

Hazard Management and Resource Restoration/Abandoned Mine Land Management

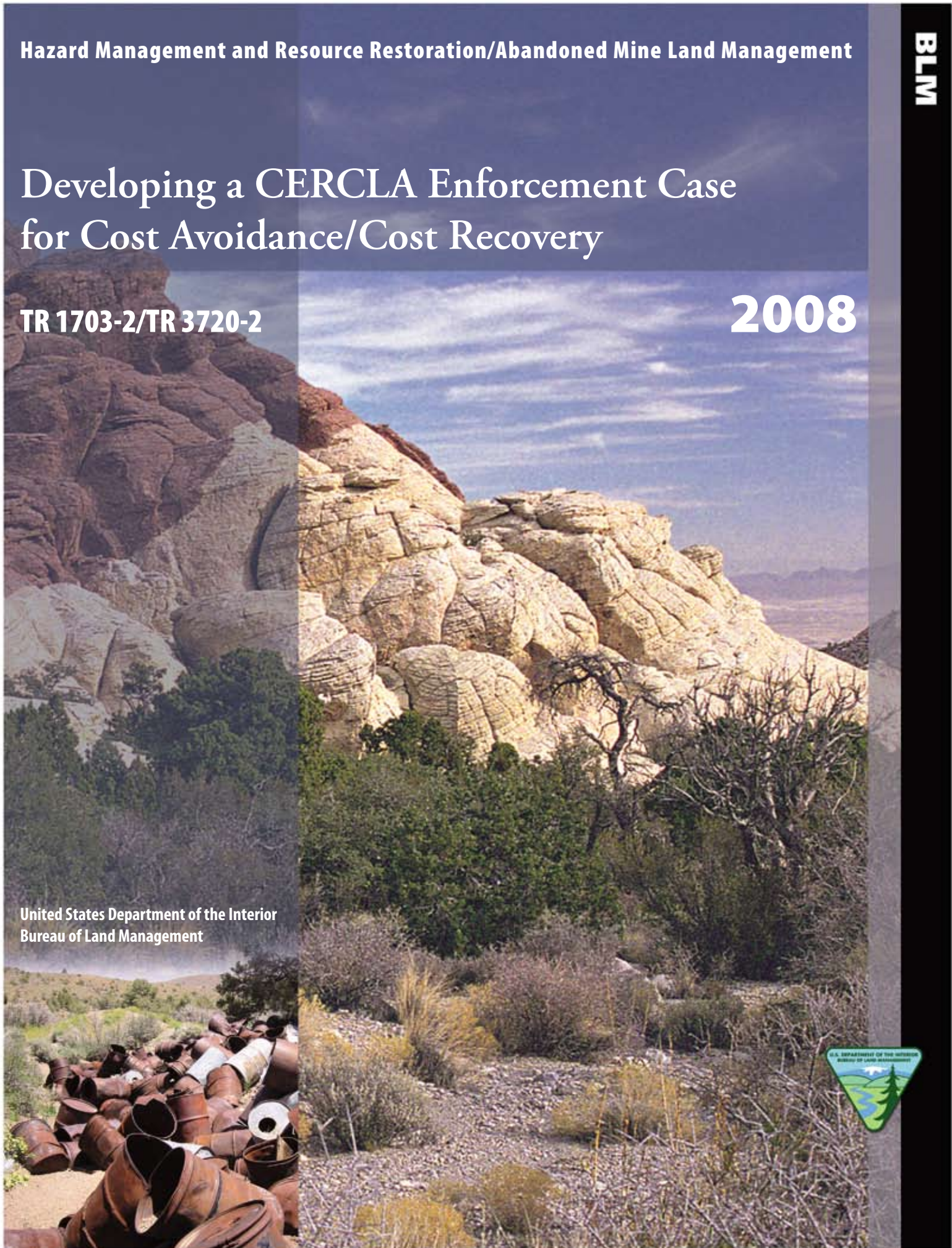
BLM

Developing a CERCLA Enforcement Case for Cost Avoidance/Cost Recovery

TR 1703-2/TR 3720-2

2008

United States Department of the Interior
Bureau of Land Management





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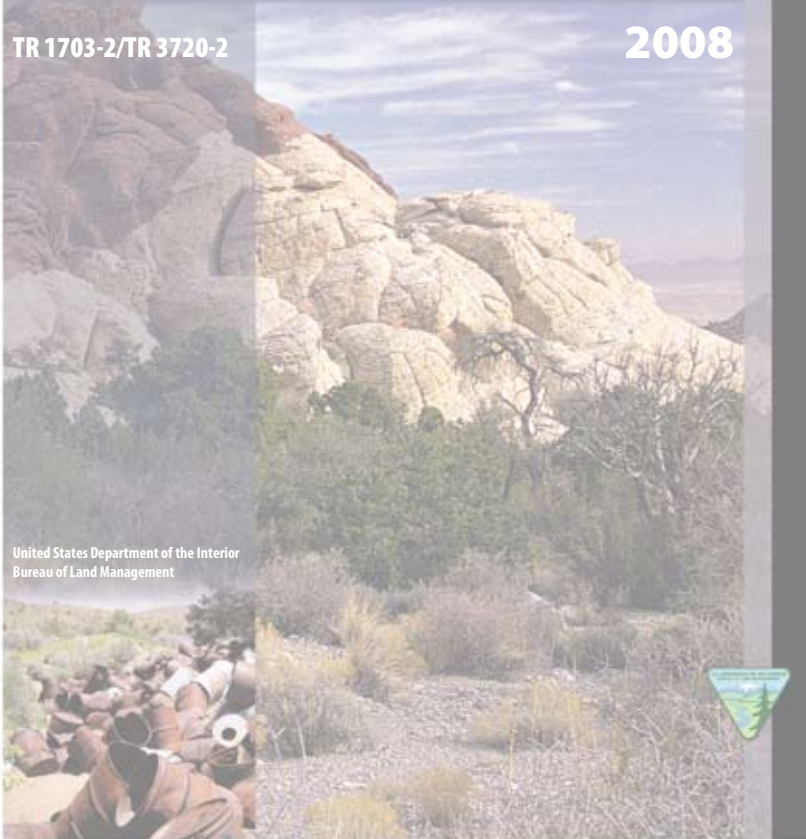
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ABSTRACT

The Bureau of Land Management (BLM) is responsible for sustaining the health, diversity, and productivity of the public lands under its jurisdiction, custody, and control for the use and enjoyment of present and future generations. Releases of hazardous substances can have a significant impact on the health and safety of individuals who use and work on public lands.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), is a Federal law enacted by Congress allowing the President to take any action deemed necessary to protect public health or welfare or the environment from risks posed by a release or threatened release of hazardous substances. CERCLA was substantially amended in 1986 with the Superfund Amendments and Reauthorization

Act (SARA). The primary purpose of SARA is to expedite the pace of CERCLA response actions and cleanups. Executive Order 12580, Superfund Implementation, as amended, delegated CERCLA authority to the Secretary of the Interior, who in turn delegated it to the BLM Director.

This technical reference provides information and procedures for BLM abandoned mine land and hazardous materials project managers to follow in pursuing cost avoidance/cost recovery cases in accordance with BLM's delegated authority under CERCLA. A cost avoidance/cost recovery case will be initiated once there has been a release or the threat of a release of a CERCLA hazardous substance on public land that requires BLM to take a response action.



