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Office of
Solid Waste and
Emergency Response

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TITLE: Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions

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Document Abstract: This document describes the procedures for submitting a CERCLA Section 106(b) petition. In addition, this document describes EPA's process for reviewing the petitions.

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

JUN 29 1992

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

OSWER Directive Number 9833.5

MEMORANDUM

SUBJECT: Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions

FROM: Bruce M. Diamond, Director
Office of Waste Programs Enforcement

TO: Addressees

Attached is EPA's final guidance on CERCLA section 106(b) reimbursement petitions. The guidance sets forth the procedures that EPA will follow when reviewing petitions for reimbursement.

These procedures have been developed based on extensive input provided by the Regions, Headquarters, and Department of Justice. All comments have been extensively reviewed by the guidance development workgroup and incorporated whenever possible. Particular attention has been given to the comments you provided on the proposed work certification process, the oral hearing procedures, and the access to information procedures.

Finally, I thank you for your participation in helping to develop this guidance and hope that you find this document useful.

Attachment

Addressees: Director, Waste Management Division, Regions I, IV, V, and VII
Director, Emergency and Remedial Response Division, Regions II
Director, Hazardous Waste Management Division, Regions III, VI, VIII, and IX
Director, Hazardous Waste Division, Region X
Director, Environmental Services Division, Regions I, VI, and VII
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Bill Ross, Office of Emergency and Remedial Response
Caroline Previ, Office of Solid Waste and Emergency Response

OSWER Directive Number 9833.5

Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions

Date: June 29, 1992
Office of Waste Programs Enforcement

This document is solely intended as guidance. It does not establish a binding norm and is not finally determinative of the issues addressed. This document is not intended to be a synopsis of principles of law. The policies and procedures in this guidance do not constitute a rulemaking by the Agency, and may not be relied on to create a substantive or procedural right or benefit enforceable at law by any person. The Agency may take action at variance with this guidance.

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I. Introduction

This document sets forth guidance on petitions for reimbursement submitted under section 106(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9606(b), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA). This guidance describes the contents of reimbursement petitions and the procedures that EPA intends to use in responding to reimbursement petitions.

CERCLA section 106(b)(2) allows a person who has complied with an administrative order issued under section 106(a) of CERCLA to submit a reimbursement petition to EPA for the reasonable costs plus interest of a response action. A person is entitled to reimbursement if the person can establish that s/he is not liable for response costs under section 107(a) of CERCLA or if the person can demonstrate that the Agency's selection of the response action was arbitrary and capricious or was otherwise not in accordance with law.

CERCLA section 106(b)(2) contains three key provisions. Sub-section 106(b)(2)(A) requires a person to petition EPA within 60 days after completion of the required action. Sub-sections 106(b)(2)(C) and (D) describe the substantive grounds for a reimbursement petition. Sub-section 106(b)(2)(B) allows a petitioner to file an action in a United States district court if EPA denies, in whole or in part, a petition. Appendix A sets forth the full text of section 106(b)(2). Appendix B is a checklist of the items which should be submitted with a petition.

This guidance is intended to apply to petitions filed after the date this guidance is issued. EPA may, however, in its discretion, apply this guidance to the extent reasonable to those petitions filed prior to the issuance of this guidance.

II. Contents of a Section 106(b) Petition

A. Background Information

All petitions should include the following background information:

- the petitioner's full name, title, and address;
- the name, title, address, and telephone number of any agent or attorney authorized to represent the petitioner;
- the name and address of the facility at which the response action was implemented; and
- the U.S. EPA Docket number for the Section 106(a) order, and a copy of the order.

All petitions for reimbursement should be sent by certified mail, return receipt requested, to the following address:[1]

Director
Office of Waste Programs Enforcement (OS-500)
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

EPA will not consider the petition received until the petitioner sends the petition and all necessary information to the Office of Waste Programs Enforcement (OWPE) at the above address. However, the petitioner should also send a copy of the petition including any attachments to the EPA regional program office that issued the underlying administrative order.

