

United States
Environmental Protection
Agency

Solid Waste and
Emergency Response
(5305W)

PB96-963 217
EPA540-R-96-009
OSWER Directive 9205.5-05
March 1996



RCRA/UST, Superfund, & EPCRA Hotline Training Module

Introduction to:

**Superfund Liability, Enforcement,
and Settlements**

Updated as of November 1995

DISCLAIMER

This document was developed by Booz-Allen & Hamilton Inc. under contract 68-W0-0039 to EPA. It is intended to be used as a training tool for Hotline specialists and does not represent a statement of EPA policy.

The information in this document is not by any means a complete representation of EPA's regulations or policies. This document is used only in the capacity of the Hotline training and is not used as a reference tool on Hotline calls. The Hotline revises and updates this document as regulatory program areas change.

The information in this document may not necessarily reflect the current position of the Agency. This document is not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States.

RCRA/UST, Superfund & EPCRA Phone Numbers:

National toll-free (outside of DC area)	(800) 424-9346
Local number (within DC area)	(703) 412-9810
National toll-free for the hearing impaired (TDD)	(800) 553-7672

The Hotline is open from 9 am to 6 pm Eastern Standard Time,
Monday through Friday, except for federal holidays.

SUPERFUND LIABILITY, ENFORCEMENT, AND SETTLEMENTS

CONTENTS

1. Introduction.....	1
2. Regulatory Summary.....	3
2.1 Definitions.....	3
2.2 Liability.....	6
2.3 Enforcement.....	14
2.4 Settlements.....	18
2.5 Cost Recovery	22
2.6 Relationship to Remedial and Removal Actions	24
3. Summary.....	27

1. INTRODUCTION

The objective of CERCLA is to reduce and eliminate threats to human health and the environment posed by contaminants at uncontrolled hazardous waste sites. To meet this objective, CERCLA created:

- A hazardous waste site response program, and
- A comprehensive liability scheme that authorizes the government to hold persons who caused or contributed to the contamination problem liable for the cost or performance of cleanups.

Congress also created a revolving trust fund (the Hazardous Substance Superfund) from which the President could draw funds to respond to releases and threatened releases of hazardous substances from CERCLA-defined facilities.

CERCLA provides EPA with three basic options for cleaning up a hazardous waste site:

- Under §§104 and 107, EPA can cleanup the site using Superfund money, and later recover cleanup costs from potentially responsible parties (PRPs)
- Under §106, EPA can order, or ask a court to order, PRPs to cleanup the site
- Under §122, EPA can enter into settlement agreements with PRPs that require PRPs to cleanup the site or pay for a cleanup under §107.

EPA has adopted an "enforcement first" policy for the cleanup of CERCLA sites. As a matter of policy, when a site requires remediation under CERCLA and the PRPs for the site are identified, EPA will first require the PRPs to conduct the site cleanup (either through a settlement agreement or through the issuance of §106 administrative orders) rather than conduct the cleanup with Superfund money.

Many of the questions the Hotline receives on liability, enforcement, and settlements are purely legal and beyond our scope. We do not interpret or apply the law or legal concepts to particular situations, nor do we supply information on case law. We only answer questions relating to statutory and regulatory authority, and explain how these tools are used as part of the CERCLA process.

The goal of this module is to describe the liability, enforcement, and settlement provisions of CERCLA. When you have completed this module, you should be able to:

- List the CERCLA enforcement mechanisms available to EPA
- Explain CERCLA §§104 and 106 provisions
- Define "potentially responsible party"
- Explain CERCLA §107 liability
- Cite and locate the relevant CERCLA documents on enforcement and liability
- Explain the differences between administrative and judicial enforcement and settlement procedures
- List and compare the differences between enforcement authorities as they apply to removal and remedial actions
- List the key enforcement steps in EPA's response process
- Specify noncompliance penalties and provide statutory citations.

Use this list of objectives to check your knowledge of this topic after you complete the training session.

2. REGULATORY SUMMARY

Congress provides EPA authority in CERCLA to take direct action to respond to releases or threatened releases of hazardous substances that could endanger public health or welfare or the environment. EPA may also take legal action to force parties responsible for causing contamination to clean up these sites or reimburse the Superfund for the costs of a federally-funded cleanup. The Superfund program is based on the premise that those responsible for the hazardous substances at a site should bear the burden of the cleanup. If, however, those responsible for contaminating a site cannot be found or are unable to clean up a site, EPA can use Superfund money to finance the response action. EPA also has the option of using Superfund money to conduct a response action and later pursue cost recovery from responsible parties should the circumstances at the site warrant immediate action.

SARA's passage in 1986 significantly strengthened CERCLA's enforcement provisions by incorporating enforcement tools to facilitate settlement negotiations and enforcement measures to encourage or compel responsible party cleanups. Mechanisms to pursue cost recovery from liable parties for an EPA-funded response action were also enhanced.

One useful resource for information on Superfund liability, enforcement, and settlements is the Enforcement Project Management Handbook (OSWER Directive 9837.2B). As a Superfund Information Specialist, you will find the answers to many questions will be based on the language found in guidance documents. Since the provisions of CERCLA are imposed on a site-by-site basis, very few answers to callers' questions are found in the regulations. The Enforcement Project Management Handbook is a compilation of existing guidance and serves as an important tool for locating information on specific topics.

The following is an overview of the CERCLA provisions for liability, enforcement, and settlements. The module addresses each of these topics under separate headings.

2.1 DEFINITIONS

Familiarity with the following terms is key to understanding this module.

ADMINISTRATIVE ORDER

An administrative order (AO) is a legal document, issued by an administrative agency like EPA, compelling a party to act and prescribing the activities the potentially responsible party (PRP) must undertake. Under CERCLA §106, EPA can order, or ask a court to order, PRPs to cleanup the site. It usually sets the completion date for the cleanup process, as well as discrete deadlines for actions leading up to

that date. The AO includes provisions for oversight by the lead agency and for associated costs. An AO may be "on consent" (AOC) if the agreement results from successful negotiations and is signed by both the PRP and EPA; however, the statute prohibits the use of AOCs for remedial actions. If the PRP is not cooperative, EPA has the authority to issue a unilateral administrative order (UAO) compelling the PRP to conduct the ordered activities. An AO, whether on consent or unilateral, is ordered and signed by EPA.

CONSENT DECREE

A consent decree is a legal document, approved by a judge, which formalizes an agreement reached between EPA and the PRP(s). The consent decree states when PRPs will perform all or part of a site cleanup and what actions PRPs are required to perform. An announcement of the consent decree must be published in the Federal Register for public comment prior to its approval by a judge. Under §122, remedial actions must be performed by the PRPs pursuant to the terms of a consent decree.

