



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

December 28, 1999

MEMORANDUM

**SUBJECT:** Orphan Share Reform Implementation Update

**FROM:** Barry Breen, Director /s/  
Office of Site Remediation Enforcement

**TO:** Director, Office of Site Remediation and Restoration, Region I  
Director, Emergency and Remedial Response Division, Region II  
Director, Hazardous Site Cleanup Division, Region III  
Director, Waste Management Division, Region IV  
Director, Superfund Division, Regions V, VI, VII, and IX  
Assistant Regional Administrator, Office of Ecosystems Protection and  
Remediation, Region VIII  
Director, Office of Environmental Cleanup, Region X  
Director, Office of Environmental Stewardship Region I  
Regional Counsel, Regions II, III, IV, V, VII, IX, and X  
Assistant Regional Administrator, Office of Enforcement, Compliance and  
Environmental Justice, Region VIII

The orphan share reform, announced by the Administrator on October 2, 1995, continues to be very successful. Over the course of four years, we have offered orphan share compensation in the amount of \$175 million in 98 work and cost recovery negotiations. In the majority of cases where orphan share compensation was offered, settlements have been reached with viable parties. In only a few cases has the Agency found it necessary to issue Unilateral Administrative Orders for performance of work, initiate a fund-financed cleanup, or pursue cost recovery litigation. Thank you for your efforts in making this reform so successful. As we continue to implement this important reform, there are a number of issues which I call to your attention.

### **Fairness in *De Minimis* settlements**

If a de minimis settlement is being considered at a Superfund site where an orphan share exists, de minimis parties should receive the same fairness considerations as the major parties where the information needed to determine the orphan share is available at the time of the negotiations and the orphan share is not already accounted for in the de minimis cashout formula. Since we have not yet issued guidance on applying the orphan share reform to de minimis settlements, I ask that you consult with the appropriate member of the Orphan Share Team (listed below) whenever your office is considering a de minimis contributor settlement at a site, or an operable unit within a site, at which an orphan share exists. This consultation requirement is set forth in Section III.C.25 of the September 30, 1998 memorandum titled “Revisions to OECA Concurrence and Consultation Requirements for CERCLA Case and Policy Areas”(“the Roles Memo”). The consultation requirement will exist only until we issue final guidance in this area.

### **Orphan Share Compromises in Cost Recovery Settlements**

While the decision to make an orphan share offer in a cost recovery case is discretionary, Regions are strongly encouraged to provide orphan share compensation in cost recovery settlements wherever appropriate. With the large number of cost recovery cases that have been referred to DOJ since the Cost Recovery Addendum was issued on September 30, 1997, I am concerned about the limited number of orphan share offers in cost recovery negotiations that have been reported to Headquarters.

If part of the basis for a federal compromise of costs in cost recovery cases is appropriately attributable to equitable principles such as the existence of a significant orphan share, it is in the Agency’s interest to communicate this to the parties in settlement negotiations unless to do so would impose an impediment to settlement. These offers should be reported to Headquarters, as well as orphan share compromises which are documented in ten point settlement analyses but have not been presented to the parties as such.

Please let me know if there are any aspects of providing orphan share compensation in cost recovery cases that are particularly troubling to you or your staff that result in not making an offer at eligible sites.

### **Orphan Share Data**

Congressional committees, individual members of Congress, and interested stakeholders continue to request information on our progress and success with this reform. In addition, the GAO and IG continue to ask about the reform’s application, implementation, and results. As I have mentioned previously, it is necessary for my staff to track the following:

1. Orphan share compensation *offers* in proposed work settlements;
2. Orphan share compensation *offers* in proposed cost recovery settlements;
3. Actual *settlements* under either (1) or (2) with an orphan share compensation component;
4. RD/RA negotiations/settlements where orphan share compensation was not offered because sites were not eligible for the reform (e.g., owner/operator only sites); and
5. Cases filed against non-settlers that were offered orphan share compensation. <sup>1</sup>

Please continue to ensure that your staff provides the Orphan Share Team with this information on a regular basis.

