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

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

NOV 3, 1990

**MEMORANDUM**

SUBJECT: Superfund Enforcement Strategy and Implementation Plan

FROM: Bruce M. Diamond, Director
Office of Waste Programs Enforcement

As an interested observer of the progress of the Superfund program, I thought you might be interested in the attached report prepared by this office pursuant to requests by the House and Senate Appropriations Committees. They directed the Agency to conduct an evaluation of the Superfund enforcement program. EPA responded with two reports. First is a report titled "Toward a More Effective Superfund Enforcement Program" prepared by the Environmental Law Institute (ELI) under a grant from EPA. The ELI study is an independent evaluation of the Superfund enforcement program. Second is an EPA report titled "Superfund Enforcement Strategy and Implementation Plan" (the Plan). The Plan describes the Agency's Superfund enforcement strategy and the steps necessary to implement improvements in the enforcement program. I am sending the Plan to you for your information and am willing to make the ELI report available to you should you wish.

It is important to distinguish the Plan from the Agency's recently released "Management Review of the Superfund Program" (and its Implementation Plan). The Plan was developed in response to the requests from the Appropriations Committees. The Review was developed in response to a commitment that EPA Administrator Reilly made to Congress during his confirmation hearings. The Plan focusses entirely on the Superfund enforcement process while the Review addresses all aspects of the Superfund Program. The Plan contains many of the key enforcement recommendations presented in the Review but addresses additional enforcement issues and implementation steps as well. The Plan has been well coordinated with the overall effort to implement the Review.

If you have any questions or wish a copy of the ELI report, please feel free to contact me at 382-4814. I look forward to further discussions on the progress of the Superfund enforcement program.

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# SUPERFUND ENFORCEMENT

# STRATEGY AND

# IMPLEMENTATION PLAN

U.S. Environmental Protection Agency
Office of Waste Programs Enforcement
September 26, 1989

## Introduction

In passing the FY89 appropriation, the House and Senate Appropriations Committees requested that the Environmental Protection Agency (EPA) conduct an evaluation of the Superfund enforcement program. The specific language of the Appropriations Committees' requests are included as Appendix A of this report. EPA has responded to these requests with two reports. First, EPA contracted with the Environmental Law Institute to conduct an independent evaluation of the Superfund enforcement program. This evaluation was completed in the spring of 1989. Second, EPA has developed this report titled "Superfund Enforcement Strategy and Implementation Plan" (referred to here as the Plan) which describes the Agency's Superfund enforcement strategy and the steps necessary to implement it.

The Superfund Enforcement Strategy and Implementation Plan has been developed and should be read in close conjunction with the Agency's Management Review of the Superfund Program released in June 1989 (referred to here as the Superfund Management Review). Strengthening Enforcement and Maximizing Private Party Work at Superfund Sites was one of five topics examined in the Superfund Management Review. A comprehensive plan to implement the Management Review was released in September 1989; this report supplements but does not repeat the recommendations in the review. The implementation plans and recommendations in these reports are fully consistent. The Superfund Management Review consists of analyses and recommendations in key areas of the enforcement program, while this Plan addresses the enforcement program in more detail. Neither report addresses enforcement for Federal facilities or enforcement of the notification requirements of section 103 of CERCLA and Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA). These programs are sufficiently complex in their own right that they could not be addressed in this Plan if it was to be kept to a manageable length.

This Superfund Enforcement Strategy and Implementation Plan reflects a review of recent studies of the Superfund program, as well as ongoing management initiatives involving EPA and the Department of Justice, including the Superfund Settlement Incentives and Disincentives Workgroup and the Superfund Enforcement Management Issues Workgroup. A list of issues raised in various studies and reports is included as Appendix B.

The Plan also reflects the Agency's eight years of experience in implementing the requirements of CERCLA. This Plan does not represent the final work in implementation of an enhanced Superfund enforcement program, but will hopefully represent a major step toward realization of that goal.

This Plan was developed with the participation of the major organizations involved in the Superfund enforcement program, including the Office of Waste Programs Enforcement (OWPE), the Office of Enforcement and Compliance Monitoring (OECM), the Office of Emergency and Remedial Response (OERR), the Office of the Comptroller (OC), the Office of General Counsel (OGC), the Environmental Enforcement Section of the Department of Justice (DOJ), and representatives of EPA's Regional enforcement programs and Regional counsel offices. This Plan was prepared by the Office of Waste Programs Enforcement.

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## I. ENFORCEMENT STRATEGY: GENERAL ENFORCEMENT AND SETTLEMENT PRINCIPLES

This section presents the general enforcement and settlement principles that guide the Superfund enforcement program and set the stage for the enforcement implementation plan contained in the remaining sections of this report. The Superfund Management Review's strategy for Superfund sets the framework for the implementation of the entire Superfund program. Two features of the strategy are particularly important to the enforcement program because they state the Agency's commitment to increasing enforcement actions to induce private party cleanup and to integrating the Fund and enforcement aspects of the program to improve efficiency of program operations.

### A. GENERAL PRINCIPLES

An effective Superfund program depends on a balanced approach consisting of settlements, administrative orders and litigation, and Fund-financed response. EPA will consider private party responses as the preferred approach for the majority of Superfund sites. At the same time, EPA will retain the maximum amount of leverage to use the Fund at specific sites where negotiations are unsuccessful.

The goal of the government is to negotiate an agreement for 100% of response costs. However, settling for less than 100% can be appropriate if the settlement meets the Agency's ten point settlement criteria which assure that the settlement is in the best interests of the public.[1] Judicial enforcement actions to compel private party response may not always be the quickest way of assuring cleanup for any given site. Furthermore, such actions are not without risk of adverse litigative outcomes. Nevertheless, a certain minimum number of such enforcement actions will establish a credible threat against PRPs who fail to participate in the settlement process. Where negotiations are at an impasse at the end of the special notice negotiation period, Regions should routinely issue a unilateral administrative order (UAO). Likewise, if PRPs fail to comply with a UAO, the Agency expects that serious consideration be given to bringing a section 106 judicial action or other action to enforce it. If a Fund-financed response is undertaken, all steps should be taken to seek treble damages during cost recovery. The Regions should have flexibility to select the most effective approach for a particular site. They should be able to shift funds among sites within the Region to achieve maximum leverage.

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[1] "Interim CERCLA Settlement Policy," February 5, 1985, OSWER Directive number 9835.0.

## B. JUDICIAL PRINCIPLES

The liability of PRPs under CERCLA continues to be strict, and joint and several[2], except where PRPs can demonstrate that harm at the site is divisible. The potential for joint and several liability is a valuable impetus for PRPs to reach agreement among themselves and with the government.

Citizens sometimes want PRPs to be punished for the Superfund sites they have created. However, parties may be liable under CERCLA without having violated any regulatory statutes. Thus, the primary purpose of the liability scheme is to compel cleanup. Vigorous enforcement actions should be brought against parties who fail without sufficient justification to participate in the settlement process and punitive measures should be brought against those who violate orders or decrees. The government should specifically enforce against failure to comply with information requests and use its administrative subpoena authority to facilitate the settlement process by improving information available on PRPs.

As authorized under sections 106 and 107, the government will pursue cases involving treble damages and penalties for violations of unilateral and consent orders. Taking such actions is important for establishing a credible deterrent. These actions are available against persons who fail without sufficient cause to comply with orders.

In appropriate circumstances, where a settlement for less than 100% has been reached, the government should pursue prompt and vigorous enforcement against viable recalcitrants where we have sufficient evidence linking such parties to the site. Such action should almost always be commenced within 90 days of entry of the consent decree.

The government should enhance efforts to publicize enforcement actions, particularly in suing recalcitrants, because public perception of an effective enforcement program is essential for assuring voluntary PRP participation in the settlement process. The publicity should involve the local and national media and be explicitly targeted to potentially affected recalcitrants and communities.

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[2]Strict liability is liability without regard to fault; it holds a responsible party liable for any harm caused, without regard to whether the party exercised due care or acted with negligence. Joint and several liability arises where two or more parties cause a single and indivisible harm. Each party is liable for the entire harm.

## C. SETTLEMENT PRINCIPLES

EPA should encourage early PRP participation in the settlement process. EPA should strengthen its emphasis on early and thorough PRP searches under the direction of experienced civil investigators and provide training and resources to support these activities. EPA should conduct a preliminary search to identify obvious PRPs upon site discovery and should undertake more intensive searches as soon as proposed listing on the NPL appears likely. EPA should issue general notices at all sites where PRPs have been identified. Absent extraordinary circumstances, special notice should be issued at all sites with viable PRPs no later than issuance of the record of decision (ROD).

EPA should continue to provide capable PRPs with an opportunity to participate in the remedial investigation and feasibility study (RI/FS) with appropriate oversight. Comprehensive settlements for all response work and costs are preferred. Mixed funding, de minimis settlements, and non-binding allocations of responsibility (NBARs) are Congressionally-sanctioned settlement tools. EPA believes these tools should be more fully utilized where their use will facilitate settlements and where they are used pursuant to existing Agency guidance. This does not mean, for example, that the Agency is establishing a preference for the use of a mixed funding settlement over a more comprehensive settlement. Rather, this means that EPA should increase its efforts to remove obstacles to the use of these settlement tools and should provide additional resources for their use, where appropriate.

EPA's policy is that allocations should generally be worked out among the PRPs. However, under appropriate circumstances, the government should attempt to allocate costs among settling and non-settling parties in a way that maximizes its ability to pursue non-settlors and avoids creating incentives for PRPs not to participate in the settlement process. EPA should actively facilitate allocation among PRPs on a more frequent basis. EPA should also consider funding neutral third parties to perform allocations for PRPs, and consider more aggressive use of administrative subpoenas to collect information related to allocations.

EPA should provide explicit opportunities for using non-binding alternative dispute resolution (ADR) where it would expedite settlement. EPA will consider innovative use of ADR as well as traditional forms of ADR such as non-binding arbitration and mediation.

All enforcement agreements should contain a commitment by the PRPs to adequately fund EPA oversight. Furthermore, levels of oversight should be correlated to the demonstrated ability of the PRPs to perform the RI/FS or response action. EPA will routinely issue special notice in remedial cases and will adhere to strict deadlines for completing negotiations.

## II. IMPLEMENTATION PLAN FOR ENFORCEMENT PROGRAM ELEMENTS

This section consists of specific recommendations for improvement concerning management, planning, policy and resources. It assumes a basic knowledge of the elements of the Superfund enforcement process. The recommendations listed under these steps are primarily top priority activities. They include many recommendations from the Superfund Management Review. Implementation of these recommendations requires commitment and assistance both within EPA and from Congress, as well as from public and private interest groups and States. The ability of EPA to implement these recommendations depends upon resource levels. Resources are discussed in Part IV of this Plan.

Enforcement activity at a Superfund site involves a series of steps. Many of them build upon one another. When one of the steps is performed inadequately, EPA may be unable to reach the ultimate goal -- private party response. The following section discusses ten key enforcement steps.

- Identification of Potentially Responsible Parties,
- Information Exchange and Notification
- Removal Enforcement,
- Private Party Remedial Investigations and Feasibility Studies,
- Negotiations,
- Settlement Authorities,
- Unilateral Enforcement Authorities,
- Administrative Records,
- Oversight and Compliance, and
- Cost Recovery.

