

All of the above information must be placed on a separate addendum to the Action Memo and marked "Enforcement Sensitive."

In addition to the Action Memo required to initiate a removal action, subsequent Action Memos are required to document a request for an exemption from the 12-month or \$2 million statutory limitations on removal actions, project ceiling increases, or changes in the scope of work. OSCs should ensure that all potential avenues of securing PRP cleanup or funding for cleanup have been pursued before submitting a request for statutory exemption to Headquarters. (In extreme emergencies, however, exemption requests can be submitted directly to Headquarters, with PRP searches and other enforcement activities conducted as time permits prior to initiating on-site action.)

Action Memos must be prepared for both Fund-financed removal actions and removal actions to be conducted by PRPs. An Action Memo for an enforcement-lead removal action need not include estimated costs or authorization for funding, but in all other respects it should look the same as a Fund-lead Action Memo. Because of the difference between the two with regard to costs and funding, Regions may designate an enforcement-lead memo as "Action Memo/Enforcement."

Regions may use a Fund-lead Action Memo they have already prepared as documentation for an enforcement-lead case. Some Regions have found a Fund-lead Action Memo, with estimated costs and authorization for funding, to be useful in negotiations to indicate EPA's resolve to go ahead if the PRP does not act. As with Fund-lead removal actions, the timing for preparing the Action Memo/Enforcement will depend on the urgency of the action. In time-critical situations, it may be necessary for the PRP to initiate action prior to the preparation of an Action Memo or an enforcement order.

Decisions not to take complete enforcement action also require documentation. Typical situations include when a decision is made that known PRPs are not viable, or that notice letters will not be issued to known PRPs prior to starting a removal action, or that an administrative order will not be issued to known PRPs. OSCs should ensure that any other significant enforcement decisions are appropriately documented.

Removal Action Cost Recovery Close-out Memos are required when, on the basis of enforcement information, EPA decides not to pursue cost recovery action for Fund monies used to finance a removal action [6]. Documented decisions not to pursue cost recovery are important for satisfying EPA's internal accountability for cost recovery on a site-by-site basis [7]. In most Regions, Removal program personnel, in conjunction with ORC, prepare

ENFORCEMENT PROCEDURES

Removal Action Cost Recovery Close-out Memos. These memos are confidential and are not placed in the administrative record for response selection (if the memo is the only source for important response selection information, a separate memo containing the response selection information should be prepared and placed in the administrative record file).

Cost Recovery Documentation

Costs associated with the oversight of enforcement-lead removal actions and with Fund-lead removal actions are *fully recoverable* (see pp. 26-27 for more information on the cost recovery process). Because of the possibility of a cost recovery action or other case involving the use of CERCLA (e.g., a challenge to the selection of a response action; a claim for reimbursement under CERCLA section 106), *OSCs must observe, document, and preserve critical facts about the response and its costs*. Cost documentation refers to the specific set of procedures that OSCs use to maintain a record of all on-site activities and associated costs [5]. The documentation process must ensure that physical evidence essential for litigation is collected and preserved in a manner that will withstand judicial scrutiny, and that the government has maintained sufficient evidence of total costs and substantiation of the need to incur those costs.

The essential elements of a cost recovery action and the nature of the evidence required to sustain cost recovery are:

- Evidence of a release or threatened release of a hazardous substance
- Evidence of the liability of the defendant(s) for the hazardous substance release or threatened release under section 107(a) of CERCLA
- Substantiation that response actions for which CERCLA funds were expended were not inconsistent with the NCP
- Proof of incurred costs and their payment
- Substantiation of the completion date of the removal action to demonstrate that the statute of limitations was not exceeded (see p. 27).

Cost documentation should, therefore, be an ongoing activity throughout the removal process to facilitate issuance of demand letters, timely referrals to the Department of Justice (DOJ), and reimbursement to the Fund. All AOCs should include a provision requiring reimbursement of oversight costs and past costs. OSCs or Regional enforcement staff should also demand oversight costs in UAOs prior to filing for cost recovery.

The method of cost documentation should be consistent from day to day at a specific response action. The documentation method an OSC selects should ensure thorough recordkeeping of the following seven categories of information:

- Chronology of events and decisions
- Site conditions
- Movement of personnel and equipment (e.g., site entry and exit)
- Contractor planned and authorized work compared to actual accomplishments
- Contractor costs (e.g., commercial cleanup contracts)
- Oversight costs
- Other costs (e.g., National Contract Laboratory Program services, TAT, Environmental Response Team, Regional laboratory services, Interagency Agreements, direct Headquarters and Regional intramural obligations⁵, site access/acquisition) [18].

The specific cost items to be documented vary depending upon the purpose of the documentation. Tracking response costs against the project ceiling and \$2 million statutory limit (without an exemption); for example, does not include costs associated with CERCLA section 104(b) investigations, which are tracked in order to support cost recovery actions.