INTRODUCTION

It is Department of the Interior (DOI) policy to “aggressively pursue potentially responsible parties to correct their contamination of Departmental lands and facilities or to recover the costs of cleanup” (Departmental Manual 518 DM 2). Cost avoidance or cost recovery efforts should be pursued simultaneously with a CERCLA response action in order to comply with regulations and policy and to minimize resources expended. BLM law enforcement must be involved at a site if there is reason to believe

that criminal activity has taken place, and they will take the lead for a criminal investigation.

In order to develop an enforcement case, you need to:

- Acquire information through research
- Develop a cost avoidance/cost recovery strategy report
- Document all decisions in the case file, administrative record, and cost documentation file



BACKGROUND

BLM Policy

It is BLM policy to follow Departmental Manual 518 DM 2, for CERCLA cleanups on hazardous materials sites and abandoned mine land sites.

This entails identifying any and all potentially responsible parties (PRPs) at all sites where CERCLA hazardous substances have been, or are threatened to be, released and costs for a response action are likely to be incurred. Any person who qualifies as a PRP may be liable for the BLM's past and future costs for response actions. These costs include, but are not limited to, the costs of investigations, site monitoring, sampling, evaluation of alternatives, cleanup, enforcement activities, contractor assistance, labor, equipment, and direct costs.

