

# REMOVAL ENFORCEMENT PROCEDURES

Enforcement activities described in this section include:

- PRP searches
- PRP notification and information exchange
- State notification
- Negotiations, settlements, and orders
- Oversight of enforcement-lead removal actions
- Documentation
- Public participation.

Exhibit 3 provides a checklist to assist OSCs and other Regional enforcement staff, such as civil investigators and cost recovery staff, in ensuring that all appropriate enforcement activities have been addressed at each removal site [16]. Cost recovery efforts are discussed in the following section (see p. 26).

## PRP Searches

Agency policy requires that known, viable PRPs conduct removal actions wherever possible [16, 17]. PRP searches should begin as soon as a removal action appears likely. ORC should be consulted before a removal action is commenced or PRP search work is undertaken because ORC may have valuable information concerning the PRP's identity. The urgent nature of emergency and time-critical removal actions, however, often necessitates initiation of a Fund-financed response prior to an extensive PRP search. Even if a Fund-financed removal action must begin before PRP identification and notification, *a complete PRP search should be conducted at sites*. Complete and accurate PRP searches support later negotiations, settlements, and cost recovery.

PRP searches vary in size and scope depending on the amount of time between discovery and execution of the Action Memo, the urgency of the situation, and the amount to be spent for the removal action. Exhibit 4 summarizes PRP search activities for emergency, time-critical, and non-time-critical removal actions. Regardless of the urgency of the situation, *efforts to*

**EXHIBIT 3. ENFORCEMENT CHECKLIST [16, 17]**

The following checklist has been developed to assist OSCs in conducting and coordinating enforcement procedures between other enforcement personnel and contract support. OSCs should determine that the following activities are conducted at all removal sites when appropriate:

**PRP Search, Identification, and Notification**

- Document or photograph visual evidence linking PRPs to a site, including drum labels, shipping records, and vehicle registration
- Conduct oral inquiries with PRPs and other observers (e.g., public officials, reporters) at the site
- Notify NEIC if criminal activity is suspected
- Issue CERCLA section 104(e) information requests\*
- Prepare a baseline PRP search report
- Initiate a title search\*
- Conduct off-site interviews\*
- Review relevant site records\*
- Prepare interim final PRP search report\*
- Notify PRPs orally of potential CERCLA liability (with written confirmation)
- Notify PRPs in writing of liability\*
- Issue special notice letters\*

**Preparation for Negotiation**

- Establish the administrative record
- Notify State prior to negotiations or issuance of an Administrative Order
- Prepare negotiation strategy\*
- Draft Action Memo with enforcement addendum
- Prepare draft Administrative Order on Consent (AOC)
- Negotiate AOC or issue Unilateral Administrative Order (UAO)

**Removal Action**

- Track daily costs and project future costs for Fund-lead removal actions
- Make the administrative record publicly available within sixty days after the initiation of on-site activities (emergencies and time-critical actions) or when the Engineering Evaluation/Cost Analysis (EE/CA) is made available for public comment (non-time-critical actions)
- Attend or coordinate oversight meetings including initial, status, and completion meetings, as well as site inspections
- Oversee PRP compliance with the orders

**Cost Recovery**

- Issue demand for payment of past and future costs plus interest
- Document decision not to pursue cost recovery (if applicable)
- Refer cost recovery cases to Department of Justice within twelve months of completing the removal action
- Complete Interim Final PRP Search Report

\* This activity should be conducted if time permits.

**EXHIBIT 4. PRP SEARCH ACTIVITIES\* [16]**

**Activities**

<p>Follow-up search conducted later.</p> <p>Preliminary search:</p> <ul style="list-style-type: none"> <li>• Gather visual evidence from site</li> <li>• Conduct on-site interviews</li> <li>• Consult municipal officials</li> <li>• Review readily available site records</li> </ul> <p><b>Emergency</b></p>	<ul style="list-style-type: none"> <li>• Use TAT for preliminary activities</li> <li>• Issue CERCLA section 104(e) information requests</li> <li>• Document additional evidence linking PRP to site (e.g., photos)</li> <li>• Conduct a title search (coordinate with civil investigator)</li> <li>• Conduct off-site interviews</li> <li>• Review relevant site records</li> <li>• Gather visual evidence from site</li> <li>• Conduct on-site interviews</li> <li>• Consult municipal officials</li> <li>• Review readily available site records</li> </ul> <p><b>Time-Critical</b></p>	<ul style="list-style-type: none"> <li>• Prepare interim final PRP search report</li> <li>• Issue CERCLA section 104(e) information requests regarding generators and transporters</li> <li>• Prepare baseline PRP search report</li> <li>• Document additional evidence linking PRP to site (e.g., photos)</li> <li>• Conduct a title search (coordinate with civil investigator)</li> <li>• Conduct off-site interviews</li> <li>• Review relevant site records</li> <li>• Gather visual evidence from site</li> <li>• Conduct on-site interviews</li> <li>• Consult municipal officials</li> <li>• Review readily available site records</li> </ul> <p><b>Non-Time-Critical</b></p>
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**Urgency of the Situation**

\*NOTE: Example for descriptive purposes only; some steps may follow removal actions.

