



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

AUG 8 2002

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

SUBJECT: Orphan Share Reform Implementation Update 0.3

FROM: Sandra L. Connors, Director *Sandra L. Connors*  
Regional Support Division

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  
Director, Office of Environmental Cleanup, Region X  
Director, Office of Environmental Stewardship, Region I  
Regional Counsel, Regions II, III, IV, V, VI, VII, IX and X  
Assistant Regional Administrator, Office of Enforcement, Compliance and  
Environmental Justice, Region VIII

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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 the course of six years, EPA has offered orphan share compensation in an amount exceeding \$217 million in 134 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 has the Agency found it necessary to issue Unilateral Administrative Orders for performance of work, initiate a fund-financed cleanup because of unsuccessful work negotiations, or pursue cost recovery litigation because of unsuccessful cost recovery negotiations.

Thank you for your continued efforts to make this reform so successful. As we continue to implement this important 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. FY 2000 was the first year Regions were required to enter orphan share compensation offers made in negotiations for work settlements into the CERCLIS database. In FY 2001, that requirement was expanded to include offers made in cost recovery negotiations.' A comparison of the CERCLIS data gathered for work and cost recovery offers made during FY 2001 and the information manually 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. Due to the degree of data inconsistencies, the HQ team will continue to manually track (and alert Regions to inconsistencies in) orphan share data.

Please continue to make the necessary CERCLIS data entries pertaining to orphan share compensation offers and ensure that the information entered is accurate and complete. Also, please make certain that designated Regional staff continue to communicate with the appropriate member of the Orphan Share Team (listed below) on all FY 02 orphan share compensation offers, **and** that they **fulfill** applicable concurrence/consultation requirements. Failure to provide complete and accurate data reflects poorly on both the Regional and National programs.

As a reminder, when making an orphan share offer to PRPs during work settlement negotiations, Regional staff should notify all parties in writing (e.g., general/special notice letters) that orphan share compensation may be available for the site.

Giving early notice could promote a greater willingness among PRPs to negotiate early in the process and a greater incentive to settle. We realize that in certain limited circumstances, particularly in cost recovery negotiations, it may make sense for Regional staff to make an oral orphan share offer. Oral offers should always be followed by written documentation of such offers. Documentation for oral offers may be, for example, a memorandum to the case file memorializing the oral offer, or use of the ten point settlement analysis to document oral offers. The Region should enter such documented oral offers in the CERCLIS database and notify the Orphan Share Team of the oral compensation offer.

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In addition to the Regions' CERCLIS reporting responsibilities, the Headquarters Orphan Share team will track orphan share compensation offers for all Regions in FY02. 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.

## **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* cash out formula, the *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 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 and Consultation Requirements for CERCLA Case and Policy Areas" (the "Roles Memo"<sup>2</sup>).

## **Updated Questions and Answers**

The "Revised Orphan Share Compensation Reform Questions and Answers" (Revised Qs & As) based on the "Interim Guidance on Orphan Share Compensation 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 Qs&As supercede the original set of Qs&As contained in the Orphan Share Implementation Notebook issued in August, 1996. The Revised Qs&As incorporate the original set of Qs&As, with some modifications based on our experience over the past six years of implementing this 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 available on the Orphan Share Team's posting on the Agency's

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<sup>2</sup>The Roles memo outlines several prior written and oral approvals and consultations related to the Orphan Share reform. They include:

1. Prior written or oral approval of the Director/RSD on orphan share settlement offers when projected ROD or removal costs exceed \$30 million.
2. Prior written approval (PWA) of the Director/OSRE on cost recovery settlements offering orphan share compensation to a party who rejected an earlier orphan share compensation offer (no "two bites at the apple" principle), or offering greater orphan share compensation than would have been offered had the settlor entered into a work agreement ("no better deal" principle).
3. Consultation with the Orphan Share Team on all cost recovery orphan share offers.
4. Consultation with the Orphan Share Team on all *de minimis* settlements where an orphan share exists.

Intranet at <http://intranet.epa.gov/oeca/osre/workgroups.html>.

### **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. OSRE and OERR issued guidance on use of its settlement authorities for cleanup at non-NPL sites entitled, "Response Selection and Enforcement Approach for Superfund Alternative Sites" (Barry Breen and Mike Cook, June 24, 2002). Consequently, orphan share compensation may be made available in RD/RA negotiations for work at non-NPL sites where PRPs agree to certain conditions. Regions should notify the appropriate Orphan Share Team contact when making an orphan share offer at these sites.

### **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 Cate Tierney (Team Leader) at (202) 564-4254 or Nancy Browne (Team Advisor) at (202) 564-4219.

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