It is BLM policy to first seek cost avoidance opportunities before spending taxpayer dollars to clean up a site. Cost avoidance is the process where the identified PRP is allowed to conduct site cleanup response activities with BLM approval and oversight. For example, the PRP may be allowed to perform a selected removal action through a negotiated agreement if BLM determines that these actions will be done properly by the PRP. All such negotiated agreements must be consistent with CERCLA Section 122 (Settlements).

Avoiding CERCLA response costs, where possible, is critical due to the fact that response actions are generally quite expensive and BLM funds are limited.

If cost avoidance is neither possible nor practical, it is BLM policy to pursue cost recovery from the identified PRP. Cost recovery is the process used by the U.S. Government to recover, pursuant to CERCLA section 107(a), money from the PRP that the government has expended in performing the response action. For example, the PRP has been identified, but they either refuse or are not qualified to perform the cleanup action, so the

BLM will undertake the cleanup and recover the money from the PRP. It is based on a premise that it is not equitable for the taxpayer to bear the burden of paying to clean up contaminated public land when someone else is responsible.

Since there are no provisions in the National Environmental Policy Act (NEPA) allowing for cost recovery, it is BLM policy that the project manager follow and document the CERCLA process for response actions. This is critical to ensure that the Solicitor has the most complete and accurate documentation necessary to prepare a cost recovery case.

Statute of Limitations

CERCLA Section 113 requires that an initial action for cost recovery must commence as follows:

- For a removal action, within 3 years after completion of the removal action.
- For removal actions where remedial action is initiated within 3 years after the completion of the removal action, the cost incurred in the removal action may be recovered according to the remedial action statute of limitations.
- For a remedial action, within 6 years after initiation of physical, on-site construction of the remedial action.

Potentially Responsible Parties

In order to avoid and/or recover response costs under CERCLA, the BLM must demonstrate that all of the following elements of liability are present:

1. There must be a release or a substantial threat of a release of a hazardous substance (40 CFR 302).





2. The release or threat of release is from a facility.
3. Such release has caused response costs.
4. The party against whom liability is asserted qualifies as a PRP.

A PRP, according to CERCLA Section 107(a), is any “person” who may be held liable for the costs of cleaning up hazardous substances released into the environment. A “person” includes individuals, corporations, partnerships, municipalities, and State or Federal agencies that are a:

- **Current Owner/Operator** – a person who currently owns the land or operates the facility where hazardous substances are located (regardless of whether the activity has occurred during the current owner or operator’s involvement at the site).
- **Past Owner/Operator** – a person who owned or operated the land or facility at the time hazardous substances were disposed of at the site (requires proof that disposal occurred during that person’s ownership or operation).
- **Arranger/Generator** – a person who arranged for the disposal or treatment of the hazardous substances at the site.

- **Transporter** – a person who accepted substances for transport to a disposal or treatment facility from which there is a release or threat of release.

PRPs may assert defenses to liability, including acts of God, war, or an unrelated third party. Liability under CERCLA is strict, joint and several, and retroactive. Strict liability means liability regardless of fault. Joint and several liability means that each PRP is responsible for all of the costs of responding to environmental contamination, unless that PRP can show that the harm is divisible, meaning it can be divided among the parties. Retroactive means that the PRP is liable for activities occurring before the enactment of CERCLA in 1980. There are also some exceptions to liability that include: petroleum, engine exhaust, application of fertilizer and/or pesticide products, unaltered naturally occurring substances, and federally permitted releases.

To develop a cost recovery case, the BLM must identify facts that establish that each of these elements of liability is satisfied with respect to any PRP.

DEVELOPING AN ENFORCEMENT CASE

There are many steps that must be followed in order to develop a cost avoidance/cost recovery case. The first major step involves acquiring information regarding individuals who might be responsible for the contamination at a site. This is done through PRP research. The second major step is to develop an enforcement strategy and then finally to document those decisions. The following information describes this process in greater detail.

