



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

SEP 18 2018

MEMORANDUM

SUBJECT: Principles for Reinforcing Federal Facility Agreement Informal and Formal Dispute Timelines

FROM: Susan Parker Bodine, Assistant Administrator
Office of Enforcement and Compliance Assurance

Barry N. Breen, Acting Assistant Administrator
Office of Land and Emergency Management

Handwritten signatures of Susan Parker Bodine and Barry N. Breen.

TO: EPA Superfund Division Directors
EPA Regional Counsels
EPA Regional Enforcement Directors

Purpose

The pace of cleanup at federal facility Superfund sites can be delayed when Federal Facility Agreement (“FFA”) parties (“Parties”) continue disputes beyond the agreed-upon dispute resolution timelines specified in negotiated FFAs. However, because disagreements and disputes are fact-specific, a fluid rather than a one-size-fits-all process may at times be necessary. This memorandum sets out principles clarifying and reinforcing the importance of adhering to agreed-upon FFA informal and formal dispute timelines. These principles support Recommendation 18 of the Administrator’s Superfund Task Force Recommendations report (“Task Force Report”), released on July 25, 2017.¹

Background on FFA Dispute Timelines

Under section 120(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), amended by the Superfund Amendments and Reauthorization Act (SARA) of 1986, federal facilities “owned or operated by a department, agency or instrumentality of the United States” on the National Priorities List (NPL) are required to enter into an interagency agreement, referred to as an FFA, with the EPA.² The EPA Regions, the other federal agencies (“OFAs”), and, in most cases, the

¹ The Task Force Report issued on July 25, 2017, was in response to the Administrator’s initial memo on May 22, 2017, commissioning the Superfund Task Force and requesting recommendations within 30 days that address five goals: expediting the cleanup and remediation process, reducing financial burden on all parties involved in the entire cleanup process, encouraging private investment, promoting redevelopment and community revitalization, and building and strengthening partnerships. See “Superfund Task Force Recommendations” (signed July 25, 2017),

https://www.epa.gov/sites/production/files/2017-07/documents/superfund_task_force_report.pdf. In developing these principles, EPA sought participation from major stakeholders, including the federal agencies with FFAs and the states through the Environmental Council of States (ECOS) and the Association of State and Territorial Solid Waste Management Officials (ASTSWMO).

² CERCLA § 120(e)(2).

states are signatories to these agreements. There are over 170 FFAs that govern the cleanup at federal facility NPL sites across the country; each includes dispute resolution procedures for resolving informal and formal disputes.³

In general, the dispute resolution provisions in FFAs provide that either a draft final primary document or “any action that leads to or generates a dispute” may be the subject of FFA dispute resolution procedures.⁴ The FFAs call for the Parties to make efforts to resolve disputes informally before elevating them to the formal dispute resolution procedures.⁵ Many low-level disagreements may arise at a site that can be resolved outside of the dispute resolution process.⁶ Substantive, tangible progress should be made on these low-level disagreements quickly (e.g., through a few email exchanges or phone calls between RPMs), particularly if resolution will impact the pace of cleanup. If progress is not being made quickly, then the disagreement should be explicitly characterized as an informal dispute and the dispute resolution provisions of the FFA should control.

In 1988, the EPA, DoD, and the Department of Energy (DOE) agreed to model language, including dispute resolution provisions, to govern their FFAs. However, some FFAs may include language that differs from the models. Though differences in dispute resolution timelines exist,⁷ the vast majority of FFAs provide the following timelines:

- the Parties have 30 days to resolve an informal dispute;⁸
- if not resolved informally, the disputing Party shall invoke formal dispute to the Dispute Resolution Committee (DRC), which has 21 days to resolve it;
- if it is not resolved by the DRC, the Parties have 7 days to elevate the dispute to the Senior Executive Committee (SEC), which has 21 days to resolve it;
- if the SEC is unable to reach a unanimous decision within 21 days, the EPA Regional Administrator (RA) shall issue a written position on the dispute;
- if a Party disagrees with the RA’s decision, within 14 days of that decision, the decision can be elevated to the EPA Administrator; and
- the EPA Administrator, as final arbiter in FFA formal disputes, has 21 days to ultimately resolve the dispute.

