



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

JUN 30 2011

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Options for Responding to Deficient Deliverables from PRPs

FROM: Elliott J. Gilberg, Director *Elliott J. Gilberg*
Office of Site Remediation Enforcement

TO: Superfund Division Directors, Regions I – X
Regional Counsel, Regions I – X
Superfund Program Branch Chiefs, Regions I – X
Superfund Regional Counsel Branch Chiefs, Regions I – X

As part of the Integrated Cleanup Initiative (ICI),¹ senior Superfund regional and headquarters managers met in October 2010 to identify and explore ways to address impediments to the timely completion of remedial action projects. One impediment identified by the managers was poor quality PRP deliverables that result in multiple rounds of EPA comments and PRP resubmission of revised deliverables.

When PRPs performing work at Superfund sites submit poor quality deliverables, EPA typically has a range of options. These include (but are not limited to) requesting revisions by the PRPs, unilaterally modifying the deliverable, assessing stipulated penalties, and making a referral to DOJ requesting judicial assessment of penalties. This memorandum discusses these options, recommends approaches that may facilitate EPA's ongoing efforts to ensure timely completion of PRP cleanups, and provides sample letters to PRPs that have submitted deficient deliverables.

One option for the Regions to consider is unilaterally modifying deficient deliverables to help limit response delays associated with multiple rounds of EPA comments and PRP resubmissions. EPA's model enforcement instruments generally include unilateral modification as an option when a Region receives a deficient deliverable. It may also be appropriate to assess stipulated penalties (or make a referral to DOJ requesting judicial assessment of penalties) based on case-specific factors. Factors to consider in gauging an appropriate enforcement response include the past compliance history of the PRPs (both as to prior obligations at the site and in responding to prior Agency comments on the current deficient deliverable), the degree of deficiency of the

1 The Integrated Cleanup Initiative is a three-year strategy to identify and implement improvements to EPA's land cleanup programs. More information about ICI is available on EPA's Web site at <http://www.epa.gov/oswer/integratedcleanup.htm>.

submitted deliverable, and the impact of the deliverable on the quality and timeliness of the cleanup.

Two sample letters for responding to inadequate deliverables are attached to this memorandum.² Given the many case-specific variables the Regions encounter in enforcing instruments that require PRPs to perform work, it is not possible to establish a uniform course of action that will apply in responding to every deficient deliverable. Consequently, the sample letters provide both base and alternative language for addressing initial and resubmitted deficient deliverables under common scenarios. It may be appropriate in light of case-specific circumstances for the enforcement response to a particular deficient deliverable to be more or less aggressive than the options provided in the sample letters. All such responses should clearly tell the PRPs both what EPA is requiring of them pursuant to the enforcement instrument and the consequences of failing to comply. Clear communication with PRPs facilitates timely compliance, reduces the likelihood of disputes, and creates a record for any subsequent enforcement.

The first sample letter (“Sample Letter – Comment on Initial Deliverable”) notifies the Respondents/Settling Defendants that: (1) EPA does not approve their initial deliverable; (2) they must modify the deliverable in response to EPA comments; and (3) the Agency may exercise its right to unilaterally modify the next submission if the resubmitted deliverable does not adequately address EPA’s comments. The sample letter also contains optional language notifying the Respondents/Settling Defendants that their submission of the deficient deliverable constituted a violation of the settlement and that stipulated penalties have begun accruing (or, if the deliverable was submitted pursuant to a UAO, that the Respondents may be subject to civil penalties).

The second sample letter (“Sample Letter – Modification of Resubmitted Deliverable”) informs the Respondents/Settling Defendants that: (1) EPA is exercising its right to unilaterally modify a resubmitted deliverable; and (2) pursuant to the terms of the enforcement instrument, they are required to implement the modified deliverable. EPA may unilaterally modify a deliverable either by editing the deliverable and providing it to the Respondents/Settling Defendants or by directing them to make specified changes to the deliverable. Similar to the first letter, it also contains optional language notifying the Respondents/Settling Defendants that their submission of the deficient deliverable constituted a violation of the settlement and that stipulated penalties are accruing (or, in the case of a UAO, that EPA believes the submission constitutes a violation of the UAO and thus may result in civil penalties).

The sample letters are designed to be generally consistent with EPA’s model enforcement instruments. However, not all model instruments contain the same provisions and model instruments are modified over time. Consequently, it is important that the regional personnel responsible for a site confirm that the language of a sample letter is consistent with the provisions of the applicable enforcement instrument in light of the facts of the case. The sample

² These are modified versions of sample letters attached to an OSRE memorandum from Charles Breece, dated July 1, 1996, and titled “Transmittal of Sample Documents for Compliance Monitoring.”

letter should be modified to track the language of the applicable instrument whenever possible, and especially when the sample letter may be inconsistent with that instrument. The sample letters include notes identifying several particular circumstances where it is important to check that the letter is consistent with the terms of the enforcement instrument (*e.g.*, when discussing the accrual of stipulated penalties).

