



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 6 1992

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Transmittal of Superfund Removal Procedures--
Removal Enforcement Guidance for On-Scene Coordinators
(OSWER Directive 9360.3-06)

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PURPOSE

The purpose of this memorandum is to transmit new guidance to assist On-Scene Coordinators (OSCs) in the performance of enforcement activities at Superfund removal actions. This guidance supersedes sections of the Superfund Removal Procedures, Revision No. 3, February 1988 (OSWER Directive 9360.0-03B).

BACKGROUND

EPA issued the third edition of the Superfund Removal Procedures manual (SRP) in May 1988. The next edition is planned for completion in 1992 and calls for restructuring the manual into ten stand-alone documents, each of which will cover a separate topic. We believe that this restructuring will make the manual easier to use. The first volume of the new SRP, completed in September 1990, addressed the preparation of Action Memos. The second volume, on consideration of applicable or relevant and appropriate requirements (ARARs) at removal sites, was completed in August 1991. Other volumes which will address such topics

Response Reporting and Public Participation will be published over the next few months.

IMPLEMENTATION

In keeping with the Agency's stated goal of "enforcement first," enforcement considerations should be given serious attention by OSCs at every removal site. This new enforcement guidance will assist you in achieving this goal. Please ensure that all staff involved with the implementation of removal actions are provided with this guidance. Bound copies of the guidance document will be shipped directly to the Regions for distribution.

If you have any questions on this guidance, please contact Elizabeth Zeller at FTS 260-7735.

Attachment

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Publication 9360.3-06
April 1992

SUPERFUND REMOVAL PROCEDURES
REMOVAL ENFORCEMENT GUIDANCE
FOR ON-SCENE COORDINATORS

Office of Emergency and Remedial Response
U.S. Environmental Protection Agency
Washington, DC 20460

NOTICE

The procedures set out in this document are intended solely for the guidance of Government personnel. They are not intended, nor can they be relied upon to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the guidance provided in this document, or to act at variance with the guidance, based on an analysis of site circumstances. The Agency also reserves the right to change this guidance at any time without public notice.

This document is part of a ten-volume series of guidance documents collectively titled the Superfund Removal Procedures. These stand-alone volumes update and replace OSWER Directive 9360.0-3B, the single-volume Superfund Removal Procedures manual, issued in February 1988.

Each volume in the series is dedicated to a particular aspect of the removal process and includes a volume-specific Table of Contents, Reference List, and Key Words Index. The series comprises the following nine procedural volumes:

The Removal Response Decision: Site Discovery to Response Decision

Action Memorandum Guidance

Response Management: Removal Start-up to Close-out

Removal Enforcement Guidance for On-Scene Coordinators

Public Participation Guidance for On-Scene Coordinators: Community Relations and the Administrative Record

