



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

Received

APR 2 1992

JAN 28 2000

Enforcement & Compliance Docket  
& Information Center

OSWER Directive # 9835.4-2b

**MEMORANDUM**

**SUBJECT:** Accelerating Potentially Responsible Party Remedial Design Starts: Implementing the 30-Day Study

**FROM:** Bruce M. Diamond, Director  
Office of Waste Programs Enforcement

William A. White, Enforcement Counsel for Superfund  
Office of Enforcement

**TO:** Waste Management Division Directors, Regions I-X  
Regional Counsel, Regions I-X

This memorandum implements a recommendation of the 30-day study concerning accelerating Remedial Design starts.

**SUMMARY OF POLICY**

Regions should use all available opportunities to gain potentially responsible party (PRP) commitment to start the Remedial Design (RD) as soon as possible after signature of a Record of Decision (ROD).

At a minimum, when a Region negotiates a Remedial Design/Remedial Action (RD/RA) consent decree with a PRP, the Region should make every effort to secure PRP performance of the RD no later than upon lodging of a consent decree in federal district court. Regions should use the model language for this provision, as set forth in Section VI of the Model Consent Decree for RD/RA.

Regions are strongly encouraged to use other strategies to start PRP-lead Rds prior to consent decree lodging. Examples include: amendment of a remedial investigation/feasibility study (RI/FS) consent order, negotiation of an RD consent order, and stipulation in pending litigation.

**BACKGROUND**

In June 1991, the Administrator requested that the Office of Solid Waste and Emergency Response create a task force to identify methods for accelerating the pace of Superfund cleanups. One identified source of cleanup delay is the lapse of time

- 2 -

between ROD signature and start of a PRP-lead RD. A factor in this delay is the time taken to lodge and enter a consent decree memorializing PRP commitment to do both RD and RA. The task force recommended, in a document informally known as the "30-day study," that Regions seek and use ways to obtain RD start prior to the entry of the consent decree.

The current timeframe from signature of a ROD to RD start at PRP-lead sites can be significant. Major events in that period (ROD-to-RD start) include negotiation with PRPs, preparation and signature of a consent decree, and lodging and entry of that decree. The period after negotiations (successfully) conclude can be extensive, depending on public comment on the decree, court calendars, etc. From the public's perspective, the result is site cleanup time unnecessarily lost.

Numerous options are available, depending on the circumstances of the Region's relationship with PRPs at a particular site and the complexity or uncertainty of the remedy, to accelerate RD start substantially in advance of court entry of a consent decree.

#### PREVIOUS AGENCY ACTION

In 1988, the Agency issued guidance describing several mechanisms by which a PRP could initiate the RD prior to the entry of a consent decree, "Initiation of PRP-financed Remedial Design in Advance of Consent Decree Entry," OSWER Directive #9835.402A (November 18, 1988). Included in that Directive was model consent order language.

In 1991, a Regional-Headquarters workgroup outlined several innovative ideas for accelerating RD starts where PRPs will be performing the response action. The methods identified include greater use of administrative orders to start RD shortly after ROD signature, as well as consent decree negotiation strategies seeking RD start no later than at consent decree lodging. Headquarters discussed these administrative options with the Hazardous Waste Management Branch Chiefs in April 1991 and at the Section Chiefs meeting in June 1991.

In June 1991, the Agency issued the "Model CERCLA RD/RA Consent Decree," OSWER Directive #983517 (June 21, 1991) (Model Consent Decree). The Model Consent Decree provides that performance of the RD will commence upon lodging of the agreement.

**STATEMENT OF POLICY**

In negotiating for PRP conduct of site remediation, Regions should seek PRP commitment to perform RD start as soon after ROD signature as possible; at a minimum, this should be no later than upon lodging of a consent decree for RD/RA.

**1. Model Consent Decree RD Language**

If a PRP will be performing the RD/RA through a consent decree, the Regions should employ the Model Consent Decree language for performance of RD. As discussed above, the Model Consent Decree, Section VI., paragraph 11 (Remedial Design), provides that RD activities will begin upon lodging of the consent decree in district court.