B. Elements of a Petition

Petitioners should include in their petitions all legal arguments and all technical, scientific or other factual evidence supporting their claims. All documents that petitioners rely on should be included as attachments to the petition. EPA retains the right not to consider information submitted by a petitioner after its petition is filed. EPA will, of course, consider information properly submitted by the petitioner in commenting on EPA's preliminary decision (see Section III).

EPA encourages petitioners not to submit frivolous or unsupported petitions. The Agency may seek from petitioners any Agency costs incurred in processing a frivolous petition.

C. Threshold Statutory and Regulatory Requirements

Section 106(b)(2) establishes certain threshold statutory requirements for reimbursement. Therefore, each petition should include information demonstrating that it meets the following threshold requirements:

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[1]The President's authority to implement Section 106 was delegated to the Administrator of EPA by Executive Order 12580 (January 23, 1987). The authority to receive, evaluate, and make determinations regarding petitions for reimbursement submitted pursuant to CERCLA Section 106(b) was then delegated to the Assistant Administrator for Solid Waste and Emergency Response, and re-delegated to the Director of the Office of Waste Programs Enforcement (OWPE). Concurrence of the Director of the Office of Emergency and Remedial Response is required on determinations and decisions authorizing payment (use of Fund monies). See Delegations 14-27 and R-14-27 (Petitions for Reimbursement) contained in the Superfund Internal Delegations of Authority Memorandum, September 24, 1987.

1) On or after October 17, 1986, petitioner received and complied with the terms of an administrative order issued by EPA under CERCLA section 106(a);[2]
2) Petitioner completed the required action;
3) Petitioner submitted a petition for reimbursement to EPA within 60 days after completing the required response action; and
4) Petitioner incurred reasonable costs.

Each petition should include all information necessary for EPA to evaluate these threshold requirements. This information should include, but is not limited to, the following: a copy of the administrative order; a petition containing the relevant claims; documentation from the petitioner showing that it has fully completed the action required by the administrative order (AO) (see below); a copy of a letter from the petitioner to the regional office certifying completion of the required action; a copy of any correspondence from EPA's regional office relevant to "completion" of the required action; and proof of the reasonable costs incurred. If the petition does not show that these statutory requirements have been met, then EPA will deny the petition.

The right to petition for reimbursement under section 106(b)(2) is not available to parties who received their cleanup order prior to October 17, 1986.[3] OWPE will deny petitions based on such orders.

Section 106(b)(2) requires a person to complete the required action before submitting a petition. If the petitioner has not completed the required action, then EPA may return the petition. Once the required action is complete, the petitioner may refile the petition within 60 days of completion.

The third threshold element of section 106(b)(2) requires a person to file a petition <u>within 60 days</u> after completing the required action. To meet this requirement, petitions should be postmarked no later than the 60th day after the day when the required action was completed. The petition should be sent to OWPE by certified mail, return receipt requested. If the 60 day time period for filing the petition with OWPE expires on a

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[2]<u>See</u> 40 C.F.R. §300.700(e). This section recognizes a person's right to submit a petition after complying with an order issued after October 16, 1986, unless the person has waived this right.

[3]<u>See</u>, <u>Wagner Seed Co. v. Bush</u>, 946 F.2d 918 (D.C. Cir. 1991), <u>cert. denied</u>, 60 U.S.L.W. 3687 (U.S. April 6, 1992) (No. 91-1140); <u>Bethlehem Steel Corp. v. Bush</u>, 918 F.2d 1323 (7th Cir. 1990).

Saturday, Sunday, or Federal legal holiday, then the time period is extended to include the next business day.