The terms of the individual FFA will control the dispute resolution process at a site. Thus, it is important for all Parties to understand the dispute resolution processes set out in the FFA. In addition to what is included explicitly in the FFA, elevation procedures may vary with Regional practices. Recognizing those

³ These procedures are included in a “Dispute Resolution” or “Resolution of Disputes” section in the FFA. This memorandum captures and reinforces the dispute timelines only in those sections and does not address other timelines that may be discussed in the FFAs. It is important to note that FFAs may have a different timeline for a federal agency to dispute stipulated penalties that have been assessed.

⁴ Many recent FFAs state that a draft final primary document becomes final, “upon the earlier of (i) issuance of a ‘no additional comment letter’ by EPA and the [State], (ii) thirty days after the period established for review of a draft final primary document if dispute resolution is not invoked, or (iii) modification by decision of the dispute resolution process.”

⁵ In 2009, EPA and the Department of Defense (DoD) agreed that the Fort Eustis FFA would serve as the model for all future EPA/DoD FFAs. Like the 1988 model language, its dispute resolution provision states: “During this informal dispute resolution period, the Parties shall meet as many times as are necessary to discuss and attempt resolution of the dispute.”

⁶ In this document, a “disagreement” refers to a difference of opinion at the Remedial Project Manager (RPM) level that is resolved quickly and does not rise to the level of an informal dispute or trigger informal dispute resolution timelines.

⁷ For instance, some FFAs state that “days” refer to “calendar” or “business” days. In other instances, the FFA does not specify.

⁸ Section 20.2 of the Fort Eustis FFA states: “Within thirty (30) days after: (1) the issuance of a draft final Primary Document. . .or (2) any action that leads to or generates a dispute, the disputing Party shall submit to the DRC a written statement of dispute. . .”

nuances and variations within each FFA and highlighting the importance of all Parties understanding their respective dispute resolution processes, the goal of the principles below is to reinforce the informal and formal dispute timelines as they exist in each site's FFA.

Principles Regarding FFA Dispute Resolution Timelines

The EPA, state co-regulators, and OFAs have identified the following six principles to clarify and reinforce informal and formal dispute resolution timelines in FFAs.

(1) Disputes Are a Natural Part of Complex Federal Facility Sites

Disputes, whether informal or formal, should not be viewed as inherently negative. Often, they are a necessary and natural part of the cleanup process at a complex site. Dispute timelines were built into the cleanup process at federal facilities to ensure that when inevitable disputes arose, they would be resolved efficiently through a stepwise process. If an issue cannot be resolved through informal dispute resolution, the timely elevation of informal disputes to formal dispute procedures should not be viewed by the remedial project team or their managers as a failure.

(2) All Parties Should Have a Common Understanding of the Dispute Resolution Procedures

To ensure a timely and stepwise dispute resolution process, the Parties should share a common understanding of the dispute resolution process and maintain a working knowledge of the dispute resolution timelines. Each Party should develop a practice of informing the other Parties when it believes that an informal dispute is occurring, including memorializing this belief in writing (e.g., in an email). This will ensure that there is a defining point from which to measure the start of the informal dispute timeline. This practice can be developed based on Regional or site-specific processes (e.g., tiered partnering).

(3) Resolving Disputes Informally When Possible is an Effective Dispute Resolution Tool

When significant and timely progress is not being made to resolve a disagreement, the Parties, in accordance with Principle 2 above, should make it known that the disagreement has risen to the level of an informal dispute. In accordance with the FFAs, before formal dispute is invoked, it is expected that the Parties will have engaged in a meaningful informal dispute resolution process. To conduct a meaningful informal dispute resolution process, the dispute should be defined, and all Parties should use best efforts, along with consistent and frequent communication, to resolve issues at the lowest level possible. If a Party would find it helpful, it may wish to develop a written statement articulating the issue(s) the Party believes are in dispute. Consultation with agency legal counsel is recommended in many instances.