The first step toward improving the implementation of the enforcement program overall involves integration of the Fund and enforcement programs. EPA must better integrate all of the enforcement steps into the overall site cleanup process to ensure a consistent enforcement-first approach to Superfund site cleanups. For true program integration and proper management of Fund and enforcement dollars, the Agency must adhere to some form of timeline management to maintain the cleanup process along a continuum, as recommended in the Superfund Management Review.

The discussion below provides recommended improvements for implementing specific steps in the enforcement process.

A. Identification of Potentially Responsible Parties

Topic: 1. PRP Search Process

Status and Accomplishments:

Effective PRP searches are fundamental to the Agency's enforcement goals of obtaining increased PRP involvement in conducting cleanup activities and cost recovery. They produce information about the site and parties associated with it. Since SARA, PRP searches have been conducted pursuant to the PRP Search Manual (August 1987). Training in the Regional offices accompanied distribution of the manual. Also, beginning in FY86-87, each Region hired at least one civil investigator. PRP search contractor work assignments usually contain most of the "baseline" tasks outlined in the Manual. This includes interviewing persons to gather information, describing history of operations at the site, preparing lists of PRP names, and describing status and history of PRPs. A PRP search evaluation recently conducted by the Office of Waste Programs Enforcement (OWPE) concluded that the timing of PRP searches has shown great improvement. By the beginning of FY 88, all searches were being initiated at least 120 days prior to NPL proposal. However, the timely completion of quality PRP searches with concrete evidence on liability and financial viability continues to be of concern.

The results of this study have led the Agency, through Congressional appropriation, to add 20 civil investigators to the Superfund enforcement program. EPA has also continued a strong programmatic emphasis on early PRP searches. Moreover, EPA will continue to focus on developing optimum skill mixes to conduct PRP searches. Thus, qualified individuals such as civil investigators will continue to manage the PRP search process.

Headquarters has also issued additional guidelines that further integrate the PRP search process with the goals of the enforcement program. These guidelines describe the process from the initiation of a search through general and special notice, and specifically address how to establish evidence of liability, and when to conduct follow-up research.[3] In July 1989, a three-day training program was held for Technical Enforcement Support (TES) contractors as well as interested Regional Program and legal staff to further enhance their PRP search responsibilities. The course included instruction on how to conduct the baseline search, how to prepare PRP search reports, how to followup on the baseline search, how to analyze the PRP

[3] "PRP Search Supplemental Guidance for Sites in the Superfund Remedial Program," June 29, 1989.

search results, as well as how to use particular investigative techniques to enhance the quality of the PRP search. Headquarters plans to canvass the Regions to assess additional training needs.

Issue: The Agency has laid the foundation for a more successful PRP search program using civil investigators to manage the PRP search process; utilizing strong programmatic emphasis on earlier PRP searches; and continuing development of a proper skill mix for adequate PRP searches. The Agency must now begin to show the fruits of this endeavor.

**Implementation Steps:**

- The Regions should continue to strengthen their emphasis on early and thorough PRP searches under the direction of experienced civil investigators. In addition, the Regions should conduct a preliminary search to identify obvious PRPs upon site discovery and undertake more intensive searches as soon as possible, preferably prior to proposed listing on the National Priorities List (NPL).

- As stated in the Superfund Management Review, Regions will create units specifically devoted to case support activities such as searching for PRPs, gathering information, assessing ability to pay, and identifying corporate relationships. These units should be comprised of individuals with the proper skill mix to perform these responsibilities.

- Headquarters should continue to conduct yearly audits of Regional and contractor staff.

- Headquarters should provide sufficient resources and routine training to support the Regional activities described above. Headquarters should also continue to provide routine training to new TES zone contractor staff responsible for conducting PRP searches.

- Headquarters should develop criteria for determining where early PRP searches (e.g., those conducted prior to the 1986 amendments to CERCLA) should be supplemented so that viable PRPs are sufficiently identified for cost recovery.

## B. Information Exchange with Potentially Responsible Parties

**Topic: 1. Enforcement of Information Requests**

**Status and Accomplishments:**

The Agency routinely sends out at least one mailing of §104(e) information requests to PRPs, or telephones them for information, before any response action is taken at a site. However, some PRPs currently perceive that the Agency does not enforce information

requests that are never responded to, or take action when inadequate or fraudulent responses are received. The PRP community additionally feels that the Agency builds its cases by focusing on parties who adequately respond to information requests, instead of pursuing all PRPs.

Regions indicate that a significant percentage of PRP responses to initial §104(e) information requests are inadequate and require follow-up. However, they are sometimes unable to follow-up with a second, more tailored information request because of resource constraints. Based upon the level of Agency follow-up conducted so far, Regions estimate that over 50% of all PRPs require a third information request. Agency experience indicates that PRPs who receive subsequent, tailored information requests provide more detailed responses.

Although limited, enforcement of information requests has been successful; and a joint Headquarters initiative between the Office of Enforcement and Compliance Monitoring (OECM) and OWPE is currently underway to encourage additional cases. As part of the initiative, a strategy for information request enforcement is under development. Model pleadings are being drafted to supplement the "Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas," issued on August 25, 1988. The civil investigators will follow-up on §104(e) information requests in addition to performing PRP searches. Furthermore, Headquarters has proposed a formal Superfund Comprehensive Accomplishments Plan (SCAP) definition for §104(e) enforcement to take effect in FY 90.

Issue: Due to limited resources, Regions have been unable to fully follow-up, or enforce, information requests that were never responded to, or for which inadequate or fraudulent responses were received.

Implementation Steps:

- Regions should establish management systems that assure the timely issuance of information requests, the tracking and review of responses and implementation of necessary followup.

- As stated in the Superfund Management Review, separate information gathering units and enforcement record units have been established in some Regions to ensure that qualified personnel are gathering, maintaining, evaluating and verifying the information. Headquarters will encourage other Regions to reorganize in this manner.

- Headquarters should issue a draft strategy for comment that encourages more aggressive enforcement actions in the event of non-compliance with information requests such as issuing

§104(e) orders, initiating judicial referrals, and issuing §122(e) subpoenas as soon as possible.

- Headquarters should train personnel on properly processing information requests.

- Regions should be encouraged to refer PRPs who fail to respond or who respond inadequately or fraudulently to §104(e) information requests to the Department of Justice for civil or criminal prosecution. The government should use its administrative and civil authority and seek criminal sanctions where appropriate.

- In order to minimize resource requirements, the Regions should be encouraged, where appropriate, to group referrals, (i.e., include referrals of information requests with referrals brought against PRPs under other authorities).

**Topic: 2. <u>Information Release</u>**

**Status and Accomplishments:**

The Agency routinely contacts and provides some information to identified PRPs through formal or informal mechanisms prior to conducting removal and remedial actions. This information concerns other PRPs at the site, the nature of wastes at the site, and a volumetric ranking of the wastes by party. PRPs maintain, however, that the Agency's release of information is inconsistent in quality and timeliness. Studies indicate that PRPs need liability-related information to allocate costs among themselves and to develop settlement offers.

No Agency guidance addresses information release. Current Regional practice is often reciprocal in nature: the Agency will release information to the PRPs upon receipt of certain information, such as a response by the PRP to an information request, from them.

**Issue:** Regions have been reluctant to release in a piecemeal fashion liability- related information because the information may be too resource intensive to distribute in a form helpful to the PRPs. In other cases, Regions feel that the information is evidentiary in nature and that its release might compromise subsequent enforcement action.

**Implementation Steps:**

- Headquarters should explore the development of guidance on the preparation of "waste-in" lists, which indicate the relative share of various PRP's waste contribution at a site, and development of data bases to assist Regional development of "waste-in" lists.

- As stated in the Superfund Management Review, Headquarters will develop a strategy to encourage Regional distribution of liability-related information to PRPs in appropriate circumstances to facilitate negotiations.

## C. Removal Enforcement

**Topic: 1. Resources**

**Status and Accomplishments:**

EPA has been increasing its emphasis on enforcement-lead removal activities. Removals will be "enforcement-first," taking into account the need to proceed expeditiously in time-critical situations.

Although removal enforcement is improving, the removal enforcement program faces limitations due to inadequate resources. In the Regions, the removal program is composed of a staff of technical experts who primarily respond to classic Fund-lead emergencies. They are able to address only a limited number of enforcement sites per year. If EPA were to increase enforcement resources, these experts could address a greater number of enforcement sites per year. Further, TES contracts are not easily accessible to On-Scene Coordinators (OSCs). It can take several weeks for work to be authorized. For removal actions, more immediate assistance is needed.

**Issue:** The removal program is bound by resource constraints which result in an inadequate skill mix to properly address enforcement at removal sites.

**Implementation Steps:**

- Regional offices should review the resources dedicated to removal enforcement and quickly identify needs. Headquarters should then adjust resource allocations to reflect the true resource needs. If internal resource adjustments are not adequate, the Agency should then pursue, if necessary, and on a priority basis, actions with OMB and Congress to ensure significant commitment of resources.

- Headquarters is developing a model open work assignment which should be distributed soon. Regions should establish open work assignments for TES in all Regions to expedite removal enforcement support.

Topic: 2. Regional Management Approach

Status and Accomplishments:

Management structures in the Regions vary for the removal program. The predominant structures are: (1) a single removal program where all OSCs conduct enforcement-lead and Fund-lead removals, or (2) multiple sections with Fund-lead OSCs separate from enforcement-lead OSCs. In some Regions, physical separation interferes with communication between OSCs and enforcement staff or Regional Counsel. OSCs may be assigned to work in field offices or separate buildings from enforcement staff and Regional Counsel. Consequently, little communication is face to face and document review is difficult.

Since a goal of the removal program is to mitigate threatening situations as quickly as possible, at many removals it is often difficult to afford the time to conduct enforcement activities. Furthermore, in some Regions, formal management procedures have not been adopted to assure an enforcement first approach when possible. The combination of all of these factors impedes the removal enforcement process.

Issue: Although organizational differences exist between Regions, a management approach that emphasizes "enforcement-first" is more important than actual organizational structure. In some cases, however, organizational structure appear to obstruct the removal enforcement process.

Implementation Steps:

- Regions should assess communications between OSCs, enforcement staff and Regional Counsel to determine whether access and communication are hampered. Where they are hampered, steps should be taken to enhance communications.

- Regional offices should assure that procedures are established that normally provide for the issuance of orders prior to the initiation of fund financed removals, except where not appropriate, e.g. emergency; or PRP is not identified or not viable.

- Enforcement activities at all removal sites should be considered first, except emergencies or where no PRP is present.

D. Private Party Remedial Investigations/Feasibility Studies (RI/FSs)

Topic: 1. Record of PRP RI/FS Settlements

Status and Accomplishments:

The Agency has a successful record of obtaining private party RI/FS settlement agreements. In fact, the percentage of PRP conductd RI/FSs out of the total RI/Fs started has consistently increased over the last three years, and will be over 50% by the end of 1989.

Issue: While the Agency has a good settlement record for the RI/FS, PRPs maintain that the Agency is too inflexible with respect to certain consent order provisions.

Implementation Steps:

- Since the Agency has a successful record of obtaining PRP RI/FS settlement agreements, the program does not require further incentives to obtain RI/FS settlement agreements. The Agency should not change its approach to create greater incentives.