Although the sample letters address a scenario where EPA unilaterally modifies a resubmitted deliverable, the Agency also has the option of unilaterally modifying an *initial* deliverable under some enforcement instruments. The standard for such unilateral modifications may be different, however, from the one for modification of resubmissions. For example, EPA's model RD/RA consent decree allows the Agency to unilaterally modify an initial deliverable if EPA "determines that awaiting a resubmission would cause substantial disruption" to the work or "previous submission(s) have been disapproved due to material defects and the deficiencies in the initial submission under consideration indicate a bad faith lack of effort." The model RD/RA consent decree does not require EPA to make such a determination in order to modify a resubmitted deliverable.

Please note that, under some enforcement instruments, the Respondents/Settling Defendants may have the right to invoke dispute resolution in response to whichever tool EPA employs (*e.g.*, a request for modification of a deficient deliverable, unilateral modification of such a deliverable, or assessment of a stipulated penalty). Respondents/Settling Defendants may be more likely to invoke dispute resolution in response to a unilateral modification than to an Agency request for modifications. Given that such an invocation may in itself delay response activities, case teams should weigh any increased likelihood of the invocation of dispute resolution when deciding whether to unilaterally modify a deliverable. In addition, case teams should consider whether a concurrent assessment of stipulated penalties might be warranted given the case-specific situation. Finally, case teams should also bear in mind that while PRP invocation of the dispute resolution process may delay the specific response measure that is the basis of the dispute, it should not delay the PRPs' implementation of other, unrelated, response measures.

If you have any questions regarding the sample letters, please contact Steve Keim of my staff. Steve can be reached at 202-564-6073 or keim.stephen@epa.gov.

Attachments (2)

cc: Jim Woolford, OSRTI
ICI Superfund Managing Remedial Projects to Completion Workgroup



Sample Letter – Comment on Initial Deliverable

[Note: For use when the Respondents/Settling Defendants submit an initial deliverable that is inadequate. The sample letter includes optional language for assessment of stipulated penalties (for noncompliance with a settlement) and for possible statutory penalties (for UAO noncompliance).]

Name and address of contact for
Respondents/Settling Defendants

Re: Comments on **[name of document]**
[Name of Order/Consent Decree]
[Docket No.]
[Name of Site, City, State]

Dear Mr./Ms. **[name]**:

The U.S. Environmental Protection Agency (EPA) has completed its review of the **[insert name of document]** dated **[insert date]** for the **[insert name of facility]** Site located at **[insert address]**. This document was submitted in accordance with the **[insert Order/Consent Decree]** between EPA and **[insert name of company/group]**.

EPA disapproves the **[name of document]** as submitted, and requires **[insert name of company/group]** to amend the document in accordance with the attached comments. A revised **[insert name of document]** must be submitted within **[insert days]** days of your receipt of this letter as specified in **[insert section __ of the Order/Decree]**. All of the enclosed comments must be addressed. If all comments are not adequately addressed, EPA may exercise its right to modify the document and provide the revised document to you for implementation or to direct you to make specified modifications to the document. **[RPM/Project Coordinator and/or ORC attorney should confirm that this statement is consistent with provisions of the applicable enforcement instrument and reference the applicable provision]**.

If you believe that any changes are necessary other than those directed by EPA's enclosed comments, those changes must be discussed with, and approved by, EPA's Project Coordinator prior to re-submittal of the document. Those discussions may be memorialized in a progress report or other communication to EPA's Project Coordinator. In addition, all changes made to the document, other than those made specifically at the direction of EPA, must be specified in writing to EPA upon re-submittal of the document.

If you have any questions concerning this matter, or would like to discuss the attached comments in detail, please contact me at **[insert number]** or your legal counsel may contact **[insert name of EPA attorney]** at **[insert number]**.

Sincerely yours,

[Insert name of Project Coordinator]

For noncompliance with AOCs or CDs, optional language to insert after paragraph 2:

Please be advised that your submission of a deficient **[insert name of document]** constitutes a violation of the **[insert Order/Consent Decree]** and that stipulated penalties began accruing on the day after a satisfactory version was due to be received by EPA. Consistent with the provisions of the **[insert Order/Consent Decree]**, stipulated penalties will continue to accrue until the date that EPA receives a satisfactory version of the **[insert name of document]** from you. **[Some model instruments link “material defects” in a deliverable to the assessment of stipulated penalties; the RPM/Project Coordinator and/or ORC attorney should consider modifying the letter to match that language as appropriate.]**

For noncompliance with UAOs, optional language to insert after paragraph 2: Please be advised that EPA deems your submission of a deficient **[insert name of document]** to constitute a violation of the UAO and, as a result, you may be subject to civil penalties of up to \$37,500 for each day this violation continues.



