



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
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OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Model Litigation Report for CERCLA Sections 106  
and 107 and RCRA Section 7003

FROM: Edward E. Reich  
Acting Assistant Administrator

TO: Regional Administrators  
Regional Counsel

I have attached the Model Litigation Report for CERCLA Sections 106 and 107 and RCRA Section 7003. This model supplements previous Agency guidance entitled "Model Litigation Report Outline and Guidance" (OECM, August 23, 1984), which addressed the preparation of a litigation package under most statutes, but excluded, among others, packages to be prepared for prosecution of civil judicial actions under CERCLA Sections 106 and 107 and RCRA Section 7003.

The model is intended for use in all civil judicial cases referred to the Department of Justice for prosecution under CERCLA Sections 106 and 107 and RCRA Section 7003. For those actions referred in conjunction with a settlement, a full litigation report is not required. Rather, the Regions should follow soon-to-be-issued guidance on pre-referral negotiations and current policy governing the preparation of settlement analyses accompanying the referral of consent decrees. See, 52 Fed. Reg. 2034 ("Interim CERCLA Settlement Policy"). This document also does not specifically address preparation of litigation reports for prosecution of penalty actions under CERCLA Sections 106(b), 109 or 122(1), although many sections of this document may be applicable to the preparation of such litigation reports.

I would like to express my appreciation to you and to the members of your staffs that have reviewed and commented on the drafts of the document. If you have any questions regarding this guidance, please call Glenn Unterhager or David Van Slyke of my staff at 382-3050.

**Attachment**

cc: Jonathan Z. Cannon, Acting Assistant Administrator, OSWER  
Donald A. Carr, Acting Assistant Attorney General, Land and  
Natural Resources Division, Department of Justice  
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Bruce M. Diamond, Director, OWPE  
Waste Management Division Directors, Regions I-X  
Regional Counsel Waste Branch Chiefs, Regions I-X  
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**MODEL LITIGATION REPORT****CERCLA §§ 106 and 107 and RCRA § 7003 Actions**

This guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. Such guidance and procedures do not constitute rulemaking by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this guidance and its internal implementing procedures.

MODEL LITIGATION REPORT

CERCLA §§ 106 and 107 and RCRA § 7003 Actions

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**MODEL LITIGATION REPORT****CERCLA §§ 106 and 107 and RCRA § 7003 Actions****I. Cover page<sup>1</sup>**

A. Region, statute(s) involved and judicial district.

B. Name of defendant(s) by category (e.g., owners, operators, generators, transporters).

Include names, addresses and telephone numbers of all proposed defendants in an appendix to the litigation report. The list of all other potential defendants, with addresses and telephone numbers (where available) also should be attached as an addendum.

C. Name, address and EPA ID Number of facility or facilities.

Include name, address and telephone number of all facilities/sites subject to the referral.

D. Regional contacts.

Include names, addresses and telephone numbers of regional program (technical) and legal contacts who prepared the report.

E. Stamp date of referral on cover page.

**II. Table of Contents**

Include headings, subheadings and page numbers.

**III. Synopsis of the Case (Executive Summary)**

This should be a concise narrative summary statement briefly describing the site, the environmental problem, cleanup/enforcement to date, projected future removal/

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<sup>1</sup> The cover page should be in addition to the "Data Form" prepared as a one to two page fact sheet on the case.

remedial efforts, past/future response costs, the proposed defendants and the relief sought.

#### IV. Significance of Referral

Indicate if the case is part of a special Agency initiative or may present issues of national significance.

#### V. Statutory Bases of Referral/Legal Theory of Case

##### A. Applicable statutes.

Reference briefly all applicable Federal statutes by United States Code (U.S.C.) citation and by section of the Act.

##### B. Enforcement authority; jurisdiction and venue.

Summarize briefly the enforcement authority and the jurisdiction and venue provisions of applicable statutes. If there is reason to file the action in a district other than where the site is located, note each available district and indicate the reasons for filing there. (Note that CERCLA §§ 106 and 113(b) contain specific statements of available venues for CERCLA actions, but that RCRA § 7003 and other imminent and substantial endangerment causes of action typically do not. Venue for cases involving such counts may need to depend upon the general Federal venue provisions of 28 U.S.C. § 1391.)

##### C. Bankruptcy petitions.

If the referral is for the filing of a bankruptcy claim, describe the status of bankruptcy petition, including (1) whether Chapter 7, 11, or 13, (2) whether reorganization plan filed, and (3) bar date for proof of claim. See, "Guidance Regarding CERCLA Enforcement Against Bankrupt Parties" (OECM, May 24, 1987); "Revised Hazardous Waste Bankruptcy Guidance" (OECM, May 23, 1986). If the case involves a PRP that has filed for bankruptcy, obtain and attach schedule and any other court documents previously filed. Discuss the significance of the bankruptcy to the overall enforcement or cost recovery action and the likelihood of obtaining the relief sought.

NOTE: It is important to inform DOJ of a bankruptcy filing or a pending bankruptcy action as soon as the

Region becomes aware of such action. See, "Coordination of Agency Involvement in Bankruptcy Proceedings Affecting RCRA or CERCLA Enforcement" (OECM, June 10, 1988)

#### D. Cross-media coordination

State whether coordination across media has occurred. Cross-media regional review should ensure that consideration has been given to including all available causes of action pertaining to that particular owner/operator and site.<sup>2</sup> Discuss reasons for including or omitting cross-media claims. Where the secondary cause of action is minor, or where the case development will take an inordinate amount of time, the case should be referred with the excluded secondary cause of action clearly identified. However, if the secondary cause of action is major, and if development will not unreasonably delay the referral, all such causes of action that are appropriate for filing should generally be referred together. This is particularly true for endangerment cases that may be brought under several environmental statutes simultaneously, if considerations such as defenses, scope of liability and record review warrant it. See discussion regarding other imminent and substantial endangerment provisions of Federal statutes in Section XVI, below.

#### VI. Description and History of the Site

- A. Site location (include here, or as attachments to Litigation Report (e.g., in ROD), appropriate maps). See Section IX.A.2. (Page 10, infra).
- B. Facility processes - Describe the manufacturing, recycling or disposal processes that are pertinent. See Section IX.A.2. (Page 10, infra).
- C. Site description (photographs, diagrams, etc., as appropriate). See Section IX.A.2. (Page 10, infra).

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<sup>2</sup> Review of other potential causes of action is particularly important in cases involving RCRA facilities that were in operation after November 19, 1980 and facilities involving PCB contamination that may be regulated under TSCA. In addition, review and coordination is critical under those exceptional circumstances where the Agency might contemplate a release from liability under several statutes/media.

**D. NPL status**

Include status of NPL listing. If not on the NPL, state status of HRS scoring, whether the site has been proposed for the NPL and, if so, the date the site made (or is expected to make) the final NPL. Include appropriate Federal Register cite(s). Also indicate whether State, PRPs or citizens object to the proposed listing.

**E. General description of environmental problem posed by the site.****VII. Status of Cleanup Process****A. Cleanup activities by parties other than EPA prior to or contemporaneous with EPA involvement.**

Describe, chronologically, all response efforts undertaken at the site by PRPs, or state or local governments, that have occurred prior to EPA involvement or outside the scope of EPA oversight.

