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

JUL - 2 2010

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: EPA's Continued Efforts to Enhance CERCLA Cost Recovery

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

TO: Regional Counsel, Regions I-X
Superfund Division Directors, Regions I-X

Over twenty years ago EPA issued the Superfund Cost Recovery Strategy ("Strategy"),[1] which noted that "cost recovery is one of the highest priorities of the Superfund program." This is as true today as it was in 1988. Many of the practices set forth in that Strategy and other relevant guidance are still in use today, and OSRE encourages the continued and enhanced use of these practices. In addition, we encourage the Regions to look for new ways to increase the effectiveness of EPA's cost recovery efforts. The purpose of this memorandum is to highlight some important cost recovery practices, and to encourage Regions to reevaluate their Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as "Superfund") cost recovery programs with an eye toward looking for areas of potential improvement.[2]

Currently, OSRE is taking steps to reinforce and evaluate areas of the cost recovery program. We have begun to evaluate Regional cost recovery documentation practices when EPA decides not to pursue cost recovery and we are examining the types of write-off or close-out documents (*e.g.*, "Ten Point" summaries) prepared by Regions.[3] Our evaluation focuses on the Regions' justifications for preparing write-off or close-out documents and how the Regions memorialize their write-off or close-out decisions in these documents. OSRE is also determining how and where the Regions maintain their decision documents and other related correspondence. Additionally, OSRE is surveying the Regions for enhanced cost recovery practices that can be

1 Transmittal of the Superfund Cost Recovery Strategy, J. Winston Porter, July 29, 1988, OSWER Dir. No. 9832.13.

2 This memorandum is intended solely for the guidance of employees of EPA. It is not a regulation and does not impose legal obligations. EPA will apply the guidance only to the extent appropriate based on the facts. Nothing in this memorandum supersedes existing guidance and, as always, the Regions have the discretion to use an approach that has the greatest likelihood of success and will maximize the amount of recovery.

3 See EPA Needs to Improve Internal Controls to Increase Cost Recovery (October 7, 2009) (This OIG Report evaluated cost recovery activities at non-NPL removal sites to determine the Agency's internal controls to monitor cost recovery, document PRP searches and removal milestones, and ensure accurate cost recovery data.).

shared with other Regions. OSRE will also work with the Regions on developing sample or model documents to aid EPA's cost recovery, focusing on areas such as potentially responsible party (PRP) search documentation, field letters for removal actions, and compromises in administrative settlements.

I. Appropriate and Aggressive Use of Demand Letters

We encourage the aggressive use of demand letters in all appropriate cases. Often an initial demand for remedial costs is incorporated in a Special Notice Letter notifying the recipient of its potential liability as well as providing the recipient with the government's incurred costs to date and anticipated future costs. As noted in guidance, however, EPA may issue a written demand letter anytime after costs (removal or remedial) have been incurred under CERCLA.[4] In some instances, it might be appropriate for EPA to issue a "stand-alone" written demand letter. The most common example is issuing a written demand letter at the conclusion of a removal action. Not only does a written demand letter create a formal mechanism for the Agency to recover its costs, but it also initiates the accrual of interest on expended costs.[5]

In addition, it is not necessary for a Region to anticipate referring a matter to the Department of Justice (DOJ) in order to issue a written demand letter. The Strategy states, "a demand letter should be issued . . . where response costs have been incurred under CERCLA *regardless of whether a decision has been made to initiate a judicial proceeding for cost recovery*"[6] (emphasis added). It is not a prerequisite that the Region must contemplate referring a matter to DOJ if payment is not received in order to issue a demand letter.[7] Issuing a written demand letter does not negatively impact the cost recovery program if, at some later date, the Region decides that it would not be appropriate to refer the matter to DOJ or that it is not an appropriate use of the Agency's limited resources to negotiate a settlement.[8] Nevertheless, if EPA elects to issue a written demand letter, it must have a reasonable basis for believing the recipient is a PRP under section 107 and is therefore responsible for EPA's costs under the statute.

II. Continued Use of CERCLA Section 107(l) Liens

We recommend that Regions routinely use section 107(l) liens to preserve cost recovery opportunities. Under section 107(l) of CERCLA, a lien exists by operation of law in favor of the United States at any site at which EPA has spent Superfund monies. The Superfund lien arises on property subject to or affected by Superfund removal or remedial response actions when EPA incurs costs for such action and provides written notice of potential liability to the owner of the property. To perfect the lien, the Region should send the property owner a Notice of Intent to

---

4 *See* Written Demand for Recovery of Costs Incurred Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Bruce Diamond, March 21, 1991.

