



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


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OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

**SUBJECT:** Superfund Task Force Recommendation 20 (*Identify Opportunities to Engage Independent Third Parties to Oversee Certain Aspects of PRP-Lead Cleanups*):  
Workgroup Findings and Recommendations

**FROM:** Recommendation 20 Workgroup

**THRU:** Cynthia L. Mackey, Director  
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**TO:** Steven Cook, Superfund Task Force Chair

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**I. Introduction**

Recommendation 20 of the Environmental Protection Agency's (EPA) Superfund Task Force report sought to "identify opportunities to engage independent third parties to oversee certain aspects of [potentially responsible party (PRP)] lead cleanups." This recommendation falls within Strategy 2 (aimed at creating efficiencies for PRP-lead cleanups), and Goal 2 (reinvigorating PRP cleanup and reuse).

The first task under recommendation 20 was the creation of a workgroup to research existing state programs and identify opportunities for independent third parties to perform certain fixed tasks at National Priorities List (NPL) sites. The workgroup includes representatives from the Office of Site Remediation Enforcement (OSRE), the Office of Superfund Remediation and Technology Innovation (OSRTI), and Regions 3, 4, and 5.

The workgroup determined that EPA currently has a variety of policy-based tools pertaining to the oversight of PRP-lead cleanup activities (such as third-party verification, advanced monitoring technologies) that help accomplish the goals set forth by this recommendation. The workgroup believes that these existing and new tools can be quickly integrated into our settlements without need for additional regulations or new programs. The workgroup also researched state licensed site professional programs. The workgroup concluded, however, that using these state programs or pursuing an approach similar to these state programs is not necessary given the availability of other policy-based tools. Further, the workgroup believes that using these state programs or a similar approach is not appropriate, at this time, for the oversight of PRP-lead cleanups at NPL sites.

At the outset, the workgroup sought to identify and answer certain threshold questions to be as responsive as possible to the recommendation.

#### **A. Threshold Question #1 – Ultimate Goal of Recommendation 20**

The first question the workgroup sought to answer was: What is the ultimate goal of this recommendation?

Determining the appropriate goals helped inform the workgroup's options and the workgroup's ultimate recommendations. Recommendation 20 falls under Strategy 2 of Goal 2. Strategy 2 is to "create oversight efficiencies for PRP-lead cleanups." As background, the Superfund Task Force report states the following under Strategy 2: "Cleanup decisions and implementation often take a long time due to the number of people and issues involved. Oversight efficiencies can be realized and costs can be reduced if responsibility for overseeing cleanup is clarified and better distributed." Through its deliberations, the workgroup determined that the main goal of recommendation 20 is to create efficiencies in the oversight of cleanups. Additional goals may also include reducing costs associated with oversight and reducing the amount of time to implement cleanups.

#### **B. Threshold Question #2: Substituting EPA's Oversight?**

The second question the workgroup sought to answer was: Should EPA's oversight of PRP-lead cleanups at NPL sites be replaced with oversight performed by an independent third party for certain actions?

Section 104(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides that the President is authorized to act, consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), to remove and provide for remedial action related to the release or threatened release of hazardous substances. Though potentially responsible parties can undertake this removal or remedial action, under Section 104(a), the President ultimately is responsible for overseeing and reviewing the actions taken. EPA can and does arrange for oversight assistance from contract support, states, and third parties. However, such third-party oversight complements EPA oversight and does not replace it.

#### **C. Threshold Question #3: How is "independent" to be defined?**

The third question the workgroup sought to answer was: How are we to define "independent" for purposes of identifying options related to independent third-party oversight?

The workgroup recommends that whether a third party is truly "independent" be based on three key elements: (1) independence, (2) competence, and (3) EPA's approval of the third-party. To ensure independence, it should be determined whether there is any past, current, or future potential business or financial relationships between the responsible party and the verifier. Generally, to be independent, third parties should not have had any past business relationship with the responsible party for at least 2-3 years, and should not have any such relationships with the responsible party for 2-3 years after the conclusion of the oversight work.

Under no circumstances should an independent third party be a company or individual that was involved in providing services to the responsible party related to any of the work associated with the actions or activities that resulted in the responsible party's liability. In addition, the third party should not be an entity or individual retained by the responsible party to perform the actual work required by

the settlement or order.<sup>1</sup> In other words, the responsible party should not retain the same entity to perform both oversight and settlement implementation.

Finally, when reporting the results of oversight, the third party should provide its findings and reports concurrently to EPA and the responsible party without sharing prior drafts with the responsible party.