Topic: 2. Quality of PRP-lead RI/FSs

Status and Accomplishments:

In May of 1988, Headquarters issued an "Interim Guidance on PRP Participation in Remedial Investigations and Feasibility Studies." It was revised in January 1989. In June 1989, Headquarters issued a model RI/FS statement of work that follows the revised RI/FS guidance. The Agency is currently drafting a guidance manual on oversight of PRP-conducted RI/FS and a model CERCLA administrative consent order for the RI/FS.

Headquarters is formally evaluating PRP-lead RI/FSs to further assess their quality, consistency and timeliness. The evaluation will be completed by the fall of 1989. As a follow-up to the formal evaluation, a training program is planned for Regional Project Managers (RPM) and oversight contractors.

Issue: Some commenters criticize the Agency for allowing private parties to conduct the RI/FS. They maintain that PRP conducted RI/FSs are characterized by poor quality and may result in cheaper and less protective remedies. Some regions feel that problems with PRP-lead RI/FSs are aggravated by the turnover rate of experienced RPMs and Regional counsels.

Implementation Steps:

- Headquarters is issuing guidance on RI/FS tasks and activities, including some that may currently be poorly conducted at some PRP-lead sites. The PRPs will be required to follow these and other guidances.

- Headquarters will work with the Regions to identify situations where it may be appropriate for the government to conduct portions of the RI/FS while allowing PRPs to conduct certain portions of an RI/FS.

- Headquarters should complete the oversight manual.

- Regions will be encouraged to implement the recommendations of the Superfund Management Review which are directed at decreasing the RPMs' workload through such actions as upgrading RPM, technical career and Regional counsel positions, creation of deputy RPMs, and use of in-house technical support teams.

## E. Negotiations for Remedial Design/Remedial Action (RD/RA)

Topic: 1. Achieving RD/RA Settlements

Status and Accomplishments:

EPA has a good record of achieving RD/RA settlements and the total number and value of settlements has been increasing yearly.

Headquarters has issued a variety of guidances that pertain to different aspects of the RD/RA negotiation process.[4] In addition, EPA's Management Issues Workgroup devoted a significant amount of time to addressing how to improve the management of RD/RA settlements. Their final report stressed the importance of the following and provided some recommendations on how to improve these areas: the quality and timeliness of PRP searches, the development and utilization of effective negotiation teams, meeting negotiation deadlines, and PRP organization through steering committees.

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[4] "Interim Guidance on Notice Letters, Negotiations, and Information Exchange," October 19, 1987, OSWER Directive number 9834.4A. "Waiver of Headquarters Approval for Issuance of Remedial Design and Remedial Action Special Notice at the Time of ROD Signature," September 26, 1988, OSWER Directive number 9834.10-1a. "Initiation of PRP Financed Remedial Design in Advance of Consent Decree Entry," November 18, 1988, OSWER Directive number 9835.4-2A.

Issue: Approximately 80% of negotiations are not fully completed during the moratorium period, although many agreements-in-principle are reached or nearly complete. The Regions are uncertain when unilateral administrative orders (UAOs) should optimally be used.

Implementation Steps:

- The Regions should be prepared to issue a UAO promptly after the negotiation deadline. In many cases this will involve drafting a UAO during negotiations.

- Regions should routinely issue UAOs at the conclusion of the negotiation moratorium if there are viable PRPs and a settlement is not reached at that point. Regions should promptly issue a UAO if:

  -- A good faith offer is not received by the 60th day,

  -- A good faith offer is received but settlement is not reached by the 120th day, and insufficient progress has been made to continue negotiations through a deadline extension.

- If a negotiation deadline extension is granted because sufficient progress has been made to justify an extension, Regions should be encouraged to issue unilateral orders with effective dates delayed to the new negotiations deadline.

- In addition to issuing UAO's, using model consent decrees during negotiations should facilitate the settlement process. Headquarters in conjunction with DOJ is developing a national model consent decree.

- In the limited circumstances where the Regions determine that special notice would not be appropriate, Regions, in appropriate circumstances, should nevertheless issue unilateral orders to the PRPs.

Issue: Before initiating site cleanup, EPA typically negotiates with PRPs for conduct of the RI/FS, and again, once the record of decision (ROD) is signed, for conduct of the RD/RA. Some PRPs maintain that they would conduct more cleanups if EPA were more flexible -- for example by negotiating with them for conduct of the remedial action upon completion of the remedial design.

Implementation Steps:

- o Headquarters should explore the advantages and disadvantages of negotiating conduct of the RD together with the RI/FS, and separately negotiating conduct of the remedial action upon completion of the RD. Routine Fund-financing of the RD prior to PRP conduct of the remedial action is not a varible option for the problem.

## F. Settlement Authorities

Topic: 1. Mixed Funding and de Minimus Settlement

Status and Accomplishments:

As part of EPA's effort to facilitate the use of mixed funding, Headquarters has issued general guidances which establish the basic framework for the use of mixed funding.[5] The Agency has also worked with the Regions to identify candidate mixed funding sites and has completed an extensive training program in each Region on how to utilize mixed funding.

As part of EPA's effort to facilitate the use of de minimis settlements, the Agency has issued two general guidances to the Regional offices which establish the basic framework for the use of de minimis settlements and one on de minimis landowner settlements.[6] The Agency has also worked with the Regions to identify candidate de minimis sites and has completed an extensive training program in each Region on how to use de minimis settlements.

In addition, the Settlements Incentives/Disincentives Workgroup identified disincentives to the use of de minimis settlements and specifically addressed ways to increase incentives for using de minimis settlements. The workgroup provided specific recommendations for selecting candidate de minimis sites,

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[5] "Evaluating Mixed Funding Settlements" October 20, 1987, OSWER Directive number 9834.9, and "Interim Policy on Mixed Funding Settlements Involving the Pre Authorization of States or Political Subdivisions," May 27, 1988, OSWER Directive number 9834.9a.

[6] "Interim Guidance on Settlements with De Minimis Waste Contributors," June 19, 1987, OSWER Directive number 9834.7; "Interim Model CERCLA Section 122 (g)(4) De Minimis Waste Contributor Consent Decree and Administrative Order Guidance," October 19, 1987, OSWER Directive number 9834.7-1A; and "Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property," June 6, 1989, OSWER Directive number 9835.9.

determining when to enter into such settlements, developing methods for achieving de minimis settlements with minimal resources and without alienating the major PRPs, and removing impediments to de minimis settlements through the development of additional guidance.

Issue: Some Regions are reluctant to pursue mixed funding or de minimus settlements either because they have little or no direct experience in achieving such settlements or because they are too resource intensive to use.

**Implementation Steps:**

- As stated in the Superfund Management Review, Headquarters will explore the possibility of creating incentives for the use of de minimus settlements by providing those Regions who successfully achieve de minimus settlements with supplemental resources. This will also be considered for mixed funding settlements.

- Headquarters should explore whether "trouble-shooters" with experience in achieving mixed funding or de minimus settlements can be loaned to or among the Regions for sites where such settlements are being considered.

- Headquarters should explore whether a formal mechanism for exchanging information among the Regions on successful mixed funding or de minimus settlements should be established and how it would work.

- As stated in the Superfund Management Review, Headquarters will explore whether additional Regional training is necessary.

Issue: The FY 89/90 budget process requires the Regions to budget for mixed funding needs through the Superfund Comprehensive Accomplishment Plan (SCAP). It is difficult to predict in advance which sites may require mixed funding. Where unanticipated mixed funding needs arise, defunding of one site to cover mixed funding needs for another may cause delays in cleanup of those defunded sites. In addition, making this information available through the SCAP could compromise negotiations where the PRPs may obtain information that money has already been set aside to cover a shortfall for preauthorization.

**Implementation Step:**

- As stated in the Superfund Management Review, Headquarters will continue to explore whether it is appropriate to set up a national reserve that would be available to the Regions for mixed funding needs.

Issue: The Preauthorization Decision Document (PDD) is currently drafted by Headquarters. There have been instances where certain provisions of the PDD overlap with or are in conflict with provisions of the consent decree. The overlap leaves the PRPs unclear as to what can and cannot be negotiated. Finally, there is no consistency in the manner in which PRPs request preauthorization, although the Regions have been instructed to provide the Harvey and Knott PDD as an example.

Implementation Steps:

- Headquarters should explore when it is appropriate to delegate the authority to draft the PDD to the Regions with Headquarters oversight.

- Headquarters and the Regions should review the model PDD and consent decree to identify where overlap exists and make revisions accordingly.

- Headquarters should publish the Harvey and Knott PDD in the Federal Register with a notification that the Agency expects PRPs use this as a model for their PDDs.

Issue: Questions continue to be raised about whether Federal procurement requirements apply to the procurement of contractors for work conducted pursuant to a preauthorization agreement (e.g., whether competitive bidding of contractors is needed to establish the reasonableness of costs to be incurred by the PRPs to ensure they can be reimbursed by the Fund for such costs).

Implementation Step:

- Headquarters recently issued a memorandum [7] to the Regions which clarifies the procurement procedures that may be used to assure that the costs incurred by the PRPs are appropriate based on Federal cost principles. Headquarters should explore whether there is the need to provide additional support to the Regions in implementing this memorandum (e.g., site-specific assistance).

Issue: Regions believe special accounts could be established to retain de minimis cash-outs for immediate access of funds to support cleanup activities when agreement has been reached. Such access will minimize delays in funding cleanup activities at sites, provide Regions with an incentive to pursue de minimis settlements, and provide PRPs with an incentive to settle.

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[7] "Procurement Under Preauthorization/Mixed Funding," April 19, 1989, OSWER Directive number 9225.01-01.

**Implementation Step:**

- As stated in the Superfund Management Review, Headquarters will continue to pursue the idea of setting up special accounts that would be available to the Regions for use at sites where de minimis settlements are reached.

**Topic:** 2. Non-Binding Allocations of Responsibility (NBARs)

The Agency has issued guidance to the Regions on the preparation of NBARs.[8] The Agency's policy is to generally allow the PRPs to determine allocation questions among themselves although NBARs should be used under appropriate circumstances. To date, only one formal NBAR has been completed, although the Regions do become informally involved in allocations, through the development and distribution of volumetric ranking lists. The quality of waste-in information, which is prepared for special notice, varies by the availability of information at particular sites.

**Issue:** Questions remain on what role the Agency should assume for facilitating allocations generally and what mechanisms are available for facilitating such allocations in appropriate cases. In the majority of cases, the PRPs don't want the Agency to prepare formal NBARs, but they do want EPA to facilitate allocations through the development of volumetric ranking or waste-in lists.

**Implementation Steps:**

- Headquarters should take the initiative on promoting more Regional involvement in facilitating allocations by:
  - -- Sending a memorandum to the Regions endorsing more Regional involvement in allocations in appropriate cases. This may include a discussion about allocation mechanisms that have been used to date as well as whether they were successful and why.
  - -- Identifying the appropriate forum for exploring the Agency's role and mechanisms (e.g., the CERCLA Settlements Lead Region Workgroup). The forum should explore:
    - -- the range of allocation mechanisms,
    - -- under what circumstances particular allocation mechanisms may be useful,

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[8] "Interim Guidelines on Preparing Nonbinding Preliminary Allocations of Responsibility," May 16, 1987, OSWER Directive number 9839.1.

-- the use of neutral third parties,

-- how to do allocations between owners/generators and generators/generators, and

-- what has worked and what has not worked in various Regions as well as what mechanisms should be used to transfer this information among the Regions.

