



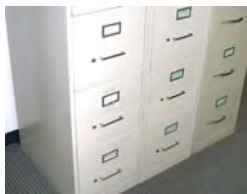
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## 3.0 Baseline PRP Search

This initial phase of the PRP search is focused on collecting evidence that establishes the liability of owner/operator PRPs and identifies generator/transporter PRPs. Although the exact nature, number, and sequence of search tasks will vary from site to site, this chapter describes 10 tasks that are often completed as part of the baseline PRP search. Keep in mind that the specific activities undertaken at a given site will depend on what is needed to achieve the Agency's PRP search goals for that site. The 10 baseline PRP search tasks are:

1. Reviewing files and collecting records;
2. Organizing records and tracking correspondence;
3. Issuing information request letters;
4. Conducting interviews;
5. Performing title searches;
6. Conducting business status and financial research;
7. Developing a site summary;
8. Compiling waste-in information;
9. Classifying PRPs; and
10. Preparing a baseline PRP search report.



(See Appendix B for a checklist of PRP search tasks.)

### 3.1 Review Files and Collect Records

The objective of this task is to locate and obtain copies of all records pertinent to the site and relevant to the PRP search. Relevant records may include correspondence, photographs, sound or magnetic recordings, computer tapes, drawings, hazardous waste manifests, technical data and reports, permits, notices of violations (NOVs), complaints, investigations, site owner records,

fire department chemical reports, litigation files, bankruptcy files, local newspaper accounts and records, and information available on line.

These records are potential sources of information on site history, identity of PRPs, and additional contacts. Before an effective file review can take place, it is critical to become familiar with the site and all background information. This task generally starts with a review of EPA files to determine the volume, content, and nature of existing information. As a starting point, the PRP search manager should coordinate with the region's record center to determine what information is available within the region. Because state and local offices can be a valuable resource in the search process, their records should be reviewed concurrently with EPA's files or soon thereafter. A thorough search for records in other federal agencies, local offices, and other sources should be performed. This task can be conducted at the same time as the title search and interviews.

In addition to the sources discussed below, refer to "Potentially Responsible Party Internet Information Sources" (Appendix \_\_\_), a detailed compendium of links to business, financial, legal, real property, and technical information sources; EPA and other government agency web sites; investigative tools; directories; libraries; maps; and aerial photographs.

### 3.1.1 Federal Files

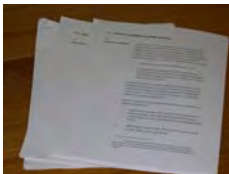
Federal records may be found in EPA's regional record centers or in files in the CERCLA, RCRA, Emergency Planning and Community Right to Know Act (EPCRA), air, water, regional counsel, and criminal investigations offices. Documents maintained in these offices may include permits, inspection reports, correspondence, records of violations and enforcement actions, and criminal records. These documents often reference other federal agencies that are or were involved with the site or a PRP. Intra-agency communications

and databases, such as the CERCLIS/WasteLAN database and the On-Line Targeting Information System (OTIS), can also yield information on a site or PRP within the region. Federal sources of information can include the following:

<b>POTENTIAL SOURCES:</b>	<b>POTENTIAL INFORMATION OBTAINED:</b>
Department of the Interior	maps and aerial photographs
Nuclear Regulatory Commission	licenses, permits, studies
U.S. Geological Survey	studies and ground water data
Environmental Photographic Interpretation Center	aerial photographs
National Oceanic and Atmospheric Administration	meteorological data
U.S. Army Corps of Engineers	studies, permits, records at federally owned sites
Occupational Safety and Health Administration	inspection reports, health and safety incident information
Securities and Exchange Commission	current and archival PRP documents, including financial statements, corporate business publications, quarterly and annual reports
Coast Guard	incident response reports
Food and Drug Administration	inspection reports (The FDA had records of facility inspections from the 1970s at one Region 2 site.)

POTENTIAL SOURCES:	POTENTIAL INFORMATION OBTAINED:
Federal Emergency Management Agency	relocation information
Federal Records Center	retired federal record files
U.S. Forest Service	maps, title searches, studies
Bureau of Land Management	mining information

### 3.1.2 State Files



State offices may maintain valuable technical information about sites. A site may be listed on a state registry of contaminated sites, or state-regulated activity or resource use, (e.g., well drilling), may have occurred there, generating applications, permits, or notices to or from owners or operators. Such information may be useful both in identifying PRPs and planning and implementing site response actions. Of particular interest are documents located in the state's Superfund and RCRA program offices as well as records maintained by the secretary of state, attorney general, and tax officials. It is a good idea to familiarize yourself with the organizational history of state offices in order to determine the possible location of all needed records. When offices are reorganized, they sometimes retain files that address subjects for which the office is no longer responsible.

The region may want to consider including language in State Multi-Site Cooperative Agreements providing that the state will compile information that it has on file for each site (e.g., spills, permits issued, compliance history, orders, citizen complaints).

This should result in preservation of PRP-related information and more timely identification of PRPs. If states provide such information to EPA, the PRP search manager should coordinate in advance with the state and include this activity in the PRP search plan. Types of information collected from state files can include the following:

<b>POTENTIAL SOURCES:</b>	<b>POTENTIAL INFORMATION OBTAINED:</b>
Environmental Agency	licenses, permits, studies, inspection reports, sample data, enforcement actions
Water and Soil Conservation	studies
Attorney General	correspondence, lawsuits, orders
Secretary of State	corporation names and addresses, registered agents, articles of dissolution, annual reports, limited partnership filings

3.1.3  
Local  
Government Files

Cities and counties regulate and keep records of activities and resource use within their jurisdiction. Local government offices may contain records of building, ground water use, and excavation permits and licenses; applications for repeal or amendment of county zoning ordinances; tax assessments; local disposal guidelines; inspection and violation notices and reports; and memoranda and correspondence between site owners and operators and local officials. In some cases, local officials may

have prepared site history memoranda and lists of hazardous materials. Like its counterpart at the state level, such information may be useful both in identifying PRPs and planning and implementing site response actions. Relevant local government records can be found in:

<b>POTENTIAL SOURCES:</b>	<b>POTENTIAL INFORMATION OBTAINED:</b>
Office of the City or County Attorney	correspondence, permits, licenses, enforcement actions
Health Department	accident reports, lists of hazardous materials
Department of Public Works	operation maps, applications, inspection and violation reports
Wastewater Management or Pollution Department	permits and licenses, correspondence, control department's inspection and violation reports
Planning, Land Use, and Engineering Departments	plat maps, aerial photographs, operations maps, correspondence, applications
Zoning Boards	applications, plat maps and aerial photographs
Police and Fire Departments	accident reports, lists of hazardous materials
City or Township Clerk/County Clerk/Recorder's Office/Tax Assessor's Office	deeds, leases, grants, addresses, mortgages and liens, easements, agreements, legal property descriptions
Historical Society	past business at the site



### 3.1.4

#### Other Records

Other good sources of information can include:

##### **The PRPs**

- PRP management;
- employees;
- suppliers;
- independent contractors; and
- customers.

Sources of information commonly in PRPs' possession are:

- information on other PRPs (including those not previously identified);
- hazardous materials listings;
- shipment manifests;
- transporter records;
- Material Safety Data Sheets (MSDSs) for substances used by PRPs;
- correspondence; and
- corporate records such as board meeting minutes.



##### **Public Libraries, University Libraries, and Historical Societies**

- local business collections;
- local newspapers, community newsletters, and articles or newsletters published by businesses associated with the site;
- documents and other paper collections donated by well-known individuals in the community; and
- specialized collections (e.g., mining, collections of aerial photographs).

### **Residents Living Adjacent to the Superfund Site**

- identity of PRPs (particularly leads early in the PRP search);
- location of waste disposal areas; and
- information about other activities at the site relevant to the PRP search.

### **Other Sources of Information**

- on-line sources of free information;
- subscription on-line information sources (e.g., Autotrack XP, Dataquick, LexisNexis, Westlaw, Dun & Bradstreet);
- Sanborn Fire Insurance maps;
- Polk/Cross directories; and
- commercial aerial photograph companies.

Early contact with the community may provide important site and PRP information, establish an EPA and community dialogue, and encourage productive community involvement throughout the life of the project.

#### 3.1.5 Special Planning Considerations

Performing file reviews and collecting records may involve some special planning considerations such as:

#### **Document Production and Retention**

It is important to determine the best method for reproducing records in consultation with the records management coordinator in each region. Factors relevant to this decision include cost, accessibility of the facility where the records will be maintained, and current regional records guidance. If any records are to be placed in a public docket, the technology available to the public for accessing them should be taken into account.

In many instances, the integrity of records and chain-of-custody issues need to be considered to ensure that the evidentiary value of documents is not compromised. Also consider Bates stamping<sup>1</sup> documents as this will help verify that no document has been lost, and allows for accurate re-filing of documents. The regional records management coordinator should be consulted in any matter that affects records management. (See also subsection 3.2.1 of this manual.)

### **Volume of Records**

If the estimated volume of records to be reviewed and copied is large, a contractor may be better suited to the task than EPA. Consult the regional records management coordinator to determine the type and amount of work required, and check with project and contracting officers to make sure that an appropriate contract vehicle is available and that the type of work is within its scope. If use of a contractor<sup>2</sup> is a feasible option, EPA may want to initially accompany the contractor in reviewing the records to determine which documents are relevant and need to be copied.

Depending on the volume of records or the release policy of the keeper of the documents, it may be more efficient to:

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<sup>1</sup> Bates stamping, which is done by hand with a specially-designed mechanical stamp, is often used in the legal industry to number or date/time mark images as they are processed. In recent years, more high-tech marking technologies have been developed that can create images with copyrights by putting a company name, logo, or legal copyright mark on documents as they are scanned or filmed. These imaging technologies can also automatically add sequential numbering to the images.

<sup>2</sup> When contractor support is being contemplated for any PRP search task, make certain that all conflict of interest (COI) checks have been completed before the task begins. Coordinate with the regional project officer (PO) or contracting officer (CO) to confirm that all necessary contract documentation is in place. Only the CO can make the final determination about the possible existence of a COI.

- copy the records at the agency with the help of a rental copier or temporary help;
- send the records to a local vendor for copying under the supervision of the contractor staff;
- microfilm<sup>3</sup> or otherwise image the documents and then produce hard copies from the images;
- procure or rent portable, hand-held scanners as an alternative to removing, handling, and copying hard copies; or
- scan documents onto a CD-ROM and provide a database on line (this method was used successfully for site records in Region 4 during an allocation pilot).

### **Privileged Documents**

The government's documents may be subject to a claim of privilege, the most common privileges being attorney work product, attorney-client, and deliberative process. (See Section 2.3 of this manual for a description of these privileges.) These privileges may be asserted by the government in litigation or in settlement negotiations in order to withhold particular documents. If a document is subject to one of these privileges, the assertion of the privilege is discretionary. Deliberate or inadvertent release of a privileged document, however, may waive the privilege. The determination to produce or withhold a privileged document is made by DOJ and EPA attorneys. When making a claim of

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<sup>3</sup> Most regional offices have microfilm readers, but use them mainly to view older records. Other imaging technologies (e.g., PDF files, CD-ROM, CD scans) have largely supplanted microfilm, and different regions may rely on different technologies. Check with the regional records manager for preferred methods and procedures.

privilege, the government must prepare a privilege log (a list of all the documents being withheld and the particular privilege(s) that apply), which is sent to the party requesting the document(s). Assertion of deliberative process privilege has special requirements, including an affidavit from the appropriate AA or RA justifying the deliberative process privilege. The designation of privilege may be litigated by the opposing party.

Not all documents subject to a potential claim of privilege may be so marked. Therefore, if there is a possibility that the documents being reviewed are privileged, the reviewer should contact the assigned attorney, who can review the documents and make a determination that there is a privilege claim. Some documents may be marked "Enforcement Sensitive" or "Confidential Settlement Document." These designations do not necessarily support a claim of privilege and must be reviewed by the assigned attorney to determine if there is a claim of privilege or if the documents are releasable.

Keep in mind that privilege designations on a document are not the same as FOIA exemptions. While documents subject to a claim of privilege may also be within one of the FOIA exemptions, these are two different determinations as documents subject to a FOIA exemption must be reviewed in light of the FOIA exemptions at 40 C.F.R. § 2.105. Consult the regional records management coordinator regarding special procedures for managing privileged, enforcement-sensitive, confidential, and FOIA-exempt documents.

### **Confidential Business Information (CBI)**

Files obtained from PRPs may be subject to a CBI claim. Although government privilege is discretionary, CBI is a matter of law. Consult with your PRP search manager and case attorney if CBI is

an issue. Generally, enforcement contracts include a CBI clause, and contractor personnel sign CBI agreements at the time the contract is awarded. The PRP search manager, PO, and CO, however, can verify that fact and provide procedures for CBI claims. State records and records from other federal agencies may be subject to such claims as well. If a contractor is performing the file review and records collection task for EPA, and the PRP makes a CBI claim, the contractor should immediately inform the PRP search manager. The PRP search manager should then consult with the EPA PO and CO responsible for the contract under which the file review is being conducted. The Agency will then determine whether it is appropriate for the contractor to review the records and whether the records in question are CBI. Consult the regional records management coordinator regarding special procedures for managing documents subject to a CBI claim.

### **Health and Safety**

The health and safety of the personnel conducting the file review and record search are an important concern. Documents or records encountered during this task may be contaminated with hazardous substances. While not common, this problem does arise on occasion. If document contamination is suspected (e.g., because records were found in a contaminated warehouse, documents are stained), the PRP search manager should be notified immediately and the Agency should attempt to determine the probable degree of contamination and its associated health effects, whether the documents should be tested, and possible methods to obtain clean copies. If a contractor is performing the task, the contractor's health and safety plan (in accordance with procedures outlined in the PRP search work plan) must be current before the contractor begins work with contaminated records.

### Access Refusal

If EPA or EPA's contractor is refused access to records or other sources of pertinent information, EPA or the contractor should document the circumstances of refusal and identify when, where, and by whom access was denied. This information should be provided to the EPA case attorney. Often, parties refusing access have little or no knowledge of EPA's information gathering authority under CERCLA, and access can often be obtained subsequently through informal dialogue between the case attorney and the property owner or the owner's counsel, if one has been retained. If a contractor is conducting a records search, the Agency should provide the contractor with a letter of introduction that explains access rights. This should be a standard operating procedure when a contractor is responsible for records collection and file review.

### 3.2 Organize Records and Track Correspondence

A good system for organizing, storing, and tracking site files and tracking correspondence is imperative for case development, litigation, and cost recovery efforts. Check with your region's records manager and other case teams to assess what file structures are already in place and effective. Effective tracking of the status of information request letters and other correspondence greatly enhances the Agency's ability to share information with PRPs and other parties, and saves time and resources.

#### 3.2.1 Organization

Records compilation and tracking may involve a fairly simple file organization, but some sites, especially large sites with many PRPs and a large volume of records spanning a number of years, may require a more complex file organization. To choose the best method of organizing documents, the following factors should be considered:

- types of information needed from the documents;
- volume of documents;

- regional file structure;
- capabilities of the organizer;
- ease of document retrieval;
- long-term tracking needs and capabilities;
- potential document security issues (especially since databases are often shared);
- unique site-specific needs;
- nature and number of potential users; and
- time required to organize documents.

### **Manual Arrangement of Documents**

If a simple organization will meet the records management objectives for a site, a manual arrangement may be utilized. Documents may be organized by chronological order, subject matter, PRP, or author. The documents are then assigned an index number (e.g., using a Bates stamp, microfilm frame number), and an index for the entire document set is developed. To be user-friendly, multiple indexes should be developed based on index number, document title, author, and date of document, or other characteristics as decided by the case team.



### **Use of a Database**

If documents need to be organized in a more complex fashion (e.g., to permit extensive cross-referencing or keyword indexing), it may be useful to develop an electronic database. All EPA regions now have access to the Superfund Document Management System (SDMS), and some regions use it to store and retrieve PRP search-related documents such as notice letters, demand letters, responses, waste tickets, and invoices. File transfer protocol (FTP) set-ups have been used in some regions for warehousing site-



related information, and may have PRP search applications. Regions differ in what database systems they use and how they use them, however, and you should consult your regional records management coordinator and PRP Search Enhancement Team contact (see Appendix E) for information about database development practices, procedures, and protocols in your region.

Following are basic guidelines for organizing a database. Some regions have developed more technically advanced databases than the guidelines contemplate, but they serve as a useful starting point.

- Group documents of similar content, such as scientific research, environmental studies, or legal documents.
- Assign an index number to each of the documents.
- Decide what information to use in the database index. Examples of information from each document might include the index number, document title, date, author, and addressee.
- If required, develop a more complex database using a coded designation for particular subject matter, a database index to refer to a particular subject, and/or keyword indexing.
- Program the database to access information in various ways (e.g., chronological order, author, keyword, subject matter).

When establishing a database for site documents, keep in mind that new documents will be added periodically. The database index may require significant revisions if a large number of new documents is discovered after the keywords are selected or the index is created. When planning a PRP search for which complex file organization may be necessary, time and resource

requirements for database maintenance and modifications must be considered in order to assure the continued usefulness of the database.

### 3.2.2 Correspondence Tracking

Tracking correspondence with PRPs and other parties often requires use of a database due to the large number of parties involved. If a database is necessary, the following factors should be considered prior to database development.