COST RECOVERY

Cost recovery is the legal process by which EPA pursues parties liable under CERCLA §107(a) in order to recover money spent by the federal government on response actions.

"DE MICROMIS" WASTE CONTRIBUTOR

A "de micromis" waste contributor is a PRP who is deemed by a settlement agreement to be responsible for only minuscule amounts of waste at a CERCLA site. EPA coined this term to denote a subset of de minimis waste contributors (OSWER Directive 9834.17).

DE MINIMIS LANDOWNER

A de minimis landowner is a PRP who is deemed by a settlement agreement to be the past or present owner of property on which a facility is located, but who did not conduct or permit the handling of any hazardous substances at the facility and who did not contribute to the release of hazardous substances at the facility (CERCLA §122(g)(1)(B)).

DE MINIMIS WASTE CONTRIBUTOR

A de minimis waste contributor is a PRP whose contribution to the hazardous substance release is minimal in volume and toxicity in comparison to the other wastes at that site (CERCLA §122(g)(1)(A)). The expedited settlement agreement for such a contributor specifies the party is responsible for only a minor portion of the response costs.

GENERAL NOTICE LETTER

A general notice letter is a formal notice from EPA informing PRPs of their potential liability for past and future response costs at a CERCLA site. Either before or along with this notification, EPA may also include an information request to determine the extent of PRP liability (CERCLA §104(e)).

INNOCENT LANDOWNER

An innocent landowner is a person who, after making "appropriate inquiry" into previous ownership and uses of the property, purchased or acquired the property without knowledge of the presence of hazardous substances on the property. PRPs may assert this claim as a defense to liability under CERCLA §107(b)(3).

LIEN

A lien is a claim or charge on property for the payment of some debt, obligation, or duty. CERCLA §107 authorizes the federal government to impose a lien on a PRP's property subject to a response action.

MIXED FUNDING AGREEMENT

A mixed funding agreement is a settlement agreement whereby EPA settles with less than all the PRPs for less than 100 percent of the response costs (CERCLA §122(b)). The three types of mixed funding agreements (preauthorization, cash-out, and mixed work) are discussed further in Section 2.4 of this module.

POTENTIALLY RESPONSIBLE PARTY

A potentially responsible party (PRP) is an individual or entity including past or present owners, operators, transporters, or generators any or all of whom may be liable under CERCLA §107(a).

SPECIAL NOTICE LETTER (SNL)

EPA uses SNLs under CERCLA §122(e) to initiate formal settlement negotiations for a response action. EPA has discretion to use the special notice procedure when it is believed the procedure will bring about negotiations that will result in a settlements between EPA and PRPs for a site. EPA may issue separate SNLs for operable units at a remedial site if doing so will facilitate an agreement and expedite the remedial action. CERCLA §122(e)(1)(A) requires EPA to provide the names and addresses of PRPs, the volume and nature of substances contributed by each PRP identified, a ranking by volume of the substances at the facility to PRPs whenever available.

2.2 LIABILITY

This section addresses the key factors in determining CERCLA liability. Liability is a broad legal term that describes the appropriation of responsibility among conflicting parties. To be held liable is to be subject to an obligation or be held responsible for a possible or actual loss, penalty, expense, or burden. Under CERCLA, liability may be tied to property ownership as well as to generation of hazardous substances, and can entail a duty to pay money (e.g., assessment costs) or to perform an act immediately or in the future (e.g., conduct a cleanup). Responsible parties that are held liable pay for the environmental damage they have caused.

WHAT CREATES LIABILITY

CERCLA §104(a) authorizes EPA to respond to a release or substantial threat of release into the environment of hazardous substances, or a pollutant or contaminant.

- Under CERCLA §101(22), “release” is broadly defined and includes “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.”
- Under CERCLA §101(8), “environment” is broadly defined and includes surface water, ground water, land surface or subsurface strata, and ambient air within the United States or under jurisdiction of the United States.
- Under CERCLA §101(14), “hazardous substance” is any substance EPA has designated for special consideration under the Clean Air Act, the Clean Water Act, the Toxic Substances Control Act, and the Resource Conservation and Recovery Act. EPA also may designate additional substances as hazardous substances under CERCLA. EPA maintains and updates a list of hazardous substances in 40 CFR Part 302.
- Under CERCLA §101(33), “pollutant or contaminant” is any other substance not on the list of hazardous substances which “will or may reasonably be anticipated to cause” adverse effects in organisms or their offspring.

A number of releases or threatened releases do not trigger CERCLA response authorities. Under CERCLA §101(14), Congress excluded petroleum, crude oil, natural gas, and synthetic gas from the definitions of hazardous substance and pollutant or contaminant. As a result, releases solely of petroleum, crude oil, natural gas, and synthetic gas into the environment do not trigger CERCLA response authorities, although they may be regulated under other environmental statutes such as the Oil Pollution Act. Under CERCLA §101(22), several types of activities are excluded from the definition of release and are not subject to CERCLA response actions. These include:

- Workplace exposures covered by the Occupational Safety and Health Act (OSHA)
- Vehicular engine exhausts
- Certain radioactive contamination covered by other laws
- Normal application of fertilizer.

Under CERCLA §104(a)(3), Congress limits and generally disallows use of the Trust Fund to finance federal response to releases of:

- Naturally occurring substances (such as radon) from locations where they are normally found
- Products (such as asbestos) that are part of the structure of, and result in exposure within residential, business, or community structures
- Substances (such as lead) in public or private drinking water supplies due to deteriorating pipes.

CERCLA §101(10) defines releases, such as the discharge of pollutants in compliance with a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act, that qualify as federally permitted releases. Although EPA has full authority under CERCLA to respond to federally permitted releases, the permittee is not liable for cleanup costs of such releases.

WHO MAY BE LIABLE

CERCLA §107(a) casts an extremely broad net in defining those persons that can be liable for the costs of responding to a release or the threat of a release of hazardous substances. The types of parties that can be held liable are:

- The current owners or operators of the facility or vessel
- Former owners or operators of the facility or vessel, if they owned the property at the time of disposal
- Those who arrange for treatment or disposal of hazardous substances at a facility (in most cases, the generators)
- Those who accept hazardous substances for transport to treatment or disposal sites.

Anyone involved in the management of hazardous substances, from production to final disposal and beyond, can be held liable. It is the responsibility of the enforcing

agency or the court to determine the degree of liability and amounts of monetary payments for any and all responsible parties. It is important to note that CERCLA liability is retroactive, meaning that persons may be held liable for releases that occurred prior to the enactment of the statute in 1980.

