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4.0 Follow-up PRP Search



The potentially responsible party (PRP) search team should analyze the information collected during the initial phase of the PRP search to determine whether:

- all reasonable leads on PRPs were pursued;
- PRP contributions to the site have been determined; and
- each PRP's liability has been established.

A review of the information also should consider the reasons for pursuing or not pursuing leads. Once the review is complete, the PRP search team should decide whether additional follow-up activities are necessary.

Follow-up tasks are often needed to complete the PRP search, although all follow-up tasks may not be necessary for each search. For instance, follow-up activities may be conducted for sites where the PRP search was considered complete but new information requires performance of additional search tasks. The PRP search team must exercise professional judgment to determine which, if any, follow-up tasks are appropriate, beneficial, and necessary for a particular site.

Follow-up tasks can help ensure a thorough, high-quality PRP search. These tasks vary from site to site, but generally fall into the following categories:

- information sources, including information request letters, administrative subpoenas, and FRCP Rule 27 testimony. (See the discussion of FRCP Rule 27 in Section 4.4.);
- waste stream analysis, including industrial surveys, process chemistry analysis, and waste stream inventory (See the discussion of waste stream analysis in Section 4.7.);

- miscellaneous tasks, including financial assessments; corporate research; compelling compliance with CERCLA § 104(e) information requests; and orphan share and insolvent and defunct determinations;
- insurance analysis; and
- other expert analysis, such as independent cost allocation analysis or waste stream analysis by mining experts.

4.1 Issue Follow-up Information Request Letters

As stated in Section 3.3.5, the PRP search team may issue follow-up requests during the baseline phase. Alternatively, the team may elect to defer such requests until the follow-up phase. There are many reasons why the team might want to defer issuance of such requests, *e.g.*, time and resource considerations, site-specific circumstances.

Follow-up request letters may be necessary if a PRP complies only partially with the initial information request, the initial response raises additional questions for EPA, or the team needs to clarify the response. In addition, the team may need to issue such letters in cases where PRPs have "nominated" other parties, claiming that they are also liable. Finally, follow-up letters may be issued to obtain financial information needed to begin insolvent and defunct determinations or analyze ability to pay.

Specialized § 104(e) Questions

The Agency may need to ask more specialized questions in the follow-up information request letters to fill information gaps. CERCLA § 104(e) questions organized by subject matter are available at EPA's Superfund § 104(e) Information Request Questions by Category Web page. (See Chapter 4 References, p. 257.)

Specialized questions are listed for the following categories:

Arranger/Generator

Owner/Operator

Auto Shops
Chemical Manufacturing Plants
Dry Cleaning
General Manufacturer Process
General Question
Grain Fumigants
Innocent Landowner
Landfills
Lead Battery Facilities
Mining Processes
PCB Sites
Solvents
Tar and Oil Byproducts
Waste Oil

Insurance

Ability to Pay PRPs
Brokers
Insurers

Transporters

Financial

Dissolution of Corporation
Estates
General Ability to Pay
General Questions
Individual Ability to Pay
Other Entities
Parent Corporation
Piercing the Corporate Veil
Successor Liability
Trusts

Superfund Recycling Equity Act

Batteries
Electrical Equipment
General Questions/Document Requests
Scrap Metal
Paper, Plastics, and Textiles

4.2 Compel Compliance with CERCLA § 104(e)



If a recipient of a CERCLA § 104(e) information request letter fails to respond within the specified time or provides incomplete answers, a reminder letter should be sent to the unresponsive recipient. (See Subsection 3.3.5 for discussion of information request follow-up actions.) In addition to warning the recipient of the risk of incurring penalties or civil, judicial, or administrative enforcement actions, the reminder letter provides the recipient an opportunity to contact EPA with questions or concerns. The reminder letter also satisfies the notice and opportunity for consultation requirement of CERCLA § 104(e)(5)(A) if enforcement by administrative order is contemplated. If there is no response or if the response to a request is still unsatisfactory after the reminder deadline has passed, EPA may compel compliance with the request through either administrative or judicial action. The PRP search manager should coordinate with the case attorney on the enforcement strategy. The case attorney usually takes the lead on compelling compliance.

EPA may pursue the following enforcement options:

- issue an administrative order to compel compliance with the request for responsive written information; or
- issue an administrative subpoena pursuant to CERCLA § 122(e)(3)(B); or
- initiate a judicial action seeking a court order compelling the recipients to provide the requested information or documents; and
- seek civil non-compliance penalties in an administrative order or a judicial action.

Administrative Order to Compel Compliance

Under CERCLA § 104(e)(5)(A), the Agency can issue an administrative order to compel compliance with the information request. Administrative orders are issued by EPA and require notice and an opportunity for consultation. The order should indicate the date on which it becomes effective and also advise the respondent that penalties may be assessed by a court against any party who unreasonably fails to comply with the order. If the recipient continues to ignore the request for information, the Agency may prepare a referral package to DOJ requesting enforcement of its administrative order. (See “Model Administrative Order for CERCLA Information Requests” (September 30, 1994), Chapter 4 References, p. 257.)

Judicial Action to Compel Compliance/Referrals to DOJ

CERCLA § 104(e)(5)(B) authorizes the federal government to initiate a civil lawsuit to compel a person to respond to the Agency's information request. A court will provide necessary relief as long as EPA's demand for information is not arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.¹ A PRP who unreasonably fails to respond to a proper § 104(e)(5)(B) demand for information potentially faces substantial monetary penalties (\$53,907 per day effective August 1, 2016) for violations that occurred after November 2, 2015 and were assessed on or after August 1, 2016.² These civil penalties are based on

¹ See CERCLA § 104(e)(5)(B)(ii), 42 U.S.C. § 9694(e)(5)(B)(ii); also *United States v. Crown Roll Leaf, Inc.*, 29 Env't Rep. Cas. 2018 (BNA) (D. N.J. 1988) (holding that EPA information request was not arbitrary or capricious); *United States v. Pretty Products, Inc.*, 780 F. Supp. 1488 (S.D. Ohio 1991) (same).

² The CERCLA § 104(e)(5)(B) penalty is statutory, not a matter of EPA policy. The penalty is periodically increased pursuant to the Civil Monetary Penalty Inflation Rule, December 31, 1996. (See Chapter 4 References, p. 257.) The most recent increase was announced at 81 Fed. Reg. 43091, 43095 (July 1, 2016).

strict liability. EPA does not have to prove that the PRPs intended to violate the law by not responding in a timely manner.

The PRP search manager should work closely with the case attorney to determine the best strategy to pursue in view of all the factors surrounding partial or non-compliance with a § 104(e) information request. The region should be prepared to present the facts of the case when seeking DOJ action to compel compliance.

The basis for the enforcement action (*e.g.*, type of information sought, why the information is important, timing considerations) should be clearly stated in the referral in order to streamline the process within DOJ. In addition, the referral should contain evidence or findings that:

- EPA has a reasonable basis to believe that there may be a release or threat of a release of a hazardous substance, pollutant, or contaminant at a given site or vessel;
- the information request was issued for the purpose of determining the need for a response or choosing or taking any response action under CERCLA Title I, or otherwise enforcing CERCLA Title I, with respect to the site or vessel;
- the respondent was requested to provide information relating to one or more of the three categories of information identified in CERCLA § 104(e)(2)(A)-(C);
- the respondent did not comply with the request in a timely manner; and
- any significant factor, such as more costs incurred, more time required, or threats to human health and the environment continued and/or increased as a result of non-compliance.

