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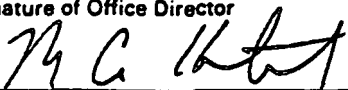
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Originator Information

Contact Person Neil Kilpatrick	Mail Code WH-527	Telephone Number 382-4819
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EA/CERCLA Case Management Handbook

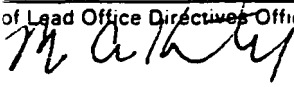
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The RCRA/CERCLA Case Management Handbook provides guidance to enforcement personnel in EPA Headquarters and Regional Offices, as well as the Department of Justice on the development and management of RCRA and CERCLA judicial actions. The manual addresses identifying cases for referral, pre-referral case development, preparation of referrals, case management and technical support for litigation.

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Signature of OSWER Directives Officer		Date

The Handbook is intended to be a living document. It presently consists of six chapters in loose-leaf form to allow for periodic additions and revisions. The first planned revision will be the guidance and operating procedures for cost recovery actions. By separate memorandum, Gene Lucero will provide detailed instructions on the maintenance of this Handbook consistent with EPA procedures.

Two workshops on this Handbook are planned for regional supervisors in both the technical enforcement and Regional Counsel areas. The first session is tentatively scheduled for Washington, D.C. in early October. It will involve personnel from Regions I-V. A second session for Regions VI-X, and those who were not able to attend the first session, will be held in Denver. Each of our organizations will be involved in presenting these workshops. Further information will be forthcoming on the workshops from OWPE in the near future.

Both EPA and DOJ have provided valuable input into the development of the RCRA/CERCLA Case Management Handbook. It is, however, a document which must be continually reviewed and updated. We look forward to hearing your comments on its usefulness and applicability to the continuing task of preparing quality enforcement cases. With recent delegations from EPA Headquarters to the Regions and with the rapid growth in both RCRA and CERCLA enforcement, it is absolutely essential that we manage our work in such a way as to assure cases are developed which can be referred and filed in a timely and efficient way. We hope this Handbook helps achieve that goal.

Addressees:

Regional Administrators, Regions I-X
Regional Counsels, Regions I-X
Department of Justice, Land and Natural Resources Division
Office of Enforcement and Compliance Monitoring
Waste Management Division Directors, Regions I and V
(w/o attachment)
Air and Waste Management Division Directors, Regions II, III, IV,
VI, VII, VIII, and X
(w/o attachment)
Toxics and Waste Management Division Director, Region IX
(w/o attachment)
Management and Organization Division

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I. IDENTIFICATION OF ENFORCEMENT CASES TO BE
REFERRED FOR POSSIBLE JUDICIAL ACTION

I. IDENTIFICATION OF ENFORCEMENT CASES TO BE REFERRED FOR POSSIBLE JUDICIAL ACTION

This chapter describes general background information and roles and responsibilities with regard to enforcement case referrals. It defines judicial referral, specifies the types of judicial relief available, describes various referral indicators, enumerates the responsibilities for identification and timely referral of candidate cases, and discusses enforcement management accountability.

A. Judicial Referral Defined

Before a suit can be filed in any court to enforce the environmental statutes EPA has been charged to uphold, EPA must deliver a written proposal to the Department of Justice (DOJ). Such a proposal formally requests that a suit be filed by DOJ on behalf of the Agency. This written proposal and delivery is an EPA "judicial referral." Once the referred case has been filed, it becomes a "judicial action."

Judicial actions should be carefully distinguished from administrative actions. Any action that a statute or regulation authorizes EPA to take, but does not involve filing papers with a court and is not part of the process of prosecuting a case already filed in court, is an administrative action.

Examples of administrative actions include:

- . Issuance of notices of violation under Section 113 of the Clean Air Act and other Acts providing for such notices;
- . Issuance of Administrative Complaints and Orders (usually called "compliance" or "administrative" orders) under Section 309 of the Clean Water Act, Sections 3008 and 3013 of the Resource Conservation and Recovery Act (RCRA) and various other Acts authorizing such orders;
- . Issuance of "emergency" or "imminent and substantial" orders under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Section 106, RCRA Section 7003, Clean Air Act (CAA) Section 303, Clean Water Act (CWA) Section 504, Toxic Substances Control Act (TSCA) Section 7, and Safe Drinking Water Act (SDWA) Section 1431;
- . Issuance of formal requests for information under Section 308 of the Clean Water Act and various other Acts authorizing such requests;
- . Issuance of subpoenas under Section 11 of the Toxic Substances Control Act;

- . Issuance of any "extra statutory" notice document such as letters to potentially responsible parties under CERCLA;
- . Issuance of complaints for civil penalties under Section 16 of the Toxic Substances Control Act or other Acts authorizing such complaints (either issued separately or combined with a compliance order).

This list is fairly complete, but should not be considered all-encompassing.

B. Types of Relief Available as a Result of a Judicial Referral

Once a referred case has been filed, courts have a great variety of remedies within their power. The five major categories of judicial relief are:

- . Money judgments
- . Injunctive or similar form of specific relief
- . In rem relief
- . Declaratory judgments
- . Criminal redress.

Not all categories of relief are specifically set forth in each statute for redress of particular violations. Each statute EPA is charged with enforcing differs in its provisions relating to judicial relief. Various combinations of these remedies may be appropriate and available under title 28 or other federal statutory provisions. These five categories of relief are discussed below.

A judgment for the recovery of money may be for (a) the recovery of civil penalties specified by statute, (b) the recovery of out of pocket costs and expenses of EPA or those EPA represents, or (c) the recovery of damages (e.g., harm caused to natural resources as provided in CERCLA).

Injunctive or other specific relief that is available for enforcement of most EPA statutes includes mandatory and prohibitory temporary restraining orders, mandatory and prohibitory preliminary or final injunctions, and any other order of a court that directs the performance of an act or prohibits the commission of an act. A court order that directs a person to spend money to accomplish a specified result has traditionally been considered "specific" equitable relief and not a money judgment.

In rem relief involves the seizure of specific articles or any other legally authorized remedy directed to property rather than persons. In rem relief involves the arrest, seizure and/or condemnation of specific real or personal property and other forms of relief directed to property rather than persons, such as foreclosure of a lien. Examples include condemnations of land under powers of eminent domain, judicial seizures and condemnations under federal food and drug laws, and various actions in admiralty against vessels or contraband.

A declaratory judgment is a court decision on a point of law that is a focus of dispute between the litigants. Such a judgment merely declares the law but does not direct specific relief. However, actions seeking a declaratory judgment often include a request for specific relief. Subsequent actions for specific relief may also follow the issuance of a declaratory judgment.

Criminal judgments impose fines or imprisonment, or various forms of probation based upon specified conditions. Some combination of these punitive judgments is also possible.

C. When to Recommend Judicial Instead of Administrative Action

EPA has a number of enforcement tools to use in implementing environmental laws and regulations. These include both administrative and judicial actions. The type of enforcement action chosen in each case should:

- . Procure compliance in the most timely manner
- . Halt further violations as soon as possible
- . Rapidly cure the consequences of violations
- . Use the least amount of EPA and other governmental resources.

The facts of each case will largely determine whether a judicial remedy or an administrative remedy will be sought.

Agency experiences to date have pointed out certain types of cases or situations that usually warrant judicial relief. Typically, those situations are where:

- . A party fails to comply with an administrative order
- . Immediate relief in the form of an injunction is needed to protect the public from imminent hazards
- . Penalties are important for deterrence purposes and cannot be imposed for the violation in question except by judicial order
- . Penalties imposed through the administrative process, or costs recoverable under the liability provisions or various statutes (e.g., CERCLA §107, CWA §311) must be judicially collected
- . Long-term specific conduct by a violator is to be compelled.

These five situations may be used as guidance in attempting to identify potential judicial referrals.

Not every case that falls into one of these categories is a candidate for referral, however. CERCLA Section 106 administrative orders may be an important exception to the general rule that judicial decrees (on consent or after litigation) are the most readily enforceable devices in cases of compelling long-term specific conduct. On the other hand, judicial referral is particularly appropriate when attempting to deter others similarly situated, given the greater notoriety associated with judicial proceedings.

D. Roles and Responsibilities in Making Enforcement Option Decisions

Enforcement option decisions are made in the first instance by three different groups: EPA Regional Administrators, EPA Regional Counsels and the EPA Criminal Enforcement Division.* The roles and responsibilities of each are displayed in Exhibit I-1 and discussed below.

The Regional Administrator (RA) is responsible for identifying non-complying sources and potential enforcement targets and, after consulting with Regional Counsel, making the final decision on appropriate Agency response to violations. He or she must also ensure that the option selected is properly initiated in a timely manner. If one type of formal enforcement action is not sufficient, it is the RA's responsibility, in consultation with the Regional Counsel (RC), to initiate a more stringent enforcement action in a timely manner.

For judicial referrals in particular, Regional Counsel must be consulted; however, it is the Regional Administrator's responsibility to decide whether to refer a case. It should be noted that declining to refer a matter as a civil judicial action does not preclude administrative enforcement or referral as a criminal matter.

Throughout the process, Regional Counsel is the attorney to the Regional Administrator and program client. All judicial referrals should be accompanied by a concurrence from the Regional Counsel. Once a referred case has been filed, the Regional Counsel is specifically responsible for providing timely and effective legal support. The Regional Administrator is responsible for ensuring that the regional technical office provides adequate technical support. In addition, whenever the Regional Administrator (or his/her program designee) must make decisions and take actions with legal consequences, he or she must ensure that the Regional Counsel is consulted; this includes but is not limited to, the issuance of any formal administrative notices of violation, orders or complaints.

-
- * With respect to both civil and criminal judicial referrals, they must be reviewed by and have the concurrence of the Assistant Administrator for the Office of Enforcement and Compliance Monitoring (OECM). The AA for OECM must notify the AA for OSWER and the appropriate RA when a case is referred to the DOJ and when an appeal is formally initiated.

EXHIBIT I-1

**ROLES AND RESPONSIBILITIES IN MAKING
ENFORCEMENT OPTION DECISIONS**

<u>Regional Administrator</u>	<u>Regional Counsel</u>	<u>EPA Criminal Enforcement Division</u>
<ul style="list-style-type: none">• Identifies non-complying sources and potential enforcement targets• Consults with Regional Counsel or enforcement options• Makes final decision on appropriate Agency response to violations. Such responses may include:<ul style="list-style-type: none">- Requests for information- Information discussions with the source- Warning letters or notices of violation- Administrative orders or complaints- Civil judicial referrals• Coordinates enforcement actions with states• Ensures follow-up on all enforcement actions and initiates more stringent actions where necessary• Participates in a client's role in administrative or judicial settlement discussions• Ensures that technical litigation support is being adequately provided by regional personnel	<ul style="list-style-type: none">• Advises RA on enforcement options• Assists in preparation of and concurs on judicial referrals• Ensures that legal litigation support is being adequately provided by regional personnel• Refers criminal cases, usually with the concurrence of the special agent in charge, to Headquarters	<ul style="list-style-type: none">• Special agent in Charge may refer criminal cases• Coordinates with Regional Counsel and apprises RA of criminal case referrals

In criminal matters, cases can only be referred for criminal prosecution by the Regional Counsel or the Special Agent In Charge. The Regional Administrator is not involved directly in criminal referrals although he or she should ordinarily be made aware of them. It should also be noted, that EPA's Criminal Enforcement Division has independent investigative authority for potential criminal violations. To the extent feasible, that Division should coordinate its activities with the appropriate EPA regional program and legal offices.

E. Roles and Responsibilities Regarding Enforcement Management Accountability

In the rapidly changing area of hazardous waste enforcement, proper management of enforcement activities is critical to the success of the program. To ensure that enforcement efforts are proceeding satisfactorily, each Regional Administrator is specifically accountable to the Administrator of the Agency for meeting specified enforcement accountability targets within the Region. Achievement of these targets is generally a performance standard in each Regional Administrator's performance agreement.

OSWER has initiated management, tracking and reporting systems for the RCRA and CERCLA hazardous waste enforcement program activities. These systems facilitate headquarters and regional management of the hazardous waste program and in addition to the Strategic Planning and Management System (SPMS) and the Action Tracking System (ATS), ensure that Agency statutory, regulatory, and policy objectives are met. These systems include the RCRA Enforcement Management System (REMS) and the Superfund Consolidated Accomplishments Plan (SCAP). In FY 1985, the SCAP process will be inclusive of the Remedial Accomplishments Plan (RAP) and the Regional Enforcement Accomplishments Plan (REAP) to ensure that planning and other activities concerning all categories of National Priorities List sites are managed effectively. The SCAP process requires the identification of NPL sites targeted for action in the current fiscal year. Similarly, the REMS process combines targeting, projections and enforcement strategy to ensure that RCRA program objectives are met.

1. RCRA

Several general principles should be key considerations in developing an enforcement management strategy in the RCRA area. In the early stages of a program, when new and complex requirements apply, vigorous enforcement is critical for promoting information exchange and to ensure that the regulated community understands both what is necessary to attain compliance and that it is in their best interest to comply. In imminent hazard situations, and in cases of particularly egregious violations, rapid and decisive enforcement action is needed to protect health and the environment.

These general principles should be applied in the RCRA program through a focus on three types of activities:

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These general principles should be applied in the RCRA program through a focus on three types of activities:

- . More effective tracking of regulated community compliance, including the requirement for more frequent reports by states and more effective use of the hazardous waste data management system.
- . More second-level enforcement actions, including administrative orders and civil actions, where needed to ensure compliance.
- . More detailed oversight of state activities to track the progress of enforcement actions at particular facilities.

A management system (REMS) has been established for tracking RCRA enforcement activities. This system includes reporting requirements and a process for tracking this information. The activities reported include oversight and non-oversight inspections, of major handlers and other treatment, storage, disposal facilities as well as generators and transporters. Inspection categories reported include compliance evaluation and compliance sampling of major and non-major handlers. Record reviews of closure plans, financial responsibility reports, groundwater monitoring data, and exception/discrepancy reports are included in the enforcement activities reported. Information is also required on enforcement followup to inspections which result in documentation of Class I RCRA violations. Activities tracked include warning letters/notice of violation, §3008 referrals. Warning letters/notices of violation and compliance complaints issued to federal facilities are also tracked in the REMS process. State reports of analogous enforcement activities are required on a monthly basis. The REMS process should be employed by regional office staffs to assist in defining cases for referral consistent with the case management manual.

2. CERCLA

Under CERCLA, administrative and/or judicial enforcement authorities are used to secure privately financed cleanup (as an alternative to using other Superfund Trust Fund) whenever the private party cleanup can be satisfactorily performed in a timely manner. In attempting to secure this up-front private party response action the Agency has emphasized a balanced use of administrative and judicial authorities.

When private party cleanup is not a viable option, however, Superfund trust fund monies will be spent to effect site cleanup and cost recovery actions will be instituted. Cost recovery activities seeking reimbursement and Superfund expenditures for response will be initiated in every appropriate case where there are viable potentially responsible parties (see CERCLA §107 guidance for further information concerning cost recovery actions). Cost recovery actions will be initiated on a prioritized basis consistent with annual Superfund Consolidated Accomplishments Plan guidance.

II. PRE-REFERRAL CASE DEVELOPMENT PROCESS

Whether pursuing private party cleanup or attempting to recoup Superfund response expenses, tracking enforcement activities is critical to an effective enforcement management system.

Among the activities tracked, a number take place before the formal enforcement process begins. These include remedial investigations and feasibility studies at enforcement lead sites, site classification, responsible party searches, financial assessments, responsible party notifications and negotiations.

The CERCLA enforcement program is also composed of numerous activities that occur during the formal enforcement process. The following activities are also tracked in the SCAP process:

- . Supporting on-going litigation to ensure success in securing site clean-up and establishing legal precedent.
- . Developing new cases under §106 for site cleanup in the enforcement-lead category of sites on the NPL.
- . Focusing on use of administrative orders to secure private party clean-up removal and remedial actions.
- . Initiating cost recovery actions under §107 for prioritized completed removal actions, and all completed remedial actions.
- . Follow-up on instances of non-compliance with administrative orders (unilateral or on-consent) or with civil actions for enforcement. Pursue consent decree or judicial decree non-compliance with contempt actions.

Enforcement management measures have been established taking these activities into account. That system will also include tracking of the total numbers of administrative and civil actions under the authority of CERCLA.

II. PRE-REFERRAL CASE DEVELOPMENT PROCESS

This chapter describes a recommended process for EPA's internal development of hazardous waste cases in advance of their formal referral to the Department of Justice. In this chapter, case development background, judicial referral initiation, referral package preparation, and referral to EPA Headquarters are discussed. Because of the wide range of activities and roles in the pre-referral phase, this chapter relies heavily on exhibits to simplify and clearly delineate exact responsibilities, products, and timeframes. The descriptive text guides the reader to highlights of each exhibit.