TYPES OF LIABILITY

Two types of liability are imposed under CERCLA. The first, strict liability, is the assessment of legal responsibility without regard to fault or diligence. To hold a party strictly liable, the government must only prove that the PRP meets the statutory definition of liability, regardless of the party's intent, knowledge, or purpose. The government does not have to prove that the PRP acted in a negligent manner; the government needs only prove that the PRP is in one of the four statutory classes of liable parties found in §107, and that the release or threat of a release of a hazardous substance occurred at the facility.

The second type of liability under CERCLA, joint and several liability, has been applied by many courts in CERCLA cases. Joint and several liability means that if the harm at the site is indivisible, such as unmarked, intermingled drums or commingled wastes, any and every PRP at the site may be liable for the entire cleanup cost, regardless of the amount of waste the PRP actually contributed to the site. If the harm at the site is divisible, then the burden of apportioning the harm is on the PRPs. The PRP who pays all or part of the costs of a site cleanup, however, does have the right to sue other parties that may have been responsible, and to force them to contribute funds (see CERCLA §113(f)). In resolving contribution claims, the courts may allocate response costs among liable parties using equitable factors as appropriate. In general, however, EPA's practice is to attempt to identify and notify all PRPs and issue orders or litigate against the largest contributors.

AMOUNT OF LIABILITY

There are four types of costs outlined in §107(a)(4) for which responsible parties may be held liable: costs of removal and remedial actions plus interest; other necessary response costs plus interest; damages for injury to natural resources plus interest; and health assessment costs plus interest. Section 107(c)(1) specifies limits to the dollar amounts of liability that may be imposed on an owner or operator. For facilities, this amount equals the total of all response costs plus \$50,000,000 for any damages. There are specific limits set forth for different types of vessels as well. In any case, if the responsible party was guilty of willful misconduct or is uncooperative, that party can be held liable for the full costs of the response and damages.

A responsible party who fails to clean up a site when issued an administrative order under §106 may potentially be held liable in an amount at least equal to, and not more than three times, the cost incurred by the government as a result of such failure to take proper action under §107(c)(3) (treble damages). Liability for punitive

damages incurred under this section cannot be transferred to another party even by a contractual agreement (§107(e)).

DEFENSES TO LIABILITY

Defenses are legal arguments or factual claims raised in a lawsuit to prove why a PRP should not be held liable. Section 107(b) specifies the defenses PRPs may raise to avoid liability for the cost of a response. There are only three:

- An act of God (e.g., a hurricane or earthquake)
- An act of war
- An act of omission of a third party who is not an employee or an agent of the defendant, and does not have a contractual relationship with the defendant.

The first two defenses are fairly self-explanatory; a description of the third defense follows.

THE THIRD-PARTY DEFENSE: THE "INNOCENT LANDOWNER"

The third-party defense is used most frequently, and is often called the "innocent landowner" provision. This defense rebuts the presumption of liability that runs with ownership of land by claiming the landowner made a good faith effort to discover any contamination. The defendant has the burden of proof. There is no set formula for proving the third-party defense: it is determined by the facts, on a case-by-case basis. The court scrutinizes the defendant's relationship to the property, specifically whether the defendant knew or had reason to know of the disposal of hazardous substances at the facility. The elements of the defense are found in §§107(b)(3) and 101(35). The defendant raising the third-party defense must be free of both actual or inferred knowledge and any contractual relationship concerning the property, except as allowed under §101(35)(A). A person who acquires contaminated property and who can satisfy the requirements of §107(b)(3) and §101(35) may be able to establish a defense to liability. Guidance on landowner liability and on the type of investigation a buyer should perform prior to purchasing property in order to demonstrate "due care" can be found in the August 18, 1989, Federal Register (54 FR 34235). In addition, the third-party defense may come into play where a person is the victim of a so-called "midnight dumper."

EXEMPTIONS TO LIABILITY

Unlike defenses, which are legally allowable arguments that must be proved and do not guarantee a bar to liability, an exemption automatically grants a release from liability if the conditions of the exemption are met. Four exemptions from CERCLA liability are discussed below.

Secured Creditor

The definition of owner/operator in CERCLA §101(20)(A) excludes persons whose ownership rights in a facility are held primarily to protect a security interest. Holding a security interest means having a legal claim of ownership in order to secure a loan, equipment, or other debt rather than retaining ownership for purposes of profit or business. This exclusion protects those persons, such as private and governmental lending institutions (i.e., banks), who may maintain a right of ownership or guarantee loans for facilities which may become contaminated with hazardous substances, from potential liability under §107 as an owner or operator. This exclusion also may protect those persons who acquire title to or ownership of contaminated property by an involuntary transfer or acquisition (i.e., through an inheritance).

The interpretation of the security interest exemption generated uncertainty within the financial and lending communities, particularly with regard to the extent to which a secured creditor may undertake activities to oversee the facility for the purposes of protecting the security interest without incurring liability under §107. To meet the provisions of the security interest exemption, a holder may not participate in any management activities.

As part of its policy, EPA developed a two-pronged test outlining activities considered participation in management. The first prong evaluates the actions that are participation in management. A lending institution, or holder, participates in management if it exercises decision-making control over a borrower's environmental compliance, or exercises control at a level comparable to that of a manager of a borrower's facility, such that the holder has responsibility for overall day-to-day decision making. For example, a holder performing the functions of a plant manager or operations manager would be participating in management.

To meet the criteria of the second prong of the two-pronged test, a holder must not participate in the management of the borrowing facility. An example of an action that would not qualify as participation in management is a lender's requirement that a borrower come into compliance with applicable federal, state, or local environmental regulations. The reconstruction and renegotiation of the terms of a security interest, such as requiring payments of additional rent or interest, also would not qualify as participation in management.

In the policy, EPA also clarified the applicability of the lender liability provision to government entities. The Agency generally will exempt from CERCLA liability as an owner or operator a unit of state or local government that involuntarily acquires contaminated property. A government entity that involuntarily acquires contaminated property and meets the requirements described below will have a third-party defense to CERCLA liability.

The requirements for a third-party defense to CERCLA liability are the following:

- The contamination occurred before the government entity acquired the property
- The government entity exercised due care with respect to the contamination (e.g., did not cause, contribute to, or exacerbate the contamination)
- The government entity took precautions against certain acts of the party that caused the contamination and against the consequences of those acts.

A government entity will not have a CERCLA liability exemption or defense if it has created or contributed to the release or threatened release of contamination from the property. As a result, acquiring property involuntarily does not unconditionally or permanently insulate a government entity from CERCLA liability. The liability exemption and defense described above do not shield government entities from any potential liability that they may have as generators or transporters of hazardous substances under CERCLA. For more information see Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily, September 22, 1995, and The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities, December 1995.

