UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM *June 17, 1999*

SUBJECT: Negotiation and Enforcement Strategies to Achieve Timely Settlement and Implementation of Remedial Design/Remedial Action at Superfund Sites

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This memorandum recommends strategies which can be used to encourage potentially responsible parties (PRPs) to enter into a settlement using the model remedial design/remedial action (RD/RA) Consent Decree[1]; discusses the current model Unilateral Administrative Order (UAO);[2] and suggests practical alternatives to expedite Superfund settlements and the cleanup process. While the negotiation of each RD/RA settlement poses unique issues, these strategies are intended to be sufficiently flexible so that they can be applicable in the vast majority of negotiation scenarios.

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[1] *See* "Remedial Design/Remedial Action Consent Decree," 60 Fed. Reg. 38817 (July 28, 1995).

[2] *See* "Model Unilateral Administrative Order for Remedial Design and Remedial Action Under Section 106 of CERCLA," OSWER Directive No. #9833,0-2(b) (March 30, 1990).

I. Background

An overriding goal of the Superfund program is for PRPs to expeditiously conduct remedial actions. As a general rule, EPA prefers to achieve these response actions under the Model RD/RA Consent Decree rather than through a UAO because settlements reduce the possibility of litigation and the attendant transaction costs. Negotiating a settlement, however, should not delay the start of RD/RA at a site. In instances where a RD/RA settlement cannot be obtained, EPA prefers to issue a UAO rather than to conduct a fund-lead cleanup. If RD/RA negotiations fail, generally a UAO should be issued to the appropriate parties before the Agency conducts a Fund-lead cleanup. The use of the Hazardous Substance Fund (Fund), however, without the prior issuance of a UAO may be appropriate in a particular case.

Pursuant to Section 122 of CERCLA, EPA has the discretion to enter into an agreement with PRPs for the performance of response actions. If EPA determines that a period of negotiation would facilitate an agreement and expedite remedial action, then it notifies the PRPs according to Section 122(e)(1) of CERCLA. Section 122(e)(2)(B) of CERCLA provides PRPs with sixty (60) days from the date of receipt of the special notice letter to submit a good faith proposal to EPA. If a good faith proposal is received and accepted by EPA, then the PRPs are granted an additional sixty days (total 120 days) during which negotiations can continue without EPA commencing an enforcement action under Section 106 of CERCLA, or funding a remedial action. This 120-day negotiation moratorium is a benchmark for measuring the timeliness of RD/RA negotiations, and the case team should use it to evaluate the progress of negotiations and whether an extension is appropriate.

In March 1998, EPA's Office of Inspector General (OIG) issued an advisory report that analyzed overall trends in the length of RD/RA negotiations for fiscal years 1990-1996 and whether Superfund enforcement reforms had affected the length of negotiations.[3] The report noted that, between 1993 and 1996, negotiation periods had increased. Consequently, EPA is concerned about this increase in negotiation periods and is reaffirming its commitment, through this memorandum, to completing negotiations in an expeditious manner.

II. General Strategies to Ensure Timely Cleanups

The case team should analyze all of its negotiating alternatives, including the use of Fund money, very early in the enforcement process. A negotiation and enforcement strategy should be developed, to the extent practicable, before deciding to send special notice letters. The use of alternative dispute resolution for liability allocation should be considered when developing the negotiation strategy. By preparing a strategy which includes the use of appropriate enforcement and settlement tools, the case team can ensure that remedies are implemented in a timely fashion without jeopardizing productive settlement negotiations. Initially, the case team should establish a

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[3] *See* "RD/RA Negotiation Time Frames," OIG Report No. E1SFG7-11-0024-8400015 (March 27, 1998).

well-coordinated procedure involving communications among representatives of EPA's legal office, the program, and relevant Headquarters offices and the Department of Justice (DOJ)[4], to determine on a site-specific basis which settlement and enforcement tools are most appropriate to reach settlement expeditiously and to begin site remediation quickly. If a UAO is issued and the parties fail to comply, then the Region should carefully review its enforcement options and refer appropriate cases to DOJ. Issuance of UAOs to PRPs, with consistent and appropriate enforcement for non-compliance, sends a strong message that will make entering into a settlement for RD/RA work more desirable.

