



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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MEMORANDUM

SUBJECT: Enforcement First at Superfund Sites: Negotiation and Enforcement Strategies for Remedial Investigation / Feasibility Studies (RI/FS)

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This memorandum confirms EPA's commitment to have potentially responsible parties (PRPs) conduct the Remedial Investigation / Feasibility Study (RI/FS) wherever appropriate. To achieve this goal, EPA encourages Regions to conduct early and thorough PRP searches and to consider carefully whether it is appropriate for the identified PRPs to conduct the RI/FS. When the Region decides to pursue a PRP-lead RI/FS, it should conduct settlement negotiations with PRPs and, if negotiations fail, consider issuing a Unilateral Administrative Order (UAO) to all appropriate parties.

This memorandum contains guidance for EPA personnel. This memorandum is not a rule and does not create any legal requirements. EPA personnel should apply it in any situation only to the extent appropriate to the facts.

Background

EPA is committed to ensuring that those who are responsible for hazardous waste sites take the lead in cleanup, when appropriate, throughout the Superfund cleanup process. This “Enforcement First” approach has proven to be effective at increasing the number of PRP-lead Remedial Action starts at non-Federal facility sites.¹ With this memorandum, Regions are encouraged to increase the number of PRP-lead RI/FSs. As a general rule, EPA prefers to achieve Enforcement First through settlement agreements (Administrative Orders on Consent (AOCs) or Consent Decrees (CDs)) rather than through UAOs. In instances where a settlement cannot be obtained, the Region should consider issuance of a UAO.²

To date, EPA’s experience has shown that, with adequate oversight, PRPs can perform acceptable RI/FSs.³ A detailed and thorough Statement of Work (SOW) helps ensure an adequate RI/FS by setting forth work and deliverable requirements, specifying procedures and relevant guidance documents,⁴ and establishing oversight expectations. EPA’s ability to seek penalties under a settlement agreement or UAO provides incentives for PRPs to meet the requirements of the SOW and to submit timely and appropriate deliverables. Moreover, EPA retains its right to conduct all or a portion of the RI/FS work if the PRPs’ work may cause an endangerment to human health or the environment or does not meet the terms and conditions of the agreement or UAO.

¹ See, e.g., “Superfund: Building on the Past, Looking to the Future” EPA (April 22, 2004) (hereinafter “120 Day Study”). This document is available at <http://www.epa.gov/oerrpage/superfund/action/120day/index.htm>.

² See “Enforcement First for Remedial Action at Superfund Sites,” OSWER and OECA (September 20, 2002). This document, and other Superfund enforcement documents cited in the footnotes, are available at <http://www.epa.gov/compliance/resources/policies/cleanup/index.html>.

³ See generally “Revised Policy on Performance of Risk Assessments During Remedial Investigation / Feasibility Studies (RI/FS) Conducted by Potentially Responsible Parties,” OSWER Directive 9340.1-02 (January 26, 1996) (hereinafter “1996 RI/FS Directive”).

⁴ EPA guidance documents that provide standard guidelines for an RI/FS are available at <http://www.epa.gov/superfund/action/guidance/remedy/rifs/overview.htm>. See, e.g., “Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA, Interim Final,” OSWER Directive 9355.3-01 (October 1988).

General Strategies to Achieve PRP-Lead RI/FS

The discussion below provides a framework to encourage Regions to achieve Enforcement First at the RI/FS phase. First, the Region should begin a thorough PRP search as early as possible at sites listed or expected to be listed on the National Priorities List (NPL) or designated or expected to be designated as Superfund Alternative (SA).⁵ Second, when PRPs are identified, the Region should analyze whether a PRP-lead RI/FS is appropriate. Third, if the Region determines a PRP-lead RI/FS is appropriate, settlement negotiations should begin. Fourth, if negotiations fail, the Region should consider issuing a UAO.