Removal Response Reporting: POLREPs and OSC Reports

Special Circumstances

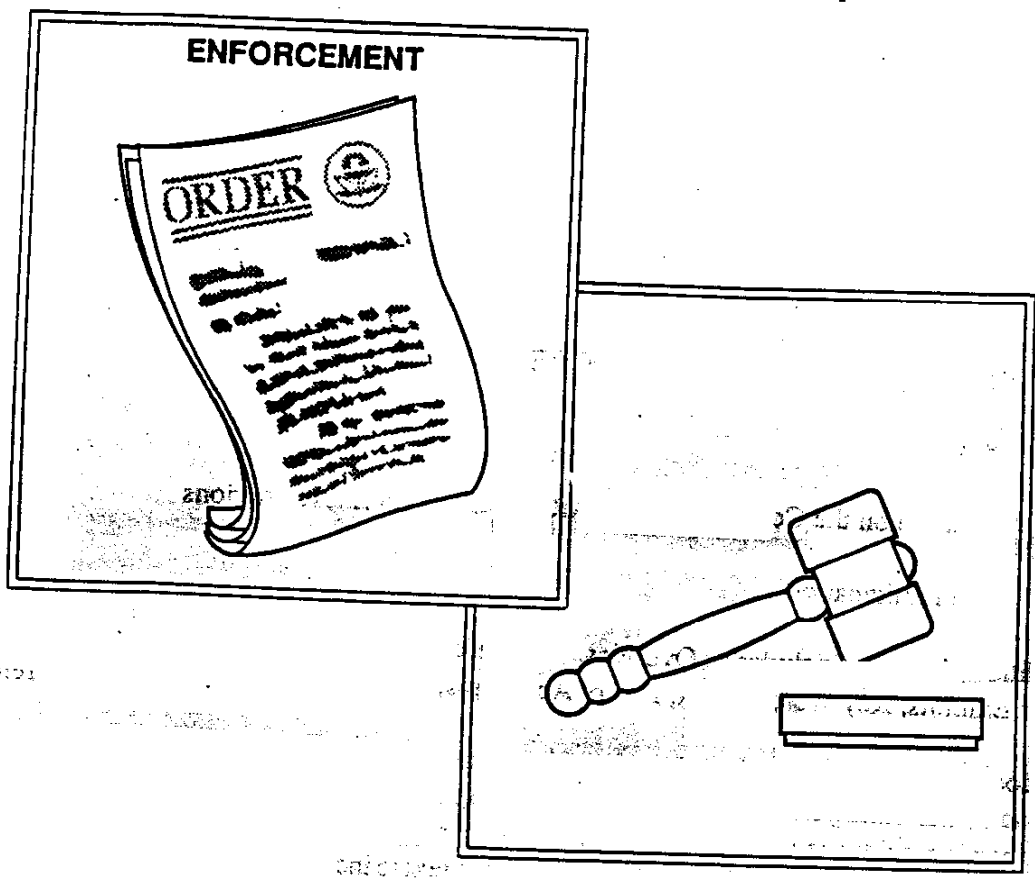
Guidance on the Consideration of ARARs During Removal Actions

State Participation.

In addition, the series includes an Overview volume, containing a comprehensive Table of Contents, List of Exhibits, Key Words Index, List of Acronyms, and Glossary, for use as a quick reference.

This document summarizes the relevant guidance and statutory authorities for conducting enforcement activities during removal actions. "Appendix A. References" provides a comprehensive list of supporting guidance documents that may be consulted for additional information on relevant topics. Bracketed numbers [#] appear throughout the text to indicate specific references in Appendix A which lists additional guidance on particular topics. Consult the reference documents for a more detailed explanation of removal or enforcement policies and procedures. In addition, appropriate sections of statutes and regulations are also cited throughout the text, with a full citation of each statute and regulation appearing in Appendix A. Appendix B contains the Key Words Index.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) gives the President authority to negotiate settlements, issue orders to persons including Potentially Responsible Parties (PRPs), or sue PRPs to repay cleanup costs when the Trust Fund established under CERCLA has been used to finance removal or remedial actions. The President has delegated this authority in large part to the Environmental Protection Agency (EPA). The steps EPA takes to reach settlement or compel responsible parties to perform cleanups or pay for them are parts of the Superfund enforcement process. On-Scene Coordinators (OSCs) conduct or contribute to many steps in removal enforcement.



Enforcement implements the Congressional intent of CERCLA: "The Polluter Pays."

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INTRODUCTION

Overview

One of the primary objectives of CERCLA and EPA policy with regard to enforcement is that parties causing or contributing to a release of hazardous substances should take responsibility for cleanup. Broadly speaking, under CERCLA section 107, potentially responsible parties (PRPs) comprise:

- Certain past and present owners and/or operators of a facility where there is or has been a release or threatened release of hazardous substances
- Persons who arranged for disposal or treatment of hazardous substances at a facility from which there is a release or threat of a release
- Persons who accept or accepted hazardous substances for transport to disposal or treatment facilities and selected the site from which there is an actual or threatened release.

OSCs and Regional technical enforcement staff¹ routinely join forces to identify and compel PRPs to perform removal actions or pay for a government cleanup. The goal of this guidance is to describe the roles and responsibilities for conducting enforcement and to describe the procedures to take during enforcement actions. Further information on removal enforcement procedures may be found in the Enforcement Project Management Handbook [16].