III. Strategies for Encouraging PRPs to Enter into RD/RA Consent Decrees

A. Added Financial Incentives. PRPs should be reminded that only those parties who enter into a consensual agreement with the United States will be eligible to benefit from the following financial incentives:

1. Special Account Money. Only PRPs who cooperate in the settlement process and who enter into a settlement agreement will be eligible to receive any money received by EPA from de minimis settlements or cash-out settlements where payments received by EPA are placed into a Section 122(b)(3) site-specific special account.[5]

2. Orphan Share Compensation. Under EPA policy, parties performing under a consensual agreement may be compensated for a limited portion of known shares of responsibility attributable to insolvent or defunct parties (orphan parties). EPA will also consider such compensation in a cost recovery settlement, but will not, except in extraordinary cases, offer an orphan share compromise in a cost recovery settlement to a party who refused a prior work settlement offer that included a compromise based on orphan share considerations.[6]

3. Mixed Funding. EPA may also agree to share in the costs of the response action by entering into a mixed funding agreement with PRPs. Such agreement may provide for

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[4] When federal PRPs are involved, EPA should provide early notice to the federal PRPs and the Environmental Defense Section of DOJ as well.

[5] *See* "Interim Final Guidance on Disbursement of Funds From EPA Special Accounts to CERCLA Potentially Responsible Parties," OECA, OSRE (11/3/98).

[6] *See* "Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time-Critical Removals," OECA (6/3/96) and "Transmittal of Addendum to the 'Interim CERCLA Settlement Policy' Issued on December 5, 1984," OECA, DOJ (9/30/97).

mixed work or preauthorized mixed funding.[7] Mixed funding agreements are not available absent a settlement.

B. Advantageous Consent Decree Terms. In addition to the above financial incentives available to settling PRPs, the Model Consent Decree offers numerous other provisions which are more beneficial to PRPs than those set forth in the Model RD/RA UAO. The case team should make the PRPs aware of these differences. For example:

1. The case team should make it clear that it may be willing to agree to a more limited recitation of factual findings in a consensual settlement document, as long as the findings are sufficient to confer the court with jurisdiction over the parties to the settlement.

2. Settling defendants will receive contribution protection under a Consent Decree. This protection is most advantageous in cases involving non-settling parties who have incurred costs in connection with cleanup activities at a site.

3. Parties settling in a consent decree also will have the benefit of dispute resolution provisions which establish procedures for narrowing and resolving disputes arising under the RD/RA consent decree and, if necessary, for providing access to the court. Generally, recourse to the court is not available in the context of a UAO because of CERCLA's bar against pre-enforcement review under Section 113(h).

4. After appropriate milestones have been achieved in settling parties' performance under the RD/RA consent decree, the government's covenants not to sue, or to take administrative action, as to the settling parties take effect. Additionally, settling parties are afforded another measure of finality with respect to the work to be performed at the site because the Consent Decree limits the circumstances under which EPA can "reopen" its case against them.

5. While UAOs are not negotiated documents, the Model RD/RA Consent decree includes many provisions that can be modified, within reason, to accommodate the defendant's particular circumstances or other site-related factors.

C. UAOs are not negotiated documents. PRPs should not expect that any concessions offered to them during the negotiations preceding issuance of the UAO will be included in the UAO. Thus, a UAO should recite Findings of Fact and other provisions consistent with EPA's strongest positions provided that they are supported by the record in the case. Moreover, the litigation team should make it clear at the beginning of negotiations (and, if necessary, reiterate when negotiations are faltering) that if negotiations fail and a UAO is issued, the PRPs will be directed to implement the remedy in accordance with a Statement of Work (SOW) drafted by the

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[7] *See* "Superfund Program, Mixed Funding Settlements," 53 Fed. Reg. 8279 (March 14, 1988); OSWER Directive # 9834.9.