### **HQs Prior Approvals/Consultations**

The Roles Memo outlines several prior written and oral approvals and consultations related to the Orphan Share reform. The high profile of this reform in the reauthorization debates, along with our need to ensure its implementation with limited resources, necessitates a high level of coordination. We are requesting coordination activities on specific orphan share issues for the following reasons:

1) *Prior written or oral approval of the Director/RSD on orphan share settlement offers when projected ROD or removal costs exceed \$30 million* - This prior approval was instituted to alert Headquarters to large orphan share offers so we can assess the impact of a large offer on funds available for cleanup at other sites.

2) *Prior written approval (PWA) of the Director/OSRE on cost recovery settlements offering orphan share compensation to a party who rejected an earlier orphan share compensation offer (no “two bites at the apple” principle), or offering greater orphan share compensation than would have been offered had the settlor entered into a work agreement (“no better deal” principle)* - Our overarching goal is to maintain incentives for parties to perform work. Making a second orphan share compensation offer at the cost recovery stage or offering more in orphan share compensation than a settlor would have received for work is contrary to this goal and therefore requires evaluation at the national level. Our policy is that parties in cost recovery should not get a second chance at an orphan share offer or get a better deal than parties in cases involving a work component, except in extraordinary cases (i.e., where compelling equities or other special circumstances indicate that a party in cost recovery should get a second chance or a better deal than parties willing to perform work). PWAs will assist us in determining when there are compelling reasons for making such offers and ensure national consistency in departing from general policy principles.

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<sup>1</sup> When an offer has been made and does not result in settlement, Regions are encouraged to promptly file a cost recovery claim to pursue outstanding costs (including the orphan share) against non-settling PRPs.

3) *Consultation with the Orphan Share Team on all cost recovery orphan share offers* - This consultation was put in place because the 1997 Cost Recovery Addendum outlines general principles but provides little in the way of specifics to assist Regions in calculating the appropriate orphan share compensation offer in cost recovery cases. A consultation on a case specific basis helps to ensure national consistency and will help us determine if there are any standardized methods to making such calculations.

4) *Consultation with the Orphan Share Team on all de minimis settlements where an orphan share exists* - This consultation is necessary because there is not presently specific guidance for assessing the appropriate cash-out payments for de minimis parties at sites with an orphan share. A consultation on a case specific basis is a way to ensure national consistency and to assist Regions in making offers consistent with the principle of fair treatment of de minimis parties. This consultation requirement will exist only until we issue final guidance in this area.

### **Updated Questions and Answers**

Orphan Share Questions & Answers (“Qs&As”) have been expanded and updated. Regional orphan share contacts have commented on this document, which is in final management review. Many of the Qs&As specifically address implementation issues in cost recovery negotiations. We have also added or modified a number of Qs&As relating to offers in work negotiations as we have gained considerable experience in this area. This document will provide significant information regarding implementing the reform and will be sent to you under separate cover.

### **Intranet site**

OSRE has recently established its Infobase on the Agency's Intranet. The Orphan Share Team has a posting at <http://intranet.epa.gov/oeca/osre/workgroups> which includes many useful resources, including the orphan share policy, cost recovery addendum, Qs&As, and names and phone numbers of the Orphan Share Team contacts.

### **Orphan Share Support**

The Orphan Share Team is charged with assisting Regions with implementing the orphan share reform at appropriate sites. The designated team contacts are available to any staff in your Region that have orphan share questions. The team contacts for orphan share issues are currently as follows:

Region 1: Bob Roberts (202) 564-4267  
 Region 2: Meredith McLean (202) 564-4216  
 Region 3: Lisa Blum (202) 564-4283  
 Region 4: Bob Roberts (202) 564-4267

Region 5: Douglas Dixon (202) 564-4232  
Region 6: Lisa Blum (202) 564-4283  
Region 7: Cate Tierney (202) 564-4254  
Region 8: Douglas Dixon (202) 564-4232  
Region 9: Meredith McLean (202) 564-4216  
Region 10: Cate Tierney (202) 564-4254

Again, thank you for helping us with the success to date of this important and closely monitored reform. If you have any questions regarding this memorandum, or need to speak to someone about a specific matter and can not reach the appropriate contact listed above, please contact Deniz Ergener (Team Leader) at (202) 564-4233 or Nancy Browne (Team Advisor) at (202) 564-4219.

cc: National Orphan Share Work Group Members  
Bruce Gelber, DOJ  
Bob Brook, DOJ

bcc: OSRE staff