**B. EPA cleanup actions.**

The referral must clearly identify each of the Agency responses undertaken at the site, including each removal and remedial operable unit, and, if the action seeks to compel PRP response under § 106, the proposed response action. If the site involves multiple operable units (and multiple RI/FSs and RD/RAs), discuss those operable units that are the subject of the referral and generally describe any planned investigations and studies. The action must have been sanctioned (e.g., action memo or record of decision), there must be an adequate administrative record for each response action decision, and the actual action must be documented.

**1. Removals**

- a. Identify and include the authorizing document (Action Memo).
- b. Describe the status of the Administrative Record supporting the removal decision. See Section VII.C., below.
- c. Describe the major community relations activities relating to the removal, including any public comment periods held (how long and what for) and public meetings held. Identify and describe any particular portion of the response action in which



the public (including PRPs) has expressed interest. Include responsiveness summaries published following any public comment period.

- d. Identify and describe each activity completed, when those activities were completed and the status of activities underway or planned. Include a discussion of the entity that performed the activity (e.g., name of contractor and primary contractor contact) or the Agency personnel or office that undertook the activity. Also identify each OSC that worked on the project.

2. Remedial Investigation/Feasibility Study through Record of Decision

- a. Identify and describe each RI/FS completed, when those activities were completed and the status of activities underway or planned. Include a discussion of the entity that performed the RI/FS (e.g., name of contractor (and any major subcontractors) and primary contractor contact) or the Agency personnel or office that undertook the activity. Also identify each RPM that worked on the project.
- b. Describe the major community relations activities relating to the each RI/FS, including public comment periods held (how long and what for) and public meetings held. Identify and describe any particular portion of the RI/FS in which the public (including PRPs) has expressed interest. Include responsiveness summaries published following any public comment period.
- c. Discuss and include the authorizing document (Record of Decision (ROD)). Discuss any significant issues likely to be raised by defendants regarding adequacy of the ROD.
- d. Describe the status of the Administrative Record supporting the remedial decision. See Section VII.C., below.
- e. ATSDR Evaluation - Discuss ATSDR evaluation and any potential litigation problems raised by differences between EPA and ATSDR evaluations. Identify who at ATSDR did the evaluation.
- f. Posture of State regarding ROD and Participation in Settlement - Describe any contacts with the state regarding concurrence in the remedy selected.

Identify any EPA/State enforcement issues, such as whether the State has indicated interest in intervening in any potential Federal action/settlement. Attach pertinent correspondence.

- g. A risk assessment/endorsement assessment, typically part of an RI/FS, is generally performed to support remedial action selection decisions. Such an assessment will be the vehicle normally used to establish the imminent hazard portion of a CERCLA § 106 or RCRA § 7003 claim. Such an assessment should be undertaken pursuant to the Superfund Public Health Evaluation Manual (OSWER, October 1986). See also, "Risk Assessment Guidance for Superfund -- Environmental Evaluation Manual" (Interim Final, OSWER March 1989). Discussion of the risk assessment/endorsement assessment should take place in conjunction with Sections IX and XIII, below.

Appendix Two of the RCRA/CERCLA Case Management Handbook (August 1984) contains a checklist of facts necessary for CERCLA imminent and substantial endangerment cases. Appendix I hereto discusses the RCRA Section 7003 prima facie case.

- h. Discuss and include any CERCLA § 111(k) Inspector General audits of the RI/FS.

### 3. Remedial Action(s)

- a. Identify and describe each operable unit RD/RA,<sup>3</sup> when those activities were started and (if appropriate) completed, and the status of activities underway or planned. Include a discussion of the entity that performed each operable unit RD/RA (e.g., name of contractor (U.S. Army Corps of Engineers, XYZ Environmental Removal, etc.)), important subcontractors and primary contractor contacts) or the Agency personnel or office that undertook the activity. Also identify each RPM that worked on each operable unit.
- b. Describe the major community relations activities during the RD/RA, notices of significant differences

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<sup>3</sup> While remedial design (RD) is technically a "removal" action under the terms of the statute (See CERCLA Sections 101(23) and 101(24)), it is appropriate to discuss RD in conjunction with remedial action, given the nature of the remedial design and remedial action process.

(§ 117(c)), revisions to the ROD including public comment periods held (how long and what for) and public meetings held. Identify and describe any particular portion of the response action in which the public (including PRPs) has expressed interest. Include responsiveness summaries published following any public comment period.

#### C. Administrative Record For Each Removal/Operable Unit

Judicial review of the adequacy of response action selection decisions in the context of CERCLA Section 106 and 107 actions will be based upon the administrative record supporting the decision. Thus, it is essential that the administrative record in support of all pertinent Agency response decisions be completed prior to referral. See, "National Oil and Hazardous Substances Contingency Plan: Proposed Rule." 53 Fed. Reg. 51394 (December 21, 1988); "Interim Guidance on Administrative Records for Selection of CERCLA Response Actions" (Porter, March 1, 1989); "Guidance on CERCLA Section 106 Judicial Actions (Reich/Porter 2/24/89). A list (index) of all documents in the record must be included in the referral package. The record itself must be compiled, collated and stored in a secure location in the Region by the time of the referral.<sup>4</sup> Any outstanding issues regarding compilation of the administrative record should be noted and the plan for resolution of those issues should be identified.

#### VIII. Natural Resource Damage Claims

- A. Identify potentially interested Federal and/or State natural resource trustees. See, Memoranda of Understanding with NOAA and Department of Interior,<sup>5</sup> and 40 C.F.R. 300.72 - 300.74 (Trustees for Natural Resources).

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<sup>4</sup> In those exceptional circumstances where statute of limitations concerns indicate it may be appropriate (consistent with Agency guidance) to file as soon as possible, a case can be referred without an index to or final compilation of the administrative record.

<sup>5</sup> These Memoranda of Understanding have been transmitted to the Regional Counsel Branch Chief's under separate cover.

Summarize contacts, if any, with each trustee, and identify lead trustee representatives and telephone numbers.

- B. Briefly describe natural resources that may have been affected by contamination at or from the site as identified by the trustee agency.

- C. Status of site survey/damage assessment by trustee(s).

Briefly describe status of trustees' efforts to determine whether significant injury to natural resources has occurred at the site and, if applicable, to evaluate measures to restore or replace injured resources and assess damages resulting from the injury.

- D. Participation by trustee(s) in selection of remedy or negotiations.

Briefly describe the role, if any, natural resources trustees have played in the RI/FS process, consideration given to trustee comments in the ROD, and the trustee's participation or expressed level of interest in participating in negotiations with PRPs.

IX. Prima Facie Case, Liability and Description of Proposed Defendant(s), and Miscellaneous Issues Regarding Liability and Cost Recovery

A. Prima Facie Case

There are three core elements<sup>6</sup> to the prima facie case for cost recovery or injunctive relief under CERCLA:

- o There is a release or threat of release of a hazardous substance;
- o the release or threat of release is from a facility;

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<sup>6</sup> To complete a CERCLA prima facie case, additional elements include: an imminent and substantial endangerment (for CERCLA section 106 injunctive relief), or that the government incurred response costs (for CERCLA Section 107 recovery). See, Sections XI and XIII, infra.

- o the Defendant is in one of those categories of liable parties in CERCLA § 107(a).<sup>7</sup>

This section of the litigation report should focus on the first two elements<sup>8</sup> of the core of the CERCLA prima facie case:

1. Release or threat of release of a hazardous substance.

Often, this element will be established by on/off-site sampling showing that there has been an actual release. Such sampling results may need to be supplemented by an evaluation of the physical conditions on or around the site that suggest the threat of release. A summary of each different sampling program undertaken with regard to the site should be included here (along with a discussion of any chain of custody or QA/QC issues/problems) and any witnesses that may be needed to testify about these procedures should be identified.