Agency that almost certainly will not contain concessions discussed during negotiations. It should be stressed to the PRPs that any concessions regarding the terms of the SOW discussed during negotiations are not binding on EPA in the event negotiations fail and a UAO is issued.

D. Publicize issuance of UAOs. Regions should consider publicizing the issuance of each UAO and the identity of PRPs who receive it following unsuccessful negotiations. Conversely, EPA should also inform the PRPs that it may favorably publicize settlements by identifying those parties who sign a Consent Decree with EPA. In doing so, however, Regions should be mindful of the Agency's policy against negotiating press releases with PRPs.[8]

E. Issue a UAO with a Delayed Effective Date. At the time of the issuance of any special notice letters, EPA may consider including with the draft Consent Decree and SOW, a UAO which would become effective 121 days after receipt of the special notice letter if no settlement has been reached.[9] Such an order should recite Findings of Facts, Conclusions of Law, Determinations, and SOW provisions consistent with EPA's strongest position. The order will also establish a firm deadline for the negotiation of a settlement.

F. Communicate Early with Counsel Closest to PRP Decision Makers. The team should attempt to involve as early as possible in-house counsel, or other legal representatives, who are closest to the corporate decision makers. It has been EPA's experience that corporate decision makers, including corporate counsel, are likely to be interested in maintaining a cooperative relationship with EPA. Therefore, unless outside counsel has requested otherwise, attempts should be made early in the negotiation process to involve in-house PRP legal representatives. The team should copy in-house counsel when issuing general and special notice letters and communicating matters pertaining to the issuance of and compliance with orders. Of course, all EPA communications with PRPs must be in accord with applicable standards of legal ethics and professional conduct (see, e.g., ABA Model Rules of Professional Conduct 1.4 and 4.2).

IV. Where RD/RA Negotiations are Extended.

When an agreement is not reached within the 120-day negotiation moratorium provided for in Section 122(e)(2) of CERCLA, the case team should be fully prepared either to issue a UAO once the moratorium has expired or to seek a Fund-lead remedial action.

There may be negotiations, however, where the case team believes an extension is warranted. For those cases, the case team should be aware that negotiation extensions beyond

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[8] *See* "Policy on Publicizing Enforcement Activities," OECM, § III(A)(4), at 3 (11/21/85).

[9] If negotiations stall and the moratorium period has ended, such an approach may be used to establish a fixed deadline for completion of negotiations.

the statutory moratorium will require approval of Regional and Headquarters management.[10] Regional management approval is required to extend negotiations beyond the 120-day statutory moratorium period.[11] Headquarters management approval is required to extend negotiations beyond 180 days. A sixty-day extension will require oral pre-approval of the Division Director ("DD") of the Regional Support Division of the Office of Site Remediation Enforcement (OSRE). When seeking prior oral approval of the DD, the Region should be prepared to discuss whether a UAO should be issued, and, if so, the timing of the UAO, including whether a delayed-effective-date UAO should be used. If extensions beyond 240 days are necessary, then prior written approval from the Director of OSRE is required. All requests for extensions from Headquarters should be made at least fourteen (14) days prior to the expiration of the negotiation period.

If the team requests and obtains an extension to continue the negotiations beyond the 120-day moratorium, then the initiation of remedial work may be delayed while negotiations continue. To avoid a delay, the team may want to consider separating the RD from the RA and obtaining the PRPs agreement to perform the RD. Although generally disfavored, separating the RD from the RA may be appropriate in limited circumstances. In deciding whether to separate the RD from the RA, the team might, for example, consider the PRPs' willingness to also conduct the RA, the region's past experience with the PRPs at the site and whether separating the RD from the RA would increase the prospects for a PRP-financed remedial action.