## G. Unilateral Section 106 Authorities

**Topic: 1. Unilateral Section 106 Orders**

**Status and Accomplishments:**

The Agency has a high compliance rate for section 106 unilateral orders and is increasing the number of unilateral orders issued for both removals and remedial actions.

The Agency's guidance on section 106 unilateral orders is currently under revision to reflect statutory changes, new program directions and accumulated Agency experience. Headquarters is also developing model section 106 unilateral orders to facilitate unilateral enforcement actions in the Regional offices.

**Issue:** The Agency is perceived as failing to establish a credible record of administrative enforcement against recalcitrants. Regions have in the past been reluctant to routinely issue unilateral orders due to avoidance of delays or misconceptions of their role in the program, and resource constraints.

**Implementation Steps:**

- Instead of a quota system, Headquarters strategy should strongly encourage Regions to issue unilateral orders routinely to PRPs at removal and remedial sites who meet the criteria set forth in Agency guidance, prior to Fund financing and/or judicial referral. Historically, the Agency has been cautious about issuing unilateral orders at RI/FS sites, but has done so in a few appropriate circumstances.

- As stated in the Superfund Management Review, Headquarters strategy should require Regions to issue UAOs before a Fund-financed response can proceed. In exceptional circumstances, the Regions should provide justification for their decision not to issue the order.

**Issue:** The Agency has been criticized for failing to provide settlement incentives and disincentives for nonsettlors with respect to administrative enforcement.

Implementation Steps:

- For settlements encompassing less than 100% of the identified response action, Headquarters guidance will encourage Regions to issue unilateral orders to compel nonsettlors to perform the remaining portion.

- For settlements involving fewer than all of the viable PRPs, Headquarters guidance will encourage Regions to consider carving out separate tasks from the settlement for nonsettlors to perform under unilateral orders, where the work to be performed is readily divisible.

- Where a settlement agreement for 100% of the identified response action has been reached with fewer than all liable PRPs, Headquarters will consider guidance for Regions to explore use of parallel unilateral orders. Parallel unilateral orders may assist settlors to bring contribution actions against nonsettlors by directing liable nonsettlors to coordinate and cooperate with the settlors' conduct of the response action.

- Headquarters and DOJ will explore the possibility of obtaining costs from nonsettlors through unilateral orders.

Topic: 2. <u>Section 106 Judicial Referrals</u>

Status and Accomplishments:

Historically, judicial referrals have been resource intensive and have sometimes not produced satisfactory results in that they have taken years to resolve and have allowed judicial re-examination of remedial decisions. Statutory amendments to provisions concerning the administrative record and judicial standard of review were designed to resolve some of these impediments.

Headquarters issued a "Guidance on CERCLA Section 106 Judicial Actions" in February of 1989. Headquarters is drafting a strategy on treble damages to facilitate Agency collection of treble damages. EPA and DOJ are working together to standardize enforcement tools. They developed a new Model Litigation Report to improve the quality of judicial referrals.

Issue: The Agency is perceived as failing to establish a credible record of judicial enforcement against recalcitrants and PRPs who fail to adequately comply with unilateral orders and settlement agreements. In the past, Regions have been reluctant to refer cases to DOJ due to resource requirements, time constraints and the ability to fund response actions where there were no settlements.

Implementation Steps:

- Headquarters will encourage Regions to selectively refer cases to DOJ to establish a credible record of enforcement against recalcitrants. Cases should be selected based upon criteria set forth in Agency guidance.

- As stated in the Superfund Management Review, Regions will consult with Headquarters where PRPs do not comply with a unilateral order.

- To secure favorable judicial review, Regions should develop supporting documentation for administrative record purposes.

- To develop a favorable record on treble damages cases, Headquarters should develop a strategy setting forth criteria for optimum case selection. Criteria should focus upon traditional liability issues in addition to anticipating PRP assertions of "sufficient cause" (i.e. good faith defense) for noncompliance with unilateral orders.

- Headquarters should examine rulemaking on what constitutes "without sufficient cause", to rebut PRP assertions of a "sufficient cause" defense to penalties and damages at trial.

- Good candidates for referral generally should not include bankrupt PRPs. Bankruptcy cases should be screened carefully based upon the strength of evidence, the bankruptcy situation, and litigative risks.

Issue: The Agency has been criticized for failing to provide settlement incentives and disincentives for nonsettlors with respect to judicial enforcement.

Implementation Steps:

- Headquarters is investigating the feasibility and desirability of publicizing names of PRPs who fail to participate in settlement negotiations through media conferences and press releases in national and local newspapers.

- Headquarters should investigate more active coordination with the Securities and Exchange Commission to ensure that corporations subject to securities laws are disclosing their potential liabilities for cleanup costs, penalties and/or treble damages, in their annual financial statements and disclosure filings.

- As stated in the Superfund Management Review, Headquarters may pursue establishment of a litigation budget set aside of dollars and staff, over and above the Regions' regular budget, for use in §106 unilateral order litigation.

- As stated in the Superfund Management Review, Headquarters will investigate the creation of Headquarters Support Teams and Cost Recovery Documentation Teams to provide "hands-on" assistance at critical junctures in case preparation.

- As stated in the Superfund Management Review, Headquarters may investigate adjusting internal accountability commitments for other site activities, to the extent that judicial enforcement pulls staff away from other activities.

- To assist with DOJ's limited resources, Headquarters will investigate deputization from DOJ of qualified EPA Regional counsel attorneys and/or Office of Enforcement and Compliance Monitoring attorneys to represent EPA in court. Alternatively, Headquarters should pursue allocating resources for greater litigation support.

## H. Administrative Records

**Topic:** 1. Record Compilation

**Status and Accomplishments:**

Administrative records for selection of response action are being compiled in all ten Regions. Quarterly workshops, tracking systems, audits, and training are being used to assure the quality and timeliness of records and public access to those records. Each Region now has a remedial administrative records coordinator.

The records program for removal actions is improving. Quarterly workshops, tracking systems, and training are being used to assure the quality and timeliness of records and public access to these records. Each Region now has a removal administrative records coordinator.

In FY 88, Headquarters published proposed regulations on administrative records - Subpart I of the proposed revisions to the National Contingency Plan (NCP). Headquarters also released "Interim Guidance on Administrative Records for the Selection of CERCLA Response Actions" in March of 1989. A "Compendium of Guidance Documents", centralizing guidance documents frequently used in selecting response actions was sent on to the Regions for comment. The compendium will be used to save Agency resources in compiling administrative records.

**Issue:** Several outstanding issues have been identified which remain to be resolved concerning administrative records.

- Regions believe that space for these voluminous records will be at a premium.

- Inconsistencies exist among Regions in the timing of compiling and updating the records.

- States are supposed to compile and maintain records for State-lead sites. Many Regions are still compiling them for the States.

- Decisions on what to do with confidential material requires coordination between Regional counsel and program offices.

- Regions are reporting that contractors claim the Confidential Business Information privilege for much information which restricts public access to some information.

- Regions are also reporting problems with public accessibility of the record at military facilities.

**Implementation Steps:**

- Headquarters has encouraged training sessions with States and other Federal Agencies responsible for compiling administrative records to cut down on work load for the Regions.

- Headquarters should continue implementation of training and document dissemination for Regions.

I. Compliance With Consent Orders and Decrees

**Topic: 1. Tracking Systems**

**Status and Accomplishments:**

There is no Agency-wide compliance tracking system for CERCLA consent decrees. The Agency-wide CERCLA data base, CERCLIS, tracks major milestones taken at a site, but it does not track technical compliance with consent orders or decrees. The Department of Justice tracks the lodging and entry of CERCLA consent decrees upon referral for litigation milestones such as entry and lodging in court.

Also, no Agency-wide compliance tracking system exists for CERCLA consent orders. Several Regions indicate that they have a tracking data base system for major milestones of CERCLA consent orders. Management in these program offices regularly receives compliance reports from these tracking systems on all CERCLA consent orders.

Issue: The Agency has been criticized for failing to track compliance with CERCLA consent orders and decrees in a comprehensive and accessible manner.

Implementation Steps:

- Regions should establish management mechanisms to allow appropriate oversight of consent decree and consent order compliance.

- Headquarters will explore the resource implications of such mechanisms and systems upon the Regions.

- Headquarters should help Regions establish their own consent decree and order tracking systems. Regions without such systems should be encouraged to adopt a system comparable to the systems already in place in other Regional offices.

Topic: 2. Penalties for Non-compliance

Status and Accomplishments:

The Agency may pursue stipulated penalties and statutory penalties (under section 109) for noncompliance with orders and decrees. EPA may pursue penalties (under section 106)

for non-compliance with orders issued under section 106[9]. Regions have the responsibility of entering all penalties received from PRPs, including stipulated penalties, into CERCLIS.

The Agency has information that indicates that it has sought penalties from PRPs for non-compliance at eight sites. Three penalty cases were settled through consent decrees. One case resulted in a judgment for the Agency. The other four referrals are still pending. However, although the data has not yet appeared on CERCLIS, EPA is collecting penalties at other sites.

Issue: The Agency has been criticized for failing to collect penalties in the event of non-compliance with consent orders and decrees. Regions have in the past been reluctant to pursue penalties due to resource and time constraints.

Implementation Steps:

- To facilitate penalty collection, Headquarters should train Regional Project Managers (RPMs) to develop an "enforcement trail" by documenting important meetings and decisions.

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[9] "Guidance on Use of Stipulated Penalties in Hazardous Waste Consent Decrees," September 21, 1987, OSWER Directive number 9835.25.

- Regions should circulate among program and ORC management reports generated by Regional management or tracking systems. This will notify management of non-compliance.
- Headquarters should explore providing Regions with additional workforce or budget supplements for penalty collection.

## J. Cost Recovery

**Topic: 1. Recovery of Costs**

**Status and Accomplishments**

The cost recovery program serves a dual purpose for CERCLA enforcement: recovery of revenues for the Fund, and encouragement of voluntary PRP cleanup action by eliminating incentives for PRPs to wait for the government to do the work. It is inevitable that cost recovery lags behind Fund expenditure.

EPA has approximately 26 current guidance documents which address cost recovery indirectly and 13 that address cost recovery directly; 3 more are in draft. Specifically, the Superfund Cost Recovery Strategy, guidance on Cost Recovery Actions/Statute of Limitations, guidance on Direct Referral of cases to DOJ, guidance on Documenting Decisions not to take Cost Recovery Actions, guidance on Financial Management of the Superfund Program, and State Superfund Financial Management and Recordkeeping guidance have been issued since the passage of SARA in October 1986.

**Issue:** EPA is criticized for accepting cost recovery settlements for less than one hundred percent of total costs. However, not all Fund expenditures are feasible for cost recovery. When a settlement has been reached for a large portion of costs, it may be prohibitively expensive to negotiate or litigate for small remaining costs. Further, as discussed in the Superfund Management Review, the costs attributable to abandoned sites (sites with no PRPs) should not be attributed to other sites for collection; also comparisons between revenue returned to the Fund and total amounts authorized for the Fund are misleading.

**Implementation Steps:**

- As stated in the Superfund Management Review, EPA will identify realistic expectations for the cost recovery program -- perhaps in part by clarifying what costs are realistically available for recovery and defining 100 percent.

