



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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Affirmation of the EPA's Policy of Enforcement First for Remedial Investigation/Feasibility Studies (RI/FS) at Superfund Sites

FROM: Cynthia L. Mackey, Director
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Office of Enforcement and Compliance Assurance

TO: Superfund National Program Managers, Regions 1-10
Regional Superfund Legal Branch Chiefs, Regions 1 – 10
Regional Counsels, Regions 1-10

I. Purpose

The purpose of this memorandum is to provide the U.S. Environmental Protection Agency (EPA) Regions with a clarification to the "Enforcement First at Superfund Sites: Negotiation and Enforcement Strategies for Remedial Investigation/Feasibility Studies (RI/FS)," OSWER Directive No. 9355.2-21 (August 9, 2005) ("2005 RI/FS Enforcement Strategies")¹ and "Promoting Enforcement First for Remedial Investigation/Feasibility Studies at Superfund Sites," OSWER Directive No. 9200.2-109 (March 20, 2012) ("2012 RI/FS Enforcement Strategies")². Specifically, this clarification addresses circumstances when the EPA Regions should consult with the Office of Site Remediation Enforcement (OSRE) prior to committing Fund³ dollars to pay for an RI/FS project expected to exceed \$2 million.

II. Background

The National Oil and Hazardous Substances Pollution Contingency Plan (NCP) provides that in determining the need for and in planning or undertaking Fund-financed action, the EPA shall, to the extent practicable, and among other things: engage in prompt response and conserve Fund

¹ The 2005 RI/FS Enforcement Strategies is available on the Agency's website at <https://www.epa.gov/enforcement/guidance-enforcement-first-superfund-sites-negotiation-and-enforcement-strategies-rifs>.

² The 2012 RI/FS Enforcement Strategies is available on the Agency's website at <https://www.epa.gov/enforcement/guidance-promoting-enforcement-first-rifs-superfund-sites>.

³ Officially titled the Hazardous Substance Superfund Trust Fund ("Fund").

monies by encouraging private party response⁴. As outlined in detail in the 2005 and 2012 RI/FS Enforcement Strategies, the EPA Regions are encouraged to conduct early and thorough potentially responsible party (PRP) searches. If an EPA Region requires assistance completing a PRP search at a site, Headquarters can assist the Region in determining other resources which may be available, including data searches and access to national PRP search contacts. If, after completing the PRP search, an EPA Region decides to proceed with a Fund-financed RI/FS at a site, it should create a written record of its decision which memorializes that “enforcement first” is neither possible nor practicable.

III. Headquarters Consultation Prior to Committing Superfund Dollars to Fund an RI/FS Expected to Exceed \$2 Million

The 2012 RI/FS Enforcement Strategy provides that prior to committing Fund monies to pay for an RI/FS project expected to exceed \$2 million, the EPA Regions are requested to consult with Headquarters and to submit a draft RI/FS enforcement decision document (EDD)⁵ for review.

This consultation request has been in effect since the publication of the RI/FS Enforcement Strategy in 2012. Since that time however, there have been sites in which a Fund-lead RI/FS was originally estimated to cost below \$2 million, and a consultation did not occur, but it later exceeded \$2 million. This memorandum clarifies that the cost estimate of a Fund-financed RI/FS of \$2 million is a site-wide estimate (not per operable unit) and an EPA Region should consult with Headquarters: (1) prior to committing Fund monies to pay for an RI/FS project expected to *initially* exceed \$2 million and (2) *at any time during a Fund-financed RI/FS where the cost of the RI/FS exceeds \$2 million.*

Headquarters continues its commitment to review an EPA Region’s consultation EDD within two weeks of submission or a shorter turnaround if requested due to site conditions, assuming sufficient enforcement history is provided. If the cost of a Fund-financed RI/FS eventually exceeds \$2 million, then OSRE will review the Region’s EDD to determine if PRPs have been identified or could be identified with additional PRP search efforts. Should a viable and liable PRP be identified when a Region submits an EDD, OSRE will consult with the EPA Region as to whether it is feasible for the party to take over the responsibility of completing the RI/FS. OSRE will consider several factors (e.g., remaining scope of the RI/FS, capability and competency of PRP identified, etc) in the evaluation. The intent of this ongoing review is to ensure that at the end of the RI/FS, if there is a viable and liable party/parties, then the Region is in a position to transfer lead of the Remedial Design/Remedial Action at the site to the responsible party/parties.

IV. Conclusion

This memorandum reinforces the EPA’s commitment to an “enforcement first” approach, in order to ensure national consistency and to conserve Superfund dollars, by requesting Regions to consult with Headquarters any time that a Fund-financed RI/FS exceeds \$2 million.

⁴ See 40 C.F.R. § 300.400(c).

⁵ An example Fund-Lead RI/FS Enforcement Decision Document can be found as Attachment 2 of the 2012 RI/FS Enforcement Guidance.

If you have any questions please contact Pamela Daugherty (202-564-7727, daugherty.pamela@epa.gov) or Bruce Kulpan (202-564-4252, kulpan.bruce@epa.gov) in OSRE's Regional Support Division.

Disclaimer

This memorandum is intended exclusively to provide information to employees of the EPA. This document is not a rule and does not create any legal obligations or enforceable rights. Whether and how the EPA applies this information to any particular site will depend on the facts at the site.

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Superfund Division Directors, Regions 1-10