Service Station Dealers

Under CERCLA §114(c), service station dealers managing recycled oil are exempt from certain liability provisions if the dealer meets specific requirements. The exemption is applicable to generator and transporter liability under §107(a)(3) and (4), and covers claims for cost recovery under §107. The service station dealer still may be held liable under §107(a)(1) and (2) as an owner and operator.

State And Local Governments

Except for gross negligence or intentional misconduct, state and local governments are not liable for costs or damages resulting from an emergency response to a hazardous substance release. Additionally, any person rendering care or assistance pursuant to the NCP cannot be held liable for damages resulting from such care.

Contractors

Response action contractors (RACs) and state or local government employees are protected from liability, except in cases of negligence, gross negligence, or intentional misconduct.

EPA's DISCRETIONARY POLICIES ON LIABILITY

The Agency exercises its discretion in deciding whether to pursue certain parties who might otherwise be construed as one of the types of liable parties under §107(a) enforcement actions. The Agency has issued several policies concerning the liability of such parties. These policies are described below.

Residential Homeowner

In July, 1991, EPA released its Policy Toward Owners of Residential Property at CERCLA Sites (OSWER Directive 9834.6). The policy states that enforcement actions will not be taken against owners of residential property located on Superfund sites. The policy applies to properties that are owned and used exclusively for single family residences of one to four units. Furthermore, the owner's knowledge of the presence of contamination on the property at the time of purchase or sale shall not affect EPA's enforcement discretion. A potential exception to this policy would be if a homeowner's activities resulted in a release of a hazardous substance.

Owners of Property Above Contaminated Aquifers

Where hazardous substances have come to be located on or in a property solely as the result of subsurface migration in an aquifer from a source or sources outside the property, EPA will not take enforcement action against the owner of such property to require the performance of response actions or the payment of response costs. This policy is subject to the following conditions:

- The landowner did not cause, contribute to, or exacerbate the release or threat of release of any hazardous substances, through an act or omission. The failure to take affirmative steps to mitigate or address groundwater contamination, such as conducting groundwater investigations or installing groundwater remediation systems, will not, in the absence of exceptional circumstances, constitute an omission by the landowner within the meaning of this condition.
- The person that caused the release is not an agent or employee of the landowner, and was not in a direct or indirect contractual relationship with the landowner. Cases where the landowner acquired the property, directly or indirectly, from a person that caused the original release, will require an analysis of whether, at the time the property was acquired, the landowner knew or had reason to know of the disposal of hazardous substances that gave rise to the contamination in the aquifer.
- There is no alternative basis for the landowner's liability for the contaminated aquifer, such as liability as a generator or transporter under CERCLA §107(a)(3) or (4), or liability as an owner by reason of the existence of

a source of contamination on the landowner's property other than the contamination that migrated in an aquifer from a source outside the property.

For more information, see Policy Toward Owners of Property Containing Contaminated Aquifers, May 24, 1995.

Municipalities

EPA will generally not pursue generators and transporters of primarily municipal solid waste and sewage sludge. However, the Agency may pursue parties whose municipal waste includes hazardous substances from commercial, institutional, or industrial processes or activities. Municipalities that are named as PRPs, however, will be treated in the same way as private parties in the settlement process. This includes municipalities that are owners and operators of Superfund sites. For more information see Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes (OSWER Directive 9834.13).

Prospective Purchasers

It is EPA's policy not to become involved in private real estate transactions, however, EPA might consider entering into an agreement with a prospective purchaser if it will have substantial benefits for the government and the prospective purchaser satisfies specific criteria. The Agency recognizes that entering into an agreement with a prospective purchaser of contaminated property, given appropriate safeguards, may result in an environmental benefit through a payment for cleanup or a commitment to perform a response action. EPA's experience has shown that prospective purchaser agreements have also benefited the community where the site is located by encouraging the reuse or redevelopment of property at which the fear of Superfund liability may have been a barrier. EPA has adopted a policy which expands the circumstances under which prospective purchaser agreements may be considered.

EPA may reject any offer if it determines that entering into an agreement with a prospective purchaser is not sufficiently in the public interest to warrant expending the resources necessary to reach an agreement. The following criteria should be considered when evaluating prospective purchaser agreements:

- EPA action at the facility has been taken, is ongoing, or is anticipated to be undertaken by the Agency
- EPA will receive a substantial benefit either in the form of a direct benefit for cleanup, or as an indirect public benefit in combination with a reduced direct benefit to EPA

- Continued operation of the facility or new site development, with the exercise of due care, will not aggravate or contribute to the existing contamination or interfere with EPA's response action
- Continued operation or new development of the property will not pose health risks to the community and those persons likely to be present at the site
- The prospective purchaser is financially viable.

For more information see Guidance on Agreements with Prospective Purchasers of Contaminated Property, May 24, 1995.

De Micromis Parties

CERCLA provides the Agency with the authority to enter into settlements at any time with persons who may have contributed minuscule amounts of hazardous substances to a Superfund site. In appropriate circumstances, EPA may want to offer a de micromis settlement to certain parties who contribute hazardous substances to Superfund sites. The Agency generally will consider as de micromis parties those generators or transporters who contribute minuscule amounts of hazardous substances to a Superfund site. De micromis contributor settlements are not available to owners or operators of Superfund sites.

In any de micromis settlement the Agency's goal will be to "cash out" those settlers at the earliest possible time. To "cash out" means that the PRP will pay the portion of their response costs up front. As with any other de minimis settlement, a de micromis settlement must involve only a minor portion of the total, estimated response costs at the facility concerned. For more information see Guidance on CERCLA Settlements with De Micromis Waste Contributors, OSWER Directive 9834.17.

SCOPE OF CERCLA §107

The liability provisions established in §107 specify who is or may be liable for the costs of a response action for a release of a hazardous substance. Section 107 identifies those parties associated with a release; however, it does not identify the amount of money an owner, operator, generator, or other PRP will specifically pay. How much each PRP will pay and the extent of PRP contribution to site cleanup depends on the specific enforcement and settlement decisions EPA makes.