- Headquarters and the Regions will communicate cost recovery priorities which stress receiving the highest return for each dollar invested. To effectively implement this goal,

these priorities should be promptly communicated to Congress and the public.

Topic: 2. Documentation of All Costs

Status and Accomplishments:

PRPs are increasingly focusing on the documentation supporting EPA's cost expenditures. However, documentation of all costs is a burdensome process. Enforcement resources can be used more efficiently if cost documentation questions are litigated less frequently. Further, some Federal agencies lack the appropriate systems to completely document their costs associated with working on a Superfund site.

In FY88, EPA convened a cost documentation work group to address some of these issues impeding cost documentation. As required in the Superfund Management Review, EPA is developing a regulation which identifies the documentation necessary to establish costs and expenditures in a cost recovery proceeding.

Issue: To continue its aggressive approach on cost recovery, EPA should clarify or standardize cost documentation procedures.

Implementation Steps:

- As suggested in the Superfund Management Review, EPA will enter into a formal agreement with some federal agencies on acceptable cost accounting and documentation standards.
- Headquarters should continue implementation of database systems (Integrated Financial Managment System, Superfund Transactions Automated Retrieval Systems, category reports).
- Regional offices should consider establishing individual cost documentation/cost recovery support units to standardize procedures, conduct record maintenance training, and develop necessary expertise.

Topic: 3. Removal Cost Recovery

As stated in the Superfund Management Review, the three year statute of limitations under CERCLA/SARA for removal actions has prompted an increased number of judicial referrals. The legal resources required to avoid the possibility of expired claims competes with legal resources needed for RD/RA negotiations and enforcement. Although EPA's top priorities for cost recovery action are remedial actions and removal actions that are valued at over $200,000, some litigation of small cost recoveries is essential to maintain PRP incentives to settle.

**Issue:** The Agency cost recovery strategy does not precisely identify priorities and procedures for addressing removal cost recovery actions.

**Implementation Steps:**

- As stated in the Superfund Management Review, Headquarters will establish a strategy for cost recovery of removal actions. The process should meet the objectives of maximizing revenue and maintaining incentives for PRPs to settle without diverting resources from other critical stages of the enforcement process. The strategy may include:

  -- a minimum number of judicial referrals, to maintain the incentive to settle;

  -- use of arbitration or alternate dispute resolution (for cases under $500,000) prior to judicial referral; and

  -- an improved process for ordering or negotiating and overseeing PRP removal actions, to minimize the number of cost recovery actions that will be needed in subsequent years.

## III. PROGRAM RELATIONSHIPS

The Superfund program is administered by a number of EPA offices (e.g. Office of Solid Waste and Emergency Response, Office of Enforcement and Compliance Monitoring, Office of Administration and Resource Management), other Federal Agencies and the States. This Plan recognizes that revisions and/or changes to the current relationships established between these governmental entities should be explored. Critical to a successful Superfund program is streamlining or improving the present approach. Identified below are major areas where adjustments to the process should assist in achieving the goal of a more efficient and productive Superfund enforcement program.

### A. FUND/ENFORCEMENT INTEGRATION

The Superfund Management Review has recommended that the Agency establish an integrated enforcement and response program. The Agency should encourage or compel PRPs to conduct the response action at all sites where viable PRPs are found before using the Fund, except in emergencies. This "One Superfund Program - Enforcement First" concept should lead to development of proper skill mixes in Regional offices with staff working on a complete program approach. The following recommendations from the Superfund Management Review are implementable methods of restructuring the existing two programs' relationship.

- The Agency should develop an integrated timeline for both enforcement and Fund-financed activities. The timeline should include deadlines for completing negotiations and issuing administrative orders. The timeline should also reflect program goals for completing phases of the response action, and serve as a benchmark for assessing progress at sites.

- The Agency should encourage a proper skill mix for support of cleanup work, specifically including enforcement actions. The Agency should encourage creating specialized units for enforcement support activities, such as PRP searches, cost recovery efforts and administrative record support in the Regions.

Listed below are additional methods to assist in integrating response and enforcement activities.

#### 1. Site Classification System

Issue: Until recently, the Agency classified sites either as Fund or enforcement-lead. This classification served two purposes. First, it identified sites to which enforcement activities would be addressed. Second, it was used for budgeting purposes to estimate the FTE and dollar needs for managing the program. For an integrated program the first

purpose no longer exists. The second purpose (budget estimating) is still necessary, however, but must be structured to support the notion of enforcement actions being considered for every site.

Implementation Step:

- Headquarters has eliminated the site classification system. The integrated timeline will make clear that each site should undergo basic enforcement steps, beginning with early PRP searches. Regions should continue to estimate for budgeting and planning purposes which sites are likely to be enforcement or Fund-lead: Increased flexibility in funding and the manner in which SPMS commitments are formulated will allow (and in fact encourage) greater use of enforcement tools. (See item 3. Flexible Funding.)

## 2. Integrated Priorities

Issue: The integrated fund and enforcement priorities matrix was originally designed to: identify relative program priorities by listing major program activities for which resources are provided; and to provide a framework to estimate the funding levels needed to support the activities. The overall goals identified in the priorities matrix echo some of the major themes of the Superfund Management Review: mitigate immediate threats; move sites into cleanup using PRP resources as a first resort; and maintain a baseline of supporting activities.

Implementation Steps:

- The Agency should adopt for use in planning, budgeting and management activities the integrated priorities matrix approach for Headquarters and the Regions.

## 3. Flexible Funding

Flexible funding enhances the ability of the Regions to utilize funds initially targeted for Fund activities to leverage against PRPs in enforcement negotiations. The threat to use the Fund and various enforcement tools (e.g., §106 administrative orders (AOs) and judicial referrals) will achieve direct results by encouraging or compelling private parties to conduct the work. The additional gain would be the establishment of a credible threat that encourages PRPs to participate in the settlement process.

Issue: Fund flexibility requires early involvement of the enforcement program in identification of PRPs and development of a thorough case strategy. After the PRP search and case strategy development phase, a decision can be made whether to proceed with the Fund or commence

enforcement activities. The presumption should be that the Agency will first attempt to pursue a negotiated PRP action.

If the choice is made to enforce, a defined time period for negotiations must be established. If negotiations fail, one of two events should occur: 1) take additional enforcement action such as a §106 action or 2) proceed with Fund-financed activity without any significant delay.

**Implementation Steps:**

- A multi-million dollar fund will be maintained at Headquarters in FY 90 to backup RD/RA negotiations. This is in addition to the lump sum RD account which the Regions can adjust between sites. Headquarters and Regions should explore whether more flexibility is needed.[10]

### 4. Headquarters/Regional Organization Review

**Issue:** The present organizational structure of the Agency, especially Headquarters, might benefit from potential rearrangement or modifications. Some Regions have already reorganized their Superfund offices and successfully integrated the Fund and enforcement elements.

**Implementation Steps:**

- As stated in the Superfund Management Review, Headquarters will consider the benefits of conducting a review of Headquarters and Regional operations for possible restructuring of some of the offices and/or functions.

## B. HEADQUARTERS/REGIONAL/DOJ RELATIONSHIPS

### 1. Consistent Goals

**Issue:** Technical staff and attorneys perceive that each have different goals when pursuing settlements.

Technical staff are tasked with achieving a quick and technically proper cleanup while attorneys are tasked with developing legally defensible and protective documents.

**Implementation Steps:**

- Headquarters, Regions, and the Department of Justice (DOJ) should identify and commit to shared short and long-term goals and objectives for the program (e.g., in the

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[10]OERR has established a workgroup to review problems and/or issues related to flexible funding.

Interagency Agreement (IAG)) with a clear statement of their relationship to Congress and the public. These shared goals must encompass the enforcement program as a whole as well as individual site situations. As stated in the Superfund Management Review, EPA (Headquarters and Regions) and DOJ will hold a top-level conference to ensure consensus on these goals.

- As stated in the Superfund Management Review, EPA and DOJ will establish a mandatory site management planning process for use by Headquarters, Regions and DOJ that would set out a coordination process among offices and Agencies involved.

- Whenever appropriate, EPA should provide explicit and early opportunities for DOJ involvement in site management planning and negotiations. This will require development of routine communication and management systems to assure all necessary offices are involved.

### 2. IAG/Accountability/Resources

**Issue:** There is frustration in both EPA and DOJ at their perceived inability to hold the other organization accountable for activities critical to the success of the enforcement process. The legal arms of the enforcement process do not view themselves as full partners in budget planning. Regional counsel are frequently perceived as underfunded.

**Implementation Steps:**

- Headquarters should assure adequate DOJ funding through the IAG that is closely coupled with their accountability for timely enforcement action.

- Headquarters should involve Regional counsel and DOJ in the determination and accountability of the Superfund Comprehensive Accomplishments Plan (SCAP) and Strategic Planning and Management System (SPMS) commitments, and development of case/site management plans.

### 3. Delegations/Management

In FY 88, two different civil judicial enforcement authorities were delegated almost entirely to the Regional Administrators. Settlement authority is now delegated to the Regional Administrators for cases to be settled involving past and future costs totaling under $500,000. Additionally, the Assistant Administrators for the Office of Solid Waste and Emergency Response and the Office of Enforcement and Compliance Monitoring signed a memorandum waiving their concurrence on settlements for numerous categories of CERCLA cases.

The authority to refer CERCLA civil judicial actions to DOJ was

modified in April 1989. Under the new procedures, almost all classes of cases that may be brought under CERCLA are directly referred to DOJ (Office of Waste Programs Enforcement/Office of Enforcement and Compliance Monitoring review without concurrence).

Issue: There is concern that situations may have occasionally arisen in which EPA Headquarters should have been consulted on a particular case but notification is provided late, and commitments may have already been made at the negotiations table. Further, the reduction in the level of Headquarters review of cases that has occurred, as a result of recent delegations, could force DOJ into the role of ensuring national uniformity in settlements.

**Implementation Steps:**

- The role of Headquarters and DOJ should be established as early as possible in development of a case involving a potential referral or settlement. Headquarters should complete its work on establishing protocols for coordinating pre-referral negotiations among the Regions, Headquarters and DOJ. Identification of roles and responsibilities may assist in providing early warning of cases or issues that may require Headquarters concurrence/consultation.

Issue: Regional and DOJ staff have questioned the effectiveness of the Settlement Decision Committee (SDC), which has no provision for reaching final agreement absent consensus except by escalating issues to EPA Assistant Administrators and the DOJ Assistant Attorney General.

**Implementation Steps:**

- Headquarters should create an enforcement expediter position within the Agency with the primary function of facilitations prompt resolution of enforcement or settlement issues among Regions, DOJ or Headquarters.

- Headquarters should revitalize and streamline the SDC process to quickly resolve case-specific issues. For example, strive for a goal of a 5-7 working day deadline for a meeting.

### 4. Communication

Issue: Communication between Regions, Headquarters, and DOJ is often difficult. There is also a need to assure that all three parties have access to the same information resources. Database systems currently used by OECM, OWPE, and DOJ are incompatible.

**Implementation Steps:**

- The Agency should assure that enforcement and settlement decisions are communicated in a timely fashion, while assuring that enforcement sensitive information is protected. Development of a national training and information exchange program for communicating current enforcement issues will assist in the effort.

- Headquarters and DOJ should quickly reach agreement on and distribute model settlement language. The draft model consent decree now being developed can help significantly.