It is critical that all materials justifying the response activity be identified and that each is shown to be a hazardous substance.<sup>9</sup> Much of this evidence should be gathered as part of the Preliminary Assessment and Site Inspection (See 40

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<sup>7</sup> It should be noted that, under particular circumstances, a CERCLA Section 106 action may lie against parties other than those identified in Section 107. For example, a Section 106 action may be available to compel a state or local entity to remove unwarranted procedural barriers to site cleanup. See, e.g., United States v. Town of Moreau, No. 88-CV-934 (N.D.N.Y. Sept. 6, 1988).

<sup>8</sup> As noted in Section XI, infra (See, footnote 11 and accompanying text), the evidence to establish these first two elements should be based on documents in the administrative record.

<sup>9</sup> A list of substances that are hazardous substances under CERCLA is contained in 40 C.F.R. Part 302. That regulation designates under CERCLA § 102(a) those substances in the statutes referred to in CERCLA Section 101(14). It should also be noted that a RCRA solid waste, as defined in 40 C.F.R. 261.2, which is not excluded from regulation as a hazardous waste under 40 C.F.R. 261.4(b), is a hazardous substance under CERCLA § 101(14) (as well as a hazardous waste under RCRA) if it exhibits any of the characteristics identified in 40 C.F.R. 261.20 through 261.24.

C.F.R. § 300.64, 40 C.F.R. § 300.66 and CERCLA 104(b)) and in the RI/FS (40 C.F.R. § 300.68).

2. From a facility.

CERCLA § 101(9) describes in broad terms what is included in the definition of a "facility." Describe the evidence indicating that a "facility" exists.

When the site is on or proposed for NPL listing, one must be conscious of the manner the facility is defined in the litigation vis-a-vis the parallel discussion of the "facility" in the NPL listing. Any deviation from the NPL listing should be discussed.

If the proposed litigation involves multiple sites or a remote sites theory, discuss each site/facility and the theory of liability with regard to each site. In those discussions, describe, as appropriate, the impact of multiple sites on the allocation of costs and the allocation of harm.

The next section of the litigation report should focus on the third core element of the prima facie case -- liability of the proposed defendants.

B. Liability and Description of Proposed Defendants

Much of the basis for the liability case against all PRPs will be established during the EPA PRP search. Procedures for conducting PRP searches and the type of information that should be obtained are included in "Potentially Responsible Party Search Manual" (OSWER Directive 9834.6, August 1987). Pertinent information also may be contained in responses to CERCLA § 104(e)/RCRA § 3007 letters and CERCLA § 122(e) subpoenas.

As a general matter, the litigation report should describe the basis for asserting liability against each proposed defendant and explain why EPA does not propose to sue certain potentially responsible parties at this time. However, the complete package of information described below in Sections B.1., B.2. and B.3. is not required at this time for those PRPs EPA does not propose to sue as a result of this referral. In addition, some of the information required below may be available in the PRP Search Report for the site, which should be included as an attachment to the litigation report, if available. If the PRP Search Report covers the material needed in particular sections of the litigation report,

attaching the PRP Search Report and citing to the appropriate pages may be appropriate.

The report should include names of all PRPs, the volume and nature of substances contributed by each PRP and a ranking by volume, to the extent available, as done under § 1.2(e)(1) of CERCLA. Especially difficult issues of liability, such as individual corporate officer liability, corporate parent/subsidiary liability and successor corporation liability, should be highlighted in this section of the litigation report.

Information regarding liability of PRPs generally is not included in the administrative record for selection of the response action except to the extent that PRP-specific (typically, substance-specific) information is needed for response selection decisions. However, all PRP liability documents must be collated, separated by PRP to the extent possible, and available in the Regional office at the time of referral. The format for discussing PRP liability and describing the proposed defendants is noted below.

1. Owner or Operator and Former Owner or Operator.  
(CERCLA §§ 107(a)(1) and (2))

a. Description of facility and activities undertaken at facility during period of ownership.

Briefly discuss the business of the defendant, providing details about the facility in question. When the defendant is a manufacturer, describe what is produced. Describe the plant and processes used. Emphasis should be on the source of the release/threatened release that necessitates the response action. Legal description of the property must be in the title search done during the PRP search.

Past owners are responsible if they owned the property when hazardous substances were disposed of. Title search will establish ownership; documents (business records, permits, manifests, etc.) and witnesses (names of employees, neighbors should be included) will establish disposal at time of ownership.

b. State of incorporation/principal place of business.

If there is a question whether the corporation has been dissolved or subsumed into a different entity, discuss the issue, ascertain status of

corporation and attach a Dun and Bradstreet report and corporation papers from the Secretary of State's office (if not too voluminous).

Give a brief synopsis of any name changes and changes in corporate form of the proposed defendant(s). Include dates during which the corporation managed the business responsible for the problem.

c. Agent for service of process.

Include name, address, and telephone number, if known.

d. Legal counsel.

Include name, address and telephone number. Note if there are liaison counsel, separate negotiation and litigation counsel or a steering committee involved and include pertinent names and affiliations.

e. Identity of any parent or successor corporation(s).

Discuss evidence available or needed to show corporate control or assumption of liabilities. Merger, acquisition and divestiture papers should be attached, if available and not too voluminous.

f. Deed/purchase agreement with former owner.

This may be part of the title search completed during the PRP search.

g. Lease Agreements.

If the property is or has been leased, include a copy of the lease agreement(s), if not too voluminous.

h. Financial viability/insurance information.

Where financial viability of a potential defendant is an issue, financial and insurance information will be important. Discuss the issue and attach prior 10K, 10Q or other SEC filings, Dun and Bradstreet or other similar report, and recent bank loan applications, if not too voluminous. See, "PRP Search Manual"



and "Guidance on Use and Enforcement of Information Requests and Administrative Subpoenas" (OECM, 08/25/88).

Where insurance coverage may be available, describe and attach, if available, any current or previous potentially applicable insurance policies. If the case is a multi-generator case, insurance information is not needed in the referral package itself. See, "Guidance on Use and Enforcement of Information Requests and Administrative Subpoenas" and "Procedural Guidance on Treatment of Insurers Under CERCLA" (OECM, 11/21/85).

i. Personal liability issues.

If proposed defendants include corporate officers or managers, discuss facts surrounding corporate officers'/managers' personal involvement in the activities resulting in liability and the degree of their personal direction of corporate affairs.

j. Potential CERCLA § 107(b) defenses.

The only defenses available to liability under CERCLA § 107(a) for owner/operators are set forth in § 107(b). The defendant must demonstrate by a preponderance of the evidence that the release was caused solely by (1) an act of God, (2) an act of war, (3) a third party (under certain conditions), or (4) any combination of the above. Discuss any potential § 107(b) defenses associated with the potential actions and include documents that may tend to support or negate such defenses.

In general, the third-party defense in CERCLA § 107(b)(3) is available if the PRP can establish, by a preponderance of the evidence, that an entity, not related to the PRP by contract, agency or otherwise, was solely responsible for the release, and the PRP exercised due care concerning disposal at the site in light of the circumstances and took precautions against foreseeable acts or omissions of such third parties.