Hazardous waste cases that are referred may cite RCRA, CERCLA, or both, as well as RCRA and/or CERCLA in combination with TSCA, FIFRA, SDWA, CAA, CWA or Refuse Act counts (see attached list of abbreviations and acronyms). This chapter focuses on the RCRA and CERCLA components of those cases.

A. Background for Case Development

A number of important steps precede the designation of a case for judicial referral. This section shows how RCRA and CERCLA case identification responsibilities differ, describes the choice of enforcement response types, and outlines administrative enforcement options.

1. Case Development Responsibilities

The Regional Program Office is charged with a number of case development responsibilities for RCRA and CERCLA actions, the scope of which may vary depending on the type of site or incident. These responsibilities are summarized in Exhibit II-1. For RCRA cases, the Regional Program Office's initial primary responsibility is incident identification. For CERCLA cases, responsible party searches and notice are added to site identification responsibility, as are remedial investigations at both CERCLA and RCRA sites. The Regional Program Office also has responsibilities for consulting with the Office of Regional Counsel (ORC) and for information transfer, as outlined in the Exhibit.

Early in the case development process (prior to, or during the development of the referral package), the lead regional legal and technical staff members for the case should be identified and designated in writing. In the sections that follow, the key responsibilities for individual case support personnel, and for offices are described.

a. Lead Technical Representative (LTR)

The lead program contact serves as the case's technical representative and is charged with the following responsibilities:

EXHIBIT 11-1

REGIONAL PROGRAM'S INITIAL RESPONSIBILITIES
IN CASE DEVELOPMENT

RCRA

CERCLA

RCRA AND CERCLA

VIOLATION

- . Incident Identification and Analysis

IMMINENT HAZARD

- . Incident Identification and Analysis

REMOVAL

- . Site Identification
- . Search for Potentially Responsible Parties
- . Notice to Potentially Responsible Parties

REMEDIAL

- . Site Identification
- . Search for Potentially Responsible Parties
- . RI/FS or Endangerment Assessment
- . Notice to Potentially Responsible Parties

ALL SITES/INCIDENTS

- . Inform and Consult with Regional Counsel, OWPE, and OECM as Appropriate. For Example, as Concerns:
 - Response to Notice Letters
 - Proposed Meetings with Potentially Responsible Parties

Each box shows a RCRA and/or CERCLA event. Regional responsibilities are listed in each box.

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- . Represents Agency program office on the litigation team
- . Marshalls program resources as required, including technical input and development
- . Ensures compilation and maintenance of all program-generated case documents
- . Compiles factual responses to written requests during discovery
- . Ensures that lead attorneys (EPA and DOJ) are fully briefed on all relevant policy, program and technical issues as they arise or are anticipated
- . Provides technical and organizational assistance during negotiations, discovery sessions, hearings, trial, and similar proceedings during the course of the case.

Further responsibilities of technical personnel are described throughout this chapter.

b. Lead Agency Attorney (LAA)

The Lead Agency Attorney is responsible for representing the Agency regarding the case or proposed case in dealings with DOJ; other federal, state, or local agencies; and defendants or potential defendants (usually through their counsel). In addition, the Lead Agency Attorney:

- . Represents EPA in adjudicatory administrative hearings
- . Ensures adequate legal input to the referral process
- . Ensures that all factual and technical issues raised by the referral have been adequately addressed
- . Assists the Lead Trial Attorney to prepare the case
- . Ensures that factual responses to written requests during discovery are properly and expeditiously prepared
- . Monitors the Agency's follow-through in its resource commitments to the case.

The Lead Agency Attorney's responsibilities are distinct from the Lead Trial Attorney's, as shown below.

c. Lead Trial Attorney (LTA)

The Lead Trial Attorney is normally an employee of DOJ, and represents the United States, including the Agency, in court. Further, the Lead Trial Attorney represents the United States in any proceedings or negotiations relating to a court action, or with defendants or potential defendants.

d. Other Agency Personnel

Although many other Agency personnel may participate in the development of a referral or preparation of a case, it is very important that all extra-agency contacts concerning the case be made through or with the concurrence of the Lead Agency Attorney. Similarly, the Lead Trial Attorney should deal directly with persons in the Agency on matters relating to the case in coordination with the Lead Agency Attorney and Lead Technical Representative.

Two special instances in which other Agency personnel have special case development responsibilities are shown below. These are consultation with management during case development and post-notice letter meetings.

(1) Consultation

Consultation with the appropriate level of Agency management during case development is also an Agency responsibility. Since some cases can be handled fully in the Region, it may not be incumbent upon regional personnel to seek further authority. However, in some circumstances, described below, regional staff need to seek additional authority.

The extent of Headquarters involvement in specific cases corresponds directly to case classification. The Office of Enforcement and Compliance Monitoring (OECM) has established guidelines for classification of enforcement cases into four major types:

- . Class I -- Nationally managed cases
- . Class II -- Nationally significant cases
- . Class III -- Regional cases
- . Class IV -- Direct referrals from the Regions.

For example, in complex cases with multiple parties, or cases with precedential or national significance, consultation with Headquarters legal and technical staff should be implemented early in the process. Cases which fall within Class IV are set forth specifically in the letter agreement between Alvin Alm and F. Henry Habicht, II dated September 29, 1983.

(2) Post-notice letter meetings

Affirmative responses to notice letters that require meetings with responsible parties introduce a further dimension of case development responsibility for regional staff. Exhibit II-2 describes the relevant activities, the personnel responsibilities, and when applicable, the timeframe in which the activity must be accomplished. Regional technical case staff shall contact the appropriate level of EPA to affirm the appropriate extent of Headquarters technical involvement. Regional legal case staff shall contact the appropriate level of EPA and DOJ to affirm the appropriate extent of Headquarters and DOJ legal involvement. Ultimate decisions regarding case management authority and legal or technical settlement terms are made by the AA for OECM and the AA for OSWER. The technical staff ensures that the feasibility study (FS) or endangerment assessment (EA) is complete, to provide a basis for meeting and negotiation. Within 60 days of completing the FS or EA the meeting takes place, attended by Regional program and legal staff, with Headquarters and DOJ as indicated. Finally, the results of any meeting with responsible parties must be memorialized, and copies must be sent to OECM and the Office of Waste Programs Enforcement (OWPE) at Headquarters.

2. Choice of Enforcement Response

A number of enforcement response types may be initiated subsequent to RCRA violations or imminent hazards, or CERCLA site identification. Such options include:

- . A warning letter (RCRA)
- . An administrative order (AO) (RCRA 3006, 3013, 7003 and CERCLA 106)
- . A Fund-financed response and judicial referral for cost recovery (CERCLA)
- . Requests for information (RCRA 3007, CERCLA 104)
- . A judicial referral for
 - Injunctive action and/or
 - Non-compliance with an AO (RCRA and CERCLA).
- . No action (RCRA and CERCLA).

The Agency does not encourage the use of a written "no action" response. To condone a "no action" response requires the express written approval of the AA for OECM or his/her designee.

EXHIBIT II-2
MEETINGS WITH RESPONSIBLE PARTIES AFTER NOTICE LETTER ISSUANCE
IN PRESUMED CLASS I AND II CASES

ACTIVITY	RESPONSIBILITY
1. Contact Headquarters to affirm extent of Headquarters and DOJ participation in meeting	Regional Counsel Case Attorney contacts: . . . OECM Regional Coordinator, or . . . OECM Branch Chief. Regional Program Case Specialist contacts: . . . OWPE Regional Coordinator, or . . . OWPE Branch Chief.
2. Make final decisions on extent of Headquarters or DOJ involvement or other significant issues	AA for OECM and AA for OSWER
3. Conduct meetings with responsible parties to obtain voluntary compliance	Regional Program Office Staff, Regional Counsel Case Attorney Headquarters, DOJ as indicated
4. Memorialize outcome of meeting in written document	Regional Program Office staff, Regional Counsel Case Attorney with copies to: . . . OECM . . . OWPE

Exhibit II-3 shows response choice activities, assignments for their completion, and the types of products that are required.

Responses are selected by the Regional Program Office consistent with existing delegations, and in consultation with the Regional Counsel (especially for AOs and referrals). The choice of response should occur before meetings with the responsible party. In the second step, the Regional Program office develops the response, and its supporting documents (AO, Warning Letter, in consultation with the Regional Counsel. The Regional Program Office also assumes responsibility for initiating the chosen response, immediately on termination of the meetings.

It should be noted that the issuance of an AO, with an appropriate record of decision (ROD) may make a subsequent judicial case stronger and more easily proven. Thus, an AO is recommended whenever practicable, as a predecessor to judicial referral.

Regardless of the choice of enforcement response, the potential for judicial action exists from the discovery of RCRA violations or imminent hazards, or CERCLA site identification, until final resolution of the violation, the hazard, or the site. Until such resolution, all persons working on such matters should anticipate the potential for litigation and act accordingly.

3. Follow-Up On AOs and Other Administrative Enforcement

After Administrative Orders are issued, the Regional Program Office continues to have the primary responsibility for some follow-up activities. Regional Program Office staff will, as in other parts of the referral process, consult with Headquarters, and often with DOJ. This consultation is especially important for the resolution of significant or precedential issues. Exhibit II-4 summarizes these responsibilities, with reference to the specific actions and products of this phase of case development.

a. RCRA 3008 ORDERS

The Regional Program Office must immediately inform the Regional Counsel of any responses to RCRA 3008 Complaint AOs. The program office, with advice from Regional Counsel, may conduct informal settlement conferences. A written record of the results of the conference must be produced. A consent order and agreement is necessary if there is resolution of all issues by the parties. When a hearing is requested, the Regional Counsel's office will represent the program office and plan the lead role in negotiations.

EXHIBIT II-3
CHOICE OF ENFORCEMENT RESPONSE

ACTIVITY	RESPONSIBILITY	PRODUCT	TIMING
1. Select response	Regional Program Office (consistent with existing delegations). The Regional Counsel should be consulted as required: <ul style="list-style-type: none"> Especially important for AOs and referrals 	Record of decision (ROD), Especially important for AOs and Fund-financed response	Choice of response before any action, or at latest, prior to final meeting.
2. Develop response	Regional Program Office. The Regional Counsel should be consulted for advice as required	Appropriate administrative enforcement documents, consistent with existing guidance: <ul style="list-style-type: none"> AO Warning Letter 	
3. Initiate response	Regional Program Office		Initiate response immediately on termination of meetings.

EXHIBIT II-4
FOLLOW UP ON ADMINISTRATIVE ENFORCEMENT

ACTIVITY	RESPONSIBILITY	PRODUCT	TIMING
1. Track responses to complaint AOs (RCRA 3008)	Regional Program Office informs Regional Counsel		Immediately, when hearing is requested
2. Conduct informal settlement conferences (RCRA 3008)	Regional Program Office with advice from Regional Counsel	Written record of conference results	
3. Hearing pursuant to RCRA 3008 complaint AO	Regional Counsel's Office, with assistance of Program Office, plays lead role	If settlement, a consent order and agreement	
4. Track response to RCRA 3013, 7003, CERCLA 106 AOs.	Regional Program Office informs . Regional Counsel . OECM-W . OWPE		Immediately when response received
5. Meeting or conference pursuant to RCRA 3013, 7003, CERCLA 106 AOs	Team consisting of: . Regional Program Office . Regional Counsel Class I or II cases should also include: . Headquarters legal representative . Headquarters technical representative . DOJ if necessary		

**EXHIBIT 11-4, continued
FOLLOW UP ON ADMINISTRATIVE ENFORCEMENT**

ACTIVITY	RESPONSIBILITY	PRODUCT	TIMING
6. Meeting or conference for nationally significant case (RCRA 3013, 7003, CERCLA 106 AOs)	Regional Counsel case attorney contacts: <ul style="list-style-type: none"> . OFCM Regional Coordinator, or . Branch Chief Regional Program case staff contacts: <ul style="list-style-type: none"> . OWPE Regional Coordinator, or . Branch Chief 		Should not last longer than 60 days
7. Memorialize outcome of meeting OR CONFERENCE (RCRA 3013, 7003, CERCLA 106 AOs)	Regional Program Office sends copies to: <ul style="list-style-type: none"> . OFCM . OWPE 	Written document	
8. Follow up inspections and determinations of compliance or non-compliance	Regional Program Office	Written report on non-compliance	No later than 30 days following compliance date specified in AO
9. Choice of enforcement response for non-compliance	Regional Program Office	Choice will lead to eventual: <ul style="list-style-type: none"> . Warning letter . AO . Fund expenditure . Judicial referral, or . No action. 	Within 2 weeks of non-compliance determination

b. RCRA 3013 OR 7003 ORDERS, CERCLA 106 ORDERS

The Regional Program Office must immediately inform the Regional Counsel, OEM-W and OWPE of responses to RCRA 3013, RCRA 7003 or CERCLA 106 AOs. Meetings or conferences pursuant to AOs require attendance of Regional Program and Regional Counsel's Offices. With Class II cases, attendance by Headquarters legal and technical representatives, as well as DOJ representatives, may be necessary. The Regional Case Attorney and technical staff must contact Headquarters, as detailed in Element six of the Exhibit, to determine the extent of Headquarters participation.

If a meeting or conference with an outside party is required for a nationally significant case, the resulting series of negotiations should not ordinarily last more than 60 days. The Regional Program Office is responsible for memorializing the outcome of such meetings. If there is resolution of all issues by the parties, a consent AO may result. If there is incomplete resolution of all issues, the Agency's unilateral RCRA 3013(c) order, RCRA 7003 or CERCLA 106 order will be effective as specified in the order.

c. All AOs

When there is a compliance order schedule or conditions in the effective consent or unilateral order, the Regions perform follow-up compliance determinations and provide a written report on noncompliance no later than 30 days after the specified compliance date. The choice of an appropriate enforcement response for noncompliance with the AO is made by the Regional Program Office within 2 weeks of the noncompliance determination.

B. Initiation of Judicial Referral

The case referral process formally begins at the point when:

- Either a significant violation (e.g., Class I violation under RCRA guidance) or an imminent hazard has been discovered, or a site requiring CERCLA action is identified; and
- The administrative enforcement process is deemed to be inadequate or inappropriate to resolve the dispute; and
- The Regional Program Office, in consultation with the Regional Counsel, decides to pursue judicial referral.

Case referral, therefore, does not normally begin until administrative remedies have been completed, abandoned, or determined to be fruitless or unnecessary.

Regardless of when case development and referral begin formally, the Regional Program Office should consult with, and involve the Regional Counsel from the earliest stages of the process. This indicates the need for early designation of the Lead Technical Staff member and Lead Case Attorney, as described in the beginning of this chapter.

In order to proceed in a timely fashion, the possibility of case referral should be anticipated at the time negotiations are initiated. In instances of Fund-financed cleanup, referral of the case to Headquarters should normally be made within six months after the completion of the final cleanup activity. The CERCLA §107 Cost Recovery Guidance (August 23, 1983) further clarifies responsibilities for Fund-financed action and subsequent enforcement.

C. Preparation of a Referral Package

In the third phase of case development, a litigation team is established, and a referral package for EPA Headquarters is assembled. It is the litigation team's job to prepare the referral package; both the establishment of the team, and their effort to develop the package are described in the following sections.

1. Litigation Team

The composition of the litigation team depends on the classification of the case, and its potential for national significance, precedence, or issue resolution. Exhibit II-5 describes the composition and function of the litigation team in detail.

The team is convened within six weeks of the decision to pursue judicial referral or final cleanup activity. The Regional Counsel leads the group, whose composition varies depending on the case classification. Regional legal and technical personnel are always involved; Headquarters legal and technical staff are added to the team for Class I or II cases. Possible members are shown on Exhibit II-5.

Within a month of its first meeting, the litigation team should develop three crucial documents:

- . A Case Negotiation Strategy; and
- . A Case Litigation Strategy; and
- . A Draft Referral Package for Headquarters.

In so doing, the remaining legal and technical issues must be resolved. Any additional meetings with responsible parties should also be concluded within 60 days of the first meeting of the litigation team, so that referral can proceed.