Under the fourth threshold requirement, petitioner must demonstrate that he or she has incurred reasonable costs. The petitioner should submit documents with the petition reflecting the costs that s/he incurred in performing the required action. The documents should contain an itemized list of the costs incurred in performing the response action, proof that the petitioner paid these costs, and proof that the party performing the work accepted the payments in satisfaction of the obligation. The petitioner should also explain why s/he believes the costs are "reasonable." The factors relevant to the reasonableness of costs include, but are not limited to, the number of bids the petitioner received for a project, the basis for choosing a contractor, the bidding procedures, any modifications to the original contract, and any delay in petitioner's initiation, facilitation, or completion of the response action. The type of documents that could support petitioner's claims for costs include bids, cost estimates, commercial rates for the services, authorized work contracts, contractor rates, market prices, progress reports, copies of itemized invoices, copies of canceled checks, receipts, and other appropriate documents. EPA will use this information when evaluating the reasonableness of costs (see Section II.E).

D. Statutory Standards for Reimbursement

If the petition satisfies the four threshold requirements discussed above, then EPA will evaluate the merits of the petition. To evaluate the petition's merits, EPA will examine whether the petition demonstrates **either, or both,** of the following:

- Petitioner is not liable for response costs under CERCLA section 107(a) (see sub-section 106(b)(2)(C)) or;
- Based on the administrative record, the selection of the response action required by the order was arbitrary and capricious or otherwise not in accordance with law. (see sub-section 106(b)(2)(D)).

The burden of proof rests with the petitioner. Under sub-section 106(b)(2)(C), the petitioner must prove by a preponderance of the evidence that s/he is not liable. In contrast, a claim based on sub-section 106(b)(2)(D) requires the petitioner to demonstrate, on the administrative record, that EPA's selection of the response action was arbitrary and capricious or otherwise not in accordance with law. Sub-section 106(b)(2)(D) limits reimbursement to the costs incurred pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law. EPA will review this

claim based solely on the information contained within the administrative record for the selection of the response action.

E. Reasonable Costs Plus Interest

Upon determining that the petitioner may be entitled to reimbursement, OWPE will evaluate the reasonableness of a petitioner's response costs for the required action. The reimbursement petition should describe the basis for the petitioner's claim that the costs incurred are reasonable. The petition should itemize all cost documents. The petition should identify any monies the petitioner received from other parties via any other means (e.g., settlements, contribution, insurance, private party actions, and government contracts) for performing the required action. Such monies do not represent costs incurred by the petitioner, and are therefore not subject to reimbursement. All cost information should be submitted with the petition. EPA retains the right to not consider information submitted after the 60 day deadline.[4]

In evaluating the petitioner's costs, OWPE will consider the circumstances of the response action, evidence of the customary practices existing at the time the monies were expended by the petitioner (e.g., cost estimates furnished by qualified firms, results of competitive procurement for identical or similar activities, and documentation of market prices for similar activities), and any other relevant factors. OWPE may grant all, part, or none of the costs sought. EPA will not reimburse any costs that are not part of the reasonable costs of the response action required by the order, such unallowable costs include, but are not limited to, the additional cost for work performed beyond the scope of the administrative order and legal fees related to the reimbursement petition process.

Finally, CERCLA sub-section 106(b)(2)(A) indicates that interest on the amount of money expended in implementing a required action accrues from the date of expenditure. The interest rate used in this calculation will be the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26 of the United States Code.

III. Agency Procedures for Processing Section 106(b) Petitions

Generally, EPA will evaluate a petition using the process outlined below. However, EPA may use its discretion to stay the process before a final decision is issued. For example, EPA may stay the evaluation process if a related settlement or judicial action is proceeding (e.g., a CERCLA section 107 action) or for

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[4] See Section II.C at page 2.

other good cause. A petitioner may elect to withdraw a petition, or withdraw from a multi-party petition (e.g., if a petitioner enters a settlement with EPA and thus waives his or her rights under section 106(b)). Once a petitioner withdraws a petition, EPA will allow the petitioner to refile the petition only where the 60 day statutory period for filing a petition has not yet expired.