EPA philosophy increasingly emphasizes enforcement in an effort to use limited program resources effectively to ensure that the responsible party conducts or funds response activities. Most recently, the Management Review of the Superfund Program (the "90-Day Study") and its subsequent implementation plan articulated a clear and straightforward direction for the Superfund program. *A key element of this strategy is the "enforcement-first" approach.* The goal of this approach is to compel PRPs to conduct response actions and cleanups in lieu of government-financed response actions. This approach mobilizes private party resources to conduct cleanup from the start, rather than using the Fund and recovering costs through litigation later. As one method of obtaining more PRP cleanups, EPA will increase the use of enforcement and settlement authorities.

Although "enforcement first" is an underlying principal of the removal process, the urgent nature of certain removal actions may require response initiation by the Agency before

¹ For consistency, this guidance refers to Regional technical enforcement staff; individual Regions, however, may use other Region-specific terms.

ENFORCEMENT AUTHORITIES

undertaking extensive enforcement activities. For example, prior to the initiation of cleanup, emergencies typically allow time for only limited enforcement action, such as an oral demand for cleanup. In these circumstances, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) gives the OSC authority to balance enforcement priorities with those of environmental protection, allowing the OSC to choose the latter as a means of achieving EPA's primary goal of protecting public health and the environment.

Generally, a complete PRP search and subsequent enforcement activities are conducted at sites, even if a Fund-financed removal action must commence prior to PRP identification and notification. Time-critical removal actions, where up to six months can elapse before the initiation of on-site activities, or non-time-critical removal actions, which permit a planning period of more than six months, offer time for more thorough enforcement efforts prior to the start of on-site activity [16].

Beyond the immediacy of the need to respond to a release, *OSCs, in close coordination with the Office of Regional Counsel (ORC), need to evaluate the following factors in determining how vigorously to pursue enforcement to compel performance by PRPs:*

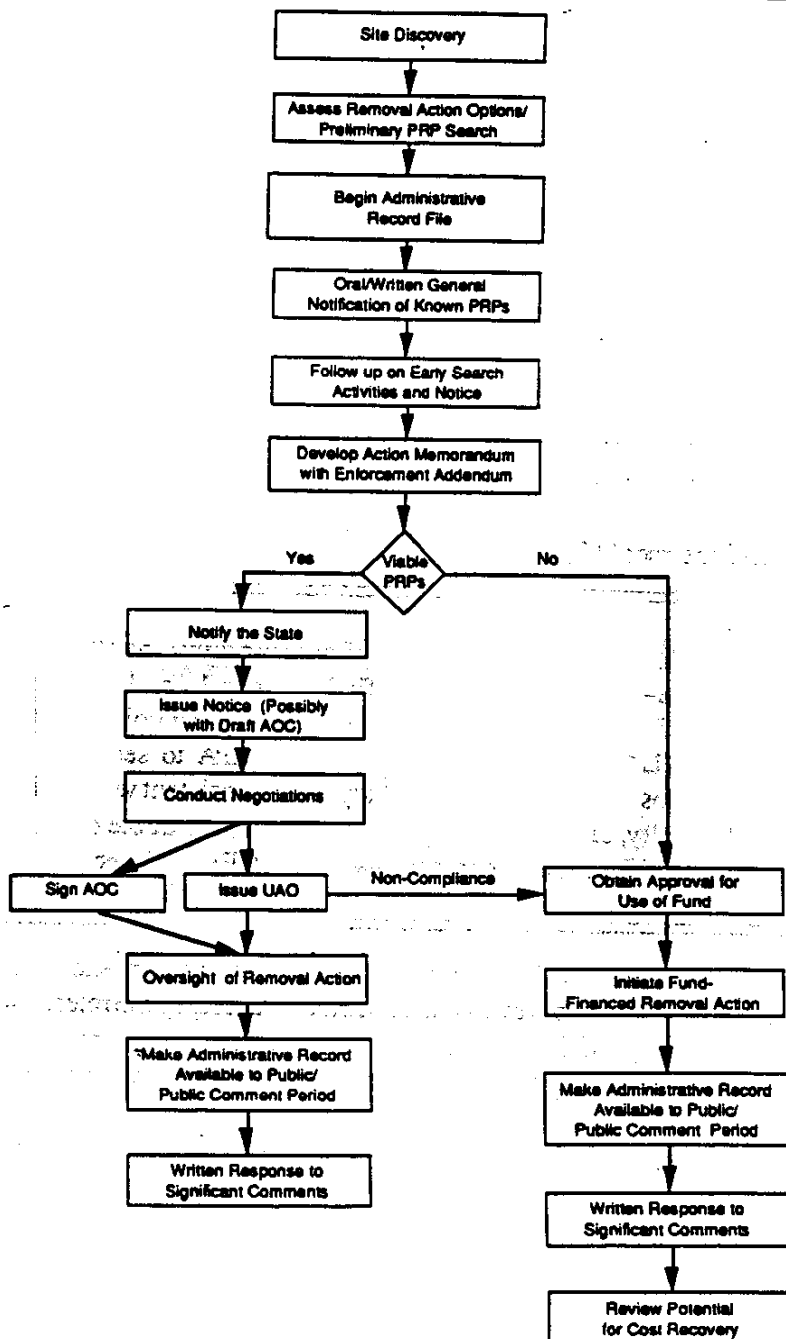
- Evidence indicates that PRPs are liable and that they have the financial capability to conduct the removal action.
- The OSC can define the removal action with enough specificity -- such as by treatment technology, or defining the goals or specifying activities required by the action -- so as to instruct PRPs as to what is expected.
- The PRPs command the technical competence to respond or have the resources to hire a contractor who does.