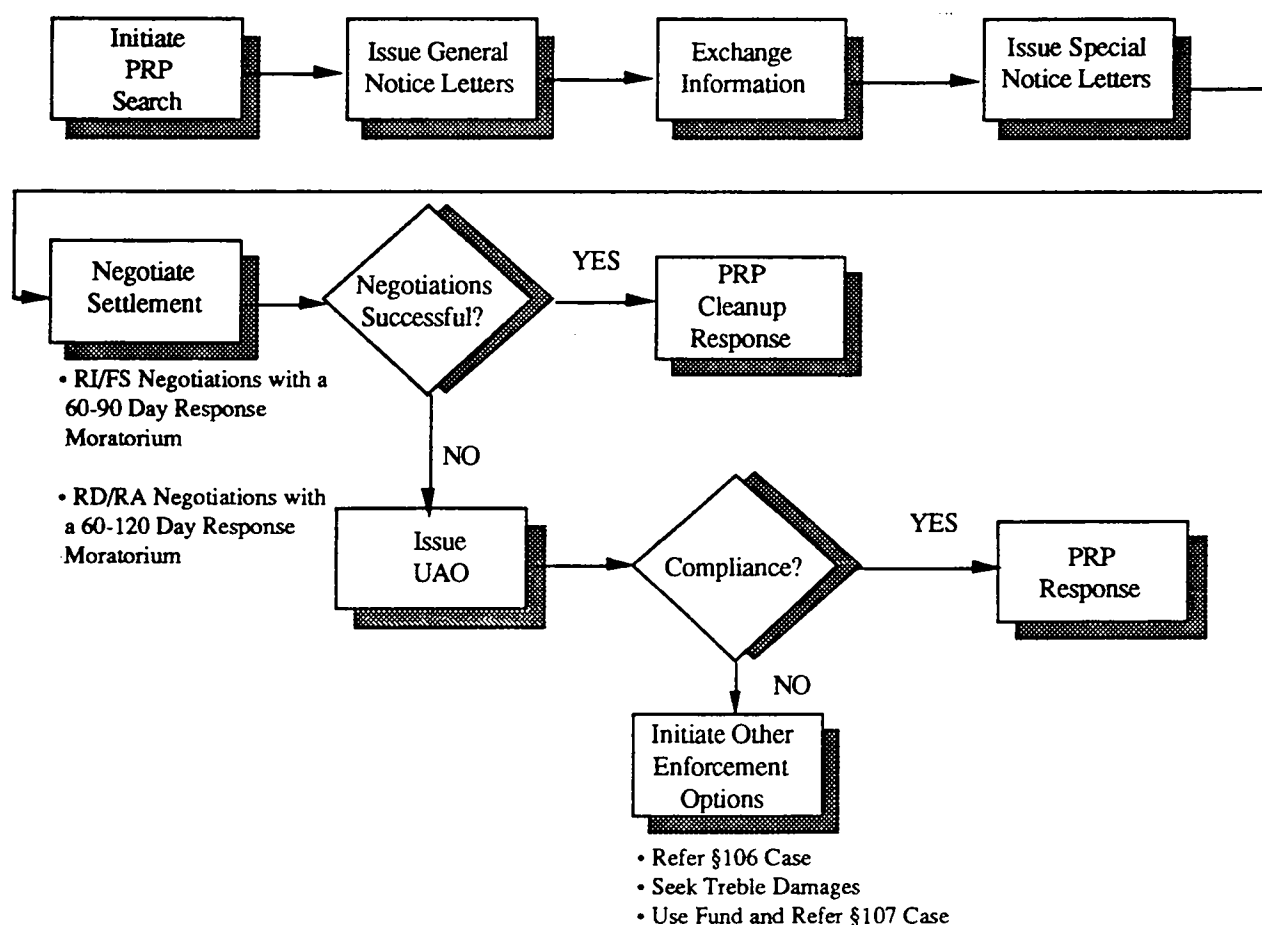
2.3 ENFORCEMENT

One goal of the Superfund enforcement program is to make responsible parties pay for the environmental damage they have caused. Ideally all PRPs would conduct

and pay for cleanup from the beginning. Frequently, however, the situation is an emergency and there is not time to search for PRP(s) and ensure they take responsibility for their action. In these cases EPA acts immediately, taking a "Fund-lead" action, which uses federal money from the Superfund, and subsequently pursues PRPs for cost recovery. When the situation permits, EPA policy is to seek action by the responsible party before expending Fund resources. When this happens the action is referred to as an "enforcement-lead" or "PRP-lead" action.

CERCLA provides a broad range of enforcement authorities that EPA can use to meet the goals of the Superfund program. These include authorities to search a PRP's property, order PRPs to clean up sites, negotiate settlements with PRPs to fund or perform site cleanup, and to take legal action if the PRPs do not perform or pay for cleanup. Figure 1 presents the steps initiated by EPA in the enforcement process.

Figure 1
ENFORCEMENT PROCESS



PRP IDENTIFICATION

To identify the parties responsible for site contamination, EPA conducts an extensive search. PRP searches include activities such as site file searches, state agency and EPA file reviews, title searches, and the construction of a history of operations that occurred at the site. The PRP search does not necessarily need to be completed before a list of potential parties is drawn up. In addition, EPA may issue information request letters to parties who may have information about the site, such as the names and addresses of owners or operators, the types of wastes found at the site, and/or possible generators and transporters associated with the site. Once EPA has enough information to identify parties as potentially liable for contamination at a site, EPA issues a general notice letter to each PRP notifying them of their potential liability (CERCLA §104(e)). After the PRPs are notified of their potential liability, EPA begins an informal information exchange concerning site conditions, PRP connections to the site, and the identification of other PRPs (53 FR 5298; February 23, 1988).

SPECIAL NOTICE PROCEDURE

Based on information obtained during the PRP search and information exchange process, EPA may choose to issue SNLs to PRPs. CERCLA §122(e) contains special notice procedures designed to facilitate formal negotiations with PRPs. The SNL includes the names and addresses of other PRPs, the volume and nature of substances each PRP contributed, and a ranking of the substances by volume. Issuance of an SNL triggers a period of time called a moratorium, during which certain EPA actions at the site may not be taken (CERCLA §122(e)(2)(A)). This time period lasts for 60 days and may be extended in certain circumstances described below.

NEGOTIATIONS

The goal of the moratorium is to reach a settlement in which the PRPs agree to conduct or finance response activities. If within 60 days the PRPs make a good faith offer to conduct the response action, the moratorium may be extended up to an additional 60 days to provide time for reaching a final settlement. If a settlement is reached, the PRPs may conduct the response action under a consent decree or an administrative order on consent with EPA or with EPA contractor oversight (§122(d)(3)). If there is no good faith offer or if negotiations fail, EPA may conduct the response action (§122(e)(4)).

PENALTIES

In addition to being liable for the costs of cleaning up contaminated sites, PRPs can also be subject to penalties under CERCLA. Failure to comply with an administrative order or a violation of the NCP can result in the assessment of an administrative (civil) penalty or a criminal charge. Penalties assessed directly by

EPA are administrative. Penalties assessed by the court at the Agency's request are generally referred to as judicial (civil) penalties. The following are examples of penalties to which PRPs may be subject.

