# Forty Years Later, Revisiting the Idea of a Single Emergency Authority Provision

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Through a variety of provisions across a number of different environmental laws, the U.S. Environmental Protection Agency ("EPA") is given the authority to undertake certain emergency actions and issue emergency orders to protect the public and the environment when there is a risk of urgent or imminent danger.[1] While these statutes may differ in their individual, specific constructions, they contain similar language and share a common origin; the commonalities between the provisions have been noted by both the courts[2] and by Congress.[3] The statutes, which include provisions of the Clean Air Act ("CAA"), Resource Conservation and Recovery Act ("RCRA"), Safe Drinking Water Act ("SDWA"), and Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), generally include language specifying that the EPA Administrator may act when there is evidence of, or information about, an "imminent and substantial endangerment" to people or the environment.[4] If appropriate conditions are met, the provisions give EPA the authority to issue emergency orders to responsible parties without first pursuing judicial action in court.[5] This, in turn, can enable EPA to act more quickly to order an actor to stop or change conduct that is causing human or environmental risk or damage—for example, requiring a company to abate an action that is causing a chemical to leach into a public water supply.

Since their initial passage roughly forty years ago, portions of the different emergency provisions have been amended and each of the emergency authorities has been interpreted slightly differently by the courts. Guidance documents developed by EPA for each statutory emergency authority provide nonbinding direction for EPA to follow when responding to emergency scenarios, but these documents may be difficult to access, dated, and, like the statutes themselves, generally treat emergencies in each type of environmental media (air, water, etc.) separately.[6]

In order to adequately ensure continued protection of public health and environmental health, EPA must have clear, comprehensive emergency authorities that are up-to-date. Current standards for the use of EPA emergency authorities lack clarity, are difficult to access, and can be convoluted. Given the important role that EPA's emergency authorities play in the protection of the public as well as the environment, the need for clarity and effectiveness should not be understated. Fast-paced technological developments in nanotechnology, energy production, manufacturing, and other fields will continue to yield new and sometimes unanticipated hazards and generate new levels of uncertainty in projecting and assessing potential risks. Where previously uncommon chemicals or chemical combinations are used in new ways (in fracking for gas extraction, for example),[7] where the storage of gases below the soil surface reveals previously unrealized risks and dangers,[8] or where delays in action are attributed to a lack of legal clarity in a statutory emer-

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1. *E.g.*, Clean Water Act § 504, 33 U.S.C. § 1364 (2012); Safe Drinking Water Act § 1431, 42 U.S.C. § 330i (2012); Resource Conservation and Recovery Act § 7003, 42 U.S.C. § 6973 (2012); Clean Air Act § 303, 42 U.S.C. § 7603 (2012); Comprehensive Environmental Response, Compensation, and Liability Act § 106(a), 42 U.S.C. § 9606(a) (2012).
2. *E.g.*, United States v. Price, 523 F. Supp. 1055, 1070 (D.N.J. 1981) (noting "[RCRA] Section 7003 is but one of several imminent hazard provisions that Congress has included in environmental statutes. . . . These provisions are broadly drafted to give appropriate Government officials the right to seek judicial relief or take other appropriate action to avert imminent and substantial threats to the environment or public health.").
3. *E.g.*, S. Rep. No. 101-228, at 370 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3753 (regarding amendments to emergency powers: "These changes are necessary . . . to conform the Administrator's emergency authority under the Act to emergency authorities under other environmental laws.").
4. *See, e.g.*, 42 U.S.C. § 7603 (2012).
5. *See, e.g.*, 42 U.S.C. § 7603 (2012) ("If it is not practicable to assure prompt protection . . . by . . . a civil action . . . ").
6. *See* discussion *infra* Section II, III.C.
7. *See generally* U.S. Envtl. Prot. Agency Office of Research & Dev., EPA/601/R-14/003, Analysis of Hydraulic Fracturing Fluid Data From the FracFocus Chemical Disclosure Registry 1.0 (Mar. 2015), www.epa.gov/sites/production/files/2015-03/documents/fracfocus_analysis_report_and_appendices_final_032015_508_0.pdf.
8. *See, e.g.*, Anna Gorman, *Fear of Health Problems Plagues Porter Ranch, Calif., Gas Leak Victims,* U.S. News (Mar. 11, 2016 8:52 AM), www.usnews.com/news/articles/2016-03-11/fear-of-future-health-problems-plagues-porter-ranch-calif-gas-leak-victims.

gency authority itself,[9] clear emergency response capability is needed to ensure that EPA can meet its mandate of protection. Such clarity can also provide helpful guidance for the regulated community.

A student Note argued nearly forty years ago that a single, unified approach that would compile all the statutes into one single provision, streamlining its effectiveness and eliminating the risk that each section would be interpreted differently, could be effective at unifying and clarifying the emergency authority of the relevant provisions.[10] As early as 1979, after the separate passage of many of the original environmental statutes and the emergency provisions they contained, the Skaff Note called for a unified emergency authority statute that would place EPA emergency authority in a single provision,[11] or, in the alternative, that each of the statutes be amended to use identical language in order to avoid interpretive problems and confusion in implementation.[12] Since that time, however, the provisions have been amended differently, judicial holdings have further altered their interpretations, and many of the early concerns associated with separate emergency powers sections have already come to pass.[13]

This Note will examine and compare the emergency authority in four statutes: CAA, CERCLA, RCRA,[14] and SDWA. While many other statutes have public protection clauses,[15] in order to limit the scope of this Note and to build on the already comprehensive 2008 discussion of these statutes in an article written by Charles de Saillan,[16] only the aforementioned four major statutes will be examined in detail here. They are similar in construction and scope and use similar language.

Challenges evident in the use of the various emergency provisions suggest that it may be time to revisit the idea of creating a unified emergency provision that would encompass EPA emergency powers across all different media, regardless of which statute they would traditionally have been granted under. Compiling the disparate emergency powers into a single provision could assist EPA in responding to emergencies by reducing confusion and providing more clarity about when it has authority to act and when it does not in cases of urgent and potentially life-threatening danger. Such a change might also reduce administrative burdens on the agency and result in an increased ability of EPA to maintain and update its emergency authority guidance documents. A change of this magnitude warrants careful study, however, because of the added potential for negative consequences to environmental and public health. If undertaken improperly or drafted poorly, a unified emergency powers provision could hamper EPA's ability to protect the public, resulting in widespread health risks. An ineffective emergency authority could also permit significant environmental damage that could be impossible to fix. This Note is not meant to suggest a final answer or approach to this question, but instead is meant to serve as a starting point for a renewed discussion of the issue.

This Note discusses EPA emergency powers and suggests solutions to resolve interpretive differences found among the provisions. Part I describes the origins of the emergency powers and how the requirements of exercising those powers have changed over time due to statutory amendments and revisions. Part II describes the practical effect in the courts of some of those changes as well as treatment of the evidentiary requirements as viewed by the courts and EPA. Finally, Part III describes how drafting a single statute with clear language or amending the provisions of the current statutes to match could enhance EPA's ability to protect the public and the environment and provide clarity to the regulated community, while still imposing strict and substantive limits on that power.

For the purposes of this analysis, it is important to note that the statutory provisions discussed are referred to generally and most broadly as "emergency provisions." However, this is only a general descriptor meant to facilitate discussion. As this Note will describe, these provisions are applied in cases of imminent hazard, potential risk, or endangerment, based on their precise statutory language. Their use is not limited to scenarios that might typically be described as "emergency" situations in common parlance.[17]

