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Orphan Share Superfund Reform Questions and Answers

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BACKGROUND

Orphan share compensation was introduced in the third round of Superfund reforms. The Agency announced it would compensate parties for a limited portion of the orphan share in settlements involving future cleanup and issued the *Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time Critical Removals* (work policy) on June 3, 1996. The work policy is intended to enhance fairness and encourage potentially responsible parties ("PRPs") to agree to perform cleanups at contaminated sites. The work policy provides for compromise of federal claims based on the orphan share, up to certain specified caps.

The orphan share reform was expanded in September 1997 with the issuance of the *Addendum to the "Interim CERCLA Settlement Policy Issued on December 5, 1984"* (cost recovery policy). The cost recovery policy provides Regions with discretion to offer orphan share compensation in cost recovery cases (*i.e.*, those in which EPA has already cleaned up a site or has taken other action and is now seeking to recover its costs) where a significant orphan share exists.

There is an important distinction between the work and cost recovery policies. Under the work policy, settlement negotiations for future work that meet certain requirements should include an offer of orphan share compensation. In contrast, under the cost recovery policy, Regions have discretion to offer orphan share compensation in negotiations covered by the policy.

In both work and cost recovery settlements, orphan share compensation is provided in the form of a compromise of government costs at a site (it does not involve the Agency providing money from the Fund to PRPs). "Orphan share compensation" is a term of art limited to the compromise calculated pursuant to the dictates and limitations of the work and cost recovery policies, and is not intended to be synonymous with the term "federal compromise." Orphan share compensation may represent all or merely a part of the total federal compromise in a settlement. Thus, for example, in a cost recovery negotiation, a case team may calculate the appropriate amount of orphan share compensation pursuant to the cost recovery policy, but may determine that the litigative risks, ability to pay, and/or equitable factors at a site call for a compromise of costs in addition to orphan share compensation. In either the work or cost recovery context, the orphan share reform is not intended to interfere with the government's ability to reach an appropriate settlement figure, which may include a federal compromise greater than the orphan share compensation calculated pursuant to the policies, once it has been determined that settlement is in the best interests of the United States.

A. GENERAL PRINCIPLES

1. Since the work policy and the cost recovery policy are only interim documents, when are the finals expected?

The work and cost recovery policies are entitled "interim" to give EPA the flexibility to modify them as we gain experience through implementation. Although labeled "interim," they have the same effect as "final" guidance. At a later date, EPA may modify the documents to reflect lessons learned and may issue final versions.

2. How does the orphan share reform affect the Region's ability to pursue parties under principles of joint and several liability?

None of EPA's settlement principles, including those related to orphan share, has any effect on joint and several liability. Common law tort principles of joint and several liability are not disturbed by this reform. CERCLA remains a statute that provides for joint and several liability unless there is sufficient proof of divisibility of harm and a reasonable basis for apportionment.

As an inducement to settlement, however, the Regions should offer "orphan share" compensation for eligible remedial design/remedial action (RD/RA) sites and non-time-critical (NTC) NPL removal sites and may offer such compensation for cost recovery sites as one component of their settlement analysis, along with traditional factors such as litigation risks, cooperation of performing parties and resources of the parties. In fact, this willingness of the government to compromise based on orphan share is one of the major benefits of settling promptly with the government. Absent such settlements, the United States will generally require the burden of all site cleanup costs to be borne by viable liable parties.

a. How does the reform affect the Region's treatment of nonsettlors?

Regions should pursue nonsettlors jointly and severally for cleanup work and recovery of response costs. Again, the orphan share component of the Federal compromise is only available through EPA's enforcement discretion during settlement negotiations and in accordance with the orphan share policies.

b. What if the Region or a court determines that the parties have met their burden of proving that the harm is divisible and reasonably capable of apportionment?

The orphan share reform is not intended to disturb a party's divisibility of harm defense to joint and several liability. Divisibility is the legal apportionment of harm at the site. A party that has proved divisibility at a site is not liable for the divisible portion of the

cleanup or costs. However, orphan share compensation could still be offered with respect to the portion of the costs that the party is liable for provided there is an orphan share associated with that portion of the harm at the site.

3. Is mixed funding available to implement the reform?

The reform does not provide for mixed funding, nor does it disturb the Agency's enforcement discretion to enter into mixed funding agreements. (*See* footnote 3, page 3 of work policy and Q&A D.7).

B. ELIGIBILITY

1a. What are the basic criteria for providing orphan share compensation in work negotiations?

At sites where a work settlement is being negotiated, the following criteria must be satisfied for specific application of the policy (*But see* Q&A B.5 for site exclusions):

1) EPA initiates or is engaged in negotiations for RD/RA at NPL sites[1] or for Non-Time Critical (NTC) removal at an NPL site;
2) A PRP or group of PRPs agrees to conduct the RD/RA or RA pursuant to a consent decree or the NTC removal pursuant to a consent decree or an administrative order on consent; and
3) An "orphan share" exists at the site.

The policy, however, may be applied in other circumstances (*e.g.*, *See* Q&As B.2).

1b. What are the basic criteria for providing orphan share compensation in cost recovery negotiations?

In cost recovery settlement negotiations, the following criteria must be satisfied along with considering all relevant site-specific factors to determine if an orphan share offer is appropriate:

1) A significant orphan share exists at the site;
2) The settling party did not previously refuse a settlement offer that included orphan share compensation (except in extraordinary cases, *See* Q&A D.2 and E.5). "Settlement offer" includes any offer, not limited to special notice, of a compromise based on orphan share (*e.g.*, a verbal offer). A party that had the opportunity to proceed in negotiations with EPA after having received a settlement

[1] Orphan share compensation may be available in RD/RA negotiations for work at non-NPL sites where PRPs agree to certain conditions. While EPA is developing guidance on this topic, we ask that regions contact headquarters if you are interested in providing orphan share compensation at NPL-equivalent sites.

offer that included orphan share compensation, but that did not proceed with such negotiations, can be deemed to have "refused" that settlement offer for purposes of this analysis.

2. Since the work policy specifically applies to NTC removals at NPL sites, does this mean that time-critical removals or removals at non-NPL sites are excluded from the policy?