#### **D. Threshold Question #4: Who will engage or retain the independent third party?**

The last threshold question the workgroup discussed was: Will EPA or the PRP retain (and pay for) the independent third party?

Because Goal 2 pertains to re-invigorating responsible party cleanup and reuse, and Strategy 2 is aimed at increasing oversight efficiencies of PRP-lead cleanup, the workgroup presumes that the PRP would retain the third party.<sup>2</sup> Using the criteria and parameters discussed in Threshold Question #3 will ensure the third party will indeed be independent despite being compensated by the PRP.

Based on these threshold questions and answers, the workgroup developed and discussed three options that were responsive to the recommendation and its goals.

## **II. Encourage Use of Existing and New EPA Oversight Tools & Approaches**

As part of this research effort, the workgroup determined that there exist several EPA policy-based tools and approaches for PRP oversight that do not require the promulgation of new rules or regulations and may still achieve the primary goal of this recommendation: creating efficiencies in the oversight of PRP-lead cleanups at NPL sites. Some of these existing tools and approaches rely on independent third parties to perform oversight; oversight that complements, and does not replace, the oversight of EPA. These policies and guidance may be quickly integrated into our settlements without need for additional regulations or new programs.

### **A. Independent Quality Assurance Team for Remedial Action**

EPA's *Guidance on EPA Oversight of Remedial Designs and Remedial Actions Performed by PRPs*<sup>3</sup> ("Oversight of RD/RA by PRPs") discusses, among other things, the role and responsibilities of the independent quality assurance team (IQAT) during the PRP's performance of the remedial action (RA). This guidance states that an IQAT is used "to ensure compliance and provide unbiased quality assurance monitoring of the Remedial Action."<sup>4</sup> The guidance provides that the IQAT, retained by the PRP, is comprised of representatives from testing and inspection organizations and is independent of the remedial action constructor (also retained by the PRP). Among other things, the IQAT may be used to (1) review design criteria, plans, and specifications for clarity and completeness; (2) direct and perform observations and tests for quality assurance inspection activities; (3) perform independent on-site inspections of the work to assess compliance with design criteria, plans, and specifications; and (4) report to the PRP and EPA the results of all inspections and corrective actions, including work that is not of acceptable quality or that fails to meet the specified design requirements.<sup>5</sup> A recent survey of the

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<sup>1</sup> Though this subsection discusses the definition of independence as provided in OECA's independent third-party verification module and guidance, which refers to entities, licensed site professionals generally are individual persons who are licensed or certified by a state.

<sup>2</sup> In some instances, EPA does use contractors to provide oversight support. These contractors are retained directly by the Region and associated costs are billed to the PRP.

<sup>3</sup> *Interim Final Guidance on EPA Oversight of Remedial Designs and Remedial Actions Performed by Potentially Responsible Parties*, OSWER Directive 9355.5-01 (Apr. 1990), available at <https://semspub.epa.gov/work/11/174047.pdf>.

<sup>4</sup> *Id.* at 2-2.

<sup>5</sup> *Id.* at 2-5 to 2-6.

Regions confirmed that, at certain sites and where appropriate, PRPs are using IQATs to ensure quality assurance.

The Oversight of RD/RA by PRPs guidance also discusses the EPA remedial project manager's (RPM) role in the oversight of the PRP's performance of RD/RA. Specifically, the guidance explains that the RPM may obtain technical assistance for performing oversight by engaging an "oversight official," who provides technical support to the RPM in monitoring the PRP's compliance with the settlement agreement. The oversight official operates under some form of contractual or interagency agreement with EPA and reports directly to EPA.<sup>6</sup>

In addition, EPA's model statements of work (SOW) for the model RD/RA consent decree and model unilateral administrative order both cite to the 1990 Oversight of RD/RA by PRPs guidance and includes an optional provision for the IQAT if the case team determines that an IQAT is appropriate for the work. The SOW provisions explain that the IQAT will be independent of the PRP's supervising contractor, and will have the responsibility to determine whether the work is of expected quality and conforms to applicable plans and specifications.<sup>7</sup>

Under this guidance and model SOWs, it appears that the IQAT could be sufficiently independent of the PRP and would provide many of the same oversight functions that the licensed professionals perform under the state programs. Therefore, this guidance and these model SOWs seem to already allow for independent third parties to help EPA (or state, if the state is the lead agency) oversee certain aspects of PRP-lead cleanups.