9. *See, e.g.*, Stacey Banks et al., U.S. Envtl. Prot. Agency Office of Inspector Gen., 17-P-0004, Management Alert: Drinking Water Contamination in Flint, Michigan, Demonstrates a Need to Clarify EPA Authority to Issue Emergency Orders to Protect the Public (Oct. 20, 2016) [hereinafter Management Alert], https://www.epa.gov/sites/production/files/2016-10/documents/_epaoig_20161020-17-p-0004.pdf.
10. Richard B. Skaff, *The Emergency Powers in the Environmental Protection Statutes: A Suggestion for a Unified Emergency Provision*, 3 Harv. Envtl. L. Rev. 298, 324 n.165 (1979).
11. *Id.* at 300, 324–25.
12. *Id.* at 324, n.165.
13. *See* Charles de Saillan, *The Use of Imminent Hazard Provisions of Environmental Laws to Compel Cleanup at Federal Facilities*, 27 Stan. Envtl. L.J. 43, 203 (2008) ("It is easy to view these imminent hazard provisions as a hodgepodge of disparate and inconsistent authorities cobbled into the statutes at various times for various purposes, and subject to diverse and often illogical limitations.") (citation omitted); *see also* Skaff, *supra* note 10. For further relevant, general discussions of the history and origins of some of these interpretive questions and comparisons, see Kathryn Saenz Duke, *Using RCRA's Imminent Hazard Provision in Hazardous Waste Emergencies*, 9 Ecology L.Q. 599 (1981) and Barry J. Trilling, *"Potential for Harm" as the Enforcement Standard for Section 7003 of the Resource Conservation and Recovery Act*, 2 UCLA J. Envtl. L. & Pol'y 43 (1981).
14. Both § 7002 and § 7003 of RCRA are discussed here, as they contain "imminent and substantial endangerment" language: § 7002 provides authority for citizen suits based on endangerment, while § 7003 provides for EPA orders. 42 U.S.C. §§ 6972, 6973 (2012).
15. *E.g.*, Toxic Substances Control Act § 208, 15 U.S.C. § 2648 (2012); Clean Air Act § 112(r)(9), 42 U.S.C. § 7412(r)(9) (2012); Comprehensive Environmental Response, Compensation, and Liability Act § 104(a), 42 U.S.C. § 9604(a)(1) (2012); Clean Water Act, 42 U.S.C. § 1321(e); Clean Water Act 33 U.S.C. § 1364(a) (2012).
16. de Saillan, *supra* note 13.
17. *See, e.g.*, B.F. Goodrich Co. v. Murtha, 697 F. Supp. 89, 96 (D. Conn. 1988) ("The 'imminent and substantial endangerment' language of § 9606(a) is not limited to emergency situations . . . "), *aff'd,* 958 F.2d 1192 (2d Cir. 1992); United States v. Conservation Chem. Co., 619 F. Supp. 162, 193 (W.D. Mo. 1985) (citing United States v. Waste Indus., 734 F.2d 159, 165 (4th Cir. 1984)) ("Contrary to the Defendants' contentions, an endangerment need not be an emergency in order for it to be 'imminent and substantial.'"); U.S. Envtl. Prot. Agency, EPA-R08-OAR-2013-0556-0015, Guidance on Section 303 of the Clean Air Act 2–3 (Apr. 1, 1999) [hereinafter 1999 CAA 303 Guidance] (noting that EPA may act prior to actual harm because § 303 is precautionary), https://www.regulations.gov/document?D=EPA-R08-OAR-2013-0556-0015; *see also* de Saillan, *supra* note 13, at 110–17, 111 n.381 (providing discussion and RCRA case summaries).

Part I introduces and describes the texts of four relevant statutes. For each statute, the current text of the relevant provision is provided first, followed by a discussion focusing on the language used and history of amendments and changes where relevant.[18] After a brief introduction on the origins of emergency powers provisions, the emergency provision in CAA § 7603 is described, followed by the provisions in RCRA § 7003, CERLCA § 106(a), and SDWA § 1431.

## I. Text and Amendments of Relevant Statutes

### A. *Origination of Emergency Powers*

The first instance of relevant emergency power legislation can be found in the Air Quality Act of 1967, where § 108(k) initially provided a limited emergency authority for suit to be brought by the Attorney General in district court for an injunction against any air pollution that was endangering the public health.[19] The original § 108(k) was meant to be used only for special problems, not as a substitute for regular enforcement actions.[20] This concept of limited use is still true today for the emergency provisions.[21] Since the passage of the Air Quality Act of 1967, the CAA, RCRA, CERCLA, and SDWA have all been created and, in some cases, amended repeatedly, to include other emergency authority.

### B. *CAA § 303 "Emergency Powers" Section Language and History*

The CAA provides language that sets the standard for EPA action in cases of air pollution emergencies. Section 303 of the CAA states:

> [T]he Administrator, upon receipt of evidence that a pollution source or combination of sources (including moving sources) *is presenting* an *imminent and substantial endangerment to public health or welfare, or the environment*, may bring suit on behalf of the United States . . . to stop the emission of air pollutants . . . . If it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of such a civil action, the Administrator *may issue such orders as may be necessary* to protect public health or welfare or the environment.[22]

This statute has been amended more than once.[23] Originally, the emergency provisions of the CAA allowed EPA to act to protect only human health.[24] The most recent CAA amendments in 1990 expanded the protection of the emergency clause to include the authority to protect public welfare and the environment, a change from only "the health of persons."[25] The legislative history of the 1990 amendments shows that Congress made the changes to bring § 303 into conformity with other environmental laws and to ensure EPA's authority remained effective as emergency response.[26]

Several other changes were made at that time as well; among the other changes were an increase in the time period for which an emergency order could be in effect to sixty days from twenty-four hours, and a change in the ways in which EPA could act if a relevant state or local government had not yet acted.[27] "Welfare" had already been defined broadly in the definitions preceding § 303.[28] The changes broadened the reach of the CAA emergency provisions.[29] The statute has not been amended since 1990.[30]

Over the past forty years, several cases have examined EPA's use of CAA § 303, though it is not used with particular frequency.[31] Courts have acknowledged that EPA has

18. *n.b.* Only details relevant to the specific regulatory language as it currently appears are discussed here: Charles de Saillan's article provides a more thorough, detailed, and comprehensive discussion of these emergency powers provisions as they appeared in 2008, as well as discussion of how these provisions impact facilities owned by the federal governement. *See* de Saillan, *supra* note 13, at 91–106. Descriptions of origins of each statute and their changes through approximately 1979 can be found in greater detail in Richard B. Skaff's article. *See generally* Skaff, *supra* note 10.
19. Air Quality Act of 1967, Pub. L. No. 90-148, § 108(k), 81 Stat. 485, 497 (1967) ("[T]he Secretary, upon receipt of evidence that a particular pollution source or combination of sources . . . is presenting an imminent and substantial endangerment to the health of persons, and finding that appropriate State or local authorities have not acted to abate such sources, may request the Attorney General to bring suit on behalf of the United States in the appropriate United States district court to immediately enjoin any contributor to the alleged pollution to stop the emission of contaminants causing such pollution or to take such other action as may be necessary."); Skaff, *supra* note 10, at 300.
20. United States v. Waste Indus., 556 F. Supp. 1301, 1311 (E.D.N.C. 1982) ("Congress did not intend this section 'as a substitute procedure for chronic or generally recurring pollution problems.'") (quoting H.R. Rep. No. 90-728, at 1954 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 1938, 1954).
21. *See* discussion *infra* Sections I.B, I.D, I.E, and I.F.
22. 42 U.S.C. § 7603 (2012) (emphases added).
23. *See* de Saillan, *supra* note 13, at 92–94 (providing full amendment history).
24. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 12(a) (1970), 84 Stat. 1705; *see also* Skaff, *supra* note 10, at 303–04.
25. Clean Air Act Amendments of 1990, Pub. L. No. 101-549 § 704 (1990), 104 Stat. 2681.
26. 42 U.S.C. § 7603; S. Rep. No. 101-228, at 370 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3753 ("These changes are necessary to enable the Administrator to address air pollution emergencies in an adequate manner, and to conform the Administrator's emergency authority under the Act to emergency authorities under other environmental laws. See TSCA section 208, CERCLA section 106(a), RCRA section 7003, and CWA section 504. Similarly, the deletion of the requirement that the Administrator mnay [sic] not bring suit unless State or local authorities have failed to act conforms the Act to other environmental laws."); *see also* de Saillan, *supra* note 12, at 92–96.
27. Clean Air Act Amendments of 1990, Pub. L. No. 101-549 § 704(5), 104 Stat. 2399; *see also* 1999 CAA 303 Guidance, *supra* note 17, at 1–2.
28. 42 U.S.C. § 7602(h) (2012) ("All language referring to effects on welfare includes, but is not limited to, effects on soils, waters, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.").
29. *See* 42 U.S.C. § 7603; *see also* S. Rep. No. 101-228, at 370 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3753; 1999 CAA 303 Guidance, *supra* note 17, at 4; de Saillan, *supra* note 13, at 93-94.
30. *See* 42 U.S.C. § 7603; *see also* S. Rep. No. 101-228, at 370 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3753.
31. A comprehensive database of all EPA actions under this or other emergency provisions does not appear to exist at this time. A search of Lexis Advance for decisions citing to 42 U.S.C. § 7603 generates only twenty-one cases, and some of those cite to the provision only in passing. EPA's enforcement docket website states that "not all cases dockets have been published electronically at this point," see EPA, EPA Administrative Enforcement Dockets, at https://yosemite.epa.gov/oa/rhc/epaadmin.nsf. A search of the enforcement docket limited to statute "CAA" generated zero results in searches for "303," "7603," "emergency powers," and "emergency provision" as of October 17, 2017.

the authority to issue CAA § 303 orders with the status of law in general, and have noted limitations placed on the use of emergency authority.[32] Although the statute's language differs slightly from the language used in RCRA § 7003 and CERCLA § 106(a),[33] and might initially suggest that actions under § 303 must be limited to situations where EPA has evidence that pollution "is presenting" a risk (as opposed to "may present a risk"), EPA's guidance suggests that it can still act as long as there as there is a risk of imminent and substantial harm, "no matter how distant the manifestation of harm may be."[34] The legislative history of the CAA and its 1990 amendments support the notion that CAA § 303 emergency authority, like authorities in other statutes, has a protective, preventative element and is meant to protect the public before harm actually occurs.[35] As discussed previously,[36] the remaining terms—such as "imminent and substantial," etc.—are broadly defined to allow for the protection of people and the environment against air pollution harms.