**EXHIBIT II-5
LITIGATION TEAM**

ACTIVITY	RESPONSIBILITY	PRODUCT	TIMING
1. Convene first meeting of the litigation team	Regional Counsel convenes group consisting of: <ul style="list-style-type: none"> Regional Counsel staff attorney Regional Program Office technical staff Headquarters legal and technical staff as appropriate, based on case classification (see below). 		Within six weeks of decision to pursue judicial referral or six weeks of final cleanup activity
2. Involve appropriate Headquarters Staff for Class I or II case	Regional Counsel case attorney contacts: <ul style="list-style-type: none"> OECM Regional Coordinator, or Branch Chief Regional Program case staff contacts: <ul style="list-style-type: none"> OWPE Regional Coordinator, or Branch Chief 		
3. Identify and resolve remaining legal and technical issues	Litigation team	<ul style="list-style-type: none"> Case Negotiation Strategy Case Litigation Strategy Draft Referral Package for Headquarters 	Within one month of first meeting
4. Conduct additional meetings with potentially responsible parties	Litigation team		Should not extend longer than 60 days from first meeting of the litigation team

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2. Referral Package for Headquarters

When it has been determined that judicial case referral is appropriate, the litigation team prepares, and transmits to EPA Headquarters, a referral package. Chapter III of this handbook, "Description of EPA Hazardous Waste Civil Referral Package" lists in great detail, the required contents of the package. Among the important types of documents are the following:

- . Copies of inspection reports
- . Work plans
- . Sampling and analysis reports
- . Other relevant technical data
- . Summaries and, generally, copies of cost document action
- . Records of decisions
- . Copies of administrative orders
- . Draft complaint (optional)
- . Case history memoranda, including EPA administrative action summaries
- . Recommended case budget.

In addition, the package should clearly identify the Lead Regional trial Attorney and the Lead Regional Technical Representative. In most cases, the Regional lead staff will also be the Agency lead staff responsible for assuring that all necessary case development is conducted vigorously and in a timely fashion.

D. Referral to Headquarters

After completion of the referral package, the final phase in pre-referral case development is executed. In this phase, the Region sends the referral package to Headquarters, where a final assessment of the national and program-wide issues that would recommend or discourage referral to the Department of Justice for litigation is made. This section describes special referral procedures, and the Headquarters review process, in order to effect consistent transmittal and review efforts.

Transmittal of the referral package to OECM (with copies to OWPE Headquarters and DOJ) is the Regional Administrator's responsibility. OWPE will review the package, and within 21 days of receipt will provide to OECM a written certification of the Regional determination of the endangerment or that the cost documentation is complete. If OWPE cannot

certify it, they will notify OECM. OECM will review the package within the same 21 days and then determine whether to refer the case to DOJ, to return the case to the Region for further development, or to request additional information from the Region. In cases where more information is required, the Regional Administrator provides a modified referral package within 30 days.

1. Headquarters Review Process

Except for the special cases described below, Headquarters will follow a standard process for timely review and decision on case referrals. The review process is not expected to include insistence on redrafting for simple differences in style, or minor differences in approach. It may however, include ratification or adjustment to the proposed contract budget for experts, based on the Headquarters' perspective of available resources. Exhibit II-6 describes the Headquarters review process in terms of roles, activities, products, and timing. The latter element is particularly important in this procedure.

When Headquarters determines that the package is in order, OECM can make the formal referral to DOJ, sending copies to the AA-OSWER and the Regional Administrator. The referral package includes a memorandum to the Assistant Administrator, Office of Enforcement and Compliance Monitoring, OWPE's determination, where needed, and a letter for the signature of the Assistant Administrator, OECM, to the Assistant Attorney General, transmitting the case for filing. The letter must be submitted and signed within two weeks of OECM and OWPE's concurrence. Details are provided on Exhibit II-6.

2. Referral Decisions in Special Circumstances

Referral decision procedures may occasionally need to reflect special circumstances such as emergency cases in which ordinary time limits are too long. This section describes procedures for such instances, and for case withdrawal or post-referral settlement.

a. Emergency Cases

The standard referral process must be followed in emergency situations, except that telephoned referral requests should be used to expedite the process. Written confirmation and necessary documentation must follow any telephoned requests. The authority to accept and further convey such referrals at Headquarters is shared by the following designees.

- . Associate Enforcement Counsel For Waste
- . OWPE - Appropriate Division Director
- . DOJ - Appropriate Assistant Section Chief

**EXHIBIT II-6
HEADQUARTERS REVIEW PROCESS**

ACTIVITY	RESPONSIBILITY	PRODUCT	TIMING
1. Transmit referral package to: . OECM . OWPE (copy) . DOJ (copy)	Regional Administrator		Within six months of Regional Program Office decision to pursue referral, or six months of final cleanup activity. Where additional meetings with potentially responsible parties are required, transmittal no later than one month after final meeting (but not later than period for completion of the referral package set forth above).
2. Review referral package	OECM and OWPE		Within 21 days of receipt
3. Submit determination to OECM on cases where required	OWPE	Written certification for inclusion in judicial referral package	Within 21 days of receipt
4. Request additional information of Regional Administrator	Associate Enforcement Counsel - Waste, and/or Director, OWPE	Memorandum setting forth determination that more information is required	Within three weeks of receipt.
5. Comply with information request, and return modified referral package to OECM and OWPE	Regional Administrator	Modified referral package	Within 30 days of receipt

**EXHIBIT 11-6, continued
HEADQUARTERS REVIEW PROCESS**

ACTIVITY	RESPONSIBILITY	PRODUCT	TIMING
6. Referral to DOJ	OECM	Memorandum to AA for OECM including: • certification of determination of imminent hazard by OWPE • Letter to the Assistant Attorney General for Land and Natural Resources, transmitting case for filing	Letter submitted and signed within two weeks of date of concurrence by OECM
7. Transmit copies of referral letter to: • AA, OSWER • Regional Administrator	OECM		

b. Access to Sites

Where access to a site is sought through a judicial petition for entry, or through a warrant, direct referral from the EPA Regional Office to DOJ is allowed. Telephone referral requests may be used to expedite the process. Written confirmation and necessary documentation must follow any telephone request. OECM-Waste must be advised of any such direct referrals.

c. Requests for Case Withdrawal or Filing Delay

Requests to DOJ for withdrawal of a case or for delay in filing must originate with the Regional Administrator or the AA for OECM. The AA for OECM should consult with the Regional Administrator and the AA for OSWER, if appropriate, before originating such a request. Such requests will be posed in writing. The letter will explain the reasons for the request, and copies will be sent to:

- . OECM or the Regional Administrator
- . OWPE
- . DOJ
- . U.S. Attorney's Office, if appropriate.

If, within two weeks of receipt of the copy by OECM, the AA for OECM does not object to the withdrawal request, it is to be treated as final. DOJ normally will not file an action while such a request is pending.

* * * *

Case referral and its preliminary steps demonstrate the need for close EPA-DOJ, and Headquarters-Regional coordination. Responsiveness to time constraints and information provision requests will also ensure achievement of referral objectives.

III. DESCRIPTION OF EPA HAZARDOUS WASTE CIVIL REFERRAL PACKAGE

III. DESCRIPTION OF EPA HAZARDOUS WASTE CIVIL REFERRAL PACKAGE

Prompt, effective litigation requires attention to the development of the referral package, the settlement and the litigation strategies. This document requires a greater investment in these activities than in the past. In this chapter, the exact contents of an EPA hazardous waste civil referral package are defined. The package contains three primary parts:

- . The cover letter
- . The referral package contents defining the case
- . The documentary file.

Each of these parts has a number of very specific documents associated with it, as detailed below.

A. Cover Letter

The cover letter transmits the case referral package from EPA to DOJ. It is addressed to the Assistant Attorney General for Land and Natural Resources, and is signed by the EPA AA for OECM. All case references in the letter must be identical to EPA's computer docket. The elements of the cover letter are listed in Exhibit III-1. They are descriptive of the incident; the legal remedies and theories; and personnel and resources required for completion of the case.

The cover letter provides a brief synopsis of the request for litigation. The following section details the exact contents of the referral package.

B. Referral Package Contents

The referral package demonstrates the need for litigation in a particular case, and transmits EPA's technical and legal knowledge to DOJ. One copy of the referral package should be prepared and delivered to DOJ. A courtesy copy may be furnished to the U.S. Attorney's Office (USAO) by the Region. The transmittal letter to the USAO shall state: "I understand that current Department of Justice regulations and the United States Attorney's manual provide that this action may not be commenced without the express prior approval of the Assistant Attorney General of the Land and Natural Resources Division." The remainder of this chapter is composed of ten lists, each corresponding to a section of the referral package, and citing the specific elements to be included in that section. The lists may be used as a checklist for the completeness of the referral package.

EXHIBIT III-1
ELEMENTS OF THE CASE REFERRAL COVER LETTER

1. Brief description of the problem necessitating litigation
2. Specific objectives of the litigation
3. Proposed defendants
4. Statutory claims
5. Members of litigation team
 - . Legal members
 - . Technical members
 - . Lead EPA spokesperson
6. Any need for special urgency
 - . Confirmed by telephone to Chief or Assistant Chief of EES,
DOJ (FTS 633-5271)
7. Any important or precedential legal issues
8. The resource commitment of the Agency
 - . Full time equivalents (FTE) (litigation team)
 - . FTE (witnesses)
 - . Contract dollars.

Section 1. Factual Description of the Problem and Government Response

This descriptive section outlines the events at the site, and recounts the procedural activities of governmental response. Documents to be included are:

a. Site history and description of:

- . Location and ownership of site
 - Results of title search
 - Sufficient information to establish venue
 - Location map if possible
- . Historical activities at site
- . Environmental and health concerns
 - Pollutants, their toxicity, exposure pathways
 - Data analyses such as site map with plotted data
 - Proximity to water supplies, population centers, natural resources, etc.

b. Procedural history and description of:

- . All Superfund (Headquarters and Region) activities at site
 - Documents contemplated by NCP (see Appendix II-1, Exhibit 1).
- . State and local activities.
- . Administrative Orders if appropriate (include copies).
- . Contracts or negotiations with private parties (include copies of all correspondence with defendants or their counsel).
- . Notice letters (include sample copies), demand letters (include sample copies), information requests including any problematical §104(e) responses.
- . Historical and anticipated coordination with state and local governments (include names, addresses and phone numbers of attorneys and key technical staff).
- . Copies of any specifically required statutory determinations, e.g., imminent and substantial endangerment for §106.

Section 2. Objectives of Litigation

This section requires a description of the relief and monetary penalties sought in the litigation, including:

- . A particularized statement of the relief sought -- should include draft (perhaps outline) of final order sought by Agency.
- . If penalties are sought, a calculation of penalties owing.

Section 3. Legal theory of case

The third section highlights the statutory provisions on which the case will be built.

- . Statutes upon which the Agency wants to proceed. (Note case support, whether established or novel theory.)

Section 4. Legal History of Case

All prior legal documents are identified and attached in this section of the referral package.

- . Copies of all filed, legal pleadings relevant to case, such as:
 - Bankruptcy papers
 - Prior acti:
 - Related state cases
 - Warrants.
- . Dates and parties to whom notice and/or demand letters have been sent.

Section 5. Elements of the Case

The prima facie elements of the case must be accurately described in this section of the referral package. They refer to any of the statutory citations upon which the case is based, and are summarized in the following 6 appendices to this manual:

- . Appendix One: 107 CERCLA (Haz/Facility)
- . Appendix Two: 106 CERCLA
- . Appendix Three: 7003 RCRA
- . Appendix Four: 303 CAA
- . Appendix Five: 504 CWA
- . Appendix Six: SDWA

The prima facie elements for cases related to CERCLA Access (Sample), CERCLA Access (Response), 106 AO CERCLA, Bankruptcy Claims, CERCLA misc., RCRA 3008 original, RCRA 3008 AO will be developed at a future date. For each of the elements, the proposed evidence and method of proof must be identified. The following categories (or others) may be used:

- . Stipulation or admission
- . Documentary
- . Fact witness
- . Expert witness.

The Elements section may also need to be responsive to one or more of the following instances, each with special information needs.

a. Consistency with National Contingency Plan (NCP)

If NCP consistency may be an issue, include all records of decision and other documentation required as precondition to action, such as record of decision under §106(a).

b. Cost Recovery

For a case under CERCLA §107 for cost recovery, a statement of account must be prepared, with a description of documentary backup. Original documents must also be available.

c. Witnesses

If witnesses are identified in this part, the following information must be indicated:

- . Present place of employment
- . Home and business phone
- . Substance of testimony
- . Whether statement is on file.

For expert witnesses, the following are required in addition:

- . Field of expertise (include C.V. and reports)
- . Whether individual is under EPA contract
 - For how long?
 - Under what financial arrangements?
- . Other cases where retained in past or present.

Section 6. Recommended Defendants

This section of the referral package describes the complete information required in identifying proposed defendants for each case. It should include:

- . The name of each proposed defendant
 - Address and agent for service
 - General description of assets, if known
- . A description of each defendant's contact with the site, including:
 - Volume and type of waste for each defendant, if relevant
- . The legal theory of liability
- . A description of the relief sought from each defendant
- . A list of other possible defendants and reasons considered and rejected.
- . A copy of each of the following applicable documents for each defendant:
 - Information letter
 - Notice letter
 - Demand letter
 - §104(e) letter and characterization of response.

A complete defendant section contains the applicable documents described above.

Section 7. Identification of Potential Problems

It is important that the referral package identify and begin to respond to potential problems that might be met during litigation. Therefore, an analysis of problems should include the following elements:

- . Anticipated defenses, including a summary of defendant's contentions and factual underpinnings
- . Any internal criticism of cost figures, including IG audit
- . All problems with consistency with National Contingency Plan.
- . Identification of any needs for special urgency:
 - Statute of limitations
 - Environmental threats
 - Whether preliminary injunction should be sought
- . Identification of witnesses having or claiming to have information harmful to EPA's case
- . Notation of any governmental involvement at site.

8. Description of the Documentary File

A file of all documents in the possession of EPA that will support the case should be consolidated before referral. The Department of Justice will not and is not expected to file a civil action for cost recovery until complete, original documentation is in the possession of the litigation team. (Original documents should be in the file.) In addition, the location of the file, its caretaker, and size should be clearly defined in the referral package.

A docket sheet summarizing the contents of the file should be enclosed with the referral. The docket sheet assigns a unique number to each document as the file is compiled, identifying the document and its length. All docket sheets should be designed for public disclosure.

The documentary file should be completely consolidated and include:

- . Records of administrative decisions, evaluations, and recommendations
- . Cost accounting - broken out by spending offices
- . Technical files
 - Assessment of site
 - Assessment of threat
 - Assessment of remedy
- . Correspondence
- . Pleadings
- . Defendant files
- . Other evidentiary documents
- . Minutes of negotiations
- . Documents required by appropriate Appendices to this section

Two parallel files may be maintained. The first is a public, discoverable file, from which Freedom of Information Act (FOIA) requests may be answered. The second is a privileged file, containing attorney/client privileged information, work products, and other sensitive documents. The nature of privilege should be noted on the docket sheet.

Section 9. Settlement

The referral package should indicate with specificity the nature of any previous settlement discussion and include proposals made by any party. The package should also recommend a bottom line settlement position and, if desired, suggest a negotiation strategy.

Section 10. Agency Resource Commitment

In the final portion of the referral package the Region shall describe EPA's resource commitment to the case. The success of judicial enforcement often depends on the amount of technical and legal resources that can be applied to the case. These resource commitments should be taken seriously, but can be adjusted by agreement of all offices, as circumstances warrant. The Region should ensure that time or resources other than those of the Regional Office, are available. In addition, the resource estimates should attempt to predict the resources needed through trial of the case. An estimate of the probability of a particular case going to trial should also be made.

The following specific resource commitment information is required:

- . Members of litigation team and estimated FTE
- . Estimated FTE for Agency witnesses (or other governmental witnesses who may testify). Sufficient time need be included for:
 - Preparation of testimony
 - Consultation with litigation team
 - Deposition
 - Trial testimony.
- . Contract dollars and current contract status for expert witnesses. This estimate should reflect:
 - Entire contract dollars needed for all outside testimony
 - Time for preparation of testimony
 - Consultation with litigation team
- Deposition
 - Trial testimony
 - Travel
- . Estimated costs of other litigation support such as computerized support, travel, exhibits, etc.

When the resource commitment estimates are complete, the referral package may be transmitted to DOJ.

IV. CASE MANAGEMENT AFTER REFERRAL

IV. CASE MANAGEMENT AFTER REFERRAL

Once the case has been referred to DOJ, a number of important responsibilities fall to both Agency and Department staff. This chapter outlines these case management actions, and the roles of all team members. The subsections of this chapter are organized by the type of activity (substantive motions, discovery, response to discovery, etc. undertaken during this phase.)

A. General Principles: The Case Litigation Team

As in other phases of the referral process, the general principles guiding post referral steps specify distinct roles for all members of the litigation team. The litigation team is composed of the following members:

- . Department of Justice attorney(s)
 - Including Assistant United States Attorney(s)
- . EPA attorney(s)
- . EPA technical representatives.

Key to the success of the team is early and consistent identification of objectives supported by a strategy for achieving those objectives. The team should operate recognizing that success in litigation often depends on the best marshalling of evidence, including but not limited to compelling experts, more complete data and evidence, and by better and harder work throughout the process.