If the team decides to separate the RD from the RA, then several alternatives [12] should be considered, including: (1) entering into an administrative order on consent (AOC) for RD; (2) amending an existing remedial investigation/feasibility study (RI/FS) AOC to incorporate the RD[13]; (3) issuing a UAO for the RD once the 120-day moratorium has expired; and (4) funding

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[10] *See* "Revisions to OECA Concurrence and Consultations Requirements for CERCLA Case and Policy Areas," OECA, OSRE, § III(B)(11), at 8, (9/30/98).

[11] The case team should let the PRP know that by continuing negotiations beyond 120 days, EPA is not extending the statutory moratorium and consequently is not precluded from commencing an enforcement or Fund-lead action at the Site.

[12] Most of these alternatives have been previously discussed by the Agency in two guidance documents. See "Initiation of PRP-financed Remedial Design in Advance of Consent Decree Entry," OSWER Directive #9835.4-2A (11/18/88) and "Accelerating Potentially Responsible Party Remedial Design Starts: Implementing the 30-Day Study," OSWER Directive #9835.4-2b (4/2/92).

[13] For example, EPA could include, as part of its RI/FS negotiations and the accompanying consent order, common elements (e.g., sampling, scoping, and contracting) of the RD phase. Remedy specific elements would be added after the remedy is selected or incorporated during the RD/RA negotiations.

the RD. The language in an AOC or UAO should specify that the PRPs are obligated to conduct the RD until expressly superseded by any subsequent consent decree or UAO.

Getting the PRPs to conduct the RD without their agreement to conduct the RA, however, does raise some concerns. For example, if the PRPs are performing the RD only, they may seek to delay implementation of the selected response action by using the RD process to reiterate earlier challenges to EPA's proposed plan or by proposing additional studies unrelated to the RD. Thus, it is imperative that EPA clearly define the scope of the RD, the role of the PRPs, and EPA's expectations for completing the work.[14]

On the other hand, remedial designs are less costly to conduct than remedial actions and PRPs who cannot reach agreement to fund the remedial action may be able to quickly agree on funding the RD. Aside from giving the PRPs more time to work out an allocation for the cost of the RA, performing the RD also brings the PRPs into the cleanup process and may make it more likely that they will agree to do the RA.

V. Where an RD/RA Agreement is Reached.

In cases where the PRPs agree to perform the RD/RA, the case team should consider ways to avoid or minimize delays in starting the RD. In some cases, delays occur between the signing of the consent decree and entry of the consent decree. By relying on the existing Model RD/RA Consent Decree language, which allows the RD to begin shortly after lodging, the case team can avoid delays caused by waiting for entry of the consent decree. (*See* Model RD/RA Consent Decree, Section VI. "Performance of the Work by Settling Defendants," paragraphs 10 and 11.) In addition, and as mentioned in Section IV. above, existing EPA guidance[15] on expediting the design phase of the remedial work suggests several other alternatives, including: (1) entering into a stipulation to conduct the RD in those cases where a complaint has been filed; (2) issuing an administrative order solely for the RD where PRPs have agreed to start the RD early[16] and (3) amending an AOC for an RI/FS to incorporate common elements from the RD.

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[14] Of course, if PRPs identify legitimate issues through the RD process, then EPA may agree to consider an Explanation of Significant Difference (ESD) or a ROD amendment.

[15] *See* OSWER Directive # 9835.4-2A (11/18/88); and OSWER Directive # 9835.4-2b (04/02/92), *supra*, note 12.

[16] Although the 1988 guidance indicates that a Section 106 unilateral order might be appropriate, an administrative order on consent pursuant to Section 104 is also available.

VI. Options to Consider if Negotiations Are Unsuccessful.

A. Issue UAOs to All Appropriate Parties. The negotiating team must emphasize that EPA will issue UAOs to all appropriate parties in accordance with Agency policy.[17] EPA policy provides that the following factors should be considered in determining which parties may be excluded from receiving such an order: financial viability; evidentiary issues; a party's contribution to site conditions or prior work; and manageability.