### C. *RCRA § 7003 "Imminent Hazard" Provision Language and History*

Like the CAA, RCRA contains its own uniquely-worded emergency provision.[37] The "Imminent Hazard" provision contained in RCRA § 7003 is the equivalent of the other emergency provisions, and EPA action under RCRA § 7003 is not limited to emergency situations.[38] RCRA § 7003 enables the EPA Administrator to act "upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste *may present an imminent and substantial endangerment to health or the environment . . . .*"[39]

RCRA § 7003 was originally passed with the "is presenting" language that is currently found in CAA § 303, arguably specifying that action could only be taken in cases where there was a definite risk of harm, not when a risk of harm was merely possible.[40] The provision has since been amended[41] and now uses "may present."[42] The scope of RCRA § 7003 extends only to protecting "health" or "the environment"; unlike CAA § 303, protection of public welfare is not included.[43]

### D. *RCRA § 7002 "Citizen Suits" Provision Is Similar in Construction to RCRA § 7003*

RCRA § 7002, a citizen suit provision passed along with § 7003 in 1976, allows citizens to bring their own suits over violations of RCRA. While other statutes also permit citizen suits,[44] RCRA § 7002 contains language similar to § 7003 that is relevant to the analysis of these provisions.[45] It will be discussed in section II.B. Congress expected to treat the language in the two provisions similarly.[46] RCRA § 7002 provides for citizen suits under specific circumstances, such as inaction by the EPA Administrator, against any person "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which *may present an imminent and substantial endangerment to health or the environment.*"[47]

### E. *CERCLA § 106(a) "Abatement Actions" Section Language and History*

Yet another variation on emergency authority language can be found in CERLCA § 106(a), an "Abatement Actions" provision. This provision states:

> In addition to any other action taken by a State or local government, when the President determines that there *may be 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 from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat . . . [and] after notice to the affected State, take other action under this section including, but not limited

32. 42 U.S.C. § 7603; *e.g.*, Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1249 (11th Cir. 2003) ("It is clear from the text of section 7603 that Congress enabled the EPA to issue orders with the status of law, but only in an extremely narrow context.").
33. *See* discussion *infra* Sections I.C and I.E.
34. 1999 CAA 303 Guidance, *supra* note 17, at 8-9 (citing H.R. Rep. No. 95-294, at 328 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1117; S. Rep. No. 101-228, at 370 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3753); *see also* discussion *infra* Section II.A.
35. S. Rep. No. 101-228, at 370 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3753; H.R. Rep. No. 95-294, at 328 (1977) ("[T]he committee intends that this language be construed by the courts and the Administrator so as to give paramount importance to the objective of protection of the public health. Administrative and judicial implementation of this authority must occur early enough to prevent the potential hazard from materializing.").
36. *See* discussion *infra* Part II.
37. 42 U.S.C. § 6973 (2012).
38. *See* United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1109 (D. Minn. 1982) (discussing relevant legislative history from SWDA § 1431 and noting that the language of emergency provisions in general must be interpreted broadly).
39. 42 U.S.C. § 6973 (emphasis added).
40. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580 (1976), 90 Stat. 2826; *see also* de Saillan, *supra* note 13, at 100–05 (providing history of amendments and discussing interpretive change); discussed *infra* Part II.
41. Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 90 Stat. 2334.
42. 42 U.S.C. § 6973.
43. 42 U.S.C. § 6973(a).
44. *E.g.*, 42 U.S.C. § 7604 (2012) (citizen suits under CAA).
45. 42 U.S.C. § 6972 (2012).
46. H.R. Rep. No. 98-198, at 53 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 5576, 5612 (noting in a report discussing RCRA: "Section 11 confers on citizens a limited right under section 7002 to sue to abate an imminent and substantial endangerment pursuant to the standards of liability established under section 7003. . . . The committee believes this expansion of the citizens suit provision will complement, rather than conflict with, the administrator's efforts to eliminate threats as to public health and the environment, particularly where the government is unable to take action because of inadequate resources. It is expected that EPA and the Department of Justice will carefully monitor litigation under this provision . . . in order to assure orderly and consistent development of caselaw in this area.").
47. 42 U.S.C. §§ 6972(a)(2), (b) (2012) (since the time of its passage in 1984, this section has employed the identical "may present" standard of risk, not the "is presenting" standard of risk) (emphasis added).

> to, issuing such orders as may be necessary to protect *public health and welfare and the environment*.[48]

As in the other related emergency powers sections discussed herein, CERCLA § 106(a) provides authority for the government to act proactively to protect the public or the environment from harm. The statutory language of § 106(c) required EPA to develop guidelines for the use of this authority and other related sections.[49] EPA guidelines for action under § 106(a) originally appeared in the Federal Register in 1982.[50] The language also required that EPA take into account other related emergency powers provisions, including the relevant sections of CAA, RCRA, and SDWA.[51] This emergency provision contains a *may present* standard, in contrast to other provisions that use an *is presenting* standard.[52] The scope of the provision is broad, covering health, welfare, and the environment.[53]

Unlike the other statutory emergency provisions discussed here, where the text gives EPA or the EPA Administrator the direct authority to act, CERCLA § 106(a) requires that the President make the determination of endangerment as a precursor to action,[54] but this authority is delegable.[55] The authority to act under CERCLA § 106(a) is delegated to the EPA Administrator.[56]

The statute was amended in 1986, but the changes did not affect the substantive language of the emergency powers provisions in § 106(a) or (c), which remain the same as when they were passed in 1980.[57]

### *F. SDWA § 1431(a) Emergency Powers Section Use and History*

A more limited example of emergency authority can be found in the emergency powers section of SDWA. SDWA § 1431(a), Emergency Powers, states:

> [T]he Administrator, upon receipt of information that a contaminant which is present in or is likely to enter a public water system or an underground source of drinking water . . . which *may present an imminent and substantial endangerment to the health of persons*, . . . may take such actions as he may deem necessary in order to protect the *health of such persons*.[58]

Section 1431 was the first of the emergency provisions to include the authority for the issuance of administrative orders instead of requiring civil suits.[59] The scope of the statute is more limited than the others previously mentioned, as the statute only covers the protection of public health, and does not extend to protection of the public welfare or protection of the environment.[60] As in RCRA and CERCLA, and unlike in CAA, the standard for action is whether a contaminant "may present" an endangerment.[61] As a result of an amendment in 2002, the statute may now also be applied in the event that "there is a threatened or potential terrorist attack" or similar event.[62] SDWA § 1431 is different from the other provisions discussed here in that it allows action "upon receipt of information," as opposed to "upon receipt of evidence."[63] "Information," like "evidence" in the other statutes, is not defined in the statute, but the language about an "imminent and substantial endangerment" is the same.[64]

## II. Practical Use of Emergency Provisions

This section discusses how each of the four emergency provisions is actually used in practice. Of particular importance is how the language of each statute is interpreted and applied by the courts, and how EPA interprets the provisions through guidance documents.

### *A. CAA § 303 Use and Function: Meeting Each Portion of the Statutory Language*

As stated *infra*, § 303 is rarely used;[65] as of 1999 it had only been used in court three times[66] and a Lexis review of cases citing the statute across all federal courts shows that it might not have been used in court since the 1990 amendments.[67] Therefore, references in other case law and the interpretive guidance provided by EPA will serve as indicators of interpretations of the statute for this section.