### **B. Independent Third-Party Verification or Certification**

OECA's compliance program<sup>8</sup> includes the option of the responsible party retaining an independent third party, who is competent to perform the verification activities and who is approved by EPA, to verify that the responsible party has performed the activities agreed to in the settlement.

Settlement agreements have used independent third-party verification for the following functions: to certify as to the proper installation of pollution control equipment; to ensure the appropriate design of a landfill cap; and to oversee compliance with various settlement requirements.

The key requirement for establishing third party verification is ensuring that the verifier is independent and qualified. Third-party verifiers should be required to provide their findings and reports to EPA at the same time as they provide them to the settling party, and the Agency will then exercise its discretion to determine whether the PRP is complying with its settlement obligations.

Using third party verification can help achieve two main objectives: (1) create additional assurance that a responsible party will fully implement its settlement commitments; and (2) streamline or enhance EPA's ability to determine if a responsible party is complying with the settlement. Further, using a third-party verifier does not eliminate the need for EPA oversight, but rather supplements EPA's oversight responsibilities.

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<sup>6</sup> *Id.* at 2-7.

<sup>7</sup> RD/RA CD Statement of Work, available at [https://cfpub.epa.gov/compliance/models/view.cfm?model\\_ID=543](https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=543); RD/RA UAO Statement of Work, available at [https://cfpub.epa.gov/compliance/models/view.cfm?model\\_ID=753](https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=753).

<sup>8</sup> U.S. EPA, Next Generation Compliance webpage, available at <https://www.epa.gov/compliance/next-generation-compliance>. See also memorandum issued by Susan Bodine, OECA Assistant Administrator, on *The Appropriate Use of Compliance Tools in Civil Enforcement Settlements* (Apr. 3, 2018), available at [https://www.epa.gov/sites/production/files/2018-04/documents/memoonappropriateuseofcompliance\\_tools\\_in\\_civil\\_enforcement\\_settlements.pdf](https://www.epa.gov/sites/production/files/2018-04/documents/memoonappropriateuseofcompliance_tools_in_civil_enforcement_settlements.pdf).

At this point, as far as the workgroup is aware, no PRP at an NPL site cleanup has used an independent third-party verifier. The closest example to such a scenario took place within the consent decree (CD) for *United States v. Enbridge Energy, Ltd.*, Case No. 1:16-cv-00914-GJQ-ESC, which was entered in May 2017. In the CD, the United States alleged that Enbridge violated the Clean Water Act §§ 309 and 311, and the Oil Pollution Act § 2702, with respect to two oil spills that occurred in 2010, which resulted in the unlawful discharges of oil from two pipelines. Because of the discharges, EPA issued several Section 311 administrative orders requiring Enbridge to clean up the discharged oil. Under the CD, Enbridge is required to comply with numerous injunctive measures, including: implementing an in-line inspection based spill prevention program, performing and instituting leak detection and control room procedures, improving emergency spill response and preparedness, and installing new remotely controlled valves. As part of the CD, Enbridge is required to retain, at its expense, an independent third party to conduct verification of Enbridge's compliance with all but the emergency spill response measures provided in the CD.

Regions may incorporate third-party verifiers into CERCLA settlements, where appropriate, to assure timely and satisfactory implementation of cleanups.

### **C. Advanced Monitoring for Long-Term Stewardship**

The Office of Enforcement and Compliance Assurance's Office of Site Remediation Enforcement has developed a memorandum that provides guidance on the use of certain advanced monitoring technologies and approaches for maintaining and monitoring (or overseeing) institutional controls (ICs), engineering controls (ECs), and other aspects of long-term stewardship (LTS).<sup>9</sup>

In the LTS context, advanced monitoring refers to a broad range of analytic systems, techniques, technologies, and approaches for better detecting potential land uses or activities that are inconsistent with the cleanup, that conflict with an IC, and/or that may impede the effectiveness of an EC. Advanced monitoring technologies and approaches in the LTS context, generally, are those that are not yet in widespread use, monitor LTS activities on a real-time or near real-time basis, and/or are existing technologies or approaches used in new ways to provide better information on the LTS activities at the site or facility.

The technologies and approaches discussed in the July 2018 memorandum are: (1) land activity monitoring; (2) one-call excavation monitoring; (3) local land use and building permit monitoring; (4) geographic information system mapping and database approaches; (5) vapor intrusion system remote monitoring; and (6) change detection monitoring. Almost all of these advanced monitoring technologies or approaches use or rely on a third party to implement the technology and facilitate the monitoring process.