The litigant on report should identify and address any events or circumstances that may show "sole cause," "due care" or

"foreseeability." Discussion of the availability of the third-party defense in light of those facts should also be included in the report.

Discuss fully whether the "innocent landowner" defense may be available based upon the parameters set forth in CERCLA Section 101(35). Review "Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, *De Minimis* Settlements Under Section 122(g)(1)(b) of CERCLA and Settlements with Prospective Purchasers of Contaminated Property" (OECM/OSWER 6/6/89) and SARA Conference Report. Discuss how factors relating to the landowner fit within the guidance. Include all administrative discovery and documents from the landowner which may tend to support or negate this defense. The referral should also assess the nature and weight of available evidence regarding the defense as it may apply to each owner/operator.

2. Generators and Other Persons Who Arranged for Disposal  
(CERCLA § 107(a)(3))

The following information should be provided for those parties that the Region recommends as defendants. A lesser amount of information regarding other potential generator-type PRPs that are not proposed defendants at this time should be provided as well, along with a short explanation of the determination not to include those parties as proposed defendants in this referral package. See Section IX.B., page 10, supra.

- a. As a starting point, the referral must contain a list of amount and types of wastes generated by and contributed to the site by each generator, to the extent known, ranked by volume. The list should include an indication of whether the material is a RCRA hazardous waste or other CERCLA hazardous substance and the source of that determination (e.g., it is a listed waste, it fails the Extraction Procedure (EP) Toxicity Test, etc.). See, Section IX.A.1., below. If ATSDR is or will be writing a report, so note (and attach copy if appropriate and not too voluminous).
- b. Identification of generator's facility and description of and evidence documenting amount and type of hazardous substances sent to the site (e.g., manifests, § 104(e)/§ 3007 letter responses,

subpoenas, interviews, etc.). Such information should be organized, summarized and collated separately for each defendant. If such documentary information is not available or is somewhat equivocal (assuming, of course, a good faith basis to proceed), the litigation report must identify the reasons for including the party as a proposed defendant and the strategy for linking the defendant to the site (e.g., proposed discovery strategy or use of process chemistry).

- c. Indication of the current level(s) at the site of each contaminant sent to the site by the proposed defendant(s), if available. It is important that the hazardous substances at the site be identified, to the extent possible, with each potential defendant.

- d. Description of the transporter of and the method of transporting the material for disposal.

Facts should be included detailing whether the company used an independent contractor, company owned vehicles, etc. for delivering the waste material.

- e. State of incorporation.

See, Section IX.B.1.b. above.

- f. Agent for service of process.

See, Section IX.B.1.c., above.

- g. Legal counsel.

See, Section IX.B.1.b., above.

- h. Identity of any parent or successor corporation(s).

Where financial viability of a subsidiary is questionable or when a PRP has been acquired by another entity subsequent to disposal of the hazardous substances, discuss evidence available or needed to show corporate control or assumptions of liability. Merger, acquisition and divestiture papers should be attached, if available and not too voluminous.

- i. Description and evidence of financial viability.

See, Section IX.B.1.h., above.

j. Potential CERCLA § 107(b) defenses.

See, Section IX.B.1 j., above.

3. Transporters - CERCLA § 107(a)(4)

a. Description of transporter's business.

b. List of generators each transporter worked for.

c. List of amount and types of waste transported and destination.

d. Description of evidence documenting pickup point and destination point, and amount and type of hazardous wastes or hazardous substances transported.

e. Discussion of evidence to be used in showing that the transporter selected the site. See, "Policy for Enforcement Actions against Transporters under CERCLA" (OECM/OWPE, December 23, 1985).

f. Description of any potential trans-shipments beyond disposal facility in question. See also, discussion at Section IX.B.2.j., above.

g. State of incorporation.

See, Section IX.B.1.b., above.

h. Agent for service of process.

See, Section IX.B.1.c., above.

i. Legal counsel.

See, Section IX.B.1.d., above.

j. Identity of any parent or successor corporation.

See, Section IX.B.2.h., above.

k. Description and evidence of financial viability.

See, Section IX.B.1.h., above.

l. Potential CERCLA § 107(b) defenses.

See, Section IX.B.2.j., above. Also note "ICC" defenses in CERCLA § 101(20).

C. Miscellaneous Issues Regarding Liability and Cost Recovery

1. Special Defendants

Identify and discuss any issues regarding special defendants (e.g., municipal or State agency defendants). Include here any discussion of Federal PRPs involved with the site.

2. Divisibility of Harm

Discuss any divisibility issues presented by separate sites or potentially segregable harms presented at a single site. Discuss any proposed allocation of costs that is based upon such potential divisibility.

3. Exemption from Liability Issues - Discuss if applicable:

- a. Federally permitted release (CERCLA § 101(10)).  
See, "Reporting Exemptions for Federally Permitted Releases of Hazardous Substances; Proposed Rule" 53 Fed. Reg. 27268 (July 19, 1988).

- b. Petroleum, natural gas, synthetic gas, and crude oil exclusions (CERCLA §§ 101(10), 101(14), 101(33)).

For cases involving waste oil, used oil or other petroleum based materials, set forth a preliminary determination of why the parties dealing with such materials should be sued and the bases for this determination.

Review "Scope of the CERCLA Petroleum Exclusion" (OGC, July 31, 1987) and state how analysis in this case complies with that guidance. Once promulgated, RCRA § 3014 regulations should be discussed, if relevant.

- c. Nuclear materials (CERCLA § 101(22)).

- d. Fertilizers - Normal application is not a "release" (CERCLA § 101(22)).

- e. Pesticides - Cost recovery may not be available for response to releases of pesticides registered under FIFRA. See CERCLA Section 107(i). Discuss any "pesticide reformulation facility" issues that may be relevant.

- f. Consumer products - Products for consumer use not included in definition of "facility" in CERCLA § 101(9).

4. Equitable Considerations<sup>10</sup>

In certain circumstances, the Region may be able to anticipate additional arguments that will be asserted by certain PRPs. Such arguments may include equitable defenses, negligent permitting of a site by a State or Federal agency, etc. Any such potential issues known to the Region should be identified and addressed in the litigation report.

5. Ability to Recover Costs/NCP Issues

Discuss any potential arguments that may be asserted by defendants regarding costs, including such things as gross errors in implementing the remedy and inconsistency of the response with statutory or NCP provisions. This discussion may be deferred to Section XI.D., below, if appropriate.

6. Potential Criminal Liability

The referral memo should briefly describe if there is a State or Federal criminal investigation ongoing, contemplated or completed and relationship to current Agency guidance on parallel proceedings.

X. Enforcement History: Contacts with the Potential Defendants

To ensure that the Department of Justice has a complete history of EPA's course of dealings with the site and the potential defendants, the following information should be discussed if applicable.

- A. Pertinent contacts with potential defendants. Indicate dates, duration, nature of contact and any conclusions drawn, including evidence of recalcitrance or cooperation. Initial contact may be made during the PRP search. The following is a partial list of the types of

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<sup>10</sup> The government has consistently taken the position that, aside from proving that they are not one of the parties that may be held liable under CERCLA Section 107(a), a PRP's only possible defenses in a CERCLA action are those delineated in CERCLA Section 107(b). It should be noted, however, that certain courts have held that equitable defenses are available under CERCLA.

contacts that should be discussed in the litigation report.

1. Information requests, subpoenaed documents/ testimony.

See, "Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas" (OECM 08/25/88).