The OSC should re-evaluate the above criteria throughout the removal action, in the event that enforcement circumstances change. Exhibit 1 presents an overview of the removal enforcement process from start to finish and outlines the OSC's role in this process.

Enforcement Authorities

Generally speaking, EPA has been delegated the authority under CERCLA section 104(a) to remove or arrange for the removal of any hazardous substance, pollutant, or contaminant if it is deemed necessary to protect the public health or welfare or the environment. Fund-lead removal actions are limited by section 104(c) to actions not exceeding either \$2 million in cost or 12 months in duration, unless an exemption to these limits has been granted. Section 104(b) of CERCLA authorizes studies and investigations to determine the existence, source, and extent of the release or threatened release, while section 104(e) provides a means of gathering information on PRP liability, site history, and the identity of additional PRPs.

EXHIBIT 1. OVERVIEW OF REMOVAL ENFORCEMENT ACTIVITIES AND THEIR RELATIONSHIP TO REMOVAL ACTIONS*



* This general overview of removal enforcement may not apply in all situations, especially emergencies.

ENFORCEMENT AUTHORITIES

CERCLA section 122 authorizes EPA to negotiate a settlement with PRPs through an Administrative Order on Consent (AOC) under section 106. Section 106 also authorizes EPA to compel PRP response through issuance of a Unilateral Administrative Order (UAO), and to enforce the terms of an Administrative Order and compel non-complying PRPs or non-PRPs (e.g., adjacent landowners) to respond through judicial action [9, 15]. Administrative Orders describe actions to be taken at a site and should be placed in the administrative record file.

Administrative Order on Consent - A legally enforceable agreement signed by EPA and PRPs whereby PRPs agree to perform or pay the cost of site cleanup, and may forfeit the right to make a claim against the Fund. AOCs do not have to be approved by a judge, but are enforceable in court.

Unilateral Administrative Order - A legally enforceable order issued by EPA to compel PRPs to perform a response action. It is EPA policy to proceed with a UAO if PRPs fail to respond appropriately to the notification and negotiation process, provided that necessary criteria are met [15].

Section 107 of CERCLA outlines the basic liability provisions of the statute. It imposes strict liability upon the classes of PRPs identified on page 1, and it has been interpreted by the courts to impose joint and several liability upon all PRPs involved at a site where harm is not divisible. CERCLA section 107 also authorizes EPA to seek reimbursement from PRPs for all response costs incurred by the Agency not inconsistent with the NCP, including interest [6, 8]. Additionally, section 107 authorizes EPA to seek treble damages as a result of PRPs failing without sufficient cause to comply with a CERCLA section 106 order.