### **D. EPA Guidance on Tailoring or Streamlining PRP Oversight**

Similarly, there exists EPA guidance that encourages the Regions to consider different approaches when it comes to determining the level of oversight necessary for PRP-lead cleanups. Although independent third parties are not discussed, the options and principles put forth in these guidance documents may result in achieving the same objectives our workgroup has identified.

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<sup>9</sup> Office of Site Remediation Enforcement, *Advanced Monitoring Technologies and Approaches to Support Long-Term Stewardship* (OSRE July 20, 2018), available at <https://www.epa.gov/enforcement/use-advanced-monitoring-technologies-and-approaches-support-long-term-stewardship>.

The 2000 *Interim Guidance on Implementing the Superfund Administrative Reform on PRP Oversight*<sup>10</sup> directs the Regions to focus on efforts to engage in open dialogue with PRPs as a means to promote appropriate oversight that ensures the development and implementation of protective cleanups, gives careful consideration to the associated costs being charged to PRPs, and maximizes EPA's recovery of oversight costs.

In 2006, OSRE and OSRTI issued guidance for *Using RCRA's "Results-Based Approaches and Tailored Oversight Guidance" when Performing Superfund PRP Oversight*.<sup>11</sup> This guidance encourages Superfund program managers to consider the tailored oversight principles contained in the RCRA Results-Based Approaches guidance when developing oversight plans with PRPs for their Superfund sites.

### III. Existing State Licensed Site Professional Programs

Recommendation 20 sought to identify opportunities to engage independent third parties to oversee PRP-lead cleanups. Under this recommendation, the workgroup was tasked with researching "existing state programs" in relation to independent third-party oversight. From this, the workgroup deduced that the recommendation was referring to state licensed site professional (LSP) programs. This section discusses the workgroup's research and findings with respect to existing state LSP programs.

The workgroup identified six states that have licensed or certified professional programs for use at sites contaminated with hazardous substances or hazardous waste. These states are Connecticut, Massachusetts, New Jersey, North Carolina, Ohio, and West Virginia.

Typically, state licensed professional programs are created by law and/or regulation and apply at certain sites contaminated with hazardous substances or hazardous waste. Under these state licensed professional programs, the person or entity responsible for cleaning up the site is required to retain an independent third-party professional to oversee and, in some cases, perform the cleanup of the site. This third party is licensed or certified by the state, in accordance with specifically prescribed requirements. When an LSP is retained to oversee the cleanup – and certify that the cleanup has been conducted according to the state's applicable cleanup regulations – the state does not engage in oversight. Most, if not all, of the states with these licensed professional programs may review certain deliverables that are submitted by the licensed professional or responsible party, and some states may conduct audits of a certain number of sites that rely on licensed professionals. Otherwise, the licensed professional is responsible for all oversight activities.

Despite the recommendation's interest in state LSP programs for oversight at NPL sites, the workgroup has determined that, for the following reasons, using state LSP programs is not appropriate at NPL sites at this time:

- Two of the states, Ohio and West Virginia, use LSPs through their voluntary cleanup programs, but these programs do not allow for NPL sites to participate.<sup>12</sup>

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<sup>10</sup> Office of Emergency and Remedial Response & Office of Site Remediation Enforcement, *Interim Guidance on Implementing the Superfund Administrative Reform on PRP Oversight*, OSWER Dir. 9200.0-32P (May 17, 2000), available at <https://semspub.epa.gov/work/HQ/175071.pdf>.

<sup>11</sup> *Using RCRA's "Results-Based Approaches and Tailored Oversight Guidance" when Performing Superfund PRP Oversight*, Office of Site Remediation Enforcement & Office of Superfund Remediation and Technology Innovation (Dec. 22, 2006), available at <https://www.epa.gov/enforcement/guidance-using-rcras-results-based-approaches-and-tailored-oversight-guidance-when>.