Public Participation

EPA's public participation activities in the Superfund program, as a whole, consist of all those public outreach activities conducted throughout the planning and implementation of Superfund responses. Sections 300.415 and 300.820 of the NCP specify two forms of public participation for all-removal actions:

- Community relations activities - designed to integrate the specific information needs of the community into the design of the communications approach or community relations plan for the site [14].

⁵ The term intramural obligations refers to CERCLA funds expended for costs internal to EPA, including direct costs such as salaries, travel and per diem of on-site EPA personnel, supplies, direct equipment rental and maintenance, and indirect costs, including EPA Headquarters and Regional administrative and management costs.

ENFORCEMENT PROCEDURES

- Administrative record activities - designed to serve as the basis for the response selection and as a vehicle for public participation in the selection of a response action [10].

The application of these requirements is site-specific, and they have been designed to ensure an appropriate level of public involvement without causing unnecessary delay. For instance, the timing and type of community relations activities required for a removal action depend on the duration of on-site activity, while the timing of administrative record requirements is, in part, based on the length of the planning period available prior to the initiation of on-site activities.

EPA is the lead agency for developing and implementing public participation activities at enforcement-lead sites. As the Agency's lead technical representative and director of public participation activities at a site, the OSC is responsible for conducting or delegating responsibility for these activities. A PRP may assist in the implementation of these activities, with EPA oversight, at the discretion of the Regional office. While the public participation activities required for an enforcement-lead response do not differ from the activities required for a Fund-lead response, the nature of an enforcement-lead response necessitates a sensitive approach in communicating information to the public. In general, OSCs should coordinate closely with ORC and other public participation staff when PRPs are active in the planning and design of the removal action.

Negotiations

Negotiations between EPA and PRPs are generally conducted in confidential sessions [12]. Planning and communication efforts must be sensitive to the potential release of information that may be detrimental to the settlement and/or litigation process. The OSC is responsible for approving the release of any information regarding the negotiations to the site community. The OSC should work with the Community Relations Coordinator to identify what precautions should be taken while conducting community relations at the site, such as restricting discussions with the press or public regarding pending litigation. If the site has been referred to DOJ, is in litigation, or is the subject of negotiations, the OSC should obtain ORC approval to release information about the status of litigation to the public.

Following the conclusion of negotiations, information concerning the requirements of the AOC or UAO should be made available to the community in the administrative record. Community relations staff should discuss the terms of the AOC and UAO with, and describe the removal action to, citizens, local officials, and the media. If the PRP subsequently fails to respond appropriately to an administrative order, any public statements or information releases regarding the status of the actions at the site or prospective EPA actions must be cleared by the OSC (and ORC if enforcement or cost recovery litigation is considered possible).

Community Relations Implementation

As part of preparing for community interviews to develop the community relations plan (CRP)⁶, community relations staff should discuss the site with other Regional staff in order to identify what special precautions, if any, should be taken in the course of conducting the interviews [14]. The interviews should not be considered part of the PRP investigation for the site; if such information is volunteered, the information should be relayed to enforcement staff for additional follow up. To incorporate the full range of views, lead agency staff may consider interviewing PRPs in the community. The OSC, in conjunction with enforcement personnel and the Community Relations Coordinator, decides which community members will be interviewed.

The CRP should incorporate input from all Agency personnel directly affected by the schedule and conduct of activities presented in the document. In an enforcement-lead action where the PRP shows sufficient interest, commitment, and capability to warrant some level of participation in implementing the CRP, the EPA and PRP roles should be explicitly defined in the CRP. If the PRP is involved in the conduct of community relations activities, the OSC should let the community know the level of participation and responsibilities to be assumed by the PRP under the direction of the OSC. The following activities are necessary to finalize the CRP when PRPs are involved in community relations implementation:

- The ORC and PRP attorneys must review the accuracy of any legal information contained in the CRP.

- The OSC must make a copy of the final CRP available to all interested parties, including the attorney for the PRP.

- The OSC must apprise other response personnel of any situations or enforcement activities that may affect the implementation of the CRP.

Administrative Record Activities

Publicly available documents concerning response selection must be made available to all interested parties at the same time [14].

The text of all comments, criticisms, and new information submitted by the public, including PRPs, during the public comment period must be included in the administrative record [10]. After the close of the public comment period, EPA must develop a written response to significant comments that reflects the Agency's consideration of these comments for inclusion in the record file.

