



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

JUN 12 1987

OFFICE OF  
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

**SUBJECT:** Cost Recovery Actions/Statute of Limitations

**FROM:** Gene A. Lucero, Director *Gene A. Lucero*  
Office of Waste Programs Enforcement

**TO:** Directors, Waste Management Division,  
Regions I, IV, V, VII, VIII

Director, Emergency and Remedial Response Division,  
Region II

Directors, Hazardous Waste Management Division,  
Regions III, VI

Director, Toxic and Waste Management Division,  
Region IX

Director, Hazardous Waste Division, Region X

The purposes of this memorandum are to:

1. Update EPA's policy on timing of cost recovery action (This memorandum supersedes Timing of Cost Recovery Action, G. Lucero, October 7, 1985).
2. Request that you bring your personal attention to the accuracy of data being used to brief Congress on the status of cost recovery efforts at sites.
3. Request the initiation of cost recovery action for those sites where the statute of limitations date is approaching.

It remains the Agency's goal, where appropriate, to seek recovery of all monies expended at Superfund sites. Moreover, to promote cost recovery and obtain interest, the Agency will transmit demand letters as early as practicable. Additional guidance on the timing and content of demand letters, including guidance on maximizing interest, will be sent in the near future.

## I. Timing of Cost Recovery

Section 113(g)(2) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act (SARA), contains specific provisions on the statute of limitations for cost recovery actions under section 107. This memorandum does not set forth the statute of limitations for pre-SARA response actions. Section 113(g) requires that cost recovery actions be commenced:

- A. for removal actions, within three years after completion of the removal action. Where the Agency has made a determination to grant a waiver under section 104(c)(1)(C) for continued response action, the cost recovery action must be brought within six years after this determination; and
- B. for remedial actions, within six years after the initiation of physical on-site construction of the remedial action. If the remedial action is initiated within three years after completion of the removal action, the removal costs may be recovered under the remedial action statute of limitations for cost recovery (i.e. within six years after the initiation of on-site construction of the remedial action).

The term "commenced" as used in section 113(g) means a filed section 107 cost recovery action. As a matter of policy, the Agency views completion of the removal action as the day the cleanup contractor demobilizes at the site and completes the scope of work identified in the original or modified action memorandum. The final Pollution Report (POLREP) submitted by the OSC normally contains this information. (See Superfund Removal Procedures, Revision #2, August 20, 1984). Remedial investigations/feasibility studies (RI/FS) may fall within the statutory definition of removal action. For purposes of cost recovery they should be treated as a separate removal action. Therefore, a cost recovery action should be commenced within three years of completing the original removal (exclusive of the RI/FS) unless physical on-site construction has started.

Although section 113(g)(2)(A) of CERCLA, as amended, allows three years from completion of a removal to initiate cost recovery action, it still remains our policy to begin cost recovery activity within one year after completion of the removal. For remedial actions, Agency policy requires that cost recovery activity be initiated within 18 months after the signing of the Record of Decision (ROD) or during the later phase of construction of the remedial action, if the construction is expected to take more than two years after the ROD is signed. Adherence to these time frames will ensure that current, not stale, evidence and knowledgeable witnesses will be available to support the prosecution of the action and that the Agency will not be faced with statute of limitation risks.

At this point it is appropriate to clarify the Agency's position on priorities for removal cost recovery referrals. Due to the resource commitment of litigation, the Agency has established that cost recovery cases where the costs exceed \$200,000 should take priority for referral. There is no prohibition on referring cases under \$200,000. However, the judicious use of limited resources dictates that the Agency first address those sites which promise a better return on the Agency's time and money investments. Where appropriate, cases under \$200,000 have been and should continue to be referred. Selection of cases for referral is a Regional determination which should be based on a variety of factors including strength of evidence, financial viability of defendants and likely return to the Agency including enforcement costs.

Section 122(h) of CERCLA now provides the Agency with the authority necessary to compromise claims for cost recovery actions where the total of all response costs expended at a site is less than \$500,000. This new authority should assist the Agency in addressing the lower dollar value cases without litigation where an appropriate settlement can be made. The Agency is currently developing procedures for settlement of claims under \$500,000.

## II. Update of Information

Attached for your review is information on completed removals for each of your Regions. Please review this information and, using the comment field provided, indicate your schedule for referral of cost recovery action. Cost recovery actions may not be appropriate for some sites: for example, where no PRP can be identified, or where the PRPs are not financially viable. If you do not intend to refer the case, please note this fact. Where you decide that cost recovery action is inappropriate, you should explain the decision not to take cost recovery action in a signed memorandum in your files. You should assume that there will eventually be audits of these cases, by Headquarters, and perhaps the Inspector General and Congressional Oversight Committees.

Please use the following categories when completing the comment field for sites where actions will not be referred:

- 1) No PRPs identified
- 2) PRPs not financially viable
- 3) Questionable evidence
- 4) Questionable legal case
- 5) other (specify)

The accuracy and completeness of this information is critical to our ability to demonstrate the effectiveness of EPA's cost recovery program. The current data, which has been provided in response to Congressional requests, indicates that EPA has initiated cost recovery efforts at only 29% of the completed removal sites. (They account for approximately 52% of the available obligations). To the extent

information was available, the above figure on cases subject to cost recovery was determined by subtracting from the universe of completed removals, those where it appeared that cost recovery is inappropriate.

While we believe that our data base may not be current, the low level of case initiation does point out the need for serious management attention. A referral should be planned in this or next years Superfund Comprehensive Accomplishments Plan (SCAP) and so indicated on the attached reports. Where action is not appropriate, it is critical that the data base be adjusted to so indicate. Please provide your comments and schedule for activity on the attached material within two weeks.

### III. Initiation of Actions

If, after review of the attached site information, there are any cases which require filing immediately or in the near future, please advise OWPE, OECH and the Environmental Enforcement Section of the Justice Department immediately, so that we may expedite the referral and filing process. All planned referrals should be incorporated into the Integrated SCAP.

We will provide you with updates of removal completions and ongoing remedial actions (similar to the attached charts) on a quarterly basis for your review and comment. We also solicit your suggestions on the chart format and content.

Any questions on this memorandum or the attached information may be addressed to Janet Farella of my staff. She may be reached on FTS 382-2034.

### ATTACHMENTS

cc: Edward E. Reich, OECH  
David Buente, DOJ  
Regional Counsels, Regions I-X