The litigation of a hazardous waste case by the government is truly a team effort. Each member of the team must carry her/his part of the load, and careful coordination among the team is crucial. While the structure and responsibilities of the team may change from one case to the next depending on the nature of the case and the interests and strengths of the team members, coordination and consultation among the team is imperative. Usually, the litigation team will have three central figures: The Lead Trial Attorney, the Lead Agency Attorney, and the Lead Technical Representative. Arrangements must be established and maintained which assure that each central member of the team is kept abreast of and is consulted about all significant activities and decisions occurring in the case. Generally speaking, each central member is jointly and severally liable for assuring coordination and consultation with the other two central members.

Exhibit IV-1 lists the activities and responsibilities that support the accomplishments described above, noting specified roles for the different agencies and team members. Managers at all levels are expected to instill a cooperative spirit in their staff members, recognizing the

**EXHIBIT IV-1
GENERAL STEPS OF CASE MANAGEMENT**

ACTIVITY	RESPONSIBILITY
1. Determine Lead Trial Attorney	DOJ
2. Establish case strategy	DOJ, in consultation with Agency personnel on case
3. Resolve litigation decisions: . Case strategy . Case management . Resource needs . Expert needs.	DOJ Resource commitment disputes handled by management
4. Determine Technical Issues and Settlement Position	EPA, in consultation with DOJ
5. Resolve other issues . Identify relief sought . Provide internal coordination . Identify policy concerns	EPA
6. Convene a conference of the litigation team to develop case strategy and make assignments and establish deadlines for case development	Lead Trial Attorney
7. Prepare and distribute memorandum describing the discussions and resulting assignments	Lead Trial Attorney, or designee

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EXHIBIT IV-1 Continued
GENERAL STEPS OF CASE MANAGEMENT

	ACTIVITY	RESPONSIBILITY
8.	Resolve differences of opinion for routine case strategy	Lead Trial Attorney
9.	Resolve substantial policy questions	Managers - Appropriate decisionmakers in supervisory chain
10.	Appoint staff person to act as case manager for: . Technical issues . Policy issues . Witness support . Legal coordination	EPA
11.	Develop contracting and administrative procedures to obtain: . Expert witnesses . Other technical support	EPA
12.	Identify expert witness needs within case budget	Lead Trial Attorney, in close consultation with staff technical person
13.	Design comprehensive plan for discovery	Lead Trial Attorney
14.	Adopt ad hoc procedures to ensure complete coordination among offices. Lead Trial Attorney may deal directly with all team members	Lead Trial Attorney with litigation team

variable roles of case personnel. The Lead Trial Attorney is determined by DOJ as soon as reasonably possible, but not later than 60 days after referral. Responsibilities of the Lead Trial Attorney are described in Chapter II of this document.

One of the most important steps in this phase is the development of the case strategy. The process is initiated by the Lead Trial Attorney, in conference with all case personnel. The conference should be held as soon as possible after referral, and not more than 30 days after designation of the Lead Trial Attorney. The conferees must, at this time, resolve a number of issues. Among the issues that should be discussed and resolved, insofar as possible, at the case strategy conference are:

- . Whether the case is appropriate for government application for a preliminary injunction or other form of extraordinary relief;
- . All legal issues expected to be raised in the case proceedings;
- . Evidence that will be necessary to sustain the government's case;
- . Witnesses who will or may be necessary to introduce evidence on behalf of the government;
- . Further litigation team member assignments.

A post conference memorandum developed within five days of the conference conclusion memorializes resolution of these issues, and the assignments that may result from this effort. Resolution of other issues (relief sought, internal coordination, policy identification) is EPA's responsibility.

The Lead Trial Attorney has the authority to resolve routine case strategy differences: however, substantial policy questions must be brought to management for resolution. The Lead Trial Attorney, in close consultation with the team's technical staff, identifies expert witness needs within the specified case budget. Moreover, he or she designs the comprehensive discovery plan.

EPA's role in case management requires the appointment of technical staff (usually two or three technical staff members for each attorney) to manage technical and policy issues, witness support, and legal coordination. EPA also must develop contracting and administrative procedures for expert witness and other technical support as needed.

The litigation team may then adopt ad hoc procedures to ensure complete coordination between EPA and DOJ. The Lead Trial Attorney may deal directly with all team members.

B. Document Organization

Chapter III of this document described in detail, the required documentation for effective case development. Herein, the importance of such documents is reiterated, since document organization is so vital to case management procedures.

EPA is responsible for maintaining a consolidated file of all documents. Evidentiary documents ordinarily should be original documents. A docket sheet summarizing the contents of the document file will also be developed by EPA and provided to DOJ.

C. Analysis of Referral

After reviewing the referral package, DOJ should promptly arrange an initial meeting of the litigation team. At this time, the team can identify further information that may be required for case filing or subsequent to filing. EPA will promptly respond to these information requests.

D. Requests to Withdraw Referral or Delay Filing

In some circumstances, EPA may wish to withdraw its referral, or delay filing. The requirements for doing so are detailed in Chapter II, Part (D) (2) (c).

E. Pleadings, Dispositive Motions, and Other Substantive Motions

The preparation of pleadings, motions, and briefs is the primary responsibility of DOJ, although EPA views will be sought on any significant pleadings. A further description of the events and responsibilities of this phase of litigation is provided in Exhibit IV-2. DOJ will ordinarily have responsibility for nearly all of the motion drafting activities, with EPA playing a review and technical support role during this process. If demand letters have not been sent, DOJ will do so for cost recovery complaints. The Lead Trial Attorney will assign responsibility for preparation of motion responses, as shown in the Exhibit, and will respond to minor motions and minor discovery motions.

F. Preparation of the Government-Initiated Discovery

Government-initiated discovery activities are the result of development and implementation of a comprehensive discovery plan. As described in Chapter III, this plan is the responsibility of the Lead Trial Attorney, as is assignment of discovery responsibilities. Since discovery matters generally do not invoke policy, extensive coordination is not usually required. However, EPA technical and legal personnel should be consulted. If Agency input is not received in a timely manner, the Lead Trial Attorney will serve the discovery. The Lead Trial Attorney will also provide copies of discovery answers to Agency legal representatives.

EXHIBIT IV-2
PREPARATION OF PLEADINGS AND MOTIONS

ACTIVITY	RESPONSIBILITY
1. Prepare pleadings, motions, and briefs	DOJ Consultation with EPA will be sought for major products
2. Prepare complaint	DOJ, with necessary technical allegations provided by EPA technical representative
3. Review complaint	EPA technical and legal representatives
4. Send demand letters, when they have not been sent in a cost recovery complaint	DOJ
5. Assign responsibility for preparation of: <ul style="list-style-type: none">. Responses to motions to dismiss. Responses to motions for summary judgment. Responses to other motions	Lead Trial Attorney
6. Respond to minor motions (e.g. for extension of time) and to minor discovery motions	Lead Trial Attorney

When discovery includes depositions, each deposition will ordinarily be taken by one attorney. The Lead Trial Attorney will decide which attorney will take the deposition and whether experts should be provided to assist in the deposition.

G. Response to Defendant Discovery

The Agency normally is responsible for preparing draft responses to discovery initiated by defendant(s). The LPA legal representative generally will coordinate obtaining and preparing complete answers for the entire Agency and submit them to the Lead Trial Attorney with ample time for his or her review.

H. Requests for Additional Support During Litigation

During the course of the litigation, any member of the litigation team may spot possible weaknesses in the government's case that might be remedied by further case development. These will be communicated to the Lead Trial Attorney, who, after consultation, will assign responsibility for the additional work.

In cases where new OWPE or OECM resources requirements significantly exceed those contemplated in the referral package, OWPE/OECM concurrence will be required.

I. Outside Contacts

For every case, there are identifiable groups which can be seen to be outsiders. These outsiders include opposing parties, their counsel, and their contractors and witnesses. Outsiders also include more neutral persons such as the press, intervenors, the legislative and judicial branches of the Federal Government, and, in some instances, state and local governments. All inquiries from outsiders pertaining to the case should be forwarded to the Lead Trial Attorney and all contacts or discussions with outsiders must go through the Lead Trial Attorney or his/her designee.

J. Negotiations and Settlement

Negotiations and settlement are part of litigation, and should be handled as such. Therefore, the progress of litigation should not be impeded by settlement negotiation efforts.

The Lead Trial Attorney should participate in all negotiations and she/he should be the recipient of all inquiries from the opposing side. In all significant negotiations, the Lead Trial Attorney will normally be the government spokesperson, and the Lead Agency Attorney and Lead Technical Representative (if technical issues are to be discussed) should be present. It is the responsibility of each member of this litigation team to keep his/her management advised of all significant developments in

settlement negotiations and to communicate any feedback received from her/his management to the litigation team. All settlements must be approved by OECM and DOJ. Before OECM will approve a settlement, it must be approved by the Regional Administrator and OSWER.

K. Updates on Evidence

EPA will periodically update addresses of witnesses, field and lab contractor personnel, and other evidence during the course of the litigation.

L. Pretrial Order

Preparation of the pretrial order in accordance with local rules and practices is extremely resource intensive. All members of the litigation team should devote extra efforts during this period.

M. Trial

The culmination of the case development process, should settlement not be reached, is the trial. The Lead Trial Attorney determines the trial strategy. He or she is supported at trial, by Agency personnel and contractors as needed. Adherence to the rules of evidence may make trials resource-intensive and may require many witnesses. Often the exact dates of testimony will not be known, so availability and flexibility are critical.

* * * * *

In this chapter, the progression of activities from case team development through trial has been detailed. Observation of these procedures is key to interagency coordination and the success of subsequent efforts.

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V. TECHNICAL SUPPORT FOR LITIGATION

Case development and support activities rely a great deal on expert technical assistance. The litigation team determines the need for expert input at each phase of case development. In some instances, it may be difficult to ascertain when experts need to be involved, especially if case progression toward actual litigation is uncertain. This chapter addresses technical support only in the litigation components of case development. It assumes that certain early technical assessments are complete. These include:

- Preliminary responsible party determination (for detailed description, see National Enforcement Investigations Center (NEIC), Procedures for Identifying Responsible Parties: Uncontrolled Hazardous Waste Sites - Superfund, February 1982.)
 - Site inspection
 - Site ownership (including title search)
 - Articles of incorporation
 - §104(e) CERCLA information request letter or equivalent
 - Site records
- Financial assessment of responsible parties
- Preliminary site assessment (i.e. nature of endangerment; for detailed description, see National Contingency Plan §300.64).

Continuing technical support is required, in the later litigation phases.

This chapter contains four sections, of which three describe continued technical support, and the fourth describes case budgets:

- Endangerment Assessment
- Feasibility Study for Enforcement
- Expert Witnesses
- Case Budget

These sections, and their implications for technical assistance needs apply only to enforcement-lead sites. In cost recovery (Fund-lead) efforts, the two assessments will have been completed as part of the remedial investigation/feasibility study for the site response action and normally will be available when a §107 case is initiated.

A. Endangerment Assessment

1. Purpose

An endangerment assessment serves two purposes in appropriate injunctive actions. First, it provides the basis for the "imminent and substantial endangerment" count of the Complaint. Second, in actions under Section 106 of CERCLA, it fulfills the requirement of the National Contingency Plan.

2. Scope

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An endangerment assessment evaluates the actual or potential health and welfare hazards to populations or the environment exposed to contaminants from a hazardous waste site. The assessment itself must include the following information:

- . Qualitative and quantitative data describing predicted or actual hazards, exposures and risks
- . Supportable conclusions regarding the potential for endangerment to the public health, welfare or the environment.
- . Adequate documentation of all facts and suppositions cited must be provided.

An endangerment assessment is a part of the remedial investigation/feasibility study (RI/FS). When an RI/FS is not done (e.g., at a non-NPL site), it is a separate determination. An endangerment assessment must also be included in a §106, 3013, or 7003 administrative order. If an RI/FS was done, the order should summarize the endangerment assessment that was done in the RI/FS. If the order calls for an RI/FS to be done, such as on consent, the order must contain a preliminary endangerment assessment. The final endangerment assessment that is done by the respondent in the RI/FS should then include this preliminary endangerment assessment and expand upon it. The assessment takes existing data and evaluates its significance, using, for example, partial or inconclusive data to make educated and reasonable predictions. It then uses exposure and risk evaluations to define the extent of endangerment. The endangerment assessment ties together the important information from the remedial investigation, a toxicological evaluation, an exposure assessment and a risk assessment to define the magnitude of the hazard at a site. The approaches to the exposure and risk assessments may be qualitative or quantitative depending on the needs of the litigation team.

3. Conducting an Endangerment Assessment

An endangerment assessment takes data from the remedial investigation and the feasibility study. In general, it consists of two parts. The first is a site evaluation taken from the remedial investigation. This evaluation determines the nature and the extent of the contamination from the site. The evaluation predicts the extent of future contamination should the pollution continue unabated. The second part assesses, as quantitatively as possible, human and environmental exposure, and their likely consequences.

Remedial Investigations/Feasibility Studies are done at all National Priorities List sites before remedial actions are taken. After a site is designated as a Federal enforcement lead site, an RI/FS will be conducted by the Office of Emergency and Remedial Response (OERR) according to a schedule mutually acceptable to OWPE and OERR. The RI/FS will be conducted at Federal enforcement lead sites and can take from 3 to 18 months depending upon the complexities of the site.

OWPE will review the scope of work of the RI/FS to determine if it is comprehensive enough to provide information on endangerment. Exhibit IV-1 outlines the contents of an endangerment assessment that will be needed in the review. OWPE staff or consultants with the appropriate expertise (TES contract) will conduct these reviews.

OWPE and OERR are currently working together to publish a joint policy on endangerment assessment as part of the remedial investigation and feasibility study guidances. This guidance will discuss the statutory basis for why an endangerment assessment is done, when one is done, what an endangerment assessment is, how it is put together, and who does them. The guidance is expected out at the end of July 1984.

EXHIBIT V-1

ENDANGERMENT ASSESSMENT OUTLINE

I SITE CHARACTERIZATION

- A. Physical description of the site
- B. Geographical location
- C. Demographic surroundings
- D. Type of facility (landfill, incinerator, impoundment)
- E. Management practices

II CONTAMINANTS FOUND AT THE SITE

- A. Identity/type
- B. Quantity
- C. Form
- D. Manner of disposal
- E. Concentration in environmental media
- F. Ambient levels

III. FACTORS AFFECTING MIGRATION

- A. Topography
- B. Soil parameters
- C. Geological parameters
- D. Hydrological characteristics
- E. Climate

IV. ENVIRONMENTAL FATE OF CONTAMINANTS

- A. Physical and chemical degradation characteristics
- B. Movement between environmental media
- C. Hydrogeological/geochemical characteristics
- D. Evidence of migration

V. RISK EVALUATION

- A. Risk assessment
 - 1. Hazard identification
 - 2. Dose-response assessment
 - 3. Exposure assessment
 - 4. Risk characterization
- B. Risk management
 - 1. Process of evaluating and selecting options
 - 2. Risk assessment as one basis

VI. IMPACT EVALUATION

A. Health assessment

1. Multi-disciplinary review
2. Evidence of effects on target population

B. Human health studies

1. Long term epidemiological studies
2. Clinical studies

C. Health advisory

1. Short and long term risks
2. Medical panel consensus
3. Description of precautionary measures

B. Feasibility Study For Enforcement**1. Purpose**

Similar to the endangerment assessment, a feasibility study (FS) for enforcement serves two purposes. The feasibility study for enforcement determines the relief that should be sought from the defendants at trial. Past experience shows that courts are not inclined to order responsible parties to do mitigative assessment studies, but want the plaintiff to delineate the remedy. The second purpose of the assessment is to fulfill the requirement of the National Contingency Plan that an enforcement sought remedy considers the same factors as Fund financed remedy (See NCP §300.68 (c)).

2. Scope

A feasibility study is conducted prior to any Fund-financed remedial action. It considers the range of remedial options and recommends the one that is:

"the lowest cost alternative that is technologically feasible and mitigates and minimizes damage to and provides adequate protection of public health, welfare, or the environment." (NCP §300.68 (j))

Feasibility studies will be initiated at several federal enforcement lead sites. If the feasibility study is done in conjunction with the remedial investigation it will be done by the Remedial/Field Investigation Team (REM/FIT) contractor. If not, either the REM/FIT I or II contract or the OWPE Technical Enforcement Support (TES) contract will do the FS, and it will be called an alternatives assessment.