The case team should calculate the penalty by determining the maximum allowable penalty and adjusting it for litigation risk factors. Typically the penalty will at least seek to recover any economic gain created by the violation. In addition, the referral should include proof of service and should address possible defenses, such as good faith effort to comply. Resources to assist in drafting litigation referrals are available on EPA's intranet site.

4.3
Issue
Administrative
Subpoenas

An administrative subpoena is an information-gathering tool that is available to the PRP search team. CERCLA § 122(e)(3)(B) authorizes EPA to issue administrative subpoenas, which require live testimony of witnesses (subpoena *ad testificandum*) or the production of documents (subpoena *duces tecum*) deemed necessary for performing a non-binding preliminary allocation of responsibility (NBAR) or "for otherwise implementing" CERCLA § 122, *e.g.*, reaching ATP or de minimis settlements under § 122(g). This means that in order to issue a subpoena for testimony by a live witness, EPA must show that the expected testimony is related to pursuit of a settlement activity. The expected testimony/documents do not have to assist EPA in reaching a settlement *with the party being subpoenaed*. If the expected testimony/documents will assist the Agency in analyzing the potential for settlement with another party connected to the site, that is sufficient for invoking this authority. The purpose of the testimony should be clearly set forth in the supporting documents.

The Agency strongly encourages the issuance of administrative subpoenas during the initial phase of the PRP search, especially when dealing with recalcitrant persons. The PRP search team should discuss a possible subpoena with the case attorney and consult "Recommendations Concerning the Use and Issuance of Administrative Subpoenas under CERCLA Section 122" (August 30, 1991) as well as "Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas" (August 25, 1988), both of which may be found on EPA's Use and Enforcement

of CERCLA Information Requests and Administrative Subpoenas Web page. (See Chapter 4 References, p. 257.)

Administrative subpoenas may be judicially challenged. Therefore, it is important to document the rationale for invoking the authority provided in CERCLA § 122(e)(3)(B). In particular, it is important to show how the subpoena's issuance satisfies the criterion of "otherwise implementing CERCLA Section 122." Accordingly, the subpoena should describe or identify as specifically as possible the information sought from the recipient. If documents are requested, a list of the specific documents or areas of inquiry is recommended. In addition, the subpoena should inform the recipient that he or she might claim certain information as CBI.

When the Agency issues an administrative subpoena pursuant to CERCLA § 122 (e)(3)(B), its purpose is to investigate or gather information. A witness served with an administrative subpoena does not have the following procedural rights:

- right of legal counsel to cross-examine;
- right of legal counsel for the witness to "speak on the witness record;" and
- right to receive aid in developing testimony or other forms of "coaching" from legal counsel during questioning.

No legal mandate prohibits the use of an administrative subpoena as an initial information gathering tool, but the Agency prefers using CERCLA § 104(e) information requests before issuing administrative subpoenas.³ Information request letters are less intimidating and generally more conducive to expeditious and

³ Regional consultation with headquarters is not required prior to issuing an administrative subpoena as long as the subpoena does not deviate significantly from the model subpoena issued by the Agency in 1988. See "Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas" (August 25, 1988), Chapter 4 References, p. 257. If the subpoena deviates significantly from the model, consultation with the Office of Enforcement and Compliance Assurance is required.

favorable settlements than administrative subpoenas, but administrative subpoenas are useful for preserving testimony and they can be effective with recalcitrant persons.

Witnesses who have received an administrative subpoena are entitled to receive the same fees and mileage reimbursement that are paid by U.S. courts. Travel expenses are paid at the same rates applicable to federal employees for items such as common carrier, hotel, subsistence, and mileage. It is the region's responsibility to budget for these expenses within the travel budget allocated to it.

The PRP search team should work with the region's financial management division to determine the paperwork requirements (*e.g.*, procurement requests, government transportation requests, travel vouchers) when planning to use administrative subpoenas.

Referrals to Enforce an Administrative Subpoena

EPA may seek enforcement of an administrative subpoena if the recipient fails to appear to testify, fails to provide documentary evidence, or refuses to answer all the questions asked. CERCLA § 122(e)(3)(B) authorizes EPA to bring an enforcement action if this should happen. As with any legal enforcement proceeding, EPA must refer the case to DOJ, following the procedures set forth in the August 25, 1988 guidance cited in footnote 3. (See Chapter 4 References, p. 257) The appropriate documents must be prepared by the case attorney, who will seek any necessary assistance from other PRP search team members. A referral to enforce an administrative subpoena consists of a draft petition for an order to show cause, a draft memorandum of points and authorities in support of the petition, and a draft order to accompany the petition. The memorandum of points and authorities should briefly set out the facts of the case and address any arguments or defenses that the respondent is likely to raise.

The referral should also contain all necessary exhibits in support of the petition, including an affidavit of service, a copy of the subpoena, an affidavit supporting the facts alleged in the petition from a person with knowledge of those facts, and any other relevant material that serves as the AR documenting the subpoena process.

4.4
Perpetuate
Testimony
Using FRCP
Rule 27



Where FRCP Rule 27 May Be Appropriate

Rule 27 of the Federal Rules of Civil Procedure (see Chapter 4 References, p. 257) establishes a procedure for taking the deposition of a person before a civil action is filed in federal court. This method of obtaining testimony is used infrequently but can be a useful tool in situations where the government is not able to file a case because it is not yet "ripe" for adjudication. The legal concept of "ripeness" requires careful legal analysis. PRP search team members should consult the case attorney as to whether and how this concept applies to their particular case. When an action cannot be brought immediately, there may be a risk of losing the testimony of key witnesses due to death, departure from the country, or other circumstances incident to the passage of time. Rule 27 provides a means to record this testimony and use it in court should the witness not be able to testify.

Rule 27 can be a useful tool when conducting PRP searches. There are likely to be few remaining witnesses to disposals that occurred two or three decades ago. Those who are still alive, such as former truck drivers, may be quite old. Although rarely used, Rule 27 can be an important way to preserve the testimony of these witnesses in the event they are later "unavailable" under the legal definition of that term. If you are considering a Rule 27 deposition, be sure to consult your regional and DOJ counsel before taking any action.

Use of FRCP Rule 27 Testimony

Procedurally, the taking of a Rule 27 deposition does not differ in any way from a deposition conducted during discovery in a civil action. The deponent has the right to counsel, may be cross-examined, and testifies under oath subject to the penalties of perjury. Furthermore, in terms of admissibility in court, there is no difference between testimony from a Rule 27 deposition and a discovery deposition. An attorney who wants to take a Rule 27 deposition, however, must get the court's permission, whereas a discovery deposition may be taken without special permission. Special permission involves "petitioning the court" or filing the appropriate legal motions or briefs as necessary. This is done by the DOJ attorney and the regional case attorney. Although this can be a lengthy process, it is certainly worthwhile to preserve testimony in case an important witness dies or becomes too ill to appear at trial. In addition, the testimony elicited from Rule 27 depositions is admissible in a wider number of circumstances than testimony in response to an administrative subpoena issued pursuant to CERCLA § 122(e)(3)(B). As in the case of a discovery deposition, the other PRPs need to be notified that a deposition will take place and given an opportunity to attend.

Referral Procedure

Regional attorneys desiring to take a deposition pursuant to Rule 27 must prepare a summary referral package and forward it to DOJ. A Rule 27 package is less detailed than the standard litigation report since the requested action is less complex than initiation of a lawsuit.