A. Identify PRPs as Early as Possible

With a PRP search, the Region investigates parties who are potentially liable for the costs of responding to the release or threat of release of a hazardous substance at a particular Superfund site. As noted in the recent 120 Day Study, effective PRP searches are critical to the Agency's goals of having PRPs conduct response activities when appropriate and recovering EPA's costs.⁶ Identification of PRPs prior to the RI/FS: (1) enables the Agency to issue prompt General Notice Letters; (2) provides necessary evidence to support future settlement agreements and UAOs; and (3) facilitates the formation of PRP steering committees.

Particularly at sites listed or expected to be listed on the NPL or designated or expected to be designated as SA, the Region should begin a thorough PRP search as early as possible.⁷ Before or during the site investigation, the Region should develop a PRP search plan that includes some or all of the anticipated baseline search tasks. Baseline search tasks generally include: (1) collecting available records pertinent to the site and relevant to the PRP search; (2) issuing information requests under CERCLA section 104(e) and/or administrative subpoenas under CERCLA section 122(e)(3) to appropriate parties; (3) performing a land title search; and (4) collecting other business status and corporate information.

Regions should strive to conduct PRP searches that will establish the identity of PRPs as

⁵ EPA has issued guidance on criteria for designating a site as SA. *See* "Revised Response Selection and Settlement Approach for Superfund Alternative Sites," OSWER 9208.0-18 (June 18, 2004) (hereinafter "Revised SAS Guidance").

⁶ *See* 120 Day Study, at 71.

⁷ EPA has issued several documents that provide an overview of a productive PRP search. *See, e.g.*, "PRP Search Manual," OECA / OSRE (September 2003); "Integrated Timeline for Superfund Site Management," OSWER Directive 9851.3 (June 11, 1990); "PRP Search Supplemental Guidance for Sites in the Superfund Remedial Program," OSWER Directive 9834.3-2a (June 16, 1989).

quickly as possible. If appropriate, EPA may involve any PRPs identified early in the process with the continuing search. A constructive working relationship between EPA and PRPs is likely to lead to enhanced settlement opportunities and prevent delays during negotiations.

B. Determine Appropriateness of a PRP-Lead RI/FS

After identifying PRPs, but prior to issuing Special Notice Letters, the Region should determine whether a PRP-lead RI/FS is appropriate at the site. The Region should base its determination on an assessment of the identified PRPs and the site's characteristics.⁸ First, to assess whether the identified PRPs are the appropriate parties to conduct the RI/FS, the Region should consider the:

1. Adequacy of the documentation of the PRPs' liability;
2. Demonstrated financial viability of the PRPs and/or PRPs' contractor;
3. Demonstrated technical capability of the PRPs and/or PRPs' contractor, including:
 - a. Experience in conducting acceptable RI/FS-type investigations and human health and ecological risk assessments at Superfund sites;
 - b. Ability to understand and follow current Superfund RI/FS and risk assessment processes and guidance documents;
 - c. Demonstrated ability to submit data to EPA in the proper format; and
4. Agency's prior experience with the PRPs and/or PRPs' contractor at this or other sites.

The Region should pursue a PRP-lead RI/FS when the Region has found it is appropriate under the criteria listed above.⁹ If EPA has inadequate documentation of the PRPs' liability, or has found the PRPs to be uncooperative or unreliable at this or other Superfund sites, a PRP-lead RI/FS may be inappropriate. Also, in unique circumstances, the Region may decide that a PRP-lead RI/FS is inappropriate because of other site-specific reasons. For example, a PRP-lead

⁸ Certain criteria set forth in this guidance have been adopted from previous EPA directives. *See, e.g.*, 1996 RI/FS Directive; "Evaluation of, and Additional Guidance on, Issuance of Unilateral Administrative Orders (UAOs) for RD/RA," OSWER Directive No. 9833.2c (June 20, 1991) (hereinafter "1991 UAO Memo"); "Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions," OSWER Directive No. 9833.0-1a (March 7, 1990).

⁹ If necessary, the Region may choose to carve out the risk assessment or reuse assessment from an otherwise PRP-lead RI/FS. *See* 1996 RI/FS Directive; "Reuse Assessments: A Tool to Implement the Superfund Land Use Directive," OSWER Directive 9355.7-06P (June 4, 2001).

RI/FS may not be achievable when a large number of PRPs have been identified, but the PRPs have not yet coalesced into a group to negotiate with EPA.