A feasibility study for enforcement can differ from a program initiated feasibility study in some ways that reflect special needs of the enforcement program. These are described below.

a. Temporal Aspects of Investigation

The feasibility study may not initially include all aspects of the site, since OERR may take an incremental approach. For example, the immediate problem of drinking water contamination may be addressed first. At some later time, OERR might examine the residual pollution in a receiving water body, if the later threat does not present an immediate danger to humans. The scope of the enforcement action, however, should be as comprehensive as possible to avoid having to amend the Complaint or risk bringing new counts after the case has been resolved.

b. Fund Balancing

Enforcement sought remedies do not have to consider the Fund balancing provisions of the NCP (§ 300.68(k)), as do Fund-financed activities.

c. NCP Interpretation

Enforcement considerations may lead to different interpretations of the NCP. For instance, two alternatives may remedy a problem; one has primarily initial capital costs and the other primarily future annual costs. Although an evaluation of present worth may show that the second alternative is cheaper, enforcement needs may require the more expensive capital costs if the responsible party is unlikely to continue to pay the annual expenses.

Therefore, the scope of a feasibility study for enforcement could be broader or narrower than that of a program initiated feasibility study, depending upon the nature of the particular site. The Regional technical enforcement personnel will review the scope of each enforcement feasibility study or alternatives assessment to ensure that enforcement considerations are included. OWPE is currently drafting guidance on this topic, which will be included in the OERR RI/FS guidance. As envisioned, the OERR RI/FS Guidance will accept the basic methodology of Fund-financed feasibility studies and incorporate the enforcement factors discussed above.

C. Expert Witnesses

Expert witnesses can be one of the crucial factors in success of a case. As an integral part of the case development plan, identification and strategy for use of experts is required prior to case referral. This section describes the types of expert witnesses that may be required, witness selection, and procurement procedures.

1. Fields of Specialization

The complexity of hazardous waste cases introduces a demand for a broad spectrum of expertise. The following list describes some (but not all) of the fields of specialization to be considered:

. Human Health

- Toxicology
- Epidemiology
- Medical opinion
- Public health
- Biostatistics

- . Environmental Effects
 - Aquatic and mammalian toxicology
 - Ecology
 - Entomology
 - Botany and plant pathology
 - Environmental fate
- . Physical Sciences
 - Geology
 - Hydrology
 - Soil Science
 - Geological engineering
 - Environmental engineering
 - Chemical engineering
 - Analytical chemistry.

The specific facts of the case should dictate the nature of expertise required.

2. Witness Selection

Historically, experts have been selected in two ways. In one, the litigation team agrees to hire a specific person in a field of expertise. In the second, an appropriate expert is unknown to the team and, therefore, a search for the best candidates is conducted. OWPE is now developing a computerized data base of experts which can be accessed by the litigation team through a request to Headquarters. Expert searches can also be conducted by the National Enforcement Investigations Center (NEIC) but these requests should still be made through Headquarters. Once a number of highly qualified experts in a given field have been identified, the litigation team then interviews the nominees and selects the case expert. In some instances the search for experts in a field is done for a specific case. In others the demand for expertise of a certain kind is great enough to demand a general search, with the nominees presented to any litigation team requesting that expertise. The latter method is also used when an exhaustive search on a particular case turns up several highly qualified experts and subsequent cases can benefit from this earlier search.

3. Procurement of Witnesses

In the past, a variety of mechanisms have been used to hire experts. EPA or other federal or state government employees have been used as experts. In addition, experts have been procured through contracts such as the REM/FIT contract, Office of Research and Development (ORD) contracts, a water enforcement contract, and DOJ contract mechanisms.

Consideration should be given to use of government (particularly EPA) employees as witnesses, for a number of reasons. First, there can be a considerable cost savings. EPA and the federal government employ many experts of national and international renown. In addition, the government can help the prosecution of future difficult cases if it now trains capable experts in the area of court testimony. The U.S. Geological Survey (USGS), Army Corps of Engineers (COE), and U.S. Fish and Wildlife Service (FWS) are examples of other federal agencies that can provide expert opinions.

When outside consultants are required, procurement can be accomplished through the TES contract. The use of TES is prohibited when a firm other than the one awarded the contract, is needed. In this case a sole source procurement, a buy-in to an existing contract or a subcontract through REM/FIT should be used. Advanced planning is needed when a sole source procurement is necessary, since the process can take several months. In the situation where a named expert is needed immediately, that person can be hired within a few days under TES. If the expert must be hired more quickly, this might be done by the Department of Justice. However, due to the shortage of funds, the expert should be hired by TES as soon as possible. OWPE and OEM-W are working with the EPA Contracts Office to quicken the procurement of experts. OWPE is currently preparing a guidance document on the selection and use of experts.

D. Case Budgets for Imminent Hazard Cases (CERCLA; RCRA 3013 and 7003)

The availability of resources to support the Agency's enforcement efforts is a continuing concern. In nearly every enforcement action taken on hazardous waste sites it was desirable to add more government personnel to the case effort. Lacking this, contractor support has been relied upon. To date these extramural resources have been given mainly on a first come, first served basis and in a few instances on a planned basis. Fortunately, the overall support needs so far have been met within the extramural resources budgeted. This has been helped by a bias on the part of the technical offices advocating the use of in-house experts where possible.

However, as the number of active cases increases, it is inevitable that the availability of resources will become a real issue and that trade-offs will have to be considered. Rather than facing this issue sometime during the fiscal year and being confronted with a crisis decision, it would be desirable to plan for the enforcement required resources as early as possible, thereby allowing the trade-offs to be decided before there is conflict. DOJ and EPA officials can then decide how many new cases can be supported, how many and what cases should be expedited and which should proceed on a slower track. This will be accomplished by the case budget system.

Although the case budget process is still under development, the following are the principles upon which it will be built. It is based on the premise that OWPE is the principal source of extramural funds to support enforcement efforts. OWPE has a mix of contractors and interagency agreements that can be used. Based on projected workloads, the Regions will be assigned an amount of credit upon which they can draw from any of the OWPE contracts or interagency agreements.

Enforcement costs can be divided into three categories: overhead, prelitigation expenses and post referral expenses. For the first category, OWPE would first subtract from its budget those costs necessary to support the enforcement program as a whole, such as contractor support to perform policy analysis.

Prelitigation expenses include those items that are necessary to conduct site classification, such as responsible party searches, and other activities that are necessary to develop a number of potential enforcement cases, such as negotiation support and records compilation. These prelitigation expenses are planned for in the Superfund Comprehensive Accomplishments Plan (SCAP) and a budget for each Region can be established by multiplying the totals for each category by a cost factor, which is an average of each category's costs to date. The Regional Program Offices would then manage their SCAP targets against the resources allocated. The Regions would have the flexibility to shift resources from a site task that costs less than the average to another that costs more. OWPE will manage a contingency fund consisting either of the funds that have not been allocated to overhead, prelitigation or post referral costs, or, if the demand exceeds the budget, a percentage of the budget, e.g. 5 to 10 percent. The contingency fund can be accessed in the event that, for good cause, the actual total prelitigation expenses for a Region exceed the budget. OWPE will establish an appeals system before implementation of the case budget system in fiscal year 1985.

The post referral expenses include additional technical studies beyond the RI/FS, technical review of documents, expert witnesses, interrogatory responses, evidence audits, compliance monitoring and costs related to recovery actions. In addition, there are existing cases, future cases, and Class I, II and III cases (see chapter II). In brief, the Regions will prepare cost estimates for each existing case and each new case on the next year's SCAP. For Class III cases which will cost less than the average case, approximately \$300,000, a budget will be established for and administered by each Region as for prelitigation expenses. For Class I and II cases OWPE will participate in the formulation and/or review of the individual case budgets. Where Class III cases are expected to exceed the average case cost, OWPE will be involved to an extent proportional to the amount that the case exceeds the average. As for prelitigation expenses a contingency fund will be established.

OECM and DOJ will review the overall case budget at the time it is formulated prior to the start of each fiscal year. Any budget disputes between DOJ and the Region which cannot be quickly resolved by the Region should be brought to OWPE. The case budget system will be initiated in the FY 1985 SCAP guidance to the Regions, which asks the Region to assess FY 1985 extramural needs.

SUMMARY

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Evolving case support needs must be handled quickly and judiciously. In some instances, competing resource demands, and a growing case load in general require conscientious use and administration of support activities. This chapter has pointed out ways in which support can be achieved for maximum effectiveness.

VI. POST-JUDGMENT FOLLOW-UP

The final phase of case management requires careful attention to post-judgment follow-up. These follow-up actions ensure that the fruits of case development labor are instituted in a timely fashion, and accomplish the necessary environmental goals. The types of action requiring follow-up, personnel responsibilities, and the constraints to post-judgment follow-up are detailed in this chapter.

A. Action Requiring Tracking or Follow-up

Two categories of activities should result in a conscientious tracking effort: judicial consent decrees and court judgments. Follow up for administrative decrees is discussed in the RCRA and CERCLA Administrative Order Guidance.

The obligations for consent decree and court judgment follow-ups are identical. They should ensure:

- . Submission, review and approval of plans, or scopes of work for investigations or feasibility studies
- . Submission, review and approval of plans and specifications for technical components of remedial activities
- . Payment of fees, penalties, reimbursements or other monies
- . Maintenance of schedules and deadlines for submission of plans and data, completion of remedial components, and completion of consent decree requirements
- . Resolution of disputes that arise during implementation of the consent decree.

These tracking functions require substantial coordination between the government bodies charged with RCRA and CERCLA functions. The next section describes the roles and responsibilities that best serve a coordinated follow-up effort.

B. Preferred Roles for Tracking Enforcement Actions

The EPA, DOJ, and states are charged with specific responsibilities in ensuring the accomplishment of court-imposed actions by defendants. In roles parallel to their pre-judgment efforts, EPA and DOJ perform complimentary, yet separate functions. In addition, the states have potential functions related to their position and ability to perform monitoring activities. Since states may be party to the enforcement decree or judgment, they must assume responsibility for its relevant sections. Exhibit VI-1 shows EPA, DOJ and state roles.

**EXHIBIT VI-1
POST JUDGMENT RESPONSIBILITIES**

EPA	DOJ (or US. Attorney)	States
1. REGION		
<ul style="list-style-type: none"> . Has lead role in tracking implementation of compliance for consent decrees and court judgments. Include: <ul style="list-style-type: none"> - Designation of lead attorney for tracking - Designation of lead technical staff for tracking . Lead tracking attorney: <ul style="list-style-type: none"> - Ensures timely agency review, approval or other decision is communicated to responsible party. . Lead tracking technical staff <ul style="list-style-type: none"> - Coordinates required technical support - Arranges necessary contract support. - Ensures adequate implementation . Identifies violations or disputes 	<ul style="list-style-type: none"> . Takes any necessary action required for follow-up to violations or disputes. 	<ul style="list-style-type: none"> . May be able to provide compliance assurance support at request of EPA regional office, including: <ul style="list-style-type: none"> - Site visits - Maintenance inspections - Review of reports and proposals. . May be responsible for specific sections of decree or judgment where: <ul style="list-style-type: none"> - State is a party to enforcement action - State resources are most effectively employed.
2. HEADQUARTERS		
<ul style="list-style-type: none"> . Maintains manual or automated follow-up tracking system for all enforcement actions . Maintains contract capability for technical support, to ensure compliance . Ordinarily oversees the identification of violations or disputes. 		

VI-2

EPA's role, especially in the Region, is a major factor in post-judgment monitoring. As in previous case development steps, lead technical and legal staff members are appointed in the Regions. Their jobs, as shown in Exhibit VI-1, represent leadership positions in Agency communication with the responsible party, Agency technical review, and arrangement for contract support. EPA Headquarters maintains contract capability for follow-up through its TES contract and its Interagency Agreement with the Army Corps of Engineers. These can be used to review remedial design and remedial implementation, as well as, in appropriate circumstances, for compliance monitoring.

Headquarters is also responsible for maintenance of tracking systems, used for management information at the national level. The automated or manual system should be capable of tracking all enforcement actions requiring follow-up. The National Enforcement Investigations Center (NEIC) currently uses a tracking system for judicial consent decrees in all EPA programs. Future expanded use of this system by EPA Headquarters and Regions is under consideration.

Final follow-up responsibilities belong to DOJ, typically in response to a new referral which must take any action needed to respond to violations of decrees, or to disputes.

C. Constraints and Obstacles to Post Judgment Follow-up

Lack of designation of responsibility and shortfalls in resource commitment may hinder post-judgment efforts, effectively thwarting the result of otherwise successful enforcement actions. Therefore, the roles discussed above must be clearly delineated and communicated to the appropriate offices. In addition, the importance of post-judgment follow-up must be emphasized.

Effective tracking of enforcement actions requires sufficient resource availability, especially in the Regions. Thus, as staff responsibilities are determined, staff must be made available to fill the positions. Further, contract support should be specifically available for technical enforcement reviews. These reviews may be of investigation plans, remedial actions and designs, and remedial analytical results. To be effective, contract support is needed in a timely fashion in response to short Agency review schedules.

* * * * *

The results of strong enforcement efforts by EPA and DOJ must be supported by equally strong post enforcement tracking. In this way, the Agency and the Department can best ensure that judicial decisions are realized.

LIST OF ABBREVIATIONS AND ACRONYMS

LIST OF ABBREVIATIONS AND ACRONYMS

OSWER # 9837.0

AA	Assistant Administrator
AO	Administrative Order
ATS	Action Tracking System
CAA	Clean Air Act
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
CFR	Code of Federal Regulations
COE	Corps of Engineers
CWA	Clean Water Act
DOJ	Department of Justice
EA	Endangerment Assessment
FEMA	Federal Emergency Management Administration
FIFRA	Federal Insecticide, Fungicide & Rodenticide Act
FOIA	Freedom of Information Act
FS	Feasibility Study
FTE	Full Time Equivalent
FWS	Fish and Wildlife Service
HHS	Department of Health and Human Services
LAA	Lead Agency Attorney
LTA	Lead Trial Attorney
LTR	Lead Technical Representative
NCP	National Contingency Plan
NEIC	National Enforcement Investigations Center
NPL	National Priorities List
OECM	Office of Enforcement and Compliance Monitoring
OECM-W	Office of Enforcement and Compliance Monitoring, Associate Enforcement Counsel for Waste Enforcement
OERR	Office of Emergency and Remedial Response
ORC	Office of Regional Counsel
ORD	Office of Research and Development
OSC	On-Scene Coordinator
OSWER	Office of Solid Waste and Emergency Response
OWPE	Office of Waste Programs Enforcement
POLREP	Pollution Report
RA	Regional Administrator
RAP	Remedial Accomplishments Plan
RC	Regional Counsel
RCRA	Resource Conservation and Recovery Act
REAP	Regional Enforcement Activities Plan
REMS	RCRA Enforcement Management System
REM/FIT	Remedial/Field Investigation Team
RI	Remedial Investigation
ROD	Record of Decision
RRT	Regional Response Team
SAIC	Special Agent in Charge
SCAP	Superfund Consolidated Accomplishments Plan
SDWA	Safe Drinking Water Act
SPMS	Strategic Planning and Management System
TES	Technical Enforcement Support
TSCA	Toxic Substances Control Act
USAO	U.S. Attorney's Office

APPENDICES

APPENDIX ONE

PRIMA FACIE CASE

OSWER # 9837.0

§107 CERCLA

HAZ SUB/FACILITY

Appendix One

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FACT TO BE PROVEN	STATUTORY BASIS	COMMENTS
I. A. Release or threatened release	107 (a)(4) and 101 (22)	A witness capable of describing site conditions and/or history is necessary. NOTE: definition of release is very broad and "threat" of release greatly expands notion.
B. of hazardous substance	107(a)(4) 101(14)	Sufficient analysis of waste to identify at least one of the substances contained in definition. Definition should be read in alternative. Analysis of waste should be done during site investigation or during response action.
C. from a facility	107(a) 101(9)(18)	Unless admitted, description of site using key words of definition should be adequate. NOTE: definitional exclusion of "consumer product in consumer use". Also note exclusion at 107(j) for "federally permitted release" 101(10). Location of facility establishes probable venue under §113(b) (Exception: bankruptcy). NOTE: While release or threatened release a particular generator's or transporter's waste is not required, it should be established wherever possible.
D. Release or threatened release of a hazardous substance caused incurrence of response costs	107(a)(4) and	An administrative record of decision should exist which documents "release or threatened release of hazardous substance" leading to "incurrence of response costs". The ROD will presumably be executed by the individual authorized to spend fund money, and will be backed by administrative record. Witness should be available.
II. Each defendant is liable as either:		103(c) Reports may be useful evidence for owners/operators/transporters. Nonexistence of report may help eliminate 107(b) defense
A. Owner		
(1) At time of release or threatened release leading to response or at time of response	107(a)(1) 101(20)(A)	Owner(s) at time of release/threatened release leading to response action established by title investigation. NOTE: Security holders are not owners unless they participate in management of facility. 101(20)(A) Req. for Adm. should establish easily.
<u>or</u>		