There are two components of the package. The first and most important part is a background description of the Agency's actions and the need for a Rule 27 deposition. In short, this should briefly

describe the Agency's actions at the site, including removals, remedial actions, enforcement actions, PRP search efforts, and other relevant activity necessary to familiarize DOJ with the case.

Next, there should be a detailed discussion that demonstrates that there is a substantial likelihood that the government would be successful in establishing each element enumerated in Rule 27(a)(1) and of receiving the court's approval for the deposition. All documentary evidence, such as medical records and correspondence with the witness, should accompany this discussion.

The second part of the package is the draft petition. Regional counsel should draft the petition for approval by DOJ.

The completed package should be sent to the appropriate assistant section chief at DOJ for review. The DOJ attorney will contact EPA's case attorney to discuss the resolution of any issues that may be identified. DOJ will file the petition with the court. If the court approves the petition, DOJ will provide notice to opposing counsel and arrange to take the deposition at an appropriate location such as the U.S. attorney's office nearest to the deponent. If the court denies the petition, Agency personnel may be required to provide additional evidence to substantiate the need for the proceeding.

4.5 Perform ATP Determinations

In cases where EPA is considering an ATP settlement, EPA considers competing interests. On one hand, the Agency is charged with ensuring that contaminated sites are cleaned up, that Trust Fund expenditures are recovered, and that those responsible for contamination pay an appropriate share of cleanup costs. On the other hand, many individuals and businesses have limited resources with which to satisfy the government's claims. The latter consideration begins the ATP analysis, sometimes referred to as a financial assessment. The purpose of an ATP analysis is to develop the financial and economic information necessary to assess the

ability of a PRP to address an environmental problem, pay a penalty, or provide funds for cost recovery. This assessment enables EPA to formulate an appropriate negotiation and litigation strategy. ATP determinations are usually made by staff with specialized expertise.

4.5.1
General Policy on
Superfund ATP
Determinations

EPA's "General Policy on Superfund Ability to Pay Determinations" (September 30, 1997) (see Chapter 4 References, p. 257) and model language for ATP settlements provide EPA with the means to settle the liabilities of PRPs with ATP issues in a way that "will not put a company out of business" and avoids imposing undue financial hardship on either businesses or individuals. CERCLA § 122(g), titled "De Minimis Settlements," specifically authorizes EPA to (1) negotiate settlements based on a PRP's ability to pay rather than on its full liability at the site, (2) require ATP applicants to promptly provide EPA with the information needed to assess the PRP's ability, or inability, to pay, and (3) consider alternative payment methods as may be appropriate when ATP PRPs are unable to pay the "total settlement amount at the time of settlement." Users of this manual should not rely solely on information presented herein, but should consult EPA's ATP policies and provisions in their entirety. These include guidance on evaluating ability to pay a civil penalty in an administrative enforcement action. (See Chapter 4 References, pp. 257-258).

ATP settlement is reserved for persons who demonstrate that paying the amount sought by the government is likely to put them out of business or jeopardize their viability. It is also available to businesses and individuals who demonstrate that paying such an amount is likely to create an undue financial hardship. Undue financial hardship means that satisfying the government's claim would deprive the PRP of ordinary and necessary assets or render the PRP unable to pay for ordinary and necessary business or living expenses. For example, although under EPA's policy an applicant's ability to borrow against the value of a personal residence is a valid

option for obtaining settlement funds, the ATP assessment would not include funds obtained by selling a personal residence as this would be considered an undue hardship. In addition to determining the dollar range of a PRP's ability to fund a settlement, the purpose of an ATP assessment is to identify a number of actions that the applicant might select from in order to obtain the necessary funds, without specifying or requiring that the applicant take any particular course of action.

As the court noted in *United States v. Bay Area Battery*,⁴ the government must be afforded the flexibility to take ability to pay into account in fashioning settlements under CERCLA. In particular, it must consider the value of permitting businesses to continue earning money and employing workers, and demonstrate compassion for individual circumstances.

Conditions under Which EPA Will Consider a Claim of Undue Financial Hardship

Although an ATP settlement is based largely on the financial condition of the ATP candidate, other requirements have to be satisfied as well. These requirements include the following:

- The PRP requests the ATP settlement.
- The PRP provides sufficient information to carry the burden of demonstrating that payment of the full amount sought by EPA is likely to create an undue financial hardship.
- The ATP analysis is based on the best available information provided by the PRP.
- The ATP analysis considers the entire financial position of the PRP, including available insurance.

⁴ *United States v. Bay Area Battery*, 895 F. Supp. 1524 (N.D. Fla. 1995).

- The settlement does not release the PRP from other site-related responsibilities, *e.g.*, providing necessary information, site access.
- The settlement is entered into on an individual basis with each person as defined by CERCLA.
- The settlement amount is in addition to expenditures that are recoverable from other sources.
- The settlement resolves all the PRP's liability at the site.

(See "Model Notice Approving Reduction in Settlement Amount Based on Inability to Pay" (April 30, 2008) and "Model Notice Denying Reduction in Settlement Amount Based on Inability to Pay" (April 30, 2008), Chapter 4 References, p. 257)

In seeking an ATP-based settlement, the burden is on the applicant to prove that it cannot afford to pay all EPA's costs at a site; the burden is not on EPA to prove that the applicant can afford to pay. Moreover, an ATP-based settlement will not be allowed if EPA does not receive all the information it requests from the applicant to make a thorough ATP assessment. In other words, the applicant cannot "cherry pick" the information it provides, nor should the ATP assessment be performed based on incomplete information. EPA's assessment needs to consider the applicant's complete financial condition, including present as well as future funding needs. For example, in the case of an individual the analysis would consider future potential earnings, which can include reductions in income during retirement as well as increased or projected uncovered medical expenses.

Evaluation of an entity's ability to pay generally consists of a two-part analysis. The first part of the analysis, called the "balance sheet phase," looks at the assets, liabilities, and owner's equity of the PRP, calculating the amount of money available from excess cash, sale of assets that are not ordinary and necessary, borrowing

against assets, and owner's equity. The second part of the analysis, called the "income and cash flow statement phase," looks at the income and expenses of the PRP and generally calculates "available income" for a Superfund settlement over a five-year period. The number of years of available income, however, may be changed when circumstances warrant. (See "Interim Guidance on the Ability to Pay and De Minimis Revisions to CERCLA § 122(g) by the Small Business Liability Relief and Brownfields Revitalization Act" (May 17, 2004), Chapter 4 References, p. 258.)

4.5.2 ATP Information Sources



EPA has developed computer models for analysis of financial issues affecting enforcement actions. (See Chapter 4 References, p. 258.) As the models are updated periodically, it is advisable to consult both web sites to make sure you have the latest versions. These models are screening tools only and their use does not constitute a thorough analysis. The case team should consult the financial analyst who will be reviewing the ATP candidate's financial information to ensure that all relevant information is requested. Also be aware that your region may have customized one or more of the models to adapt them to regional needs. NEIC staff with financial analysis expertise also may be available to conduct financial analyses.