No. The work policy is intended to encourage PRPs to perform cleanup work. The Regions should offer orphan share compensation during settlement negotiations for RD/RA and NTC removal actions at NPL sites. However, the Region may determine that it is also appropriate, in light of timing, resources and other factors (*e.g.*, the orphan share is large, the work parties' share of responsibility is small), to apply the reform to time-critical removals or removals at non-NPL sites. Because the Agency does not want to create disincentives for PRPs to perform removal work under a consent agreement, it is important to provide opportunities for compensation during removal work settlement negotiations (including time-critical and non-NPL if possible). This discretion recognizes that for time-critical removals the Region may not have the ability to negotiate a work agreement that includes orphan share compensation due to the urgent need for response action. However, in situations where time permits, time-critical removal negotiations should generally include offers of orphan share compensation, to the extent sufficient information is available, in order to maintain incentives for parties to perform work.

3. Are there any limitations on the types of response costs that may be included in calculating an offer in a cost recovery case?

No. Under the cost recovery policy, the Regions may offer orphan share compensation in negotiations regardless of the type of costs being negotiated. Costs may include those associated with time critical and non-time critical removals, EECAs, RI/FS work, RD/RA work and oversight at NPL and non-NPL sites. When making a cost recovery offer in the case of a time-critical or non-NPL removal action, as with any cost recovery offer, the Region should be mindful to make an offer no better than that which would have been made at the time work was being negotiated,[2] while striving to maintain incentives to reach work settlements. (*See also* Q&A D.2.)

4. Can the Region apply the orphan share reform to benefit parties performing a remedial investigation/feasibility study (RI/FS) under an AOC?

[2]When determining the amount of orphan share compensation, Regions should consider the time-value of money as to those parties which had the benefit of not expending dollars prior to or during cleanup.

In general, the work policy is intended to encourage PRPs to perform response cleanup work and does not apply to remedial investigations and feasibility studies and the like, (*e.g.*, EECAs). However, there may be circumstances in which it would be appropriate to offer orphan share compensation to PRPs willing to perform an RI/FS under an AOC. In these cases, the offer of compensation is permitted in the form of forgiveness of past costs and not as a waiver of future oversight costs. CERCLA § 104(a)(1) requires PRPs conducting an RI/FS to agree to "reimburse the Fund for any costs incurred by the President under, or in connection with, the oversight contract or arrangement."

5. At which types of sites is orphan share compensation NOT available under the work and cost recovery policies?

Orphan share compensation is not available for either work or cost recovery at:

1) Federal facilities (*See* footnote #2, page 2 of the work policy);

2) "Owner/operator only" sites--sites where every PRP is liable as a current or former owner and/or operator, (*i.e.*, "chain-of-title" sites where the only PRPs identified by the Region are owners or operators and there are no generators or transporters). (*See* footnote #2 , page 2 of the work policy).[3]

a. Why are owner/operator-only sites (or "chain-of-title sites") excluded from the reform

At the time of policy formulation, a decision was made that it would be more prudent to use limited government resources for settlements that reduce high transaction costs at sites with larger numbers of PRPs, namely sites with generators and transporters. This site type exclusion (*i.e.*, owner/operator-only sites) is explicit in the work policy. The exclusion applies implicitly to cost recovery cases. This is a site type exclusion--not a party type exclusion (*See* Q&A B.5.b & c).

b. What if an owner/operator was also a generator?

Consistent with legislative reauthorization proposals supported by EPA, "owner/operator-only" sites are excluded even if the owner/operators may also be liable as generators or transporters at the site. In other words, even though an operator may also be liable as a generator at the site, its generator liability would not make orphan share compensation available at the site if there are no other non-owner/operator generators at the site.

[3]The fact that the orphan share policy does not apply to owner/operator only sites does not mean that the United States cannot exercise its prosecutorial discretion in appropriate circumstances to otherwise compromise its claim based on litigation risk or equities.

c. Does this mean that sites that have one or more owner/operators are excluded, even if there are generators at the site?

No, the exclusion applies solely to owner/operator only sites. The presence of a single non-owner/operator PRP whose liability is based on a generator or transporter theory means that the orphan share reform can apply at the site, even to the benefit of owner PRPs.

d. If the only generators at the site are "Aceto" generators, and the only other PRPs are owner/operators, are the PRPs at the site eligible for orphan share compensation?

Yes, the PRPs at the site may be eligible for orphan share compensation. Typically, "Aceto" generators are persons who arranged for the disposal of a hazardous substance by: (1) supplying a chemical ingredient to a formulator or processor; (2) retaining ownership or control of the ingredient throughout the formulation process, which involves the contemporaneous generation and disposal of hazardous substances; and (3) retaining ownership of the finished product. *See* United States v. Aceto Agricultural Chem. Corp., 872 F.2d 1373 (8th Cir. 1989). (Eighth Circuit held allegations that defendant pesticide manufacturers contracted for the formulation of hazardous substances into commercial grade pesticides which they owned, in a process that involved the generation and disposal of wastes, were sufficient to withstand defendants' motion to dismiss).

6. Are Federal PRPs at a privately owned site eligible for orphan share compensation in work and cost recovery negotiations?

Yes. Federal PRPs at privately owned sites are treated the same as private parties[4] for purposes of the orphan share reform. Federal PRPs would receive orphan share compensation even if the Federal parties were the only generators or transporters at the site.

[4] The only difference that may apply in work negotiations is that, because of unique federal appropriations limitations, most Federal PRPs do not perform cleanup work, but instead only provide funding to the private PRPs performing the work.

7. How are the MAAC caps calculated if the subject of negotiations is only the remedial action and does not include the remedial design?

If the subject of the negotiations is limited to remedial action, the past cost/future oversight costs MAAC cap should be limited to EPA's unreimbursed past costs and future oversight costs associated with the remedial action; it cannot include the PRPs' past costs of work performed at the site (*e.g.*, PRPs' costs of performing remedial design, with the exception of a limited set of UAO conversion cases). (*See* Q&A B.8 .) Similarly, the 25% of the ROD MAAC cap, should be limited to the RA costs.[5] It should be noted that, if pursuant to the RD, RA costs have been revised, Regions should use that revised number to calculate the 25% ROD MAAC cap as opposed to the RA estimate in the ROD. When calculating the orphan share MAAC cap, total site costs should not include PRP past costs for performing the RD.

8. Can PRPs who are doing work under a UAO convert to a CD in order to benefit from orphan share compensation?

In general, because of the effort required to convert a UAO to a CD, the Region should only do so if it finds that a substantial benefit accrues to the Agency. However, once the Region makes the decision that conversion is appropriate, the Region may consider offering orphan share compensation if fairness dictates the application of the reform. Of course, there may be UAO conversion cases in which it is inappropriate to offer orphan share compensation. For example, the Regions should generally not offer orphan share compensation in a UAO conversion context if the respondents had previously been offered, but refused, an opportunity to settle with orphan share compensation. Even then, there may be mitigating factors that might warrant orphan share compensation in an extraordinary case. (*See* Q&A E.5.)