After the response action required in a section 106 order is completed, the petitioner has 60 days to file a reimbursement petition with OWPE. The petitioner should send, prior to or concurrent with the filing of the petition, a letter (return receipt requested) to the appropriate EPA Regional Program Office, and to OWPE, certifying completion of the required action. The letter should be substantiated with support documentation (e.g., copies of invoices, work orders, disposal records, receipts or manifests, and other relevant documents). Parties should be aware that there are significant sanctions for submitting false information.

Upon receipt of the petitioner's letter certifying completion of the required action, the regional office should reply in writing to the petitioner within 60 days either confirming or denying that the petitioner completed the required action. The regional office should send its response to the petitioner by certified mail, return receipt requested, and should send a copy to OWPE. If the regional office finds that the action has not been completed, the Region should state the basis for the finding and the actions needed to complete the required action. If the Region's response to the petitioner is not postmarked or franked by the 60th day from receipt of the certification and no extension of time has been granted by OWPE (see below), then OWPE may deem the required action complete for purposes of section 106(b)(2) only. In some circumstances, a regional office may determine that the petitioner completed the required action after the date of petitioner's letter certifying completion. In this situation, a petitioner may file the petition within 60 days after the date of actual completion, as reflected in the Region's letter confirming completion. The petitioner's statutory obligation to file the petition within 60 days after completing the required action is not affected by a regional office's response to the petitioner's letter certifying completion.

On a case-by-case basis, a regional office may, for good cause, submit a written request to OWPE asking for a limited extension to evaluate whether the required action has been completed. OWPE anticipates that a regional office will only request the extension under extenuating circumstances or when a dispute arises between the regional office and the petitioner as to whether the work was completed.

Upon receipt of a petition, OWPE will send a letter to the petitioner and the appropriate regional office acknowledging receipt of the petition. Generally, OWPE will not evaluate a petition's merits until the work under the Order is completed as indicated by the Region's letter confirming completion (see above).

When the work is completed, OWPE will evaluate a petition for completeness in order to determine if the petitioner has met the threshold statutory filing requirements identified in Section II of this guidance. The regional office may submit comments to OWPE on any petition, and should do so within 60 days after EPA receives the petition (assuming that the petitioner has completed the required action). The regional office should send a copy of the comments to OWPE and the petitioner.

If the petitioner cannot show that the threshold statutory requirements are met, then EPA will deny the petition. If the petition meets the threshold requirements, then OWPE will evaluate the merits of the petition. OWPE may first perform a summary review under the following scenarios:

- There are no factual issues in dispute; or,
- Assuming as true all facts most favorable to the petitioner, OWPE would deny the petition; or
- Assuming as true all facts least favorable to the petitioner, OWPE would grant the petition.

In these situations, OWPE expects to issue a preliminary decision without further investigation into the facts of the case. In particular, OWPE will not offer an opportunity for an oral hearing in such cases because further factual case development would be of no benefit.

When a petitioner claims that he or she is not liable under section 107(a) of CERCLA, in most cases, OWPE expects to evaluate claims relating to liability based solely on the documents submitted by the petitioner and the regional office. However, there may be limited cases where the evaluation of liability claims will justify additional procedures. EPA will initially review the liability claims to determine whether to offer the petitioner an opportunity for an oral, evidentiary hearing on the liability issues.

An oral hearing would be conducted at EPA Headquarters or in the appropriate regional office by an EPA Headquarters' hearing officer. The hearing would include the opportunity for live testimony on specified factual issues from one or more of the parties' (the petitioner and the regional office) witnesses and the opportunity for cross-examination. EPA will notify the parties by letter (return receipt requested) if it decides to offer the opportunity for an oral hearing. If EPA offers an oral

hearing, it may require a response within a fixed time, such as 15 days from the issuance of the written offer. Failure to respond to the offer in a timely manner will constitute a waiver of the opportunity for a hearing. However, EPA may decide on its own to hold an oral hearing. If an oral hearing is held, OWPE (or the EPA hearing officer) will notify the petitioner and the Region in writing of the issues and provide a hearing date.