ABEL Model

ABEL is a computer program designed to evaluate the ability to pay of firms held liable for environmental penalties or Superfund cleanups, and is intended to be used as a screening tool. It estimates the probability that a firm can pay a penalty, contribute to the cleanup of a Superfund site, or invest in pollution control equipment. ABEL is designed to accept tax data input directly from tax returns submitted by C corporations, S corporations, and partnerships (*i.e.*, IRS forms 1120, 1120A, 1120S, and 1065, respectively). ABEL is convenient to use because virtually all business entities are required to file tax returns. In the absence of

tax return data, analysis of private corporations can be performed using sources such as financial statements, loan applications, and Dun & Bradstreet (D&B) reports. ABEL also presents a two-phase analysis of a firm's financial health:

1. The financial profile presents a summary of the firm's balance sheet, income statement, and cash flow; ABEL also computes five financial ratios to provide a rudimentary measure of the company's financial health.
2. The ATP analysis estimates future cash flow based on the company's past performance.

INDIPAY Model

INDIPAY is a computer program designed to evaluate the ability to pay of entities for which the individual owner is responsible for the penalty or contribution, such as sole proprietorships, partnerships, and private individuals. The model requires one to three years of individual tax return data and the Individual Ability to Pay Claim Financial Data Request Form (see Appendix H), which can be generated from within the model. EPA financial analysts, however, generally prefer to evaluate up to five years of returns in addition to using the model. INDIPAY provides two types of analysis:

1. Phase 1 is a quick assessment of an individual's level of net income and complexity of personal finances. If an individual has low income and uncomplicated finances, a Phase 2 analysis is unnecessary.
2. Phase 2 estimates whether the individual can pay a penalty, based on cash flow and ability to borrow additional funds, which is modified if the individual is retired.

These two scenarios are discrete, independent analyses. Their results should not be combined to determine ability to pay; instead, the lower of the two results is usually relied on.

(See Appendix I and Chapter 4 References, p. 258 for additional individual financial data forms that may be useful in lieu of or in addition to the Individual Ability to Pay Claim Financial Data Request Form or in special situations.)

MUNIPAY Model

MUNIPAY evaluates a municipality's, town's, sewer authority's, or drinking water authority's claim that it cannot afford compliance costs, cleanup costs, or civil penalties. MUNIPAY performs two different analyses; a demographic comparison, which uses U.S. Census data to compare the municipality to state and national norms, and an affordability calculation, which assesses the amount of currently available funds and, if necessary, funds available through financing.



Other Sources of Information

Other potential sources of information for conducting financial analyses include:

FINANCIAL STATEMENTS

- **Audited Statements**

Audited statements are financial statements made by an independent auditor. Independent auditors are accountants who follow consistent procedures required by generally accepted accounting principles (GAAP) and generally accepted auditing standards (GAAS).

Information included in audited statements is therefore considered verifiable. Audited statements often describe related-party transactions and contingencies in footnotes. These documents are prepared for purposes other than ATP

analysis, however, and are verifiable in the context of accounting purposes only. If audited statements are not available, a review or compilation should be used.

- **Unaudited Statements**

Unaudited statements are financial statements usually prepared by someone with an accounting background for the management of a company. These statements are useful in that they are flexible in providing types of information such as environmental expenditures, but they are not verifiable. For a company's fiscal year, financial or unaudited statements are usually provided when an audit review or compilation is not available. For the most recent year-to-date financial information, unaudited statements are expected.

TAX RETURNS

Federal income tax returns are among the most important documents for ATP analysis because they typically contain standardized information that can be used directly with the ABEL model. Returns must be signed, and include all supporting schedules. The Agency should request that each ATP candidate (business or individual) submit federal income tax returns for the past three to five years, based on the recommendation of the financial analyst assigned to review the information, and a completed financial questionnaire.

Forms that should be requested from different types of for-profit PRPs and individuals include:

- Form 1120 or Form 1120A (short form) plus supporting schedules for regular (Subchapter C) corporations;

- Form 1120S plus supporting schedules for Subchapter S corporations (Subchapter S corporations may not have more than 100 shareholders and must meet other requirements to qualify for this tax treatment.);
- Form 1065 plus supporting schedules including Schedule K-1 for each partner of a partnership and each partner's Form 1040;
- Form 1040 plus supporting schedules, which should include Schedule C (business income) for sole proprietorships (Sole proprietors should also submit an Individual Financial Data Request Form.); and
- Form 1040 plus supporting schedules for individuals (Individuals should also submit an Individual Financial Data Request Form.).

REPORTS

- **Dun & Bradstreet**

D&B reports provide financial information about companies for a fee. They are frequently used to evaluate creditworthiness as they include information on company finances, payment history, and officers. Information in the reports is submitted to D&B by the companies themselves. D&B company profiles allow comparison of the financial condition of similar companies.

- **Securities and Exchange Commission**

Federal securities laws require publicly traded companies to disclose information on an ongoing basis. Domestic issuers other than small businesses must submit annual reports on Form 10-K to the SEC. These reports provide a

comprehensive overview of companies' business and financial conditions, and include audited financial statements. The annual report on Form 10-K is distinct from the annual report that companies send to their shareholders when they hold annual meetings to elect directors, although companies are required to provide copies of their 10-K reports at shareholder request. In addition, companies with a public float (equity market capitalization) of \$75 million or more must disclose on their 10-K forms whether they make their reports available free of charge on their web sites. Form 10-K filings are available from the Electronic Data Gathering, Analysis, and Retrieval (EDGAR) database on the SEC's Web site.

The SEC requires all public companies (except foreign companies and those with less than \$10 million in assets and 500 shareholders) to file registration statements, periodic reports, and other forms electronically through EDGAR. Documents submitted to the SEC in compliance with federal laws and SEC regulations typically contain a mixture of information from audited statements, tax returns, and other sources. This information is also available from the EDGAR database. (See Chapter 4 References, p. 258.)

- **Annual Shareholder Reports**

Annual reports can be useful indicators of the health of a corporation and can be used to highlight any inconsistencies between the financial picture the company reports to its shareholders and the information it provides to EPA via CERCLA § 104(e) responses.

COURT RECORDS

These are a potential source of information, but locating them requires someone familiar with courthouse searches. Many state and local court records are now available on line. Federal records can be accessed through Public Access to Court Electronic Records (PACER). (See Appendix F, “Potentially Responsible Party Internet Information Sources (PRPIIS).”)

ON-LINE SOURCES

Information from on-line databases may be useful in clarifying or verifying information obtained from other sources, uncovering hidden assets, identifying related companies, and other purposes. (See Appendix F, “Potentially Responsible Party Internet Information Sources (PRPIIS).”) Moreover, EPA has a national contract with D&B Hoovers™, and many regions have accounts with CLEAR®, LexisNexis®, and Lexis Advance®.

INFORMATION REQUEST LETTER RESPONSES

Non-PRPs, such as owners of nearby properties, often have valuable information about sites and their operations. Information request letters may be issued to any individual who may have information about a site. The PRP search team should consider issuing CERCLA § 104(e) requests to any party who might have information, whether or not the party is likely to be named as a PRP.

4.5.3
Performing
Property
Appraisals



The Agency may need to assess the monetary value of certain contaminated real property to support remedial actions evaluated or undertaken in accordance with the NCP. Appraisals may be necessary when imposing a notice of lien under CERCLA § 107(l) and subsequently pursuing an *in rem* action against the property. Property appraisals may be conducted both before and after response action. If EPA's response action increases the fair market value of property, EPA may have a CERCLA § 107(r) "windfall" lien for the increase in fair market value attributable to EPA's response action up to the amount of EPA's unrecovered response costs. Property appraisals may also be conducted during a PRP search to determine the assets of a PRP. (See "Interim Enforcement Discretion Policy Concerning 'Windfall Liens' Under Section 107(r) of CERCLA" (July 16, 2003), Chapter 4 References, p. 258.) If the Agency is obtaining an appraisal for purposes of acquiring an interest in real property, it must be conducted in compliance with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Act (URA), 42 U.S.C. §§ 4601 to 4655; the regulations issued thereunder, 49 C.F.R. Part 24; the Uniform Standards of Professional Appraisal Practice; and the Uniform Appraisal Standards for Federal Land Acquisitions (the "Yellow Book"). (See Chapter 4 References, p. 258.) If the appraisal is needed for purposes other than property acquisition, the URA, its regulations, and the Yellow Book do not apply.

