



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

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**May 10, 2005**

**MEMORANDUM**

**SUBJECT:** Interim Protocol for Coordination of Bankruptcy Matters under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)

**FROM:** Susan E. Bromm, Director /s/  
Office of Site Remediation Enforcement (“OSRE”)

**TO:** Office of Regional Counsel Superfund Branch Chiefs, Regions I-X  
Superfund Division Directors, Regions I-X  
CERCLA Program Branch Chiefs, Regions I-X

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Enclosed for your use is the “Interim Protocol for Coordination of Bankruptcy Matters” (“Protocol”). While the Protocol focuses on bankruptcy matters under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), its practical application may extend to other statutes as well. OSRE encourages recipients to share the Protocol with other media programs due to its potential applicability to other statutes. The document was created through the efforts of a number of Headquarters and Regional offices, as well as the Department of Justice.

The Agency’s bankruptcy practice has evolved over the years, as Regional and Headquarters staff have developed significant expertise in bankruptcy matters. While individual Regions usually handle bankruptcy matters that only affect its Region, Headquarters manages most multi-Regional cases. In some situations, however, Regional offices have taken the lead on multi-Regional cases, in coordination with other offices. This Protocol incorporates the “lessons learned” from these efforts.

The primary purpose of the Protocol is to provide guidance for managing multi-Regional bankruptcies. However, it may not be necessary or cost-effective to use all the tools discussed in the Protocol in every multi-Regional case due to site specific, staffing or resource issues.

This document may be updated as we obtain additional experience and expertise in addressing multi-Regional bankruptcies. Therefore, we welcome any additional comments on the Protocol and its implementation. Comments or questions regarding the Protocol should be submitted to Ted Kim, who may be reached by e-mail at [kim.theodore@epa.gov](mailto:kim.theodore@epa.gov), by phone at 202-564-1136, or by fax at 202-501-0269.

Enclosure

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## INTERIM PROTOCOL FOR COORDINATION OF BANKRUPTCY MATTERS

*This protocol and any internal procedures adopted for its implementation and use are intended as guidance for employees of the United States Environmental Protection Agency. The procedures outlined in this protocol reflect and memorialize EPA's bankruptcy practice. Although this protocol attempts to provide an uniform methodology that the Regions and Headquarters can use in handling bankruptcy notices and cases, it recognizes that variances from this protocol may occur. The protocol does not constitute rulemaking 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.*

	TABLE OF CONTENTS	PAGE
I.	BACKGROUND .....	1
II.	PURPOSE AND USE .....	2
III.	ROLE OF THE BANKRUPTCY COORDINATOR IN HANDLING BANKRUPTCY NOTICES .....	2
IV.	ROLE OF THE BANKRUPTCY COORDINATOR IN BANKRUPTCIES AFFECTING ONLY ONE REGION .....	6
V.	ROLE OF THE LEAD BANKRUPTCY COORDINATOR FOR MULTI-REGIONAL BANKRUPTCIES .....	6
	BANKRUPTCY CONTACTS <sup>1</sup> .....	10

### I. Background.

- A. Over the last several years, the United States Environmental Protection Agency (“EPA”) has addressed numerous situations in which parties with environmental liabilities have filed for bankruptcy. These bankruptcy cases may involve sites or facilities in one or more Region(s). The Department of Justice (“DOJ”) typically becomes involved once it receives a referral from a Region or the Office of Enforcement and Compliance Assurance (“OECA”) at Headquarters (“HQ”) requesting the filing of a Proof of Claim (“POC”). Cases involving only one Region and DOJ are handled with little, if any, HQ involvement. Multi-regional bankruptcies require coordination among the Regions, HQ, and DOJ to ensure that a comprehensive POC is timely filed and/or to facilitate settlement. A Lead Region Bankruptcy Work Group, composed of a regional bankruptcy contact from all ten Regions, as well as DOJ and HQ staff, was created in 1992 to facilitate the handling of bankruptcy cases.
- B. As EPA has handled more bankruptcy cases, questions have arisen as to how to best manage these cases in light of limited resources. Headquarters has generally

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<sup>1</sup> A list of the current bankruptcy contacts is attached at the end.

been the default lead in the majority of multi-regional bankruptcy cases. However, the expertise and experiences of the regional bankruptcy contacts has expanded, such that Regions have taken the lead in several multi-regional bankruptcy cases.