2. Interviews with site or generator employees, truck drivers, etc.
3. FOIA requests.
4. Demand letters (CERCLA § 107 actions only).
5. Warrants, access orders or agreements.
6. Administrative order(s)

Describe any State or Federal AOs that have been issued to anyone involved at the site and the current status of the order(s). If the case involves enforcement of a Federal AO under RCRA or CERCLA, the AO should be attached to the report and the basis for and the facts surrounding any claim for penalties or treble damages (CERCLA only) need to be discussed.

7. Permit(s) (State or Federal) and permit applications relevant to the referral.

List all permits issued to the facility or site and discuss those that are relevant to this referral and any actions required to enforce the conditions of the permit.

8. Federal lien - See, "Guidance on Federal Superfund Liens" (OECM 9/22/87).

**B. Involvement of State, local agencies and citizens.**

Identify pertinent contacts or actions taken or anticipated by State or local agencies and citizens. In particular, discuss local or State civil or criminal enforcement actions taken or pending and describe any role the State anticipates playing in an ongoing action. Any notable positions that the State has taken regarding this site or other CERCLA sites in the area of State involvement in remedy selection or implementation decisions, or ARAR selection should specifically be

noted. Media coverage regarding the site should also be noted and print media articles should be attached, if available.

C. Citizen suits filed.

Identify any relevant citizen suits. Identify plaintiff and defendants. Summarize claims asserted. Indicate date case was filed and in what court. Describe case status.

D. Administrative or judicial actions (regarding the site only) filed by State or filed or referred by Federal government under environmental statutes other than RCRA, CERCLA or State counterparts thereof should be discussed.

Include recent actions in all media and under all statutes. Include any related or pending administrative enforcement proceedings (e.g., CAA § 113/120, TSCA § 16(a), RCRA § 3008, FIFRA §§ 13 or 14(a), CWA § 309, and MPRSA § 105(a) proceedings). Generally discuss defendant's responses. Also indicate recent contacts by/with program office permits staff.

E. RCRA facilities.

Where the site/facility is a RCRA facility or former RCRA facility (e.g., LOIS, WOIS, or protective filers of a RCRA Part A permit), the rationale must be given for the decision to pursue § 7003 or § 106 injunctive relief for site remediation, instead of corrective action or closure pursuant to RCRA § 3008(h) or, if appropriate, §§ 3004(u) or (v), where permitted. IMPORTANT: See, NPL deferred listing policy for RCRA sites, as described at 51 Fed. Reg. 21057 (June 10, 1986) and 53 Fed. Reg. 30002 (August 9, 1988). See also, "National Oil and Hazardous Substances Contingency Plan: Proposed Rule." 53 Fed. Reg. 51394, 51415 (December 21, 1988).

F. Prior Orders or Consent Decree(s)

Certain facilities or sites may have been subject to prior administrative orders or consent decrees addressing other cleanup actions or access. The litigation report should include a general description of the terms of the decree, whether the facility or site owner complied with the terms of the decree and what statute and claims were involved.



## XI. Cost Recovery

There are four elements to the prima facie case for cost recovery relief under CERCLA:

- o There is a release or threat of release of a hazardous substance.
- o The release or threat of release is from a facility;
- o The release or threat of release caused the United States to incur response costs,
- o The Defendant is in one of those categories of liable parties in CERCLA § 107(a).

Elements 1, 2, and 4 have been discussed in Section IX, above.<sup>11</sup> The third element (expenditure of response costs), as described below, has several facets to it.<sup>12</sup>

There are two general types of evidence that must be available to prove costs: "work" evidence and "cost" evidence. The "work" evidence typically will be in the form of documents and testimony detailing the activities undertaken. The "cost" evidence will primarily involve documents detailing the cost of those activities. The major guidance documents discussing CERCLA costs and cost documentation requirements are:

- o "Procedures for Documenting Costs for CERCLA § 107 Actions" (OWPE January 1985)

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<sup>11</sup> These three elements are typically part of the government's "liability" case and should be established, in most cases, through summary judgment. The evidence to establish the "release/threat" and "facility" elements should be based on documents in the administrative record for the selection of the response action.

<sup>12</sup> To the extent that this element of the Section 107 prima facie case involves review of remedy selection decisions, Section 113(j) requires that review be on the administrative record. It is EPA's view that under Section 107 of CERCLA, judicial review of costs incurred by EPA is confined to proof that the implemented cleanup was consistent with the response action selected by EPA, that the response action was performed and that the claimed costs were actually incurred.

- o "Financial Management Procedures for Documenting Superfund Costs" (FMD September 1986)
- o "Cost Documentation Requirements for Superfund Cooperative Agreements, Appendix U" (OSWER Directive 9375.14u)
- o "Resource Management Directive 2550D - Financial Management of the Superfund Program" (Comptroller July 25, 1988)
- o "Superfund Cost Recovery Strategy" (OSWER Directive No. 9832.13, July 25, 1988)

Work and cost documents must be available for each of the cost areas in a cost recovery case. In addition, official determinations regarding expenditures of money should be discussed in the litigation report and the corresponding documents included in the appendices (e.g., approval memo for removals exceeding \$2.0M). The referral should also indicate whether the Region has redacted the cost documents for confidential business information (CBI) and, if not, a date by which it will do so.

**A. Past cost summary (by category of costs).**

As noted in prior guidance, the cost summary (but not the entire cost documentation package) must be included in the litigation report. Nonetheless, the complete cost documentation package must be compiled in the Region at the time of the referral and supplemented thereafter on a timely basis.

**B. Response action cost elements and documentation.**

The referral must clearly identify each of the Agency responses undertaken at the site (i.e., Removal(s), RI/FS, RD, and RA) and each operable unit of each response.

Each phase of a response action will have certain types of documentation required for proof of the costs for that phase of response. Some of the documentation may be similar to that used in proof of other phases of an overall response to a site. For each of the response actions at a site, the following information and documents must be gathered, organized and available in the Region at the time of referral. Definitive guidance on the documents necessary for cost recovery is contained in the manuals noted above.

1. Each Federal contractor used and tasks performed.
  - a. Work done (e.g., contracts, subcontracts, letter reports, Technical Directive Documents (TDDs), work assignments, scopes of work, work progress reports, TDD Acknowledgement of Completion);
  - b. cost of that work (e.g., invoices, vouchers); and
  - c. that payment was made (e.g., paid/processed invoices, contract status notifications, and Treasury Schedules).
2. Each Interagency Agreement (IAG) employed and tasks performed.
  - a. Work done (e.g., each IAG, contracts entered into by the other Agency, work assignments, scope of work, work progress reports, and acknowledgements of completion);
  - b. cost of that work (e.g., invoices, vouchers, drawdown vouchers and the pertinent reports to the agency);
  - c. that payment was made (e.g., paid/processed invoices).
3. Each cooperative agreement signed, tasks performed and contractors hired by the State.<sup>13</sup>
  - a. Work done (e.g., each cooperative agreement and all amendments thereto, contracts entered into by the State, work assignments, scope of work, work progress reports, and acknowledgements of completion);

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<sup>13</sup> CERCLA Section 111(k) requires an Inspector General audit of the Hazardous Substances Superfund and random audits of cooperative agreements and State Superfund contracts. EPA's Inspector General also does periodic site-specific general audits. The results of any site-specific audits pertinent to the referral should be described and, if not too voluminous, attached. Copies of audit reports may be obtained from the Inspector General Division of the Office of General Counsel.