Since professional real estate appraisals may be expensive, each appraisal should be specifically authorized by the EPA primary contact when a contractor is conducting the PRP search. Less costly estimates of the "as is" property value may be developed by parties other than professional real estate appraisers. In either case, the PRP search team should carefully evaluate whether and what kind of property appraisal is needed before committing funds to conduct one. The researcher should also obtain the names of all Agency and DOJ personnel who may be using the information obtained from

the property appraisal. Because appraisal assumptions affect the usefulness of value estimates, it is important for the researcher to be aware of the assumptions involved in the search.

All the assumptions made when performing the appraisal should be noted. For example, the date on which remediation will be completed and the property will reach its post-remediation value can only be estimated. "As is" and "as modified" property valuations need clear and complete descriptions of the property modifications as well as consideration of "highest and best use" of modified property, *i.e.*, its most productive appropriate use. In addition, it should be noted whether there is a fee simple title that is free and clear of all debts, liens, and encumbrances.

Selecting and retaining a real estate appraiser is an important part of the property appraisal process. To obtain information on a recommended real estate appraiser, the researcher may go to the local Chamber of Commerce, obtain member lists from appraiser associations such as the Institute of Real Estate Appraisers, or use the yellow pages. After researching the lists of property appraisers, several of these firms should be contacted in order to address the planned research, assess the appraiser's qualifications and credentials, and ascertain if there are any potential conflicts of interest. If a contractor is involved in the selection process, it should clear its choice with the Agency. Finally, once the appraiser is approved by EPA, a contract should be prepared that includes a list of written assumptions for the appraiser and sets a ceiling on costs unless first notified by the appraiser.

The need for a property appraisal should be considered in the PRP search planning process. Any scheduling requirements should be clearly explained to the appraiser prior to signing a contract. If the schedule cannot be met "up front," another appraiser should be selected. The existence of nearby, comparable property recently subjected to value assessment should be considered prior to

performing the property appraisal. Close contact and coordination should be maintained among all parties involved (EPA, contractor, appraiser) to define the comparable search area and be aware of scheduling and budgetary impacts. Finally, the appraiser should contact the EPA primary point of contact to determine if site access is required. If access is required, EPA should contact the site owner and request written consent. USACE may be available to perform property appraisals pursuant to existing interagency agreements. Informal property values can often be easily obtained at the county assessor's office. This information is often available on line. A county assessor's office typically will have properties' tax-assessed values as well as their fair market values.

4.6 Perform Insolvent and Defunct Determinations

At sites where PRPs have agreed to perform cleanup (either remedial action under a CD or non-time-critical removal (NTCR) activity under an ASAOC), EPA may have committed itself to compensate a portion of the shares of insolvent and defunct parties under the "Interim Guidance on Orphan Share Compensation for Settlers of Remedial Design/Remedial Action and Non-Time-Critical Removals" (June 4, 1996).⁵ (See Chapter 4 References, p. 258.)

4.6.1 Definition

This interim guidance applies where:

- EPA initiates or is engaged in ongoing negotiations for RD, RA, or NTCR at an NPL site;
- a PRP or group of PRPs agrees to conduct the RD/RA or RA pursuant to a CD or the RD or the NTCR pursuant to an ASAOC or CD; and
- an orphan share exists at the site.

⁵ Note that this guidance does not apply to CERCLA cost recovery settlements in which the parties are not agreeing to perform RD/RA work or a NTCR. In these situations, reference the "Addendum to the Interim CERCLA Settlement Policy issued on December 5, 1984" (September 30, 1997) (see Chapter 4 References, p. 258), which provides the regions with direction for addressing potential compromises of CERCLA cost recovery claims due to the existence of a significant orphan share.

The orphan share guidance does not apply at Superfund sites that only involve owners and operators (*i.e.*, the guidance only applies at Superfund sites that include arrangers and/or transporters as PRPs). The guidance also does not apply at federal facility sites.

Orphan Share Definition

The term "orphan share" refers to the share of responsibility that is specifically attributable to parties EPA has determined are:

- potentially liable;
- insolvent or defunct; and
- unaffiliated with any party potentially liable for response costs at the site.

The orphan share does not include liability attributable to:

- unallocable waste;
- the difference between a party's share and its ability to pay (the "delta"); or
- parties such as "de micromis" contributors, MSW contributors, or certain lenders or residential homeowners that EPA would not ordinarily pursue for cleanup costs.

4.6.2 Insolvent and Defunct Determinations



A party is considered insolvent if EPA determines that the party has no ability to pay. A party is not considered insolvent if it has some, even a limited, ability to pay. Available insurance counts as having some ability to pay.

A party is considered defunct if it:

- has ceased to exist or ceased operations; and
- has fully distributed its assets such that the party has no ability to pay.

For both insolvent and defunct determinations, EPA's investigation must indicate that there is no successor or other affiliated party that is potentially liable.

Regions have the flexibility to determine the appropriate level of information gathering and analysis necessary to determine if a party is insolvent or defunct. In many situations, there will be information readily available demonstrating that a party is insolvent or defunct, *e.g.*, a CERCLA § 104(e) response. In most cases, however, some additional information gathering will be necessary.

The "General Policy on Superfund Ability to Pay Determinations" (September 30, 1997) (see Chapter 4 References, p. 258) also may be useful in making insolvent and defunct determinations. Although ATP is a distinct determination, the analysis is similar to that required to make an insolvent and defunct determination.

The standard for determining a party's limited ability to pay is whether a payment of the amount sought by the government is likely to create undue financial hardship, *i.e.*, will prevent a PRP from paying for ordinary and necessary business expenses or ordinary and necessary living expenses. If payment is likely to do so, the proposed settlement amount should be reduced. The undue financial hardship standard applies when determining ATP parties for purposes of determining the orphan share at a site.

Specific Methods of Gathering and Analyzing Information

There are three levels of information gathering and analysis that may be considered in making orphan share determinations:

1. An initial screening process that focuses on public information (*e.g.*, Census Bureau information, D&B reports, SEC filings) and limited financial submissions, *e.g.*, five years of tax returns;

2. Computer models (*e.g.*, ABEL, INDIPAY, MUNIPAY) if the initial screening process indicates further analysis is required; and
3. Services of regional or contractor financial analysts.

It is up to the region to determine the appropriate level of analysis for making an orphan share determination. Note that this applies only to the orphan share determination; the ATP guidance still requires the use of a financial analyst for an ATP settlement.