- C. The current OECA delegation addressing bankruptcy settlements under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) is CERCLA Delegation 14-13-B, “Concurrence in Settlement of Civil Judicial Actions.”<sup>2</sup> This delegation authorizes Regional Administrators to approve bankruptcy settlements. While no requirement exists for formal OECA approval of bankruptcy settlements or the filing of POCs, the Office of Site Remediation Enforcement’s (“OSRE”) CERCLA Prior Approval, Concurrence, and Consultation Roles Chart (“Roles Chart”) requires that Regions consult OSRE’s Office Director on all multi-regional bankruptcy settlements. See Roles Chart C.3 (7/13/2001). As a practical matter, OSRE has sought approval from OECA’s Assistant Administrator (“AA”) for most multi-regional bankruptcy matters, since they raise issues of national significance or require national coordination.

## II. **Purpose and Use.**

- A. The Protocol provides guidance for managing bankruptcy matters involving one or more Regions.
- B. The expectation is that Regions will use this Protocol in most instances. However, the tools and procedures discussed herein may not be necessary or cost-effective in all situations. Site-specific, staffing, or resource issues may result in variance from the Protocol.

## III. **Role of the Bankruptcy Coordinator in Handling Bankruptcy Notices.**

- A. The current bankruptcy contact for each Region should serve as the Regional Bankruptcy Coordinator (“RBC”). HQ should designate a HQ Bankruptcy Coordinator (“HBC”).
- B. Except as provided in part III.C below, each RBC should file notice,<sup>3</sup> in accordance with Rule 5003 of the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”),<sup>4</sup> with the clerk of each bankruptcy court within its Region

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<sup>2</sup> See *infra* note 17 (discussing CERCLA Delegation 14-13-B).

<sup>3</sup> The notice is currently under development.

<sup>4</sup> The Bankruptcy Rules govern the types of notices to serve upon creditors and interested parties. Bankruptcy Rule 5003 was amended in 2000 to permit federal agencies to file a statement with the clerk of each bankruptcy court that designates their mailing addresses for cases in that district.

that designates the regional office as the proper address for notices in cases arising in such court.

- C. The HBC should file notice, in accordance with Bankruptcy Rule 5003, with the clerk of the bankruptcy courts for the District of Delaware (“Delaware”) and the Southern District of New York (“SDNY”) and designate HQ as the proper address for notices in cases arising in such courts.<sup>5</sup>
- D. The RBC or HBC (for cases filed in Delaware or the SDNY) will serve as the EPA contact for receiving and disseminating bankruptcy information received from the Office of the United States Trustee.
- E. The RBC or HBC should screen all the bankruptcy notices with which it is served and seek to ascertain whether the bankruptcy involves an environmental claim or issue of interest to EPA. For cases filed in Delaware or the SDNY, the HBC should forward to the appropriate RBC any bankruptcy information that may impact sites or facilities within the Regions. When the HBC is served with notices for bankruptcy cases filed in jurisdictions other than Delaware or the SDNY, the HBC should promptly forward such notices to the appropriate RBC for evaluation.
- F. Each RBC should develop a regional e-mail list of personnel (“Bankruptcy List”) to whom information regarding bankruptcy notices should be sent to evaluate whether its Region may have an interest in the bankruptcy case. At a minimum, the Bankruptcy List should include attorneys who work on enforcement matters, the regional finance office,<sup>6</sup> as well as program managers who may have knowledge of potential future enforcement cases.
- G. The RBCs should circulate information regarding the following types of bankruptcy notices to the Bankruptcy List for their respective Regions to determine whether the bankruptcy case involves an environmental claim or issue of interest to the Region:
  - 1. Notice of a new bankruptcy filing;
  - 2. Notice of bar date;
  - 3. Notice of debtor’s efforts to add EPA as a creditor to its schedules; and

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<sup>5</sup> The Protocol differentiates bankruptcy cases filed in Delaware and the Southern District of New York from cases filed in other jurisdictions, because many bankruptcy cases involving large national and multi-national corporations (which may impact numerous Regions and contaminated sites) are often filed in Delaware and the SDNY.

<sup>6</sup> Due to the fact that the Office of the Chief Financial Officer has decided to consolidate regional finance office functions, the Cincinnati Finance Office (“CFC”) may handle a Region’s debts and should be notified accordingly.