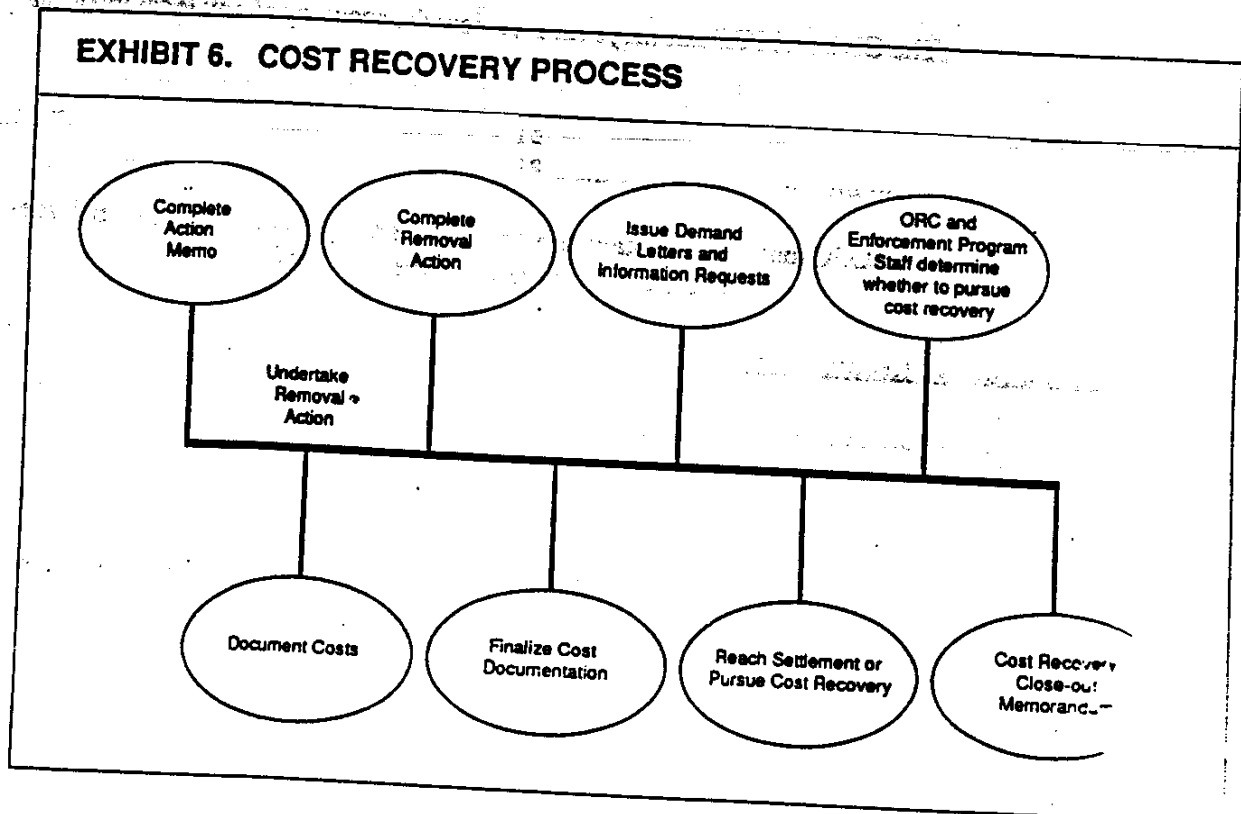
⁶ A formal CRP is required for removal actions where on-site action is expected to extend beyond 120 days from the initiation of on-site removal activity.

COST RECOVERY

CERCLA contains a strict liability scheme. Further, Federal courts have found PRPs to be jointly and severally liable when the harm is not divisible. CERCLA also authorizes EPA to seek reimbursement from PRPs for all costs incurred by the Agency, not inconsistent with the NCP, for response actions taken pursuant to CERCLA [6, 8]. If the site involved a Fund-financed removal action, then the PRPs are liable for all the response costs not inconsistent with the NCP. Prior to referral of a cost recovery case to DOJ, OSCs help to document costs and draft demand letters to be sent to PRPs. They may also be involved in negotiating with PRPs and compiling referral packages. Exhibit 6 illustrates the cost recovery process.

As response activities are documented by the OSC, a demand for payment of all past response costs is sent to the PRPs [1]. *Demand letters are issued in all cases to the extent appropriate and practicable where costs have been incurred under CERCLA and PRPs have been identified*, regardless of whether or not a decision has been made to pursue cost recovery. The written demand letter triggers the accrual of pre-judgment interest on response costs sought, and is a prerequisite for enforcement [16, 17]. OSCs should consider issuing demand letters accompanied by CERCLA section 104(e) information requests to gather additional evidence and identify additional PRPs for cost recovery purposes.