5 See 42 U.S.C. § 9607(a). Demand letters should explicitly state that interest begins to accrue on expended costs at the time of demand.

6 Transmittal of the Superfund Cost Recovery Strategy, J. Winston Porter, July 29, 1988, page 22.

7 In many cases, however, failure to respond to a demand or failure to provide a good-faith offer will result in enforcement action by the Agency.

8 In fact, in low dollar cases the Region might know early on that it will not refer the matter to the Department of Justice. Nevertheless issuing a demand might still be appropriate.

Perfect Federal Lien and provide an opportunity for a hearing before a neutral official. If a hearing is requested, the Region may wait to record the lien after the neutral official has concluded that the statutory elements for recording the lien have been satisfied. Section 107(l)(3) of CERCLA provides that if the State has not by law designated an office for receipt of the notice of the lien, then the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located.

EPA has encouraged the use of CERCLA section 107(l) liens in various guidance documents.[9] Although the Regions expend resources perfecting and maintaining liens, in many instances a lien is an effective cost recovery tool.[10] For example, in one case a bankruptcy court approved a Stipulation and Order that reimbursed EPA approximately $2.6 million in response costs from the filing of a lien. The money was disbursed from the proceeds of the sale of the source property at a Superfund site. EPA received 75% of the property sale proceeds by advancing an argument that the vast majority of its CERCLA lien took priority over the next largest claim, a county's real property tax lien, which was filed after EPA's lien arose. EPA argued its lien had priority because a plain reading of section 107(l)(3) of CERCLA made it clear that a CERCLA lien is subject only to the rights of purchasers, holders of security interests, or judgment lien creditors whose interests are filed under applicable State law before notice of the CERCLA lien has been filed.

Liens provide EPA the opportunity to recover CERCLA section 104(b) investigation and monitoring costs incurred by EPA regardless of whether an enforcement document is in place. In addition, filing a lien and demonstrating a willingness to proceed to a lien hearing can sometimes encourage an uncooperative party to move toward settlement. Finally, at some sites the only asset is the property and the lien allows the Agency to recover some of its costs once the property is sold.

III. Using Section 106(a) Unilateral Orders to Preserve Cost Recovery Resources

It is not unusual with a time-critical removal action to initiate the response as a Fund-lead activity. With a time-critical removal, the necessity to address the release, or threat of release, initially takes precedence over conducting a PRP search to find a liable party that can perform the response. Regardless, Regions should initiate a PRP search as early as practicable because it is vital to identify any viable PRPs that will be able to complete the removal action as a PRP-lead activity. Regions should routinely assess the possibility of converting Fund-lead removal actions into enforcement-lead. We encourage the Regions to develop a formal evaluation process for removal actions that will allow the Regions to reassess the status of liable parties and explore the option of issuing a section 106(a) order to a liable party to complete the removal action.[11] Such an approach fulfills the "enforcement first" policy of the Agency and allows Regional removal

9 *See* Guidance on Federal Superfund Liens, Thomas L. Adams Jr., September 22, 1987; Supplemental Guidance on Federal Superfund Liens, William A. White, July 29, 1993; Use of Federal Superfund Liens to Secure Response Costs, Barry Breen, May 28, 2002.

10 We recognize that in cases where the value of the site property is extremely low and is not likely to appreciate it might not be appropriate to expend resources perfecting a 107(l) lien.

11 For more on issuing UAOs for time-critical removal actions, see Issuance of Administrative Orders for Immediate Removal Actions, Lee M. Thomas, Feb. 21, 1984. It should be noted that issuing a UAO is not the only possible option for the Agency. Time permitting, Regions might find it more beneficial to negotiate an Administrative Order on Consent rather than issue a UAO.

resources to be preserved for other Sites where a viable, liable party is not available to perform the response.[12]

IV. Consider Pursuing Costs Where the Total Site Costs are Less Than $200,000

In 1995, EPA issued guidance stating that Regions may prepare an abbreviated Decision Document for cases where total response costs are less than $200,000.[13] Unfortunately, this brief guidance may have inadvertently given the impression that it is generally not appropriate for EPA to pursue claims under $200,000. The intent was not to discourage the pursuit of these smaller dollar claims, but rather to provide the Regions with flexibility to decide how best to manage smaller dollar claims by using an informal cost-benefit analysis. With very small dollar claims it will rarely make sound financial sense to perform an extensive and costly PRP search or to issue numerous demands or information requests. However, considering the numerous and varied cleanup cases EPA manages, it is very likely that Agency enforcement action would be appropriate in some cases.[14]