Strict Liability - A "no fault" standard of liability, as opposed to a lesser standard of negligence. PRPs are liable even if the problems caused by the release were unforeseeable, the PRPs acted in good faith, or state-of-the-art waste management practices were in use at the time of disposal. Only limited defenses are available under section 107(b).

Joint and Several Liability - In situations where more than one PRP is involved, it may be difficult to determine each PRP's contribution to the release, i.e., the harm is "indivisible." The doctrine of joint and several liability allows EPA to sue one or more PRPs, or all of them together. If the suit is successful, each PRP is liable for the entire conduct or cost of site cleanup; each PRP bears the burden of seeking reimbursement from other PRPs, if appropriate.

Treble damages - CERCLA section 107(c)(3) authorizes EPA to obtain punitive damages of three times the amount of any costs incurred by the Fund as a result of PRPs failing without sufficient cause to take proper action under a CERCLA section 106 order. Treble damages can be sought in cost recovery cases where an administrative order has been issued previously.

CERCLA section 122(a) authorizes EPA to enter into agreements with PRPs to perform response actions. Section 122(e) provides special notice procedures, including a 60-120 day moratorium on EPA action to facilitate negotiations, which can be used to negotiate non-time-critical removal actions.

The NCP sets out, among other things, a division of responsibility among the various levels of government, the appropriate role of private parties, and procedures for undertaking response actions. Section 300.160 of the NCP also provides requirements for response action documentation to support enforcement and cost recovery actions. The NCP applies to all response actions taken pursuant to the authorities of CERCLA or the Clean Water Act (CWA) as amended by the Oil Pollution Act of 1990 section 311, and is applicable to releases or threatened releases of hazardous substances into the environment, releases or threatened releases of pollutants or contaminants that may present an imminent and substantial danger to public health or welfare, and releases or threatened releases of oil onto the navigable waters of the U.S. or its adjoining shorelines.

ENFORCEMENT ROLES AND RESOURCES

Roles and resources for conducting enforcement activities vary from Region to Region. Two basic structures, however, currently predominate in Regional enforcement organizations:

- A section of OSCs conducts Fund-financed removal actions, but not enforcement work. A separate section of enforcement project managers conducts both removal and remedial enforcement work.
- OSCs conduct both removal and enforcement work, with other Regional staff providing concurrence on enforcement-related decisions.

Whatever the Regional enforcement structure, *close coordination between the OSC, ORC, and other enforcement staff is a critical component of every removal action* to ensure appropriate use of resources in identifying and compelling PRPs to respond. Exhibit 2 presents a summary of the roles and responsibilities of OSCs and other Regional staff available to support OSCs [16].

OSC Roles

The OSC's role in enforcement activities during removal actions can be broadly defined as follows:

- Initiating and supporting PRP search, notification, and negotiation activities
- Providing a work plan or a scope of work for Administrative Orders detailing the proposed response
- Documenting or assembling documentation on all aspects of the removal action including decision and cost recovery documentation, and establishing the site file and administrative record file, within the time required by the NCP
- Approving the release of information regarding EPA and PRP negotiations
- Overseeing the PRP response
- Assuring PRP compliance with an AO.

The participation of OSCs is vital to all phases of the enforcement process, although the extent of OSC involvement may vary.

EXHIBIT 2. ENFORCEMENT ROLES AND RESPONSIBILITIES [16]