Acquire Information: PRP Research

In order to implement DOI policy to aggressively pursue PRPs to correct their contamination of public lands and facilities, and/or to recover the full costs associated with a cleanup, it often is necessary to conduct a PRP search to ascertain whether any viable PRPs exist. It is also BLM policy that a PRP search should be completed at every site where BLM conducts a response action. A PRP search should be initiated once a decision is made by the BLM that a response action should be taken. A PRP search involves in-depth research conducted by qualified individuals to determine the identity and status of PRPs at a specific site, as well as to develop evidence of liability that may be used in negotiations or in a judicial or administrative action.

A PRP search may not be necessary when the PRPs are already known, when there are clearly no identifiable PRPs, or when the response

Identification of PRPs allows the BLM to bring those parties into the response action process, either to participate in the cleanup activities or to reimburse the BLM for the costs.

action is being handled as part of a criminal enforcement measure. If a PRP search is not performed, the reasons for not doing a search must be documented in a decision memo and placed in the case file.


Qualifications to Conduct PRP Searches

It is important to ensure that the person or persons conducting PRP searches have sufficient qualifications to meet the BLM's needs. Any individual (whether BLM staff or contractor) who conducts a PRP search should have the ability to search title, review financial records, and assess mining claims and patent records. The individual should also have sufficient background in CERCLA and other environmental laws to make assessments of whether parties at a site qualify as PRPs under CERCLA and to determine if a release or other material at a site qualifies as a CERCLA hazardous substance. BLM employees should also have attended all applicable response actions training courses.

Costs and Scheduling for PRP Searches

The cost of a PRP search and the time necessary to complete it may vary significantly, depending on a number of factors, including the complexity of the site history, the number of PRPs identified, and the complexity of corporate issues. The project manager is responsible for scheduling and budgeting the resources required to conduct the search. BLM staff can arrange to contract for PRP searches through the National Operations Center (NOC) and BLM's National Assistance Contract. The NOC can prepare a Statement of Work (SOW) and the bid information package to





send out seeking requests for proposals. Sources of funding to pay for PRP searches include BLM Subactivities 1640 (Hazardous Materials Management), 1010 (Soil, Water, Air Management), 9210 (Natural Resource Damage Assessment and Restoration or NRDAR funds), and the DOI Central Hazardous Materials Fund (CHF).

Pre-PRP Search Responsibilities of the BLM

Prior to starting a PRP search, the project manager should gather existing internal records and data pertaining to the site. For example:

- Documentation about the history of operations at the site
- Knowledge of contaminants of concern and the time frames in which they were generated or disposed of at the site as identified during the site evaluation
- Current/past site operators/owners/generators/transporters at the time when contaminants of concern were released

In order to make the determination to proceed with a PRP search, the project manager should utilize the information and data gathered to answer the following questions:

Are PRPs already identified from the initial in-house research of records?

If yes, then what further information, if any, is needed to determine the nature and duration of each PRP's involvement at the site, as well as the financial viability of each PRP?

If PRPs have not been identified, then what other sources might be researched to identify PRPs?

Is the work so complicated or time-consuming that a contractor should be hired to perform the PRP search, or can BLM staff perform the work in-house? If the determination is

made to hire a contractor, then a Statement of Work must be prepared.

Contents of the PRP Search Report

Once the PRP search is completed, the PRP Search Report should include the following:

- Executive Summary
- Site location and background
- History of site operations (operators)
- Chain of Title (owners)
- Identification of PRPs (individuals and/or corporations), names, addresses, phone numbers, and corporate history (e.g., mergers, acquisitions, corporate successors)
- Financial status of PRPs
- Any data gaps
- Conclusions and Recommendations

Develop an Enforcement Strategy Report

Once a PRP search is completed, a copy of the draft PRP report should be sent to the NOC and the Solicitor's Office for review and comment. The fact that a PRP report has been completed should also be documented in the Case File. Such documentation can simply state that a report has been done, the date, by whom, and that it is being reviewed.

After this review, it is BLM policy that an Enforcement Strategy Report be prepared. An ESR is prepared from the PRP Search Report. The ESR explains the BLM's strategy for cost avoidance and/or cost recovery at a site. The ESR identifies what steps will be taken, how, and by whom for the purpose of developing and proving the case against each identified PRP. The ESR describes the process necessary to develop the evidence and prepare for negotiations or enforcement actions. The draft ESR should be prepared by the Coordinator and the NOC and

reviewed by a Regional Solicitor. However, if the site is a CHF site, then the BLM should coordinate closely with the assigned CHF Solicitor to prepare the ESR.