- Headquarters and DOJ should study the possibility of integrating their individual database systems.

- Headquarters should continue the development of the Enforcement Bulletin in conjunction with the Waste Attorney's Bulletin and effective communication of negotiation positions.

**Issue:** Technical and legal questions overlap in the Superfund enforcement process. Technical staff argue that lawyers intrude on technical prerogatives, while attorneys question the sensitivity of technical staff to legal implications.

**Implementation Step:**

- The Agency should implement "cross-training" sessions for technical and legal staff to sensitize them to the concerns and view points of each others' offices.

## C. STATE/FEDERAL RELATIONSHIP

EPA and State representatives from the Superfund Management Review agreed that the State/Federal relationship should be reexamined after the release of the Administrator's report. The State/Federal relationship is a critical part of the program and one that needs a comprehensive review. The fostering of a strong State/Federal partnership has been promoted in the last few years and strides have been made in improving both communication between the Regions and States and commitment of resources (both staff and grants) to States to assist in their program development [11].

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[11] "Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites," April 7, 1988, OSWER Directive number 9831.6a-6d. "Counting State-lead Enforcement NPL Sites toward the CERCLA §116(e) Remedial Action Start Mandate," October 21, 1988, OSWER Directive number 9831.8. "Supporting State Attorney General CERCLA Remedial and Enforcement Response Activities at NPL Sites," June 21, 1988, OSWER Directive number 9831.7.

Issue: Presently, there is no comprehensive framework for State/Federal relations in CERCLA enforcement. Both entities have a role to play in the cleanup of National Priorities List (NPL) and non-NPL sites. Limits in the number of State/Federal conflicts and resource duplication can be achieved if consistency in approach and guidance can be attained. Additionally, gains in expertise and capabilities by the States can only aid EPA in addressing the cleanup problems.

Implementation Steps:

- EPA should strive to minimize whenever possible its oversight of State response actions, and maximize the use of qualified States for oversight of PRP cleanups. State-lead enforcement actions can assist the Agency in meeting its statutory goals for remedial action. Regions should be willing to commit and provide financial resources, for State enforcement activities.

- The Superfund Management Review recommends working to resolve the fundamental policy question of what the long-term role of States will be in the Superfund program. EPA and the States will work to develop short and long-term strategies to enhance State program capability, improve State performance at State-lead Superfund sites, and foster State remedial activity at sites not on EPA's NPL. The EPA/State Enforcement Workgroup will be instructed to prioritize key issues in the State/Federal relationship and to develop options and recommendations for the EPA Management/ State Environmental Commissioners meetings.

## D. COMMUNITY INVOLVEMENT AND PUBLIC OUTREACH

The Superfund Management Review took a close look at the need for the Agency to be more responsive to citizens' concerns with and interests in the Superfund program. The Superfund Management Review's recommendations endorse increased involvement by citizens in Superfund decisions at each stage of the Superfund process and encourage managers to be more responsive to issues raised by the public. One critical area for enforcement that the Agency must work to change is the belief that PRPs are provided better information than the public.

The enforcement program plays a major role in educating the public regarding the need to work with PRPs to move settlements

along and achieve site cleanup[12]. The public will need to understand the rationale behind the "enforcement-first" approach. The public can be a great ally for the program once the public understands the process the Agency undergoes to bring a PRP to settlement.

Issue: Currently, EPA lacks a complete strategy for communication of the goals of the Superfund enforcement program on a national scale. There are two factions to which outreach must be directed: 1) parties with direct interest (e.g., PRPs, environmental organizations, media) and 2) the general public.

**Implementation Steps:**

- The enforcement program should look to expanding the use of simple fact sheets and pamphlets that the Remedial Project Managers (or On-Scene Coordinators) can distribute to the public. The public's awareness of the various tools they have regarding information (i.e., administrative record file or information repositories)can assist in involving the public earlier in the decision-making process.
  As the Superfund Management Review highlighted, a commitment of resources is essential for Regions to provide enough staff to work more closely with the public.

- The Superfund Management Review recommended making public education a Superfund priority for all front-line managers and staff. EPA should educate the public (Congress, environmental and industry groups, State and local organizations and general public) as to the realistic expectations and achievements of the Superfund program (enforcement and Fund) through such actions as public forums, speeches, and press releases. Such activities can stress the reinvigorated use of the enforcement process, plus create a positive image for those PRPs who choose to settle with EPA and send a negative message about recalcitrant PRPs.

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[12] "Community Relations during Enforcement Activities and Development of the Administrative Record," November 3, 1988, OSWER Directive number 9836.0-1A.

## IV. RESOURCE IMPLICATIONS

This Superfund Enforcement Strategy and Implementation Plan does not attempt to quantify the resource implications of these recommendations. However, the following conclusions can be drawn from the report.

- Enforcement is staff intensive. Process and management reforms can achieve only limited improvements without resources. Thus, the recommendations of this Plan are contingent upon adequate resources.

- Increased resources for enforcement and oversight of private party response is ultimately a worthwhile investment, because it allows EPA to leverage private party resources for cleanup. Fund-financed response postpones but does not eliminate the need for enforcement through cost recovery.

- Increased enforcement activity should help to leverage additional private party resources, but it is counterproductive to cut the resources available for Fund-financed design and construction. The threat of Fund use for response action is a demonstrated effective incentive for private party cleanup.

- EPA should establish consistent priorities by identifying the appropriate resources and the relative priority of specific steps in the process. EPA must minimize erratic and inconsistent signals and competing demands on enforcement personnel.

- Enforcement activities are critical at all stages of response. It is not possible to run an effective program by diverting resources from one stage of the process (e.g., PRP searches) to another (e.g., negotiations for remedial design and remedial action). The enforcement process needs to be sustained at each step.

- Many sites are reaching the stage of negotiations for remedial design and remedial construction with PRPs willing and able to do work and commit resources. EPA must have adequate resources for negotiations and oversight at these sites.

- EPA can make the enforcement process more efficient. For example, a cost recovery regulation should make the cost recovery process more efficient.

- Implementation of the recommendations in this Plan may require increases in the enforcement budget for FY90 and FY91.

# APPENDICES

APPENDIX A

HOUSE AND SENATE APPROPRIATIONS COMMITTEES REPORT LANGUAGE

HOUSE APPROPRIATIONS LANGUAGE

In attempting to meet the statutorily mandated schedules for remedial investigation/feasibility studies (RI/FS) and cleanup starts, EPA has relied primarily on contractors paid with trust fund monies instead of aggressively seeking private party cleanups. Unfortunately, the enforcement program has come to be viewed by EPA staff as too burdensome and time consuming to justify serious attention or resources. The overwhelming reliance on trust fund financing as the path of least resistance has created two serious problems. First, it squanders Superfund's finite resources on a relatively few projects, limiting the number of sites which can ultimately be cleaned up. This is contrary to the legislation's clear intent that the trust fund be used to "leverage" privately financed actions wherever possible.

Second, this approach has undermined the credibility of the Superfund enforcement program. Instead of creating incentives for private parties to accept early responsibility for cleanups, EPA's passive approach to enforcement has rewarded recalcitrants by giving them, at a minimum, a "free ride" during the lengthy feasibility study and design process. Unless these two problems are corrected through fundamental changes in management philosophy and approach, the Superfund program is destined to failure.

The Agency's reliance on trust fund monies to initiate remedial actions is based on the supposition that reimbursements can be won from private parties in subsequent cost recovery actions. However, EPA's cost recovery program is either non- existent or ineffective in all but one region. Over $300,000,000 in claims has already been forfeited due to cost accounting deficiencies. And the policy of postponing recovery initiatives until years in the future has reduced prospects for successful recovery and undermined the credibility of Superfund enforcement in general. An underlying cause of these problems is that EPA's internal management system and source allocation process provide absolutely no incentives for site managers and regional staff to enforce private cleanups and win early cost recoveries.

The Environmental Protection Agency is directed to submit a report by January 1, 1989, providing recommendations for program, policy, and management changes which will create meaningful, positive incentives 1) for regional staff to achieve enforcement

settlements and cost recoveries, and 2) for responsible parties to settle and undertake privately financed RI/FS's and cleanups. In undertaking this evaluation, the Agency is urged to consult with the states, the environmental community, responsible parties and other experts. Up to $500,000 is authorized to be reprogrammed for this purpose in 1988.

## SENATE APPROPRIATIONS LANGUAGE

The Superfund Enforcement Program, due to its inherently adversarial nature, often leads to disagreements and delays. The Committee is aware that enforcement philosophies and strategies may differ significantly among EPA's Office of Waste Programs Enforcement, Office of Enforcement and Compliance Monitoring, Office of General Counsel, regional offices, and the Department of Justice. Much better defined procedures, policy guidelines, and criteria are needed in a timely fashion to give consistency to the Superfund program. In order to accelerate cleanup activities the Agency is instructed to undertake a formal evaluation of Superfund enforcement. Specifically, it should determine how the three headquarters enforcement-related offices, the program office and the Department of Justice cause delays, misdirection, inconsistency and otherwise may delay regional offices in their Superfund enforcement effort. This effort should develop a consistent framework of enforcement policies and the procedures needed to assure their implementation. Specific recommendations should also address ways to assure policy level review of enforcement agreements in the Regions on an expedited basis; policy level reviews should be defined with some specificity; and provisions for referral to Headquarters of cases requiring policy level reviews in an expedited basis should be provided.

## LIST OF ENFORCEMENT ISSUES RAISED BY REPORTS ON SUPERFUND

The following is a list of studies of Superfund conducted from 1986 until the present. The studies are arranged according to the organization that prepared them.

CONGRESSIONAL

Office of Technology Assessment (OTA)

1. "Are We Cleaning Up? Ten Superfund Case Studies," OTA, June 1988.

   Numerous findings were provided. No recommendations specific to enforcement were included.

2. "Assessing Contractor Use in Superfund," OTA, January 29, 1989.

   No recommendations specific to enforcement were included.

General Accounting Office (GAO)

3. "Superfund: Overview of EPA's Contract Laboratory Program," GAO, October 1987.

   Comprised of a fact sheet. Did not raise issues.

4. "Superfund: Improvements Needed in Workforce Management," GAO, October 1987.

   No recommendations specific to enforcement were included.

5. "Superfund: Extent of Nation's Potential Hazardous Waste Problem Still Unknown," GAO, December 1987.

   No recommendations specific to enforcement were included.

6. "Superfund: Cost Growth on Remedial Construction Activities," GAO, February 1988.

   No recommendations specific to enforcement were included.

7. "Superfund Contracts: EPA Needs to Control Contractor Costs," GAO, July 1988.

   No recommendations specific to enforcement were included.

8. "Report on Environmental Protection: Protecting Human Health and the Environment Through Improved Management," GAO, 1988.

No recommendations specific to enforcement were included.

9. "Report on Hazardous Waste: Future Availability of and Need for Treatment Capacity are Uncertain," GAO, 1988.

No recommendations specific to enforcement were included.

10. "Superfund: Missed Statutory Deadlines Slow Progress in Environmental Programs," GAO, January 26, 1989.

No recommendations specific to enforcement were included.

11. "Interim Assessment of EPA's Superfund Program," GAO at Senator Lautenberg's request, October 1988.