CERCLA does not require that EPA provide oral hearings on section 106(b) reimbursement petitions. However, oral hearings may, in some cases, be an appropriate means of providing the petitioner a full airing of liability issues. Oral hearings are particularly appropriate where there are factual issues that depend on the credibility of a witness providing testimony. In such cases, it may be appropriate to allow for an oral hearing in order to assess the witness's credibility and provide an opportunity for the opposing party to cross-examine the witness. In contrast, where factual disputes revolve around technical issues rather than witness credibility there will usually be no need to provide for an oral hearing. OWPE will decide these issues on the basis of the written submissions. It could be, however, that if the liability issues are highly complex or technical, OWPE may decide that an oral hearing would clarify matters.

In sum, petitioners should keep in mind the following points regarding the availability of oral hearings on section 106(b) petitions. It is within EPA's discretion whether to hold a hearing. EPA expects to offer an oral hearing only with respect to liability issues. EPA does not expect oral hearings to be available on response selection issues or issues relating to the reasonableness of the costs incurred by the petitioner. EPA expects to offer an oral hearing only when liability claims involve disputed factual issues. This decision will turn in large part on whether witness credibility is at issue.

If the EPA hearing officer holds an oral hearing on liability, the hearing officer will issue a recommended decision to OWPE on those specified issues. OWPE will evaluate the hearing officer's recommended decision and any remaining claims within a petition. The remaining claims could consist of any liability claims not reviewed by the hearing officer or claims based on EPA's selection of the response action. If, after reviewing all claims, OWPE concludes that the petitioner should not be reimbursed, OWPE will not evaluate the reasonableness of the incurred costs.

Once the evaluation process is completed, OWPE will issue a preliminary decision. If EPA held an oral hearing, OWPE will include a copy of the hearing officer's recommended decision with the preliminary decision document. The preliminary decision will also include, where applicable, an index of the following

documents: liability documents, the administrative record for the ordered response action, regional comments, and any other information and documents generated (e.g., conversation sheets - see Appendix C) or timely received upon request by OWPE, or the hearing officer, during the review process. OWPE will make the documents available to the petitioner at the regional office and EPA Headquarters unless exempt from disclosure (see Section IV). If regional documents are too voluminous for shipment to EPA Headquarters, the regional office and OWPE staff should make the appropriate arrangements for OWPE staff and the petitioner to review the documents.

After a preliminary decision is issued, the petitioner and the regional office will have 30 days from the date of receipt (return receipt requested) of the preliminary decision to submit comments on the Agency's preliminary decision document. The petitioner and the regional office will be afforded an opportunity to comment on the preliminary decision and all supporting information identified in the index/indices unless exempt from disclosure.

The petition, the Region's response to the petition, an oral hearing (if one is held), and the 30-day comment period are the established means for the petitioner and the regional office to present their views on the petition. OWPE may decline to consider information submitted by either party outside of these processes.

EPA will review and consider timely comments before issuing a final decision. However, EPA may decline to consider new claims or new issues raised during the comment period. Comments should relate only to the following: the claims and issues raised in the petition, the regional response to the petition, and the discussion in the preliminary decision.

EPA's final decision will either grant or deny the petition in whole or in part. The Director of OWPE will issue EPA's final decision. A decision to reimburse the petitioner, in whole or in part, requires concurrence from the Director of the Office of Emergency and Remedial Response (OERR).[5] EPA will send the final decision to the petitioner, or petitioner's counsel, by certified mail, return receipt requested and to the regional office by regular mail. The public record supporting EPA's final decision will be made available at Headquarters or the regional office as appropriate (see discussion above).

Judicial review of the final decision is governed by sub-section 106(b)(2)(B).

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[5] See footnote 1.

All confirmation letters, regional comments, summary denial letters, information request letters, letters offering hearings, and preliminary and final decisions will be sent by certified mail to the petitioner, return-receipt requested. All other correspondence to the petitioner will be sent by regular mail. All regional correspondence with Headquarters may be sent by regular mail.