Under CERCLA §109(a), Class I administrative penalties of not more than \$25,000 per violation may be assessed for failure to comply with the following provisions:

- Sections 103(a) and (b); relating to release notification requirements
- Section 103(b); relating to destruction of facility records
- Section 108; relating to financial responsibility
- Sections 122(d)(3) and 122(l); relating to settlement agreements for response actions under §104(b) and administrative orders or consent decrees under §120.

Under CERCLA §109(b), failure to comply with the above mentioned provisions can also result in Class II administrative penalties of not more than \$25,000 per day for each day in which the violation continues. In the case of a second violation, the penalty can amount to \$75,000 per day for each day the violation continues. Under CERCLA §109(c), EPA may also begin an action in the United States District court to assess and collect a penalty of not more than \$25,000 per day for each day for each above referenced violation.

Additional penalties are found in several sections of the statute. For specific information on violations of other provisions in CERCLA, refer directly to the section in question.

CERCLA AWARDS

Any individual who provides information that leads to the arrest and conviction of violators subject to criminal penalties may be awarded up to \$10,000 (CERCLA §109(d)). Any individual seeking an award must file a claim not later than 45 days after a conviction in the prosecution for which the information was provided (57 FR 26142; June 21, 1989). Regulations in 40 CFR Part 303 specify who may be eligible to file a claim for an award, how much may be awarded, and the criteria for payment of awards.

RCRA VS. CERCLA ENFORCEMENT AUTHORITY

The Resource Conservation and Recovery Act (RCRA) contains provisions for cleaning up sites contaminated with solid and hazardous waste. In some instances both RCRA and CERCLA authority apply to a response action. Factors such as the timeliness of a response, the substances involved, and the availability of other enforcement authorities to accomplish the objective are used to decide which law

applies. Generally, sites that may be cleaned up under RCRA or certain other laws will not be put on the NPL. By "deferring" the cleanup authority to another program (i.e., RCRA) prior to placement on the NPL, EPA can reserve CERCLA response activity funding for sites that are not eligible to be addressed under other federal authorities. If a site on the NPL falls under RCRA authority, it usually will undergo RCRA corrective action before Superfund remedial activity. In some cases, EPA may delete the site from the NPL. On March 20, 1995, EPA published in the Federal Register a revised policy setting forth circumstances under which a site may be deleted from the NPL before the cleanup is complete. As long as the site is being, or will be adequately addressed under RCRA corrective action authority or is subject to RCRA permitting or an enforcement order, deletion can occur. For historical information on the interface between RCRA and CERCLA see the memo from Don Clay to Stephen Wassersug, dated July 11, 1990, or see the February 11, 1991, Federal Register listing final NPL sites (56 FR 5598).

FEDERAL FACILITIES

CERCLA enforcement at federal facilities is a complicated issue. Executive branch agencies may not sue each other, nor may one agency issue an administrative order to another without providing an opportunity to first settle the dispute. Thus, EPA strives to work with other federal agencies on CERCLA compliance issues rather than initiating enforcement actions. The most common tool EPA uses to ensure federal facility compliance with CERCLA is an interagency agreement. Under §120, all federal facilities which are on the NPL must be the subject of an interagency agreement with EPA. These interagency agreements specify milestones and deadlines for the federal facility to complete remedial activities, such as developing the proposed plan, and stipulate penalties for missing those deadlines. Through these agreements, EPA is provided a level of oversight and enforcement to ensure federal facilities comply with the requirements of CERCLA.

If EPA is given no other choice but to issue an administrative order against another federal agency, it must be approved by the Attorney General's Office. Citizens, however, may sue federal facilities under the citizen suit provision in §310 of CERCLA. Under this provision, citizens may sue a federal agency in federal district court to enforce deadlines related to the RI/FS, to satisfy terms and conditions related to the RD/RA, and to enforce any interagency agreement terms. For more information on federal facility response actions see the Federal Facilities Hazardous Waste Compliance Manual and Federal Facilities Compliance Strategy.

2.4 SETTLEMENTS

When negotiations are successful, EPA and the PRPs sign a legal document that sets forth the requirements for cleanup. Settlements are authorized under CERCLA §122. There are two types of settlement agreements, administrative orders on consent and judicial consent decrees. Administrative settlements are authorized by

CERCLA, initiated by EPA, and do not go through the court system. Judicial settlements are filed in court by the Department of Justice (DOJ) on behalf of EPA. The administrative settlement process may move more quickly and thus EPA will try to exhaust all administrative mechanisms before referring a case to DOJ for judicial action.

Settlements can be reached at various stages of the remedial process. Usually some type of agreement is entered into before the Remedial Investigation/Feasibility Study (RI/FS) or Remedial Design/Remedial Action (RD/RA). A settlement agreement to conduct an RI/FS is usually in the form of an administrative order on consent. RD/RA settlements, however, must be in the form of a consent decree and lodged in court by DOJ. If settlement negotiations fail or no good faith offer is received, EPA may issue a unilateral administrative order to force liable parties to conduct the response action, or EPA may use trust fund monies to perform the cleanup and attempt to recover costs from the PRPs at a later date. Under §106, EPA has the authority to issue either administrative orders or refer enforcement cases to DOJ.

The settlement tools available to EPA under CERCLA §122 are used as incentives to encourage PRPs to settle and avoid being sued for cost recovery. These tools are discussed below.

MIXED FUNDING

Mixed funding agreements allow EPA to settle with some PRPs at a site while continuing to pursue non-settling PRPs for cost recovery (§122(b) and 53 FR 8279; March 14, 1988). These settlement tools were not available to EPA until SARA was enacted in 1986. There are three types of mixed funding settlements:

- Preauthorization; PRPs agree to conduct the response action and the Agency agrees to allow a claim against the Fund for a portion of the costs
- Mixed work; PRPs agree to conduct discrete portions of the response activities and EPA agrees to conduct the remainder
- Cashout; PRPs pay for a portion of the response costs up front and EPA performs the response action.

When evaluating the appropriateness of using a mixed funding settlement, EPA will first consider the quality of the overall settlement offer. In 1985, EPA published an Interim CERCLA Settlement Policy (OSWER Directive 9835.0) that outlined ten criteria to help determine the benefits of a PRP settlement offer amounting to less than 100 percent of the cost of a cleanup at a site (50 FR 5034; February 5, 1985). The criteria of particular importance for mixed funding settlements include the strength of the liability case against settlers and any non-settlers, the amount of money potentially withdrawn from the Fund, and other mitigating and equitable factors.

For a complete description of the Interim CERCLA Settlement Policy as it relates to mixed funding settlements, consult the March 14, 1988, Federal Register (53 FR 8279).