Information to be tracked:

- identity of the recipients;
- delivery status (e.g., accepted, refused receipt, address unknown); and
- response status (e.g., no response, partial response, complete response).

Capacity of the database system:

- procedures for entry and retrieval of information (keeping the database user-friendly);
- types of summaries and reports needed;
- number of waste types that may need to be tracked;
- nature and number of database users;
- resource requirements for database development and maintenance;
- contractor support requirements;

- period of performance of the contract;
- expected period of database use;
- compatibility of contractor hardware/software with the Agency's hardware/software; and
- ease with which the database system can be taken over by another contractor or agency.

Care should be taken not to clutter printouts with any information not required, or with unprofessional comments. A voluminous printout of information will likely negate the desired benefits of tracking, which are to promote information sharing and increase time and cost savings. As with any database system development, a quality assurance program should be incorporated for data entry and edits.

### **Maintain a Backup**

A manual system for correspondence tracking should also be in place in the event the primary information retrieval system fails. Responses to information requests should be organized alphabetically by party or in a similar system. Index numbers should be assigned to all documents and an index of the correspondence should be created.



### 3.3 Issue Information Requests

Sections 104(e) of CERCLA and 3007(a) of RCRA authorize the Agency to issue information request letters.

Section 104(e) authorizes the Agency to issue information request letters to any person (including business entities and government agencies) who may have information about a site, not just to persons who may be PRPs. The authority to issue letters under

Section 104(e) is delegated to specific individuals within each region. Issuing information request letters is a basic component of nearly all PRP searches. Under Section 104(e)(2) of CERCLA, "[a]ny officer, employee, or representative [of the President]...may require any person who has or may have information relevant to any of the following to furnish, upon reasonable notice, information or documentation relating to such matter:

- The identification, nature, and quantity of materials which have been or are generated, treated, stored, or disposed of at a vessel or facility or transported to a vessel or facility.
- The nature or extent of a release or threatened release of a hazardous substance or pollutant or contaminant at or from a vessel or facility.
- Information relating to the ability of a person to pay for or to perform a cleanup."

RCRA Section 3007(a) provides that "[f]or purposes of developing or assisting in the development of any regulation or enforcing the provisions of this chapter, any person who generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous wastes shall, upon request . . . furnish information relating to such wastes and permit such person at all reasonable times to have access to, and to copy all records relating to such wastes."

Section 3007(a) authority is in some ways narrower than Section 104(e) authority. It does not expressly authorize the Agency to seek information about a person's ability to pay for or perform a cleanup, for example, and it is limited to information (1) about hazardous wastes (2) gathered from persons who have generated, stored, treated, transported, disposed of, or otherwise handled

such wastes. On the other hand, information the Agency may seek about hazardous wastes under Section 3007(a) is not expressly restricted to their identity, nature, and quantity. Section 104(e) and 3007(a) authorities may supplement each other usefully in some circumstances.

Section 104(e) letters are used for information-gathering purposes and do not designate an entity as a potentially responsible party. A compilation of sample information request letters, questions, and additional relevant resources can be found on OSRE's internet site. (See Chapter 3 References, p. 200.) The letters and questions are specifically tailored to the type of site (e.g., chemical plant, dry cleaner), recipient (e.g., individual, small business, large corporation), recipient's involvement with the site (e.g., owner, operator, transporter), and nature of the information sought.

Recipients of information request letters may be requested to produce records or provide information on site ownership, site operation, their financial position, wastes sent to the site, possible generators and transporters, and the existence of records. (See subsection 3.3.1 of this manual for additional information on the nature and content of information request letters.)

The Agency's statutory information-gathering authority is broad enough to allow EPA to seek any information reasonably calculated to lead to information about a release. Although EPA's authority is broad under Section 104, the Agency is sensitive to the substantial burden that may be imposed on parties who receive an information request.

### 3.3.1

Identify  
Recipients/Draft  
Information  
Requests

Records obtained through the review of files may contain a number of potential sources of information and names of PRPs. Before drafting the information request letter, the PRP search team should:

- develop and maintain a list of potential recipients;
- decide who from the list should receive letters;
- verify the current addresses of recipients; and
- make decisions on the tone, content, and format of each letter, depending on the individual recipient or category of recipient.

Although site-specific needs will ultimately determine what to include in information request letters, the following factors should generally be considered when drafting them.

### **Access to On-Line Information Sources**

On-line services are a rapidly growing source of PRP information. Obtaining information through on-line research is, in some cases, the fastest and most effective method of obtaining PRP information. The difficulty with this type of research, however, is knowing what is available and how to access it.

Most on-line sources are available nationally and can be accessed through the internet, but some are not available in every EPA region or state. If this is the case, public libraries, universities, colleges, or schools can be contacted to determine their capabilities and use requirements. These institutions frequently provide services for minimal fees. In addition, contractors typically have numerous on-line capabilities. (See "Potentially Responsible Party Internet Information Sources (PRPIIS)" in Appendix F).

PRP search staff should start by contacting their regional LAN administrator, information support staff, or EPA librarian to determine what subscription on-line sources are currently available in the region and if any use restrictions apply to them. EPA's

Superfund Enforcement Directory (SFED) is a nationwide on-line directory of Superfund Enforcement personnel and resources. (See Chapter 3 References, p. 200.)

### **Nature of Recipient**

The nature of the recipient (e.g., individual, corporation, municipality) significantly affects the content of the information request. Where feasible, information requests should be tailored to each PRP or information source. Tailoring the request can greatly improve the quality of the response, reduce the need for follow-up requests, and reduce the burden on the recipient of the request. The types of information typically requested from each kind of PRP (e.g., owner, operator, transporter, generator) are presented later in this section.

### **Recipient's Understanding of CERCLA**

The PRP search team should consider the degree to which an information request recipient is likely to understand CERCLA. It is not always feasible to ascertain a recipient's degree of understanding of CERCLA, but the PRP search team can usually make some assumptions. For instance, it can assume that "ABC Corporation," which has been involved as a PRP at a number of Superfund sites, has a good understanding of CERCLA. Thus, the information request letter can use technical and legal terms that do not have to be explained in detail. Similarly the team can generally assume that a "Mrs. Joyce Smith" at a residential address likely has little or no knowledge of CERCLA or legal terminology. In this situation, the request should contain clear, non-legal language and be as concise as possible. A sample initial information request letter for individuals or small businesses is provided in "Transmittal of Sample Documents for More Effective Communication in CERCLA Section 104(e)(2) Information Requests" (June 30, 1995). (See Chapter 3 References, p. 200.)

### **Confidentiality Considerations**

If there is reason to believe that the recipient will be concerned with the confidentiality of its response, the PRP search team should insert confidentiality language into the information request letter that is consistent with 40 C.F.R. Part 2, Subpart B (40 C.F.R. §§ 2.201-2.311). From a practical standpoint, it makes sense to include this language with each request as it serves two purposes. First, it defines the boundaries of a confidentiality claim, reducing the likelihood of a general assertion of confidentiality. Second, it makes clear to the recipient that EPA may have to release information provided in a response. Also, the presence of such language will reassure the recipient that the response will be handled in an appropriate manner. Similarly, if EPA plans to use contractors to review and organize responses, inserting language in the letter identifying the contractor and explaining its duties may help reduce recipients' concerns.

Pursuant to EPA's CBI regulations, the PRP search team should request that recipients segregate information being claimed as CBI from non-CBI information. Segregation of this information can improve future information sharing with other parties by allowing for the quick release of information for which no claim of confidentiality has been asserted.

Where possible, use a corporate address to send a Section 104(e) letter, GNL, or SNL so the letter is releaseable under FOIA. If a home address is used, the letter has to be redacted to omit the home address.

### **Recipient's Willingness to Cooperate**

Occasionally EPA has reason to believe that a recipient of an information request may not be cooperative in responding to the request or may take actions to avoid liability. This belief can be



based on past experience with the party or on correspondence pertaining to previous permit violations, police reports, state investigations or interviews, or other documents. In such cases, the PRP search team should consider including language in the information request letter that asserts EPA's authority and describes the recipient's responsibilities. For instance, the False Statements Act (see Chapter 3 References, p. 200) provides for criminal penalties for any person who provides unsworn false statements or conceals information from an agency or department of the United States. This Act clearly applies to statements made to civil investigators, any written responses to questions, and signed statements. The letter might also note that a party would be in violation of the Federal Debt Collection Procedures Act (see Chapter 3 References, p. 200) if he transferred property or assets to avoid a federal debt under CERCLA.

When seeking information from a corporation, Section 104(e) letters should be sent by name and title to corporate officials (e.g., president, manager, CEO, registered agent), not to staff members, in order to lay the groundwork for legal action against the corporation in case of non-response. The *Federal Register* should be reviewed annually to see if penalty amounts for non-response have increased. If they have, Section 104(e) letters should be revised accordingly. (See Section 4.2 of this manual for further discussion of penalties under the heading "Judicial Action to Compel Compliance/Referrals to DOJ.")

The PRP search team may also ask the recipient to send copies of requested documents to EPA and maintain the original documents for a specified period of time. The primary benefit of requesting the preservation of records is notifying parties of their legal duty to preserve relevant evidence. The region should consider these factors when deciding on inclusion of preservation language.

### **Site/PRP Information Needed**

The PRP search team should determine:

- what information is needed to identify PRPs (e.g., manifest data, names, addresses);
- what information is needed to determine PRPs' liability (including possible defenses to liability); and
- what site information is needed for future investigations or response actions (e.g., physical characteristics of the site, historical data, sample data).

Once this information has been gathered, the PRP search team can draft the letters to ensure that the responses will contain information that will advance the PRP search and the site cleanup.

### **Need for PRP Financial Information**

Under CERCLA Section 104, the Agency has the right to collect financial information in order to determine a PRP's ability to pay response costs or perform response work. This authority should be used to request information about insurance coverage, specifically whether a PRP purchased insurance policies for the period in which environmental contamination took place, and to obtain copies of those policies or other evidence of their existence. This information is particularly relevant when a PRP's financial viability is, or could be, an issue (e.g., in ability to pay and bankruptcy situations). (See the discussion of insolvent and defunct determinations in Section 4.6.2 of this manual.) Each case team needs to determine if information regarding insurance coverage should be requested, either in an initial or a follow-up Section 104(e) request.

Although it is important to assess a PRP's ability to pay response costs, the PRP search team needs to evaluate the best time for seeking such information. The team may choose not to request this information in the first round of information requests unless the liability of the recipient as a PRP has been reasonably established. Some regions have found that seeking information such as tax returns and checking account statements during the first round of questions has been counterproductive. Recipients of information requests who are asked to provide financial information about the site in their first contact with EPA are often reluctant to do so because they feel it is an unnecessary burden or intrusion on them and may seek legal counsel to prepare a response or protest to the Agency. Such actions can lead to delay in getting information needed to coalesce PRPs and initiate a site response. Therefore, EPA may wait until it issues general notice letters and ask recipients to contact EPA if they believe they may have an ability to pay problem. EPA can then send appropriate financial questions to the PRP. In this way, recipients without ability to pay problems avoid having to answer financial questions and submit voluminous financial records.

When an information request letter concerns a removal action, it may be necessary to solicit financial information from PRPs so that the region can decide whether to issue a CERCLA Section 106 administrative order requiring the PRPs to conduct the removal.

#### Desired Format and Due Date for Response

When developing the information request, the PRP search team should select an appropriate format for the response. There are several options, including:

- a written response for each question;
- a fill-in-the-blank checklist; and

- a written response, signed by the recipient of the letter or a corporate officer, describing their efforts to locate documents or knowledgeable persons.

The format will likely vary from site to site or party to party. In addition to the format, consideration should be given to how much time the recipient may need to adequately respond to the request. Time is often of the essence; information requests typically provide 30 days from the receipt of the letter for a response. Methods for facilitating timely, complete responses include:

- establishing an information repository or publicly accessible web site related to PRP search activities before or immediately after issuance of the first round of information requests. The purpose of such a repository or publicly accessible web site is to make available non-confidential information to assist recipients of the information requests in better responding, reduce the number of inquiries or requests to the Agency for information, and provide information to the community at an early point.<sup>4</sup> The nature and location of a repository or publicly accessible web site may vary from site to site. One region, with assistance from a contractor, developed a database for the repository. Physical locations have included regional offices, state and county facilities, and rental space at facilities that manage records and provide chain-of- custody services. Contents of the repository could include:
  - site history,
  - environmental studies, reports, and sample data,
  - copies of notice letters/information request letters;

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<sup>4</sup> For more information on sharing information with PRPs, consult “Releasing Information to Potentially Responsible Parties at CERCLA Sites” (March 1, 1990). (*See* Chapter 3 References, p. 200.)

- previous site response reports, if applicable (e.g., an OSC report), and
- a copy of CERCLA, the NCP, and relevant guidance;
- initiating a dialogue with information request recipients immediately after issuing the information requests. Such a dialogue could be in the form of a "town meeting" at which the PRP search team:
  - explains the information-gathering process,
  - explains why information request recipients received their information requests,
  - presents factual site information,
  - identifies the location and purpose of the repository,
  - explains the Agency's authorities and the recipients' responsibilities, and
  - provides copies of site summaries.

Where the information requests are issued concurrently with a notice letter to perform the RI/FS or some other response action, this dialogue provides an excellent opportunity for PRPs to coalesce as a group, exchange information with each other, and assure that better and more timely information is provided in their responses.

### **Potential Burden of Responding to Request**

Responding to an information request letter imposes a burden on the recipient. Therefore the PRP search team should review the generic list of questions to narrow or eliminate questions that are not appropriate for the individual recipient.

## Type of Information Needed

Information that is collected generally can be classified as either quantitative or qualitative:

**Quantitative Data.** This is typical waste-in information: gallons, drums, cubic yards, and other numerical descriptions of the materials contributed by the parties. For most sites, the information of interest will likely be quantitative. It can include either waste volumes, including waste-in, waste-out, or waste remaining, depending on the circumstances, or narrative descriptions that can be converted into waste volumes.

**Qualitative Data.** This includes all other information that describes a party, its waste material, or its relationship to a site, and can range from a substance name (e.g., waste oil, trash), to the nature of a transaction (e.g., sale, manifested disposal), to information relevant to PRP status (e.g., a contract confirming that a party conveyed property with knowledge of contamination).

For owner/operator sites, specific kinds of information may be required when certain liability issues are raised. For instance, when the Agency seeks to establish successor liability, it is important to gather as much factual information as possible regarding the relationship of the alleged successor to the prior owner/operator. Consequently, if a corporation may be the legal successor in interest to a PRP business/corporation, questions seeking information about that relationship should be included in the information request sent to that corporation. Similarly, when a parent corporation may be liable for the acts of its subsidiary under the legal standard set by the U.S. Supreme Court in *United States v. Bestfoods*, 524 U.S. 51 (1998), information requests should seek factual information about the relationship between the parent and its subsidiary. The case attorney should provide the questions

appropriate to either a *Bestfoods* or successor liability inquiry. (See Section 3.6 of this manual for more information on these issues.)

Regulatory agencies often have relatively little information concerning older sites, illegal disposal sites, and owner/operator sites because the acts resulting in the release of hazardous substances at these sites were not subject to a regulator's authority or were not closely monitored by a regulator. The absence of detailed government documentation about such sites makes the use of information requests all the more important. Similarly, chemical formulator cases (i.e., generator cases based on an *Aceto* theory of liability, where the Agency argues that waste generation is inherent in a facility's chemical formulation operations) frequently cannot be built around information found in regulatory files. When preparing information request letters for such sites, the PRP search team should be particularly careful to evaluate information about the site that is available from other sources, and include questions in its information requests that solicit the remaining information needed to establish liability.

### **Components of Information Request Letters**

Although information request letters should be tailored to individual recipients, listed below are some elements that are commonly included and types of information that are commonly requested from the various categories of parties.

#### **For All Recipients**

The information request letter should:

- identify the site and briefly describe it;
- explain why the Agency thinks the recipient may have information about the site;

- cite EPA's statutory authority under Section 104(e) of CERCLA and/or Section 3007(a) of RCRA to request information. (When determining the statutory authority under which to request information, make sure that the official who has signed the letter has been delegated the information gathering authority for each statute identified in the letter. For example, a letter that requires the production of information pursuant to both CERCLA Section 104(e) and RCRA Section 3007 may be challenged if the EPA official who signs the letter has been delegated only CERCLA Section 104(e) authority.);
- indicate that the Agency plans to enforce its information-gathering authority under CERCLA Section 104(e)(5);<sup>5</sup>
- set forth the purpose of the request and its relationship to the overall case;
- indicate that the response must be in writing;
- indicate that the recipient is responsible for informing the Agency if any information contained in the PRP's response is confidential and subject to protection under Section 104(e) of CERCLA;
- advise the recipient that it must supplement its response if new information comes to light;
- inform the recipient that he may contact the Agency if he has questions or needs clarification about what is being requested; and
- clearly identify when the response is due.

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<sup>5</sup> As previously discussed, EPA should consider the recipient's level of legal sophistication and degree of familiarity with CERCLA when determining the content and tone of the information request letter. It may not be desirable in every instance to cite the enforcement provisions of CERCLA in the first round of letters.