In a UAO conversion case, we recommend the following when calculating the 25% ROD cap in analysis of the Maximum Amount Appropriate for Compensation (MAAC):

1) 25% of the cost of the future work to be performed under the CD (typical case); or,
2) in appropriate circumstances, 25% of the total ROD costs (*e.g.*, order had been issued due to site exigencies but it was understood at the time by the Agency and PRPs that once work started, the order would be converted to a settlement agreement).

[5] Where PRPs signed up to perform RD under an AOC after the OS policy was created, they should have already received Orphan share compensation related to the RD. If PRPs did not get such compensation at the RD stage, equities may dictate that compensation should be given in RA negotiations. For example, if a group of PRPs performed the RD separately from the RA at the encouragement of EPA and did not previously receive orphan share compensation, it may be appropriate to consider costs associated with the RD as part of the RA MAAC analysis.

9. Does the work policy apply where the subject of the CD consists only of an agreement to perform Operations and Maintenance (O&M)?

Yes, the reform applies to settlements in which the PRPs agree to perform only O&M at the site provided that the other requirements of the policy are met. However, when calculating the MAAC, the Regions should typically take 25% of O&M costs (not all ROD costs) in calculating the 25% ROD cap. In limited circumstances (*e.g.*, where certain PRPs performed RD/RA work under a UAO rather than a CD because reaching agreement on federal party or other issues would have delayed the work), it may be appropriate to make a different calculation. In such instances the Headquarters (HQs) Orphan Share Team is available to assist the Regions in this calculation.

10. Can the Region give *de minimis* parties the benefit of orphan share compensation?

Yes, the Region should consider giving *de minimis parties* the benefit of the orphan share compensation where the information needed to determine the MAAC at the time of negotiations is available, and orphan share is not already accounted for in the *de minimis* cashout formula. Please consult with the appropriate HQs orphan share contact for ways to handle orphan share compensation in *de minimis* settlements.

11. How does the reform apply to state-lead enforcement sites?

In the work and cost recovery policies, only the Federal government committed to provide orphan share compensation. The reform therefore applies only to costs incurred by the Federal government, which may include costs incurred by the U.S. before or after the state takes the lead at a site. With respect to costs incurred by the state at a state-lead site, interested parties may contact the relevant state environmental agency to learn whether and how that state compensates responsible parties for the orphan share associated with costs that the state has incurred.

12. Can past settlements be reopened in order to provide orphan share compensation?

No, the orphan share reform cannot be applied retroactively where settlement agreements have already been reached (*i.e.*, settlements should not be reopened). In addition, regions may not agree to "forgive" past costs that PRPs have agreed to pay in a previous CD or AOC.

13. What factors should a Region consider in determining whether to make an orphan share compensation offer in cost recovery negotiations?

In implementing the orphan share reform in cost recovery cases, the Regions should bear in mind the primary purpose of both the work and cost recovery policies, which is to be more fair and equitable by making settlement offers that, at least in part, mitigate the effects of joint and several liability. However, as the cost recovery policy cautions, the Regions should not offer settlements that provide incentives or precedents for parties to refuse to enter into agreements for performance of work, believing they may get a better orphan share offer at the time EPA pursues a cost recovery claim. Therefore, in general, EPA should not offer orphan share compensation in a cost recovery settlement to a party that refused a previous settlement offer that included a compromise based on orphan share compensation (the costs being negotiated in cost recovery are the same costs that were on the table during the work negotiations). In other words, PRPs should only get one "bite at the apple" for receiving orphan share compensation for the same costs. Additionally, the Region should consider the following factors**:**

- ***Overall size of the orphan share*****:** the larger the orphan share, the more equitable it would be to provide compensation.

- ***Relative shares of viable settlors and orphan parties*****:** it may be more equitable to give compensation to a settlor where its share is relatively small compared to the orphan share rather than to a settlor where its share is relatively large compared to the orphan share.

- ***Opportunity to do the work*****:** it may be appropriate for late-identified PRPs that were not given the opportunity to perform the work and receive orphan share compensation to receive orphan share compensation in cost recovery negotiations. In other words, PRPs who never had the opportunity to do work should not be penalized for this in cost recovery negotiations.

- ***Ability to do the work*****:** regions may consider a PRP's financial or technical inability to perform the work on its own as a mitigating factor weighing in favor of providing the PRP with some orphan share compensation in cost recovery even if the PRP declined a previous offer to do the work that included orphan share compensation as long as the PRP has otherwise been cooperative with the Agency. Such an offer would be in recognition of the fact that it was not the PRP's recalcitrance which prevents it from doing work under consent, but rather the party's financial or technical constraints.

- ***Cooperation*:** cooperation with the government and other parties (*e.g.*, information disclosure) and good faith in negotiations may weigh in favor of providing orphan share compensation to cost recovery parties.

- ***Fairness*:** behavior resulting in unfairness to other parties (*e.g.*, suits against *de micromis* contributors) may weigh against providing orphan share compensation to cost recovery parties.

- ***Exclusions*:** the site eligibility exclusions explicitly set forth in the work policy are also applicable to the cost recovery policy. Accordingly, orphan share compensation may not be offered at owner/operator only sites and Federal facilities. (*See* Q&A B.5.)

C. DETERMINING THE ORPHAN SHARE

1. What is an "orphan share?"

The orphan share is that share of responsibility for response costs specifically attributable to identified parties determined by the Agency to be:

1) potentially liable;
2) insolvent or defunct; and
3) unaffiliated with any other viable party potentially liable for response costs at the site.

2. What is not included in the orphan share definition?

The orphan share does NOT include shares associated with:

1) unattributable wastes (*i.e.*, waste that cannot be specifically attributed to an identified party);
2) the difference between a party's actual share and the share that it is able to pay;
3) *de micromis*, municipal solid waste (MSW) and other contributors typically not pursued by the Agency; or
4) those exempt from liability by the Superfund Recycling Equity Act, which is codified in CERCLA at 42 U.S.C. § 9627.

3. When is a party "insolvent?" When is a party "defunct?"

Section 101(31) of the Bankruptcy Code, 11 U.S.C. § 101(31), indicates that a party is insolvent when its assets are exceeded by its liabilities and/or it is unable to meet debts as they become due. However, for purposes of the orphan share reform, a party is considered **insolvent** when it has "no ability to pay." EPA may determine a party has "no ability to pay" even if it is not technically insolvent pursuant to the Bankruptcy Code. Conversely,

EPA may determine that a party is not an orphan party even if it is determined to be insolvent pursuant to the Bankruptcy Code. (*See also*, Q&A C.3.d.)