If you have reason to suspect that a party filed for bankruptcy, first check with your regional bankruptcy coordinator, usually an ORC attorney. This may save time and prevent duplicative effort. If he or she does not have any record of having received a bankruptcy notice, consider taking the following steps:

- Call the party and ask if a bankruptcy petition has been filed. Alternatively, this information may be available from D&B or other credit reports. Calling the clerk of the nearest bankruptcy court may not be sufficient because the broad venue provision in the Bankruptcy Code often provides debtors with a choice of bankruptcy courts. Once you have identified the court where the case was filed and the bankruptcy docket number, you can obtain access to the bankruptcy court files through PACER, which is available by subscription, and accessed from the bankruptcy court's Web page. You can also request copies of documents directly from the bankruptcy court clerk, but this could take time and involve pre-payment of a fee. You can seek assistance from the Office of the United States Trustee for the court where the bankruptcy case is pending. If the case is closed, the records may be at a federal records center. Access to these records may be obtained through the clerk of the court.

- Check with regional information managers and bankruptcy coordinators for on-line systems that may provide access to federal bankruptcy court records, filing dates, and other relevant information.

Even if the party filed for bankruptcy, this does not necessarily indicate that the debtor/PRP is insolvent for purposes of the orphan share reform. You will need to know when the bankruptcy petition was filed and if the debtor/PRP obtained a discharge of the CERCLA debt.

To determine if a party has financial difficulties outside bankruptcy:

- Check to see if the PRP has fallen behind in payments to creditors and what the consequences of non-payment have been. For example, a case team may want to determine whether creditors have moved to take control of accounts receivable or secured property, or whether a creditor has arranged to auction secured property. Some of this information may be found in D&B reports. Other investigative techniques may be required. Consult PRP search personnel and financial analysts to identify further steps to take.
- Check UCC filings to determine if creditors have perfected liens against a party's property. UCC filings are available on line and are filed with the secretary of state.
- Check to determine if a company is publicly traded or privately held. If it is privately held, information about it is usually less immediately available, making responses to § 104(e) information requests regarding ownership and company viability extremely important.

To determine if a corporation has ceased to exist or ceased operations:

- Check with the secretary of state to determine whether a certificate of dissolution has been filed in the case of a suspected defunct corporation.
- Check to see when the last annual filing was made. If one has not been made recently, this may indicate that the corporation is going out of business or has ceased to operate. It could, however, simply indicate late filing, so look beyond this record.
- Check to see if the state has revoked a corporate license. States may revoke corporate licenses if corporations are not in good standing due to non-payment of the annual fee or for other reasons.

Some states permit lawsuits against corporations within a specified period following their dissolution. It may be important to investigate this possibility if a corporation's assets were never distributed or their distribution has not been completed.

To determine if a municipality or other government entity has ceased to exist:

- Check whether the entity has lost its status as a subdivision, public agency, or instrumentality of the state.

To determine if the PRP has additional resources:

- Ask the PRP to disclose its ability to recover expenses associated with the site in its response to CERCLA § 104(e) requests or financial questionnaires. A potential insolvent or defunct PRP, like an ATP candidate, may be able to recover

expenses from other sources, such as insurance, indemnification agreements, contribution actions, and property value increases resulting from cleanup activities. If these funds are significant and likely to be recovered, the recovered expenses should be considered recoverable by the United States so that the party cannot be considered insolvent or defunct. Refer to the discussion in Section 3.3.1 under the heading “Need for PRP Financial Information.”

4.7 Perform Waste Stream Analyses

In some cases where documentation is very limited as to the nature and volume of wastes disposed of at a site, a waste stream analysis of the industrial activities conducted at the site is performed and the resulting information is entered into a transactional database. This analysis encompasses data derived from industrial surveys, process chemistry analyses, and waste stream inventory documentation.

4.7.1 Industrial Surveys

The primary focus of an industrial survey is to identify parties who owned or operated the site and may have contributed hazardous substances to the site. This is accomplished through surveying local businesses, reviewing government records, and reviewing various industrial manuals and directories. This task is particularly useful when little information is available about the site from documents, interviews, and other sources discussed previously, or when the site is in an area where neighboring facilities may have contributed to the contamination. If the site is located in a large metropolitan area, hundreds of industries could be PRPs.

4.7.2 Process Chemistry Analysis

The objective of a process chemistry analysis is to identify the nature and volume of wastes attributable to specific industries or companies. This determination is very important when little documentation exists to indicate who disposed of the wastes at a site. This task is usually conducted, however, only when the site



has a history of receiving wastes from off-site arrangers. A thorough knowledge of industrial technology is essential for the analysis, which should be performed by an environmental scientist or process chemistry engineer.

Local industries are grouped according to products generated. Wastes associated with the production of those products are subsequently compared to contaminants found at the site. Once the person conducting the PRP search establishes a link between an industry and wastes disposed of at the site, additional data-gathering efforts can be initiated to further define an identified company's specific waste-generating and -handling activities.

4.7.3 Waste Stream Inventory

The primary objective of performing a waste stream inventory is to compile an accurate list of wastes that were stored or disposed of at a site. This is accomplished by reviewing all waste stream records, operating log books, and analytical reports. This task may be required to determine the types and quantities of waste contributed by each PRP. Knowing the types of waste disposed of at a site is necessary to establish a relationship between the site and the PRPs. When a complete inventory of wastes is developed, it can be used in conjunction with process descriptions and industrial surveys to identify parties that may have been involved in disposal activities at the site. Before initiating a waste stream inventory, the investigator needs to know the locations and types of detected contamination.

In some cases, waste output models of a party's production facility are used. For example, if a facility manufactures 50 units in a given year with a corresponding by-product of two gallons of hazardous materials, then in the absence of other information it may be assumed that two gallons of by-product were generated in a year for which there are no records if manufacturing remained at 50 units.

4.7.4
Mine Sites

For mine, mill, and smelter sites, it can be important to evaluate the quantity of hazardous substances that might be released through various media, including acid generation potential and wind transport of dusts. Many mine sites have long histories and have been owned or operated by many parties. Since technologies for the extraction and processing of ores have improved, it may be appropriate to allocate response costs on the basis of volume and toxicity with earlier operations bearing a larger share. Due to the complexity of mining issues, a mining expert might need to be retained.

4.8
Interim-Final
Report
Preparation and
Review

Some but not all regions prepare an interim-final report, which is an expanded version of the baseline report that includes substantial information on generators and transporters and focuses specifically on establishing liability and financial viability. The format for the interim-final report is the same as for the baseline report. Section 3.10 provides a complete discussion of the suggested report format.

An interim-final PRP search report:

- provides justification for notice to a party of potential liability;
- identifies owners/operators, persons who arranged for treatment or disposal, and transporters;
- serves to support litigation by identifying and presenting all the evidence against each party together with an analysis of potential defenses to liability of each party;

- provides information to negotiate settlement terms or take unilateral enforcement action;
- lists parties who were considered possible PRPs during the course of the search but were dropped from consideration for notice; and
- documents why parties are no longer considered PRPs.

In general, the interim final PRP search report should be completed in time for the issuance of SNLs and the release of information under CERCLA § 122(e)(1), which includes the PRP names, addresses of PRPs that are not individuals, and the volume and nature of the substances at the site.

4.8.1 Interim-Final Report Follow-up

Information on new PRPs, as well as additional evidence on the liability of existing PRPs, may be uncovered after the completion of the interim-final report. Therefore, unless there is a full settlement, the search may not end with the completion of the interim-final report, the issuance of GNLs and SNLs, or the release of the contractors from a work assignment. Keep this in mind when planning and implementing a PRP search.