<sup>12</sup> Ohio Administrative Code 3745-300-02(B) states that any property identified on CERCLA's NPL is ineligible for participation in Ohio's Voluntary Action Program, which requires the use of certified professionals. West Virginia Code

- Generally, state LSPs are licensed to perform oversight in accordance with their respective state’s cleanup standards and requirements. To allow an NPL site to rely on a state LSP program, EPA likely would have to promulgate new rules providing that any cleanup and oversight performed at an NPL site under these states’ cleanup programs would satisfy the requirements and standards required under CERCLA and the NCP. Promulgating new regulations, however, is beyond the scope of the Task Force.
- The workgroup found that generally some of these state LSP programs are intended for “lower risk” sites, where contamination is less significant and the remedies are not as complex, costly, or resource intensive. In many of these states, the state environmental agency – not LSPs – maintain and perform oversight at “higher risk” sites, where contamination is significant and the remedy is complex.
- The workgroup is concerned about potential inconsistencies in oversight across the state LSP programs, as well as potential inconsistencies in oversight between the state cleanup programs and CERCLA. Generally, no two state licensed professional programs are the same. Each state may have different cleanup standards or regulations; the state licensed professionals are required to ensure cleanups are completed in accordance with that state’s standards and regulations. Thus, there would be a concern about inconsistencies in oversight practices, particularly given that 44 states, the U.S. territories, and the District of Columbia do not yet have such LSP programs.

In addition, CERCLA is not completely silent on the use of licensed professionals. Under CERCLA § 128(a), which generally pertains to brownfields, there is a reference to “licensed site professionals.” Section 128(a) provides that the Administrator may award a grant to a state that has a response program that includes specific elements provided in Section 128(a)(2). One of those specific elements is that the state must have “mechanisms for approval of a cleanup plan, and a requirement for verification by and certification or similar documentation from the State . . . or a licensed site professional to the person conducting a response action indicating that the response is complete.” (Emphasis added.)

Section 128 was added to CERCLA in 2002 by the Small Business Liability Relief and Brownfields Revitalization Act (“Brownfields Amendments”). Indeed, that the term “licensed site professionals” is referenced indicates a recognition by Congress that these programs exist. In fact, at the time section 128 was added to CERCLA, at least four of the above six state licensed site professional programs were in effect. Thus, Congress was aware of state licensed site professional programs when it passed the 2002 Brownfields Amendments. It could be inferred that, by limiting the term to Section 128 (and not including it in other provisions, like Section 104(a)(1) or Section 121(c)), Congress decided not to recognize the use of LSPs at NPL sites.

#### **IV. Creating a National Licensed Site Professional Program**

In addition, the workgroup considered the feasibility of creating a national licensed site professional or independent third-party oversight program, similar to current LSP programs. Such a national program would generally operate in a similar way as the existing state licensed professional programs, discussed in Section III, but on a national scale.

If EPA were to create a national licensed site professional program, it would need to promulgate rules and regulations to implement such a program. A board or body of some kind would also likely need to

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section 22-22-4(a) states that sites subject to a unilateral administrative order issued by EPA under CERCLA and sites that have been listed or proposed to be listed on NPL are not eligible for participation in West Virginia’s Voluntary Remediation Program, which requires the use of licensed remediation specialists.

be created – likely through a rule or regulation – to regulate the licensed professionals. Rules of professional and ethical conduct would be necessary to govern the conduct of licensed professionals.

In light of this – and given that promulgating new rules and regulations is beyond the scope and charge of the Superfund Task Force – the workgroup determined that creating a national licensed site professional or independent third-party oversight program is not necessary or appropriate.

## **V. Conclusion**

The Superfund Task Force charged the workgroup to identify opportunities to engage independent third parties to oversee PRP-lead cleanups. Under this recommendation, the workgroup was tasked with researching “existing state programs” in relation to independent third-party oversight. The workgroup considered a number of current policies and guidance, pertaining to the oversight of PRP cleanup activities (such as third-party verification and advanced monitoring technologies). The workgroup recommends that EPA continue to use the current policy-based tools discussed above to achieve the goals of more efficient and tailored oversight. These policies and guidance may be quickly integrated into our settlements without need for additional regulations or new programs.

This workgroup also conducted exhaustive research and, for the reasons provided above, concluded that the use of individual state LSP programs is not, at this time, appropriate for the oversight of PRP-lead cleanups at sites listed on the NPL. As a result, the workgroup is recommending that no pilot be designed to use independent third parties to perform oversight; though, this may be an area to potentially revisit in the future. In the meantime, EPA will continue to look at other opportunities for efficiencies in the oversight of PRP-lead cleanups.

Finally, though not specifically directed by the recommendation, this workgroup considered the option of creating a national program similar to state LSP programs. The workgroup concluded that this would not be a viable option because it would require the promulgation of new rules.

For questions about Recommendation 20 or the workgroup’s findings and recommendations, please contact Anthony Austin in OSRE (202-564-6943; [austin.anthony@epa.gov](mailto:austin.anthony@epa.gov)).

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