B. Strengthening the UAO Process. It is imperative that the negotiation team ensure that before issuance of a UAO is considered, all statutory and other applicable legal requirements for a UAO have been met.[18] EPA is best served when the UAO it issues is clearly enforceable. Specifically, each of the following threshold determinations should be made before the UAO is issued:

1. An "imminent and substantial endangerment" can be demonstrated, through data contained in the Administrative Record;

2. The parties to whom the UAO will be issued are properly named;

3. Anticipated defenses, particularly divisibility of harm issues, have been identified and have been carefully evaluated.

While it may be difficult to address each of the foregoing with absolute certainty, particularly in the very early stages of the UAO issuance process, attention to these requirements will help ensure that the UAO to be issued will be enforceable, thereby serving the Agency's goal of achieving prompt PRP-financed cleanups.

C. Strengthening UAO Provisions. A provision-by-provision analysis of the current model UAO is not warranted here; however, provisions deemed most relevant for this discussion are briefly highlighted.

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[17] *See* "Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Design and Remedial Actions," OSWER Directive No. 9833.0-1a, (Mar. 7, 1990) and "Documentation of Reason(s) for Not Issuing CERCLA Section 106 UAOs to All Identified PRPs," OECA, OSRE (August 2, 1996).

[18] At sites involving federal PRPs, case teams should coordinate with the Environmental Defense Section of DOJ as early in the UAO process as possible and should document their efforts. Note that the concurrence of the Attorney General is required before UAOs to federal PRPs can be issued. Executive Order No. 12580, Section 4(e) (1/23/87), 52 Fed. Reg. 2923, 2926 (Jan. 29. 1987).

1. Findings of Fact. The Agency should include information that underscores the actual and potential risk posed by the site to human health, welfare, and the environment, and should consider, in appropriate cases, other information including, but not limited to, waste handling or general management practices of the parties and the facility.

2. Administrative Record. The negotiation team should carefully review the administrative record for the remedy decision.[19] Documents relating to PRP liability are generally not included in the administrative record for the remedy decision because liability is reviewed *de novo* by a district court. Nevertheless, the case team should thoroughly review PRP liability information before issuing the UAO. In appropriate circumstances, the case team may wish to include enforcement documents (such as previous administrative orders and EPA/PRP correspondence) in the administrative record for remedy selection.

3. Severability Provision. To the extent that case law impairs EPA's broad authority to issue RD/RA administrative orders, it is important that a severability provision be included in all UAOs.

D. Seek Past Response Costs. The pressure for recovery of past response costs must be maintained when a determination has been made to issue a UAO. An updated demand letter for all past costs should accompany or follow each UAO[20] to emphasize that EPA will pursue past costs aggressively in the UAO context. In certain circumstances, the Region may choose to request that DOJ promptly file a complaint under Section 107 for recovery of past costs, without first issuing an updated demand letter to the PRPs. Where the Region has decided not to issue a UAO to PRPs after settlement negotiations have failed and the Region proceeds with a Fund-lead action, the Region should strongly consider a request to DOJ to promptly file an action under Section 107 for past response costs.

E. Participate and Cooperate Orders and Carve Out Orders. In circumstances where some, but not all, identified PRPs have agreed to perform the RD/RA under a settlement agreement, the negotiation team should evaluate issuing a UAO to the non-consenting parties under the criteria set forth above. It is important to convey to the settling parties that the Agency is committed to including all appropriate parties in the process of implementing the RD/RA, including through the issuance of a UAO directing non-consenting parties to "participate and

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[19] *See* "Final Guidance on Administrative Records for Selecting CERCLA Response Actions," OSWER Directive No. #9833.3A-1, Part III (12/3/90), for general guidelines on the contents of an administrative record for remedy selection.