For purposes of the orphan share analysis, a party should be considered **defunct** if it ceased to exist or ceased operations and has fully distributed its assets such that the party has "no ability to pay." It is important when deciding whether a party is defunct to attempt to determine if and when a company ceased operations or ceased to exist, particularly if assets were distributed and formalities were not fully observed. Formalities may include filing a Notice of Bulk Transfer, Notice of Non-Responsibility, Certificate of Intent to Dissolve, and Notice of Dissolution. If the company ceased operations before EPA established a bankruptcy claim**,** then EPA would probably have no further interest in the distributed assets. However, if the distribution occurred within one year before or after EPA's claim arose, then EPA may need to closely examine any distributions of company property when analyzing the party's ability to pay and consider whether these assets may be available or attainable for use towards site cleanup costs. NEIC may be helpful in making these determinations through resources such as Dunn & Bradstreet. This database may provide information such as the company's history of reorganization and mergers or whether there are any surviving entities.

A PRP that has a viable liable successor or is affiliated with another party with potential liability cannot be considered an insolvent or defunct party for purposes of the reform. (*See* Q&A C.3.h.)

Currently, no guidance on making an insolvent or defunct determination is available for orphan share purposes. However, the Agency's guidance on making Ability to Pay determinations (*See* Breen, 9/30/97, *General Policy on Superfund Ability to Pay Determinations*) may assist the Regions in determining what financial information to review in order to make insolvent/defunct determinations.

Note that an extensive effort to identify insolvent and defunct parties may not be necessary if either: 1) 25% of the ROD or removal costs; or 2) past costs plus future oversight costs, will clearly be the MAAC.

a. How does the Region determine whether a party has "no ability to pay?"

To determine whether a party has "no ability to pay," the Region should evaluate the party's financial status. In general, if a party cannot make any payment at a site without undue financial hardship, the party would be considered to have "no ability to pay." An undue financial hardship occurs if, in the opinion of EPA, "satisfaction of the environmental claim will deprive a PRP of ordinary and necessary assets or cause a PRP to be unable to pay for ordinary and necessary business or living expenses." (*See* Breen, 9/30/97, *General Policy on Superfund Ability to Pay Determinations*, page 1.)

In some circumstances, an extremely large difference between a party's equitable share and its "ability to pay" may lead a Region to conclude that the party qualifies as an orphan. For example, if the Region's evaluation indicates that a party can pay $100 toward its $1 million share, the Region should obviously determine that the party has "no ability to pay" and is an orphan. However, if a party could pay $250,000 out of a $1 million share, the Region could determine that the party has a limited ability to pay and therefore is not an orphan. For further assistance in making "no ability to pay" determinations, consult the HQs contacts and/or the document *Overview of the Process for Providing Orphan Share Compensation*, located in the Orphan Share Implementation Notebook at Tab 3, or the 9/30/97 *General Policy on Superfund Ability to Pay Determinations.*

b. Does the Region have to perform an "ability to pay" analysis according to the Ability to Pay Guidance for each party that it believes may be insolvent or defunct?

Not necessarily. The 1996 work policy requires Regions to make a "rough estimate" of the size of the orphan share, based on readily available or easily obtainable information. Some inquiry into the party's financial status is necessary to determine whether the party is insolvent or defunct, but the degree of inquiry necessary for each party depends on the available information, the specific circumstances of the case, and the time available for performing the analysis (*e.g.*, determining the orphan share should not impede cleanup or delay statutory negotiation deadlines).[6] In some cases, parties may be identified as orphans based upon a review of those parties' tax returns. Many financial assessments may be screened and resolved by EPA personnel with some knowledge of ability to pay issues or by using contractor resources. Defunct parties may be investigated and questions may be resolved using investigators or ESS/SES contractors. (*See* Tab 3 of the Orphan Share Implementation Notebook, *Overview of the Process for Providing Orphan Share Compensation*.) The Region should consult a financial analyst for particularly complex financial determinations.

[6] Note that the government may need to perform a more thorough analysis of a party's viability and/or ability to pay at other stages of the enforcement action, for example, when determining an appropriate cost recovery settlement amount for a particular PRP or when determining whether to sue a non-settling PRP.

c. May a Region consider an entity defunct if the Region cannot locate that entity?

Yes. Entities that Regions cannot locate may be considered defunct if an adequate search has been done to locate them. Appropriate efforts may include, for example, sending out notice letters to the last known address and checking to see if parties are listed in Dunn & Bradstreet and other available business databases (*e.g.*, "Finder" on Lexis-Nexis).

d. Should a party who has filed for bankruptcy, or is bankrupt, be considered insolvent?

Not necessarily. Depending on the particular bankruptcy filing, the Agency may recover according to a percentage on the dollar for the claim or reach a separate settlement agreement for payment with a bankrupt party. Some debtors pay creditors 100% of their claims or may enter into settlements with EPA providing for payment of their settlement share. The term insolvent for purposes of the orphan share policy is not being used as it is in the Bankruptcy Code.[7] However, it is likely that many debtors will be insolvent (i.e., will have no ability to pay under the orphan share policy) because many debtors are unable to pay their ordinary and necessary business expenses. Indeed, many debtors file for bankruptcy in order to discharge the ordinary and necessary business expenses that they are unable to pay.

There are a number of factors to consider in assessing a debtor's ability to pay. These factors include the number of creditors (secured and unsecured), the amount and due date for the debtor's liabilities, and the amount of assets. The type of filing[8] however is

[7]For example, a bankruptcy court may determine a party is insolvent under the Bankruptcy Code. But under the distribution plan, each creditor is being paid 10¢ on a dollar. In this case, depending on a party's allocated share, the Region may decide that party has "no ability to pay" and therefore is an orphan party (because 10¢ on the dollar on a large share is too little of an ability to pay), or that the party has a limited ability to pay (because it has a smaller allocated share) and is not an orphan party.

