



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

April 19, 2001

MEMORANDUM

SUBJECT: Orphan Share Reform Implementation Update No. 2

FROM: Barry Breen, Director
Office of Site Remediation Enforcement

TO: Director, Office of Site Remediation and Restoration, Region I
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Site Cleanup Division, Region III
Director, Waste Management Division, Region IV
Director, Superfund Division, Regions V, VI, VII, and IX
Assistant Regional Administrator, Office of Ecosystems Protection and
Remediation, Region VIII
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Regional Counsel, Regions II, III, IV, V, VI, VII, IX and X
Assistant Regional Administrator, Office of Enforcement, Compliance and
Environmental Justice, Region VIII

The orphan share reform announced in October 1995, and expanded in September 1997 to include certain cost recovery claims/cases, continues to be very successful. Over five years, EPA has offered orphan share compensation in an amount exceeding \$194 million in 118 negotiations for work and cost recovery settlements. In the majority of cases where orphan share compensation was offered, settlements have been reached with viable parties. In only a few cases where orphan share compensation was offered has the Agency found it necessary to issue a Unilateral Administrative Order for performance of work, initiate a fund-financed cleanup, or pursue cost recovery litigation. Thank you for your continued efforts to make this reform so successful. As we continue to implement this reform, there are a number of issues to which I call your attention.



CERCLIS Requirements

Many outside parties continue to request information on our progress and success with this reform. In addition, the GAO and IG continue to ask about the reform's application, implementation, and results. FY 2000 was the first year the Regions were required to enter orphan share compensation offers made in negotiations for work settlements into the CERCLIS database. In FY 2001, that requirement is expanded to include offers made in cost recovery negotiations.¹ A comparison of the CERCLIS data gathered for work offers during FY 2000 and the information gathered by the Orphan Share Team at Headquarters for the same year revealed many inconsistencies, with the information in CERCLIS typically found to be incomplete. FY 2001 is the last year the HQ team plans to manually track (and alert Regions to inconsistencies in) orphan share data. Please emphasize to your staff the importance of making the necessary data entries pertaining to orphan share compensation offers in CERCLIS and ensuring that the information entered is accurate and complete.² Failure to provide complete and accurate data reflects poorly on both the Regional and National programs.

Fairness in *De Minimis* Settlements

If a *de minimis* settlement is being considered at a Superfund site where an orphan share exists, *de minimis* parties should receive the same fairness considerations as the major parties at the site. Thus, where the information needed to determine the MAAC (maximum amount appropriate for compensation) is available at the time of the *de minimis* negotiations and the orphan share is not already accounted for in the *de minimis* cashout formula, a *de minimis* offer should take into account the orphan share at the site. Applying the orphan share reform to *de minimis* settlements can require detailed calculations and evaluation. Please continue to consult with the appropriate member of the Orphan Share Team (listed below) to work through these issues whenever your office is considering a *de minimis* contributor settlement at a site (or an operable unit within a site) at which an orphan share exists. This consultation requirement, intended to assist the Agency in developing national consistency in this area, is set forth in Section III.C.25 of the September 30, 1998 memorandum titled "Revisions to OECA Concurrence an Consultation Requirements for CERCLA Case and Policy Areas" (the "Roles Memo").

¹ In addition to the Regions' CERCLIS reporting responsibilities, the Headquarters Orphan Share Team will track orphan share compensation offers for all Regions in FY01. They will track:

1. Orphan share compensation offers in proposed work settlements;
2. Orphan share compensation offers in proposed cost recovery settlements;
3. Actual settlements under either (1) or (2) with an orphan share compensation component;
4. RD/RA negotiations/settlements where orphan share compensation was not offered because sites were not eligible for the reform (e.g., owner-operator only sites); and
5. Cases filed against non-settlers that were offered orphan share compensation.

² The importance of making an accurate and complete entry of orphan share compensation offered in work and cost recovery negotiations into CERCLIS is heightened, as the Policy and Program Evaluation Division of my office no longer accepts manual numbers.