Additionally, the Agency has become more adept at recovering CERCLA costs due to a standardized cost recovery approach, and it is now possible to pursue some of these smaller dollar claims more efficiently. While it is true that the Agency has historically placed, and continues to place, a higher priority on cost recovery cases over $200,000, there may be other reasons besides the dollar value of the case to pursue enforcement.[15]

Since the inception of the Superfund program EPA has recovered nearly $138 million at sites where total costs were less than $200,000, and we strongly encourage the Regions to continue pursuing smaller dollar claims whenever appropriate. The standard for pursuing these smaller dollar claims is the same for any other claim for response costs -- the Regions should weigh the resources needed to recover the costs against the amount that may be recovered, while considering the likelihood of recovery.[16]

V. Anticipate and Pre-empt Bankruptcy's Impact on Cost Recovery

Although EPA settlements often allow for "periodic" billing of future response costs, the Agency strives to bill its costs annually.[17] The importance of annual billing has been highlighted recently by a number of bankruptcy filings involving companies that were historically considered highly solvent that have extensive environmental liabilities at Superfund sites nationwide.[18]

---

12 *See* Enforcement First for Remedial Action at Superfund Sites, John Peter Suarez and Marianne Lamont Horinko, September 20, 2002 (PRPs should conduct removal actions whenever possible, and EPA should pursue enforcement opportunities throughout the Superfund process).

13 *See* Cost Recovery Cases Where Site Costs Total Less Than $200,000.00, Bruce M. Diamond, May 12, 1995.

14 For example, when the PRP is known; where the evidence is straightforward and uncontested; and where the PRP is viable.

15 There are some cases, where, even if the enforcement costs to the Agency potentially exceed the estimated recovery, EPA might decide that it is appropriate to pursue its claim because of an important legal or policy issue or the party's recalcitrance.

16 Interim CERCLA Settlement Policy, Lee M. Thomas, Courtney M. Price, F. Henry Habicht, December 5, 1984.

17 See CERCLA Future Response Costs: Settlement, Billing and Collection, Kenneth Patterson, June 20, 2002.

18 Within the last few years, many companies, including Chrysler, General Motors, ASARCO and W.R. Grace, have filed for protection under Chapter 11 of the United States Bankruptcy Code.

Sending annual bills in the years prior to a company's bankruptcy filing increases the probability that the Agency's annually incurred costs would be paid in full by the party before a potential bankruptcy filing. Once a PRP files for bankruptcy, all of EPA's unpaid response costs are lumped together in its proof of claim, with the potential that EPA will not recover all if its costs. As a way of maximizing our recovery of incurred costs, Regions should continue to strive to bill future response costs annually, recognizing the potential impact any subsequent bankruptcy filing would have on our recovery.

VI. Appropriately Document All Costs

As noted in the 1988 Cost Recovery Strategy, if a Region decides not to pursue a cost recovery action for either removal or remedial costs, a decision must be documented in a close-out memorandum.[19] The Region should prepare a similar document in cases where the Agency has settled either administratively or judicially for less than 100% of costs and does not contemplate pursuing non-settling parties for the balance of the Agency's unrecovered costs. In the judicial context, this is typically done in the Ten Point Settlement Analysis that accompanies the referral to DOJ for entry of the consent decree.[20]

In the administrative context, it is equally important to perform a similar analysis and generate a final decision document.[21] It is essential for EPA's final decision document to identify total costs incurred by EPA, noting the amount of costs recovered, and any compromise of costs, including a justification for the compromise. The final decision document memorializes the Region's evaluation of the remaining cost recovery potential at the site and its decision to remove the case from further consideration by the Agency. This documentation should be retained in the site file so that a Region can easily provide justification for the decision not to pursue costs in response to any internal or external audit or cost recovery review.[22] In addition to the final decision document, the Region should also place in the permanent site file all supporting documentation, such as an index of all PRP search documents and financial analyses used in making the decision not to pursue further cost recovery. The index should include the title of the final decision document, the date the document was created/finalized and the physical or electronic location of the supporting documents. The final decision document is enforcement confidential and should not be included in the administrative record.

Along with preparing the appropriate decision document, the Regions should continue to enter decision document information in the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS).[23] When entering this information, the Region

19 *See* Guidance on Documenting Decisions Not to Take Cost Recovery Actions, Jonathan Z. Cannon, June 7, 1988.