48. 42 U.S.C. § 9606(a) (2012) (emphasis added).
49. 42 U.S.C. § 9606(c).
50. Guidelines for Using the Imminent Hazard, Enforcement and Emergency Response Authorities of Superfund and Other Statutes, 47 Fed. Reg. 20664-701 (May 13, 1982).
51. 42 U.S.C. § 9606(c) ("[T]he Administrator . . . shall . . . establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section and other existing statutes to effectuate the responsibilities and powers created by this Act.").
52. 42 U.S.C. § 9606(a).
53. *Id.; see also* de Saillan, *supra* note 13, at 106–07.
54. 42 U.S.C. § 9606(a).
55. 42 U.S.C. § 9615 (2012); *see* United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112-13 (D. Minn. 1982) ("A section 106(a) claim need not contain an allegation of specific presidential authorization for the suit.").
56. Exec. Order No. 12,316, 46 Fed Reg. 42,237, 42,238 (Aug. 12, 1981); Exec. Order 12,580, 52 Fed. Reg. 2923, 2926, 2929 (Jan. 23, 1987) (revoking Exec. Order. No. 12,316 and redelegating authority). *n.b.* These orders also delegate authority for CERCLA § 106(a) to the U.S. Coast Guard.
57. *Compare* 42 U.S.C. § 9615, *with* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2781; *see also* de Saillan, *supra* note 12, at 106-07 (providing for a full discussion of amendment history).
58. 42 U.S.C. § 300i (2012) (emphasis added).
59. Skaff, *supra* note 13, at 301 (stating that "Section 1431 created the authority to issue administrative orders enforceable through fines and civil actions).
60. 42 U.S.C. § 300i(a); *see also* de Saillan, *supra* note 13, at 97–100.
61. 42 U.S.C. § 300i(a).
62. 42 U.S.C. § 300i(a); Pub. L. No. 107-188, Title IV, § 403(2), 116 Stat. 687 (2002). The statute and the emergency provision as a whole have been amended at other times, but those changes did not affect the parts of the emergency provision that are relevant to this discussion. *See* de Saillan, *supra* note 13, at 98-99.
63. 42 U.S.C. § 300i.
64. *See id.*
65. *See* discussion *supra* Section I.B.
66. 1999 CAA 303 Guidance at 4 n.4.
67. *See supra* text accompanying note 31.

**Table 1: Comparison Table of Historic Language of Emergency Provisions.**

| | Air Quality Act 108k[1] | CAA 303 amendments of 1970[2] | RCRA 7003[3] | RCRA 7002[4] | CERCLA 106(a)[5] | SDWA 1431[6] | CWA 504[7] |
|---|---|---|---|---|---|---|---|
| **Year Passed:** | 1967 | 1970 | 1976 | 1976 | 1980 | 1974 | 1972 |
| **Statutory Actor:** | The Secretary (of Dept. of Health, Education, and Welfare) … | The Administrator … | The Administrator … | Any Person … | The President* (delegated to Administrator) | The Administrator … | The Administrator … |
| | upon | | | | | | |
| **Statutory Requirement for Gov't to Act:** | Receipt of evidence | Receipt of evidence | Receipt of evidence | N/A (citizen suit) | Determination of the President … | Receipt of evidence | Receipt of evidence |
| | that a "pollution source," "combination of sources," etc. | | | | | | |
| **Threshold for Action:** | Is presenting … | Is presenting … | Is presenting … | Alleged to be in violation of any permit, standard, regulation, condition, requirement, or order … | There … may be … because of an actual or threatened release … (Note: does not use imminent and substantial endangerment language) | May present … | Is presenting … |
| | an imminent and substantial endangerment to | | | | | | |
| **Scope:** | Health of persons | only human health | Health or the environment | N/A | Public health or welfare or the environment | Health of persons | Health of person or welfare of persons |

1. Air Quality Act of 1967, Pub. L. No. 90-148, § 108(k) (1967), 81 Stat. 485, 497.
2. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 12(a) (1970), 84 Stat. 1705.
3. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, § 7003 (1976), 90 Stat. 2826.
4. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, § 7002(a)(1) (1976), 90 Stat. 2826.
5. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, § 106(a), 94 Stat. 2767.
6. Safe Drinking Water Act of 1974, Pub. L. No. 93-523, § 1431, § 1431(a), 88 Stat. 1660, 1688.
7. Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2 (originally codified at 1972)). Although a description and history of CWA § 504 is outside the scope of this note, CWA § 504 is included here for the convenience of the reader, as it bears many similarities to the other statutes mentioned. For further discussion of CWA § 504 and its history, see de Saillan, *supra* note 13, at 96-97.

## 1. CAA § 303 May Only Be Used When the Situation "Is Presenting" an Endangerment

The linguistic difference between § 303's requirement that that a situation "is presenting" an endangerment and the emergency provisions in the other statutes using "may present" would seem to require a definite level of certainty of harm before action could be taken: only situations that are currently presenting an imminent and substantial endangerment would be appropriate for a § 303 action. In a situation where a firm determination cannot be made about whether or not the risk of harm is definite, EPA arguably might not be able to act under this authority. One hypothetical situation that might trigger this uncertainty could be a scenario where it is unclear if a leaking substance being emitted is hazardous or not; for example, in a scenario where a new or unknown substance is being emitted into the air and the substance has some potential of being benign or otherwise not harmful. Section § 303 authority could be uncertain is if it were unclear whether the leaking substance is actually capable of causing damage. A scenario where a leak or spill is suspected but not definitively demonstrated could also trigger this uncertainty. These scenarios could occur in a variety of contexts; the 2015 massive gas leak from a storage facility in Porter Ranch, California, provides an illustration of the circumstances that might develop in a way that limits the information available to EPA in a sudden emergency.[68]

68. *See* Gorman, *supra* note 8.

**Table 2. Comparison Table of Current Language of Emergency Provisions.**

| | CAA 303[1] | RCRA 7003[2] | RCRA 7002[3] | CERCLA 106(a)[4] | SDWA 1431(a)[5] | CWA 504[6] |
|---|---|---|---|---|---|---|
| **Statutory Actor:** | The Administrator … | The Administrator … | Any Person … | The President* (delegated to Administrator) | The Administrator … | The Administrator … |
| **Statutory Requirement for Gov't to Act:** | Upon receipt of evidence … | Upon receipt of evidence … | N/A (citizen suit) | Determination of the President … | Upon receipt of information … | Upon receipt of evidence … |
| | that a "pollution source," "combination of sources," etc. | | | | | |
| **Threshold for Action:** | Is presenting … | May present … | May present … | There may be … | May present … | Is presenting … |
| | an imminent and substantial endangerment to | | | | | |
| **Scope:** | public health or welfare or the environment | public health and the environment | to health or the environment | public health or welfare or the environment | the health of persons | to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such persons |

1. CAA § 303, 42 U.S.C. § 7603 (2012).
2. RCRA § 7003, 42 U.S.C. § 6973 (2012).
3. RCRA § 7002, 42 U.S.C. § 6972(a)(1)(B) (2012).
4. CERCLA § 106(a), 42 U.S.C. § 9606(a) (2012).
5. SDWA § 1431(a), 42 U.S.C. § 300i (2012).
6. CWA § 504, 33 U.S.C. § 1364(a); Although a description and history of CWA § 504 is outside the scope of this note, CWA § 504 is included here for the convenience of the reader, as it bears many similarities to the other statutes mentioned. For further discussion of CWA § 504 and its history, see de Saillan, *supra* note 13, at 96-97.