C. Proceed With the RI/FS

1. Document Decision to Proceed with Fund-Lead RI/FS

If the Region decides to proceed with a Fund-lead RI/FS at a site listed or expected to be listed on the NPL or designated or expected to be designated as SA, the Region should create a document record of its decision. Specifically, the Region should create a record with both general information about the site (e.g., site name, identifier number, location, response activities to date) and answers to the following questions:

- What PRPs have been identified at this site?
- If no PRPs have been identified, what steps have been taken to identify PRPs at this site?
- If PRPs have been identified, provide a list of the PRPs and indicate how the Region has evaluated the PRP using the criteria listed [in this guidance], including but not limited to:
 - Documented liability.
 - Financial viability.
 - Technical capability.
 - EPA's prior experience.
 - Other site-specific considerations.
 - Why the Region has decided not to pursue a PRP-lead RI/FS.

OSRE will periodically review the Region's decision documents during regional visits or meetings (e.g., Office Director visits, regional work planning meetings, or docket reviews) and share the information with OSRTI. OSRE and OSRTI initially will evaluate this information on an annual basis to better understand the circumstances that lead to a Fund-lead RI/FS but may revise this documentation process or issue further guidance as necessary in the future.

2. Alternately, Proceed With Settlement Negotiations

If it has been determined that a PRP-lead RI/FS is appropriate, the Region should prepare for and proceed with settlement negotiations. Generally, settlements for an RI/FS will be set forth in an AOC, accompanied by an SOW. To meet the requirements of CERCLA section 104(a)(1), EPA must: (1) determine that the PRPs will "properly and promptly" conduct the RI/FS; (2) determine that the PRPs are qualified to conduct the RI/FS; (3) contract with or arrange for someone to oversee the RI/FS; and (4) ensure that the PRPs will agree to pay for

oversight costs.¹⁰ In addition to the evaluation criteria identified above, the AOC negotiation process may provide useful insight into the PRPs' ability to conduct this phase of the Superfund process properly and promptly.

EPA generally prefers to achieve Enforcement First through AOCs rather than UAOs even though negotiations may be resource intensive. AOCs also may offer benefits to PRPs and EPA that are not available under a UAO. The Region should ensure that PRPs are aware of these potential benefits, including:

Contribution. It is EPA's view that, pursuant to CERCLA section 113(f)(2), an AOC provides PRPs with protection from contribution claims made by non-settling PRPs for matters addressed in the settlement. PRPs that sign an AOC also should have a right to contribution under CERCLA section 113(f)(3)(B) for the response costs incurred pursuant to the AOC.¹¹

Beneficial Terms. The model AOC for RI/FS¹² offers certain provisions that may be more beneficial to PRPs than the requirements typically included in a UAO for RI/FS. Most significantly, the model AOC for RI/FS includes a covenant by EPA not to sue and dispute resolution provisions that establish procedures for narrowing and resolving disputes. Moreover, once an AOC is entered, the Region should meet with the PRPs to discuss EPA's planned oversight activities.¹³

Under consensual agreements, EPA may compensate parties for a limited portion of known shares of responsibility attributable to insolvent or defunct parties (commonly referred to as orphan parties). While the orphan share policy generally is intended to encourage PRPs to perform response cleanup work, the Region may decide, based on site-specific considerations, to offer orphan share compensation to PRPs willing to perform an RI/FS under an AOC. The offer

¹⁰ EPA can negotiate with PRPs to pre-pay oversight costs, placing the payments into a Special Account. See "Consolidated Guidance on the Establishment, Management and Use of CERCLA Special Accounts," OSRE / OERR /OCFO (October 4, 2002).

¹¹ The Supreme Court in Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. ___, 128 S.Ct. 577 (December 13, 2004), expressly declined to decide whether a UAO is a "civil action" that would confer contribution rights under Section 113(f). Aviall, 543 U.S. at ___, 128 S.Ct. at 584, fn.5.

¹² The current model AOC for RI/FS was issued on January 21, 2004 and is available at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm>.