- b. cost of that work (e.g., invoices, vouchers, drawdown vouchers and the pertinent reports to the Agency);
  - c. that payment was made (e.g., paid/processed invoices).
4. Agency personnel activities performed at the site.
- a. Work done (e.g., timesheets, travel authorizations);
  - b. cost of that work (e.g., Agency financial management (SPUR) report, Travel Vouchers, etc.);
  - c. that payment was made (Treasury Schedules).
5. EPA indirect costs - Indirect cost calculation worksheets and summary sheet should be included in the litigation report. See, "Superfund Indirect Cost Manual for Cost Recovery Purposes: FY 1983 through FY 1986" (OARM March 1986); "Superfund Indirect Cost Rates for Fiscal Years 1985 and 1986" (OARM 12/17/87).
6. Interest
- a. Identify date of demand and include copy of demand letter or other document indicating initiation date used for calculation of prejudgment interest.
  - b. Include spreadsheet or other documents showing prejudgment interest calculations.
- See, CERCLA Section 107(a); Comptroller Policy Announcement 87-17: "Interest Rates for Debts Recoverable Under the Superfund Amendments and Reauthorization Act of 1986" (09/30/87); "Interest Rates for Superfund Related Debts" (Comptroller 6/15/88)

C. Projected future costs.

- 1. An estimate of the types, amounts and basis of future expenditures, if they are planned or can reasonably be projected, should be included.

2. Future costs (or even a declaratory judgment concerning liability for future costs<sup>14</sup>) are, for tactical reasons, not always sought in each case. If they are not sought (i.e., no potential statute of limitations problem, an explanation why not should be included.

D. Potential problems with costs. (See also, IX.C.5., above)

1. The referral should describe and include any documents discussing or criticizing any cost figures or activities undertaken, including the On-Scene Coordinator's Report (40 C.F.R. 300.40) or any Congressional investigations or Inspector General audits not described previously that refer to or directly discuss the site cleanup activities or costs.
2. Any potential problems regarding consistency with the National Contingency Plan should also be discussed.

E. Statute of Limitations (CERCLA Section 113(g)(2))

Discuss any potential statute of limitations issues. See, "Timing of Cost Recovery Actions" (OWPE, October 7, 1985). See also, "Cost Recovery Actions/ Statute of Limitations" (OWPE, June 12, 1987). Indicate relevant dates.

F. Identify any prior proceeds received.

1. Ten percent state share
2. Prior settlement proceeds (received and expected)
3. Bankruptcy proceeds

XII. Penalties and Punitive Damages

- A. Section 106(b) - State whether defendant has violated an order issued under Section 106. The referral must describe all evidence showing that defendant willfully violated or failed or refused to comply with the order, without sufficient cause. Discuss all arguments that defendant may raise justifying failure to comply with the order (e.g., not a responsible party, terms of order were arbitrary).

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<sup>14</sup> See, CERCLA Section 113(g)(2).

Set forth calculation of penalties. Discuss all opportunities defendant had to meet with Agency prior to issuance of the order. Note the possibility that, under Tull v. United States, 481 U.S. \_\_\_, 107 S.Ct. \_\_\_, 95 L.Ed. 2d 365 (1987), the case may involve a jury trial.<sup>15</sup> Any referral that proposes civil penalties must contain some analysis of the penalty aspects of the case in light of Tull.

- B. Section 107 - Defendant may be liable for punitive damages in an amount equal to and not more than three times the amount of costs incurred by the Hazardous Substances Superfund if defendant failed without sufficient cause to properly carry out removal or remedial action under a CERCLA §§ 104 or 106 order. Discuss the nature of and evidence supporting proof of defendants' violations, the amount and basis for damages sought under this authority, and any justifications defendant may have for failing to perform the action.

### XIII. Injunctive Relief

Under this section of the litigation report, the substantive requirements of the relevant portions of the applicable statute should be presented. Applicable case law should be cited and analyzed. If a novel theory is proposed, support for that theory should be included. In addition, any determinations that are required by statute or regulation (e.g., that an imminent and substantial endangerment exists at the site) should be described and documented in the administrative record.

#### A. CERCLA Section 106<sup>16</sup>

CERCLA Section 113(j) clearly provides that CERCLA remedy selection decisions are entitled to review based upon the

<sup>15</sup> Under Tull, the Supreme Court held that the Seventh Amendment to the Constitution may guarantee a jury trial to determine liability in Clean Water Act civil enforcement cases seeking civil penalties. Under that ruling, however, a jury does not assess the amount of penalties, nor is a jury required in an action brought solely for injunctive relief. The government's position is that a jury trial is not available to decide liability issues where a court can decide the case through summary judgment (e.g., where no issues of material fact are present).

<sup>16</sup> See, "Guidance on CERCLA Section 106 Judicial Actions" (Reich/Porter, 7/29/80) for factors considered in selecting and initiating Section 106 actions.

administrative record.<sup>17</sup> That decision will be based on, among other things, evidence of two of the three core elements of the CERCLA prima facie case (noted in detail in Section IX.A., above): (1) the release or threat of release of hazardous substances, (2) from a facility.

The key additional element for a Section 106 action, aside from liability, is that there be a condition which presents or may present an imminent and substantial endangerment to public health or welfare or the environment. Evidence on this subject generally will be available through the results of activities undertaken pursuant to Subpart F - Hazardous Substance Response of the NCP (40 C.F.R. Part 300 et seq.). The endangerment assessment/risk assessment typically contained in the RI, or as a separate document, is the critical piece of information.

The evidence to support these three elements of the Section 106 prima facie case should be addressed in and be part of the RI and FS and will be documented in the ROD as part of the Agency's remedy selection decision. The remedy selection decision in the ROD itself should define the injunctive relief EPA will seek and should be upheld if it is supported by the administrative record and is not arbitrary and capricious.<sup>18</sup>

Of course, to complete the CERCLA Section 106 prima facie case, the United States will still have to present evidence on liability (i.e., that the party is a responsible party (including but not limited to these classes of persons liable under CERCLA Section 107(a))) and may have to present evidence showing that any alleged affirmative defenses under Section 107(b) are inapplicable,<sup>19</sup> both of which might be reviewed by the court de novo. See, Section IX., above.

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<sup>17</sup> To assist in ensuring record review of the remedy selection decision, the Region also should typically issue a unilateral administrative order under CERCLA § 106 after the ROD is signed.

<sup>18</sup> The case law on the standard of review for remedy selection decisions in the context of CERCLA Section 106 actions that were filed pre-SARA has been split. However, it is the Agency's position that record review with an arbitrary and capricious standard is applicable.

<sup>19</sup> The Section 107(b) defenses to liability typically are available in Section 106(a) actions for injunctive relief.

B. RCRA Section 7003 (See Appendix I)

The prima facie case for RCRA Section 7003 is slightly different than that for CERCLA Section 106. Success on the merits under RCRA Section 7003 requires proof of the following elements:

- o Past or present handling, storage, treatment, transportation<sup>20</sup> or disposal,
- o of a hazardous or solid waste,
- o may present an imminent and substantial endangerment to health or the environment, and
- o the party has contributed or is contributing to such handling, storage, treatment, transportation or disposal.

If a RCRA § 7003 count (or other non-CERCLA statutory "endangerment" claim) is proposed, causation and record review of remedy selection will probably be raised by defendants. Since RCRA does not on its face provide for record review, and the reach of CERCLA Section 106 and RCRA Section 7003 is generally coextensive,<sup>21</sup> the referral should identify the specific reason for inclusion of the RCRA § 7003 (or other "endangerment") claims.