*locate PRPs should continue throughout the removal action to support cost recovery and the possibility of PRP involvement in any continuing or future response actions.*

### Emergency Actions

In emergency situations, where the release or threatened release requires that on-site clean-up activities begin within hours of the lead agency's determination to conduct a removal action, and immediate protection of public health, welfare, and the environment is the first priority, *OSCs follow streamlined PRP search procedures.* For example, in certain emergency situations such as train or truck wrecks, the PRPs are readily identifiable and are willing to handle the response. In these cases, a PRP search may not need to be conducted. In other emergency situations, the OSC may need to take expeditious actions to abate the immediate threat before conducting a PRP search. However, in many emergency situations, a preliminary PRP search can be completed before taking actions to abate the immediate threat. A preliminary PRP search under emergency conditions should include making oral inquiries, reviewing site records, and searching for visual evidence to link PRPs to a site. Oral inquiries may include conversations with municipal officials, site owners and operators, and site personnel. A file examination consists of a review of on-site records pertinent to PRP identification, including bills of lading and other readily available owner/operator documents. Visual documentation includes drum labels and other obvious evidence to link PRPs to a site. OSCs should work with enforcement personnel to collect and document potential evidence.

### Time-Critical Actions

In time-critical situations, where a period of up to six months is available before cleanup activities must begin, OSCs can expand upon the preliminary PRP search activities discussed above for emergency situations. Enforcement staff initiate title searches, off-site interviews, and CERCLA section 104(e) information requests to obtain information on the site's history, identification of additional PRPs, and financial information used for determining whether or not to issue an Administrative Order [11].

### Non-Time-Critical Actions

In non-time-critical situations, where a period of six months or more is available before clean-up activities must begin, OSCs and Regional enforcement staff can conduct the same preliminary PRP search activities described above. This search results in a PRP baseline report. In addition, Regional technical enforcement personnel conduct a comprehensive PRP search, including the identification of generators and transporters. Enforcement personnel also decide what specialized tasks will be performed, such as an assessment of PRP financial capability to pay for a removal action. Early involvement of ORC in the PRP search and financial assessment can help OSCs and enforcement staff organize search efforts and can result in a better product from a contractor or civil investigator (if involved).

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removal actions, OSCs or enforcement staff may request the assistance of NEIC or contractor support. This expanded process results in an interim final PRP search report.

### **PRP Notification**

Following identification of PRPs, Regional enforcement staff, in consultation with OSCs, initiate actions to obtain PRP response. When possible, the Regional program office should issue notice letters to identified PRPs concerning their potential liability and inform them of the intended response action prior to the initiation of a removal action [12]. Regional enforcement staff, in coordination with OSCs, develop notice letters, which are subsequently issued by the Regional Administrator or his designee. Three types of removal notice letters exist [12,16]:

- Notice of Potential Liability and EPA Conduct of Removal Action which is a notice of potential liability for a removal action that EPA has undertaken or intends to undertake as well as the opportunity for PRPs to conduct work (this may be given orally followed by written confirmation in emergencies)
- Notice of Potential Liability and Offer to Negotiate for Removal Action which is a special notice under CERCLA section 122(e), that formal negotiations will be held and that a formal moratorium on a removal action exists<sup>2</sup>
- Notice of Potential Liability for Removal Action which is an explanation under CERCLA section 122(a) of why special notice procedures under CERCLA section 122(e) were not followed.

Model removal notice letters are available in Office of Solid Waste and Emergency Response (OSWER) Directive 9834.10-1b [13].

### **Emergency Actions**

For emergency removal actions, OSCs may notify PRPs orally by telephone or in person. The Regional office then confirms the oral notification and any requests for response by sending the PRP a general notice letter which should be reviewed by ORC when time permits. While a written notice letter usually precedes an Administrative Order, this is not always possible in emergencies.

<sup>2</sup> Emergency and time-critical removal actions do not follow special notice procedures due to the urgency of these situations. Under CERCLA section 122(e)(5), removal actions may be carried out during the moratorium when a significant threat to public health or the environment exists during the moratorium [12].

## Time-Critical Actions

For time-critical removal actions, OSCs follow the same notification procedures for obtaining PRP response as in emergency actions. However, Regional enforcement personnel should issue notice letters before the start of the removal action. Enforcement staff and the OSC should also always review preliminary PRP search activities to ensure that identified PRPs have been notified.