### For Owners

The information request letter should ask and give a relevant timeframe for:

- names and addresses of all known previous owners and current owners, within the relevant time period, if that time period has been established;
- period of ownership;
- copy of the deed or other instrument conveying ownership;
- information related to liens or other encumbrances, including mortgages and copies of those documents;
- identity of lessors, lessees, and the terms of leases, including lease payment amounts, allowable and prohibited activities under the terms of the lease, description of any actions taken to enforce the terms of the lease, and a copy of the lease;
- description of any other contractual agreements affecting the property and copies of such agreements;
- if owned by a trust, a copy of the trust agreement;
- if owned by a corporation, corporate records (e.g., annual reports, meeting minutes) that discuss the property;
- information regarding operations at the property, including disposal practices (amounts, type of substance, location, timeframe), and site conditions, including any Phase I or Phase II investigation, of both present and past owners/operators ;
- surveys, maps, photographs (including aerial photographs) of the property;
- copies of insurance policies covering the property;

- property tax records;
- any permits covering the property (e.g., building, excavation);
- information specific to the type of site (e.g., questions designed to allow EPA to make a determination that a party may be de minimis or “de micromis”);
- Any information relating to exemptions or defenses to liability (e.g., BFPP, acts of a third party).

### **For Operators**

The information requested from operators is similar to that requested from owners, except that detailed descriptions of the operations should be requested from operators and from owners who were also operators. Operator information requests should seek information needed to identify individuals in charge of past and present operations as well as persons who may be liable as operators under the tests set forth by the U.S. Supreme Court in *United States v. Bestfoods*. The PRP search team should give special attention to corporate/subsidiary and successor liability issues.

### **For Owners and Operators**

- Questions about financial information generally seek to determine a PRP's ability to pay for or perform a cleanup, and may include questions about insurance policies that may provide coverage, such as comprehensive general liability and environmental impairment insurance.
- When an owner/operator's financial records survive, they often contain the amounts and dates of customer invoices and payments, and serve both as a primary source of

information and a secondary source of conversion rates, which allow a customer's "one load at \$ 5.00" record to be translated to an appropriate volume.

- Site financial records may be in the form of accounts payable and receivable ledgers, copies of incoming and outgoing invoices and checks, deposit slips, and customer account statements.
- One of the most important categories of information to seek from the owner/operator is the identity of possible off-site generators or transporters associated with the site. Such information may include:
  - names and addresses, quantities, and materials sent to or from the site; and
  - any arrangements made with regard to materials.
- **Materials Handling Information.** Ask the owner/operator to provide a description of information it has on each shipment of materials disposed of at, transported to, stored at, or treated at the site, including:
  - dates of shipment or disposal;
  - quantity and nature of the materials;
  - hazardous substances (as defined in 40 C.F.R. § 302.4) contained in the materials, including information on the waste and waste stream as possible RCRA hazardous wastes (This information will help the Agency determine if RCRA is an applicable or relevant and appropriate requirement for future response actions, or may be used later in an allocation of PRP responsibility.); and

- what was done with the material after it reached the facility (e.g., further processing).
- **Documentation.** Request copies of all business records relating to activities at the site, including customer lists, gate logs, batch reports and analytical test records, worker notebooks, laboratory reports on samples of materials, storage locations for handled items, ledgers, invoices, accounts receivable and back-up income records for taxes, correspondence, permit applications, operation reports, deeds and leases, and spill notifications. Also, consider asking for correspondence that addresses shipments that were discontinued because the material was not accepted or correspondence that threatens to discontinue shipments if material does not meet standards. This information may be very useful in distinguishing the hazards and threats posed by materials associated with various PRPs.

#### **Additional Items to Request from Owners/Operators**

- names and addresses of individuals who have information regarding the items listed above;
- any data or studies resulting from environmental investigations at the site;
- a description of the files searched by the individual or corporation in response to the Agency's request;
- special information for particular classes of sites (e.g., municipal landfills); and
- a description of the recipient's personal or corporate relationship to the site.

In some cases, the recipient will be unable to provide EPA with the information sought. In these cases, the PRP search manager may determine that it is necessary to require the recipient of the letter, or a corporate officer responding for a corporation, to describe the efforts made to locate information or knowledgeable persons, and to sign the entire response under penalty of perjury.

### **For Generators/Transporters**

Generator/transporter information requests are often issued in the follow-up phase of the PRP search based on information received from the initial round of information requests. The PRP search team is encouraged, however, to identify and issue requests to generators/transporters as early as possible in order to establish a core group of PRPs to work with and facilitate determining which parties are exempt, de minimis, insolvent, or defunct.

Information request letters to persons who arranged for disposal (generators) and transporters are typically similar in scope to the letters issued to owners/operators. Information request letters issued to generators/transporters should request information regarding their liability. In addition, the information request should seek information that will establish whether the substance was a listed or characteristic hazardous waste as defined by EPA.



#### 3.3.2 Mail and Track Information Requests

The PRP search plan should designate the person responsible for tracking and receiving information requests. To the extent possible, PRP search managers should arrange for the verification of the address, and identify an appropriate point of contact (e.g., registered agent, corporate counsel) for each recipient prior to mailing information request letters. While confirming this information may be burdensome at sites with hundreds of recipients, it can greatly reduce the number of letters that are returned due to an incorrect address.

**Information request letters may be sent via:**

- Certified mail, return receipt requested. Delivery may also be accomplished through Federal Express. Use of post office box addresses should be avoided because there may be no signature to indicate receipt of the letter. Date stamp the "green cards" (i.e., the returned receipts) as they are received by EPA; returned receipt cards often do not show the date on which the letter was received, and it is difficult to take enforcement action for late responses without proof of when the information request letter was received. The information on the return receipt provides the Agency with proof that a representative of the recipient received the letter. Within a week of the mailing, there will likely be some letters returned to EPA due to reasons such as "address unknown," "no forwarding address," or "refused receipt;"
- Priority mail. The U.S. Postal Service will provide the sender a tracking number to check on line at the [www.usps.gov](http://www.usps.gov) web site. The recipient does not have to sign for the letter. If the recipient is located at the address on the letter, the USPS will deliver the package and post the delivery date and time on line. Priority mail is a good option when the recipient has refused a certified letter.
- Air courier. Information request letters may also be sent via air courier if the courier provides documentation of the delivery attempt and of the receipt of the delivery.

For letters with address problems, the PRP search manager should attempt to obtain a valid address for the intended recipient and re-send the information request. Although this requires some effort, any effect on the schedule will likely be relatively minor and the rewards from successful delivery could be significant. Tracking information request letters should be planned for in advance of their mailing.

For those letters that are unclaimed or refused, the PRP search manager should work with the case attorney to identify options for successful delivery. If you are confident that you have the correct address of a PRP and the letter is continually being refused, the letter can be delivered by the CI or search manager. When parties fail to comply or only partially comply with information requests, the Agency will consider its options for encouraging or compelling compliance, which are discussed in detail in Sections 4.1 and 4.2 of this manual.

3.3.3  
Analyze  
Responses

Performing an analysis of the responses received is among the most important elements of the PRP search. Information request letters are a basic component of most PRP searches, and responses may be the only source of information. Consequently, it is very important that the responses are reviewed by appropriate personnel in a timely manner. Summaries of responses, which are often created with contractor support, can be quite useful when a large number of parties or requests is involved.

Responses to information requests should be analyzed for:

- information that links a party to the site;
- information establishing liability;
- information that establishes a PRP's financial viability, if necessary; and
- leads that may provide the region with additional information about a particular PRP, other parties, or site characteristics.

Information request responses may help the PRP search team develop a history of site activities and describe the involvement of various parties in the treatment or disposal of hazardous materials. The PRP search team should take care when extracting information on site history for the baseline PRP search report, especially when responses are from hostile, uncooperative parties or those with significant liability concerns; there are often conflicting interpretations of a site's chronology of events. Responses can be compared to aerial photographs, state permits, correspondence, and other information in an attempt to verify site history. The team member who reviews a response should note if the response appears incomplete or false. In these situations, the PRP search manager and case attorney should determine the appropriate enforcement action.

After analyzing the responses, the PRP search team can begin to develop a list of parties associated with the site who may be PRPs. The team should present PRP liability information in evidence summary sheets created expressly for documenting the liability of each PRP. A separate evidence sheet for each PRP is advisable.

An assertion of a CBI claim on documents or information submitted to EPA (whether pursuant to a 104(e) request or under other circumstances) requires that EPA treat the documents or information as CBI until such time as OGC or ORC determines that the information is not entitled to treatment as CBI.<sup>6</sup> PRP search managers and others should segregate any materials claimed as CBI in order to assure that such materials are not released. A determination as to whether the submitted materials are entitled to treatment as CBI must be made in accordance with the regulations at 40 C.F.R. Part 2, Subpart B. CBI is a complex issue and a

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<sup>6</sup> 40 C.F.R. § 2.201 *et seq.* (see Chapter 3 References, p. 200) sets out the procedures for making CBI determinations. EPA may determine the confidentiality of business information as soon as it is received. (See 40 C.F.R. § 2.204(a)(2), authorizing EPA to make a CBI determination even though no request for release of the information has been made.)



determination that materials are either CBI or not CBI can only be made by OGC or ORC. The common practice is to maintain materials as CBI when such a claim is made by the submitter unless it is necessary to make a formal determination pursuant to Sections 2.204, 2.205, or 2.207. Generally such a determination becomes necessary when the material is the subject of a request pursuant to FOIA or in discovery. There are procedures for EPA contractors to view CBI materials. It is very important to follow the CBI regulations; there are civil and criminal penalties for improper disclosure of CBI materials.

3.3.4 Develop  
Response  
Summaries

After analyzing the responses to the information request, it may be helpful to develop summaries of all the responses received. Response summaries aid the development of site history and encourage PRP involvement. Summaries can be very useful for decision makers or other parties involved in the PRP search, who can review the summaries rather than each individual response.

Contractors can be called upon to assist the Agency in developing response summaries for cases with numerous information requests. Care should be taken, however, to avoid having contractors perform legal analyses or reach conclusions about PRPs' liability, as these functions must be performed by EPA personnel.

3.3.5 Information  
Request  
Followup

Once the due date for a response has expired and the responses have been reviewed, the PRP search manager should coordinate with the case attorney on appropriate follow-up actions, if needed. These actions may include:

- issuing a follow-up letter;
- using alternative means to seek a response or clarify the request;

- issuing an administrative order to compel compliance; and
- initiating a judicial action asking a court to compel compliance.

During the review of information request responses, it sometimes becomes apparent that the recipient simply did not understand what was being requested, or the recipient did not fully appreciate the Agency's authority to obtain information or the recipient's responsibilities in this regard. A follow-up letter may be appropriate for clarifying the requests or being more explicit in describing the Agency's enforcement authorities. Model follow-up letters that have proven to be effective are available in the regions.



Alternative means of seeking responses to information requests are routinely employed in the regions. In some situations, it may be appropriate to place a telephone call to the recipient in order to determine the basis for a lack of response (e.g., more time is needed, clarification is required). A telephone call should be followed up in writing to document the nature and content of the call. In other situations, a personal visit to a recipient to discuss the information request has been effective in obtaining requested information. Consider using a less time-consuming approach than the previous two methods by developing a "speedy type memo", such as a generic pre-formatted "post-it"-type memo that is filled in and mailed to the recipient for a response along with the original information request. This could serve as a simple follow-up method for seeking clarification of the response or requesting additional information. When using any of these methods, the resource requirements and time involved for follow-up actions must be weighed against the potential gain to the Agency and other PRPs.

Administrative subpoenas, penalties, and administrative and judicial actions to compel compliance with information requests are discussed in Sections 4.2 and 4.3 of this manual. Due to the

time-intensive nature of these actions, they are usually reserved for the follow-up phase of the PRP search.

### 3.4 Conduct Interviews

Interviews complement the collection of relevant site records and aid in the development of site-specific information that may not be recorded in government and PRP documents. They are another tool for collecting or clarifying information on PRPs, other parties who may have information, site history, disposal operations, locations of disposal, or other issues relevant to the PRP search. Interviews also may help identify the existence of relevant documents such as business and hauler licenses, landfill permits, zoning permits, and building permits.

The PRP search team should ascertain what the state bar rules are for providing notice to the attorney representing a business entity before current employees, and in some cases former employees, are interviewed. The rules of professional conduct for attorneys vary from state to state, so it is important to determine what rules apply in each case. These rules often consider employees to be part of the corporation or business, with the result that the corporate attorney may have a right to be notified of the interview and to be present for it. These considerations may apply even if the EPA attorney is not present, as CIs, paralegals, contractors, or private investigators can be said to be working "at the direction of the EPA attorney." Violations of these rules could subject the supervising attorney to a range of sanctions.

#### 3.4.1 Interview Considerations

Interviews are generally performed to identify additional PRPs or gather evidence for liability determinations. If site documents do not exist, interviews may be the only method available to obtain the information needed to complete the search. Interview questions, therefore, should generally focus on whether the

interviewee may have participated in the activity being investigated or may have witnessed the activity.

If site documents do exist, interviews may help clarify the content of the documents or identify additional leads. The interviewer may also attempt to determine how the documents were prepared, how to gain access to documents not already in the Agency's possession, and how to authenticate documents, if necessary. Interview questions should focus on whether the interviewee:

- has knowledge of how the documents were compiled and who compiled them;
- is in possession of the documents; or
- may have additional information.

Factors to consider when deciding whether to conduct interviews include:

- nature and volume of information already obtained;
- nature and volume of information potentially to be gained from interviews;
- time required to plan, coordinate, and conduct interviews;
- timing considerations (how interviews fit into scheduled site activities);
- capabilities and availability of interviewer;
- location and availability of interviewees;
- sources of interviewees;
- documentation or admissibility requirements; and
- canons of ethics and disciplinary rules.

### **Nature and Volume Considerations**

If the nature and volume of information already obtained is sufficient to meet the PRP search objectives, conducting interviews may not be necessary. Although interviews generally provide useful information, the nature and volume of information potentially to be gained from an interviewee should be weighed against the time and effort necessary to plan, coordinate, and conduct the interview.

### **Timing Considerations**

EPA encourages conducting interviews early in the information-gathering process whenever possible (e.g., concurrently with the "file review and record collection" search task). Early interviews may enhance the PRP search team's understanding of a site's nature and history, and thereby enable it to plan the remedial investigation and focus the remainder of the PRP search more effectively. Moreover, the passage of time may reduce the availability and cloud the memories of owners/operators and their employees, who are likely to be among the best sources of site information. Site-specific factors may dictate that not all interviews can be conducted as early as might be desirable, however, and some interviews may be so valuable that delaying completion of the PRP search report is justified until they can be conducted. In all cases, however, interviews are intended to complement information request letters, not to replace them.

### **Capabilities of the Interviewer**

When deciding to conduct interviews, the capabilities and availability of qualified Agency personnel are an important consideration. Interviews should be planned far enough in advance to allow the interviewer to become familiar with the site, PRP search strategy, and pertinent questions.

Participants in the PRP search pilot program reported that much of the success of early interviews can be attributed to the personal contact between the interviewer and the persons being interviewed.

PRP search personnel noted that interviews are often a more effective information-gathering tool than 104(e) letters.

Interviews may have several advantages over written contacts:

- An interviewer can follow up immediately on important statements, rather than send another letter.
- People generally give broader and more valuable answers when being interviewed in person.
- Eye-to-eye contact may allow the interviewer to better judge whether an interviewee is forthcoming and truthful.
- Interviews with persons who are cooperative but elderly, ill, or illiterate often generate useful information that a 104(e) letter would not.

It is helpful to have access to civil investigators early in the PRP search process to assist with interviews. Individuals who will not consent to be interviewed should be sent a 104(e) letter or subpoena if the potential testimony is determined to be relevant.

### **Location and Availability of Interviewees**

Another important consideration when evaluating use of interviews is the location and availability of potential interviewees. Ideally, all interviewees would live in close proximity to one another and relatively close to the regional office. Interviewees, however, are often scattered across the country, located in another country, or unwilling to be interviewed. The PRP search team should balance the value of each potential interview against its cost in time and money and then prioritize the interviews. The age and potential disabilities of an interviewee should be taken into account when

balancing the value of an interview against available resources. As discussed above, sometimes an interviewer can obtain information that would not be provided in a 104(e) response. If resources are not sufficient to conduct face-to-face interviews, interviews can be conducted by telephone.

### **Documentation and Admissibility Requirements**

When considering the use of interviews as an information-gathering tool, it is important to determine the intended use of the interviews.

An Agency employee's notes from an interview have less evidentiary value than a 104(e) response signed by a PRP, and may not be admissible at trial. Concerns about the evidentiary value of information obtained in an interview may determine who should perform the interview, when the interview should be conducted, or whether the interview should be conducted. If the Agency desires to produce evidence that will be admissible in court, then a route other than interviews typically should be pursued.<sup>7</sup>

#### 3.4.2 Who Performs the Interview

Interviews should be performed by EPA staff members who have experience or specialized training in how to conduct interviews. They are usually performed by CIs, but in some instances case attorneys, paralegals, and RPMs have performed or participated in interviews.

Interviews are best conducted by personnel who have been trained in interviewing techniques and who are familiar with issues regarding CERCLA liability. It is also important that the interviewer be cognizant of any ethical rules or state bar rules restricting contact with represented parties. Even though the interviewer may

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<sup>7</sup> There are caveats to this statement. In general, recorded or signed statements gained from interviews can be useful in litigation, even though not admissible at trial as evidence. (See Federal Rules of Evidence 801 through 817, Chapter 3 References, p. 200, for more information on use of recordings and signed statements.)

not be an attorney, the ethical and bar rules may be applicable because the interview or contact may be imputed to the attorney. In order to interview represented parties, contact should be made with their attorneys, generally with the assistance of the case attorney. In any case, the PRP search and/or case team should consult before interviews are conducted in order to determine the most effective procedure.