HAZ SUB/FACILITY

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FACT TO BE PROVED	STATUTORY BASIS	COMMENTS
(2) During disposal of hazardous substance	107(a)(2)	Owner(s) during disposal established by evidence of dates of disposal of hazardous wastes (which lead to incurrence of response costs) coupled with title investigation. Rec. for Admission should establish ownership dates.
B. Operator	101(20)(A)	In most instances the operator will be easily identified, usually a corporate entity. To reach individuals working under corporate either (1) pierce corporate veil (not easy) or (2) establish that the individual "controlled activities at facility" or "participated in management" of facility. The "controlled activities" test will be most easily sustained if it occurred immediately prior to "abandonment" of facility. See 101(20)(A)(iii). The "participated in management" test is sustainable by analogy to 101(20)(A) [second sentence]. Also note 101(20)(B) & (C) for inclusion/exclusion of common or contract carriers for this class.
(1) At time of release or threatened release leading to response or at time of response <u>or</u>	107(a)(1)	Evidence of dates of "disposal" [See 100- of RCRA] of hazardous wastes (which lead to incurrence of response costs) will be necessary under 107(b)(2).
(2) During disposal of hazardous substance	107(a)(2)	"Disposal" & "Treatment" definitions very important. Arrangement can be shown simply by practice, although contract is preferable.
C. Generator		
(1)(a) Arranged for disposal or treatment...	107(a)(3) 100- RCRA	
<u>or</u>		
(b) Arranged with transporter for disposal or treatment	101(26)	
(2) of hazardous substances	101(14)	Evidence that a particular generator's waste is hazardous. If documentary evidence does not establish, site samples of waste identified to a generator should be obtained. A whole host of possible evidence could be used: generator, operator, or owner information obtained under 104(e) is good source.
(3) owned or possessed by such person		

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FACT TO BE PROVEN	STATUTORY BASIS	COMMENTS
(4) disposal or treatment by any other person or entity	107(a)(3)	Disposal or treatment arranged by defendant be done by another party. This phrase ("by any other person or entity") may be read to modify "owned or possessed by" rather than "disposal or treatment", thus reaching parties who never owned or possessed the waste (such as brokers).
(5) disposal or treatment at facility owned or operated by another party or entity		
(6) facility containing such hazardous substances	107(a)(3)	Show that hazardous substance generated by defendant was at site. Best evidence would be on-site analysis or identification. Acceptable evidence would be dispatch, delivery and lack of evidence removal, particularly if that type of substance is documented to be on site.
D. Transporter		
(1) accepted hazardous substances for transport or disposal	107(a)(-) 101(26)	Although statute does not explicitly require a showing that waste was actually transported to site and present, such a showing should be made. NOTE: A transporter who does not select the site may, in some circumstances, be considered an owner, 101(20)(b) & (c), and in most circumstances will be included in 107(a)(3). See 101(20)(b) which contemplates possible transporter liability under 107(a)(3).
(2) no treatment facilities selected by transporter		
E. Insurers		
- Guarantor providing evidence or responsibility under §111	108(c) 101(13)	1. Guarantor has same affirmative defenses as owner/operator who it insures; or a defense of wilful misconduct of owner/operator. 2. No insurance for facilities under 108 until, at the earliest, December, 1988. See 108(b)(1) & (3).
Joint and Several Liability		Indivisibility of injury

Exhibit One

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FACT TO BE PROVED	STATUTORY BASIS	COMMENTS
III. Costs and Damages		
A. All costs of removal or remedial action incurred by U.S. Gov't.	107(a)(4)(A)	<ol style="list-style-type: none"> 1. Included fund and non-fund (i.e., DOD, FEMA) monies 2. Removal: See 101(23): remedial: §101(24) 3. See cost and time limitations on response actions at 104(c)(1)-- ROD and A/R required for exceptions. See also, cost limitations of 107(c)(1), particularly 107(c)(1)(D). Note 107(c) limitations not available in some circumstances. 107(c)(2), 103(c). 4. Costs of removal & remedial actions must be documented. Tie to release or threatened release. 5. Response actions are not authorized "unless the President determines that such action will not be done properly... [by a] responsible party." 104(a)(1) end. Wherever possible there should be an ROD or other evidence to this effect.
B. Administrative & enforcement costs	104(b) and also 101(24) & (23) 111(a)(4) & 111(c)(3)	Administrative and enforcement costs are part of "response costs." They are authorized by 104(b), and thereby included specifically in definition of "removal", 101(23), and thereby into 107(a)(4)(A).

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FACT TO BE PROVED	STATUTORY BASIS	COMMENTS
C. Natural resource damage	107(4)(c) 101(16)	1. See 40 C.F.R. 300.72 - 300.74 2. See also: 107(f), 111(b), 111(d)(1), 111(h), 111(i) NOTE: These damages cannot be released except by appropriate trustee under NCP.
D. Punitive damages	107(c)(2)	Good practice requires a/c's prior to expenditure. Ups ante and helps 10-(a) determination.
1. Presidential order issued & served 2. Defendant failed to provide response action without sufficient cause.		
IV. Not Inconsistent with National Contingency Plan	107(a)(4)(A)	Words "not inconsistent with" are burden shifting. However, U.S. should be prepared to establish, through the use of ROD's A/R's, and other evidence prima facie consistency. Documents establishing delegations of authority should be available for each decision required by NCP and/or CERCLA. See Attached listings of necessary documentation.
V. Affirmative Defenses		
A. The 107(b) Defenses: Release or threat of release and damages were <u>caused solely</u> by	107 (b)	1. These are clearly affirmative defenses. Thus, causation is implied unless defendant carries burden to the contrary. NOTE: Defenses eliminated for failure to notify: 103(c).
(1) Act of God (2) Act of War (3) Act or omission of a third party and defendant exercised due care and took precautions against foreseeable acts	101(1)	1. Third party cannot be agent or employer or have direct or indirect contractual relation with defendant.

DOCUMENTATION FOR RECOUPMENT OF
CERCLA EXPENDITURES

NCP CONSISTENCY

1. OSC documentation - in log book and site file
 - collection of pertinent facts (§300.33(b)(2))
 - reports to RRT (§300.33(b)(4))
 - notification to State (§300.33(b)(5))
 - notifications to FEMA or HHS (§300.33(b)(6) & (7))
 - POLREPs (§300.33(b)(11)) (See Superfund Removal Guidance Revision #1, 12/2/82, pp. 27-28 ("Superfund Removal Guidance"))
2. General documentation under Subpart F for all fund expenditures - §300.61
 - a. §300.61(a) - Documentation that there is a release or threat of release into the environment of a hazardous substance or a pollutant or contaminant which may present an endangerment.
 - b. §300.61(b) - Documentation that it has not been determined that response action will be done properly by responsible party. (Use CERCLA 104(a)(1) and §300.61(b) language).
 - c. §300.61(c) - Documentation that specified factors (state participation; private party cleanup; local community concerns; use established technology; industry and expert involvement) have been considered in determining need for or undertaking Fund-financed activity.
3. Preliminary assessment - §300.64 (See Superfund Removal Guidance, p. 9).
 - a. §300.64(a) Documentation of preliminary assessment should summarize readily-available information and should include, where available, evaluation of magnitude of hazard; identification of source and nature of release; existence of private parties ready, willing, and able to undertake a proper response; and identification of factors which make immediate response necessary.

b. §300.64(b) - Documentation should summarize data collected and reviewed (e.g., site information, photographs, interviews, site inspection).

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c. §300.64(c) - OSC should indicate reason for termination of assessment (e.g., no release, no hazardous substance; no pollutant or contaminant which may present an endangerment, amount of release does not warrant federal response; private party will do work).

4. Immediate removals - §300.65 (See Superfund Removal Guidance, pp. 10-13 and Appendices 1 (Decision Rationale) and 2 (Ten Point Document)).

* a. §300.65(a) - Determination (Ten Point Document or Action Memo) that "initiation of immediate removal action will prevent or mitigate immediate and significant risk of harm to human life or health or to the environment".

1) Supported by documentation that statutory and NCP criteria have been met. (See Superfund Removal Guidance, Appendix 1 (Decision Rationale). Supporting evidence should be in site file.

(a) Immediate removal is necessary. (See Superfund Removal Guidance, p.10)

(b) No alternatives to CERCLA removal action. (See Superfund Removal Guidance, p.10)

(c) OSC's selection of response action is directly related to mitigation of the release threat or threats. (See Superfund Removal Guidance, p.11)

2) Ten Point Document (See Superfund Removal Guidance, Appendix 2 (Ten Point Document))

(a) Regional Administrator (RA) has approval authority for immediate removals up to \$250,000 (not including dioxin).

* / Indicates CERCLA or NCP requirement for formal determination by EPA official.

- (b) Should contain "determination" language (See 4a above) and signature of RA.
- * 3) Action Memo (See Superfund Removal Guidance, p.13)
 - (a) Approval by AA, OSWER or his designee for immediate removals above \$250,000 and all dioxin sites;
 - (b) Should contain "determination" language (See 4a above) and signature of AA with concurrence by Offices of Safe Drinking Water, Radiation, Enforcement, (if site is on NPL);
 - (c) Forwarded from Director, Emergency Response Division (ERD) to Director, Office of Emergency and Remedial Response (OERR) to AA, OSWER;
 - (d) Based on Ten Point Document or same information which OSC communicates by TWX or Magnafax or phone to ERD, (If request was made by phone, confirming POLREP should be prepared).
- b. 300.65(b) Documentation of action taken at site including POLREPs, Final OSC Report, Immediate Removal Contract, and Invoices. Witness should be available to explain action taken at site and to relate it to release or threatened release.
- c. §300.65(d) - Documentation (OSC's Final Report or Final POLREP) should indicate that immediate removal complete: (1) criteria of §300.65 are no longer met and (2) wastes transported off-site have been treated or disposed of properly.

* / Indicates CERCLA or NCP requirement for formal determination by EPA official.

- * d. §300.65(d) - Determination that, if over \$1 million obligated or 6 months elapsed from initial response, "(1) Continued response actions are immediately required to prevent, limit, or mitigate an emergency; (2) There is immediate risk to public health or welfare or the environment; and (3) Such assistance will not otherwise be provided on a timely basis." Keyed to CERCLA §104(c)(1).
- (1) Supported by documentation that statutory and NCP criteria have been met (See Superfund Removal Guidance, pp.20-22 and Appendices 9 and 10). Supporting evidence should be in site file.
 - (2) Action Memo (See Superfund Removal Guidance, Appendix 9).
 - (a) Approval by AA, OSWER
 - (b) Should contain "determination" language (See 4d above) and signature of AA
5. Evaluation and determination of appropriate response - planned removal and remedial action - §300.66
- a. §300.66(a) - purpose: to provide for further evaluation when (1) assessment indicates further response may be necessary or OSC requests and (2) lead agency concurs that further response should follow immediate removal. (See Superfund Removal Guidance p.14)
 - b. Documentation of further inspection (§300.66(b); additional monitoring or investigation (§300.66(c)(1); or assessment of risk (§300.66(c)(2)).
6. Planned removal - §300.67
- * a. §300.67(a) - Determination (Planned Removal Action Memo) that (1) "There would be substantial cost savings by continuing immediate removal; or (2) The public and/or environment will be at risk if response is delayed at a release not on NPL."
- 1) Supported by documentation that NCP criteria have been met (See Superfund Removal Guidance p.14) and planned removal is appropriate (See

* / Indicates CERCLA or NCP requirement for formal determination by EPA official.

factors noted at §300.67(c) (nearby population threatened by hazardous substances; contaminated drinking water; hazardous substances which present a serious threat to health or the environment; highly contaminated soils at surface; threat of fire or explosion; weather); OSWER # 9837.0

2) Planned Removal Action Memo (See Superfund Removal Guidance, Appendix 3)

- (a) Approval by AA, OSWER.
 - (b) Should contain "determination" language (See 6a above) and signature of AA;
 - (c) Prepared in draft by CSC or remedial project officer (RPO) and forwarded with cover letter explaining action requested;
 - (d) Forwarded by Director, ERD to Director, OERR, to AA, OSWER, with concurrence of Offices of SDWA, Radiation, OGC, OEC, OSWE.
- b. §300.67(b) - request from Governor or designee
 - c. Copy of contract or cooperative agreement required by §300.67(a)
 - d. Documentation (OSC's Final Report or Final POLREP) should reflect that risk to public health has been abated (considering factors listed in §300.66(c)).
 - * e. §300.66(d) - Determination that if over 6 months elapsed or \$1 million obligated, procedures and documentation identified in 4d above should be followed.
 - f. Documentation of action taken at site including POLREPs, Final OSC Report, Planned Removal Contract, Invoices, etc. Witness should be available to explain action taken at site and to relate it to release or threatened release.

* / Indicates CERCLA or NCP requirement for formal determination by EPA official.

/. Remedial Action - §300.68

a. General Documentation

- 1) Site must be on NPL (include public file, site scene, public comments under §300.66(e)(4) and Agency response, etc.)
- 2) Copy of contract or cooperative agreement with state §300.62(c) & (d). Keyed to CERCLA 104(c)(3).
- 3) Evidence of consultation with State required under §300.62(f). Keyed to CERCLA 104(c)(2).

b. §300.68(d)(1) - Documentation of scoping (i.e., scope of remedial action) based on §300.68(g) factors.

c. Initial remedial measures (IRMs) - §300.68(e)(1) (See Draft Revised Guidance, State Participation in the Superfund Remedial Program, Vol. 1, 6/28/83, p. VIII-3 ("State Remedial Guidance") and Memorandum, preparation of RODs for Remedial Actions, from Hederan, 6/25/82.)

- * 1) Determination - (ROD or other Action Memo) based upon §300.68(e)(1) factors, that initial remedial measures should begin before selection of final remedy as (a) "Such measures are determined to be feasible and necessary to limit exposure or threat of exposure to a significant health or environmental hazard"; (b) "Such measures are cost-effective" and (c) Remedy is appropriate when balanced against the need to use Trust Fund Money at other sites §300.68(k)1.

(a) Approval by AA, OSWER

(b) Supported by documentation that Statutory and NCP criteria have been met. Supporting evidence should accompany ROD or Action Memo.

* / Indicates CERCLA or NCP requirement for formal determination by EPA official.

- * c) ROD or other Action Memo for IRM (See State Remedial Guidance, pp. VIII - 3-4)
 - (a) Approval by AA.
 - (b) Should contain "determination" language (see 7c-1) above); declaration that state has been consulted before determination of proper remedy; and signature of AA.
- d) Final remedial actions - source control (§300.68(e)(2) and offsite (§300.68(e)(3)
 - 1) Documentation (remedial investigation/feasibility study) (RI/FS) as first step in determining nature and extent of problem (and copy of contracts) - §300.68(f).
 - (a) Evaluation whether source control or offsite action is appropriate based upon consideration of factors identified in §300.68(e)(2) and §300.68(e)(3) respectively.
 - (b) Development of alternatives - §300.68(g)
 - (c) Initial screening of alternatives to narrow list of potential remedial actions - §300.68(h) - considering cost, effects of alternative, and acceptable engineering practices.
 - (d) Detailed analysis of alternatives to evaluate alternatives in depth - §300.68(i) - considering for each alternative specification of alternative; detailed cost estimated; engineering implementation; extent to which alternative will effectively mitigate and minimize damage to, and protect public health, welfare, and environment; adverse environmental impacts.
- * 2. §300.68(j) and (k) - Determination (ROD) - selection of remedy which agency determines is (a) "cost-effective" (i.e., the lowest cost

* / Indicates CERCLA or NCP requirement for formal determination by EPA official.

alternative which is technologically feasible and reliable which effectively mitigates and minimizes damages and provides adequate protection of public health, welfare or the environment)" and (b) appropriate when balanced against the need to use Trust Fund money at other sites. OSWER # 9837.0

- a) Supported by documentation that statutory and NCP criteria have been met. (See State Remedial Guidance, pp. VIII 3-6 and Appendix J). Supporting evidence should be part of ROD.

* b) ROD

- (1) Approval by AA, OSWER for final remedial actions.
- (2) Should contain "determination" language (See 7d-2) above, declaration that state has been consulted, and signature of AA. For actions involving off-site disposal, there should be declarations that the action is cost-effective, will create new capacity to manage hazardous substances, or is necessary to safeguard the public health, welfare, or the environment.
- (3) Document, which is sent from RA to AA, recommends a remedial option or no action alternative for the site
- (4) Included in ROD are:
 - background data on site
 - summary of selected remedial options and costs

* / Indicates CERCLA or NCP requirement for formal determination by EPA official.