## Non-Time-Critical Actions

For non-time-critical removal actions, special notice letters may be issued to invoke formal negotiations and a 60-120 day moratorium on EPA response actions. First, OSCs and enforcement staff review the interim final PRP search report and decide if additional resources should be expended either to identify more PRPs or to further establish the liability of identified PRPs. The PRP search review and follow-up activities should include the use of section 104(e) information requests [11]. Prior to the issuance of special notice letters or the beginning of negotiations, ORC and other enforcement staff should be consulted. OSCs and Regional enforcement staff then should issue the special notice letters and schedule negotiations as soon as possible to secure an enforcement-lead removal action within the established time frame.

## **State Notification**

For a removal action, *States should always be notified prior to negotiations for, or issuance of, an Administrative Order.* The appropriate State department or agency should be notified by letter, except in an emergency when preliminary notification may be made by telephone. All telephone notifications must be followed by written confirmation.

## **Negotiations, Settlements, and Orders**

Where viable PRPs have been identified and site conditions allow, OSCs, in consultation with Regional enforcement staff and ORC, plan and conduct negotiations and develop AOCs [12]. Prior to conducting negotiations, OSCs, with appropriate support from Regional enforcement staff and ORC, should:

- Draft and issue notice letters specifying the work to be done and establishing a time frame to negotiate an AOC
- Draft and obtain a copy of the Action Memo/Enforcement (see p. 21) for use in negotiating an AOC; although a completed copy is not required, the Action Memo serves as a useful leverage tool

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- Draft and send a proposed AOC to the PRPs with the notice letter or shortly thereafter.

Preparing the above documents prior to negotiations ensures that EPA will enter negotiations with a well-defined plan for PRP or, if necessary, Agency response.

While conducting negotiations, OSCs and Regional enforcement staff meet with PRPs; negotiate the language of the AOC including general overall schedule and technical concepts in the work plan; and complete either an AOC that the PRPs agree to and sign, or issue a UAO. While the preferred outcome of negotiations is an AOC, EPA has the authority under section 106 to issue a UAO to compel non-complying PRPs or non-PRPs (e.g., adjacent landowners) to conduct or comply with the removal action [9, 15, 16]. In some emergency or time-critical removal actions, sufficient time to negotiate consent agreements with PRPs is not available; therefore, OSCs and Regional enforcement staff may find it necessary to bypass negotiations for an AOC and immediately issue a UAO.

For simple removal actions, the AOC may include a work plan as an attachment. For more complex removal actions, the AOC often details the scope of work and requires the PRP to draft a detailed work plan as a first deliverable. All AOCs should contain provisions requiring reimbursement of the government's past costs and oversight costs.

### EXHIBIT 5. CHECKLIST OF CRITERIA TO ISSUE UAO

The following checklist has been developed to assist OSCs in determining if a UAO may be issued. OSCs should determine that the following activities are conducted prior to issuing a UAO.

- \_\_\_ Appropriate parties have been identified
- \_\_\_ Evidence exists of release or threatened release of a hazardous substance
- \_\_\_ Evidence exists that the release or threatened release is from a facility
- \_\_\_ Evidence exists of an imminent and substantial endangerment to the public health or welfare or the environment
- \_\_\_ Notice has been given to the affected State
- \_\_\_ Removal action is consistent with applicable law, CERCLA and the NCP.

If viable, recalcitrant PRPs do not respond to their notice letters and do not sign an AOC, OSCs and Regional enforcement staff develop and issue a UAO. Exhibit 5 provides a checklist to assist OSCs in ensuring that all criteria have been satisfied to issue a UAO.

The provisions of a UAO are similar to an AOC, except that more detailed findings of fact may be stated. Also, UAOs usually contain a provision requiring that PRPs provide notice of intent to comply within a specified period and typically do not contain past costs, stipulated penalties, or dispute resolution clauses. OWPE is developing a directive containing a model UAO and a model AOC to assist OSCs in preparing these documents.

### Oversight of Enforcement-Lead Removal Actions

Administrative Orders detail the activities PRPs must undertake or the cleanup goals they must achieve along with the completion date for the entire removal action [16]. OSCs, through the oversight process, monitor and determine compliance with the AOC or UAO. OSCs remain on the site, contact on-site personnel daily, or visit the site periodically to monitor compliance. Contractors may assist OSCs in overseeing field activities and reviewing work plans, data, and reports. If the enforcement-lead removal action is not conducted appropriately or in a timely manner, in accordance with the AOC or UAO, OSCs and Regional enforcement personnel may seek penalties, initiate a CERCLA section 106 judicial action, or perform the removal action. In either case, oversight activities should include, but are not limited to:

- An initial meeting of the primary clean-up contract official, PRP-designated coordinator, and OSC to review the work to be conducted and establish methods of contact and procedures, in the event of a deficiency in PRP performance
- Periodic status meetings with, or reports submitted to, the OSC to monitor PRP progress
- Site inspections at critical points in the removal process.