Obtaining and documenting information effectively is critical to establishing the foundation needed to build a successful cost recovery case.

Contents of an Enforcement Strategy Report

It is not necessary to prepare a ESR in cases where a PRP search definitively indicates that there are no viable PRPs, or if after consultation with the Solicitor's Office, the BLM determines that no further information inquiries are worthwhile. However, if a ESR is prepared it must identify the following:

- The identity of the PRPs
- The elements of liability present with respect to each PRP
- The existing or missing evidence with respect to each PRP
- Technical information about the site
- Legal issues that need to be researched
- The next steps in the process, which may include the following:
 - Additional PRP research
 - Update the Administrative Record
 - Update the Cost Documentation file
 - Preparation of the Community Relations Plan
 - Preparation of CERCLA 104(e) letters, General Notice and/or Demand Letters
 - Preparation of site entry or access agreements
 - Preparation for negotiations

Communication with PRPs

Communication with PRPs can take several forms including Information Requests, Notices of Liability (both "General" and "Special"), and Demands for Payment of Past Costs. All forms

of written communication with PRPs should be coordinated closely with the Solicitor's Office.


The BLM has been delegated authority to send CERCLA 104(e) Information Requests to any person who might have relevant information on a site. Relevant information can include the identification, nature, and quantity of materials that have been or are generated, treated, stored, or disposed of at the site or transported to a site; the nature or extent of a release or threatened release of hazardous substances; and the ability of any person to pay for or to perform a cleanup at a site. A person receiving a CERCLA 104(e) Information Request is most often a PRP at the site, but can also be any other person who may have relevant information about the site. CERCLA 104(e) Information Requests must be reviewed and approved by the Solicitor's Office before being signed and sent by the BLM State Director or the Director's designee.

The information requested pursuant to a CERCLA 104(e) request is sought through the preparation and delivery of a formal letter to the party believed to possess information.

General notice letters are enforcement documents that can be issued under CERCLA Section 122 authority. This authority has been delegated to the DOI Solicitors. The purpose of this letter is to inform PRPs of their potential liability for response costs, to begin or continue the process of information exchange, and to initiate negotiations. Often a General Notice Letter and a 104(e) Information Request will be combined and sent as one letter. If responses to these letters are not received within 30 days, the project manager should notify the Solicitor's Office for further action.

The BLM also may issue Demand Letters to formalize the demand for payment of BLM's incurred costs of a response and identify the likelihood of future response costs. Demand Letters are written and sent only to viable PRPs.





Demand Letters should be issued for all response action costs incurred at a site. These costs, which include operational and oversight costs, must be well documented. Demand Letters also inform PRPs that interest has begun to accrue on the amount of the demand. They can be issued separately or may be included as part of a General Notice Letter.

Negotiated Agreements and Orders

Administrative Orders on Consent

Administrative Orders on Consent (AOCs) are negotiated agreements between the BLM and PRPs to perform a response action at a site. AOCs describe requirements for the response action and establish schedules for completion of the response action. The agreement is enforceable and allows for the assessment of stipulated penalties, but at the same time provides procedures, including dispute resolution, so that issues can be worked out early and equitably.

The Solicitor's Office prepares all AOCs with input from the Coordinator. The project manager is responsible for drafting the SOW that typically is attached to an AOC. The SOW describes the specific requirements for the study or response action that the PRP is expected to perform.

Unilateral Administrative Orders

Unilateral Administrative Orders (UAOs) can be used to require PRPs to take a response action when the PRP is unwilling to negotiate an

acceptable AOC and the BLM determines that an "imminent and substantial endangerment" to public health or welfare or the environment exists. The authority to issue UAOs has not been delegated to the BLM by the Secretary of the Interior. Therefore, any recommendation to issue UAOs must be referred from a BLM State Director to the Secretary of the Interior through the BLM Director and the Solicitor. In consultation with the Solicitor's Office, BLM Field and State Offices should provide input into the UAO as to the ability of the PRP to perform the work, the cooperativeness of the PRP, and the impact of any delays on public health or welfare or the environment.