4.9 Pursue Litigation and Cost Recovery

CERCLA §§ 106 and 107 Litigation⁶

In the case of a cost recovery referral, EPA sends a cost referral package to DOJ for litigation. In selecting sites at which to pursue cost recovery, EPA places a priority on sites at which more than

⁶ If PRPs do not agree to perform work, whether the RD/RA, removal, or RI/FS, EPA's first and strong preference is to issue a unilateral administrative order (UAO). If EPA fails to reach an agreement with the PRPs to conduct the work, EPA should consider issuing a CERCLA § 106 UAO to all appropriate PRPs ordering them to conduct the response action. If the PRPs fail to comply with the UAO, EPA may initiate a judicial action requesting injunctive relief and/or CERCLA § 106 penalties for noncompliance. EPA may also initiate a Fund-financed response action.

\$500,000 were spent on the response action.⁷ As DOJ develops the case, regional staff will likely be called upon to perform litigation support activities. These may include consulting with case attorneys on technical issues, reviewing PRP liability evidence, attending depositions, and testifying in court. The RPM or OSC often will budget for and manage litigation support contractors. At a minimum, cost recovery litigation requirements include:

- ensuring that the PRP search includes (to the extent EPA determines necessary) the entire universe of PRPs, PRP liability information that meets evidentiary standards, and thorough and accurate financial analyses;
- ensuring that the AR is complete;
- documenting costs and work performed that are attributed or allocated to the site, including both direct and indirect costs;
- perfecting liens;
- sending demand letters; and
- negotiating with PRPs to try to obtain a settlement, thereby avoiding the need for a referral and litigation.

(See the discussion of CERCLA § 107(I) liens in “EPA’s Continued Efforts to Enhance CERCLA Cost Recovery” (July 2, 2010), (Chapter 4 References, p. 258).

⁷ Regions are free to pursue costs under \$500,000, however, balancing the resources needed to recover them against the amounts that may be recovered and the likelihood of recovery.

Litigation is not the preferred route, but it is available if necessary to get site remediation started or to recover the Agency's response costs. A thorough PRP search is necessary for the success of either negotiation or litigation.

Cost Recovery

There are five contexts in which the Agency traditionally recovers its costs:

1. If the Agency funds a removal or RI/FS and the PRPs agree to perform the RD/RA, the Agency may recover its past costs as part of the RD/RA settlement.
2. If the Agency funds a removal or the RI/FS, and one group of PRPs agrees to perform the RD/RA while another group of viable PRPs does not agree to do so, the Agency may pursue the non-settlers separately for unreimbursed response costs.
3. If the Agency funds the RD/RA because there was no settlement, it may seek all costs, including any pre-RD/RA costs, in a cost recovery action.
4. Where the time between the completion of a removal, RI/FS, or RD and the initiation of on-site construction is likely to exceed three years, EPA may pursue past costs and seek a declaratory judgment on liability for future costs in order to satisfy the SOL in CERCLA § 113(g)(2).

5. Where there are multiple remedial operable units (OUs), EPA may pursue cost recovery at one and seek declaratory judgment on liability for its costs at the others, assuming that the OUs share the same set of PRPs.

Bankruptcy, or the possibility of bankruptcy, can arise in any of these contexts. It is always advisable to perfect Superfund liens early to strengthen EPA's claims in the event the owner does subsequently file for bankruptcy. For more information, consult "Guidance on EPA Participation in Bankruptcy Cases" (September 30, 1997) (Chapter 4 References, p. 258), the "Continued Efforts" memorandum, or your regional bankruptcy coordinator.

Statute of Limitations

CERCLA § 113(g)(2) states that a cost recovery action must be commenced:

- within three years after completion of a removal action, except that such cost recovery action must be brought within six years after a determination to grant a waiver under CERCLA § 104(c)(1)(C) for continued response action; and
- within six years after initiation of physical on-site construction of the RA, except that if the RA is initiated within three years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action.

While CERCLA outlines the general parameters for timing of a cost recovery action, site-specific issues may be involved in determining when the statute of limitations (SOL) runs. For example, under CERCLA § 113(g)(2)(B), removal costs may be pursued as part of the remedial cost recovery action if the RA is initiated within three years of completion of the removal. Applying the SOL in this situation requires site-specific determinations as to when the removal action was completed and when the remedial action was initiated.

While EPA generally considers RD to be a removal action, several courts have held that for SOL purposes, removal ends with the ROD, and RA begins with the RD. Therefore, to be safe, regions should use the ROD issuance date as the endpoint for removal action and the starting point for remedial action.

At sites where there has been a series of remedial and removal actions, close attention should be paid to the SOL for each action. Moreover, whether multiple removal actions at a site are considered part of one removal action for SOL purposes is both a case-specific inquiry and an issue on which courts in different jurisdictions differ. In these situations, regions should consult ORC and OSRE regarding factual issues and the applicable case law in their jurisdictions.

Once the Agency's costs have been documented and the PRPs are sufficiently identified, EPA sends demand letters to the PRPs. The demand letters notify the PRPs of their potential liability for EPA's cleanup costs. If negotiations result in a settlement, EPA and the PRPs may enter into an ASAOC or CD whereby the PRPs agree to reimburse EPA for its costs. If total United States response costs at a site exceed \$500,000 (excluding interest), DOJ must concur on the terms of the settlement. (See the "Continued Efforts" memorandum for a discussion of aggressive use of demand letters.)

If one or more PRPs fail to reimburse EPA for the costs itemized in the demand letter(s), EPA may forward a referral to DOJ recommending litigation for cost recovery. Cost recovery actions for removals should be referred to DOJ as soon as possible after completion of the removal action, and ideally within one year after the completion date unless the region plans to recover removal costs at the same time as remedial costs under CERCLA § 113(g)(2)(B) because it expects the RA to begin within three years of completion of the removal action. In all cases, removal cost recovery actions should be referred to DOJ no later than six months before the SOL expires. Cost recovery actions for RAs should be referred to DOJ when physical on-site construction of the RA begins.

When the SOL deadline is near and the claim has not been settled or filed, the case team may consider entering into a tolling agreement with the PRPs. A tolling agreement is an agreement by the parties to extend the SOL either for a specified period or until a specified event occurs. The period or the event is defined in the agreement. A tolling agreement must be signed by DOJ on behalf of the government and by the PRPs. The effect of the agreement is to provide additional time to work out a settlement in a case by mutual agreement of the parties. Typically, the PRPs that enter into a tolling agreement do not admit liability, retain all their defenses to liability, do not agree to pay anything to the federal government, and do not compromise any of their existing legal rights. These extended negotiations do not always result in a settlement, but a tolling agreement can be useful when it appears that further discussion among the parties may be productive. In order to encourage expeditious negotiations, DOJ ordinarily prefers that tolling agreements be for a period of six months, and in most cases will not approve an agreement that extends the SOL more than one year.



Cost Recovery for Removals

Completing a removal will generally trigger an action to recover the costs thereof. EPA will seek recovery of all costs if the removal was Fund-lead, or oversight costs if it was performed by the PRPs pursuant to a UAO. (See the "Continued Efforts" memorandum for more information on using UAOs to "preserve cost recovery resources.") As a general rule, cost recovery cases involving removals (except those with CERCLA § 104(c)(1)(C) waivers) are filed within three years of completion of the removal. If RA is initiated within three years after the completion of the removal action, however, removal costs may be recovered in the RA cost recovery action, but will not be in every instance. The facts of a particular case frequently dictate when the "completion" of a removal has occurred at a site, and when the SOL begins to run. Out of an abundance of caution, SEMS conservatively defines removal action completion for SOL purposes as the date on which the OSC determines that no further on-site activities will be required. This date may differ from the date of demobilization of cleanup personnel at the site, as some post-removal, on-site activities may remain to be performed before the OSC determines that he or she will not have to return to the site to perform additional work. The OSC's decision date and the demobilization date should be documented in a Pollution Report or removal closeout memorandum. Due to the fact-intensive nature of removal completion determinations, however, OSRE or OGC should be consulted whenever concern exists regarding the SOL for cost recovery, as an incorrect determination could bar the Agency from recovering its costs.