While Regions should include this provision in the great majority of cases, there may be situations where it may not be appropriate at a particular site. For example, if the remedy is highly controversial and the initiation of RD at lodging of the consent decree could be seen as inconsistent with full public participation, the Region may decide not to use the procedures in this guidance.<sup>1</sup> (See section 5 below.)

**2. Administrative Alternatives for Early RD Start.**

Where appropriate, Regions are strongly encouraged to secure PRP commitment to RD start in advance of consent decree lodging (i.e., as soon as possible after ROD signature). For example, if a PRP performed the RI/FS through an administrative order on consent and indicates it will perform the RD/RA, it may be appropriate to amend the completed RI/FS order, to have some or all of the RD started while overall negotiations for the RD/RA consent decree continue.<sup>2</sup>

---

<sup>1</sup> Please note that the performance of Remedial Design is not subject to the public participation procedures under Section 122(d) of CERCLA. The Agency considers Remedial Design to be a removal action, outside the scope of Section 122(d)(1), which covers proposed agreements concerning remedial action under Section 106 of CERCLA. Thus, while the Agency may voluntarily agree to subject the terms of the Remedial Design portion of a proposed Section 106 Remedial Design/Remedial Action consent decree to the procedures of section 122(d), there is no legal requirement to do so.

<sup>2</sup> This administrative alternative is most likely to be a viable option where the PRPs who performed the RI/FS are the same parties which agree to implement the RD/RA.

If a Region receives a good faith offer for the RD/RA during the special notice process, the Region should consider asking the PRPs to complete the RD through an administrative order on consent. This option necessitates issuance of two settlement documents: an administrative order and consent decree. Under this administrative option a Region could negotiate separately the consent order from the consent decree or negotiate both simultaneously. To reduce resources when negotiating the agreements simultaneously, the Region could use the consent decree language agreed upon by the PRPs as the basis for several of the provisions in the administrative order (incorporate these provisions by reference).

A Region may also consider an administrative option if, after the ROD is issued, a Region continues searching for additional PRPs to perform the RA. Settling with several PRPs to only perform the RD in this situation is appropriate if it would help to facilitate performance of the RA by other PRPs and would not delay initiation of the RA.

### 3. Stipulation in Pending Litigation

When there is pending litigation involving the Agency and PRPs, and the PRPs agree to perform the RD/RA through a consent decree, the PRPs and the Agency could enter into a stipulation filed with the court, whereby the PRPs agree to perform the RD without waiting for lodging of the consent decree.<sup>3</sup>

### 4. Relationship of Administrative Action to RD/RA Consent Decree

If a Region initially uses an administrative option for the RD, but then lodges a RD/RA consent decree in court, the Region could have the administrative agreement subsumed into the overall consent decree upon entry in court. Another option is to have the administrative agreement terminate upon court entry of the consent decree. Where performance of the RD is through an administrative order, the Region should conduct any unresolved RD/RA or RA settlement negotiations and take all other steps possible to ensure minimum delay between completion of the RD and performance of the RA. In all cases, the Regions should implement the administrative action in a manner that avoids delay of the initiation of RA.

---

<sup>3</sup> There is model language for the stipulation to perform the RD. See "Initiation of PRP-financed Remedial Design in Advance of Consent Decree Entry," OSWER Directive #9835.402A (November 18, 1988).

- 5 -

**5. Notification to Headquarters**

In order to maintain national consistency, if a Region plans to execute an RD/RA consent decree which does not provide for RD start, at a minimum, upon lodging of the consent decree, the Region should verbally notify the Branch Chief, Compliance Branch, CERCLA Enforcement Division. In this notification a Region should delineate any attempts made to secure PRP RD start prior to entry of the consent decree, and explain why such efforts were not successful or appropriate at a given site.

**PURPOSE AND USE OF THIS GUIDANCE**

This policy and any internal procedures adopted for its implementation are intended exclusively as guidance for employees of the U.S. Environmental Protection Agency. This guidance does not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this guidance or its internal implementing procedures.

**FURTHER INFORMATION**

For further information concerning this memorandum, please contact Gary Worthman in the Office of Waste Programs Enforcement at FTS (202) 260-5646.

cc: Henry L. Longest  
Lisa K. Friedman  
Waste Management Branch Chiefs, Regions I-X  
Regional Counsel Superfund Branch Chiefs, Regions I-X