(4) Informal Disputes Should Be Elevated When Progress Has Stalled

Where progress is not being made informally, informal disputes should be elevated to formal disputes to improve decision-making efficiency and potentially avoid delaying cleanup activities. Recognizing whether progress has stalled on a disputed issue can be a challenge. For example, the Parties may appear to be generating momentum on resolving an issue, but ultimately cannot resolve the issue in a timely manner. In other situations, the Parties may also need more data to clarify the disputed issue, which can stall discussions while this data is being collected and lead to ambiguity as to the dispute's status. In those and other instances, RPMs and the project team should use their best judgment to confirm the Parties share a consistent understanding of the exact issue(s) in dispute and make an informed decision as to whether substantive progress is being made to resolve disputed issue(s). The Parties should also consider how many days beyond the informal dispute timeline the Parties have extended the informal dispute. Elevating the unresolved, disputed issue(s) when substantive, tangible progress is not being made informally on those issues will help ensure that informal disputes do not languish and slow the cleanup

process. Under many FFAs, the disputing Party is required to provide a written statement of formal dispute to the DRC, thereby creating a record.

(5) Formal Dispute Timelines Should Be Followed to the Greatest Extent Practicable

The Parties commit to prioritizing the scheduling of dispute-related meetings to the greatest extent possible to meet the dispute resolution timelines in each FFA. As with informal disputes, formal dispute timelines should not be extended if significant and timely progress to resolve the disputed issue(s) is not being made.⁹ At times, other considerations unrelated to the resolution of the formal dispute itself, such as scheduling difficulties, may cause the Parties to push timelines back; and in those instances, delays may be unavoidable. Each agency has a different chain of command structure, which can add complexity to the elevation process. Where timely progress in reaching a resolution is not being made at a particular formal dispute level, the Parties should adhere to the elevation procedures in the FFA, including requirements that elevation be in writing, to ensure that a formal dispute is not causing site cleanup progress to stall.

(6) Each Party to the FFA Has an Important Role in Adhering to Dispute Timelines

The Parties recognize the importance, where possible, of adhering to the agreed-upon informal and formal dispute timelines included in FFAs. At each site with an FFA, RPMs and their respective management chains will be informed about these principles and made aware of the renewed focus on adhering to FFA informal and formal dispute timelines. Each of the Parties plays an important role in ensuring dispute timelines are followed to avoid unreasonably lengthy disputes.

Tracking of FFA Disputes

Recognizing that transparency can play a role in moving disputes forward, the EPA developed an internal procedure for tracking and reporting informal disputes to help ensure that informal disputes do not cause cleanup delays at federal facility NPL sites. The tracking and reporting procedure will ensure that regional management and national program staff are aware of informal disputes, their status, and the respective issues in dispute, with the ultimate goal of ensuring avoidable delays do not occur. This tracking and reporting procedure may also encourage disputes on similar issues to be handled more consistently across the national program. The EPA intends to report out any results from that internal procedure to OFAs and states with a role in that site's cleanup.

Conclusion

These principles reinforce the importance to all Parties of adhering to the informal and formal dispute timelines as they exist in the FFA for each site. Dispute timelines were built into the cleanup process to ensure that cleanup work at federal facility NPL sites is not unnecessarily delayed when disagreements arise. The Parties will continue to work together to ensure that protracted disputes are not the cause of delays to the cleanup by applying these principles and striving to adhere to dispute timelines.

cc: Federal Facility Leadership Council
Federal Facilities Forum
Federal Facility Program Managers

⁹ The Fort Eustis FFA's Extension section (Section XIII) states: "A Schedule, Deadline or Milestone shall be extended upon receipt of a timely request for extension and when good cause exists for the requested extension."