¹³ See "Interim Guidance on Implementing the Superfund Administrative Reform on PRP Oversight," OSWER Directive 9200.0-32P (May 17, 2000).

of compensation in these cases would likely take the form of forgiveness of past costs, rather than a waiver of future oversight costs.¹⁴

Participate and Cooperate Orders. In circumstances where some, but not all, identified PRPs agree to perform the RI/FS under an AOC, the Region may consider issuing a UAO to non-consenting PRPs to “participate and cooperate” in the performance or funding of the RI/FS.¹⁵

Other Benefits. The Region generally may revisit any preliminary allocation decisions reached during the RI/FS when negotiating a CD for RD/RA. PRPs also may have more control over which entities join a PRP group under an AOC, rather than under a UAO. Further, certain PRPs may find a public relations benefit to agreeing to perform an RI/FS, rather than being ordered by EPA to perform the work.

3. If Negotiations Fail, Consider Issuing a UAO for RI/FS

In the event settlement negotiations fail, the Region should consider issuing a UAO to the PRPs before beginning a Fund-lead RI/FS. Depending on the nature of the failed negotiations, the Region may need to reevaluate the appropriateness of a PRP-lead RI/FS using the criteria in Section B above. In some circumstances, the PRPs’ lack of cooperation during AOC negotiations may make a Fund-lead RI/FS appropriate. If the Region chooses to issue a UAO for RI/FS at an SA site, the Region generally should also proceed to list the site on the NPL.¹⁶

A UAO for RI/FS must meet all statutory requirements of CERCLA section 106(a) and other applicable requirements.¹⁷ For example, before issuing a UAO, the Region must ensure that EPA can demonstrate, based on the Administrative Record, that: (1) a release or threat of release (2) of a hazardous substance (3) from a facility (4) may present an imminent and substantial endangerment to public health, welfare, or the environment. In addition, in

¹⁴ See “Interim Guidance on Orphan Share Compensation for Settlers of Remedial Design/Remedial Action and Non-Time Critical Removals,” OECA (June 3, 1996); “Orphan Share Superfund Reform Questions and Answers,” OSRE (January 2001).

¹⁵ See “Documentation of Reason(s) for Not Issuing CERCLA 106 UAOs to All Identified PRPs,” OECA (August 2, 1996) (hereinafter “1996 UAO Memo”).

¹⁶ See Revised SAS Guidance.

¹⁷ See, e.g., 1996 UAO Memo. The Department of Justice must consult and concur on a UAO to a federal agency PRP. See Executive Order 12580, 52 Fed. Reg. 2923 (January 29, 1987).

accordance with EPA guidance, the Region should:

1. Ensure that the parties to whom the UAO will be issued are properly named;
2. Identify and carefully evaluate anticipated defenses; and
3. Notify the affected State.

A UAO for RI/FS is not a negotiated document, and the Region generally should communicate to the PRPs that the UAO will not include any concessions offered to them during the AOC negotiations. Similarly, the Region should not negotiate the scope and oversight of the RI/FS and generally should not offer orphan share compensation.

In accordance with EPA policy, the Region should issue UAOs to all appropriate and identified parties even while gathering evidence about potential additional PRPs. If relevant, the Region should document its reasons for excluding certain parties from the UAO.¹⁸ For example, if the Region has not compiled sufficient evidence of liability against a certain party, that party may be excluded from a UAO. In this situation and other appropriate cases, the Region may decide later in the process to issue Participate and Cooperate orders to additional PRPs.

Conclusion

In support of EPA's Enforcement First efforts, Regions are encouraged to pursue a PRP-lead RI/FS when appropriate. A thorough and prompt PRP search is essential to increasing the number of PRP-lead RI/FSs. EPA generally prefers to achieve Enforcement First through settlement agreements, and the Region should educate PRPs about potential benefits of settlement agreements over UAOs. If negotiations fail, however, EPA is committed to using all its enforcement tools, including UAOs for RI/FS.

This document is available on EPA's Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/enf-first-rifs.pdf>. At the time of publication, the OSRE contact for questions about this document is Anne Berube, who can be reached at 202-564-6065.

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¹⁸ See 1996 UAO Memo, at 5-6.

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