Updated Questions and Answers

A set of “Revised Orphan Share Compensation Reform Questions and Answers” based on the “Interim Guidance on Orphan Share Compensations for Settlers of Remedial Design/ Remedial Action and Non-Time Critical Removals” (Steven A. Herman, June 3, 1996) and the “Addendum to the Interim CERCLA Settlement Policy Issued on December 5, 1984” (Steven A. Herman and Lois J. Schiffer, September 30, 1997) was transmitted to the Regions on February 2, 2001. The Revised Questions and Answers (Revised Qs&As) supercede the original set of Qs&As contained in the Orphan Share Implementation Notebook issued in August 1996. The original set of Qs&As addressed implementation issues related to orphan share compensation in the context of RD/RA and NTC removal action negotiations. The Revised Qs&As incorporate the original set of Qs&As, with some modifications based on our experience over the past five years of implementing the reform, and adds Qs&As summarizing our practice related to orphan share compensation in cost recovery negotiations. The Revised Qs&As should prove useful to your staff in making orphan share compensation offers in both work and cost recovery negotiations, and in continuing to make the orphan share compensation reform a success. The Revised Qs&As document is also available on the Orphan Share Team’s posting on the Agency’s Intranet at <http://intranet.epa.gov/oeca/osre/workgroups>.

Model Settlement Language Relating to Orphan Share Compensation

In September 2000, OECA and DOJ issued a joint memorandum, “Model Language Relating to Orphan Share Compensation Through the Compromise of Future Oversight Costs,” Barry N. Breen and Bruce Gelber, September 28, 2000, providing model language for inclusion in future RD/RA consent decrees and administrative orders on consent for removal actions that provide orphan share compensation through the compromise of future oversight costs. The intent of the model language is to ensure that the compromise of future costs as orphan share compensation is limited to oversight costs and does not exceed the amount intended at the time the settlement is negotiated. Please refer to this memorandum when drafting settlement documents that provide orphan share compensation through the compromise of future oversight costs. The memorandum is available on the Orphan Share Team’s posting on the Agency’s Intranet at <http://intranet.epa.gov/oeca/osre/workgroups>.

RD/RA Settlement Negotiations at Non-NPL Sites

The 1996 Orphan Share Work Policy was specifically limited to work negotiations involving RD/RA or non-time-critical removals at NPL sites. Over time, consistent with one of the stated purposes of the reform of encouraging PRPs to perform cleanup work, the Agency has used its discretion to expand application of the orphan share reform to time-critical removals, as well as removals at non-NPL sites. Presently, OSRE is developing guidance regarding use of its settlement authorities in negotiations for RD/RA cleanup at non-NPL sites. Consequently, orphan share compensation may be available in RD/RA negotiations for work at non-NPL sites where PRPs agree to certain conditions. Until this guidance is issued, if you are contemplating an

RD/RA settlement at a non-NPL site with an orphan share, please consult the Orphan Share Team.

Orphan Share Support

The Orphan Share Team is charged with assisting Regions with implementing the orphan share reform at all appropriate sites. The designated team contacts are available to any staff in your Region that has orphan share questions. The team contacts for orphan share issues are currently as follows:

- Region 1: Bob Roberts, (202) 564-4267
- Region 2: Douglas Dixon, (202) 564-4232
- Region 3: Lisa Blum, (202) 564-4283
- Region 4: Bob Roberts, (202) 564-4267
- Region 5: Cate Tierney, (202) 564-4254
- Region 6: Lisa Blum, (202) 564-4283
- Region 7: Cate Tierney, (202) 564-4254
- Region 8: Douglas Dixon, (202) 564-4232
- Region 9: Bob Roberts, (202) 564-4267
- Region 10: Douglas Dixon, (202) 564-4232

Again, thank you for helping us with the continued success of this important and closely monitored reform. If you have any questions regarding this memorandum, or need to speak to someone about a specific matter and cannot reach the appropriate contact listed above, please contact Deniz Ergener (Team Leader) at (202) 564-4233 or Nancy Browne (Team Advisor) at (202) 564-4219.

cc: National Orphan Share Workgroup Members
Bruce Gelber, DOJ
Leslie Allen, DOJ

bcc: OSRE staff