In addition, a site completion meeting should be arranged to verify that all work was performed as directed.

### Documentation

#### Site File

OSCs are responsible for establishing and maintaining a site file for each removal action they manage [4]. The site file is composed of all documentation related to a site, including

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operational, legal, financial, public relations, and technical documents. Contractor support and other Regional personnel may assist the OSC in maintaining the site file.

The site file contains several subsets of documentation; discussed below, that are important for removal enforcement activities.

### Administrative Record File

Section 113(k) of CERCLA requires the establishment of an administrative record<sup>3</sup> consisting of documents upon which the selection of a response action is based. *The administrative record, which is a subset of the site file, has two primary purposes:*

- It is the basis for judicial review of any issues concerning the selection of a response action. Because a proposed removal action must be supported by the administrative record, the OSC should ensure the adequacy of the administrative record in the event the decision is challenged, such as in a subsequent cost recovery case.
- It provides for public participation in Superfund decisions, including the opportunity, as appropriate, for comment on the response action selection.

Because judicial review is limited to the administrative record for selection of the response, *the administrative record must be sufficient to document EPA's response decisions.* This means including in the administrative record file all documents relied upon by EPA in making its decision, and all public comments relevant to the decision, whether or not they support the Agency's response selection [10].

Enforcement-specific documents are included in the administrative record file if they contain information relevant to the response selection or public participation in the response selection, but do not pertain exclusively to PRP liability. Examples of appropriate documentation that should be in the administrative record file as described in section 300.810 of the NCP include:

- Factual information and data such as evidence of a release or threat of a release, preliminary site evaluations, sampling plans, technical studies, endangerment or risk assessments, and data submitted by the public
- Policy and guidance pertinent to the selection of the response

<sup>3</sup> The administrative record is the completed compilation of documents on which the Agency based its selection of a response action. The administrative record file refers to the ongoing collection of documents the Agency anticipates will include those constituting the administrative record when the final selection of the response is made [10].

- Public participation information such as public notices, public comments, and responses to those comments
- Enforcement documents such as Administrative Orders
- The administrative record file index
- Documentation of State involvement
- Decision documents including original Action Memos, Action Memo/Enforcement, and any subsequent Action Memos.

OSCs, in conjunction with their Regional Administrative Record Coordinators, are responsible for establishing the record for a site. Generally, the Administrative Record Coordinator is responsible for compiling and maintaining the record files, while the OSC, in consultation with ORC, selects the documents to be included. OSCs should follow the same procedures for establishing an administrative record for all removal actions, including enforcement-lead actions. PRPs typically are required to maintain records to assist EPA in any future enforcement activities and to assess compliance with Administrative Orders, but cannot be responsible for decisions concerning which documents are included in the administrative record.

Administrative records need to include a confidential portion when privileged information is required to document Agency decisions, but must be withheld from the public. Confidential information includes these privileges:

- Trade secrets, commercial, or financial information
- Personal privacy
- Investigatory files relating to law enforcement
- State secrets
- Confidential informant
- Information exempted by other statutes.

In addition to enforcement-specific information, the site file and administrative record contain other documents that are critical for the support of enforcement activities. These documents are discussed further below.

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### Decision Documentation

Three kinds of removal action decision documents are important for effective enforcement activities:

- Action Memos, including exemption requests (these belong in both the administrative record and the site file)
- Documentation of decisions not to take complete enforcement action (this belongs in the site file)
- Removal Action Cost Recovery Close-out Memo (this belongs in the site file).

While all of the above documents include summaries of enforcement information and provide justification for the relevant decision, the signing of the Action Memo authorizes obligations from the Fund for implementing the selected response, and generally signifies the completion of the response selection decisionmaking. Documents relevant to the response, however, may be subsequently added to the administrative record file in certain situations as described in section 300.825 of the NCP [10].

An Action Memo documents the approval of the selected removal response and is important in the enforcement process. It is the decision document included in the administrative record file for selection of the response, and provides an incentive for PRPs to settle if they believe EPA will proceed with an action with or without their participation.

Enforcement information must be discussed in an addendum to all Action Memos, including exemption requests. This information, generally, should not be placed in the administrative record file:<sup>4</sup>

- Extent of search for, and identification of, PRPs
- Financial status of PRPs
- Issuance of notice letters (special or general)
- Previous negotiations that have been held with the PRPs and the results of those negotiations
- Additional enforcement history, strategy, discussion, and recommendations.

<sup>4</sup> Exemption requests, ceiling increases, and requests for changes in the scope of work should refer to and attach the original Action Memo to avoid duplicating unchanged enforcement details. Any new enforcement information, however, must be included in each subsequent Action Memo.