Cost Recovery for Sites in the Remedial Process

Cost recovery activities at sites in the remedial process are a function of past expenditures for removals, RI/FS, or RD; the

outcome of RD/RA negotiations; and timing concerns related to the SOL date triggered by "initiation of physical on-site construction" of the RA.

"Initiation of physical on-site construction" represents the date when cleanup personnel went on site and undertook some type of physical activity, such as erecting a fence or installing utilities. Included among activities that do not constitute physical on-site construction are actions of an administrative nature, such as hiring contractors. Similar to the removal completion determination, the facts of the case are important, such that OSRE or OGC should be consulted when concern exists regarding the determination of the date of initiation of physical on-site construction for SOL purposes. Consultation is critical because a mistaken determination could bar the Agency from recovering its costs.

Documentation Requirements

EPA guidance describes procedures for documenting cost recovery decisions. The region should document a decision not to pursue a cost recovery action in a close-out memorandum, which justifies the decision and serves as the basis for entering the write-off into SEMS. Where EPA proposes to settle for less than 100 percent of its costs and does not plan to pursue non-settling parties for the balance, this justification should form part of the ten-point settlement analysis, which is drafted by the site attorney with assistance from Superfund enforcement staff. The ten-point settlement analysis serves as a briefing tool for management, who are being asked to approve the proposed settlement, and as the basis for entering a write-off into SEMS when a valid rationale exists for not pursuing unrecovered costs remaining after the settlement. The close-out memorandum serves the same purposes when there is no settlement or litigation.

The memorandum should evaluate the remaining cost recovery potential at the site so that the region can explain and justify its decision in response to future audits or inquiries. The region should place all supporting documentation and financial analyses in the permanent case file and enter the appropriate basis for not pursuing cost recovery in SEMS. (See the “Continued Efforts” memorandum and “Submittal of Ten-Point Settlement Analyses for CERCLA Consent Decrees” (August 11, 1989) (Chapter 4 References, p. 259) for further discussion of these requirements.)

Additional documentation requirements apply to decisions not to pursue cost recovery where unaddressed past costs are greater than \$500,000. These requirements are discussed in detail in “PRP Search Documentation Summary Requirements for Decision Documents to Not Pursue Cost Recovery Where Unaddressed Past Costs Are Greater Than \$200,000” (March 8, 2011).⁸ (See Chapter 4 References, p. 259.)

⁸ The ceiling was raised from \$200,000 to \$500,000 in 2013, but the documentation requirements have not changed.

Chapter 4 References		
Name	Section	Location
Superfund § 104(e) Information Request Questions by Category	4.1	https://www.epa.gov/enforcement/superfund-104e-information-request-questions-category
Model Administrative Order for CERCLA Information Requests (September 30, 1994)	4.2	https://www.epa.gov/enforcement/guidance-model-cercla-section-104e5a-administrative-order-information-collection
Civil Monetary Penalty Inflation Rule	4.2	40 C.F.R. Part 19 https://www.epa.gov/enforcement/environmental-protection-agency-40-cfr-parts-19-and-27-civil-monetary-penalty-inflation
Recommendations Concerning the Use and Issuance of Administrative Subpoenas under CERCLA Section 122 (August 30, 1991)	4.3	https://www.epa.gov/enforcement/guidance-use-and-enforcement-cercla-information-requests-and-administrative-subpoenas
Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas (August 25, 1988)	4.3	https://www.epa.gov/enforcement/guidance-use-and-enforcement-cercla-information-requests-and-administrative-subpoenas
Federal Rules of Civil Procedure, Rule 27, Depositions to Perpetuate Testimony	4.4	28 U.S.C. App. https://www.gpo.gov/fdsys/granule/USCODE-2010-title28/USCODE-2010-title28-app-federalru-dup1
General Policy on Superfund Ability to Pay Determinations (September 30, 1997)	4.5.1	https://www.epa.gov/enforcement/guidance-superfund-ability-pay-determinations
Model Notice Approving Reduction in Settlement Amount Based on Inability to Pay (April 30, 2008)	4.5.1	https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=427
Model Notice Denying Reduction in Settlement Amount Based on Inability to Pay (April 30, 2008)	4.5.1	https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=428

Chapter 4 References		
Name	Section	Location
Interim Guidance on the Ability to Pay and De Minimis Revisions to CERCLA § 122(g) by the Small Business Liability Relief and Brownfields Revitalization Act (May 17, 2004)	4.5.1	https://www.epa.gov/enforcement/guidance-ability-pay-and-de-minimis-revisions-cercla-section-122g
Guidance on Evaluating a Violator's Ability to Pay a Civil Penalty in an Administrative Enforcement Action	4.5.1	https://www.epa.gov/enforcement/guidance-evaluating-ability-pay-civil-penalty-administrative-enforcement-actions
Penalty and Financial Models	4.5.2	https://www.epa.gov/enforcement/penalty-and-financial-models
Financial Disclosure Statement To Be Completed by Individual Defendant	4.5.2	www.flmp.uscourts.gov/file/32/download?token=KHZhEPjQ
EDGAR	4.5.2	http://www.sec.gov/edgar.shtml
Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA (July 16, 2003)	4.5.3	https://www.epa.gov/enforcement/interim-guidance-enforcement-discretion-concerning-windfall-liens-cercla-section-107r
Uniform Appraisal Standards for Federal Land Acquisitions	4.5.3	https://www.justice.gov/file/408306/download
Interim Guidance on Orphan Share Compensation for Settlers of Remedial Design/Remedial Action and Non-Time-Critical Removals (June 4, 1996)	4.6	https://www.epa.gov/enforcement/guidance-orphan-share-compensation-rdra-and-non-time-critical-removal-settlers
Addendum to the Interim CERCLA Settlement Policy Issued on December 5, 1984 (September 30, 1997)	4.6.1	https://www.epa.gov/enforcement/guidance-cercla-settlement-policy-interim
General Policy on Superfund Ability to Pay Determinations (September 30, 1997)	4.6.2	https://www.epa.gov/enforcement/guidance-superfund-ability-pay-determinations

Chapter 4 References		
Name	Section	Location
EPA's Continued Efforts to Enhance CERCLA Cost Recovery (July 2, 2010)	4.9	https://www.epa.gov/enforcement/guidance-efforts-enhance-cercla-cost-recovery
Guidance on EPA Participation in Bankruptcy Cases (September 30, 1997)	4.9	https://www.epa.gov/enforcement/guidance-epa-participation-bankruptcy-cases
Submittal of Ten-Point Settlement Analyses for CERCLA Consent Decrees (August 11, 1989)	4.9	https://www.epa.gov/enforcement/guidance-superfund-settlement-ten-point-analysis
PRP Search Documentation Summary Requirements for Decision Documents to Not Pursue Cost Recovery Where Unaddressed Past Costs Are Greater Than \$200,000 (March 8, 2011)	4.9	https://www.epa.gov/enforcement/guidance-documenting-prp-search-decision-documents-and-unaddressed-cost-recoveries