### **Signed Statements**

Interviews are conducted pursuant to the authority of Section 104(e). Face-to-face, in-person interviews conducted by CIs or other EPA staff can be a good source of information that cannot be matched by written questions and answers due to the free-flowing nature of an interview.<sup>8</sup> An interview can be used to gather initial information or to follow up and substantiate information already gathered. Preparation for the interview is key to obtaining the most useful information from the person being interviewed. Interviews can be recorded on tape (with the consent of the interviewee) or can be reduced to writing in the form of a statement. If a written statement is to be used, the form is usually a summary of the most important information learned during the course of the interview, but the statement can take a different form, suitable to the situation, the facts revealed, or the preference of the interviewee. Having the interviewee sign the statement provides a written record of the recollection of the interviewee at the time of the interview. Such a record could be used later to help the interviewee recall events that due to the passage of time may fade from his or her memory.

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<sup>8</sup> Interviews cannot be compelled; if a potential interviewee does not wish to provide information orally, check with the case attorney who can advise as to the next step if the information is needed from that person. A Section 104(e) information request or an administrative subpoena may be appropriate.



Should the person who signed the statement later change his or her mind about the events recounted in the statement, the signed statements cannot later be used to sustain an allegation of perjury. This is because federal law provides that to commit perjury, a declarant must “have taken an oath before a competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered.” 18 U.S.C. § 1621. EPA personnel are not persons authorized by a court to administer oaths. Nonetheless, signed statements have intrinsic value and anyone can ask a person to sign a statement.

It is possible that the interviewee may voluntarily agree to, or suggest, attesting to his statement through the use of an affidavit, signed in front of a notary public. Although EPA personnel are not authorized to administer oaths, notary publics are, and EPA staff can prepare an affidavit for signature by the interviewee and notary public that begins, “I (                    ), being duly sworn on oath, depose and state as follows:” and ends, “subscribed and sworn to before me, the \_\_\_\_\_ day of \_\_\_\_\_ (month), \_\_\_\_ (year). Notary public \_\_\_\_\_ (name). My commission expires \_\_\_\_\_ (date). [With the notary seal].” An interviewee has no obligation to sign an oath in front of a notary public, and any decision to do so must be completely voluntary, without the receipt of promises or threats of any kind.

3.4.3  
Identifying  
Interviewees

Interviewees are typically persons who may be able to identify or locate PRP and site documents. After a thorough review of collected site information, the PRP search team should develop a list of potential interviewees by name and address. Once the list is developed, the PRP search manager should prioritize the interviewees based on factors such as age or condition, plans to move out of the area, or one of the factors listed above in

subsection 3.4.1 of this manual. The PRP search manager should also review the prioritized list of interviewees in light of resources available (time, staff, and money) to conduct the interviews.

Potential interviewees include:

#### **Site Operators and Employees (Present and Past)**

- plant manager
- plant engineer
- supervisors
- equipment operators
- gate and scale operators
- plant workers
- contractors
- companies
- transporters (truck drivers)
- RCRA Subtitle D waste disposal haulers

#### **On-site Visitors**

- vendors
- inspectors
- recyclers
- customers

#### **Federal Government Officials**

- federal courts
- bankruptcy courts
- national law enforcement agencies

- Securities and Exchange Commission
- Department of Veterans Affairs
- Occupational Safety and Health Administration
- U.S. Postal Service

### **State Government Officials**

- environmental agencies
- bureau of vital statistics
- registry of motor vehicles
- secretary of state
- attorney general
- professional licensing board
- probate/superior courts
- department of public health



### **Local Witnesses**

- police officers
- firefighters
- city/county clerks and assessors
- neighbors
- building inspectors
- local government
- meter readers (water, gas, electric)
- county health department
- local library
- historical societies

3.4.4  
Conducting  
Interviews

Before conducting interviews, the interviewer should become familiar with the site and the information needed by:

- reviewing EPA background information on the site;
- obtaining names of state or local government agencies and officials involved with the site; and
- generating a list of site-specific questions.

Preparing for and conducting the interview may involve:

- preparing a general outline of discussion points;
- determining whether the interviewee is represented by an attorney;
- knowing the elements of liability and the Agency's case;
- understanding the industry in question, thereby establishing the interviewer's credibility;
- using visual aids to aid the memory of interviewees;
- preparing specific questions beforehand to ensure that all topics consistent with the PRP search strategy are covered;
- having two persons present at the interview, if possible, one serving as the note taker, the other as the primary interviewer;
- considering whether an EPA attorney should attend the interview if the interviewee's attorney is going to attend; and
- determining the interviewee's association with the site and the basis of her knowledge (e.g., first-hand information, rumors).



## Government Officials

Interviewing federal, state, or local government officials can be very productive because these officials, especially state and local officials, often have an intimate knowledge of the site. Contact with government officials is generally made by telephone or, if necessary, by letter or in person. It is generally preferable for interviews of government officials to be conducted by CIs instead of contractors as CIs are government employees also and often have more experience conducting interviews. Telephone calls will suffice in most cases. If a contractor is conducting the interview, the contractor should identify himself as an EPA contractor conducting background research on the site or have a letter of introduction from EPA if the interview is being done in person. Government officials should be asked about:

- the availability of relevant documents in the government's files;
- whether and how copies can be obtained;
- activities on the site before, during, and after the site's suspected use for waste disposal;
- PRPs associated with the site;
- site enforcement history, including any notices of violation (NOVs);
- administrative or legal actions involving the site and the PRPs, and the location of relevant documents;
- relevant state or local regulatory requirements and the location of pertinent documents such as landfill permits, building permits, and zoning ordinances;
- any news media articles about the site; and
- other people or organizations knowledgeable about the site.

Former government employees are also a potential source of information. Attempt to work out an acceptable arrangement with officials or attorneys for the relevant agency, even if the scope of the interview is limited. After obtaining the approval of the former employee's agency, the former employee should be contacted to request an interview, just as with other private parties. As always, contractors performing interviews should be required to obtain approval from the PRP search team before contacting interviewees.

### **Interview Facts and Tips**

Although the CI and other regional staff conducting interviews should take advantage of training in interview techniques available from a variety of sources, the following list contains basic tips to keep in mind when conducting interviews:

- Attempt to obtain information from more than one source.
- Obtain factual information regarding the background of the interviewee.
- Investigators do not have authority to grant anonymity to interviewees.<sup>9</sup>
- Consider hiring a private investigator who is skilled in interview techniques to conduct interviews.
- Obtain the cooperation of the interviewee; the interview may be a precursor to a deposition.
- Never lie to or deceive the interviewee.

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<sup>9</sup> Although there is no specific official who always has authority to grant anonymity, investigators have sometimes relayed requests for anonymity to their superiors. Decisions to grant such requests, however, are entirely ad hoc and depend on the specific facts of each case. Once the interviewee has been so informed, he may choose to discontinue the interview pending disposition of the request.

- Obtain background information about records. This is important for determining the credibility of the interviewee and the reliability of records. Find out who prepared the records and, how, why, when, and from what source they were prepared.
- Verify the accuracy of information from other sources (e.g., use one interview to support another). Use documents to confirm information whenever possible.
- Attempt to pin down numbers (e.g., "How many drums were there? More than 10? More than 50?").
- Conduct interviews in a businesslike manner with professional demeanor.
- Use language that is understandable to the interviewee; avoid acronyms and technical or legal jargon.
- Do not assume that you know what the interviewee is saying; clarify when in doubt.
- When arranging the interview environment, consider individual or cultural "zones of comfort" regarding seating and privacy.
- Ask the same question a variety of ways.
- Paraphrase and repeat to the interviewee to ensure a mutual understanding of what is being said.
- Let the interviewee get through his story once before challenging or asking detailed questions.
- Attempt to resolve inconsistencies in the interviewee's responses before leaving the interview.

- Conclude the interview by summarizing important information, asking if the interviewee can think of anything else that was not covered, establishing a way to keep in touch (e.g., providing a business card), and attempting to obtain any documents identified during the interview.
- Early interviews can sometimes advance the PRP search process more quickly than sending 104(e) letters to the same individuals. For example, an early interview of an owner/operator helped the PRP search team in one region better understand the business practices leading to contamination of the site. The general manager was able to show PRP search personnel how business records were kept at a treatment and storage facility and how to read those records. The region was then able to identify other PRPs and use its enhanced understanding of how the site had operated to write more specific 104(e) letters to those PRPs.

It is suggested that the interviewer indicate in her interview notes what can be substantiated and what is speculation.

#### 3.4.5

##### Interview

##### Documentation

Interviews are generally documented in one of three ways:

- written summaries;
- recorded interviews; or
- sworn statements (affidavits) confirmed by a notary, including a statement to the effect that the declarant/affiant swears under penalty of perjury that the foregoing is true and correct.

Signed statements become "sworn statements" if notarized.



A **written summary** of an interview is a document written by the interviewer that summarizes the facts presented by the interviewee. Although the summary should be written in the third person, it may be helpful to include direct quotes from the interviewee within the text, especially when the quotes may be viewed as particularly incriminating, descriptive, or inflammatory. Setting aside such language in quotes allows the information to be conveyed to the reader without bringing the interviewer's neutrality into question.

The written summary should begin with a heading that includes the interviewee's name, title, address, telephone number, and other identifying information; the date and time the interview was conducted; and the identity of others present, including the interviewer. If records were provided during the interview, describe the records in the written summary and state where they were obtained. If visual aids were used during the interview, note when and where they were used and attach copies to the report, if possible. The written summary should be prepared as soon as possible after the interview.

A **recorded interview** can only be obtained with the permission of the interviewee. When recording an interview, the interviewer should begin by recording an introduction that includes the interviewer's name, the date and time of the interview, the location, and the interviewee's name. The interviewer should ask the interviewee if he understands that the interview is being recorded, and verify that it is being done with his permission. Ask the interviewee to spell his name, provide his address, and state his date of birth. The interviewer also may ask the interviewee for his social security or driver's license number, but cannot compel the interviewee to provide them. The interviewer can proceed with the questions after concluding this introduction.

After the interview is over, verify with the interviewee that he understood that the conversation was being recorded and that it was done with his permission. The interviewer should provide a closing that includes her name, the name of the interviewee, and the date and time the interview ended. A transcription of the recorded interview serves as the written record of the conversation. After the transcription is completed, the original tape should be secured in a safe location and the location of the original tape and identity of the transcriber referenced in the transcript.

In some instances, the interviewee cannot appear in person and the interview takes place by telephone and is tape-recorded. If the interviewee agrees to the telephone conversation being taped, the telephone conversation can be taped on a recorder containing a beep tone warning. Before taped interviews are conducted over the telephone, state laws pertaining to recording telephone conversations should be thoroughly reviewed.

**Signed statements** are summaries of an interview that are written in the first person and signed by the interviewee. The interviewer should conduct the interview and take notes as usual. The written summary of the interview should be in the first person, however, as if the interviewee were writing the notes of the interview herself. The interviewer may choose to summarize the statement immediately after the interview, or return with the statement on another occasion. In either case, the interviewee will read the summary and confirm that it represents the information that she conveyed in the interview. The interviewee will be apprised of and given the opportunity to make changes to the summary before signature. She will then sign the statement.

Although a written summary or recorded interview is useful and in most instances adequate for the purpose of gathering information, a signed statement can have a higher degree of credibility. By

signing, the interviewee confirms the information contained in the statement. This does not prevent an interviewee from changing his or her mind later, but a signed statement may be used to refresh the recollection of the interviewee at a later date. Signed statements under oath may subject the signatory to perjury if the interviewee changes his or her mind. Great care must be taken therefore to ensure that any affidavit is taken voluntarily and the interviewee has an opportunity to review and edit any statement before signing the affidavit.

The same database used to organize and track files and other records may be used to store information concerning completed interviews. All interview documentation should be assigned an index number for easy retrieval.

### 3.5 Perform Title Search

A title search is a review of public records for information about past and current ownership of real property. These records may be located at county, township, or parish clerks' and recorders' offices. (Tax information is found at the assessor's office.) For PRP search purposes, the objectives of a title search include:

#### **Primary Objectives**

- identifying former and current owners and operators;
- identifying owners and operators at the time of each disposal;
- identifying potential interviewees;
- providing an accurate legal description of affected property;
- identifying any subdivision or replatting of affected property;

- identifying current encumbrances to property, including easements, covenants, restrictions, and any other matters that currently affect or may affect the title or remediation plans; and
- establishing a historical chain of title, which provides historical ownership and may include historical addresses for former owners and current parcel numbers and addresses.

### **Other Objectives**

- obtaining the deed for evidence;
- determining real estate tax amounts paid or unpaid;
- identifying abutting properties and their owners;
- supplying title search documentation;
- assisting in determining site use;
- identifying outstanding liens against the property (e.g., unreleased mortgages, judgments); providing real property parcel information that can be used to evaluate, select, and implement components of the remedy (e.g., engineering and proprietary institutional controls) and determine the various ownership interests that may be affected by them; and
- identifying oil, gas, and mineral rights.

### **Scoping a Title Search**

#### 3.5.1 Determine Ownership Interests

A title search seeks to identify 1) current owners and matters that currently affect the property (e.g., easements, mortgages, taxes), and 2) former owners and leaseholders, if leases were recorded.

The latter is commonly referred to as a “historical chain of title” search. For purposes of identifying PRPs, it is important that the title search cover the period during which contamination is suspected to have occurred up to the present. Guidelines such as going back 50 years or to the end of World War II or the first industrial use of the property can sometimes be useful, but in most cases determining the relevant period for a search is a highly site-specific exercise.

Title searches can be very expensive, especially if a site is comprised of many parcels or if there is a long and complex title history. Therefore title search activities should be tailored to each site’s specific needs. For example, if ownership information and legal descriptions are needed solely for purposes of recording deed restrictions or a lien, or for gaining access during a removal action, current title information may suffice. When a search is undertaken to identify PRPs, however, these findings usually need to be supplemented by information about former owners and leaseholders.

Title research may be conducted by an EPA employee (often a civil investigator), a contractor, a title company, or some combination of the foregoing. Regardless of who performs the title search, the researcher will need to obtain information about the site location (including the county, parish, or township), a legal description and address, parcel information, and the period the title search will cover. The “Performance Work Statement for Enforcement Support Services” (Appendix A) addresses title searches as Task 1.9. This statement may provide useful guidance whether or not contractors are used.

It is important to bear in mind that a title search consists solely of the gathering of title documentation, not legal analysis. Some contractors and title companies will provide title “opinions” for title

insurance and other purposes, but any title search Statement of Work should make it clear that such tasks are outside the scope of the title search.

A Superfund site, as described in a removal assessment report or screening inspection report, may be comprised of multiple parcels with one or more owners. Identifying the parcels that make up the site is an important step in the title search process. "Parcel" is the term typically used to refer to a legally described piece of real property. The legal description establishes the boundaries of the parcel. The property may be described in terms of metes and bounds or by section, lot number (in recorded plats), parcel number, or merely a deed reference.

The "assessor parcel number" refers to the parcel number established for the property by the local taxing authority for purposes of assessing taxes. The legal document showing the sale of the property from one party to another, generally called a deed, will usually include the legal description and perhaps the tax assessor's parcel number and the physical address of the property. In most cases, parcels are assessed separately even if they have the same owner, so a business or company may own a large tract of land consisting of several parcels for tax assessment purposes. This may be so even if the business or company received title to the land by a single deed.

In some jurisdictions, the parcel number may be referred to on the deed or even form part of the legal description of the property. In other jurisdictions, the parcel number is usually not found on the filed deed copy. In such cases, the parcel number, book and page number of the filed deed, and/or a copy of the parcel map can often be obtained from the assessor's office if the title searcher can provide the address, legal description, or owner's name. Once the book and page number of the deed are known, a copy of the

current owner's deed can be obtained from the recorder's office. Most county recorders and assessors will not go back in the records any farther than the current owner as they consider that a title search.

Additional title searches may be necessary if contamination has been found migrating off site. A title search also may be conducted for parcels adjacent to the site if, for example, EPA will need to obtain access from owners or ultimately implement institutional controls on properties that abut the site. In addition, a title search of adjacent parcels may disclose names of people familiar with past or present site activities who can be contacted and interviewed. It also may provide information about other activities in the area that may have contributed to contamination at the site.

In some cases, a professional survey may be necessary. If a property's legal description were unclear, for example, a survey might serve to clarify its boundaries. A survey also may be required to identify the portion of a site or other property the use of which is to be restricted by institutional controls if this portion is not coextensive with the boundaries as defined in title documents. In this case, a survey might be needed to establish the location of physical contamination in relation to those boundaries as it may be necessary to consider the entire extent of such contamination and impose the controls on many or all the parcels within the contaminated area, not solely on the parcel where the facility that caused the contamination is located.

The PRP search manager, in consultation with the case attorney, should establish site-specific title search requirements.

Site-specific determinations should include:

- the time period the title search is to cover;

- the area the title search is to cover (identified by site parcel legal descriptions, county tax assessor parcel numbers or street addresses, or section, range, and township numbers);
- whether certified copies of title documents and deeds are required;
- the format of the title search results summary; and
- what documents and information should be included in the title search report (e.g., current and historical parcel maps, liens and encumbrances, types of deeds and leases, legal descriptions).