However, the actual difference between the "is presenting" and "may present" language may be limited and somewhat superficial. While, under an "is presenting" standard the risk of harm must be certain, the magnitude and type of harm themselves may still be unclear when action is taken. Examining the relevant legislative history of the provision, EPA guidance notes that the "is presenting an . . . endangerment" standard may be met before emissions actually occur, and therefore "it is not necessary for EPA to wait for the emissions to occur before issuing a § 303 order to abate the endangerment. An endangerment can be present even if it is not on a continuous basis."[69] The guidance points out that the Senate Report on the 1990 CAA amendments stated that the amendments broaden the EPA Administrator's authority to respond to threats of harm, not harm alone, from the use of "endangerment."[70] It also notes the preventative nature of the word "imminent," determining that an endangerment may be imminent "where present conditions indicate a threat of harm . . . no matter how distant the manifestation of actual harm may be."[71]

While it is clear that the statute's preventative protections are meant to apply proactively, this suggests that a risk of harm that is *entirely* and completely speculative may still fall outside of § 303 authority, although there is some case law that indicates that scientific proof of harm is not required.[72]

The EPA guidance document also cites to *Ethyl Corp. v. EPA*,[73] a CAA § 211(c)(1)(A) case, and *Reserve Mining Co v. EPA,*[74] a Clean Water Act ("CWA") case, for the concept that the endangerment standard is intentionally precautionary.[75] Case law on related statutes further show that the statute is preventative in nature and meant to resolve problems before irreparable damage is done.[76]

69. 1999 CAA 303 Guidance, *supra* note 17, at 8.
70. *Id.* at 4 (citing to S. Rep. No. 101-228, at 370 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3753).
71. *Id.* at 5.
72. *See id.* at 13-14 (stating repeatedly that endangerment cannot be speculative and providing a nonexhaustive list of factors EPA may consider when making an imminent and substantial endangerment finding); *but see* United States v. Vertac, 489 F. Supp. 870, 885 (E.D. Ark. 1980) (finding EPA's exercise of RCRA emergency powers proper where chemical was believed to be dangerous but not fully proved to be dangerous).
73. Ethyl Corp. v. EPA, 541 F.2d 1, 17 (D.C. Cir. 1976) ("[W]e conclude that the 'will endanger' standard is precautionary in nature and does not require proof of actual harm before regulation is appropriate.").
74. 1999 CAA 303 Guidance, *supra* note 17, at 5 (citing to Reserve Mining Co. v. EPA, 514 F.2d 492, 528 (8th Cir. 1975)).
75. *Id.*
76. *See, e.g.,* United States v. Price, 523 F. Supp. 1055, 1070 (D.N.J. 1981) (finding the Government may rely on RCRA to prevent further harm to the environment); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1394 (D.N.H. 1985) (a CERCLA case, quoting *Ethyl Corp.,* 541 F.2d at 13-17, a CAA § 211 case, for the proposition that "will endanger" is precautionary and that actual harm is not required before action can occur); *see also* de Saillan, *supra* note 13, at 100–02 (providing further discussion).

### 2. Under CAA, There Must Be a Reasonable Expectation That There Is an Imminent and Substantial Endangerment Posed by the Air Pollution

Additionally, EPA must show that there is an "imminent and substantial endangerment" posed by the pollution. EPA's CAA guidance document draws further on RCRA § 7003 interpretation to determine that the "imminent and substantial endangerment" standard may be met when a pollutant is reasonably expected to be hazardous, but when there is still a question of whether or not it definitively is.[77]

### 3. Under CAA, There Must Be a Risk to Public Health, Public Welfare, or the Environment

Like § 106(a) of CERCLA, CAA § 303 is broad in that it encompasses public health, public welfare, and the environment. The guidance document for CERCLA was prepared prior to the 1990 CAA Amendments which extended § 303 to public welfare and the environment, but presumably the "public welfare" clause would be interpreted by a court per the definition in the statute,[78] and the "environmental" clause would be interpreted similarly to the interpretation in CERCLA, *infra*.

In order to use § 303, EPA must be in "receipt of evidence" that the relevant pollution is presenting a problem.[79] There is no exact standard for what constitutes acceptable evidence under CAA § 303; however, EPA guidance suggests that what constitutes enough evidence is fact-specific and may include "witness statements, medical reports, expert opinion, or other evidence."[80]

## *B. RCRA § 7003 and § 7002 Use and Function: Meeting Each Portion of the Statutory Language*

Unlike the other emergency provisions, which are limited to specific environmental media, RCRA is broad in that it can be used to address health risks regardless of media.[81] Under RCRA, whether or not a § 7002 or § 7003 action has been adequately supported by the record is a question that turns on whether the reviewing court finds that the provided evidence adequately demonstrates each component of the statute. The totality of the evidence provided must be sufficient to demonstrate each component of the language of § 7003 and § 7002: that the waste: (a) may present (b) an imminent and substantial endangerment (c) to health or (d) the environment.[82] While courts have interpreted sections of RCRA broadly,[83] each element of the language must be satisfied. As discussed *supra,* the "may present" language is different from the "is presenting" requirement in CAA § 303.[84] The potential for risk is found in the interpretation of the "imminent" endangerment language, as it is in the other statutes.[85]

### 1. Under RCRA, "Imminent and Substantial" Means That There Must Be Danger of Sustaining a Direct, Definitive Injury That Is Serious in Nature

The potential future harm alleged must be both "imminent" and "substantial." Under RCRA, the harm must be "imminent" in that it must show that there is "a realistic danger of sustaining a direct injury."[86] There must be "a realistic chance—or a genuine probability—that a future injury will occur in order for that injury to be sufficiently imminent."[87] This, therefore, does not require that the harm itself be presently manifest, although the *threat* of the harm must be.[88]

One commonly cited case on RCRA liability is *Interfaith Community Organization v. Honeywell International, Inc.*[89] In *Interfaith*, the court examined a lower court's decision in a case where a local community organization (Interfaith) sued Honeywell under § 7002, the citizen suit provision of RCRA, alleging that a site owned by Honeywell "may present an imminent and substantial endangerment to health or the environment" due to hexavalent chromium contamination.[90] The case discussed problems that occurred as waste from chromium production was piled near tidal wetlands along a river, eventually growing into a site of "1,500,000 tons of waste, 15-20 feet deep, on some 34 acres" where a "green stream" and "yellowish-green plumes" were seen in the surface water.[91] The material was known to be carcinogenic and was toxic to the environment.[92] Seeking an injunction, Interfaith prevailed at trial, and the case was appealed.

On appeal, the Third Circuit declined to support a multifactor test advanced by the court below to define "substantial" as it related to the "substantial endangerment" requirement of the statute.[93] Instead, noting that there was no definition

77. 1999 CAA 303 Guidance, *supra* note 17, at 5–6.
78. 42 U.S.C. § 7602(h) (2012); *see also* discussion *supra* Section I.B.
79. 42 U.S.C. § 7603 (2012).
80. 1999 CAA 303 Guidance, *supra* note 17, at 12.
81. *See* de Saillan, *supra* note 13, at 200–01.
82. 42 U.S.C. §§ 6973, 6974 (2012); *see also* Steven A. Herman, U.S. Envtl. Prot. Agency, Guidance on Use of Section 7003 of RCRA 2 (Oct. 20, 1997) [hereinafter 1997 RCRA Guidance], https://www.epa.gov/enforcement/guidance-use-administrative-orders-under-rcra-section-7003 ("As a threshold matter, the Region should not consider initiating action under Section 7003 unless there is adequate evidence that all requirements of Section 7003(a) have been met . . . ).
83. *See* United States v. Price, 688 F.2d 204, 213–14 (3d Cir. 1982) (the "expansive language" of RCRA's provision allows courts to grant remedies to eliminate risks from toxic wastes).
84. *See* discussion *supra* Section II.A.1.
85. 1997 RCRA Guidance, *supra* note 82, at 10.
86. Tri-Realty Co. v. Ursinus College, 124 F. Supp. 3d 418, 436 (E.D. Pa. 2015) (quoting N.J. Physicians, Inc. v. President of the United States, 652 F.3d 234, 238 (3d Cir. 2011)) (interpreting "imminent" language for requirement of demonstrating standing).
87. *Id.*
88. Meghrig v. KFC W., Inc., 516 U.S. 479, 486 (1996). Regarding the combination of "may present" and "imminent harm" in a citizen suit based on RCRA, "this language implies that there must be a threat which is present *now*, although the impact of the threat may not be felt until later." *See also* 1997 RCRA Guidance, *supra* note 82, at 10 (providing further cases).
89. Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 399 F.3d 248 (3d Cir. 2005).
90. *Id.* at 253.
91. *Id.* at 252.
92. *Id.*
93. *Id.* at 259.

of the word "substantial" in the statute, the Court investigated the common meaning of the word, as well as the legislative history of RCRA to find that it essentially means "serious . . . to the environment or health"[94] and specifying that in uncertain cases, "the error must be made in favor of protecting public health, welfare, and the environment."[95] Treating the issue as one of first impression for the Circuit, the court determined that the standard of review for whether or not to uphold findings on endangerment determinations under RCRA would be clear error, as they were questions of fact.[96] Declining to adopt the more detailed test of the lower court, the Third Circuit Court of Appeals found that the extra requirements "held plaintiffs to a higher standard than needed" which was "irreconcilable" with § 7002.[97] This determination fits with the EPA guidance's determination that an endangerment is substantial "if there is reasonable cause for concern that health or the environment may be seriously harmed."[98]