[8]In a **Chapter 7 individual bankruptcy**, a trustee is appointed, the debtor's assets are liquidated, and pre-petition debts are then discharged. From the liquidated assets, the trustee will pay the creditors who filed proofs of claim in the order of their priority. (Secured creditors first, then unsecured creditors). In a **Chapter 7 corporate liquidation**, the trustee takes control of and liquidates all property in which the corporation has an interest. The assets are distributed to the corporation's creditors listed in the corporation's bankruptcy schedules or those that filed timely proofs of claim, following the priority schedule. If there are insufficient funds to pay all claims in full, payment is made pro rata within each class of claims. If the case is a **no-asset Chapter 7** case, there are no funds available for distribution and no possibility of recovery. In a **Chapter 11 corporate reorganization**, the debtor corporation remains in possession of its property. The debtor corporation must file a schedule of its liabilities which describes the corporation's debts. The debtor corporation then prepares a plan of reorganization which details its offer to pay a percentage of its debts consistent with the priority schedule under the Bankruptcy Code. The plan must be accepted by the creditors and approved by the bankruptcy court. Pre-petition claims are paid under the plan and are discharged.

not necessarily a determinative factor in assessing whether a party is insolvent under the orphan share compensation policy.

Regions should also note that there is an administrative expense priority which applies to environmental cleanup claims incurred post-petition with respect to property of the debtor's estate. Secured creditors will still be paid first, but the environmental cleanup creditor with an administrative expense priority will be paid before an unsecured creditor. Likewise, if a debtor will continue to own contaminated property, its liability for threatened or ongoing releases is not dischargeable. Also, if a party signed a CD as a work party and then filed for bankruptcy, EPA contends that the party's liability is non-dischargeable. In such cases, the debtor or reorganized debtor may fully comply with its obligations.

It is important for the Region to include an analysis in the 10-point settlement document regarding whether a bankrupt party is insolvent and, if not affiliated with another viable party, an orphan party. For more information on Bankruptcy *See*: 1) *EPA Participation in Bankruptcy Cases*, OECA Guidance issued 9/30/97; and 2) *Bankruptcy Primer for the Regional Attorney*, issued 2/94.

e. Should a party be considered an orphan if it has other potential sources of income (*e.g.*, insurance proceeds)?

No. The Region should consider whether funds from sources such as insurance recoveries, indemnification agreements, contribution actions, and increases in property values resulting from cleanup activities will be available to the party being analyzed. This is consistent with the Agency's guidance on ability to pay. (*See* Breen, 9/30/97, page 5, *General Policy on Superfund Ability to Pay Determinations*) If these funds are significant and likely to be recovered, they should be considered in determining whether the party is an orphan. This of course presumes that adequate information on such funding sources can be obtained in a timely fashion. If, however, there is any question regarding other potential sources of income, and the Region does not have adequate time to investigate those potential sources, the Region should err on the side of the US and leave the burden on viable PRPs to demonstrate the other potential sources of income will not become available.

f. Can an owner's orphan status be affected by a Prospective Purchaser Agreement (PPA)?

In any of these types of bankruptcies, EPA should consider filing a proof of claim before the bar date in order to ensure that its cost recovery claims against the party are preserved. Requests for filing a proof of claim or other participation before a bankruptcy court are made by referral to DOJ.

Yes. Proceeds or services generated and directed to a site cleanup via a PPA should be considered in determining whether an owner is actually an orphan. A seller once thought of as an orphan may lose this status as a result of new resources generated by a sale of its property, such as: direct proceeds that enable the owner to pay its equitable share of site costs; the purchaser's payment into a special account of funds for future site work; or the purchaser's commitment to perform work at the site pursuant to the remedy. If, however, a PPA's consideration does not include reimbursement of costs or remedial work (*e.g.* consideration is access or other nominal consideration), the seller's status as an orphan would remain unchanged.

g. Should foreign assets be considered in assessing a PRP's ability to pay?

Consideration of foreign assets may be relevant in assessing a PRP's ability to pay (including any affiliated parties). It is unusual that the United States would search for or have evidence pertaining to the foreign assets of a PRP in a typical CERCLA case. However, if evidence exists that a PRP has foreign assets and there appears to be a reasonable prospect for reaching these assets, it should be considered in determining that party's ability to pay for purposes of an orphan share determination.

h. What is an "affiliated party?"

An affiliated party can include a liable successor corporation, parent corporation, subsidiary corporation or an individual (*e.g.*, an officer, director, shareholder, or employee). The work policy provides that the estimated share for an insolvent or defunct party affiliated with another potentially liable and financially viable party cannot be an orphan at the site for purposes of applying the reform. The general approach is that if the financially viable party (*i.e.*, the affiliate) could be liable under a credible legal theory for the share of another party with "no ability to pay," the party with "no ability to pay" should not be considered an orphan.

4. How is the orphan share estimated?

The government gains additional experience in making orphan share estimates with every site or case where the issue is considered, but EPA has not issued guidance for estimating the orphan share. The Gore Factors, and other equitable factors, are frequently relied upon by courts in making equitable allocations in contribution actions and may be helpful to the Region when estimating the equitable share of an orphan party. Such equitable factors may include:

1) the amount of hazardous substances contributed by each party;
2) the degree of toxicity of hazardous substances contributed by each party;
3) the degree of involvement of each party in the generation, transport, treatment, storage, or disposal of hazardous substances;

4) the degree of care exercised by each party with respect to each hazardous substance;
5) the cooperation of each party in contributing to the response action and in providing information;
6) the mobility of hazardous substances contributed by each party; and
7) a party's financial benefit from the operation.

In addition, there may be case law on point and trade press publications (*e.g.*, ABA publications, Environmental Law Reporter, etc.), which may be instructive in estimating the size of the orphan share (*See* Tab 5 of the Orphan Share Implementation Notebook).

5. Can the Region rely on PRPs' estimates of the size of the orphan share?

The Region may not rely solely on PRP estimates of the size of the orphan share. The Region should require the PRPs to provide supporting documentation, review whether the documentation substantiates the PRPs' estimate of the orphan share, and make an independent determination based on all relevant information. (Note: this is critical in cases where the offer of orphan share compensation is based on the orphan share percent of total site costs.)

D. CALCULATING ORPHAN SHARE COMPENSATION

1. How should the Region calculate the amount of orphan share compensation to offer under the work policy?

The work policy states a presumption that the Region will offer the maximum amount appropriate for the orphan share component of the Federal compromise. The MAAC is the lowest of the following dollar figures and should not exceed any of the following:

1) Orphan share % of total site costs (total site costs are the costs that are being negotiated, *e.g.*, all unreimbursed past costs incurred by EPA, ROD costs or NTC removal costs, and associated projected future oversight costs);
2) 25% of future ROD costs or removal costs (in general, for the phases being negotiated; *See* Q&A B.7, B8, B.9); or
3) EPA's total unreimbursed past costs (not the PRPs' past costs) plus future oversight costs.