IV. Access to Information and Confidentiality

Generally, the Petitioner will have access to all documents in the administrative record supporting the selection of the response action, as well as documents in the record compiled by EPA concerning its decision on liability issues and any other documents concerning EPA's decision on the petition. The administrative record is kept at the appropriate regional office or EPA Headquarters and is available to all interested parties. However, certain documents may not be maintained in the publicly available portion of the administrative record because they may be subject to one of the nine statutory exemptions under the Freedom of Information Act (FOIA) (5 U.S.C. Section 552 et seq.). The FOIA provides for disclosure of Agency records to any requestor except where the record falls under an exemption. A petitioner is subject to the provisions of FOIA when seeking information which may fall within the nine statutory exemptions. Whether or not a petitioner cites FOIA when requesting information not currently public and available, EPA will treat the request as a FOIA request.

OWPE encourages the Regions to make every effort to release relevant investigatory records compiled for law enforcement purposes, including liability evidence, if no important purpose is served by withholding the record. A more complete disclosure may provide the petitioner with the opportunity to learn why the Agency found it liable for the response action. Under certain circumstances, a Region may choose not to disclose information because it may, for example, "interfere with enforcement proceedings" or affect judicial proceedings. An example of a circumstance preventing the disclosure may be a RD/RA negotiation or a cost recovery action which coincides with the petition evaluation process.

In some cases a Region may determine that a document is subject to another FOIA exemption, such as exemption five, the exemption pertaining to inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency. This exemption includes documents subject to the internal-deliberative process privilege and the attorney work-product privilege. Again, OWPE strongly encourages the Regions to make every effort to release documents which fall within this exemption if no important purpose is served by withholding the records.

Exemption four pertains to trade secrets, and confidential commercial, or financial information (confidential business information (CBI)). This exemption may apply to information EPA obtained either from the petitioner or from other entities. EPA has developed regulations on CBI (40 C.F.R. Part 2, Subpart B).

The petitioner may submit information to the Agency and assert a business confidentiality claim covering part or all of the submitted information. Information covered by such a claim will be released only to the extent, and by means of the procedures, set forth in 40 C.F.R. Part 2, Subpart B. If no such claim accompanies the information when it is received by EPA, EPA may release information without further notice. However, a request for documents claimed exempt will trigger a review and request to the submitter of the documents for substantiation of its claim from an EPA legal office. The Agency legal office may determine that the information claimed exempt is not entitled to confidential treatment. If such a determination is made, EPA may, after appropriate notice, release the information unless an action is instituted in a federal court to enjoin release of the information.

Generally, CBI can only be disclosed in certain narrowly defined circumstances. 40 C.F.R. Section 2.209 outlines the parties that may receive CBI and the procedures that EPA follows when it disseminates CBI. EPA may disclose CBI in limited circumstances to Congress, other federal agencies, by order of a federal court, within EPA, with the consent of the business that submitted the information to EPA and to certain authorized representatives (such as contractors). EPA may also release CBI because of the relevance of the CBI to a proceeding. This determination by the presiding officer This release of CBI can only be made in accordance with EPA's CBI regulations, 40 C.F.R. Part 2.

Despite these limitations on disclosure, EPA anticipates that most of the information relevant to a petition will be generally publicly available. EPA will make every effort to evaluate, carefully, each request for disclosure of information and weigh any important reasons for withholding requested information.

Finally, OWPE plans to include in its preliminary decisions on petitions an index of the related administrative record for the petition. The index would reference, among other documents, confidential information and privileged documents. The petitioner may review the nonexempt portions of the administrative record at the regional office, and at EPA Headquarters unless it is too voluminous for shipment to EPA Headquarters (see above).

V. Regional Involvement in the Petition Review Process

A regional office has the following six responsibilities in the petition process:

A. Confirmation Process - The regional office has 60 days from receipt of the petitioner's certification letter (unless extended) to confirm or deny in writing that the required action has been completed (see procedures above).