- (5) Attachments to ROD should provide sufficient information to justify the remedy:

- summary sheet on proposed remedy
- detailed narrative summary describing site, enforcement status, and rationale for recommending action
- other supporting documentation (RI/FS, public comments, etc.)

- * (6) Operation and Maintenance (O&M) Decision Document should accompany ROD (See State Remedial Guidance, p. VIII-5)

- for AA's signature
- summaries available information about O&M needs

3. Documentation of action taken at site including POLREPS, contract for remedial work, invoices, checks, etc. Witness should be able to explain action taken at site and to relate it to release or threatened release.

OTHER DOCUMENTATION

1. Waste analysis-site: sufficient to show release or threat of release of hazardous substance.
2. Waste analysis - by generator: sufficient to show presence of hazardous substance linked to each generator.
3. Documents supporting release or threat of release & photographs, maps and charts, fire reports, etc.
4. Title check for period commencing with beginning of disposal activities to present
5. Documentation of dates of disposal
6. Generator contracts

* / Indicates CERCLA or NCP requirement for formal determination by EPA official.

7. Operator contracts
8. Transporter contracts
9. Leases
10. Notice letters
11. Demand letters
12. Administrative Orders
13. 104(e) letters & responses

APPENDIX TWO

PRIMA FACIE CASE

§106 CERCLA, 42 U.S.C. §9606

IMMINENT HAZARD

Appendix Two

Page 1 of 3

This document was prepared as suggestion and guidance only. It does not reflect accurately official agency views or policies.
*** NOTE ***

FACT TO BE PROVEN	STATUTORY BASIS	COMMENTS
I. President determines that:	§106(a)	Evidence of a determination is required. Note: President's functions have been transferred to the Administrator of EPA. 46 Fed. Reg. 42237; E.O. 12316. Allegations of specific Presidential authorization are not required. See <u>U.S. v. Reilly Tar</u> , 546 F. Supp. 1100 (D. Minn. 1982).
A. THERE MAY BE	§106(a)	Actual harm need not be established; risk of harm is sufficient.
B. AN IMMINENT	§106(a)	"Imminent" - refers to imminence of the risk not harm. "Imminence of a hazard does not depend on the proximity of the final effect but may be proven by the setting in motion of a chain of events which would cause serious injury." <u>United States v. Hardage</u> , Civ. No. 85-1032-W.D. Okla., December 2, 1980, slip op. at 3-4. See also Appendix Six on §1001 SDWA.
C. SUBSTANTIAL ENDANGERMENT	§106(a)	"Endanger" means something less than actual harm. "Endangerment is not prone to factual proof alone but must be decided by assessment of risk. Risk is to be assessed "from suspected but not completely substantiated relationships between facts, trends of among facts, from theoretical projections *** or from probative preliminary data." <u>U.S. v. Vermont Chemical Corp.</u> 489 F. Supp. 870, 883 (D. Ark. 1980).

FACT TO BE PROVEN	STATUTORY BASIS	COMMENTS
D. TO PUBLIC HEALTH OR WELFARE	\$106(a)	<p>Toxicologist and other experts must be able to identify potential effect on humans of exposure to contaminants and to testify regarding population at risk and degree of risk of harm.</p> <p>Note: If NCP is followed evidence may be available in Preliminary Assessment. CERCLA §104(b) authorizes an investigation to determine, in part, extent of hazard.</p>
E. OR ENVIRONMENT	<u>\$106(a)</u> §101(8) §101(12) §101(7)	<p>§101(8) of CERCLA defines environment broadly to include: "the navigable waters, the waters of the contiguous water, ground and water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States."</p> <p>Expert evidence of actual effects on environment or risk of harm will be necessary particularly if there is no health hazard.</p>
F. BECAUSE: 1. OF AN ACTUAL OR THREATENED RELEASE	<u>\$106(a)</u> §101(22)	<p>A witness must be able to testify as to "release" or potential for "release," i.e. testimony re: the leaking or escaping of wastes into the environment. CERCLA §101(22) defines "release" broadly to mean "any spilling, leaking, pumping, pour, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing, into the environment."</p> <p>Note: Section 101(22) sets out certain exceptions. In addition there are federally permitted releases.</p> <p>Note: Evidence needed to support this element should be available from the work prepared under NCP - 40 C.F.R. §300.63; <u>et seq.</u></p>

FACT TO BE PROVED	STATUTORY BASIS	COMMENTS
2. OF A HAZARDOUS SUBSTANCE	§106 §101(14)	Sufficient analysis of waste to identify at least one of the substances contained in the definition. Analysis should be done during site investigation.
3. FROM A FACILITY	§106 §101(9)(8)	Unless admitted, description of site using key words of definition should be adequate. Note: There is an exception for any consumer product in consumer use.
II. PERSONS TO BE RESTRAINED	§106 §107(a)	Section 106 does not identify any responsible parties. Liability has been held to extend to those persons liable under §107 for cost recovery, i.e., owners, operators, generators, and transporters. See <u>United States v. Price</u> , No. 80-4104 (D.N.J. July 25, 1983). <u>United States v. Outboard Marine</u> , 556 F. Supp. 54 (N.D. Ill. 1982). See DISCUSSION OF RESPONSIBLE PARTIES - APPENDIX ONE PART II.
A. OWNERS B. OPERATORS C. GENERATORS/BROKERS D. TRANSPORTERS E. INSURERS		
III. DISTRICT COURT IN WHICH THREAT OCCURS MAY GRANT:	§106	Venue is appropriate in district where threat exists. Relief should include type of response actions authorized under CERCLA. Use CERCLA §101(23) "removal" actions and CERCLA §101(24) "remedial" actions as a checklist. This includes investigative work, and work necessary for a permanent remedy. Opinion testimony will be needed to establish what type of relief is appropriate.
A. RELIEF OF NECESSARY TO ABATE SUCH DANGER OR THREAT		
B. AS PUBLIC INTEREST AND THE EQUITIES REQUIRE	§106	Information on defendants' ability to perform relief should be presented. Traditional elements for injunction needs to be presented

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OSWER # 9837.0
APPENDIX THREE
PRIMA FACIE CASE
§7003 RCRA; 42 U.S.C. §6973

FACT TO BE PROVED	STATUTORY BASIS	COMMENTS
1. Administrator must Receive Evidence that:		Administrative Record Should be available
A. 1. Handling,	1/ 1004(33)2/	These terms cover a broad range, arguably the universe, of activities involving solid or hazardous waste. Statute is not limited to restraint or cessation of ongoing human conduct, but also to amelioration of harmful conditions, (e.g. leaching) even encagerments and/or conduct occurring pre-enactment. <u>U.S. v. Kelly</u> , 500 F. Supp 1100 (D. Minn. 1982). Evidence may be available through record keeping requirements of §3007 order or §3013 order.
2. Storage,	1004(34)	
3. Treatment,	1/ 3/	
4. Transportation, or	1004(37)4/	
5. Disposal		
B. Of either:		
1. Solid Waste, or	1004(27)	Very broad definition of solid waste, but note specific exceptions.
2. Hazardous Waste	1004(57), 40 C.F.R. 261	The definition states that a waste is hazardous if it "may ... cause, or significantly contribute to an increase in illness or mortality, or if it "may ... pose a substantial present or potential hazard to human health (continued)

- 1/ Not defined by the Statute.
2/ 42 U.S.C. §6903 is the definitions section of RCRA.
3/ See also Hazardous Materials Transportation Act, 49 U.S.C. §§1801, 1802(6), 1809, 1810.
4/ Note, disposal includes leaking, which arguably includes actions the result of inaction or past action, rather than affirmative human conduct, U.S. v. Charles Price, Civ. No. 80-4104 (D.N.J., Sept. 23. 1981).

FACT TO BE PROVED	STATUTORY BASIS	COMMENTS
B. (Continued)		<p>or the environment" when managed. These terms indicate a standard less than the strict, conventional "causation." There must be sufficient analysis of waste to identify hazardous wastes. Evidence may be available from record keeping requirements. 33002 - 3004.</p>
C. May present		<p>The standard of proof was relaxed in the in the 1980 Solid Waste Disposal Act Amendments. Previously this read "is presenting."</p>
D. An imminent and	1	<p>imminence applies to nature of threat rather than the identification of the time when the endangerment initially arose.^{5/} Imminence does not depend on the proximity of the final effect, but may be proven by the setting in motion of a chain of events which could cause serious injury. <u>U.S. v. Royal N. Hardage, No. Civ. 80-1031-W (W.D. Okla., Dec. 2, 1980).</u></p>
Substantial Endangerment		<p>When one is endangered, harm is threatened; no actual injury need even occur. Evidence must show only risk of harm. See <u>Ethyl Corp. v. EPA</u>, 541 F.2d 1 (D.C. Cir. 1976), Cert. den. 426 U.S. 941 (1976); <u>United States v. Reserve Mining</u>, 514 F.2d 492 (6th Cir., 1975); <u>United States v. Vertac</u>, 489 F. Supp. 870, 885 (E.D. Ark. 1980).</p>

1/ Not defined by the Statute.

5/ H.R. Committee Print (96-IFC 31, 96th Cong. 1st Sess. 32 (1979)).

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FACT TO BE PROVED	STATUTORY BASIS	COMMENTS
E. To		See also legislative history and case law interpreting other "endangerment" provisions of federal law, including Sections 504(a) and 311(e) of the Clean Water Act, Section 1431 of the Safe Drinking Water Act, Section 303(a) of the Clean Air Act, Section 7 of the Toxic Substances Control Act, Section 6(c) of the Federal Insecticide Fungicide and Rodenticide Act, 2601 of the Consumer Product Safety Act, §662 of the Occupational Safety and Health Act, §1610(b) of the Hazardous Materials Transportation Act, §1551(b) of the Deep Water Ports Act, §1415 of the Marine Protection Research, and Sanctuaries Act, and §355(e) of the Federal Food, Drug and Cosmetic Act.
1. Health, or	1/	Human Health.
2. The environment	1/	The term presumably incorporates surface water, groundwater, soil, and air, and probably includes fish, mammals, flora, and plant life. Proof of threat to these elements presumably meets statutory proof requirement. There must be sufficient evidence to establish (1) the substances present, (2) that such wastes may cause significant adverse effects on human health or the environment, and (3) such wastes cause threat to that health, or the environment in the area at issue.

1/ Not defined by the Statute.

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FACT TO BE PROVED	STATUTORY BASIS	COMMENTS
B. Take Such other action as may be necessary		See also Appendix 2; CERCLA §106.
C. Recovery of U.S. Expenditures		
1. Removal/Remedial/ Cleanup Costs		See Appendix I <u>supra</u> , re: documentation of CERCLA expenditures for reimbursement. Also, see Section 304(b) and 311(f) and (g), CWA.
2. Enforcement Costs		A right to recover federal funds must be implied, because Section 7003 does not contain any express authority to seek cost recovery. See <u>Wandotte Trans. Co. v.</u> <u>U.S.</u> 389 U.S. 191 (1967); <u>U.S. v. Moran Towing</u> <u>and Transportation Co.</u> , 409 F.2d 961 (2d Cir. 1969); <u>United States v.</u> <u>Price, Restatement</u> , <u>Notes §19(1)</u> .

FACT TO BE PROVED	STATUTORY BASIS	COMMENTS
II. Person to be restrained	1004(15)	Such persons may include owners or operators of the site, former owners or operators, landowners/lessors, independent contractors, corporate officers and directors (in the official and individual capacities) waste generators, waste transporters. See e.g. <u>U.S. v. Reilly Tar</u> ; D.N.J., No. 87-1104, <u>U.S. v. Charles Price</u> (Mem. Op., July 28, 1983); But see <u>U.S. v. Wade</u> ; <u>U.S. v. Waste Industries</u> . See also attached evidence checklist.
III. Relief:		
A. Stop such		
1. Handling	1/	Included in relief granted by courts in 7003 actions are restraint of continued leaking (<u>Price</u>), investigative activities (658 F.2d 204 3rd Cir. 1980); preparation and implementation of plans for removal of wastes (<u>Midwest Solvents Recovery</u>), injunction against further activities on site, formulation of plans for security and removal of plans for security and removal of wastes (<u>Ottati and Goss</u>). See Also <u>U.S. v. Diamond Shamrock Corp.</u> (C.D. Ohio, Civil No. C80-1857, Memorandum Opinion of May 29, 1981);
2. Storage	T004(33)	
3. Treatment	1004(34)	
4. Transportation	1/	
5. Disposal 6/	T004(3)	

1/ Not defined by the Statute.

6/ The government need not allege the acts of disposal which gave rise to the condition. The focus of Section 7003 is rather on amelioration and prevention. United States v. Solvents Recovery Services, 496 F.Supp. 1127, 1129, 1132, 1139-41 (D. Conn. 1980).

APPENDIX FOUR
PRIMA FACIE CASE
§303 Clean Air Act, 42 U.S.C. 7603

*** NOTE ***

This document was prepared as suggestion and guidance only. It does not purport to reflect accurately official agency views or policies.

*** NOTE ***

Appendix Four

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FACTS TO BE PROVEN	STATUTORY BASIS	COMMENTS
I. ADMINISTRATOR RECEIVES EVIDENCE THAT:	§303(a)	There must be some administrative record showing what evidence the Administrator received. This information must be confirmed by State and local authorities. (See Subparts F and G below).
A. A POLLUTION SOURCE OR COMBINATION OF SOURCES (INCLUDING MOVING SOURCES)	§303(a)	Note: There is no specific definition of pollution source in the CAA. "Moving sources" includes those sources covered under Subchapter II of the CAA, 42 U.S.C. §7521 to 42 U.S.C. §7574. "Major stationary sources" is defined in 42 U.S.C. §7602(j).
B. IS PRESENTING	§303(a)	The threatening condition must be in existence. Note: under §1003 of RCRA; §106 of CERCLA and §1431 of SDWA the standard has been relaxed to "day present."
C. AN IMMINENT AND	§303(a)	"Imminent" refers to imminence of risk not harm. Appendix six of SWA.
D. SUBSTANTIAL ENDAANGERMENT	§303(a)	The legislative history on the CAA's original imminent and substantial hazard provision provides that it is "not intended as a substitute procedure for chronic or generally recurring pollution problems which should be dealt with under other provisions of the Act." H.R. Rep. No. 725, 90th Cong., 1st Sess. 119 (1967). See <u>United States v. Reilly Tar</u> , 546 F. Supp. 1100, 1110 (D. Minn. 1982).

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FACTS TO BE PROVED	STATUTORY BASIS	COMMENTS
E. TO THE HEALTH OF PERSONS	§303(a)	Expert and technical witnesses will have to establish (1) the types of pollution emanating from the subject sources; (2) that the pollutants may cause significant health effects on human beings, and (3) that under facts of this case the population surrounding the pollution source are or may be affected by the source.
F. EPA HAS CONFIRMED THE CORRECTNESS OF ITS INFORMATION	§303(a)	Agency must have documentation or other proof that it first apprised itself of the correctness of its information from state and local authorities.
G. STATE AND LOCAL AUTHORITIES HAVE NOT ACTED TO ABATE SUCH SOURCE OR SOURCES	§303(a)	Agency must have documentation or other proof that state or local authorities have not acted to abate the source. And presumably that State and local future action will not be adequate.
II. INJUNCTIVE RELIEF		
A. THE ADMINISTRATOR MAY BRING SUIT IN THE APPROPRIATE DISTRICT COURT TO IMMEDIATELY RESTRAIN	§303(a) 28 U.S.C. §1391(b), (c)	Venue is appropriate in the district where (1) the emission is occurring; (2) the defendants reside, or (3) if a corporation is being sued, where it is licensed to do business.
B. ANY PERSON	§303(a) §303(c) 42 U.S.C. 7602 (e)	"Person" is defined broadly to include individual, corporations, partnerships, associations [government authorities], and officers agents and employees thereof."