In October, 1988, the GAO delivered to Senator Frank Lautenberg in his capacity as chairman of the Subcommittee on Superfund and Environmental Oversight, an interim report on Superfund Enforcement. The purposes of the GAO study were three: assessment of the agency's use of its enforcement tools to achieve CERCLA goals; analysis of ways to improve the cost recovery program; and evaluation of the adequacy of the Agency's Superfund planning and management systems.

The interim report covered the first two areas. It found that the enforcement program could do better in using available tools and in recovering costs. In particular, the study concluded that:

- the adequacy and timeliness of EPA searches for potentially responsible parties liable for site cleanup are continuing problems;
- the tracking and follow-up of information request letters used to further establish the liability of potentially responsible parties for a site have been inconsistent;
- reasons for not using unilateral administrative orders to compel responsible party cleanup of sites are not fully documented;

- special notice letters used to start negotiations for responsible party cleanups are not being issued on a timely basis; and

- efforts to recover Superfund monies used to clean up sites have been untimely and have been hampered by accounting system problems.

Senator Lautenberg

12. "Sixteen Recommendations for Improving the Superfund Program." Two reports dated December 1987 and October 1988.

Of the sixteen (actually seventeen) recommendations, the following were specific to enforcement:

- Training institutes should emphasize contracts management, legal training and site management;

- EPA should improve site work oversight by assuring that site managers receive backup from other Regional staff and by keeping caseloads manageable;

- EPA should replenish the fund, and push the program forward by aggressively using all its enforcement tools, and establish enforcement consistency throughout the Regions. Vigorous enforcement will also provide incentives for settlements;

- EPA should also set aside funds for cleanup in the event settlement negotiations fail;

- To move cases along more efficiently, EPA should push for more specialization and more thorough case development by Regional legal staff; and

- EPA should also explore whether creating legal expediter positions in the Regions and/or Headquarters can streamline the process.

House Appropriations Committee

13. House Appropriations Committee Study of Superfund, December 1988.

Of the ten reports presented, two covered issues specific to enforcement:

1. Status of EPA's Superfund Program. Specifies that getting polluters to be responsible for cleanup was a major goal which EPA has not recognized. Accuses EPA of running a public works program instead. Calls for improved performance in both enforcement-led initiatives and cost recovery.

2. EPA/DOJ Management of Enforcement. Settlement negotiations with PRP's generally protracted, difficult, and complex. There are problems especially with multiple PRP's and multiple Federal/State levels of review. EPA case development activities (relating to cost documentation, administrative record, PRP searches, and evidence supporting liability) could be improved. Also, improvements could be made in cost recovery performance.

STATES

**Association of State and Territorial Solid Waste Management Officials (ASTSWMO)**

14. Letter to Lew Crampton, EPA, ASTSWMO, February 7, 1989.

The ASTSWMO letter raised the following issues and recommendations:

Finding 1: Several States and EPA have proven that with adequate funding to back up enforcement negotiations, the number of enforcement settlements increased dramatically.

Recommendation 1: Use available funds to support enforcement negotiations first, then for the remedial process.

Finding 2: Some lawyers by their training (case-by-case methods) are not likely to be effective leaders in increasing Superfund/RCRA case handling production.

Recommendation 1: Allow program personnel to regain control of the program from the lawyers.

Finding 3: EPA has been relying too heavily on Fund-lead activities while not placing enough emphasis on getting PRPs to undertake or pay for cleanups. This is contrary to Congressional intent.

Recommendation 1: Integrate the fund-financed and enforcement efforts so one complements the other under a program strategy which seeks PRP commitments in the first instance and spends money where PRPs are unwilling or unable to do the work.

Recommendation 2: EPA should work with States to provide tools such as funding and standardized enforcement approaches and agreements which help build State enforcement programs.

National Governor's Association (NGA)

15. Recommendations made to the Bush transition team, NGA, January 30, 1989.

NGA provided the following issues and recommendations:

Finding 1: EPA should place greater emphasis on compelling cleanup by responsible parties. While using the Fund at sites enables EPA to move faster at many sites, it inevitably threatens the long-term solvency of the Trust Fund.

Recommendation 1: Help build State enforcement programs by providing States with tools such as funding, flexibility to use Fund monies if negotiations fail, and standardized documents to execute enforcement agreements.

National Association of Attorneys General (NAAG)

16. Recommendations for Environmental Protection in the 1990's, NAAG, February 9, 1989.

The issues and recommendations raised by NAAG are as follows:

- Expand funds available for State-lead enforcement cases.
- Fund States to assist in cost recovery efforts.
- Decisions regarding using RCRA or CERCLA authority at a site should be made jointly by EPA and the State.

- Increase the emphasis on enforcement actions against responsible parties.

- Funds should be earmarked for enforcement and States should be notified of their availability.

NON-GOVERNMENTAL

17. "Making Superfund Work," Clean Sites Inc., January 1989.

Clean Sites, Inc.'s major recommendations are as follows:

**Recommendation 1: Maximize enforcement and settlement to increase responsible party cleanups.**

1. **To increase the number of site cleanups while conserving Fund monies, EPA should accelerate implementation of a strategic enforcement program:**

   a) **EPA should direct a significant number of administrative orders and judicial enforcement actions toward recalcitrant responsible parties to impel them to undertake or participate in site cleanups;**

   b) **EPA should increase the number of cost recovery actions brought against responsible parties, where government funds have been used to conduct cleanup activities, and should file these actions sooner.**

2. **EPA should implement incentives to obtain responsible party agreements to undertake site cleanups, such as structuring settlements so that viable non-settlors are penalized in subsequent litigation by paying more than if they had settled.**

3. **EPA should establish realistically high goals for the number of responsible party cleanups and hold its Regional offices accountable for meeting these goals through a combination of enforcement actions and settlements.**

4. **EPA should implement incentives to obtain responsible party agreements to undertake site cleanups including expanding the use of mixed**

funding and de minimis settlements, making non-settlors pay more after subsequent litigation, looking to non-settlors first to cover subsequent site costs.

**Recommendation 2:** Improve the remedy-selection process

1. EPA should explain how the different selection of remedy criteria in Section 121 are to be evaluated and weighed.

2. EPA should continue to encourage "early actions" including those undertaken by PRPs and develop "model remedies."

3. An appropriate array of treatability studies should be included in the RI/FS at any site where there is significant uncertainty regarding the remedies being considered.

4. Headquarters and Regions should establish panels to review technical issues.

5. EPA should establish and make easily accessible and well publicized the library of Records of Decisions (RODs) for Regional use.

6. EPA should aggressively implement the technical assistance grant program.

**Recommendation 3:** Manage the Superfund program for optimal progress

1. EPA should continue to delegate site-specific decision-making authority to the Regions. Regional Administrators should be more accountable to Headquarters.

2. Regional decisions regarding site cleanup technology should be subject to a limited and expedited discretionary administrative appeals process to HQ to ensure consistency and redress administratively any factual errors.

3. Roles and responsibilities both in the Regions and HQ should be clearly defined.

4. Remedial project manager positions should be upgraded, and staff should be provided with training.

5. HQ and Regions should not be reorganized at this time.

Recommendation 4: Define new measures of program success

1. EPA should track measures of program success that focus on achievements (i.e., speed of site cleanup, the number of sites financed by PRPs), rather than focusing primarily on inputs (i.e., RI starts).

2. EPA should provide the public with understandable, timely and easily acceptable information regarding Superfund progress.

18. "Blue Print for the Environment," Consortium of Environmental Groups, December 1988.

Of the major recommendations outlined, the one specific to enforcement is as follows:

Recommendation: The Environmental Protection Agency should make greater use of the Superfund statute giving the Agency authority to order potentially responsible parties to conduct remedial investigations and feasibility studies and site remedial actions; this authority includes unilateral administrative orders which trigger treble damage penalties if violated and strict joint and several liability.

Implementation Steps:

1) By June 30, 1989, each EPA Regional Office should nominate at least twenty percent of the sites at which it is presently negotiating with PRPs for a unilateral administrative order to be followed by an enforcement suit if the administrative order is not complied with. Attorneys from the Regional Offices, the Office of Enforcement and Compliance Monitoring and the Enforcement Section of the Department of Justice's Lands and Natural Resources Division should work together to develop these lawsuits.

2) By October 30, 1989, the Assistant Administrator for the Office of Solid Waste and Emergency Response should report to the appropriate Congressional Committees (including the Oversight and Investigations Subcommittee of the House Energy and Commerce committee) on EPA's progress towards achieving this goal. By January 1, 1990, each EPA Regional Office should designate another twenty percent (or more) for similar treatment; Congress should receive another report by April 30, 1990.

19. "Right Train, Wrong Track: Failed Leadership in the Superfund Program," Environmental Defense Fund, Hazardous Waste Treatment Council, National Wildlife Federation, Natural Resources Defense Council, Sierra Club, U.S. PIRG, June 1988.

No recommendations specific to enforcement were included.

20. "Mandate for Leadership III. Policy Strategies for the 1990's," Heritage Foundation, 1989.

The issues and recommendations specific to enforcement are as follows:

- PRP's should have the option to seek independent arbitration for cleanup responsibility and costs. EPA should be limited to assigning costs proportionate to each party's share of responsibility if parties agree to binding arbitration. Once an EPA-supervised cleanup is completed, all firms that complied with the findings under arbitration should be released from future private tort liability. Questions of liability for injuries incurred prior to cleanup should be left up to the States. Firms refusing to participate could still be sued for the remaining cost of the cleanup.

21. "Toward A More Effective Superfund Enforcement Program," Environmental Law Institute, March 1989.

The major issues, findings and recommendations of the ELI Report are outlined below:

A. ELI evaluated two major aspects of the Superfund enforcement program: the legal enforcement structure (including policies, procedures, guidance, law and

court decisions), and the institutional arrangements for implementing the Superfund enforcement program.

B. The enforcement analysis provides a theory of enforcement from which basic principles are derived, describes existing enforcement in the Superfund program, and then applies the basic principles in an example national enforcement strategy. The main points are:

1. EPA needs an integrated national enforcement strategy (jointly with the Department of Justice) which is vigorously implemented because:

   a. a national strategy is the most effective, especially with limited resources; and

   b. the reasonable expectation of punishment elicits cooperation.

2. The national enforcement strategy should be based on the principle of creating a reasonable expectation among responsible parties that:

   a. it will be less costly to fulfill their legal obligations on the government's terms than to fail to meet those obligations; and

   b. the risks of trying to escape the costs of cooperation is outweighed by the risk of incurring the cost of government detection and punishment.

3. The tasks necessary to implement this principle are:

   a. create the legal obligation by identifying the site, response action, and responsible party, and making the requirement explicit (orders for work or demands for payment);

   b. detect those parties who are responsible for cleanup;

   c. communicate to the responsible parties their obligations and the risks and consequences of failing to comply;

d. punish those who don't comply in a timely fashion.

4. ELI evaluated the existing Superfund enforcement program, and found that it did not have a national strategy or conform to their basic principles.

5. Although ELI provided a detailed, national strategy, they stress that it is only and example, and that the key is to have a strategy that meets the basic principles, is thought through to the details, and is vigorously implemented. Key elements of ELI's example enforcement strategy include:

   - improved information gathering with respect to cost documentation, compilation of administrative record, PRP searches, and information requests to PRPs;

   - greater use of unilateral administrative orders for response actions, creating the potential for treble damage recovery for noncompliance without sufficient cause; and

   - communicate the risks of non-compliance, through publicizing successful cases and through strategies developed with other agencies regarding liability under other laws.