These RCRA § 7003 prima facie case elements are discussed briefly below and more extensively in Appendix I:

1. Past or present handling, storage, treatment, transportation or disposal.

Describe the facility or PRP activities that come within the meanings of these terms. ("Treatment", "storage" and "disposal" are all defined in RCRA § 1004.)

2. Hazardous or solid waste.

Each material that is the subject of the referral for which liability is sought to be imposed must be

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<sup>20</sup> Note that RCRA § 7003 contains an exemption from liability for certain transporters, similar to the exemption in CERCLA § 101(20).

<sup>21</sup> RCRA Section 7003 applies to "solid or hazardous wastes," which is a broader universe of materials than "hazardous substances."



identified as a hazardous waste or a solid waste. See, RCRA §§ 1004(5) and 1004(27), respectively. See also, 40 C.F.R. 261.3 and 40 C.F.R. 261.2, which, while not directly governing Section 7003 actions, also delineate materials as hazardous wastes due to their characteristics or because they are specifically listed as such in the regulations.

3. May present an imminent and substantial endangerment to health or the environment.

Although we will argue for record review in these cases, additional evidence may need to be adduced. A discussion of the types of evidence that may be needed to support this element of the RCRA § 7003 case is included in Appendix I.

4. The party has contributed or is contributing to such handling, storage, treatment, transportation or disposal.

This aspect of the RCRA §7003 prima facie case may be an additional, different burden than faced under CERCLA. The referral must discuss the available documentary and testimonial evidence that will be used to show that a particular generator's waste (or at least the same type of waste when the wastes have commingled), or an owner/operator's actions "has contributed or is contributing to" a situation that may present an imminent and substantial endangerment.

#### XIV. Other Legal Issues

- A. Potential defenses/exclusions (other than those noted in Sections IX.B.1.j., IX.B.2.j. and IX.C., above).
- B. Statute of limitations

See, Section XI.E., above, regarding the CERCLA statute of limitations. Since RCRA contains no specific statute of limitations, underlying facts relating to the timing of any action under RCRA, including any potential limitations, should be included.

- C. Applicability of prior consent decree or A.O. entered for this site. See, Section X.F., above.
- D. Res judicata/collateral estoppel/equitable estoppel.

**XV. Litigation/Settlement Strategy****A. Case Management Planning**

1. A preliminary draft case management plan should be prepared. See "Case Management Plans" (Adams/Marzulla 3/11/88). Availability of and proposed assignments for Regional legal and technical personnel should be noted in the draft plan.

**B. Settlement Negotiations**

1. Prior efforts to settle.

Describe history or attempts to settle by way of notice/demand/special notice letters, PRP meeting, etc.

2. Special notice

Discuss whether special notice was sent and the results. See, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (OWPE, 10/19/87)

3. History of negotiations.

Describe nature, extent and duration of prior or ongoing settlement discussions regarding subject of this referral, or negotiations concerning other pending environmental civil or administrative actions. (When available, include discussions and attempts to settle by State.) Describe attempts at compromise and why process failed. Attach a copy of latest version of AO or CD discussed with PRPs before negotiations were terminated.

4. Planned Future Negotiations

If additional negotiations are to be pursued immediately after filing, include a brief settlement evaluation (See, Interim CERCLA Settlement Policy, 50 Fed. Reg. 5034), recommending a bottom line and a suggested negotiation strategy. See also, "DRAFT CERCLA RD/RA Settlement Negotiations Checklist" (OECM, 01/26/88).

- a. State whether this case may be appropriate for mixed funding. See, "Evaluating Mixed Funding Settlements under CERCLA" (OECM/OSWER, 10/20/87).

- b. State whether this case has the potential for de minimis settlements. See, "Interim Guidance On Settlements with De Minimis Waste Contributors under SARA Section 122(g)" (OECM/OSWER 06/17/87) (52 Fed. Reg. 24333, 06/30/87).

5. Include discussion of and a copy of any Non-Binding Preliminary Allocation of Responsibility (NBAR) and responses by PRPs.

See, "Interim Guidelines for Preparing Preliminary Non-Binding Allocations of Responsibility" (OSWER, 5/16/87) (52 Fed. Reg. 19919, 5/28/87).

C. Litigation Strategy

1. Discovery<sup>22</sup>

Indicate general need for obtaining evidence (especially for critical facts) by discovery (interrogatories, depositions and requests for admissions) on issues of liability and, in certain instances, response costs. (Include names and addresses, if available, of potential witnesses and the evidence to be sought from such persons.)

Discuss the approach to be taken in managing discovery and document production if the action involves multiple parties or massive numbers of documents.

2. Summary Judgment

Indicate if case has potential for summary judgment or partial summary judgment and on what issues. Explain briefly.

XVI. Other Imminent Hazard Provisions

The referral should carefully consider whether claims exist under the imminent hazard provisions of the other Federal statutes listed below. The Appendices to the RCRA/CERCLA Case Management Handbook describe and discuss each element of

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<sup>22</sup> Despite the availability of record review for issues regarding the adequacy of remedy selection, discovery will be available for certain other aspects of CERCLA cases, such as for issues regarding liability.

proof, listed below, for these other statutes and should be consulted.

A. Clean Air Act § 303, 42 U.S.C. § 7603

1. A pollution source or combination of sources (including moving sources) [See, 42 U.S.C. §§ 7521-7574; 42 U.S.C. § 7602(j)],
2. is presenting an imminent and substantial endangerment to the health of persons.
3. State and local authorities have not acted to abate such sources.
4. Defendant is a person causing or contributing to the alleged pollution.
5. EPA has confirmed the correctness of its information.

B. Clean Water Act § 504, 33 U.S.C. § 1364

The Administrator may seek injunctive action to stop the discharge of pollutants or take such other action as may be necessary (See, CWA §§ 504(a), 502(12), (6), (7), (9), (10), (14)) where the Administrator receives evidence that:

1. A pollution source or combination of sources [See, CWA § 504(a), 502(19), (12), (6), (7), (14), (9), (10), 306(a)(3)],
2. is presenting an imminent and substantial endangerment to (1) the health of persons or (2) to the welfare of persons where such endangerment is to the livelihood of such persons, such as inability to market shellfish [504(a)].
3. Defendant is a person causing or contributing to the alleged pollution [504(a), 502(19)]. See also, discussion on RCRA § 7003, Section XIII.B., above.

C. Safe Drinking Water Act § 1431, 42 U.S.C. § 300i

The Administrator may seek appropriate relief to protect health of affected persons, including injunctive relief, when the Administrator is in receipt of evidence that:

1. A contaminant or contaminants [§ 300i(a), § 300f(6)],

2. present in or likely to enter [§ 300i(a)],
3. a Public Water System [§ 300i(a), §300f (4)] or an underground source of drinking water,
4. may present an imminent and substantial endangerment to the health of persons, and
5. appropriate State and local authorities have not acted to protect the health of such persons.
6. Where practicable, EPA consulted with State and local authorities.
7. Information on State or local action taken, if any. (Note: This provision is silent as to definition of responsible parties.)

