the OPA is to prevent oil spills. While the OPA does not create any new cleanup authorities for EPA, it allows the Agency to recover costs incurred during the cleanup of oil discharges conducted under CERCLA or the CWA. In addition, if a discharge is posing a substantial threat to public health or welfare, Section 311(c) states 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." Moreover, Section 311(e) states that when it is determined that "there may be an 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" the President may "secure relief from any person as necessary to abate such endangerment; or . . . take any other action . . . including issuing administrative orders, that may be necessary to protect the public health and welfare." District courts may also grant relief under this section.

d. Safe Drinking Water Act

The Safe Drinking Water Act ensures water quality and develops programs to reduce or eliminate groundwater pollution in public water systems. Section 1431 of the SDWA provides national drinking regulations that dictate maximum contaminant levels for specified contaminants and treatment techniques. Under this provision, the EPA may issue orders to protect the public health or commence a civil action for relief, including a restraining order, a permanent injunction, or a temporary injunction when the Administrator:

[R]eceives information that a contaminant is present in or is likely to enter a public waster system or an underground source of drinking water, and the contaminant may present an imminent and substantial endangerment to human

¹⁴ Section 504 CWA,



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health, and the appropriate State and local authorities have not acted to protect the public health

The courts have held that SDWA Section 1431 authority, like RCRA Section 7003 authority, is not limited to emergency situations. Rather, injunctive relief may be granted when a risk of harm exists without requiring that threat of irreparable harm.¹⁵ For example, the discovery that water samples taken from a public water system tested positive for the presence of total and fecal coliform, and the City's failure to notify the affected residents and the state environmental agency resulted in the issuance of an administrative order by the EPA. The relief ordered included the: 1) chlorination of the water supply, 2) issuance of a public notice to water users alerting them to the presence of coliform, 3) daily sampling of the water, and 4) implementation of an EPA-approved plan to produce water that did not exceed the maximum contaminant level for both total and fecal coliform.


e. Clean Air Act

The purpose of the Clean Air Act (CAA) is to reduce smog and air pollution. The CAA has two provisions to abate dangers, Section 303 and Section 112(r).

Section 303 of the CAA, authorizes the EPA to initiate judicial action, or issue and administrative order, to abate imminent and substantial endangerment to public health, welfare, or the environment caused by emissions of air pollutants. For example, a foam and fiber pad manufacturer was ordered to cease all operations because it was found to be emitting unidentified organic vapors which were presenting a public health hazard. The order required that the manufacturer not operate until it could demonstrate that it could do so without presenting an imminent and substantial endangerment to the public. In addition, the company was required to submit a plan detailing its ability to operate safely.

In order to prevent accidental releases of chemicals from stationary sources, instead of responding to them, Congress enacted Section 112(r) of the CAA in 1990. This provision requires that owners and operators of stationary sources detect and prevent, or minimize the effects of accidental releases whenever extremely hazardous substances are present at a facility. The regulations issued under this section define the requirements that must be met by these facilities and establish dates for compliance. In case of an actual or threatened release that may cause an imminent and substantial endangerment to human health, or welfare, or the environment, Section 112(r) (9) gives EPA the authority to issue orders and seek judicial relief.

¹⁵ United States v. Price, 688 F. 2d 204, 211 (3d Cir. 1982)

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f. Toxic Substances Control Act

The purpose of the Toxic Substances Control Act (TSCA) is to regulate the manufacture, use, distribution in commerce, and disposal of chemical substances. Currently, 75,000 industrial chemicals are manufactured in the U.S. Under TSCA Section 7, if the EPA determines that the manufacture, processing or distribution of a chemical substance, mixture, or article containing such a substance or mixture is imminently hazardous, it may commence a civil action for its seizure or issue an order to secure necessary relief against any person who manufactures, imports, processes, distributes in commerce, uses, or disposes of that substance or mixture.

g. Federal Insecticide, Fungicide, Rodenticide Act

The Federal Insecticide, Fungicide, and Rodenticide Act controls the distribution, sale and use of pesticides. Under FIFRA Section 6, the EPA may suspend a pesticide registration if it determines that it is necessary to prevent an "imminent hazard." An "imminent hazard" is defined as an unreasonable adverse effect on the environment or an unreasonable hazard to the survival of a threatened or endangered species. The administrator then has 90 days to issue a notice of intent to cancel the registration of the pesticide or change its classification before the emergency order expires