Document Decisions

Case File

Case files are not required by CERCLA, but it is BLM policy that the project manager establishes a case file that contains **all** documents that are directly relevant to response actions at a site. Some examples of documents typically located in a case file include, but are not limited to: e-mails, notes, correspondence, reports, guidance, technical references, time sheets, contracts, billings, and memoranda. The case file also serves as the master file for all documents that may be lost or removed from the Administrative Record file, but the case file and the Administrative Record file are not identical files. The case file should be started as soon as a Site Verification Report is prepared and will be one of the first documents to be included in the case file.

Administrative Record File

The Administrative Record file (AR) is a public record required by law (CERCLA Section 113(k)), and contains those documents that were considered or relied upon in the selection of a response action at a site. The lead agency compiles and maintains the AR in accordance with 40 CFR 300.800. The AR provides the basis for public participation and involvement, and also provides a record for judicial review by documenting the Government's deliberative process. It is very important that the BLM document each step of the CERCLA process because judicial challenges to CERCLA response actions are limited to the documents included in the AR. Therefore, a well documented AR supports the BLM's remedy selection and helps to facilitate successful cost recovery actions.

Cost Documentation File

The cost documentation file is a file that contains all information about expenditures directly related to the response action taken at a site. These documents are proof that work was performed and are essential in proving cost recovery cases by confirming that money was spent for a legitimate purpose. Examples of cost documents include, but are not limited to: time sheets, travel vouchers, contractor labor, equipment and supplies, report preparation, sampling, testing, monitoring, investigations, community relations requirements, and agency overhead costs.

The cost documentation file should be established as a separate file early in the response process in order to accurately capture all costs incurred by the BLM. A copy of all of these documents should also be kept in the case file, but not in the AR. The project manager should also ensure that a Special Interest Project Code be established in accordance with BLM's financial system.



CONCLUSION

All decisions not to pursue a cost avoidance/cost recovery case against PRPs must be documented in a Decision Memo signed by a BLM State Director or the Director's designee and placed in the case file. Decision Memos should include the following information:

- The reason a PRP search was not conducted.
- A PRP search was completed, but no financially viable PRPs were found.
- Financially viable PRPs were found, but management decided not to pursue the PRPs.

The memo should also include the Site name, location, and a brief description of the contamination and the work conducted at the site and the amount of funding already spent for cleanup and/or anticipated costs of cleanup

Because the BLM has been delegated this very important CERCLA authority from the Secretary of the Interior, via the President, it is the duty of the Bureau to use this tool in order to seek out and make the responsible parties pay for cleaning up any degradation they may have caused to the public land. It is unfair to make the taxpayers bear the burden of these costs for which they were not responsible.



GLOSSARY OF TERMS

Administrative Order on Consent (AOC): A legal agreement signed by the lead agency and a PRP through which the PRP agrees to perform a response action and/or pay response costs.

Administrative Record (AR): A public record, required by law, of those documents that form the basis for the selection of a response action at a site.

Cost Avoidance: A process by which the U.S. Government works with the PRP to have them conduct or assist with the cleanup at a CERCLA site.

Case File: A working file that contains all BLM records for a specific site.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): CERCLA is a Federal law enacted by Congress allowing the President to take any action deemed necessary to protect to public health or welfare or the environment from risks posed by a release or threatened release of hazardous substances. After being enacted, CERCLA was first published as a slip law (Pub. L. 96-510, title 1, section 101, December 11, 1980). The Government Printing Office compiled CERCLA along with other slip laws into the United States Statutes at Large (Stat.) at 94 Stat. 2767. CERCLA was then codified in the United States Code (U.S.C.) at 42 U.S.C. 9601. In accordance with CERCLA Section 105, the President authorized the Environmental Protection Agency to establish rules and regulations to implement CERCLA. These rules and regulations were published in the Federal Register and then codified into 40 CFR 300.

Central Hazmat Fund: An appropriated fund created by Congress that allows the Department of the Interior to clean up CERCLA hazardous substances at sites where the DOI is the lead agency.

Community Relations Plan: The plan that documents the community's concerns at a site. This plan identifies the community relations objectives and specifies how those objectives will be met.

Cost Documentation File: A file that contains all information about expenditures directly related to the response action taken at a site. These documents are the proof that work was performed.

Cost Recovery: A process by which the United States Government seeks to recover the costs of a response action from PRPs.

Decision Memorandum: The memorandum that documents the decision to pursue or not to pursue an enforcement case against a PRP.