B. (Optional) Comment on Petition - The regional office may comment on a petition and should do so within 60 days after EPA receives the petition (assuming that the petitioner has completed the required action). The Region should send a copy of these comments to OWPE and the petitioner.

C. Documents - The regional offices should anticipate that persons who intend to file section 106(b) petitions will ask to review the administrative record for selection of the response action well in advance of the deadline for filing their petitions. The Regions should be prepared to handle such requests.[6]

Once a petition is filed, the regional office should provide OWPE with the administrative record for the selection of the response action[7] and (or when requested) information supporting the Region's position that the petitioner is liable. The Region should also include an index/indices of these documents. In the event that these documents are too voluminous for shipment, the regional office and OWPE should make the appropriate arrangements for OWPE to review the necessary documents.

After OWPE issues a preliminary decision, the regional office should be prepared to provide the petitioner with the facilities needed to review the non-exempt indexed documents identified in the preliminary decision as well as the final decision.

D. Additional Information - In evaluating a petition, OWPE or a hearing officer may request or receive additional

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[6]See 40 C.F.R. §300.820 for the timing requirements surrounding preparation of the administrative record file.

[7]This submission will not be needed if the threshold filing requirements are not met or if petitioner does not assert a claim under sub-section 106(b)(2)(D).

information from a regional office. The Region should be prepared to send this information and a related index to EPA Headquarters, with a copy to petitioner.

E. Oral Hearing - If EPA offers the petitioner an oral hearing, OWPE or the EPA hearing officer will notify the regional office in writing of a hearing date. The regional office may then participate in the hearing, which could include oral testimony on factual issues from one or more of the parties' (the petitioner and the Region) witnesses and the opportunity for cross-examination.

F. Comments on the Preliminary Decision - OWPE will provide the regional office and the petitioner 30 days to submit comments to OWPE on the preliminary decision.

VI. Further Information

For further information on this guidance, contact Fred Zimmerman, Office of Waste Programs Enforcement, CERCLA Enforcement Division (OS-510), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460, (202) 260-2034.

APPENDIX A

CERCLA Section 106(b)(2) provides:

(A) Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 107(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 107(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of Title 28.

Appendix B

Summary of Information That Should Be Included With the Reimbursement Petition

A. All Information Establishing the Threshold Statutory and Regulatory Matters (see section II). This information should include (but is not limited to) the following:

   1. A copy of the underlying Administrative Order.

   2. A copy of the letter from the petitioner certifying completion and the Confirmation Letter from the Region if available.

   3. All cost documentation reflecting the reasonable costs incurred in performing the response action.

B. All Information Establishing That The Petitioner Meets Either or Both of the Statutory Standards for Reimbursement

   1. Petitioner is not liable
   2. EPA's decision in selecting the ordered response action was arbitrary and capricious or otherwise not in accordance with law.

C. Any and all additional documents and written explanations needed to support the petitioner's claims.

Appendix C

Conversation Sheet

Date: Time: Location:

Purpose of Conversation:

Name of Participants in Conversation:

Headquarters:

Region:

