




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

DEC 21 2011

REPLY TO THE ATTENTION OF:

MEMORANDUM

SUBJECT: Region 5 Response to the Office of Inspector General's Report No. 11-P-0697:
"EPA Should Bill Superfund Oversight Costs More Timely"

FROM: Susan Hedman 
Regional Administrator

TO: Arthur A. Elkins, Jr.
Inspector General

The above-referenced report identifies two Superfund sites where Region 5's oversight bills were not sent out on an annual basis, and makes certain recommendations regarding the Region's billing of Superfund oversight costs. We welcome this opportunity to comment on the report and respond to its recommendations.

Most significantly, the report recommends that Region 5 develop a policy to require oversight billing no less frequently than annually. EPA's current guidance does not require annual billing. Rather, the guidance strikes what we believe to be the appropriate balance between the Agency's need to regularly replenish the Superfund Trust Fund and the Regional need for billing discretion when the enforcement posture of a site so requires. We direct you to EPA's *Interim Guidance on Implementing the Superfund Administrative Reform on PRP Oversight*, at page 3 (Attachment 1).¹ This guidance provides that "where PRPs have entered into agreements with EPA to pay oversight costs, EPA will *strive* to issue timely (*e.g., annual*) oversight bills" (emphasis added). The terms "strive" and "e.g." reflect the real world of Superfund enforcement, which requires the use of good judgment and discretion when deciding to bill oversight costs. Similarly, EPA's model settlement agreements typically provide that EPA will bill the respondents or defendants "on a periodic basis" (*e.g., paragraph 55.a. of the Model Remedial Design and Remedial Action Consent Decree*).

The Allied Paper/Portage Creek/Kalamazoo River Superfund site ("Kalamazoo River site"), criticized in the OIG report, is a case in point. We respectfully disagree with any determination that oversight billing should have been speedier. Rather, Region 5's enforcement team believes that, as a matter of negotiation strategy, the billing of oversight costs would have significantly impeded the Region's ability to secure two additional agreements for important cleanup work in

¹ OSWER Directive No. 9200.0-32P by Stephen D. Luftig, Director, Office of Emergency and Remedial Response, and Barry N. Breen, Director, Office of Site Remediation Enforcement (dated May 17, 2000).

the river, jointly worth \$63 million. In 2009, one of the major potentially responsible parties – a signatory to the agreements giving rise to the oversight payment obligations – filed for bankruptcy protection. As a result, Region 5’s oversight costs became a component of the Agency’s \$908 million unsecured claim in the bankruptcy.

With regard to the Sauget Area 2 Superfund site, also called out in the OIG report, billing was delayed for over a year because the Region wanted to make every effort to ensure accuracy and avoid cost disputes at this complex site. Four cleanup orders are in effect at Sauget; EPA bills costs for the Army Corps of Engineers, the State of Illinois, ten EPA personnel and various outside contractors under six different accounts. The delay in billing was necessary to ensure that no duplicate billing had inadvertently occurred.

In short, we believe that Region 5 has a sound cost recovery program, and that the OIG report does not adequately recognize that judgment and discretion play an important role in the billing process. We believe the report should also acknowledge that Region 5 does indeed issue oversight bills annually in the vast majority of cases. In fiscal year 2010, 98 percent of the regularly scheduled oversight bills were issued within 120 days of the annual anniversary date of an order or agreement requiring oversight billing, i.e. within the timeframe recommended by EPA’s existing guidelines.

With regard to your recommendation concerning the development of procedures for staff coordination on oversight billing, please see Region 5’s Memorandum of Understanding (MOU) for Superfund cost recovery procedures (Attachment 2). The MOU was last amended on September 27, 2001 and formalizes cost recovery procedures among the Superfund Division, the Office of Regional Counsel, and the Resource Management Division. This MOU recognizes the roles and responsibilities of all personnel involved in Superfund cost recovery, and it establishes the Cost Recovery Task Force. This task force includes representatives from each division and meets on a quarterly basis to monitor, discuss, and plan all aspects of our cost recovery program. Region 5 also has a bill tracking system which records billing dates and establishes dates for future billings.

Region 5 agrees, however, that additional protocols are needed to ensure that management is promptly advised of any projected delay in oversight billing so that issues can be resolved expeditiously. To that end, Region 5 has developed a standard operating procedure (SOP) to attach to the MOU, that provides staff with clear direction on how and when to inform management of any issues that could delay the issuance of a bill (Attachment 3). Management review and approval will be required for any bills to be issued less frequently than on an annual basis. In addition to the existing tracking tool, we will use the unbilled accrual report on a quarterly basis to monitor for any outlier situations that may be developing. In addition to amending the MOU with this new SOP, we are making minor adjustments to the MOU to reflect our new organizational structure.

We have already addressed your final recommendation. The billing for the total amount of recoverable oversight costs for the Allied Paper/Portage Creek/Kalamazoo River and Sauget Area 2 Superfund Sites has been brought up-to-date. See Attachment 4 for details on the billing dates and amounts. We plan to bill any future oversight costs on an annual basis.

Thank you for providing us with an opportunity to respond to your report. I believe that the procedures we are implementing as a result of your audit will make an already strong program even stronger. If you have any questions, please contact me or your staff may contact Dale Meyer, Resource Management Division at 312-886-7561 or meyer.dale@epa.gov; Larry Kyte, Office of Regional Counsel at 312-886-4245 or kyte.larry@epa.gov; or Sharon Jaffess, Superfund Division at 312-353-0536 or jaffess.sharon@epa.gov.

Attachments (4)

cc: Eric Levy
Paul Curtis
Margaret Hiatt