C. The institutional analysis covers three areas: performance measures, organizational structure, and resources and resource allocation. As before, ELI begins with basic management principles, then covers shortcomings in the existing program, and finally presents options for improvement, describing both their pros and cons. ELI points out that improvements in the three areas are complementary and not intended to stand alone.

1. Performance Measures. The existing measures (SPMS & SCAP) are not consistently successful in motivating personnel; ignore quality; are not

sufficiently linked to the ultimate enforcement objectives; and do not measure or reward multi-year performance.

a. Option 1 - replace SPMS targets with enforcement-oriented targets (such as successful PRP searches).

b. Option 2 - reduce the number of SPMS & SCAP targets to a smaller number of performance measures such as PRP financing as a percentage of total costs).

c. Option 3 - develop and use multi-year performance targets in addition to annual and quarterly targets.

2. Organizational Structure. Under the existing structure it is unclear who has ultimate responsibility for a national enforcement strategy; responsibility for an enforcement strategy is not accompanied by necessary authority; personnel (staff and contractors) are not always appropriately skilled.

a. Options 1-3 - develop a range of options for restructuring headquarters responsibilities from major changes to keeping the current structure.

b. Options 4-5 - establish separate information gathering units and enforcement records units in each Region to help ensure that the personnel are qualified.

c. Option 6 - obtain authorization for ORC or OECM attorneys to represent EPA in court by having the DOJ selectively deputize qualified EPA attorneys.

d. Options 7-8 - establish DOJ Regional offices to facilitate their early involvement, or allocate FTE's to U.S. Attorney's offices so that they can provide litigation support to EPA Regional offices.

e. Option 9 - redraft and enforce the MOU with DOJ in order to exercise greater control over the enforcement program.

f. Option 10 - improve the training of ORC attorneys.

3. The Resource Allocation Process. There are four problems associated with the existing system:

- The existing allocation process creates an incentive system that lowers the priority of enforcement activities because of the relationship between performance measures and resource allocation.

- The use of national average pricing factors limits the resources available for enforcement activities, resulting in inadequate resources for some Regions.

- Real and perceived restrictions on the use of resources by Regions reduces their ability to respond to unexpected enforcement needs by reallocating resources.

- The site classification system artificially limits the range of enforcement tools available for each site and restricts the use of certain tools at crucial times.

a. Option 1 - Make specific allocations for preparation and maintenance of administrative records and cost documentation.

b. Option 2 - Encourage Regional pricing of site-specific activities instead of using national pricing factors.

c. Option 3 - Reduce restrictions on the Regions' use of resources, allowing reallocations to occur to meet contingencies or address priorities.

d. Option 4 - Create a central fund for remedial actions to create appropriate incentives for Regions and PRPs, and provide headquarters with greater control.

e. Option 5 - Eliminate the site classification requirement as fund-lead, enforcement-lead, or PRP-lead in order to make better use of enforcement tools.

f. Option 6 - Increase total FTE's for the Superfund program.

22. "Superfund From the Industry Perspective: Suggestions to Improve and Expedite the Superfund Remediation Process," Consortium of Industries, February 1989.

The consortium of industry groups provided the following findings and recommendations:

Finding 1: EPA and industry must cooperate in order to maximize the number of sites addressed and to avoid squandering money on nonproductive transaction costs.

Finding 2: Liability is usually not an issue. Main issues of concern to EPA and industry are settlement, selection of remedy, and equitable allocation of costs.

Finding 3: The Remedial Investigation/Feasibility Study (RI/FS) process frequently takes too long, is far too costly, focuses on irrelevant considerations, fails to collect necessary data, collects extraneous data, and fails to provide an adequate basis for selection of a remedy.

Recommendation 1: Potentially responsible parties (PRPs) must be notified of their potential liability prior to the start of an RI/FS, and EPA and the PRPs should start and maintain a technical dialogue which will reduce the cost of technical studies.

Recommendation 2: To streamline the RI/FS, the universe of alternative remedies reviewed should eliminate alternatives that are determined to be infeasible, and should focus on one realistic remedy rather than on every conceivable remedy.

Recommendation 3: Model RI/FS's should be developed for classes of sites.

Recommendation 4: EPA should consider whether some aspects of the site remediation can be implemented prior to the completion of the RI/FS. Conversely, EPA should not force PRP's to undertake interim measures which are not consistent with the expected final remedy.

**Recommendation 5:** EPA and industry should establish a national clearinghouse on remedies.

**Recommendation 6:** EPA HQ and Regional staff should meet with industry representatives to discuss RI/FS streamlining.

Finding 4: EPA needs to ensure equitable treatment of all parties. Past settlement negotiations have not pursued enough recalcitrant parties. As a result settlements have become much more difficult because cooperative companies are reluctant to shoulder the costs and burdens of cleaning up the waste of recalcitrants.

**Recommendation 1:** EPA should use its investigatory powers early on in the process to identify and pursue all PRPs at each site, and should share this information with PRP groups which may also be pursuing a similar effort.

**Recommendation 2:** EPA should consider good faith claims that certain PRPs are not liable or that EPA has miscalculated their contribution.

**Recommendation 3:** EPA should use available settlement tools (de minimis settlements, NBARS, and mixed funding) to facilitate settlement, discourage litigation and encourage cleanups.

De minimis settlements should be allowed early using a premium that reflects the uncertainties at the site, and the money from these settlements should go to an escrow fund for cleanup, not to the Superfund or to EPA for past costs.

NBARS should be provided as a starting point for allocation of responsibility, if the PRPs so desire. Development of presumptive liability shares for owner/operator and transporters would also facilitate settlement.

Mixed funding should be approved on an expedited basis to provide seed money to start cleanups more quickly. In order to be effective, projects funded this way should not be subject to federal procurement regulations which were not designed for this type of situation, and which may add greatly to the delay and cost of cleanup.

Finding 5: Time and effort of both industry and EPA are wasted in negotiating language of certain clauses of consent decrees (CD's) and administrative orders (AO's) which are of little practical significance (i.e., jurisdiction).

> Recommendation 1: Standardize the language of the following clauses for CD's and AO's: Jurisdiction, Permits, Force Majeure, Stipulated Penalties, Disclaimer of Liability, Dispute Resolution, Indemnification of EPA, and Claims Against the Fund. (Suggested language is provided in the report).

Finding 6: EPA should begin a dialogue with industry concerning cleanup standards. There is uncertainty on the part of EPA and private parties as to what the SARA provisions require and how they will be implemented. Without clarification, settlements will be difficult and sometimes impossible.

> Recommendation 1: EPA should recognize that in certain instances complete cleanup may not be appropriate. At some sites, it may be appropriate to implement an interim measure, review the site periodically, and require cleanup in the future if it becomes necessary or a new technology becomes available.

Finding 7: The following observations have been made regarding the EPA oversight process:

- the negotiation environment has become unnecessarily adverserial;
- there is a lack of consistency in the implementation of the basic program goals and policies among the Regions;
- some EPA staff are inexperienced and lack the background to monitor contracts or evaluate cleanup proposals made by contractors or PRPs;
- turnover rate of EPA personnel is excessive and exacerbates oversight problems; and,
- EPA is too dependent on contractors.

> Recommendation 1: EPA should only undertake cleanups where there are no PRPs who are willing or able to undertake cleanups.

Recommendation 2: EPA staff needs to understand that industry and government must work together to clean up Superfund sites and that PRPs are willing and eager to work constructively with EPA, if given the opportunity.

Recommendation 3: Personnel require training to be able to negotiate with PRPs, negotiation should be courteous and professional, and once trained, personnel should be given the authority to strike compromises to promote settlements which are fair to all involved and are consistent with guidance from HQ.

Recommendation 4: EPA should channel resources to oversight of PRP contractors rather than hiring additional contractors to perform the same work.

Recommendation 5: EPA needs to develop incentives for its engineers and technical staff to remain with the Agency for several years. EPA might consider requiring multi-year contracts, or increasing pay.

INTERNAL: ENVIRONMENTAL PROTECTION AGENCY (EPA)

Office of Research and Development (ORD)

23. "Superfund Outreach," EPA, Office of Research and Development (ORD), December 28, 1988.

No recommendations specific to enforcement were included.

Office of Inspector General (OIG)

24. "Report of Audit: Review of Region III's Management of the Technical Assistance Team (TAT) Services," OIG, September 1988.

No recommendations specific to enforcement were included.

25. "Report of Audit: Review of Region IV's Management of Significant Superfund Removal Actions," OIG, September 1988.

The objective of this Office of the Inspector General (OIG) report was to evaluate Region IV's effectiveness and efficiency in managing significant (cost over $1 million) Superfund removal actions at the Peak Oil site, near Tampa, Florida and the General Refining site, near Savannah, Georgia. The one principal "finding" concerning enforcement was that the EPA did not take adequate action to pursue a

responsible party cleanup for the General Refining site. Region IV disagreed and provided extensive comment.

26. "Audit of EPA's Planning, Negotiating, Awarding, and Administering of Emergency Response Cleanup Services Contracts," OIG, September 1986.

No recommendation specific to enforcement were included.

27. "Report of Audit on EPA's Utilization of the Zone I Field Investigation Team," OIG, July 1988.

No recommendation specific to enforcement were included.

28. "Capping Report on State Performance," OIG, 1988.

The purpose of the report is to inform senior EPA management officials of the recurring problems identified in cooperative agreement audits, and to recommend actions or policy changes to alleviate the problems. The one major issue concerning enforcement is that EPA Regions were not effectively performing their oversight responsibilities of the Superfund cooperative agreements which contributed to delays in performing goals and objectives and could adversely affect cost recovery efforts.

29. "General Report on CERCLIS," OIG, 1987.

No recommendations specific to enforcement were included.

## APPENDIX C

## ACRONYMS

AO: Administrative Order (Either Unilateral or on Consent)

AOC: Administrative Order on Consent (Consent Administrative Order)

CERCLA: Comprehensive Environmental Response, Compensation and Liability Act of 1980

ESD: Environmental Services Division

FAR: Federal Acquisition Regulations

FS: Feasibility Study

IAG: Inter Agency Agreement

IFMS: Integrated Financial Management System

NBAR: Non-binding Allocation of Responsibility

NCP: National Contingency Plan

NPL: National Priorities List

OSC: On-Scene Coordinator

PRP: Potentially Responsible Party

ROD: Record of Decision

RA: Remedial Action

RD: Remedial Design

RI: Remedial Investigation

RPM: Remedial Project Manager

SARA: Superfund Amendments and Reauthorization Act of 1986

SCAP: Superfund Comprehensive Accomplishments Plan

SPMS: Strategic Planning Management System

STARS: Superfund Transactions Automated Retrieval System

TAG: Technical Assistance Grants

UAO: Unilateral Administrative Order

OFFICES OF THE SUPERFUND ENFORCEMENT PROCESS

DOJ: Department of Justice

OC: Office of the Comptroller, OARM

OECM: Office of Enforcement and Compliance Monitoring

OERR: Office of Emergency and Remedial Response, OSWER

OGC: Office of General Counsel

ORC: Office of Regional Counsel, Regions I-X

OWPE: Office of Waste Programs Enforcement, OSWER

OSWER: Office of Solid Waste and Emergency Response

OARM: Office of Administration and Resources Management