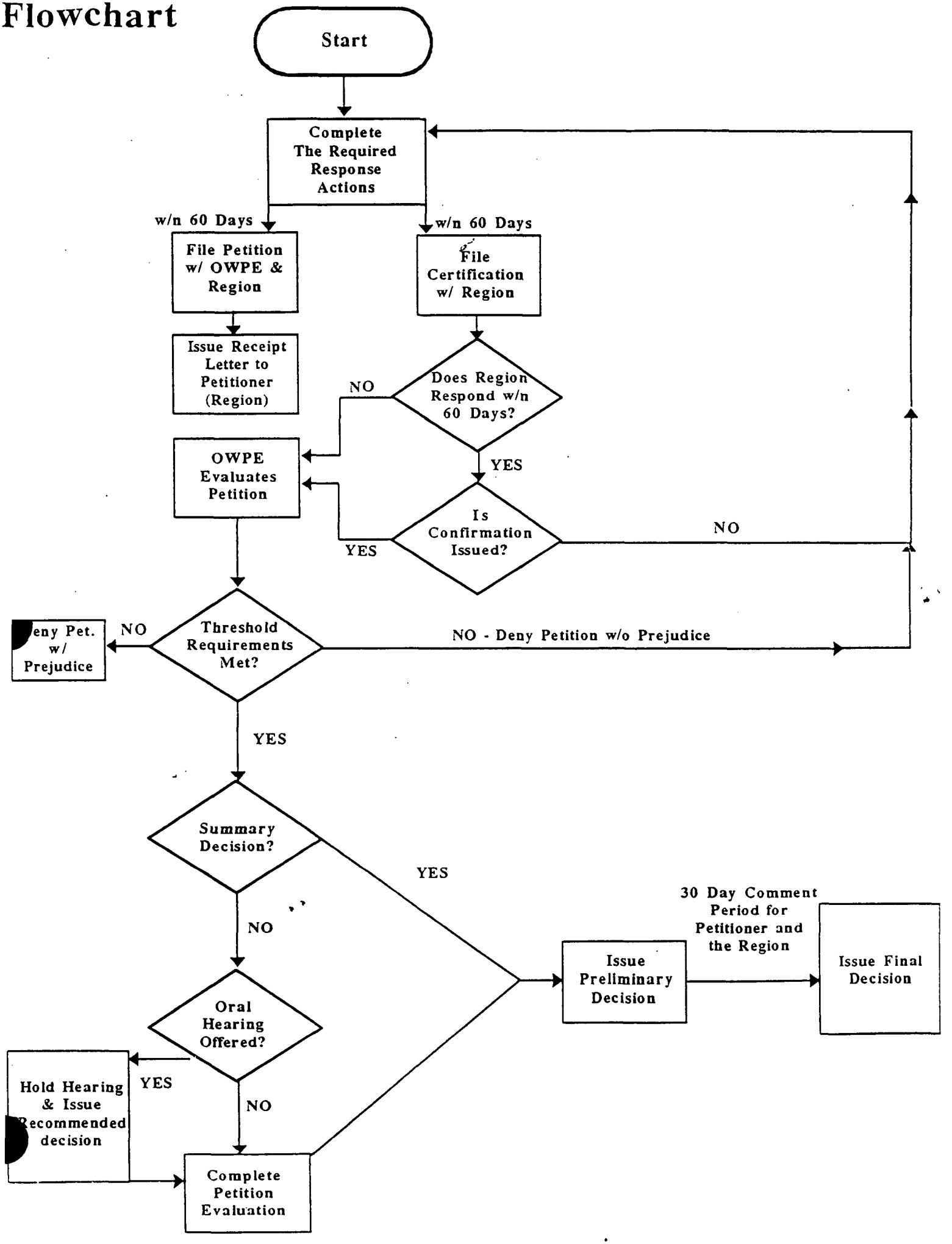
Petitioner(s) or
Representative:

Were all parties asked to participate in the conversation?
Yes or No. Explain.

Summary of Conversation:

Future Action Based on the Conversation:

Flowchart


Start
Complete The Required Response Actions
w/n 60 Days
File Petition w/ OWPE & Region
Issue Receipt Letter to Petitioner (Region)
w/n 60 Days
File Certification w/ Region
Does Region Respond w/n 60 Days?
NO
YES
OWPE Evaluates Petition
Is Confirmation Issued?
YES
NO
Threshold Requirements Met?
NO
Deny Pet. w/ Prejudice
NO - Deny Petition w/o Prejudice
YES
Summary Decision?
YES
NO
Oral Hearing Offered?
YES
NO
Hold Hearing & Issue Recommended decision
Complete Petition Evaluation
Issue Preliminary Decision
30 Day Comment Period for Petitioner and the Region
Issue Final Decision