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FACTS TO BE PROVED	STATUTORY BASIS	COMMENTS
C. CAUSING OR CONTRIBUTING TO THE ALLEGED POLLUTION	§303(a)	Link between person and to the source must be established.
D. TO STOP THE EMISSION OF AIR POLLUTANTS CAUSING OR CONTRIBUTING TO SUCH POLLUTING OR	§303(a)	Provides original jurisdiction to district court. Prior A/O is not required.
E. SUCH OTHER ACTION AS MAY BE NECESSARY	§303 a	Note: Where hazardous air pollutants are at issue, 42 U.S.C. §7-12, United States may be able to take action under CERCLA.
III. ENFORCEMENT OF ADMINISTRATIVE ORDER		
A. IT IS NOT PRACTICABLE TO ASSURE PROMPT PROTECTION OF HUMAN HEALTH BY A CIVIL ACTION	§303(a)	In addition to meeting the requirements of Part I there must be substantial evidence of immediate health emergency.
B. ADMINISTRATOR MAY ISSUE SUCH ORDERS "AS MAY BE NECESSARY TO PROTECT THE HEALTH OF PERSONS WHO ARE OR MAY BE AFFECTED BY SUCH POLLUTION SOURCE."	§303 a	Abatement orders, as noted below, are available for only 24 hours unless court action is filed. See C below

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FACTS TO BE PROVED	STATUTORY BASIS	COMMENTS
C. IF ACTION IS FILED WITHIN 24 HOURS ADMINISTRATIVE ORDER WILL EXTEND FOR 48 HOURS. THEREAFTER COURT MUST EXTEND ORDER. IF ACTION IS NOT FILED A/O EXPIRES AFTER 24 HOURS	\$303(b)	Enforcement will obviously require TRO and immediate notification to DOJ if order is issued.
D. PENALTIES	\$303(b)	Each day is a breach of violation carrying a \$5000 a-day penalty.
1. Order Issued under \$303(b) \$5000 per day.	\$303(b)	Order and proof of service, together with administrative record supporting its issuance, i.e. evidence in Part I, must be presented. Hand delivery or returned receipt will be required.
2. Willful Violation	\$303(b)	Evidence of affirmative conduct contrary to order must be introduced.
3. Failure or Refusal to Comply	\$303(b)	Evidence that defendant has means to comply but does not.

NOTE

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APPENDIX FIVE
PRIMA FACIE CASE §502, 55 U.S.C. §1364
OF CWA

Appendix Five

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<u>FACT TO BE PROVED</u>	<u>STATUTORY BASIS</u>	<u>COMMENTS</u>
<u>I. Conditions Precedent</u>		
A. The Administrator (of EPA) must receive evidence	504(a)	Higher degree of proof and certainty than "information." Record of information received and steps taken to confirm its accuracy should be presented.
B. That a pollution source or combination of sources	502(a), 502(19) 502(12) 502(6) 502(7) 502(1-) 502(9) 502(10)	Note: Although not specifically defined, use of term "pollution source" rather than "discharge of of pollutant" apparently allows the Administrator to act not only if there is or has been a discharge of pollutants, but also if a discharge is merely threatened. It is possible the use of the term "pollution source or combination of sources" (pollution is defined in 502(19)) also can be used to allow the Administrator to act when the requirements of a discharge or threatened discharge of pollutants are not met (i.e. the definition of point source is not met). Pollution source is a broader term and may include more entities than point source. (See §306(a)(3) "source") However, when read in conjunction with the later phrase "to stop the discharge of pollutants", it seems that the Administrator probably should be presented with evidence that there has been, is, or threatens to be a "discharge of pollutants". <u>Discharge or threatened discharge of a pollutant (502(12))</u> Sufficient analysis of the waters from documentary evidence or samples (§308, record and reporting requirements is useful source), to identify:

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FACT TO BE PROVED	STATUTORY BASIS	COMMENTS
		<p>(1) the addition of at least one of the substances contained in the term pollutant and/or testimony that such addition is threatened. Pollutant defined in 502(6). Note: exclusion from definition of (a) sewage from vessels as defined in §312(6); (b) water, gas, or other material which is injected into a well to facilitate the production of oil or gas; (c) water production derived in association with oil or gas and disposed of in a well, if well is approved by State and State determines such injection or disposal will not result in the degradation of ground or surface water resources.</p>
		<p>(2) To navigable waters (502(7)). Note "navigable waters" is not mentioned in §504, nonetheless it is very broadly defined and does not require "navigability in fact." It includes, creeks, tributaries, and sewers. See e.g. <u>U.S. v. Veliscol Chemical Corp.</u>, 438 F. Supp. 9-11, 9-12 (Tenn. 1976). It does not include "groundwater." (3) From any point source (502(1)). Note: exclusion from "point source" of return flows from irrigated agriculture or dam-induced pollution. (4) The addition or threatened addition of any pollutant to the waters of the contiguous zone (502(9)) or the ocean (502(10)) from any point source other than an vessel or other floating craft.</p>
		<p>Note: The term "discharge" extends to the indirect, accidental or unintentional, such as might result by an act of God upon an enclosed processing facility, the structure of which would appear to preclude the possibility of the addition of pollutants to navigable waters.</p>

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FACT TO BE PROVED	STATUTORY BASIS	COMMENTS
C. Is presenting	504(a)	<p>Definition of "point source" is broad and does not require a showing of intent or unreasonableness of existing collecting system; for example, surface runoff of polluted waters, even if resulting from rainfall or gravity, once collected or channelled, constitutes discharge from a "point source". "See <u>United States v. Earth Sciences, Inc.</u>, 597 F.2d 368 (10th Cir. 1979).</p> <p>The threatening condition must be in existence.</p> <p>Note: Under §1431 SDWA, §106 of CERCLA and §7003 RCRA the standard of proof is related to "may present."</p>
D. An imminent and substantial endangerment to (1) the health of persons	504(a)	<p>Best evidence would be actual harm to health or welfare (as limited) ^{1/}. However, term "endangerment" interpreted broadly and only proof of risk of harm, not actual harm required. <u>United States v. Reserve Mining</u>, 514 F. 2d 492 (8th Cir. 1975). <u>United States v. Vertac</u>, 489 F.Supp. 870 885 (E.D. Ark. 1980).</p> <p>Two elements in "risk of harm" analysis: (1) probability of harm (risk); (2) harm in event of exposure (consequences). Evidence regarding the "risk" would be the level of pollutants present in the water. Evidence as to the "harm" or "consequences" could be expert testimony that under an acceptable, even if as yet unproved medical theory, the threatened release may be injurious to the public health or causes a "reasonable concern over the public health." Even a low level</p>

^{1/} However, even actual harm may not be a sufficient showing if the relief requested (e.g. shutting down plant) is significant and the pollutants could be removed fairly easily.

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ACT TO BE PROVED	STATUTORY BASIS	COMMENTS
		<p>of pollutants may be an "endangerment" if the testimony raises a "reasonable concern" over the public health from such discharge (see list below).</p> <p>Whether there must be a showing of "imminent and substantial" as independent factors from the endangerment element is unclear. To the extent "imminent" is given an independent meaning, it probably modifies the risk of harm rather than the harm itself -- i.e. the risk of harm, not the harm itself, must be near rather than remote in time. (Discharge of pollutant that may cause harm to health after a period of latency, presents an imminent endangerment).</p> <p>"Imminent" does not refer to the time when the endangerment occurred -- the events may have occurred in the past but be presenting a threat to public health or welfare.</p> <p>"Substantial" probably modifies the harm element only, although it is possible that the term applies either to the risk or the harm, but not both.</p> <p>The following type of evidence would be most persuasive, in descending order:</p> <ol style="list-style-type: none"> a. Actual harm to health caused by a discharge. b. Adverse effects on the welfare of persons affecting livelihood - e.g. the FDA may prohibit fishing because of the high concentrations of pollutants in the fish and the pollutants are the result of discharge from a particular source. The prohibition on fishing may destroy the fishing industry, with consequent loss of jobs by many employees.

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FACT TO BE PROVED	STATUTORY BASIS	COMMENTS
		<p>c. Scientific experimental evidence that human contact with the type of pollutant being discharged adversely affects the health of persons.</p> <p>d. Scientific experimental evidence that contact with the type of pollutant being discharged has caused adverse effects in life forms other than humans. Experts should be used to testify regarding the soundness of the method used in the experiment, its consistency with scientific principles, and that findings of the experiments indicate that human contact with the pollutant at the levels being discharged may cause substantial endangerment to the health of persons.</p> <p>e. Experimental scientific evidence regarding adverse health effects in life forms other than humans, introduced for purpose of showing that such adverse health effects will probably impact life forms in a body of water and consequently endanger the welfare of persons affecting livelihood, <u>i.e.</u> experimental evidence showing that a pollutant causes shellfish to die within several months of contact and that the continued discharge will ruin the shellfish industry and place a substantial number of persons out of work.</p> <p>Note: The standard in 504(a) does not allow proof of general harm to the environment only.</p> <p>Note: Whether or not the "imminent and substantial endangerment" is only an administrative standard -- <u>i.e.</u> authorizing the Administrator to go to court -- or is a judicial standard</p>

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FACT TO BE PROVED	STATUTORY BASIS	COMMENTS
II. If the above conditions are met met:	A. The Administrator 504(a); may bring suit 28 U.S.C. in the §1391(b), (c) appropriate district court to immediately restrain.	which applies for both a permanent and preliminary injunction is unclear. If seeking a preliminary injunction, the traditional (and more stringent) equitable standards governing preliminary injunctions should be demonstrated: (1) irreparable injury in the absence of relief; (2) the possible of harm to the non-moving party is not substantial or is outweighed by irreparable injury; (3) the likelihood of success on the merits; (4) the public interest requires relief.
III. Parties Subject to Suit by <u>Administrator</u>	(1) any person 504(a) 502(5)	The term person is broadly defined to include corporations, partnerships, government authorities, etc.
(2) causing or contributing to the alleged pollution	504(a), 502(19)	Note: Although "causing" may be restrictive, "contributing to" has been interpreted in a broad fashion. Includes contribution of a small amount of pollution. Includes past acts which could presently be contributing to the alleged pollution (502(19)). See RCRA §7003; Appendix Three.

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FACT TO BE PROVED	STATUTORY BASIS	COMMENTS
IV. <u>Power of the Court</u>		Evidence that a particular person including generator, transporter, owner or operator of a point source, is contributing (or is threatening to contribute) to the alleged pollution. If documentary evidence does not establish, samples from the water should be obtained. Evidence from owner or operator of a point source obtained under §306 is a good source. Again, to the extent the action is combined with an action under CERCLA the investigations under CERCLA, the investigations under CERCLA may be helpful. See CERCLA §§106 and 107, Appendices One and Two.
(1) to immediately restrain any person causing or contributing to the pollution	504(a), 502(5), 502(19)	See above
(a) to stop the discharge of pollutants	504(a), 502(12), 502(6), 502(7), 502(9), 502(10), 502(14)	Note: See p.1 for definition of "discharge of pollutants."
(b) or to take such other action as may be necessary	504(a)	Gives the court broad authority to order <u>affirmative</u> injunctive relief against the polluter to abate and remedy the effects of endangerment. In considering affirmative injunctive relief, the court may weigh several factors: (1) the nature of the anticipated harm; (2) the burden on the company and its employees from the issuance of the injunction; (3) the financial ability of the company

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FACT TO BE PROVED	STATUTORY BASIS	COMMENTS
		<p>to adopt new methods; (4) a margin of safety to the public. See <u>United States v. Reserve Mining Co.</u>, 514 F.2d 492 (8th Cir. 1975)</p> <p>The court also may consider whether the company is proceeding in good faith to abate the endangerment. Additionally, the court may consider whether ordering the defendants to do certain acts would be the most practical and effective solution or whether a better immediate solution is for the government to undertake the preventative action and then recover against those parties ultimately found responsible. See CERCLA. See also <u>United States v. Reserve Mining Co.</u>, 408 F. Supp 1212 (D. Minn. 1976).</p>

APPENDIX SIX

PRIMA FACIE CASE

§1431 SDWA, 42 U.S.C. §300i

Appendix Six

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*** NOTE ***
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 as suggestion and guidance
 only. It does not purport
 to reflect accurately official
 agency views or policies.
 *** NOTE ***

FACTS TO BE PROVED	STATUTORY BASIS	COMMENTS
1. RECEIPT OF EVIDENCE BY EPA ADMINIS- TRATOR THAT:	42 U.S.C. §300i(a)	There must be evidence to support initiation of the action. (See also the requirements for state and local consultation H & I below.)
A. CONTAMINANT	§300i(a) and §300i(f)(6)	The term is broadly defined to include virtually any foreign substance in water, i.e. "any physical, chemical, biological, or radiological substance or matter in water." §300i(f)(6).
B. 1. Present in <u>or</u>	§300i(a)	Sufficient chemical analysis of the subject public water system to prove that the contaminant is there.
2. Likely to enter	§300i(a)	Expert and/or technical witnesses to testify as to the movement or likelihood of movement of the substance toward the subject public water supply.
C. A PUBLIC WATER SUPPLY	§300i(a) and §300i(f)(4)	The water system must be for "human consumption" with at least 15 service connections or servicing at least 25 individuals. Note that the definition includes facilities such as collection, treatment and storage facilities under the control of the operator of the system and used "in connection with the system;" as well as, collection and pretreatment storage facilities <u>not</u> under control of the operator but used in connection with the system.

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FACTS TO BE PROVE	STATUTORY BASIS	COMMENTS
D. MAY PRESENT	§3001(a)	"May present" includes "risk of harm." An actual endangerment need not exist.
E. AN IMMINENT AND	§3001(a) <u>1/</u>	"Imminent" refers to imminence or risk not harm. Legislative history recognizes latency periods.
F. SUBSTANTIAL ENDANGERMENT	§3001(a)	"Substantial endangerment" is defined in the legislative history to mean likelihood of adverse health effects, statistical probability of disease or threat of serious harm. See H.R. Rep. No. 93-1185, <u>supra</u> , at 36.
G. TO THE HEALTH OF PERSONS	§3001(a)	Technical and expert witnesses will have to show that contaminants may cause significant adverse health effects on human beings and that under facts of the case such harm might be inflicted on the population which uses the water system.
H. APPROPRIATE STATE AND LO- CAL AUTHORITIES HAVE NOT ACTED TO PROTECT THE HEALTH OF SUCH PERSONS	§3001(a)	Agency must have documentation or other proof that EPA first apprised itself of state or local inaction or agency determined that State and local action is insufficient.
I. EPA CONSULTED WITH STATE AND LOCAL AUTHORI- TIES REGARDING CORRECTNESS OF AGENCY'S INFOR- MATION WHERE PRACTICABLE.	§3001(a)	Agency should document or have other proof of (1) impracticability of consultation with state and local authorities or (2) correctness of information from local and state authorities. Taken together, it appears that unless the case presents a demonstratable "emergency" that the Agency should consult with State and local officials to confirm its findings and to assure itself that state and local actions will not be sufficient.

1/ See Legislative History - H. Rep. No. 93-1185, 93rd Cong. 2d Sess. at 36, reprinted in 1974 U.S. Code & Ad. News at 6488.

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FACTS TO BE PROVE	STATUTORY BASIS	COMMENTS
F. INFORMATION ON STATE OR LOCAL ACTION TAKEN, IF ANY	§3001(a)	Agency should establish why State and local action, if proposed will not be adequate.
II. CIVIL ACTION FOR INJUNCTIVE RELIEF		Note: As distinguished from RCRA §7003 and CWA §504, SDWA is silent as to who are responsible parties subject to an injunction under the Act.
A. "APPROPRIATE RELIEF, INCLUDING A RESTRAINING ORDER OR PERMANENT OR TEMPORARY INJUNCTION."	§3001(a)(2)	Traditional equitable tests apply. See <u>Weinberger v. Romero-Barcelo</u> , 456 U.S. 305 (1982). Nonetheless, prima facie case should present overwhelming justification for protective action, regardless of cost. See <u>United States v. Price</u> , 688 F.2d 21- (3rd Cir. 1982), language of SDWA is sufficiently broad to authorize preliminary injunction to require funding of diagnostic study of threat posed to water supply from toxic dump. Evidence of what relief is appropriate should be presented.
III. ENFORCEMENT OF ADMINISTRATIVE ORDER		
A. ADMINISTRATOR MAY ISSUE SUCH ORDERS "AS MAY BE NECESSARY TO PROTECT THE HEALTH OF PERSONS WHO ARE OR MAY BE USERS OF THE [WATER] SYSTEM."	§3001(a)(1)	Based on the Agency record, containing the elements specified in Part I, Agency may issue an administrative order specifying appropriate relief necessary to protect health. Basis for order and propriety of order should be set forth in an Administrative Record.

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FACTS TO BE PROVED	STATUTORY BASIS	COMMENTS
B. PENALTIES	\$3001(b)	Each day is a separate violation, carrying a maximum \$5000 a-day penalty.
1. Order issued under \$3001(a)(1)	\$3001(b)	Order and proof of service of order together with the administrative record supporting its issuance must be presented. Returned receipt or hand delivery with evidence of receipt should be available.
2. Willfull Violation	\$3001(b)	Evidence of affirmative conduct contrary to order must be introduced.
3. Failure or Refusal to Comply	\$3001(b)	Evidence to establish that defendant choose not to comply. Proof that defendant had means to comply but nonetheless did not. This may involve discovery. Note: Action to enforce will in all likelihood also contain a claim for injunctive relief. Where the U.S. was or may be forced to take action, and CERCLA applies, CERCLA claim may also be appropriate. See, 42 U.S.C 9606(c).