For purposes of determining orphan share compensation, unreimbursed past costs (*i.e.*, those which are on the table for negotiation) do NOT include PRP past costs or response costs that

PRPs have committed to pay in any previous agreement but have not yet paid. [9] In addition, future oversight costs that PRPs have committed to pay in a previous agreement should not be included in the estimated future oversight cost calculation. One example of costs that do not constitute unreimbursed past costs in the orphan share context would be oversight costs that a PRP agreed to pay in a previous RI/FS AOC.

2. How should the Region calculate the amount of orphan share compensation to offer under the cost recovery policy?

There is no orphan share compensation formula in the cost recovery policy. Rather, the cost recovery policy provides three guiding principles:
1) in order to consider making an offer, there must be a significant orphan share;
2) except in extraordinary cases, cost recovery parties should not get an orphan share compensation offer if they were already offered orphan share compensation in the work context for the same costs (the "no two bites of the apple" principle); and
3) except in extraordinary cases, cost recovery parties should not receive more orphan share compensation than they would have received had they been made an orphan share offer in the work context (the "no better deal than work parties" principle).

The first two principles are addressed in Q&A B.13, which discusses factors that are relevant to the decision whether to offer orphan share compensation at all in cost recovery negotiations. The third principle goes to how much orphan share compensation the parties should receive. The starting point for determining the appropriate amount of the orphan share compromise should be the MAAC analysis as stated in the work policy. That is the lesser of: 1) the orphan share; 2) past costs & future oversight; or 3) 25% of response action, *e.g.*, ROD costs.

In most cases, it will be fairly simple to calculate the orphan share cap and the 25% of future response costs cap.[10] In calculating the past cost and future oversight cost cap, the Regions should perform a "back in time" analysis in order to give effect to the "no better deal than the work parties" principle. That is, instead of calculating the past and future costs at the time of the cost recovery negotiations (when costs are generally significantly higher because most of the work is already done), the Regions should calculate past plus future oversight costs as of the time a work offer would have been made (when, in general, past costs would have been significantly lower because site work is likely just starting).

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[9]The fact that the orphan share policy does not allow for the PRP costs to be included in cap calculations does not mean that the United States cannot exercise its prosecutorial discretion in appropriate circumstances to otherwise compromise its claim based on equities such as PRP cooperation.

[10] Where the actual ROD costs are lower than the ROD estimate, use the actual ROD costs. This will ensure that the non-work PRPs are not getting more orphan share compensation than they would have in the work context.

Unlike the work policy, the cost recovery policy does not have a presumption that PRPs should be offered the MAAC. However, the Regions are encouraged to offer the MAAC when it is equitable to do so. To determine whether to offer parties in cost recovery negotiations the MAAC or less than the MAAC, the Regions should consider factors, such as: 1) why the PRPs did not perform work under consent if offered an opportunity to do so; 2) whether PRPs performed work under a UAO; 3) if Fund monies were used to perform the cleanup; 4) if there is a large orphan share at the site; 5) whether small party contributors (relative to the orphan share) were asked to do the work; etc... (*See also* the factors discussed under Q&A B.13.)

Because the analysis is based on a factual scenario that never actually happened, applying the "back in time principle" can be difficult and, in some instances, imprecise. The HQs Orphan Share Team is available to assist in making this sometimes difficult calculation. There may be instances when a strict application of the MAAC analysis (particularly the "back in time" analysis) produces too little compensation. In these instances (i.e, extraordinary cases as stated in the cost recovery policy), the Region may request HQs concurrence to exceed the MAAC.

3. What if there is a change in the ROD or removal cost estimate during work negotiations?

If during negotiations, cost estimates significantly increase since the initial orphan share compensation offer was made, Regions should use that increased number to calculate the 25% ROD or removal cap. On the other hand, if during negotiations the cost estimate significantly decreases since the initial orphan share compensation offer was made (*e.g.*, the ROD is amended), the 25% ROD cap would be calculated based on the lower ROD estimate.

4. What if there is a change in the scope of the remedy under an existing CD or AOC?

If a CD or AOC is amended such that additional work is required resulting in a substantial increase in the cost of the remedy, the Region may re-visit the MAAC analysis and, if appropriate, offer compensation based on the future work component of the amended CD. If costs or cost estimates change during implementation of the remedy but no CD amendment is needed to implement the remedy change, then orphan share compensation should not be revisited.

5. What if it is known at the time of the CD or AOC negotiations that there is a good chance that the ROD or removal costs will substantially increase or substantially decrease after the CD or AOC is final?

If there is a good chance that a PRP's work obligation will substantially change after a CD or AOC is final (*e.g.*, the subject of the negotiations is a contingent ROD), it is appropriate

to negotiate a provision that would further compensate the PRP for the orphan share or allow for the United States to recover costs that may have been forgiven in excess of the actual MAAC. The HQs Orphan Share Team is available to assist the Regions in drafting such a provision.

6. Why is one of the limits on the amount of orphan share compensation based on 25% rather than a greater percentage of the ROD or removal costs?

Because Congress has not reauthorized Superfund or reinstated the Superfund taxing authority and has not provided the Agency with a separate appropriation for orphan share compensation, the Trust Fund would be depleted by the costs of implementing the program and achieving cleanups. Given these circumstances, EPA believes that establishing a 25% limitation at every site strikes the appropriate balance between providing meaningful implementation of this reform and preserving the Trust Fund.

7. Because the MAAC may be limited in situations where there are minimal past costs to forgive, are there other means of compensating parties beyond the MAAC?

In some cases a great disparity exists between the orphan share and the amount of past costs and future oversight costs sought by the Agency (and thus available for compromise under the MAAC formula). Because the orphan share policy does not authorize Regions to exceed the MAAC, Regions may consider other means of compensating parties such as mixed funding or special account funds. The orphan share reform does not alter the Agency's enforcement discretion to enter into mixed funding agreements at appropriate sites. Any decision to pursue a mixed funding settlement must be based upon a totality of the circumstances at a site, which may include the existence of a large orphan share (*See*: *Evaluating Mixed Funding Settlements Under CERCLA*, OSWER Directive #9834.9, October 20, 1987). In addition, the Region may consider giving work PRPs access to special account funds. (*See*: *Interim Final Guidance on Disbursement of Funds from EPA Special Accounts to CERCLA Potentially Responsible Parties*, Breen, 11/3/98). Mixed funding or special account amounts made available to the PRPs are not considered orphan share compensation under the reform.