<p>ON-SCENE COORDINATOR *</p>	<ul style="list-style-type: none"> • Initiates and supports PRP search, notification, and negotiation activities • Provides a scope of work for Administrative Orders • Drafts Administrative Order • Documents and assembles documentation on all aspects of the removal action including decision and cost recovery documentation • Reviews and approves PRP plans/proposal for cleanup and oversees PRP response
<p>REGIONAL TECHNICAL ENFORCEMENT STAFF</p>	<ul style="list-style-type: none"> • Supports enforcement activity
<p>REGIONAL COUNSEL</p>	<ul style="list-style-type: none"> • Supports PRP search • Reviews or assists drafting of orders and participates in negotiations and settlements • Reviews site documents
<p>PUBLIC PARTICIPATION STAFF</p>	<ul style="list-style-type: none"> • Coordinates and monitors contractor support for community relations aspects of enforcement-lead removal action (e.g., public meetings) • Assists with preparation of Community Relations Plan • Organizes site file and administrative record file • Develops press releases • Provides agency spokesperson
<p>REGIONAL ADMINISTRATOR or APPROPRIATE DESIGNEE</p>	<ul style="list-style-type: none"> • Issues Administrative Orders • Approves Action Memorandum
<p>CONTRACTOR SUPPORT</p>	<ul style="list-style-type: none"> • Provides technical support for all aspects of enforcement activities

* These activities may be conducted by a Remedial Project Manager when a removal action is performed at a site where remedial activity has been initiated.

** Regional technical enforcement staff are generally organized into separate units specializing in certain enforcement tasks or in a comprehensive section that manages all enforcement activities.

ROLES AND RESOURCES

Regional Technical Enforcement Staff

All Regions have enforcement staff to undertake or assist with enforcement activities. Regional technical enforcement staff consist of personnel with scientific, accounting, document management, and legal expertise who work with OSCs to ensure that enforcement responses meet both program objectives and legal requirements. Regional technical enforcement staff are generally organized in one of two ways:

- As a comprehensive enforcement section that manages all enforcement activities for both the removal and remedial programs
- As separate enforcement units specializing in certain tasks such as PRP searches, civil investigations, and cost documentation. For example, some Regions have PRP search units with civil investigators available to assist in PRP searches and criminal investigations.

Enforcement staff and the OSC need to coordinate closely to ensure that enforcement issues have been thoroughly investigated, documented, and resolved.

Office of Regional Counsel

ORC is composed of attorneys for each Region who provide counsel and litigation support for both the removal and remedial programs. ORC attorneys are involved particularly in negotiations and settlements, drafting administrative orders, and reviewing site documents for sufficiency of enforcement information.

OSCs should involve ORC in removal enforcement as soon as possible. This involvement is important because the ORC can assist in developing enforceable Administrative Orders and EPA's cost-recovery case. ORC also may be able to assist in the identification of PRPs and facilitate the removal enforcement process. If a removal action is to be conducted at a site with a remedial action already underway, the OSC should consult the ORC before beginning a PRP search in order to avoid duplication of effort.

Public Participation Staff

Among the Regional personnel available to assist OSCs with the enforcement aspects of public participation planning and implementation are the Community Relations Coordinator, the Administrative Record Coordinator, and Regional Public Affairs staff. The Community Relations Coordinator serves as the OSC's primary resource for coordinating and monitoring contractor support for the community relations aspects of an enforcement-lead removal action, and may direct the preparation of community relations plans, assist with

community interviews, and maintain the information repository [14]. The Administrative Record Coordinator organizes information for the administrative record and may provide or identify materials from which to compile the administrative record and the information repository [10]. Public Affairs personnel provide support for the OSC in media-related activities such as developing press releases or acting as an Agency spokesperson.

Contract Resources

Contractor support is available to the OSC or Regional technical enforcement staff to assist in PRP searches, and the issuance and compilation of enforcement documentation:

- The Technical Enforcement Support (TES) contracts provide technical assistance to EPA Headquarters and Regional offices in the enforcement of CERCLA for all enforcement-related activities, except PRP oversight.
- Technical Assistance Team (TAT) contracts provide initial PRP search work, title searches, and monitoring of PRP-conducted on-site investigations.
- The Alternative Remedial Contracting Strategy (ARCS) contracts provide technical assistance to Regional offices for all enforcement oversight activities.

These contractors ensure smooth operation of enforcement activities through coordination with Federal, State, and local authorities.

Criminal Investigations

OSCs or other enforcement personnel must notify the appropriate Regional Office of Criminal Investigations or the National Enforcement Investigations Center (NEIC) immediately when they suspect criminal activity [2]. The NEIC may initiate a criminal investigation, working with the OSC and ORC.