DE MINIMIS

A de minimis settlement is a final settlement between parties who meet the requirements of §122(g)(1). These settlements allow parties to pay a discreet or specific amount of response costs and avoid future legal costs. There are two types of de minimis settlements available to qualifying PRPs: de minimis waste contributor settlements and de minimis landowner settlements.

Under §122(g)(1)(A) relating to generators, a PRP who can prove the hazardous substances they contributed to the site are minimal in amount and toxicity in comparison to other hazardous substances at the site may qualify for a de minimis waste contributor settlement. The PRP would only pay for a minor portion of the response costs. As a subset of de minimis waste contributor settlements, CERCLA provides the Agency with the authority to enter into settlements with persons who may have contributed minuscule amounts of hazardous substances at a site. These settlements, known as de micromis settlements, are helpful in reducing transaction costs associated with PRPs seeking contribution from non-paying PRPs under §113(f). A de micromis settlement may be especially appropriate for such entities as small businesses, associations, nonprofit organizations, or other persons that do not manufacture large amounts of hazardous substances. The need for de micromis settlements has arisen largely in municipal/industrial "co-disposal" landfill cases where generators of chemical or industrial wastes have brought contribution actions against large numbers of small parties who contributed only trash or other municipal solid waste. In such cases, the resulting litigation and other transaction costs can overwhelm the truly small volume parties, and are likely to far exceed the allocable share of each such party, even if liability can be established. For additional information on de minimis and de micromis settlements, see OSWER Directives 9834.7-01C and 9834.17.

Along with de minimis and de micromis contributor settlements, under CERCLA §122(g)(1)(B), qualifying landowners of property on which a Superfund site is located who, during the term of ownership, did not conduct or permit generation, transportation, storage, treatment or disposal at the facility may enter into a de minimis landowner settlement limiting their liability at a site. The requirements which must be satisfied in order for the Agency to consider a settlement with a landowner under the de minimis settlement provisions are analogous to the elements which must be proved in order for a landowner to establish a third-party defense under §§107(b)(3) and 101(35). De minimis settlements may be entered either through consent decrees or administrative orders on consent.

As part of the Superfund Reforms, EPA is encouraging the use of de minimis and de micromis settlements to expedite the settlement process and relieve minor

contributors from liability. To foster these settlements, EPA published the revised documents entitled Model CERCLA §122(g)(4) De Minimis Contributor Consent Decree and Model CERCLA §122(g)(4) De Minimis Contributor Administrative Order on Consent (September 19, 1995), which are to be used as guidance by EPA and DOJ staff when negotiating de minimis contributor settlements. Furthermore, EPA announced in October 1995, as part of Superfund Reform, that it will double the cut-off for the de micromis contribution threshold. The goal of EPA's policy is the contribution limitations, will not be pursued. If necessary, EPA will enter into a settlement with these parties for no money in order to provide de micromis party contribution protection from third party suits. For further guidance on de minimis landowner settlements, see the August 18, 1989, Federal Register (54 FR 34235). Also, for more information on de micromis settlements, see Guidance on CERCLA Settlements with De Micromis Waste Contributors (OSWER Directive 9834.17).

COVENANT NOT TO SUE

A covenant not to sue is a release from liability for PRPs who wholly or partially clean up a site or pay for the cost of cleanup. According to §122(f), EPA may issue covenants not to sue for CERCLA liability, including future liability, in the settlement of some CERCLA cases. EPA grants releases from liability based on the Agency's confidence that the remedy will prove to be effective and reliable. The covenant not to sue is given in exchange for a PRP's agreement to perform the response action or to pay for an Agency-lead cleanup, and does not take effect until PRPs have completed all actions required by the CD or the AOC. Covenants not to sue include "reopener" provisions allowing EPA to bring administrative or judicial actions against a PRP where previously unknown conditions or new information indicate that the remedy is no longer protective of human health or the environment (CERCLA §122(f) and 53 FR 28041; July 27, 1987).

PROSPECTIVE PURCHASERS

EPA may choose to enter into a covenant not to sue to encourage purchasers to buy contaminated property for cleanup, redevelopment, or reuse, without fear of future liability. EPA will consider such agreements with prospective purchasers under certain conditions. In May 1995, EPA issues guidance which expanded the circumstances under which the Agency will provide covenants not to sue to prospective purchasers of contaminated property. EPA will consider such agreements if they result in either: 1) a substantial direct benefit to the Agency in terms of cleanup or funds for cleanup or; 2) a lesser direct benefit to the Agency coupled with a substantial indirect benefit to the community in terms of cleanup, job creation, or development of property (60 FR 34792; July 3, 1995).

ALTERNATIVE DISPUTE RESOLUTION

In 1990, Congress passed the Administrative Dispute Resolution Act that encouraged all federal agencies to use alternative dispute resolution (ADR)

techniques to aid in the mitigation of federal agency disputes. Mediation, EPA's most frequently used ADR method, involves the use of a neutral negotiation facilitator who has no decision-making power. The agreements reached in a mediation session are nonbinding. Mediation has been discussed with settling parties in more than 50 enforcement actions and used in 30 (Enforcement Project Management Handbook, OSWER Directive 9837.2B). Although some believe that ADR may require additional work and funds, EPA has established a Headquarters liaison position to coordinate ADR activities agency-wide. EPA has also sponsored pilot projects testing the success of ADR. For more information with respect to ADR, refer to the document entitled Final Guidance on the Use of Alternative Dispute Resolution in Enforcement Actions (OSWER Directive 9834.12) and Use of Alternative Dispute Resolution in Enforcement Actions, May 1995.

2.5 COST RECOVERY

If settlement negotiations are not successful, EPA will finance and conduct the response action and subsequently pursue cost recovery from the liable parties. This section addresses various types of cost recovery actions such as EPA recovering costs from PRPs for Fund money spent to perform a response action; PRPs seeking reimbursement for response costs from other PRPs; and private parties recovering costs for the performance of a response action from the Fund or PRPs.

EPA AND PRP RESPONSES

CERCLA §107(a) authorizes EPA to initiate cost recovery actions for all costs not inconsistent with the National Contingency Plan (NCP) which are incurred during a response to an actual or threatened release of a hazardous substance. Cost recovery can be pursued for the costs of a removal, RI/FS, and RD/RA, including EPA's costs of overseeing PRP responses and interest. The enforcement actions to recover costs may include demand letters, negotiations with PRPs, arbitration, alternative dispute resolution, administrative settlements, judicial settlements, and litigation. In most cases, PRPs will negotiate with EPA over the extent of liability or the costs incurred. If the negotiations are successful, EPA can issue an AOC or the court (if the costs of the response action exceed \$500,000) will approve the terms of the settlement for which the PRP must reimburse EPA for its response costs. If the PRPs refuse to reimburse EPA for those costs, EPA can refer the case to DOJ to recover costs. CERCLA §113(g) established a statute of limitations on cost recovery actions; an action to recover costs must start within three years of completing a removal action or within six years after starting construction of the remedial action.