4. Notice of discharge.

H. Determining Whether an Environmental Claim or Issue of Interest is Involved.

1. For new bankruptcy filings involving businesses or non-consumer bankruptcies, the RBC or, for cases filed in Delaware or the SDNY, the HBC should seek to review Exhibit C of the debtor's bankruptcy petition and the Statement of Financial Affairs ("SOFA")<sup>7</sup> to evaluate the environmental disclosures that are required to be included in these documents.
2. For new bankruptcy filings involving businesses or non-consumer bankruptcies, the RBC or, for cases filed in Delaware or the SDNY, the HBC should ask the appropriate office to run the name of debtor through the CERCLIS<sup>8</sup> database to determine whether such debtor has been identified as a potentially responsible party ("PRP") at any Superfund sites.
3. The RBC, HBC, or attorney assigned to the case may also conduct a further inquiry<sup>9</sup> that may include any one of the following:
  - a. Researching EPA Databases. EPA's other databases besides CERCLIS may provide useful information in determining whether the debtor may have environmental liabilities. For instance, to determine whether an environmental claim or issue of interest

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<sup>7</sup> The SOFA contains extensive information about the debtor and its financial and business operations. It includes Question 17, which requires disclosure of certain environmental liabilities the debtor may have. The SOFA may be obtained by any one of the following methods:

- a. **Researching PACER.** PACER is a subscription computer service available on the Internet that links the user to the appropriate court web site for the case of interest and provides electronic access to court files. If a Region has difficulty accessing PACER, HQ should be contacted;
- b. **Researching the Internet.** Internet sites, such as [www.trumbullgroup.com](http://www.trumbullgroup.com), <http://www.kccllc.net/>, and [www.bmccorp.net](http://www.bmccorp.net), often contain the SOFA, particularly for larger bankruptcy cases;
- c. **Contacting the United States Attorney's Office.** While the clerk's office of the bankruptcy court can provide information as to where the SOFA may be found or obtained, any attempt to get a copy, other than through debtor's counsel or PACER, should be made through a request to the U.S. Attorney's Office or DOJ, not the court itself;
- d. **Contacting the U.S. Trustee's Office;** or
- e. **Contacting Debtor's Counsel.** In some instances, debtor's counsel may also have additional information about environmental liabilities that it may volunteer.

<sup>8</sup> The CERCLIS database contains information on Superfund sites across the Nation and its territories, including location, status, contaminants, and actions-taken. CERCLIS also contains information regarding parties that the Agency has determined are potentially responsible parties under CERCLA.

<sup>9</sup> Such inquiry will depend on: (1) the nature of the debtor's industry (*e.g.*, the steel and chemical industries, or those regulated under the Resource Conservation and Recovery Act ("RCRA")); and/or (2) if EPA has already decided to participate in the bankruptcy.

exists under other statutes besides CERCLA, such databases as the Integrated Compliance Information System (“ICIS”) or RCRA Info may be used; or

- b. Other Means as Necessary. Electronic research on the debtor using databases, such as [www.bankruptcydata.com](http://www.bankruptcydata.com), as well as research of the company’s Internet website (if available), may be utilized as appropriate. In some instances, the National Enforcement Investigations Center may be contacted to get more comprehensive environmental liability information. Alternatively, the Office of Civil Enforcement’s Special Litigation and Projects Division’s Civil Investigator’s Team may be used for ability to pay investigations and asset searches.
  
- I. If the RBC or HBC determine that a bankruptcy case may involve matters of interest to EPA and includes sites or facilities in other Regions, the RBC or HBC (or appropriate attorney or program person assigned to the case) should notify the RBCs in the affected Regions, HQ (if a RBC sends out the notice), and DOJ and forward all relevant information that may have been collected.<sup>10</sup>
  
- J. The RBC and HBC should work with their program counterparts to develop a process whereby bankruptcy notices are evaluated to determine whether the debtor owns or operates facilities that could result in future environmental liabilities.<sup>11</sup>
  
- K. The RBC (for cases filed within its Region) or HBC (for cases filed in Delaware or the SDNY) should review plans of reorganization and disclosure statements,<sup>12</sup> notices regarding sales of real property under Section 363 of the Bankruptcy Code, and notices regarding proposed financing orders under Section 364 of the Bankruptcy Code. If such notices include provisions adverse to EPA’s interests (*i.e.*, Bankruptcy Code § 363 sales that purport to transfer real property free of environmental liability, Bankruptcy Code § 364 financing orders that purport to absolve the lender of any environmental liability based upon standards other than those set forth in CERCLA, or plans that purport to discharge environmental

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<sup>10</sup> Such relevant information may include: the name and location(s) of the debtor and its affiliates; the scheduled bar date (if any); Question 17 of the debtor’s SOFA; and the Debtor’s Petition for Relief, Exhibit C.