8. If some of the past costs have already been compromised during a prior settlement, should those costs be used in calculating the MAAC?

It depends on whether the parties to the prior settlement are the same as the parties to the current settlement negotiations.

a. If the parties to the prior settlement are the same parties to the current settlement negotiations --

and some portion of the past costs were forgiven in the prior settlement (*i.e.*, EPA compromised the costs in the prior settlement), the forgiven costs (and any reimbursed past costs) should not be used in calculating the appropriate orphan share compensation. In other words, the costs already forgiven by the Agency as to those parties and the monies already collected by the Agency are off the table for purposes of the current settlement negotiations.

b. If the parties to the prior settlement are different from the parties to the current settlement negotiations –

and some portion of the past costs were forgiven in the prior settlement, the Region may decide to include those forgiven past costs (which were forgiven only to previous settlors) in the current settlement negotiations. These unreimbursed costs may be included in the calculation of orphan share compensation here and not in the above scenario because, consistent with joint and several liability, these new parties are still liable for the costs not reimbursed by the other parties.

The general principle is that as long as it is to a different set of parties, the Regions may give the same covenant not to sue for the same costs (those being compensated in recognition of the orphan share) to multiple parties.

9. Is the Region required to offer the MAAC under the work policy?

There is a *presumption* that the Regions will offer the MAAC. In some circumstances, equitable considerations may justify offering less than the MAAC.

10. What factors may be used to adjust the MAAC?

The work policy describes three factors to consider when determining whether to offer less than the MAAC:

1) fairness to other PRPs, including small businesses, MSW parties, small volume waste contributors, and certain lenders and home owners;
2) PRP cooperation; and
3) size of the orphan share.

PRPs are expected to be fair and cooperative. In addition, the work policy does not authorize the Regions to increase compensation beyond the MAAC. Therefore, the factors mentioned above should not be used to increase the compensation offered under the policy. However, the large size of an orphan share may be used as a mitigating factor which may explain the PRPs lack of cooperation in some instances. The Region must provide an analysis of its decision to offer less than the maximum amount in the 10-point settlement analysis.

11. How much compensation can a party receive in a cost recovery settlement as compared to a work settlement?

The settling party must not receive a greater compromise of response costs in a cost recovery settlement based on the existence of an orphan share than it would have received if the party had signed a consent agreement to perform the work and the orphan share policy was applied, except in extraordinary cases (which need HQs concurrence). (*See* Q&A D.2.)

12. May the Region provide orphan share compensation in a cost recovery settlement if the parties would not have received any orphan share compensation in the work context because, for example, the cleanup was negotiated prior to the existence of the June 1996 policy or the cleanup was for a time critical removal and the work policy would not have required an offer in these circumstances?

Yes, although the general principle is that parties should not receive a better deal in cost recovery than they would have received in the work context. The intent of this principle is to maintain incentives for parties to do work and not to provide incentives for a party's unwillingness to conduct work. However, where, for example, parties would not have received compensation because work negotiations occurred pre-June 1996, the Regions have the discretion to offer compensation in the cost recovery context so long as the amount offered would not be more compensation than parties would have received had the June 1996 policy been applied at the time work was conducted. (*See* discussion on "back in time" principle, Q&A D.2)

13. Should orphan share compensation be provided when the Region is negotiating with parties to perform less than the entire response action for either the whole site or an operable unit?

Orphan share compensation can be provided to PRPs who agree to perform the response action at an operable unit (OU) for a site. However, in general, only PRPs that are willing to perform the entire response action at an OU, or the entire response action at a site that does not have distinct OUs, should be entitled to orphan share compensation. PRPs agreeing to perform only a portion of the work should generally not be granted orphan share compensation unless those PRPs have a compelling reason for not performing the entire

remedy, such as a strong divisibility argument. If the Region apportions the work, the Region should only offer compensation for undertaking a portion of the work if there is an orphan share associated with that portion of the work. In general, the MAAC analysis should be done only on those costs associated with the work being negotiated. (*See* Q&A D.14 below).

In many instances, the government will negotiate a global settlement and the PRPs will work out allocation issues without government involvement. The Regions, however, also have the discretion to divide the work if it is advantageous and equitable to do so. In these instances, the Regions have the discretion to offer orphan share compensation to both groups or to only one group of PRPs if, in EPA's judgment, that group is performing a portion of the work that is demonstrably larger than its equitable share.

14. How should the Region deal with using past costs for compensation at sites where there are multiple OUs?

The rule of thumb is that orphan share compensation is available to offset whatever costs the Region is negotiating (*i.e.*, what is "on the table"). When the same PRPs are liable for each OU at a site, but the Region is only negotiating one of the OUs, the Region has discretion to agree to recover past costs associated with other OUs (and provide compensation by forgiving such past costs) or to determine that such past costs should be recovered separately when EPA negotiates a settlement with the PRPs for the work at that OU. Where different sets (or overlapping sets) of PRPs are responsible for the multiple OUs, such settlements may be so difficult to negotiate that the Regions are encouraged to keep costs associated with each OU separate. (*See* Q&A D.4 with regard to prior settlements with PRPs for work at a site.)

15. When the Region allocates shares between the generators at a site, should it include the volume of MSW sent to the site?

No. MSW volumes are not considered in calculating the generator shares because EPA generally does not pursue parties who contributed only MSW to a site. (*See*: *Policy for Municipality and Municipal Solid Waste CERCLA Settlements at Co-Disposal Sites*, (February 5, 1998) and *Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes*, (December 6, 1989)). This is consistent with the guidance on preparing waste-in lists which states that the Regions should not include volumes attributable to parties whose contribution is solely MSW. (*Final Guidance on Preparing Waste-in Lists and Volumetric Rankings for Release to Potentially Responsible Parties (PRPs) under CERCLA,* OSWER Directive No. 9835.16 (February 22, 1991)). Thus, only the wastes of those parties whom EPA would ordinarily pursue should be included in the total volume of wastes for purposes of allocating equitable shares among the generators.

16. Should the Region provide orphan share compensation to a party settling under the February 5, 1998 "Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites" if that party's settlement is based solely on the generation or transportation of MSW?

No. That party's settlement share is determined using a dollar-per-ton multiplier for the party's contribution of MSW. Since the share is based on that party's contribution of only MSW to the site, that settlement amount should be considered an appropriate share for that party, and it would not be appropriate to give that party orphan share compensation.

17. Should the Region give orphan share compensation to a municipal owner/operator settling under the February 5, 1998 "Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites?"