### **Documentation**

Title search documentation may include:

- warranty deeds
- quitclaim deeds
- grant deeds
- indentures
- deeds of trust
- trustees' deeds
- land patents
- executors' (or administrators' or personal representatives') deeds
- sheriffs' deeds
- tax deeds
- mortgages
- easements



- liens (e.g., tax, mechanics, lis pendens, declaration of takings)
- declarations of restrictive and maintenance covenants
- leases
- mineral leases
- oil and gas leases
- parcel maps
- plat and subdivision maps
- tax statements/appraisals
- UCC Article 9 statements
- financing statements
- real estate contracts
- bills of sale
- powers of attorney
- assignments
- affidavits
- wills
- bankruptcy proceedings
- judgments

It is useful to request that the title search provide both signature and recordation dates of documents as documents are not always recorded in a timely manner and recordation dates may affect the priority of liens and encumbrances. It is also useful to obtain both current and historical parcel maps and to note any changes in parcel numbers or dimensions that have occurred.

Note that leases are not always recorded, but may still be found by researching tax records for the property. Lessees may have personal property at facilities on which they pay taxes. Personal property includes structures, portable buildings, or any other physical property that the county has the ability to tax, but does not include the land itself.

The title search may also discover information about the business form of past and present owners (e.g., partnership, corporation). Documents relating to the business form, however, are likely to be found in the office of the Secretary of State or other repository of business records, not in the office where land title records are found. (See subsections 3.6.1 through 3.6.9 and 3.6.11 of this manual for further discussion of business forms and records.)

### 3.5.2 Develop a Title "Tree" or Chronology

The next major step in the title search process is to develop a title "tree" or chronology that organizes the documents obtained through the title search. It should include a reference list of all recorded documents, including their location by book and page number. Recorded documents may include any of those listed above. Generally, the title "tree" or chronology provides a brief description of each transaction, including whether it affected all or only a portion of the site. This summary of site ownership history may include:

- the terms of the transaction (e.g., a five-year recorded lease);
- whether the transaction transferred all or only some of the rights to the land (e.g., in mining areas it is important to know whether the mineral rights were transferred with the surface rights, and what, if any, rights were retained by the transferor);

- explanations and implications of specific real property, contract, or other specialized terms such as quitclaim deed, conditional sales contract, and partial release of deed of trust and mortgage; and
- charts and maps, if considered useful (e.g., at multi-parcel sites, maps can be a particularly useful tool for organizing site, contamination, ownership/title, and related information).

Upon receipt of the title search, the PRP search manager should review title search work products to determine whether the correct property or properties (i.e., the various parcels that may make up a site) were researched. Making this determination is often difficult and uncertain due to the technical terminology used in property descriptions and the sometimes extensive subdivision and merger that properties undergo. The best practice, whether the title search is performed by contractors or in house, is to use GIS mapping software to plot the legal descriptions obtained from the title documents against a current county parcel map that identifies the parcels of interest to EPA. This plot can be compared with the parcel map to ensure that the legal descriptions match the property of interest.

The PRP search manager also should review title search work products to determine whether:

- the correct property or properties (i.e., the various parcels that may make up a site) were researched;
- the correct documents were provided;
- any deeds or other title documents are missing, incomplete, or unreadable;

- the property descriptions in the documents relate to site property;
- the chain of title is continuous (i.e., no gaps appear in the chain); and
- leases and deeds were reviewed for restrictive language concerning ground water or land use.

A title search is complete when the ownership history is complete (i.e., it contains no gaps between owners or provides an explanation of any gaps). A title search report should always end with a statement such as, "As of [date] there had been no further conveyances."

### 3.5.3 Additional Uses for Title Documents

As noted above, deeds and leases may contain language restricting ground water, surface water, or other land uses. Title documents may also contain information about installation of sanitary sewers, storm drains, historical features, and other easements that may become important later in the investigation. Careful examination of grantor/grantee information in these documents may also help explain relationships within privately held companies, such as changes in officer positions over time.

### 3.5.4 Updating Title Information

Response actions often involve the use of institutional controls and, in turn, often require that environmental covenants or similar "deed restrictions" be recorded against the property that comprises the site. When institutional controls are being contemplated, the title search can be brought up to date to identify current encumbrances that might affect environmental covenants. It also may be useful to consult U.S. Army Corps of Engineers historical records on rivers and creeks as Corps projects can effect changes in property boundaries that are often not documented in local property records.

It is important to bear in mind that institutional controls cannot be placed on property without the written consent of the property owner, whether the owner is a PRP or not.

### 3.6 Business Status and Financial Research

- CERCLA Section 107(a) identifies four classes of "persons" who may be liable for costs incurred by the United States, a state, or an Indian tribe, and who may be liable to perform future response actions at a site. (See discussion in Section 1.2 of this manual.)

#### 3.6.1 Introduction

- Individuals and a variety of commercial and governmental entities may qualify as a person because of their own acts and omissions or because of the acts or omissions of others. (See CERCLA Section 101(21) for the definition of "person.")
- The PRP search should determine, for each PRP identified, whether the person still exists, if the person is still viable, and the exact name used by the person today.
- In many cases, records gathered, such as manifests or trip tickets, may identify a PRP as the PRP was known years ago. During the time that has elapsed since the records were created, the name of the entity may have changed and a different business may be operating under the same name. Therefore, it is crucial to trace each person from the time of liability to the present so that EPA can correctly identify who is liable to perform or pay for the cleanup.
- For individuals, a portion of this research is completed by performing skip tracing and asset searches. (Skip tracing is the process of locating someone who has gone missing whether deliberately or not.)
- Liability may extend beyond the assets and the earnings of the person, depending on the type of person (e.g., sole proprietor, partnership, corporation) and as provided by the laws of the state in which the entity operates.

- Liability of a person may continue long after the original person or business has ceased to exist. As a result, more than one existing person may be liable.

3.6.2  
Forms of  
Business  
Organization

The following is a general introduction to the forms in which a business may be organized. It includes a definition of each form, a brief description of the formalities required to begin the form, and a simplified description of who is liable for the acts, omissions, and debts of a business organized in that form. Formation and liability of a business or commercial entity are governed primarily by the law of the state in which the entity operates or is headquartered. Identifying the specific business entity (or form) is necessary in order to accurately identify the PRP, as well as collaterally liable parties.

[Note: This section presents a general overview of the formation and liability of businesses and may not be applicable to every case. It is recommended that you consult with the appropriate attorney in your region when assessing the potential liability of PRPs associated with a particular site.]

3.6.3  
Person

In order to understand the significance of various business forms as they relate to the CERCLA liability scheme, it is helpful to review the definition of "person" in the statute. CERCLA Section 101(22) defines a "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, state, municipality, commission, political subdivision of a state, or any interstate body."

As defined, each person can perform commercial acts, such as opening bank accounts, buying or leasing property, selling merchandise, borrowing money, and providing services. As a

consequence of these commercial acts, persons can be liable, under both civil and criminal statutes, for the consequences of their acts or failure to act. For instance, a partnership can be held liable for damages caused by an employee of the partnership, performing an act within the scope of his employment, who injures another person. In civil actions, courts may require a partnership to pay damages or perform other remedies; in criminal actions, the individual partners may be fined or imprisoned.

3.6.4  
Business  
Organization

The organization of a business, both in terms of the formalities of creating a business and the structure or form of the business, is governed primarily by state law. Almost all states have adopted all or parts of several model laws, such as the Uniform Commercial Code (UCC), the Model Business Corporation Act, and the Uniform Partnership Act. Each state, however, has the authority to codify its own requirements for those who wish to start a business. The three most common business organizations are sole proprietorships, partnerships, corporations.

3.6.5  
Sole  
Proprietorships

**Definition:** Businesses owned and operated by an individual (or a married couple). The business is regarded as an extension of the person, with no legal or commercial distinction.

**Taxation:** The profits and losses of the sole proprietorship are reported directly on the individual's tax return and are normally recorded on a Schedule C, which is attached to the individual income tax return, Form 1040.

**Ownership and Liability:** All the assets of the business are owned by the individual, the individual controls the activities and direction of the business, and the individual is liable for all the debts and obligations of the business. Accordingly, any asset owned solely by

the individual could be reached to satisfy any debt of the sole proprietorship. For assets owned by the individual jointly with another individual(s), it may be necessary to research the laws of the state where the asset is located or the individual resides. This is especially true for non-business assets owned jointly with a spouse.

**Registration:** A sole proprietorship is not generally required to formally register to establish a business but may be regulated by a variety of state and local agencies, often for reasons related to health and safety, professional standards, or tax revenue. Accordingly, a sole proprietor may need to file appropriate documents in order to use a fictitious business name or to obtain a business license.

3.6.6  
Partnerships:  
General  
Partnerships and  
Limited  
Partnerships

**Definition:** Partnerships are associations of two or more persons to carry on a business for profit as co-owners. Partners can be people, other partnerships, corporations, trusts, or any other person as defined under state law. There are generally two types of partnership, general and limited.

**Taxation:** Even though the partnership itself is not required to pay income tax, the partnership is required to file a return of partnership income (Federal Form 1065). Attached to the partnership return is Form K-1, which allocates all income or loss of the partnership among the partners. Each partner then reports its portion of the profit or loss on its own income tax return.

**Ownership and Liability:** Partnership property is owned by the partnership, and may not be used to directly satisfy the personal debts or obligations of the partners. Under specific circumstances, however, a creditor may move to dissolve the partnership or sell the debtor partner's interest to resolve the personal debts of the



partner. Although debts of a partner may not directly attach to the assets of a partnership, the debts of the partnership may attach directly to the assets of general partners.

3.6.6.A  
Elements  
Specific to a  
General  
Partnership

Unless there is an appropriate filing in the state where the business activity occurs to create some type of person such as a limited partnership or corporation, any group of two or more persons (other than a married couple) that is formed for a common business purpose normally falls into the category of a general partnership. In a general partnership all partners are general partners (i.e., they participate in the management and operation of the business). Each general partner may bind or legally obligate the partnership. Each general partner is entitled to full information and disclosure about partnership matters and business. Each general partner has a fiduciary relationship to the others; that is, each owes the others his best efforts to make the partnership as successful as possible. Typically, a general partnership is formed by a written agreement that may or may not be recorded with the county or the state in which the partnership does business. A general partnership may also be formed by oral agreement.

**Ownership and Liability:** Each partner is personally liable for all debts and obligations of the partnership. Accordingly, the assets of each general partner may potentially be reached by a creditor. Assets of the partnership, however, belong to the partnership, and may not be used to satisfy the personal debts of partners.

**Registration:** A general partnership usually does not require any formal registration to establish the business, but may be regulated by a variety of state and local agencies, often for purposes related to health and safety, professional standards, or tax revenue.

Accordingly, a partnership may need to file appropriate documents in order to acquire a business name or obtain a business license.

3.6.6.B  
Elements  
Specific to a  
Limited  
Partnership

**Definition:** A limited partnership is a business association of at least two legal persons, one or more of whom are general or managing partners, and the rest of whom are limited partners. Limited partners invest capital in the partnership, but do not participate in its management. They are investors, much like shareholders in a corporation, entitled to distributions of profits, but without any authority to direct or run the business (no control). Limited partners may sell their interest without dissolving the partnership and without the consent of the other partners. Their withdrawal or death does not dissolve the partnership. A statement or agreement of limited partnership must be in writing and filed, either with the county in which the partnership has its principal office or with the secretary of state's office, or both. Failure to file the appropriate papers and abide by the appropriate state regulations for the state in which the business activity takes place, may affect the limitation of liability that generally protects the limited partners. As in general partnerships, general partners have a fiduciary responsibility to the limited partners to put forth their best efforts toward the success of the partnership.

**Ownership and Liability:** A general partner has unlimited liability for the debts and obligations of the limited partnership. A limited partner's liability is normally limited to the amount of his investment.

**Registration:** A statement or certificate of limited partnership must be filed with the secretary of state or equivalent and, when required by specific states, with the county in which the partnership has its principal place of business. The statement or certificate generally identifies the partnership name, partnership address, general partners, agent for service of process, and term or duration of partnership. Partnership interests or percentages may also be identified.

### 3.6.7

#### Corporations



Most states have adopted the Model Business Corporation Act or the Revised Model Business Corporation Act, which lend uniformity to requirements for incorporation. Nearly every state, however, has adopted different requirements for documents that need to be filed, the jurisdiction for filing those documents, the amount of disclosure required, and regulations governing the sale of stock, among other items. These differences make it necessary to become familiar with the requirements of each state.

**Definition:** The *Corpus Juris Secundum* (18 C.J.S. § 2) explains that a corporation is an artificial entity created by the law of its state of incorporation. A corporation is made up of a body of individuals (shareholders) “united as a single separate entity under a common name” with a perpetual existence. For legal purposes, a corporation’s status under the law is that of an individual, even though one corporation may be an affiliate of another corporation or corporations, such as a parent or subsidiary.

Although an artificial person, a corporation “is entitled to rights under the law, and must enforce its own rights and privileges.”

The “essential attribute of a corporation is the capacity to exist and to act, within the powers granted, as a legal entity” separate and distinct from its shareholders.

The characteristics of a corporation generally include:

- the capacity of perpetual existence;
- the power to sue or be sued in the corporation's name;
- the ability to purchase, own, and sell property and real estate;
- the ability to engage in specified business as set forth in its articles of incorporation; and
- any other characteristics and powers as provided by statute.

“The law of the state of incorporation,” however, “determines the status, nature and functions of a corporation.”

**Taxation:** Unless the corporation is a Chapter S corporation, it files its own tax return and is responsible for paying the income tax on its earnings. Any divestiture of assets from the corporation to the shareholders is identified as a dividend and this dividend is taxed on the shareholders' tax returns. (See p. 158 for a discussion of Chapter S corporations.)

**Ownership and Liability:** Shareholders own stock in the corporation. The corporation in turn owns the assets of the corporation. Shareholders, officers, and directors are generally not liable for the debts of the corporation. Shareholders are at risk to the extent of their investment in the corporation.

**Regulation:** Corporations must be incorporated under state law and must comply with regulations applicable in that state in order to maintain their standing as legal persons. Corporations must also register in the states in which they conduct business. In some states, a corporation that has had its corporate charter revoked no longer operates as a corporate person and may instead be operating as some other type of entity (e.g., partnership, sole proprietorship). In addition, corporations seeking to sell stock or other securities to the general public are regulated by the Securities and Exchange Commission (SEC), and must provide substantial disclosure to the public, as noted in subsection 3.6.11.C of this manual.

3.6.7.A  
Elements Unique  
to Corporations

- **Continuity.** A corporation is established in perpetuity, and can continue to operate even in the event of death, disability, or withdrawal by shareholders, directors, or officers.



- **Transferability of equity interest.** Equity interest in a corporation is evidenced by shares of stock, which can generally be freely sold or transferred, subject to applicable regulations.
- **Constitutional rights similar to, but more restricted than, those of a natural person.** Constitutional rights granted to corporations include protection from unreasonable search and seizure, freedom of speech, and the right to trial by jury. Constitutional rights not granted to corporations include the privilege against self-incrimination and privacy rights.
- **Separate existence as a legal person.** A corporation exists as a person at law, separate and distinct from its shareholders, directors, officers, and employees.
- **Claims of creditors.** When a corporation is dissolved or winds up its affairs, assets of the corporation must be used to satisfy creditors first. Creditors must be notified and given an opportunity to present a claim for payment. After all creditors are paid, then stockholders are entitled to a pro rata distribution of remaining assets, if any.

### 3.6.7.B

#### Classification of Corporations

#### Public vs. Private Corporations

In a public corporation, stocks or shares are listed on a stock exchange such as the New York Stock Exchange, the American Stock Exchange, or the NASDAQ, and are available for purchase or sale either directly from the corporation or via a stock brokerage firm such as Charles Schwab, Merrill Lynch, or Morgan Stanley. In order to offer securities for sale to the general public, a corporation must provide a very high level of disclosure, including disclosure of specified financial statements, matters that are material to the economic existence or well-being of the business, the identity of

the corporation's major shareholders, and the identity of entities seeking to acquire major stock interests. Such disclosures are filed with the SEC and are required as long as the corporation remains publicly traded.

In privately held corporations, stock or shares are sold or issued only to selected private parties, and are not offered or sold publicly. Shares are often held by one person, a family, or those who incorporate the business, and shareholders are often directors or officers of the corporation as well. Such a corporation is generally known as a "close" or "closely held" corporation.

### **C vs. S Corporations**

In C corporations, both the corporation and its shareholders are subject to income tax. The corporation is taxed on its net income, and shareholders must report any dividends received from the corporation as well as gains (or losses) on the sale of stock. There are no limits to the number of shareholders in C corporations, and C corporations may be either publicly or privately held.

An S corporation is a corporation that elects to be taxed like a partnership, such that the income of the corporation is allocated or passed through to the shareholders. S corporations avoid the double taxation of C corporations, since only the shareholders report taxable income in the form of dividends or distributions. S corporations are limited by law to 35 or fewer shareholders and are normally privately held corporations.