CERCLA §§107(l) and (m) authorize the federal government to impose a lien against a party who is liable under §107(a). This lien may be imposed on the property or vessel which is subject to a removal or remedial action (further discussion on this subject can be found in supplemental Guidance on Federal Superfund Liens, OSWER Directive 9832.12-1a). The lien arises when the PRP receives written notice

of its potential liability for response costs and continues until the PRP's liability is fully satisfied or becomes unenforceable because of the statute of limitations (CERCLA §113(g)).

In addition to EPA initiating cost recovery actions, PRPs can seek to recover money expended in performing any response action from any other PRPs associated with the site. These costs must be consistent with the NCP. During or following a civil action under §§106 or 107(a), any person may seek contribution for response costs from anyone else who is liable or potentially liable. For example, if EPA has begun an action to recover funds from Responsible Party A, Party A can demand reimbursement from Responsible Parties B, C, and D. Responsible Party A can also sue B, C, and D for cost recovery even if A has not been sued by EPA (see §113(f) and 40 CFR §300.700). A court can allocate the total response cost using appropriate factors, such as the volume of hazardous substances contributed by each party, if the parties are unable to come to a settlement.

OTHER PARTY RESPONSES

Section 300.700 of the NCP states that any party may conduct a response action to reduce a release or a threat of a release. Parties conducting a cleanup may recover the costs of a response action from the Fund or from the responsible parties using one of several statutory mechanisms set out in Subpart H of the NCP. Responsible parties may not recover costs for which they are liable.

Pursuant to CERCLA §107(a), an innocent private party conducting a cleanup may receive a court award of response costs, plus interest, from the responsible party(s). In order for the private party to be eligible for reimbursement, the response action must be considered "consistent with the NCP." This means that the action must be in substantial compliance with the requirements in 40 CFR §§300.700(c)(5) and (6).

Private parties can use the mechanism provided in CERCLA §111(a)(2) to recover costs from the Fund for certain activities (40 CFR §300.700(d)). To qualify for reimbursement, EPA must preauthorize the response activities and the eligible person must demonstrate the capability to respond safely and effectively to the release, and establish that the action will be consistent with the NCP. Preauthorization will only be granted to a PRP subject to a §106 order or, as mentioned in Section 2.4 of this module, preauthorization can be a settlement agreement pursuant to §122. For more information on response claims procedures see the January 21, 1993, Federal Register (58 FR 5460).

A party who has complied with a §106(a) enforcement order may seek reimbursement for response costs incurred when complying under §106(b) (40 CFR §300.700(e)). Section 106(a) of CERCLA allows EPA to unilaterally order PRPs to implement site cleanups when a release or threat of a release poses an imminent and substantial endangerment to human health or the environment. If a PRP complies with a CERCLA §106(a) order, the PRP may petition EPA under §106(b) for

reimbursement of cleanup costs from the Superfund if they believe they are not liable for all or part of the costs or if it is found that EPA's response decision was "arbitrary and capricious." More information on §106(b) reimbursement can be found in Guidance on Procedures for Submitting CERCLA §106(b) Reimbursement Petitions and on EPA Review of Those Petitions, June 9, 1994.

Section 123 of SARA provides for local governments to receive reimbursement for the costs of temporary emergency measures (such as security fencing or response to fires and explosions), that are necessary to mitigate injury to human health and the environment. This reimbursement is limited to \$25,000 per response and requests must be received by EPA within one year of completion of the response. Specific procedural regulations pertaining to local government reimbursement are set out in 40 CFR Part 310 (58 FR 4816; January 15, 1993).

2.6 RELATIONSHIP TO REMEDIAL AND REMOVAL ACTIONS

The enforcement, settlement, and cost recovery activities occur simultaneously with site cleanup activities. For an enforcement-lead remedial action, EPA's general sequence of events is to identify PRPs, issue notice letters, and conduct an RI/FS. The PRPs may conduct the RI/FS under a consent decree or an administrative order on consent (§122(d)(3)).

When a §106 remedial action is initiated, there are three possible outcomes. The Agency may receive a "good faith" offer from a PRP, receive no response from a PRP, or engage in negotiations with a PRP that end unsuccessfully. If EPA receives a good faith offer to conduct or pay for the response action, the Agency will attempt to negotiate a settlement. If the response is unfavorable or negotiations are unsuccessful, a unilateral §106 order may be ordered. If the PRP does not comply with the order, EPA may refer the case to the Department of Justice to file a civil suit.

Removal actions, because of their emergency nature and shorter time frame, have a less complex administrative process than the remedial program, and therefore enforcement procedures for removals are more straightforward. Removal enforcement settlements are usually finalized by administrative orders (AOs) rather than consent decrees which are required for remedial settlements. AOs are less formal since they are written by EPA and do not require judicial approval. The AO may be on consent if the PRP willingly agrees to perform the prescribed activities, or an AO may be a unilateral administrative order (UAO) if the PRP is uncooperative, forcing EPA to order them to conduct a cleanup.

Although the AO enforcement mechanism may be used to conduct an enforcement-lead emergency removal action under §106 of CERCLA, the AO is not often used in these situations. The circumstances are usually better suited to Fund-lead actions since emergency situations do not allow for the administrative time of such

enforcement orders. For removal actions, EPA can conduct a cleanup under §104 response authority and use §107 to seek reimbursement if the PRP does not respond to an order, if the PRP's cleanup efforts are inadequate, or if a PRP cleanup cannot be conducted quickly enough in an emergency.

3. SUMMARY

CERCLA provides EPA a broad set of legal tools to facilitate the process of cleaning up hazardous waste sites. These tools include a variety of enforcement mechanisms, such as administrative order authority and judicial enforcement authority. CERCLA includes strong liability provisions, such as the authority and the funding to take direct action to clean up sites and pursue cost recovery from PRPs. Section 104 provides EPA with the authority to conduct a cleanup, issue information requests to gather evidence of PRP liability, and obtain site access. Section 106 includes provisions for EPA to unilaterally order PRPs to clean up sites and issue fines for not complying with orders. The liability provisions of §107 provide EPA with the authority to recover all response costs, determine the amount of liability, pursue cost recovery, and identify parties associated with a release. Section 122 authorizes EPA to enter into agreements with PRPs that allow the PRPs to conduct all or part of the response activities. Combined, these authorities allow EPA to consistently strive to ensure uncontrolled hazardous waste sites are cleaned up, and that the parties responsible for the contamination bear the burden of paying for the response.