Demand Letter: A written demand for recovery of BLM costs incurred under CERCLA.

Enforcement Strategy Report: A document developed by the BLM in conjunction with the DOI Solicitor's Office based on the PRP search. The document explains why each identified entity is a PRP, what data gaps need to be filled to develop evidence against a PRP and determine if a PRP is viable, how those data gaps will be filled, and a strategy for recovering costs or conducting enforcement.

Facility: According to CERCLA 42 USC 9601(9), "(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but, does not include any consumer product in consumer use or any vessel."





General Notice Letter: A letter to inform PRPs of their potential liability for response costs, to begin or continue the process of information exchange, and to initiate the process of negotiations.

Generator: Any person who arranged for disposal or treatment, or arranged with a transporter for disposal or treatment of hazardous substances.

Hazardous Substance: Substances that have been designated “hazardous substances” are listed in 40 CFR 302.4. As defined by CERCLA 42 USC 9601(14), “hazardous substance” means “(A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33 [the Clean Water Act (CWA)], (B) any element, compound, mixture, solution, or substance designated pursuant to Section 9602 this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to Section 3001 of the Solid Waste Disposal Act ..., (D) any toxic pollutant listed under Section 1317(a) of Title 33 [CWA], (E) any hazardous air pollutant listed under Section 112 of the Clean Air Act..., and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator [EPA] has taken action pursuant to Section 2606 of Title 15 [the Toxic Substances Control Act]. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).”

Information Request: Formal written requests for information, authorized by CERCLA Section 104(e)(2), issued during an administrative investigation.

Natural Resource Damage Assessment (NRDA):

The process of collecting, compiling, and analyzing information, statistics, and data through prescribed methodologies to determine and claim damages for injuries to natural resources.

Owner: A person who owned the land or facility at the time hazardous substances were disposed of at a site. CERCLA requires proof that disposal occurred during the person’s ownership if they were a past and not a current owner.

Operator: A person who operated the land or facility at the time hazardous substances were disposed of at a site. CERCLA requires proof that disposal occurred during the person’s operation if they were a past and not a current operator.

Potentially Responsible Party (PRP): Any individual or entity, including owners, operators, transporters, or generators, who may be liable under CERCLA 107(a).

PRP Search: A report based on intensive research conducted by qualified individuals that determines the identity and status of all PRPs at a specific site.

Public Lands: Surface lands administered by the BLM.

Release: As defined by CERCLA 42 USC 9601(22), “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)” Release also means the threat of release (40 CFR 300.5). A release does not include releases within a workplace or contained within a building; emissions from

engine exhaust associated with a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine; nuclear material released from a nuclear incident; nuclear material from a processing site designated under Section 102(a)(1) or 302(a) of the Uranium Mill Tailings Radiation Control Act (UMTRCA); or the normal application of fertilizer in accordance with label specifications and State and local regulations.

Superfund Amendments and Reauthorization

Act (SARA): CERCLA was substantially amended by SARA in 1996. The primary purpose of SARA is to expedite the pace of CERCLA response actions and cleanups.

Special Notice Letter: A written notice to a PRP, authorized under CERCLA 122(e)(1), that provides information on potential liability, conditions of the negotiation moratorium, future response actions, and demand for past costs.

Statement of Work: The document that identifies contractor requirements including time schedules and the type, level, and quality of service to be performed.

Transporter: A person who accepted substances for transport to a disposal or treatment facility from which there is a release or threat of release of hazardous substances.

Unilateral Administrative Order (UAO): An order issued by the lead agency under CERCLA 106 that requires the PRP to take a response action.



ACRONYMS/ ABBREVIATIONS

AOC – Administrative Order on Consent

AR – Administrative Record

BLM – Bureau of Land Management

CERCLA – Comprehensive Environmental Response, Compensation, and Liability Act of 1980

CFR – Code of Federal Regulations

CHF – Central Hazardous Materials Fund

DOI – Department of the Interior

DM – Departmental Manual

ESR – Enforcement Strategy Report

NEPA – National Environmental Policy Act

NRDAR – Natural Resource Damage Assessment and Restoration

NOC – National Operations Center

PRP – Potentially Responsible Party

SARA – Superfund Amendments and Reauthorization Act of 1986

SOW – Statement of Work

UAO – Unilateral Administrative Order

USC – United States Code

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