### **Domestic vs. Foreign and Alien Corporations**

A corporation is a domestic corporation in the state in which it incorporates. It is a foreign corporation in all other states in which it qualifies to do business. An alien corporation is a corporation

qualified to do business in a state in this country, but incorporated in a different country, such as Great Britain or the Netherlands. Consult OGC and regional staff attorneys regarding the feasibility of imposing CERCLA liability on foreign corporations, alien corporations, or holding companies owned or capitalized by alien corporations.

### **Profit vs. Non-Profit Corporations**

Profit corporations are established as business enterprises whose primary goal is to produce goods or services that may be sold for more than it costs to make or furnish them. Even though a for-profit corporation may not show a "profit," particularly on its tax returns, it remains a for-profit corporation by virtue of the form in which it was incorporated. Non-profit corporations are established to conduct a variety of enterprises, but are distinguished from for-profit corporations in that dividends are never distributed to stockholders. In general, non-profits do not even issue stock. Non-profit corporations often manage condominiums or common ownership associations, foundations, and other beneficial enterprises.

#### 3.6.7.C

#### Evolution of Corporations

### **Name Changes**

All corporations must be authorized by a state in order to conduct business in that state, and are granted the exclusive right to use their corporate names as part of that authorization. As long as a corporation abides by the appropriate state regulations, such as filing annual reports and paying applicable state taxes and fees, it maintains exclusive rights to this corporate name. The practical effect is that there is only one corporation at a time within a state using precisely the same name (i.e., there may be only one General Electric Corporation in a state operating at any one time).

Sometimes a corporation decides to change its name or merges with another corporation and as a result of the merger assumes a new corporate name. Upon assuming the new corporate name, the old corporate name may become available for use by another business. The corporate name may also become available if the corporate charter is revoked, the corporation is dissolved, or the corporate authorization lapses due to inactivity or failure to file an annual report.

As a result of name changes, more than one corporation may at different times conduct business under the same corporate name. Also, because corporations must be authorized to conduct business on a state-by-state basis, it is possible for distinct, unrelated companies with the same corporate name to operate in different states. Once a corporation has been identified, it is necessary to confirm its name and the state of incorporation where Superfund liability arose. Once the corporation is correctly identified, it is necessary to determine its current status.

A corporation cannot escape liability simply by changing its name. If investigation reveals that ABC Corporation was incorporated in 1970 and sent hazardous substances to a Superfund site in 1975, it is still liable today even if it changed its name to XYZ Corporation in 1995.

### **Mergers**

A merger is a combination of two or more corporations into one surviving corporation. As a general rule, the liabilities of the combining corporations are inherited by the surviving corporation.

Accordingly, once evidence of a corporation's liability has been established, all that is needed to link the liability case to the company that survived the merger is documentation from the state



that confirms the merger. Examples of such documentation may include:

- articles of incorporation and amendments;
- resolutions of the board of directors;
- merger agreements; and
- proxy statements.

### **Asset Sales**

A corporation may sell part of its business operations, facilities, or other assets (e.g., real property, equipment) to another corporation, but it cannot avoid CERCLA liability simply by divesting itself of an asset. For example, a corporation may sell a facility where hazardous substances were deposited, but doing so will not relieve it of liability under CERCLA Section 107(a)(2) if it owned the facility at the time of disposal. Therefore the PRP search should continue to investigate the selling corporation with particular attention to the proceeds of the asset sale. (See subsection 3.6.10.F of this manual for exceptions to this general rule.)

#### 3.6.7.D Sale of Stock in a Corporation

Ownership of stock in a corporation may change over time. Exchange of stock in and of itself does not change the corporate person. Accordingly, if the only change in a corporation is the ownership of its stock, then there is no change in the identity of the liable party.

If the facts developed during a PRP search identify a situation where either all or a majority of the stock of a liable corporation is sold to a different "person," it may be appropriate to conduct a

more thorough investigation to confirm that the exchange of stock was the only change that took place. In some circumstances, ownership of all or a majority of the stock of a corporation by one person may signal the existence of additional PRPs. These issues are discussed in subsection 3.6.10 of this manual.

### 3.6.8 Indemnification Agreements

An indemnification agreement is a contract between two or more parties in which one party agrees to be obligated to pay for or reimburse another party upon the occurrence of specific events as set forth in the contract. A PRP may seek to transfer its liability to another party through such an indemnification agreement. Since the United States is not typically a party to such agreements, it is not bound by their terms and conditions. Moreover, resolution of disputes and alleged failures to perform arising from such contracts requires recourse to a court of competent jurisdiction. In some instances, it may turn out that the indemnifying party is incapable of fulfilling its obligations due to a lack of financial resources.

When a PRP search identifies the existence of an indemnification agreement, ORC and possibly DOJ should be consulted to determine how best to proceed. Generally, it is the responsibility of the parties to the indemnification agreement to assure compliance with the agreement. Although an indemnifying party may agree to perform or pay for work, it is important that the United States retain enforcement authority over the PRP who is being indemnified. Under appropriate circumstances, EPA may seek an agreement from the indemnifying party not to contest its obligation to indemnify the PRP. If the indemnifying party agrees, it is essential that its agreement not be obtained in a way that inadvertently effects a waiver of the United States' enforcement authority over the PRP who is being indemnified.

### 3.6.9

#### Other Entities

#### Trusts

Trusts are legal creations, often created to hold property so that assets may be transferred to another person without expensive and lengthy probate court proceedings, or to avoid inheritance taxes. There are typically three parties identified in a trust agreement. The grantor or trustor bequeaths or transfers property to the trust. The trustee is the manager or executive for the trust, with an obligation to follow the trust documents in managing and distributing trust assets. The beneficiary or beneficiaries are the persons who are to receive or inherit the property. One type of trust, often known as a spendthrift trust, provides for the distribution of property or income according to a fixed schedule or at the direction of a trustee to one or more beneficiaries in order to prevent the beneficiary from squandering it all at once. Trusts may also be established to provide for the long-term care of an incompetent or disabled individual, particularly when the beneficiary is younger than the grantor. Trusts are created pursuant to state law, and the forms, purposes, and limitations of trusts vary from state to state. Because a trust may have legal standing as a "person" under state law, it may be liable as a PRP under CERCLA. It is therefore essential to understand the law of trusts of the state in which the trust was created and of the state in which the assets of the trust are located.

A trust is created by a trust document or instrument, which may or may not be recorded, but must be in writing. The document identifies the parties and describes the property, which may be personal or real property, that is to become the trust estate. The document also lists the duties of the trustee, provides for successor trustees, and enumerates the conditions under which trust assets may be distributed to the beneficiaries. Some trusts are irrevocable, which means that the property is transferred without the possibility of the grantor changing her mind. Other trusts are revocable, which means that the grantor retains the right to revoke

the trust and recover the trust property. In cases where a PRP grantor continues to enjoy the use or benefit of the trust property, EPA may conclude that the trust is a sham and take legal action to void or set aside the transfer of the trust property.

Trusts are required to file federal income tax returns (Form 1041) annually to report income, expenses, distributions of trust property, and any tax liability.

### **Holding Companies**

A holding company typically does nothing more than own the stock of corporations that actually create goods or provide services.

### **Shell Corporations**

A shell corporation is a corporation that exists on paper, but has no real existence. Often a shell corporation may be a holding company or the shell may exist only to preserve a corporate name, public image, or intangible right or property. The officers, directors, and shareholders of a shell corporation may be difficult to identify, and may not actually conduct any business.

### **Joint Ventures**

In many respects, a joint venture is indistinguishable from a general partnership. It is an association of two or more entities, generally with a finite or defined purpose. An example of a joint venture is an association of two construction companies who "jointly" bid on and construct a large building that would be beyond the capacity of either company separately. Joint venture agreements may be, but do not have to be, written. The primary difference between a joint venture and a partnership is that the joint venture is generally formed for the duration of a project, and

then disbanded, while the life of a partnership is governed by the time specified in the partnership agreement or the desires of the partners.

### **Municipalities**

Counties, cities, and municipalities are creations and subdivisions of state governments, established by charter or other act of the state legislature. They are legal entities, much like corporations, but have the power to require investments by the public through taxes in addition to offering voluntary investment opportunities through municipal bonds.

### **Limited Liability Companies**

Many states have adopted provisions under either their Uniform Commercial Code or Business Corporation Act to allow for the creation of a business entity known as a "limited liability company." The member(s) or company enjoy(s) the limited liability protection generally afforded to shareholders of corporations. Requirements include public notice or registration of the entity as a limited liability company and, in some cases, use of the term limited liability in the company name.

#### 3.6.10 Additional Liability Theories

As a PRP search progresses, information gathered may suggest that the investigation be expanded to include additional "persons." This section supplements the discussion of CERCLA liability in Chapter 1 by outlining theories of extended potential liability under CERCLA. This information is intended to assist regional attorneys and others participating in or performing the PRP search in developing appropriate liability recommendations. Because the interpretation and validity of these liability theories may be viewed or applied differently in each federal judicial district and from state

to state, it is strongly recommended that ORC and DOJ be consulted to ascertain the current applicable judicial interpretation given the facts of each specific case.

3.6.10.A  
Direct Liability of  
a Person as an  
Operator or as a  
Person Who  
Arranged for  
Disposal or  
Treatment of  
Hazardous  
Substances

Subject to the appropriate legal defenses and exemptions outlined in subsections 1.2.5 and 1.2.6 of this manual, the owner of real property constituting a Superfund site is a responsible party. CERCLA, however, does not limit liability solely to the owner of the real property. Instead, as discussed in subsection 1.2.4 of this manual, liability may also be imposed upon operators and on "persons" who arranged for treatment or disposal of hazardous substances (generators) and transporters. As the PRP search proceeds, many additional "persons" are often identified who played more or less extensive roles in directing or managing the activities of the business entities whose acts in turn created the hazardous conditions found at the Superfund site. Based on case-specific information developed during the PRP search, the Agency may establish that the actions and involvement of these "persons" were so extensive that liability should be imposed upon them, notwithstanding such traditional shields against liability as the corporate shield or a person's status as a limited partner. Federal courts have held that these actively involved persons may be named PRPs based upon the definition of "person" in CERCLA Sections 101(21) and 107(a) under a liability theory known as direct liability.

3.6.10.B  
Corporate  
Officers,  
Directors,  
Shareholders, or  
Employees

In addition to holding a corporation liable, the United States has brought CERCLA actions against officers, directors, employees, or shareholders of corporations. In general, corporate officers, directors, shareholders, and employees have limited individual liability for unlawful or tortious acts of a corporation. Courts, however, have applied by analogy the standard of direct CERCLA liability established in *United States v. Bestfoods* (discussed in

subparagraph 3.6.10.C of this manual) to corporate officers, directors, shareholders, and employees. Courts have ruled that an officer, director, or shareholder may be "directly liable," (i.e., personally liable) under CERCLA given either of the following fact patterns:

- A corporate officer, employee, shareholder, or director participated personally in the activity leading to the release of hazardous substances; or
- A corporate officer, employee, shareholder, or director exercised direct control over environmental management of the facility, including waste handling or disposal operations.

Direct liability is also imposed when the actions of an officer, employee, shareholder, or director of a corporation exceed the normal limits and accepted behavior, practices, or duties of his position. Evidence that shows that an individual's activities exceeded the scope of his normal duties and responsibilities with respect to site operations, particularly in directing activities that relate to the disposal of hazardous substances, is crucial to a finding of direct liability. For example, a treasurer of a corporation is usually given responsibility for the corporation's financial affairs, as set forth in the articles of incorporation or the corporate bylaws. If the treasurer directs corporate employees to drain liquid waste containing trichloroethylene (TCE) into a disposal trench, he may be held directly liable as an operator just as the corporation is liable. Direct liability may also apply to related or affiliated corporations.

3.6.10.C  
Liability of Parent  
and Affiliated  
Corporations

In *United States v. Bestfoods*, 524 U.S. 51 (1998), the U.S. Supreme Court established a standard of direct liability under CERCLA Section 107(a)(2) for parent corporations as operators of facilities owned or operated by subsidiary corporations. In

*Bestfoods*, the court held that a parent corporation that jointly operates or exercises control over the environmental operations of its subsidiary's facility may be held directly liable as an operator of the facility under CERCLA Section 107(a)(2). The court also stated that the question is not whether the parent operated the subsidiary, but whether the parent directly operated the subsidiary's facility. This may be demonstrated by showing that the parent corporation managed, directed, or conducted operations specifically related to the release or disposal of hazardous substances, or made decisions affecting compliance with environmental regulations at the facility. The court also stated that a parent's control over a subsidiary, although not giving rise to direct liability, if extensive enough, may establish indirect liability. (See the discussion below on piercing the corporate veil.)

The court in *Bestfoods* also held that a parent corporation cannot be held directly liable merely because directors and officers hold positions in both the parent and the subsidiary corporations. To impose direct liability in situations with common officers or directors, it must also be shown that the officers and directors were acting in a manner (1) advantageous to the parent; and (2) obviously contrary to the interests of the subsidiary. The direct liability of a parent corporation arising from the actions of shared officers or directors may only be imposed after an analysis of the specific facts of each case using traditional corporate law tests or principles. As a fundamental part of this analysis, the Court emphasized the importance of corporate decisions that are not made in the best interests of the subsidiary.

3.6.10.D  
Elements of  
Direct Liability

In *Bestfoods*, the court held that a parent corporation that jointly operates or exercises control over the environmental operations of its subsidiary's facility may be held directly liable as an operator of the facility under CERCLA Section 107(a)(2). The court also stated



that the question is not whether the parent operated the subsidiary, but whether the parent directly operated the subsidiary's facility. This may be demonstrated by showing that the parent corporation managed, directed, or conducted operations specifically related to the release or disposal of hazardous substances, or made decisions affecting compliance with environmental regulations at the facility (see *United States v. Kayser-Roth Corp.*, 272 F.3rd 89 (1st Cir. 2001)), *Kayser's* control over its subsidiary's environmental operations at the facility satisfied *Bestfoods'* requirements for direct operator liability by a parent corporation ).

In a potential direct liability case, documentation should include information reflecting specific actions taken and directions and orders issued by a potentially liable person. Documentation should also show the extent and nature of the involvement of the director, parent corporation, shareholder, or employee in the corporation, paying particular attention to decisions or activities that resulted in or contributed to the release of hazardous substances. A comparison of a person's job description and duties with the duties and activities actually performed as demonstrated by documents and testimony can be particularly helpful and telling.

Documentation relevant to supporting a direct liability case includes:

- corporate minutes;
- records of stock;
- corporate checks, signature cards, and bank statements;
- leases, rental agreements, purchase agreements, and all other documents reflecting transactions between the corporation and a related or affiliated party;
- list of officers (shared officers?);

- list of directors (shared directors?);
- shareholders (does one person or entity own a controlling interest?);
- affiliation schedules;
- corporate financial statements;
- statements of employees or other knowledgeable individuals;
- position descriptions;
- employment agreements; and
- travel records.

### 3.6.10.E Piercing the Corporate Veil

Piercing the corporate veil is a legal doctrine through which a corporation's shareholders (and also officers, directors, or employees), who generally are shielded from liability for the corporation's activities, can be held personally liable for those activities. This is in contrast to traditional corporate liability schemes, in which shareholder liability is limited to the money a shareholder has invested.

In *Bestfoods*, the Supreme Court left open the question (federal courts are divided on this issue) whether state law or federal common law should apply to veil-piercing claims in actions to enforce indirect liability under CERCLA.<sup>10</sup> Most courts (federal and state) apply a multi-pronged test to determine if a shareholder is

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<sup>10</sup> Because the federal courts of appeals are divided on this issue, it is necessary to determine what the controlling law is for the circuit in which a specific case may be litigated, because state veil-piercing requirements are generally stricter than federal common law requirements.

liable for the wrongdoing of the corporation with which he is affiliated. Factors often considered by courts include whether:

- control over the corporation by those sought to be held liable was so complete that the corporation had no separate mind, will, or existence of its own;
- control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity; or
- injury or unjust loss resulted to the plaintiff from such control and wrongdoing.

Generally, the doctrine of piercing the corporate veil is invoked to prevent fraud or achieve equity, particularly in the treatment of creditors of the corporation. Accordingly, as a prerequisite to piercing the corporate veil, courts generally require the corporate entity to demonstrate that it is unable to pay its liabilities or debts, whether these are Superfund cleanup costs, salaries, debts to suppliers, or taxes. (*See Carter-Jones Lumber Co. v. LTV Steel Co.*, 237 F.3d 745 (6th Cir. 2001), where the court found that a shareholder's mere control of a corporation may be sufficient to establish indirect liability and joint liability as an arranger.)

In order to pierce the corporate veil successfully, the party seeking to pierce the veil has the burden of showing why the veil should be pierced and what injustice, fraud, inequity, or other detriment will occur if the veil is not pierced (e.g., the taxpayers will be required to pay for the costs of a CERCLA cleanup instead of the wrongdoers who are trying to hide behind a corporate shield). The type and amount of evidence needed to pierce a corporate veil so as to impose CERCLA liability on corporate officers, directors, shareholders, or employees is not the same in all federal or state courts. The law governing the standards to be applied varies;

sometimes it is state-specific and sometimes it may be federal common law. It is very important, therefore, to consult ORC and, when appropriate, DOJ as soon as information is obtained suggesting that piercing the corporate veil might be warranted or required.