#### 2. Under RCRA, There Must Be a Risk to "Health" or "the Environment"

In *Tri-Realty Co. v. Ursinus College*, a district court considered a citizen suit under RCRA where the plaintiff alleged in part that a release of fuel oil from underground storage tanks on Ursinus's property was endangering health or the environment because it was leaking onto Tri-Realty's property, causing a building up of "black, highly viscous, tar-like material."[99] The court found that the evidence on the record must show that the potential harm would affect human health, harm animal or plant life, or harm the environment itself; a failure to specifically allege with evidence that one or more of these harms would result led to the granting of partial summary judgment against the plaintiff in the *Tri-Realty* case, because the plaintiff could not show that there was actual endangerment.[100] Theories of liability that depend only on harm to the environment "in and of itself"—that is, harm to the nonliving elements within an ecosystem—are covered by this language.[101] The RCRA guidance suggests that costs may be covered under this authority when they are incurred by EPA as part of "removal" or "remedial" actions.[102]

#### 3. Support in the Administrative Record

The record must be detailed enough that the court can find an adequate connection between the potential harms and the suit at hand; inadequately "connecting the dots" in a RCRA § 7002 case led a district court to grant partial summary judgment against the plaintiff.[103] The court found that, while it had to defer to the fact that the word "may" appears in the statute, evidence showing that there is at least some endangerment to humans has to actually appear in the record for a claim to survive summary judgment.[104] While no specific quantitative evidence is required, quantitative evidence may help to demonstrate the risk of endangerment.[105] The 1997 RCRA guidance notes that evidence may be "documentary, testimonial, or physical."[106]

### *C. CERCLA § 106(a) Use and Function: Meeting Each Portion of the Statutory Language*

Under § 106(a), as with the other statutes, each component of the statutory language must be met for the order to be upheld.[107] As with the other emergency provisions, § 106(a) actions are justifiable and actionable as "endangerments" even if they would not meet the typical, broad perception of an "emergency."[108]

#### 1. Under CERCLA, the President Must Make a Determination That the Criteria Are Met, but This Authority Is Delegated to EPA

Unlike the other statutes, as stated in CERCLA § 106(a), the authority to make a determination for action under this section is delegated to EPA.[109] EPA guidance from 1983 stated that "this determination will depend upon documentary, testimonial, and physical evidence obtained through investigations and inspections."[110] Other sources of evidence include data in EPA's files.[111] The 1983 guidance stated that the order issued must include a statement finding that there is, in fact, an imminent and substantial endangerment to meet the statutory requirement.[112] Similar requirements are repeated in the 1990 guidance, which states that the findings of fact

94. *See Interfaith Cmty. Org.*, 399 F.3d at 258–60 (quoting Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1015 (11th Cir. 2004)) (internal quotation marks omitted).
95. *Id.* at 259 (quoting United States v. Conservation Chem. Co., 619 F. Supp. 162, 194 (W.D. Mo. 1985)).
96. *See Interfaith Cmty. Org.*, 399 F.3d at 253-54.
97. *Id.* at 259.
98. 1997 RCRA Guidance, *supra* note 82, at 11.
99. Tri-Realty Co. v. Ursinus College, 124 F. Supp. 3d 418,at 426 (E.D. Pa. 2015).
100. *Id.* at 444-45.
101. *E.g.*, *id.* at 456 ("[T]he Court adopts a more functional interpretation of *Interfaith* and concludes that an imminent and substantial endangerment to the environment in and of itself may exist if contamination threatens the ability of a non-living element of the environment to serve some potential function in the local ecosystem."); *see also* de Saillan, *supra* note 13, at 121–25, 1323 n.449 (compiling and discussing several cases).
102. 1997 RCRA Guidance, *supra* note 82, at 23 (internal quotations omitted).
103. *Id.* at 453 ("Tri-Realty has failed to connect the necessary dots for its claim to survive summary judgment.").
104. *Id.* at 453-54.
105. *Id.* at 443 n.22.
106. 1997 RCRA Guidance, *supra* note 82, at 36-37.
107. *See, e.g.*, United States v. E.I. du Pont de Nemours & Co. 341 F. Supp. 2d 215 (W.D.N.Y. 2004).
108. United States v. Conservation Chem. Co., 619 F. Supp. 162, 193 (W.D. Mo. 1985) ("Contrary to the Defendants' contentions, an endangerment need not be an emergency in order for it to be 'imminent and substantial.'") (citation omitted); *see E.I. du Pont de Nemours & Co.*, 341 F. Supp. 2d at 247 ("[W]ord 'imminent' does not require 'proof that harm will occur tomorrow.'").
109. *See* discussion *supra* Section I.E.
110. U.S. Envtl. Prot. Agency, EC-G-1999-065, Guidance on Use and Issuance of Administrative Orders Under Section 106(a) of CERCLA 5 (Sept. 8, 1983), https://www.epa.gov/sites/production/files/2013-09/documents/useiss-sec106-mem.pdf.
111. *Id.*
112. *Id.*

section in an order should include enough information to support the criteria required.[113]

### 2. Under CERCLA § 106(a), "Imminent and Substantial Endangerment" Means That There Must Be Factors Present That Threaten Harm Either Now or in the Future, But There Is No Requirement That the Harm or Risk of Harm Be Specifically Quantified

A seminal case on CERCLA § 106(a) actions is *United States v. Conservation Chemical Company,* 619 F. Supp. 162 (W.D. Mo. 1985), in which the court examined a matter where a wide variety of hazardous materials were being released from a Conservation Chemical site to areas where they might have reached humans and other organisms in a combined RCRA and CERCLA action.[114] The decision provides detailed discussion of the specific language, legislative history, and meaning of the terms used in CERCLA § 106(a).

Under § 106(a), similar to RCRA actions, finding that an endangerment is "imminent" does not require finding that the endangerment would be "immediate."[115] "An endangerment is 'imminent' if factors giving rise to it are present, even though the harm may not be realized for years."[116] In finding that an endangerment is "imminent," EPA may take into account the time it would take to prepare documents for litigation[117]—the goal is to ensure that the public and the environment are protected.[118]

The term "substantial" does not require that a specific level of harm be present or that the harm be specifically quantified to a certain level.[119] All that is required is:

> reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of a hazardous substance if remedial action is not taken, keeping in mind that protection of the public health, welfare and the environment is of primary importance.[120]

Finally, "endangerment" under § 106(a) is also broadly defined. Finding "endangerment" does not require finding a definitive actual harm; "threatened or potential harm" constitutes endangerment.[121] Just as the term "substantial" does not require a quantified level of harm that must be found for a § 106(a) action, the term "endangerment" does not require that the risk of the harm occurring be defined in specific quantifiable terms.[122] Depending on the toxicity of the hazardous substance(s) at issue, even the "release or threatened release" of "small amounts" of materials may constitute "substantial endangerment."[123]

### 3. Under CERLCA, There Must Be a Risk to "Public Health" or "Welfare" or "the Environment"

Because of the disjunctive language used in § 106(a), an order issued under § 106(a) does not need to show that "people" may specifically be endangered; while endangerment to the public health would be sufficient, harm to the public "welfare" and harm to the "environment" are also independently valid reasons for the issuance of a § 106(a) order.[124] Further, as in other statutes discussed herein, "public welfare" is broad and may include a wide variety of factors.[125] The term "environment" is similarly wide in its scope.[126]

## *D. SDWA § 1431(a) Use and Function: Meeting Each Portion of the Statutory Language*

As is the case with the other emergency powers sections, each component of the statutory language of SDWA § 1431 must be demonstrated in the emergency order issued by EPA for the order to be valid and upheld if challenged. Legislative history from the passage of SDWA provides a detailed description of the intended uses of SDWA emergency powers section.[127]

### 1. Under SDWA § 1431(a), "Imminent and Substantial" Means That There Is an Immediate Risk the Plaintiffs Could Sustain an Injury That Is Serious in Nature

The risk of harm must be "imminent" but the harm itself may occur sometime in the future; a lag period between the exposure to the harm and the manifestation of the harm does