Sample Letter – Modification of Resubmitted Deliverable

[Note: For use when the Respondents/Settling Defendants submit a revised document for Agency review and the document does not adequately address the Agency's comments. This sample letter informs the PRPs that EPA has unilaterally revised the resubmitted deliverable (with optional alternative language warning the PRP that EPA may unilaterally modify the deliverable in the future). The sample letter also includes optional language for assessment of stipulated penalties (for noncompliance with a settlement) and for possible statutory penalties (for UAO noncompliance).]

Name and address of contact for
Respondents/Settling Defendants

Re: Modification of **[name of document]**
[Name of Order/Consent Decree]
[Docket No.]
[Name of Site, City, State]

Dear Mr./Ms. **[insert name]**:

By letter dated **[insert the date of the comment letter to Respondents/Settling Defendants]**, the United States Environmental Protection Agency (EPA) disapproved **[insert name of company/group]**'s draft **[insert name of document]** dated **[insert date]** for your facility/site located at **[insert address of installation]** and provided you with comments identifying deficiencies. You submitted a revised **[insert name of document]** on **[insert date]**. Upon review, EPA has determined that the revised **[insert name of document]** does not adequately address the comments contained in EPA's **[insert date of comment letter]** letter. Accordingly, EPA disapproves the **[name of document]** as submitted and **[insert name of company/group]** is not in compliance with the **[insert Order/Decree]**.

Specifically, the **[insert name of company/group]** response of **[insert date]** failed to adequately address the following comments: **[Suggest listing each comment in EPA's comment letter that was not adequately addressed in the resubmitted deliverable. This could be followed by the Respondents/Settling Defendants' response or summary of the Respondents/Settling Defendants' response to the comment.]**

EPA is exercising its right to modify the **[insert name of document]** to address the deficiencies identified above pursuant to section **[insert section number]** of the **[insert Order/Decree]**. The modified **[insert name of document]** is enclosed. **[Insert name of company/group]** is required to implement the **[insert name of document]** as modified by EPA, subject only to its right to invoke dispute resolution procedures. **[For directed modifications, replace the previous two sentences with: A list of modifications to the [insert name of document] is enclosed. [Insert name of company/group] is required to implement these EPA modifications, subject only to its right to invoke dispute resolution procedures. A revised [insert name of document] that implements these modifications must be submitted within [insert days] days of your receipt of this letter] [RPM/Project Coordinator and/or ORC attorney should confirm that this**

paragraph is consistent with the provisions of the applicable enforcement instrument; UAOs typically do not contain dispute resolution procedures].

If you have any questions concerning this matter, please contact me at [insert number] or your legal counsel may contact [insert name of EPA attorney] at [insert number].

Sincerely yours,

[Insert name of Project Coordinator]

Optional language to insert in place of paragraph 3 [at the Region’s discretion if it decides to give the PRPs a second chance to respond to comments and resubmit the deliverable]:

If all comments are not adequately addressed, EPA may exercise its right to modify the document unilaterally and require implementation of the revised document. **[RPM/Project Coordinator and/or ORC attorney should confirm that this statement is consistent with the provisions of the applicable enforcement instrument. Consider also including the optional penalties language that is included in the sample letter for initial deliverables, which informs the PRPs that penalties will accrue until a satisfactory deliverable is received.]**

You are hereby requested to submit a response in writing to this office no later than [insert number days] days after receipt of this Notice of Deficiency that adequately addresses the above comments to establish compliance with the referenced [insert Order/Decree].

For noncompliance with AOCs or CDs, optional language to insert after paragraph 2:

Please be advised that your resubmission of a deficient [insert name of document] constitutes a continuing violation of the [insert Order/Consent Decree] and that stipulated penalties began accruing on the day after a satisfactory version was initially due to be received by EPA. Consistent with the provisions of the [insert Order/Consent Decree], stipulated penalties have continued to accrue until the date that EPA unilaterally prepared a satisfactory version of the [insert name of document]. **[For directed modifications, replace the previous sentence with: Consistent with the provisions of the [insert Order/Consent Decree], stipulated penalties will continue to accrue until the date that EPA receives a satisfactory version of the [insert name of document] from you that implements EPA’s modifications.] [The RPM/Project Coordinator and/or ORC attorney should confirm that this statement is consistent with the provisions of the applicable enforcement instrument. Some model instruments limit the number of days that stipulated penalties may accrue while EPA is reviewing a deliverable. Also, some model instruments link “material defects” in a deliverable to the assessment of stipulated penalties; the RPM/Project Coordinator and/or ORC attorney should consider modifying the letter to match that language as appropriate]**

For noncompliance with UAOs, optional language to insert after paragraph 2: Please be advised that EPA deems your resubmission of a deficient [insert name of document] to constitute a continuing violation of the UAO and, as a result, you may be subject to civil penalties of up to \$37,500 for each day of this violation.