Corporate acts or omissions that support piercing the corporate veil include:

- failure to observe corporate formalities, including failure to;
  - properly incorporate (articles of incorporation) or file appropriate documents with the state,
  - hold meetings of the board of directors,
  - hold meetings of stockholders,
  - issue or account for stock, and
  - approve or ratify major actions of officers,
- failure to treat corporate property as the corporation's property;
- failure to properly capitalize the corporation;
- commingling of assets (e.g., combining corporate funds with personal funds); and
- related-party transactions that are not at arm's length or do not involve reasonably adequate consideration.

The creditor must show that the corporation is a sham by accumulating as much evidence as possible to support the indicators listed above. Documentation that may be important includes:

- corporate minutes (including evidence that such minutes were not kept);
- records of stock;
- corporate checks, signature cards, and bank statements;
- leases, rental agreements, purchase agreements, and all other documents reflecting transactions between the corporation and a related or affiliated party;
- lists of officers (shared officers?);
- lists of directors (shared directors?);
- shareholders (does one person or entity own a controlling interest?);
- affiliation schedules;
- corporation financial statements; and
- statements of employees or other knowledgeable individuals.

#### 3.6.10.F Successor Liability

As a general rule, a person who purchases some or even all of the assets of a business from another person during the course of an arm's-length transaction is not liable for the debts or other obligations of the seller. There are exceptions to this rule, however, depending on the facts and circumstances of the sale and on relevant case law in the judicial circuit in which jurisdiction lies. Circumstances under which liability may pass to the purchaser of business assets include:

- The buyer expressly or impliedly agrees to assume the seller's liabilities. Because EPA was not a party to this transaction or contract, it is essential to seek advice from regional counsel to determine whether EPA may

independently move against the buyer to enforce such an agreement or if it is necessary to proceed against the seller to enforce this portion of the contract.

- The transaction (asset sale) is entered into fraudulently in order to escape liability.
- The transaction amounts to a de facto merger or consolidation. As discussed in subsection 3.6.7 of this manual, when there is a formal merger between two or more corporations,<sup>11</sup> liabilities of the merging corporations are automatically assumed by the surviving corporation. A de facto merger describes an asset purchase agreement that, for all practical purposes, amounts to a merger. Most states have standards that define a de facto merger. These standards typically include the following elements:
  - there is a common relationship between the buyer and seller;
  - the buyer acquires essentially all the assets of the seller; and
  - the seller is dissolved soon after the sale.
- The buyer is a mere or "substantial" continuation of the seller. Factors that some courts have relied upon in identifying "mere continuation" asset purchases include:
  - retention of the same employees;
  - retention of the same supervisory personnel;
  - use of the same production facilities in the same location;
  - production of the same product;

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<sup>11</sup> Whether a merger has occurred can often be determined by reviewing 10-Ks and other federal and state filings.

- use of the same name;
- continuity of assets (i.e., the buyer uses the same machinery, sells to the same customers, buys from the same suppliers);
- continuity of general business operations;
- holding out as a successor to the former enterprise; and
- holding out as identical to the former enterprise (e.g., using the same name, letterhead, business cards).

Documentation that may help determine whether the standards for successor liability enumerated above have been satisfied includes:

- the asset purchase agreement with all attachments, schedules, or exhibits;
- corporate resolutions;
- employment contracts;
- customer lists;
- supplier lists;
- invoices and stationery;
- advertising;
- bulk transfer notices (notices mailed to creditors of the seller and published in newspapers of general circulation in the area where the sale occurred);
- business escrow documents reflecting the asset sale; and
- property appraisals.

Key points to remember when reviewing and evaluating asset purchase agreements include:

- The person selling the business assets is normally referred to as a predecessor. The court may require that EPA first look to the remaining assets of the predecessor to satisfy a liability before EPA is allowed to look to the assets of the successor. Accordingly, the PRP search must identify the current operational status, viability, and ability to pay of the predecessor. Some states require, as a precondition to imposing successor liability, a demonstration that the predecessor is insolvent or defunct.
- Because EPA is not normally a party to indemnification agreements or an indemnification clause within asset purchase agreements, EPA generally is not bound by the terms and conditions of indemnification agreements. Normally, only the parties to an indemnification agreement can enforce its terms. Accordingly, providing EPA a copy of an indemnification agreement may not relieve a party of CERCLA liability.
- In attempting to evaluate the potential successor liability of a purchaser, the objective is to gather evidence of as many of the liability factors discussed above as possible as no one of them is decisive. (If the issue went to trial, the court would determine the outcome by the “preponderance of evidence.”)
- Successor liability is a continually evolving field of law, and federal courts are divided on whether state law or federal common law should apply to determine successor liability under CERCLA. (Sometimes it is beneficial to see if evidence exists that meets both criteria.) Consequently, it is critical to consult with ORC and DOJ when making a liability determination based on successor liability.



3.6.11  
Financial  
Research

Effective financial research starts with a knowledge of the regulatory requirements and record-keeping policies for the location where the transaction took place. On-line databases and credit reporting services are very useful aids to understanding prior events, but the information obtained using these services may not be sufficiently reliable to be used as evidence. This is especially true when researching the sale and acquisition of companies. The various sources of financial information about businesses are discussed below.

3.6.11.A  
Corporation and  
Partnership  
Filings Required  
by States

Required business filings differ from state to state, both in terms of what information must be provided and where documents must be filed. In many states, corporations and limited partnerships are required to file documents with the secretary of state in order to defend any action in a state court. Accordingly, almost all corporations and partnerships have filed the requisite documents.

- For corporations, required filings include the corporate registration, which contains a list of officers and directors, articles of incorporation, and all amendments of the articles.
- For partnerships, required filings include the partnership agreement, which contains a list of all partners and their interests in the partnership, and may include a list of partnership property.
- Documents evidencing corporate name changes and mergers are also filed with state agencies.

When reviewing corporate filings, make sure that the available information is consistent with the span of time of potential liability. Some state offices archive older records. In those offices, it is typically necessary to make a specific request to review older filings.

- 3.6.11.B  
Court Filings
- Federal and state courts are often good sources of information that is useful for establishing corporate liability. Sometimes financial issues relevant to a CERCLA investigation have been addressed under a labor grievance or a property dispute. A review of prior legal actions and an examination of the evidence introduced in those actions can be helpful.
- 3.6.11.C  
Federal Sources
- The SEC has large amounts of information relevant to purchases, sales, mergers, and divestitures of publicly held companies. The more current information is available on line. In addition, publicly available paper documents describe activities as far back as the 1930s. Other federal agencies may have information such as contracts and contract amendments that may help establish liability.
- 3.6.11.D  
Corporate  
Directories  
Summary
- Corporate directories provide summaries of useful financial information for a variety of businesses. Older editions of these directories often are helpful in tracking name changes and the acquisition and sale of plants. These directories can also be used to establish the state of incorporation, as well as the fate of inactive, dissolved, or defunct corporations, or corporations that have merged, been acquired, or have otherwise disappeared. Useful corporate directories include the Dun & Bradstreet Million Dollar Directories, Directory of Obsolete Securities, Standard & Poor's Industrial Manuals, Moody's Manual of Investments, Moody's Industrial Manual, and Walker's Manual of Western Corporations. Corporate directories can be found in the business section of most public libraries and are updated at least annually. In addition, industrial directories are compiled annually for most states, and larger libraries may maintain a historical collection of such directories, particularly for their state.

3.6.11.E  
Credit Reporting  
and On-Line  
Services

On-line services often provide corporate information for a limited number of years or provide information that is not current. Check with the data provider to verify the period of time that the data cover and whether full data or only limited portions are being provided. These systems are very useful for gathering information quickly, but additional effort is often needed to fully understand or verify the information. Appendix \_ provides a list of on-line resources that may be useful to a PRP search team.

3.7  
Develop Site

Preparing a site summary prior to preparation of the baseline PRP search report serves two purposes:

- It focuses the PRP search team on any information gaps or incomplete baseline tasks prior to preparation of the baseline PRP search report. If information gaps or incomplete tasks are identified, the PRP search team can take steps either to complete or re-do tasks or to defer decisions to a later date when more complete information is available.
- It consolidates and facilitates sharing of information. A site summary assembles pertinent, non-confidential site chronology and property history information in one place. This summary can be shared with PRPs if it does not contain confidential or privileged information. The summary can also be used by Agency and state decision makers as a quick reference to assist in making decisions.

At this point in the PRP search process, site documents have been organized consistent with the information management provisions of the PRP search plan and reviewed for pertinent site data, information that links a party to the site, sufficiency of evidence establishing the liability of the PRP, financial viability, and potential leads about other parties involved with the site. This review should

result in a history of activities and parties involved in the treatment or disposal of hazardous substances at the site, and a compilation of other factual site information.

### **Site History**

Factual background information about the site as well as a history of the facility should be presented here. This history of the facility as a hazardous substance site should begin with the first industrial use or disposal at the site and continue through to current activities. It should identify in detail the kinds of activities conducted at the facility and the owners/operators during each period, including principal individuals. It should also identify by reference any data on substances at the site (e.g., in drums, containers) and, to the extent that the information is available, include a discussion of the environmental risks that the site presents. This will allow enforcement efforts to focus more closely on site activities that are linked to EPA response actions.



### **Factual Site Information**

Factual site information that should be contained in a site summary includes:

- site location and size;
- adjoining properties;
- brief description of site history to include:
  - site owner/operator(s),
  - when operations began,
  - type of operations at the site, and
  - types of substances manufactured, treated, stored, or disposed of,

- permits applied for or granted; and
- warnings or notices of violations issued by regulatory agencies.

All information contained in this subsection should be based on factual records, and each piece of factual information cited should reference where the source record can be found. Following the brief description, a detailed description of site history should be presented in chronological order.

The owner/operator discussion should identify the period of each person's ownership or operation of the facility, and describe what hazardous substances were disposed of and by whom during each such period. The owner/operator section should also include a title abstract or narrative provided by the title search company or title researcher. To aid the reader in reviewing title search results, a title tree or graphs depicting the chain of title may be useful. Any language in the title restricting the use of the property due to wastes deposited at the site or past industrial practices should be noted.

### 3.8 Compile Waste-In Information

In addition to developing evidence for CERCLA Section 106 and 107 actions, a PRP search should develop waste-in information for waste-in lists and volumetric rankings wherever practicable. A waste-in list shows the volume and nature of the substances contributed by each PRP at a facility; a volumetric ranking is a ranking by volume of the hazardous substances at a facility.

If EPA invokes special notice procedures under CERCLA Section 122(e)(1), the Agency is required to provide PRPs, to the extent that such information is available, with waste-in lists, volumetric rankings, and a list of PRP names and addresses. Aside from the statutory provisions for development and release of such

information, experience has demonstrated that waste-in lists and volumetric rankings are a valuable tool in bringing about settlements at Superfund sites. When presented with an estimate of the nature and volume of hazardous substances contributed to a site, PRPs are better able to coalesce into committees and determine allocations among themselves, and often are more willing to participate in settlement negotiations with EPA. While not every site is a logical candidate for a waste-in list or volumetric ranking, development of such lists and rankings is generally beneficial whenever practicable.

In the past, owner/operator transactional records were the only waste-in information developed during the baseline phase of the PRP search. The follow-up phase focused on generator and transporter liability and volumetric rankings. Since current Agency policy calls for early settlement with small-volume waste contributors, however, generator-specific waste-in information should be developed during the baseline phase so that de minimis and “de micromis” determinations can be made as soon as possible. (See “Final Guidance on Preparing Waste-In Lists and Volumetric Rankings for Release to Potentially Responsible Parties (PRPs) Under CERCLA” (February 22, 1991) for detailed guidance on waste-in lists and volumetric rankings, and “Streamlined Approach for Settlements With De Minimis Waste Contributors Under CERCLA Section 122(g)(1)(A)” (July 30, 1993) for detailed guidance on the use of waste-in information in settlements with small-volume contributors, Chapter 3 References, p. 201.)

### 3.8.1 Transactional Databases

Sections 3.2 and 3.3 of this manual discuss the value of databases for tracking correspondence and information requests. Similarly, large amounts of information on generator and transporter waste types and volume gathered from previous baseline tasks can best be managed with a transactional database. Transactional

databases are used at recycling sites, landfills, and other such sites with large numbers of generators. Information contained in transactional databases is generally derived from evidence summary sheets and waste stream analyses. Waste stream analyses are discussed in Section 4.7 of this manual.

### **Evidence Summary Sheets - Generators**

A separate evidence summary sheet generally is prepared for each shipment or group of shipments of a hazardous substance sent by a generator to a site for treatment or disposal. The evidence summary sheet for the generator should contain the following information pertaining to the hazardous substance(s) at the site:

- relationship of substances to the threat;
- volume;
- identification by name of the hazardous substances;
- EPA's determination of any RCRA hazardous wastes codes; and
- substances found at the site that the generator is known to produce.

Information on hazardous substances presented in the evidence summary sheets should be referenced to supporting documents in the correspondence tracking databases, if developed, or in the site file database. This information should be verified during the RI at the site.

### **Evidence Summary Sheets - Transporters**

Evidence summary sheets should be kept for all transporters who accepted hazardous substances for transport and selected the treatment or disposal facility to which the shipment was sent. It is useful to identify all transporters, not just those who selected the

site, since they can identify the generators. Although the transporters may not have selected the site, and consequently may not be liable, the transporter's customer may be liable as a generator. By identifying all transporter volume, the database can ensure that each transporter volume is linked to a generator, thereby making sure all generators are identified. A transporter evidence summary sheet should include the volume and nature of the hazardous substances and describe any evidence that the transporter selected the treatment or disposal site. Again, all the information on the evidence summary sheets should be referenced to supporting documents in the correspondence tracking and site file databases

As with the site file, correspondence, and information request tracking databases, the information contained in the transactional database should be screened for relevance to the PRP search. If a contractor is responsible for developing the database, the contractor must work with EPA to determine the document criteria. The QA/QC process should screen for duplicative documents and either eliminate them or enter the documents into the database as duplicates. The QA/QC process should also be applied to document codes and field definitions, which may include document location, document number, document type, originator, author(s), origination date, title, subject(s) or key words, addressee, number of pages, document condition, method of obtaining the document sources (e.g., PRP, EPA), recipients, and attachments.

### 3.8.2 Waste-In Lists and Volumetric Rankings

At some point during the baseline phase of the PRP search, the PRP search team should assess the quality and completeness of the waste-in information and determine whether waste-in lists and volumetric rankings will be developed, and by whom. CERCLA gives EPA considerable discretion whether to develop a waste-in list or volumetric ranking. Whether the records at a site constitute



sufficient evidence to produce waste-in lists and volumetric rankings is a highly site-specific determination. Regions should develop an approach for assessing waste-in information that is internally consistent and based on a common set of considerations. Where waste-in lists and volumetric rankings are developed by EPA, the following three rules should be followed when making assumptions about waste-in information:

- **Assumptions should be defensible.** Established conversion standards (converting to common units of measurement such as gallons or cubic yards) should be used and assumptions should be based on patterns established in the data in order to avoid charges that an assumption is arbitrary or capricious.
- **State assumptions openly.** When interpreting illegible numbers on a manifest, or assuming a disposal destination from an unclear hauling ticket, it is preferable to let PRPs know where EPA made assumptions and to identify where ambiguity still exists. Clearly stated assumptions contribute to the credibility of a waste-in list and give PRPs the opportunity to make their own corrections. Assumptions should be reviewed by the case attorney to ensure that they are legally supportable.
- **Be consistent.** PRPs involved at more than one site within a region will be aware of any discrepancies in the kinds of assumptions made for waste-in lists at these sites. Disputes over inconsistent assumptions only slow down the settlement process.

### **Whom To Include on Waste-in Lists**

Generators are usually included on a waste-in list when evidence indicates they contributed hazardous substances to a Superfund site. Transporters should be included on waste-in lists when the

transporter, not the generator, determined where the hazardous substances were to be taken for treatment or disposal. As a policy matter, EPA implements CERCLA Sections 107(a), 101(20)(B), and 101(20)(C) by not including transporters on a waste-in list if they did not select the site or facility to which hazardous substances were delivered. Thus, while all transporters should be sent 104(e) information request letters, only those transporters who appear to have selected the site for hazardous substance disposal should be sent notice letters.

### **Format and Content of Waste-in Information**

#### ***Waste-in Lists***

Waste-in lists contain the volume and nature of substances contributed by each PRP identified at a facility. At a minimum, the lists should contain columns for the names and addresses of PRPs as well as the types and volumes of hazardous substances. Although EPA is under no statutory obligation to release information beyond the waste-in list, regions should consider releasing supplemental waste-in list information unless there are countervailing legal, policy, or strategy reasons not to do so. Supplemental waste-in information can include, but is not limited to:

- dates of shipments;
- names of transporters;
- types of evidence from which the waste-in lists were derived; and
- comments to clarify assumptions, ambiguities, and double-counts.

When most PRPs at a site are generators, waste-in lists should be organized by generator, with a column provided for listing the transporter of each shipment in order to link the generator to the site. When there are multiple transporter PRPs, it may be advisable to prepare separate waste-in lists for generators and transporters.



### ***Volumetric Rankings of Substances at a Facility***

To the extent such information is available, CERCLA requires that special notice recipients be provided with a volumetric ranking of hazardous substances at the facility. This ranking lists hazardous substances and their respective volumes in descending volumetric order. It can be developed from waste-in list information.