113. U.S. Envtl. Prot. Agency, OSWER Dir. No. 9833.0-1a, Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions 20 (Mar. 7, 1990) [hereinafter 1990 CERCLA 106(a) Guidance], https://www.epa.gov/sites/production/files/documents/cerc106-uao-rpt.pdf.
114. *Conservation Chem. Co.,* 619 F. Supp. at 196.
115. *Id.* at 193 ("An endangerment need not be immediate to be 'imminent,' and thus warrant relief.").
116. *Id.* at 193–94.
117. *Id.* at 193 (citing United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1109 (D. Minn. 1982)) ("imminence" takes into account time needed to prepare orders and papers, complete litigation, and protect the pulbic health).
118. *Reilly Tar & Chem. Corp.*, 546 F. Supp. at 1109–10 (citing to H.R. Rep. No. 93-1185 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6454, 6487–88).
119. *Conservation Chem. Co.,* 619 F. Supp. at 194 ("[T]he word 'substantial' does not require quantification of the endangerment (e.g., proof that a certain number of persons will be exposed, that "excess deaths" will occur, or that a water supply will be contaminated to a specific degree).").
120. *Id.*
121. *Id.* at 192 (citations omitted); *see also* U.S. Envtl. Prot. Agency, Use of CERCLA Section 106(a) to Address Endangerments That May Also Be Addressed Under Other Environmental Statutes A3 (Jan. 18, 2001), https://www.epa.gov/sites/production/files/2013-10/documents/ise-crossmedia.pdf; 1990 CERCLA 106(a) Guidance, *supra* note 113, at 20.
122. *Conservation Chem. Co.,* 619 F. Supp. at 194 ("Both the courts and Congress have recognized that the evaluation of a risk of harm involves medical and scientific conclusions that clearly lie on the frontiers of scientific knowledge, such that proof with certainty is impossible." (citing *Reserve Mining Co.,* 514 F.2d at 519–20)) (internal quotation marks omitted).
123. *Id.* at 195 (citation omitted).
124. *Id.* at 192.
125. *Id.* ("The term 'public welfare' is exceptionally broad, and encompasses 'health and safety, recreational, aesthetic, environmental and economic interests.'" (quoting City of El Paso v. Reynolds, 597 F. Supp. 694, 700 (D.N.M. 1984))).
126. *Id.*
127. H.R. Rep. No. 93-1185 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6454, 6488.

not preclude emergency action, and in fact addressing this type of developing issue was a purpose of the provision.[128] This is similar to the requirements in the other statutes.

Also, as in other statutes, a finding of "substantial" endangerment is required. Under SDWA § 1431(a), substantial endangerment means that there is a significant likelihood that harm will occur; the legislative history shows that Congress anticipated something less than absolute certainty as being appropriate for action.[129]

Due to the use of the "may present" language, EPA does not need to guarantee that risk harm is presently occurring.[130]

#### 2. Under SDWA § 1431(a), the Endangerment Must Be to "the Health of Persons"

SDWA § 1431 has perhaps the narrowest scope of any emergency provision discussed here; it only enables EPA to act to protect "the health of persons."[131]

#### 3. Current SDWA § 1431 Use Due to Events in Flint, Michigan

EPA issued an emergency order under SDWA § 1431 in January 2016 as a result of the Flint, Michigan, water problem.[132] EPA was criticized for taking so long to come out with the emergency order relating to Flint, Michigan, lead contamination in drinking water.[133] The Office of the Inspector General released a report that said in part that EPA's SDWA emergency authority was too confusing, its guidance document was too old, and EPA employees were not clear about its use.[134]

## III. Proposed Solutions and Discussion

As the above examples illustrate, there are nuanced differences in the emergency provision statutes, which may result in different interpretations of similar language across the different subject areas. These differences are partially mitigated by the constant referencing of other statutes' language by courts and the guidance documents when addressing the interpretation of a statute at issue, but resolving the inconsistencies would provide much-needed clarity.[135]

### *A. Revisiting a Single Unified Emergency Provision*

As stated *infra*, there were calls to create a unified emergency provision as early as 1979.[136] Since that time, other practitioners have proposed their own changes[137] and the statutes and their interpretations have continued to develop. Today, the need for reformed emergency power provisions may be even greater than in the past. There are many potential threats to public health or the environment from rapid technological developments in energy production, manufacturing, and other fields.[138]

A single, unified provision may still be an effective method of streamlining the provisions. However, such a large-scale change (which would involve eliminating the other provisions and moving them to a single statute) might not be politically feasible, so an alternative solution that might be equally effective would be to amend the provisions in their current places so that they have identical scope and language. This would require coordination in amending each statute simultaneously. In either case, the ideal change would revise each of the four provisions discussed here, possibly along with the emergency provision in the CWA and other relevant emergency provisions.[139] The change would create a single uniform emergency authority provision, or several identical provisions, which would broadly encompass EPA's emergency powers, minimize the interpretive differences between statutes, give all the emergency authority provisions the same scope, and streamline their interpretation.

### *B. CAA § 303 as a Base Model for a Unified Emergency Provision*

With a few small changes, the language of CAA § 303 could provide the base language for a modified, unified emergency provision or a series of identical provisions.

#### 1. The Unified Provision Should Use "May Present" Standard for Clarity and Public Protection

First, in any instance where there is language specifying that an endangerment to the public or the environment *must* be present, the language should be changed to specify instead that the endangerment *may* be present (a *may present* standard). This would be a change from the current language of

128. *Id.* ("[T]he Administrator may invoke this section when there is an imminent likelihood of the introduction into drinking water of contaminants that may cause health damage after a period of latency.") (citations omitted).
129. *Id.* ("Among those situations in which the endangerment may be regarded as 'substantial' are the following: (1) a substantial likelihood that contaminants capable of causing adverse health effects will be ingested by consumers if preventive action is not taken; (2) a substantial statistical probability that disease will result from the presence of contaminants in drinking water; or (3) the threat of substantial or serious harm (such as exposure to carcinogenic agents or other hazardous contaminants).").
130. U.S. Envtl. Prot. Agency, Final Guidance on Emergency Authority Under Section 1431 of the Safe Drinking Water Act 14 (Sept. 27, 1991) http://nepis.epa.gov/Exe/ZyPDF.cgi/P100NER9.PDF?Dockey=P100NER9.PDF ("Even though EPA should strive to create a record basis to support its Section 1431 actions, the Regions should recognize that EPA does not need uncontroverted proof that contaminants are present in or likely to enter the water supply or that an imminent and substantial endangerment may be present before taking action under Section 1431.") (citing CERCLA § 106(a) issue in United States v. Conservation Chem. Co., 619 F. Supp. 162, 193 (W.D. Mo. 1985)).
131. 42 U.S.C. § 330i (2012).
132. EPA Emergency Admin. Ord. No. 012116 (Jan. 21, 2016), https://www.epa.gov/sites/production/files/2016-01/documents/1_21_sdwa_1431_emergency_admin_order_012116.pdf.
133. Management Alert, *supra* note 9, at 1, 8.
134. *Id.*
135. *See* discussion *supra* Parts I and II.
136. Skaff, *supra* note 10.
137. *See* de Saillan, *supra* note 13, at 204–07.
138. *See supra* notes 7–9.
139. CWA § 504, 33 U.S.C. § 1364 (2012); *see also* sources cited *supra* note 1.

CAA § 303, which currently uses an *is presenting* standard, and other provisions like CWA § 504, which also use an *is presenting* standard. Such a change would have two advantages. The change would ensure that the CAA provision and others similarly worded would match the scope of the other provision to ensure that all of the emergency powers were treated consistently. It would also help to more clearly indicate that EPA can still act within the statute when there is thought that there is likely a risk, but when it is unclear if the risk is definitively certain.[140] This more protective standard could be useful in rapidly-developing emergencies. It should be noted that while this change could potentially expand the scope of CAA § 303 and other altered provisions, any such expansion would be relatively minor given that the difference may simply to resolve confusion rather than to change a definitive limit on EPA action.[141] Rather than enhancing EPA's ability to act in cases of known risk of uncertain magnitude, which is covered in subsequent language, the main effect of a change from an *is presenting* standard to a *may presenting* standard would be to provide increased clarity about EPA's options for action where the risk of harm itself may be difficult to show.

#### 2. The Unified Provision Should Standardize Scope of Application

The second change to standardize all of the statutes in question would be to ensure that each relevant emergency authority has a matching scope of application. While CAA § 303 may currently be applied to protect human health, welfare, or the environment, some of the other statutes do not provide protection as broadly. RCRA § 7003, for example, applies only to health and the environment, while SDWA applies only to human health. The language should be modified for consistency. This could be done by amending the statutes to include authority to protect public health or welfare or the environment, as is the case in CAA § 303 and CERCLA § 106. Such a change would allow EPA to adequately protect against contamination and risk in all types of resources and media, not just in some.

Unlike the other provisions discussed here, SDWA § 1431 contains language that enables EPA to act with emergency authority when there is an actual or threatened terrorist attack.[142] Given SDWA's focus on drinking water safety (i.e. water for direct human consumption), this additional language makes sense, but given that the other provisions already include language enabling response to danger in uncertain scenarios, such language may be unnecessary; whether or not similar language should be added to the other provisions is a topic for further discussion outside the scope of this Note. As with the above change to a *may present* standard, a change to make all the emergency authority provisions have uniform scopes of application would potentially broaden EPA's authority to act in cases where the risk is uncertain and to act to protect a wider variety of parties. These changes, though minor, would help to resolve potentially inconsistent treatment of emergencies occurring in different environmental media.