20 If the decision not to pursue unrecovered costs is made after the Ten Point is finalized the Region should create a close-out memorandum that documents the basis of the decision not to pursue unrecovered costs. *See* Transmittal of the Superfund Cost Recovery Strategy, J. Winston Porter, July 29, 1988, page 39-40.

21 The name of the final decision document may vary by Region, for example, the "close-out" Memorandum, a "write-off" memorandum or a "decision not to take cost recovery action."

22 Creation of a final decision document to not pursue cost recovery does not bar the Agency from re-opening the case in the event additional parties or evidence is discovered at a later date. Any subsequent action, however, might be barred by the statute of limitations in section 113(g).

23 For consistency the CERCLIS justification should be explicitly stated in the closeout document.

will include the appropriate basis for not pursuing costs.[24] CERCLIS provides seven possible justifications for the decision not to pursue costs.[25] These are:

(1) No PRPs identified;
(2) No viable PRPs;
(3) Insufficient evidence;
(4) Questionable case;
(5) Insufficient Resources;
(6) Consideration of Response Work; and
(7) Other.

As a point of clarification, "insufficient resources" refers to Regional resources, not PRP resources, and can only be used in cases where the total costs of response do not exceed $200,000.[26] If a PRP is defunct, bankrupt, or insolvent, the proper category is "no viable PRPs." "Questionable case" generally refers to a legal impediment to filing a cost recovery action (*e.g.*, the statute of limitations has run). "Consideration of Response Work" is for cases where costs are written off due to consideration of response work that the party has performed at the Site.

The "Other" category should be used sparingly to represent cases that truly do not fall within one of the other specific categories. When the "Other" category is selected, Regions are strongly encouraged to use the comment field in CERCLIS to provide additional details of the decision and avoid the necessity of any additional follow-up to determine the basis of the decision.

The following CERCLIS data pull shows the approximate use of each category for not pursuing cost recovery since the inception of the Program:

Justification	Percentage of Write-offs
No Viable PRP	29%
No PRPs Identified	11%
Questionable Case	3%
Insufficient Evidence	2%
Insufficient Resources	2%
Other	20%
Two or more justifications provided	13%
No justification provided	20%

Based on the data, approximately twenty percent of the time, the Regions failed to select a category or use the comment field in CERCLIS to justify the write-off. Another twenty percent of the time, the Region selected the "Other" category, but failed to provide a reason in

24 CERCLIS refers to the decision not to pursue costs as a "write-off."

25 Six of the justifications are taken directly from Guidance on Documenting Decisions not to Take Cost Recovery Actions, Jonathan Z. Cannon, June 7, 1988.

26 *See* Guidance on Documenting Decisions not to Take Cost Recovery Actions, Jonathan Z. Cannon, June 7, 1988, page 5. If a Region needs additional resources for a cost recovery case over $200,000 it should contact OSRE for assistance.

CERCLIS for the write off.[27] Thus, in roughly forty percent of the cases where costs were written off, CERCLIS provides no assistance in determining why costs were not pursued.

OSRE recognizes that there are final decision documents for these cases, but without the additional details as to why the cases fit into the "Other" category, CERCLIS does not provide a quick and easy way to report why the costs were not pursued. It is important for the Regions to accurately identify the bases of the decisions not to pursue costs in CERCLIS, as accurate data entry is critical to a more robust review and analysis of these write-off cases.

VII. Conclusion

This memorandum is the first step in a continuing dialogue with the Regions on maintaining and improving CERCLA cost recovery. OSRE encourages Regions to revisit current cost recovery practices and adopt suggestions from this memorandum where appropriate. In addition, we look forward to working with the Regions to identify opportunities to improve the efficiency and effectiveness of the cost recovery program. Questions or comments regarding this document may be directed to David Dowton (dowton.david@epa.gov) 202-564-4228, Carolyn Lane-Wenner (lane-wenner.carolyn@epa.gov) 202-564-5129 or Ruth Broome (broome.ruth@epa.gov) 202-564-6077.

cc: Superfund Removal Managers, Regions I-X
Superfund Regional Counsel Branch Chiefs, Regions I-X
Information Management Coordinators, Regions I-X
Stefan Silzer, Director, Office of Financial Management (OFM), OCFO
Rafael Stein, Director, Financial Services Division, OCFO
Iantha Gilmore, Director, Program Costing Staff, OFM, OCFO
Meshell Jones-Peeler, Deputy Director, Program Costing Staff, OFM, OCFO

27 Although many of the "Other" or "no reason given" selections in CERCLIS occurred early in the Program, Regions are still selecting "Other" often enough that it poses a concern.