[20] *See* "Written Demand for Recovery of Costs Incurred under the Comprehensive Environmental Response, Compensation, and Liability Act," OSWER Dir #9832.18, (3/21/91) and "Transmittal of Sample Notice Letters: 1) Demand; 2) General Notice; 3) Special Notice; and 4) Follow-Up 104(e)," OSRE-RSD (7/26/96).

cooperate" ("P&C order") in the performance of the remedy. The team should refer to EPA's existing guidance and recommended language when issuing such orders.[21]

The Agency can be creative in the way it includes the non-consenting parties in the RD/RA process. In the vast majority of settlements, the negotiating team should require that the settling parties agree to implement the entire RD/RA as a condition of settlement. Along with such settlements, the team should consider the issuance of P&C orders to appropriate PRPs who have refused to participate in the settlement.[22] P&C orders should specify the actions necessary to demonstrate a good faith effort to participate and cooperate.

The negotiating team can also consider "carving out" a portion of the remedial work. A "carve out" settlement is where the consenting parties agree to perform a portion of work related to the RD/RA. Where a "carve out" settlement is negotiated, EPA should direct the implementation of the remaining portion of the RD/RA by the issuance of a "carve out" order to the non-consenting parties. A "carve out" order affords the Agency considerable flexibility in requiring the performance of discrete tasks which are tailored to the abilities and resources of the Respondent, thereby increasing the likelihood of prompt and effective compliance with the order.

F. Enforcement of UAOs. The negotiation team should inform the PRPs early in the negotiation process that if negotiations fail and a UAO is issued, then non-compliance with such UAO will be vigorously pursued by filing appropriate judicial actions for penalties, punitive damages, and where warranted, injunctive relief. The team should also inform the PRPs that Fund monies will be available to conduct site remediation in the event of non-compliance with the order.

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[21] *See* "Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions," OSWER Dir. #9833.0-1a, (3/7/90) and "Transmittal of Sample Documents for Compliance Monitoring," OSRE-RSD (7/1/96). The guidance discusses the use of "parallel" orders, which are a subset of P&C orders. The transmittal has various attachments, including language for use in cases where EPA is entering into a settlement and issuing a P&C order.

[22] In one case an issue has been raised as to the enforceability of P&C Orders issued after a settlement. *See, United States v. Occidental Chemical Corp.*, 4:CV:-98-0686 (M.D. Pa.) (Order dated Oct. 23, 1998) (EPA lacks authority to subsequently issue a UAO to nonsettling PRPs to compel their participation in the site cleanup because EPA obtained "complete relief" through a previous consent decree). EPA and DOJ believe the case was wrongly decided and have appealed the decision to the Third Circuit. *But cf. United States v. Lecarreaux*, 1991 WL 341191 (D.N.J. 1991) (Court found PRP liable for CERCLA penalties for failing to comply with a UAO that required the PRP's "cooperation" with parties performing response work under an existing UAO). Before seeking to compel performance of work at a site through a P&C order, the case team should coordinate with their DOJ counterparts.

G. Using the Fund as an Alternative. Although EPA typically favors the issuance of a UAO in cases where settlement negotiations prove unsuccessful, use of the Fund may be a better strategy in a particular case. Regional teams should contact OSRE and OERR early to determine the availability of funds and the appropriate process for obtaining Fund monies for such cases. The process will likely cover various issues, including state assurances, the Agency's National Prioritization Panel, and the actual timing for obligating the monies.

As mentioned above, pre-planning by the negotiating team at, or before, the Special Notice Letter stage is an essential component of maximizing negotiating leverage. In some circumstances, revealing what course of action the Agency will take may have a salutary effect on the likelihood of settlement. In other cases, the negotiating team may choose not to indicate what steps will be taken if negotiations break down, increasing the uncertainty and risk inherent in failed negotiations. In the appropriate case, a Region may decide not to issue a UAO, but instead may decide to implement the cleanup using Fund monies and bring a CERCLA Section 107 action to obtain all past and future costs from the PRPs.

Case law supports the Agency in its recovery of all response costs in subsequent cost recovery actions. If EPA chooses to use Fund monies to implement the remedy, then the PRPs lose the opportunity to control response costs.

VII. Disclaimer

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