## **XVII. Witnesses/Litigation Support**

### **A. Witnesses**

1. For fact witnesses identified in the litigation report that have potentially relevant information, the following should be referenced in the referral package:
  - o Present place of employment
  - o Home and business phone
  - o Substance of testimony
  - o Whether statement is on file.
2. For potential expert witnesses, the following are required in addition:
  - o Field of expertise (include resume and any reports generated by expert regarding this site or facility)
  - o Whether individual is under EPA contract, and if so through what contracting mechanism.
  - o Other cases where the expert has testified, been deposed or otherwise been retained in the past.

3. Potential adverse witnesses (fact or expert) should also be identified, to the extent known, and the substance of their potentially adverse testimony should be indicated.

B. Litigation Support

1. Identify any contractor resources necessary and present plans for procuring such resources.
2. Provide an estimate of the relative resource demands that the Region anticipates will be required for the proposed litigation and indicate any specific workload model projections attributed to this case.

This document was prepared  
as suggestion and guidance  
only.

PRIMA FACIE CASE  
RCRA § 7003;  
(42 U.S.C. § 6973)

FACT TO BE PROVEN	STATUTORY BASIS	COMMENTS
I. Administrator must present evidence of:		
A.		
1. Handling,		Disposal includes when waste is first deposited, dumped, spilled, or placed onto the ground <u>and</u> also when wastes later migrate. It includes leaking (i.e., discharging and "repositioning") as well as "reposing" wastes. <u>See, U.S. v. CCC</u> , 619 F. Supp. 162, 199-200.
2. Storage,	1004(33)1/	
3. Treatment,	1004(34)	
4. Transportation,	1004(3)2/	
or		
5. Disposal		
B. Of either:		
1. Solid Waste, or	1004(27) 40 C.F.R. 261.2	Very broad definition of solid waste, but note specific exceptions. <u>See also, American Mining Congress v. EPA</u> , 824 F.2d 1177 (D.C. Cir. 1987) holding that EPA exceeded its authority under RCRA in seeking to regulate as "solid wastes" secondary materials reused in an ongoing manufacturing process. <u>See also</u> , 53 Fed. Reg. 519 (January 8, 1988), for EPA's interpretation of that decision.
2. Hazardous Waste	1004(5) 40 C.F.R. 261.3	
		The definition states that a waste is hazardous if it " <u>may...cause, or significantly contribute</u> to an increase in illness or mortality, or if it " <u>may...pose a substantial present or potential hazard</u> to human health or environment" when managed. These terms indicate a scope broader than the strict, conventional "causation." Listing in RCRA regulations (40

1/ 42 U.S.C. § 6903 is the definitions section of RCRA.  
2/ See also Hazardous Materials Transportation Act,  
49 U.S.C. §§ 1801, 1802(6), 1809, 1810.

FACTS TO BE PROVEN	STATUTORY BASIS	COMMENTS
C. May present		C.F.R. Part 261) or evidence that it is a "characteristic" waste under Part 261 is sufficient to establish that a material "hazardous waste."
D. An imminent and		Imminence applies to nature of threat rather than the identification of the time when the endangerment actually materialized. <sup>3/</sup> An endangerment is imminent if factors giving rise to it are present, even though the harm may not be realized for years. <u>U.S. v. CCC</u> , 619 F. Supp. 162, 193 (W.D. Mo. 1985)..
substantial endangerment		An endangerment is not necessarily an actual harm but may also arise from threatened or potential harm; no actual injury need even occur. Evidence must show only risk of harm. See, <u>CCC</u> at 192; <u>Ethyl Corp. v. EPA</u> , 541, F.2d 1 (D.C. Cir. 1976), cert. den. 426 U.S. 941 (1976); <u>United States v. Reserve Mining</u> , 514 F.2d 492 (8th Cir., 1975); <u>United States v. Vertac</u> , 489 F. Supp. 870, 885 (E.D. Ark. 1980). Similarly, the U.S. need not quantify the harm to establish endangerment. An endangerment is substantial if there is reasonable cause for

<sup>3/</sup> H.R. Committee Print (96-IFC 31, 96th Cong. 1st Sess. 32 (1979)).



FACTS TO BE PROVEN	STATUTORY BASIS	COMMENTS
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concern that someone or something may be exposed to risk of harm by a release or threat of release if response action is not taken. CCC at 191-197.

See also legislative history and case law interpreting other "endangerment" provisions of Federal law, including §§ 504(a) and 311(e) of the Clean Water Act, § 1431 of the Safe Drinking Water Act, § 303(a) of the Clean Air Act, § 7 of the Toxic Substances Control Act; § 6(c) of the Federal Insecticide, Fungicide and Rodenticide Act; § 2601 of the Consumer Product Safety Act; § 662 of the Occupational Safety and Health Act; § 1810(b) of Hazardous Materials Transportation Act; § 1511(b) of the Deep Water Ports Act; § 1415 of the Marine Protection, Research and Sanctuaries Act, and § 355(e) of Federal Food, Drug and Cosmetic Act.

E. To

1. Health, or
2. The environment

The term incorporates surface water, groundwater, soil, and air, and probably includes fish, mammals, biota, and plant life.

FACTS TO BE PROVEN	STATUTORY BASIS	COMMENTS
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Liabe Persons

Any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage or disposal facility) who has contributed or who is contributing to the alleged handling, storage, treatment, transportation or disposal of a solid or hazardous waste that may present an imminent and substantial endangerment to health and environment. Such liable persons may include owners or operators of the site, former owners or operators, (both of which may include landowners or lessors), corporate officers and directors (in their official and, in appropriate circumstances, individual capacities) waste generators, and (unless exempted by § 7003) waste transporters. See, e.g., U.S. v. Aceto Agricultural Chemicals Corp., No. 88-1580 (8th Cir. April 25, 1989), U.S. v. NEPACCO, 810 F.2d at 740, 745 (8th Cir. 1986), cert. denied 108 S.Ct. 146 (1987) ; U.S. v. CCC, 619 F. Supp. at 198.

III. Relief:

A. To restrain liable persons from:

1. Handling
2. Storage 1004(33)
3. Treatment 1004(34)
4. Transportation
5. Disposal 1004(3)

Included in relief granted by courts in § 7003 actions are: restraint of continued leaking, requirement to undertake investigative activities (Price, 688 F.2d 204 (3rd Cir. 1982)); preparation and implementation of plans for removal of wastes (Midwest Solvents Recovery, 484 F. Supp. 138 (N.D. Ind. 1980)); injunction against further activities on site, formulation of plans for security and removal of

FACTS TO BE PROVEN	STATUTORY BASIS	COMMENTS
B. To order such other action as may be necessary		wastes (Ottati and Goss, Civil No. C80-225-L (D. N.H.) (Memorandum opinion December 2, 1980)). See also, U.S. v. Diamond Shamrock, Civil No. C80-1857 (N.D. Ohio) (Memorandum Opinion, May 29, 1981).  Authorizes affirmative equitable relief to extent necessary to clean up site. See, Price, 688 F.2d at 213-14; CCC, 619 F. Supp. 162, 201.
C. To recover U.S. expenditures		A right to recovery Federal funds has been implied since Section 7003 does not contain any express authority to seek cost recovery. See, U.S. v. NEPACCO, 810 F.2d at 747; U.S. v. Price, 688 F.2d 214; U.S. v. CCC, 619 F. Supp. at 201. See also, Wyandotte Trans. Co. v. U.S., 389 U.S. 191 (1967) (Clean Water Act); U.S. v. Moran Towing and Transportation Co., 409 F.2d 961 (4th Cir. 1969) (Clean Water Act); Restatement, Torts § 919(1).