No. A municipal owner/operator settling under the February 1998 MSW policy should not be given orphan share consideration. The presumptive baseline settlement amount of 20-35% for municipal owner/operators is considered to be the appropriate share for those parties. Therefore, no adjustment should be made to the presumptive settlement amount to account for potential orphan shares at the site. However, a municipal owner/operator who is also participating in a settlement because of liability in addition to its owner/operator liability should be given orphan share consideration for the portion of the settlement not associated with owner/operator liability (but not for payments for MSW - *See* Q & A, D. 10).

18. In negotiations for work or cost recovery, may the Region forgive as part of the orphan share compensation unbilled oversight costs which PRPs have committed to pay in prior agreements?

No, because it would constitute the reopening of a prior settlement and it is inappropriate to reopen prior settlement agreements, even when equities may be in the PRPs' favor (*e.g.*, cooperative in the past therefore minimal past costs are on the table). The Agency has consistently maintained during the Superfund reauthorization debate that settlements should not be reopened. To reopen settlements would be to give retroactive effect to the orphan share policy. Reopening settlements may signal to PRPs that the Agency is willing to renegotiate any number of previously agreed to provisions of prior settlement agreements.

Also, if the Agency were to institute the policy of forgiving unbilled oversight costs which PRPs are legally obligated to pay, it would be difficult to explain why the Agency would not also be willing to forgive billed, but not yet paid, oversight costs. This policy could provide an incentive to PRPs to neglect paying oversight costs which they are legally obligated to pay.

If equities indicate great unfairness to PRPs, the Region may want to consider the possible use of mixed funding dollars or special account funds to address PRP concerns.

19. May the Region forgive future oversight costs before forgiving past costs?

Yes. The Region has discretion to forgive all future oversight costs before it forgives past costs. This discretion applies to cases where the amount of compensation is capped by either the orphan share or 25% of response action costs. The practical effect of forgiving future oversight before past costs is twofold: 1) the Agency may be able to collect some of its past costs; 2) forgiveness of oversight costs would reduce [or eliminate] the need for the issuance of oversight bills. This approach does not apply where the amount of compensation is capped at 100% of the sum of past costs and future oversight costs being negotiated. (*See also* Q&A B.4 for limitations on this approach.)

E. IMPLEMENTATION

1. Should the Region notify all parties in work settlement negotiations that orphan share compensation may be available for the site? Is a notice letter the appropriate method for such notification?

Yes. If work negotiations are forthcoming, Regions should indicate in the special notice letter that orphan share compensation may be available for the site. Assuming they have adequate information, Regional staff should include the MAAC in all special notice letters or the functional equivalent for removal actions. If appropriate, the amount of compensation may be included in general notice letters as well. In any notice letter, Regional staff should caveat the dollar amount, indicating the dollar amount could change, subject to increased or decreased ROD or removal costs or an increase or decrease in the orphan share based on information obtained from the PRPs as negotiations ensue. (*See also* Q&A C.6.) Giving early notice could provide a greater willingness among PRPs to negotiate early in the process and a greater incentive to settle. If the special notice letter is waived or if negotiations are ongoing, Regions should send out a letter to the PRPs indicating the same. In order to receive credit for providing orphan share compensation in a work settlement, Regions must disclose the amount of the offer to the PRPs.

2. If the Region has decided that part of the federal compromise may be attributed to the orphan share in a cost recovery case, should the Region notify parties in cost recovery negotiations that orphan share compensation may be available for the site?

Generally, yes. However, unlike the work policy, in a cost recovery settlement, Regions are not required to disclose to the PRPs the amount of orphan share compensation being offered. From a reform standpoint, it is preferable to make the offer as early as possible in the negotiation process (*e.g.*, in the demand letter) and to be as specific as possible regarding the amount of the orphan share offer (*i.e.*, identify a specific dollar amount). We recommend such disclosure because it is important to communicate to the PRPs that the orphan share compensation offered during settlement is one way in which the Agency is reforming the Superfund program. However, from the standpoint of reaching a successful settlement, in some cases it may be appropriate to communicate to the parties only that part of the federal compromise is attributable to equitable factors, such as an orphan share, but not disclose the specific dollar amount. Finally, there may be limited cases in which it may not be appropriate to explain to the parties that part of the federal compromise is in recognition of the orphan share. In these cases, the Regions should consult with HQs. [Note that in order to receive credit for providing orphan share compensation in a cost recovery settlement, Regions must disclose to the PRPs that part of the federal compromise is attributable to the orphan share policy.]

3. Must the Region distinguish between orphan share compensation and litigation risk in the 10-point settlement document?

Yes. In both work and cost recovery settlements, Regions should assign a dollar amount to the orphan share compensation portion of the Federal compromise in the 10-point settlement analysis (in addition to the analysis of litigation risk and other factors) whether or not a specific dollar amount has been disclosed to the PRPs. Regions should also include in the 10-point settlement analysis a paragraph supporting the orphan share party determination behind the orphan share component of the Federal compromise. In addition, the offer should be reported to the HQs Orphan Share Team. If a settlement is not ultimately reached, the Region should record the offer in an appropriate document (*e.g.*, memo to the file), as well as notify the HQs Team.

4. What are the obligations of the Regions regarding orphan share compensation under the "OECA Concurrence and Consultation Requirements for CERCLA Case and Policy Areas" or "Roles Memo?"

While HQs is available for consultation and assistance on every site, the official requirements are outlined below. Regional staff should contact their HQs contact, either orally or in writing, prior to making a formal offer where there is prior written approval

required. HQs will evaluate the proposed offer, considering site-specific data and discuss the case with the Region as quickly as possible.

Two Prior Written and/or Oral Approval requirements:

1) Prior written or oral approval of the Director of the Regional Support Division (RSD) on orphan share settlement offers when projected ROD or removal costs exceed $30 million.
2) Prior written approval of the Director of the Office of Site Remediation Enforcement (OSRE) on cost recovery settlements offering orphan share compensation to a party who rejected an earlier orphan share compensation offer, or offering greater orphan share compensation than would have been offered had the settlor entered in a work agreement (cost recovery "extraordinary cases").

Two Consultation requirements:

1) Consult with the HQs (RSD) Orphan Share Team on all cost recovery orphan share offers.
2) Consult with the HQs (RSD) Orphan Share Team on all *de minimis* contributor orphan share offers (*de minimis* settlements where an orphan share exists at the site).

Any time the Region is considering a significant deviation from the orphan share policy, HQs should be contacted.