#### 3. The Unified Provision Should Balance Any Additional Coverage by Maintaining Restrictions on Use So That the Provision Remains for Emergencies Only

As mentioned above,[143] these emergency provisions will remain unusable for regular business that should ordinarily be handled through EPA's regular enforcement authority. Additionally, if further limitation on this authority is needed, the time period on the current CAA emergency order (sixty days)[144] could be applied to the remaining statutes. Also, all the modified statutes could contain the language that indicates that EPA must go to court first, if practical, and may only issue orders if the situation precludes filling in court as a remedy, as in CAA § 303.[145] Finally, the requirement that EPA notify or inform the state in which the action is occurring should be included, but this requirement should be kept discretionary, as it is in CAA § 303,[146] to ensure that people, public welfare, or the environment will not be put at risk in instances where this demand is not practical. This could be incorporated by adding the CAA § 303 language, "if it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect public health or welfare or the environment,"[147] to the universal provision or to each individual provision.

### *C. Additional Benefits From a Change to a Modified or Uniform Emergency Authority*

#### 1. Lower Administrative Burden on EPA for Guidance Document Updates and Cross-Media Responses

In addition to the increased legal clarity that standardizing the text(s) of the emergency provisions would provide, a secondary advantage would be that EPA might be better able to maintain its guidance documents on the relevant authorities and keep them updated, as there would be only one textual construction to discuss. This could also make responding to cross-media emergencies less difficult. EPA's most recent guidance document on CAA § 303 is from 1999.[148] The most recent guidance on

140. *See* discussion *supra* Section II.A.1.
141. *See* discussion *supra* Section I.B.
142. SDWA § 1431, 42 U.S.C. 300i (2012).
143. *See* discussion *supra* Part II.
144. *See* discussion *supra* Section I.B.
145. CAA § 303, 42 U.S.C. § 7603 (2012).
146. *Id.*
147. *Id.*
148. *See* 1999 CAA 303 Guidance, *supra* note 17. For this and all guidance documents discussed herein, it is possible that EPA has since updated the guidance, but that the updated guidance is not readily available. As of October 2017,

RCRA § 7003 is from 1997.[149] EPA's most recent guidance solely on CERCLA § 106(a) is from 1990,[150] and an additional guidance document for situations where CERCLA § 106(a) hazards may fall under multiple statutes ("cross-media situations") was created in 2001.[151] The EPA guidance document on the use of SDWA § 1431 is from 1991—the oldest of the four.[152]

The guidance documents should be revised to incorporate changes in case law and changes in the interpretation of the provisions over the past quarter-century. In fact, the age of the SDWA guidance document has already become an issue. A report from the EPA Office of the Inspector General regarding EPA's response to the Flint, Michigan, lead situation called for the SDWA guidance document to be updated, and for the document to provide greater clarity about the use of the provision.[153] EPA has committed to revising the SDWA guidance by November 30, 2017, but that determination was made by the EPA Office of Enforcement and Compliance Assurance under the prior administration.[154]

The most recent guidance, which covers CERCLA § 106(a) endangerments that may also be addressed under other statutes, provides discussion of response in situations where CERCLA § 106(a) is not the only applicable emergency provisions applicable.[155] This cross-media discussion and analysis could serve as a starting point for a future guidance on any revised or unified emergency provision.

### *D. Potential Concerns and Drawbacks of Switching to a Modified or Uniform Emergency Authority*

#### 1. Danger of Negative Precedent

Modifying the statutes to create uniformity in language and scope across different media could present many benefits, but there is the potential for serious negative consequences as well. If all emergency authority was found in a single provision, and courts began to interpret that provision more narrowly in even one or a few instances, emergency authority could be similarly weakened across the board. Adverse decisions could cause significant harm EPA's ability to respond to emergencies and protect the public during environmental disasters. As the ultimate goal of a statutory modification should be to ensure that EPA has the clear ability to quickly respond to conditions that are harming human health or the environment, this is an important concern that must be examined further.

#### 2. New Difficulty Creating Novel Suits to Address New Problems

In addition to the risk of restrictive negative precedent, a related potential drawback of having only one emergency authority is that the lack of variation in language could limit the ability of plaintiffs to develop novel suits under the statute's corresponding citizen suit provisions. The citizen suit provisions are separate from the emergency authority provisions (e.g., RCRA § 7002 and § 7003), but they may be interpreted together due to their similar constructions and protective objectives and changes.[156] Some practitioners suggest that citizen suits under RCRA may increase in number if EPA enforcement decreases.[157] Further, if there is less enforcement, more non-EPA entities may also try to bring suits in novel ways under one or more of the citizen suit provisions.[158] If all emergency authorities were brought into a single form and the corresponding citizen suit provisions were constrained by interpretations of that single form, the ability of citizens to bring new suits to resolve contamination affecting them would be harmed.

## IV. Conclusion

While the initial emergency provisions developed in the 1970s and 1980s were intended to be treated similarly, differing interpretations by the courts and amendments by Congress have led to substantive differences in EPA's authority to respond to emergency scenarios. These differences, in addition to creating confusion for EPA, the public, and the regulated community, may also contribute to delays or enforcement uncertainty in cases where enforcement author-

for example, EPA listed only its older CAA § 303 guidance from 1983 on its website. *See* U.S. Envtl. Prot. Agency, Guidance on Use of § 303 of the Clean Air Act (CAA) (Sept. 28, 2017), https://www.epa.gov/enforcement/guidance-use-section-303-clean-air-act-caa.

149. U.S. Envtl. Prot. Agency, EC-6-1998-378, Guidance on Use of § 7003 of RCRA (Oct. 20, 1997), https://www.epa.gov/sites/production/files/2013-10/documents/use-sec7003-mem.pdf.

150. U.S. Envtl. Prot. Agency, OSWER Dir. No. 9833.0-1a, Guidance on CERCLA § 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions (Mar. 7, 1990) (providing guidance for the use of §106(a) in traditional, single-statute cases), https://www.epa.gov/sites/production/files/documents/cerc106-uao-rpt.pdf.

151. U.S. Dept. of Justice & U.S. Envtl. Prot. Agency, Memorandum on Use of CERCLA § 106(a) to Address Endangerments That May Also Be Addressed Under Other Environmental Statutes (Jan. 18, 2001) [hereinafter 2001 CERCLA Guidance], https://www.epa.gov/sites/production/files/2013-10/documents/ise-crossmedia.pdf.

152. U.S. Envtl. Prot. Agency, Final Guidance on Emergency Authority Under § 1431 of the Safe Drinking Water Act (Sept. 27, 1991), https://goo.gl/1PExck.

153. Management Alert, *supra* note 9, at 8 (calling for an update that would include examples of the use of § 1431, provide current authority delegations, and give employees direction about when to use § 1431 action).

154. Memorandum Responding to the Office of Inspector General Management Alert Project No. 17-P-0004 Concerning EPA Authority to Issue Drinking Water Emergency Orders, Cynthia Giles, Assistant Administrator 2 (Nov. 21, 2016), https://www.epa.gov/sites/production/.../_epaoig_17-p-0004_agency_response.pdf ("OECA [Office of Enforcement and Compliance Assurance at EPA] intends to issue updated SDWA § 1431 guidance by November 30, 2017."); *n.b.* As of October 1, 2017, a search of EPA's website did not show any new updates.

155. 2001 CERCLA Guidance, *supra* note 152, at 16-19.

156. *See* discussion about RCRA §§ 7002 and 7003, *supra* Part I.D.

157. Yohannan, Suzanne, *Environmental Policy Alert, Waste, Novel RCRA Citizen Suits Could Increase if EPA Enforcement Diminishes, Imminent Hazard News*, www.insideepa.com (Feb. 15, 2017).

158. *Id.*

ity is unclear. By standardizing the language of the emergency provisions across several statutes to create a more uniform and standard approach to EPA emergency action and updating EPA guidance to match this new, standardized approach, greater clarity could be achieved. Using CAA § 303 as the base language for a unified statute and making specific modifications could provide a comprehensive protection authority while employing time limits and other limitations to ensure that this authority is not applied too broadly. Streamlining the disparate provisions could also lower the administrative burden required from EPA. These changes could result in greater protection of human health and the environment across all environmental media.