### ***Volumetric Rankings of PRPs***

Volumetric PRP rankings (sometimes referred to as generator rankings) rank PRPs in descending order by volume and express their contributions as a percentage of the total volume of hazardous substances at the facility. Although CERCLA Section 122(e)(1)(B) requires EPA to provide special notice recipients with "the volume and nature of substances contributed by each potentially responsible party identified at the facility," to the extent such information is available, CERCLA does not require that this information be aggregated into a volumetric PRP ranking. A number of regions release information in this format, however, because they feel it provides a logical starting point for negotiations. Regions should bear in mind and convey to the PRPs that waste-in information provided with special notice is intended as an estimate of individual PRP contributions, and is neither definitive nor binding in any way. It is intended solely as information to facilitate settlement agreements between PRPs and the Agency.

When there is insufficient information to convert volumes into a single unit of measurement, regions may provide a volumetric ranking using raw data from records in an unconverted form. PRPs can then choose to clarify ambiguities concerning volumes or substances in order to produce a better list upon which to negotiate.

## Special Considerations

### *Commonly Contributed Volumes*

When hazardous substances are contributed both by a generator and a transporter that designated the treatment or disposal site, regions are advised to:

- attribute the volumes to both parties when compiling waste-in information;
- not try to apportion responsibility for a hazardous substance shipment generated by one PRP and transported by another among the two PRPs in a volumetric ranking or waste-in list; and
- let the PRPs, or the independent neutral, allocate commonly contributed volumes during the site allocation process.

Because this approach may result in double-counting shipments, regions should provide PRPs with an explanation of why shipments have been double-counted and clearly identify, by means of a comment field or other notation, which shipment volumes have been attributed to both generators and transporters.



### *Municipal Landfills*

Like mining and area-wide ground water sites, landfills are notoriously difficult sites at which to compile accurate waste-in information, both because of poor recordkeeping practices and because of the mixture of different wastes disposed of at landfills. In many instances, most of the wastes in a municipal landfill are not hazardous substances and do not belong in a waste-in list or volumetric ranking.

Non-exempt generators and transporters of municipal solid waste or sewage sludge generally will not be notified as PRPs unless evidence shows that:

- the waste or sludge contains a hazardous substance; and
- the hazardous substance came from a commercial, industrial, or institutional process or activity.

Generators and transporters of commercial trash, however, are generally notified as PRPs unless they can demonstrate that:

- none of the hazardous substances contained in the trash are derived from a commercial, institutional, or industrial process or activity; and
- the amount and toxicity of the hazardous substances do not exceed the amount normally found in common household trash.



### ***Removal Sites***

Some removal sites are not good candidates for compiling waste-in information because they require cleanup action sooner than the time it would take to produce waste-in lists. Even after the work has been started, however, there may be a need to prepare the waste-in list, especially if cost recovery litigation is likely. Even if a waste-in list cannot be prepared because of time constraints, it is important to notice as many parties as possible to limit due process issues that may be raised by PRPs. At non-time-critical removal sites, the creation of waste-in lists and volumetric rankings should be seriously considered as there is more time available to prepare them at these sites than at other removal sites. When adequate transaction documentation exists and settlement seems possible, regions should prepare waste-in lists and rankings as described in CERCLA Section 122(e)(1) for release to PRPs. Because removals may proceed at an accelerated rate, it is important to start the waste-in preparation early, spend less time fine-tuning lists and rankings, and release the information to PRPs as early as possible.

For more general information on preparing waste-in lists and volumetric rankings; specific considerations for solvent recycling and transshipment sites, lead battery sites, and mining sites; and releasing waste-in information, consult “Final Guidance on Preparing Waste-In Lists and Volumetric Rankings for Release to Potentially Responsible Parties (PRPs) Under CERCLA” (February 22, 1991). (See Chapter 3 References, p. 201.)

### 3.9 Classify PRPs

The objective of this task is to classify identified parties into the broad categories of owner, operator, transporter, or generator, and then more specifically into other categories, such as de minimis, “de micromis”, insolvent or defunct, or orphan.

#### 3.9.1 Identify PRPs

Throughout the PRP search process, information should be analyzed with the following questions in mind:

- Is the information sufficient to establish PRP liability?
- What volume of waste was disposed of or treated at the site?
- Can the PRP(s) contribute toward cleanup efforts?
- Are there additional leads which should be pursued?
- Have past and present owners/operators been identified?
- Does the information presented resolve liability inquiries?
- Is the waste-in information complete?
- Are recommended follow-up activities documented?

The PRP search team should routinely perform such analyses in order to collectively identify any weaknesses in the existing PRP search efforts, identify any next steps, and determine the timing of these steps.

These analyses are particularly important to ensure effective collection of:

- information about owner/operator liability and financial viability;
- updated PRP names and addresses;
- information about the volume and nature of substances sent to the site;
- information on the contributing parties;
- information that helps determine whether a person should receive a notice letter; and
- evidence of each PRP's liability.

A list of parties identified as PRPs should be developed with complete names, addresses, and contacts. This list should contain:

- names of contact persons;
- addresses;
- telephone numbers, if available;
- name of legal contact, if the parties have representation;
- date of list preparation; and
- contact person for all correspondence.

It is very important that the addresses of PRPs or their contacts be verified for accuracy. Verification prior to preparation of the baseline PRP search report reduces the need for additional or subsequent re-mailings of general or special notice letters and helps ensure that PRPs receive adequate notice and due process rights. Failure to satisfy these procedural requirements may lead

to significant problems later in the Superfund process. PRP lists can be included as an appendix to the site summary section of the baseline PRP search report and are considered non-confidential. PRP search reports are more fully discussed in Section 3.10 of this manual.

3.9.2  
Define PRP  
Category

PRP classification initially involves grouping PRPs into one of the following CERCLA categories:

- owners (past or present);
- operators (past or present);
- generators; or
- transporters.

Further classification of PRPs into sub-categories of the above categories may be appropriate depending on site-specific needs and the nature and volume of information available. The following are examples of sub-categories:

- ability to pay (ATP) parties;
- de minimis generators;
- "de micromis" generators;
- municipal solid waste (MSW) generators;
- residential homeowners;
- insolvent or defunct parties;<sup>12</sup> and

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<sup>12</sup> During the baseline phase of the PRP search, it may not be possible to conclusively determine if a party is insolvent or defunct due to the time-consuming nature of this determination. Preliminary determinations of a party's status as insolvent or defunct should be attempted during this phase, however, with follow-up information requests or other information gathering techniques used during the follow-up phase to make the final determination. Insolvent and defunct determinations are discussed in Section 4.6 of this manual.



- parties the quantity of whose waste contribution is unknown.

It may be beneficial to classify non-PRPs into such categories as:

- status unknown;
- residential homeowner;
- knowledgeable witness;
- adjacent landowner.

If corporate information is available, the list should include the date of incorporation, whether corporate PRPs currently exist, the fate of inactive companies, current mailing addresses (including facility, headquarters, and registered agent), and parent or successor companies. Information about individuals and unincorporated companies should include their current locations, their associations with other PRPs, and their relationships to the site.

In most instances, PRP classifications are pre-decisional and subject to review during the PRP search, and consequently are considered confidential. Nonetheless, they can help the PRP search team and other Agency staff in corresponding with PRPs, conducting financial assessments, directing follow-up activities, and many other tasks.

The baseline PRP search report is a preliminary report that contains available information on the owners/operators, generators, and transporters. This report provides a chronological summary of site history and the facts pertaining to PRPs' liability. Information supporting conclusions within the report is generally included in appendices. The baseline report is generally followed by the

3.10  
Prepare  
Baseline PRP  
Search Report

interim-final PRP search report except in simple owner/operator situations where the baseline report will usually suffice. (See Section 4.8 of this manual for further discussion of the interim-final PRP search report.)

### 3.10.1 Report Format and Content

Prompted by the Agency's emphasis on earlier information exchange with PRPs and other stakeholders, more efficient information gathering, and concern over whether PRP search reports were subject to discovery production demands and FOIA requests, several EPA regions have been using a revised format for the report. Traditionally, the PRP search report format consisted of the following sections: introduction, site history, PRP identification, and conclusions and recommendations. The problems that resulted from this format included:

- Time needed to prepare the entire baseline report delayed receipt of factual site summary information that could be used for early information sharing with other parties.
- Disputes over releasability of the PRP search report were common.
- Reports could not be updated easily to reflect development of additional or new information.
- Interpretations and conclusions were not clearly distinguished from established fact.

A revised PRP search report format (for both the baseline and interim-final reports) consists of two sections treated as separate deliverables, namely:

- Site chronology and property history; and
- PRP synopsis.

3.10.1.A  
Deliverable 1:  
Site Chronology  
and Property  
History

The known facts about the site and its PRPs are summarized without interpretation in the first section of the baseline report. The site chronology and property history and back-up information are included in supplemental appendices. This section contains no conclusions, interpretations, or inferences regarding liability. A separate site chronology and property history:

- highlights the source of information being used to establish facts;
- helps identify periods of time for which there is little or no conflicting information;
- facilitates updates during a phased PRP search; and
- may be released to PRPs and other members of the public.

Suggested contents and format of the site chronology and property history section of the PRP search report are shown in Exhibit 1.

3.10.1.B  
Deliverable 2:  
PRP Synopsis

The remainder of the baseline report is contained in the PRP synopsis section. This section of the PRP search report should be stamped "Privileged Work Product -- Deliberative/Attorney Work Product - - Do Not Release Under FOIA." The PRP synopsis should include:

- PRPs identified during the research;
- PRP names, addresses, and telephone numbers;
- the basis for inclusion of each PRP;
- PRPs with potential defenses to or exemptions from liability (see subsections 1.2.5 and 1.2.6 of this manual);
- major reference sources;

- the identities of other parties associated with the site and the nature of the association;
- conclusions and recommendations; and
- appendices.

A suggested outline for the PRP synopsis section of the PRP search report is presented in Exhibit 1.

### 3.10.2 Report Review and Distribution

A site chronology and property history created as an interim deliverable segregated from the PRP synopsis section of the baseline PRP search report allows EPA to review the information contained in it earlier in the PRP search process than if combined in the traditional report format. It is suggested that the PRP search manager and case attorney review the interim deliverable simultaneously to save more time in the internal review and approval process. Once approved, this information can be shared with interested stakeholders and placed in the site repository.

## **EXHIBIT 1: SUGGESTED PRP SEARCH REPORT FORMAT**

### **DELIVERABLE 1: SITE CHRONOLOGY AND PROPERTY HISTORY**

#### **Introduction**

- project background – a brief "snapshot" of the site
- project approach – who performed the research and under whose direction
- list of contacts – public agencies that were contacted to collect information
- overview of report – the basic layout of the report.

#### **DISCUSSION OF THE SITE**

#### **Site History – factual background information about the site, including:**

- site location and size
- adjoining properties
- brief description of site history, including:
  - site owners/operators
  - when operations began
  - type of operations
  - types of substances manufactured, treated, stored, or disposed of
  - whether the substances found on site are in drums, containers, etc.
  - permits applied for or granted
  - warnings or notices of violations issued by regulatory agencies.

#### **Property History:**

- summarizes the review of all title documents
- documents ownership of the property for the period of time relevant to the site
- presents a title tree or chain of title (including corporate name changes of property owners, conveyances, quitclaims, deeds, and liens)
- contains corresponding references to the relevant documentation
- includes brief summaries of the environmental threats posed by site activities and the potential cleanup activities.

## EXHIBIT 1: SUGGESTED PRP SEARCH REPORT FORMAT (*cont'd*)

### DELIVERABLE 2: PRP SYNOPSIS

#### **Introduction**

**Discussion of the Site** – Refer the reader to the first section of the report.

**PRPs** – Cite statutory provisions and relevant policy and guidance as basis for inclusion as PRPs.

#### **PRPs – Owners/Operators**

- PRP name
- status (current owner, successor, etc.)
- current address
- headquarters address, if applicable
- registered agent
- president
- current status
- corporate information
- narrative description of basis for inclusion
- references
- nature and volume of hazardous substances associated with PRP
- reference to appendices or attachments for additional information, rankings, or groupings
- financial information, ability to pay issues

#### **PRPs – Generators (same information as for owner/operators)**

Provide information in both a PRP summary and a volumetric ranking list format, to the extent this information is available. Depending on the complexity of the site, the region may develop a list by PRP of information that describes the chemical nature of the substances and links shipment/volumetric conclusions to particular transporters and documents. In these instances, there should also be an assessment of whether the wastes were RCRA hazardous wastes for ARAR purposes.

#### **PRPs – Transporters (same information as for owner/operators)**

Provide information in both a PRP summary and a volumetric format similar to the generator lists as described above.

## EXHIBIT 1: SUGGESTED PRP SEARCH REPORT FORMAT (*cont'd*)

### **Special PRP Information**

Include any special information that may have a bearing on whether a party is ultimately designated by EPA as a PRP. Examples include entities that have been or are in bankruptcy, individuals who are deceased and a description of the status of their estates, successor corporations, parent-subsidary relationships, PRPs with potential defenses to or exemptions from liability (see subsections 1.2.5 and 1.2.6 of this manual), and defunct/insolvent PRPs.

### **Special Site Information**

Highlight any unique or complex features associated with sites such as municipal landfills, area-wide ground water or stream contamination sites, sites where the source of contamination is not clear, and sites from which wastes were sent to satellite facilities.

### **Other Parties Associated with the Site**

Identify parties who may possess additional information about the site (e.g., witnesses, previous employees not yet located) and parties about whom information is currently not available to characterize them as a PRP. Present all relevant information here, such as names, addresses, telephone numbers, basis for inclusion of this party in this subsection, and references.

### **Conclusions and Recommendations**

Summarize the identified PRPs and parties associated with the site. Include recommendations for additional actions and an estimate of the time and resources needed to perform those actions. This type of information will allow the decision makers to make an informed decision when balancing the need for information with available resources and timing constraints.

### **Appendices**

Include interview summaries, evidence sheets, potential questions for additional information request letters, and other documents referenced throughout the report.

CHAPTER 3 REFERENCES		
Name	Section	Location
Checklist of PRP Search Tasks	3.0	Appendix B
PRP Search Enhancement Team Members/Contacts	3.2.1	Appendix E
Information Requests – 104(e) Question Categories	3.3	<a href="http://www.epa.gov/compliance/resources/publications/cleanup/superfund/104e/index.html">http://www.epa.gov/compliance/resources/publications/cleanup/superfund/104e/index.html</a>
Potentially Responsible Party Internet Information Sources (PRPIIS)	3.3.1	Appendix F
Superfund Enforcement Directory	3.3.1	<a href="http://www.epa.gov/compliance/cleanup/superfund/sfed/index.html">http://www.epa.gov/compliance/cleanup/superfund/sfed/index.html</a>
Transmittal of Sample Documents for More Effective Communication in CERCLA Section 104(e)(2) Information Requests (June 30, 1995)	3.3.1	<a href="http://www.epa.gov/compliance/resources/policies/cleanup/superfund/sampledoc-cerclamem.pdf">http://www.epa.gov/compliance/resources/policies/cleanup/superfund/sampledoc-cerclamem.pdf</a>
False Statements Act	3.3.1	<a href="http://www4.law.cornell.edu/uscode/18/1001.html">http://www4.law.cornell.edu/uscode/18/1001.html</a>
Federal Debt Collection Procedures Act	3.3.1	<a href="http://www.uscode.house.gov/download/pls/28C176.txt">http://www.uscode.house.gov/download/pls/28C176.txt</a>
Releasing Information to Potentially Responsible Parties at CERCLA Sites (March 1, 1990)	3.3.1	<a href="http://www.epa.gov/compliance/resources/policies/cleanup/superfund/release-prp-rpt.pdf">http://www.epa.gov/compliance/resources/policies/cleanup/superfund/release-prp-rpt.pdf</a>
EPA Regulations Governing Business Confidentiality Claims	3.3.3	40 C.F.R. § 2.201-2.215 <a href="http://www.access.gpo.gov/nara/cfr/waisidx_01/40cfr2_01.html">http://www.access.gpo.gov/nara/cfr/waisidx_01/40cfr2_01.html</a>
Federal Rules of Evidence 801-817	3.4.1	<a href="http://www.law.cornell.edu/rules/fre/rules.htm">http://www.law.cornell.edu/rules/fre/rules.htm</a>
Federal Perjury Statute	3.4.2	18 U.S.C. § 1621 <a href="http://www.law.cornell.edu/uscode/html/uscode18/uscode18_usc_sec_18_00001621----000-.html">http://www.law.cornell.edu/uscode/html/uscode18/uscode18_usc_sec_18_00001621----000-.html</a>
Performance Work Statement for Enforcement Support Services	3.5.1	Appendix A



CHAPTER 3 REFERENCES		
Name	Section	Location
Final Guidance on Preparing Waste-In Lists and Volumetric Rankings for Release to Potentially Responsible Parties (PRPs) Under CERCLA (February 22, 1991)	3.8	<a href="http://www.epa.gov/compliance/resources/policies/cleanup/superfund/guide-volumet-rpt.pdf">http://www.epa.gov/compliance/resources/policies/cleanup/superfund/guide-volumet-rpt.pdf</a>
Streamlined Approach for Settlements With De Minimis Waste Contributors Under CERCLA Section 122(g)(1)(A) (July 30, 1993)	3.8	<a href="http://www.epa.gov/compliance/resources/policies/cleanup/superfund/app-deminimis-rpt.pdf">http://www.epa.gov/compliance/resources/policies/cleanup/superfund/app-deminimis-rpt.pdf</a>