EXHIBIT 6. COST RECOVERY PROCESS



Following the issuance of demand letters, ORC gives the PRPs a period of time in which to initiate negotiations concerning the Agency's claim. OSCs may be involved in PRP settlement negotiations. If the PRPs do not settle, enforcement program staff and ORC decide whether or not to pursue cost recovery. The statute of limitations for cost recovery is three years from the completion⁷ of the removal action, unless a "consistency" exemption to the statutory limits under CERCLA section 104(c)(1)(C) has been approved (in these circumstances, the statute of limitations is six years from the date of the exemption) [3]⁸. A decision not to pursue cost recovery must be documented in a Removal Action Cost Recovery Close-out Memorandum prepared by Removal program personnel in consultation with ORC (see p. 21)[7]. For those removal actions selected for referral to DOJ, OSCs may be involved in developing the referral package. *All removal actions involving PRPs that may be liable for removal costs and where total response costs that exceed \$200,000 should be referred to DOJ no later than 12 months after the completion of the removal action.*

⁷ The completion of the removal action generally is defined as the day the scope of work identified in the original or modified Action Memo is completed [3]. The Final Pollution Report submitted by the OSC normally contains this information.

⁸ If remedial action is initiated within three years after the completion of the removal action, the remedial action statute of limitations applies, section 113(g)(2)(B).

APPENDIX A. REFERENCES⁹

Guidance

- [1] "Draft Guidance on Use and Issuance of Written Demand for Recovery of Costs Under CERCLA"¹⁰
- [2] "Function and General Operating Procedures for the Criminal Enforcement Program," Memorandum from Courtney M. Price (January 7, 1985)
- [3] "Removal Completions and Statute of Limitations," Memorandum from Timothy Fields, Jr. and Lloyd Guerci to Addressees (August 1, 1989)¹¹
- [4] OSWER Dir. 9360.2-01, "Model Program for Removal Site File Management" (July 1988)
- [5] OSWER Dir. 9832.0-1A, "Procedures for Documenting Costs for CERCLA Section 107 Actions" (January 30, 1985)
- [6] OSWER Dir. 9832.1, "Cost Recovery Actions under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980" (August 26, 1983)
- [7] OSWER Dir. 9832.11, "Guidance on Documenting Decisions Not to Take Cost Recovery Actions" (June 7, 1988)
- [8] OSWER Dir. 9832.13, "Superfund Cost Recovery Strategy" (July 29, 1988)
- [9] OSWER Dir. 9833.1, "Issuance of Administrative Orders for Immediate Removal Actions," Memorandum from Lee Thomas to Addressees (February 21, 1984)
- [10] OSWER Dir. 9833.3A-1, "Final Guidance on Administrative Records for the Selection of CERCLA Response Actions" (December 3, 1990)
- [11] OSWER Dir. 9834.4A, "Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas" (August 25, 1988)
- [12] OSWER Dir. 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987)

⁹ Bracketed numbers appear throughout the text and correspond to the references listed in this appendix. These references may be consulted for additional information on enforcement topics.

¹⁰ Draft document.

¹¹ Draft document.

- [13] OSWER Dir. 9834.10-1b, Appendix C, "Model Notice Letters" (February 7, 1989)
- [14] OSWER Dir. 9836.0-1A, "Community Relations During Enforcement Activities and Development of the Administrative Record" (November 3, 1988)
- [15] "Use and Issuance of Administrative Orders under Section 106(a) of CERCLA," Memorandum from Lee Thomas and Courtney Price to Addressees (September 8, 1983)

Manuals

- [16] OSWER Dir. 9837.2A, Enforcement Project Management Handbook (January 1991)
- [17] OSWER Dir. 9834.3-1A, PRP Search Manual (August 27, 1987)
- [18] OSWER Dir. 9360.0-02B, Removal Cost Management Manual (April 1988)

Statutes and Regulations

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended,
42 U.S.C. sections 9601-9675

The National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR Part 300
(March 8, 1990)

APPENDIX B. KEY WORDS INDEX

Action Memo	3, 19, 20, 21
Action Memo/Enforcement	15, 19, 21
Administrative Orders	
Administrative Order on Consent	2, 4, 11, 15, 16, 17
Unilateral Administrative Order	2, 4, 11, 16, 17
Administrative record	3, 11, 18, 19, 20, 25
Administrative Record Coordinator	8, 9, 19
Community Relations	
Community Relations Plan	7, 8, 23, 25
Community Relations Coordinator	8, 24, 25
Contract Resources	
TAT	9
TES	9
ARCS	9
Cost Recovery	
Close-out Memo	20, 21, 26, 27
Procedures	3, 11, 26, 27
Criminal investigations	9
Demand letters	22, 26, 27
Department of Justice	22, 24, 26, 27
Enforcement-Lead Removal Actions	17
Information requests (CERCLA section 104(e))	12, 13, 15, 26
Liability	4, 14, 22, 26
National Enforcement Investigations Center	9, 11, 13
Negotiations	11, 15, 16, 24, 27
Notice Letters	14, 15, 16, 20