<sup>11</sup> Regional personnel should consider the nature of the debtor’s past and present operations (for instance whether the debtor owned or operated a RCRA facility) in evaluating whether environmental liabilities may also arise in the future. Even where a Region does not currently have a pending case or ongoing investigation, debtors may seek to use their bankruptcy case to impact future liability. Regional personnel should identify cases with the potential of future environmental liabilities to protect EPA’s long-term interests.

<sup>12</sup> Plans of reorganization and disclosure statements are often quite lengthy. The provisions of concern to EPA can usually be found in the sections addressing discharge, releases, and/or environmental matters.

compliance obligations or provide overbroad releases), the RBC or HBC should promptly advise the appropriate DOJ coordinator of such notices.

- L. The RBC (for cases filed within its Region) or HBC (for cases filed in Delaware or the SDNY) should review notices of a debtor's or trustee's efforts to abandon contaminated property and investigate as appropriate.
- M. When the RBC or HBC is served with a bankruptcy notice that raises specific environmental matters (*i.e.*, financial assurance or environmental insurance at a Resource Conservation and Recovery Act facility), the RBC (for cases filed within its Region) or HBC should promptly notify the regional and/or HQ personnel responsible for such matters.<sup>13</sup>

IV. **Role of the Bankruptcy Coordinator in Bankruptcies Affecting Only One Region.**

- A. Based on the responses to the initial evaluation, if only one Region decides to assert a claim or take other action in a bankruptcy case, the RBC of that Region will assume the lead and be responsible for the following activities (or will provide assistance, as needed, to the regional attorney who has lead responsibility for the case):
  - 1. Preparing the bankruptcy referral<sup>14</sup> to DOJ;
  - 2. Assisting DOJ (*i.e.*, litigating or settling) in the matter; and
  - 3. Preparing EPA's settlement documentation.
- B. The process outlined above should be followed regardless of where the bankruptcy case is filed, because the Region where the bankruptcy case is filed may not necessarily be the same as the Region with the claims or interests. HQ will generally not be involved in such cases, unless issues of national significance or national consistency arise.

V. **Role of the Lead Bankruptcy Coordinator for Multi-Regional Bankruptcies.**

- A. A multi-regional bankruptcy case is one where more than one Region decides to assert a claim or take other action against a debtor. The general presumption is that the HBC will be the Lead Bankruptcy Coordinator in multi-regional bankruptcies to ensure national consistency and coordination.

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<sup>13</sup> For instance, if the debtor owns or operates a RCRA facility, the RBC, HBC, or appropriate regional or HQ attorney should review any Disclosure Statement, Plan of Reorganization, or Asset Sale for information on how the facility(ies) will be treated.

<sup>14</sup> Bankruptcy referrals include, but are not limited to, referrals that seek to: file a POC; oppose an abandonment; obtain access; enforce a clean-up order; recoup administrative expenses; object to terms of plans of reorganization or sales of property; or complete a settlement.

- B. A Region, upon consultation with HQ, may take the lead and assign a RBC, or other appropriate regional personnel, to serve as the Lead Bankruptcy Coordinator in a multi-regional bankruptcy case under the following circumstances:<sup>15</sup>
1. Where one Region has a predominant number of sites and facilities or the largest claim at issue. HQ may request that one Region assume the lead where the majority of sites or facilities at issue are from that Region or where one Region holds the largest claim.
  2. Other Factors. A Region may be designated the lead where it: (i) has a particularly complex case that warrants the matter being handled by a Region on account of its expertise or experience on the issue; or (ii) volunteers to take the lead.
- C. Duties of the Lead Bankruptcy Coordinator.
1. Generating and submitting a consolidated bankruptcy referral<sup>16</sup> to DOJ.
  2. Assisting DOJ (*i.e.*, litigating or settling) in the matter (in consultation with the affected Regions). For instance, working with DOJ in coordinating responses of affected Regions to discovery requests and in preparation for claims or estimation hearings.
  3. Providing updates (as appropriate) to the other affected Regions.
  4. Preparing and obtaining sign-off from appropriate EPA managers (through coordination with the RBCs in the affected Regions) on any final documents for referral (*i.e.*, POC or settlement) to DOJ.
    - a. When the Lead Bankruptcy Coordinator comes from a Region, the Region will prepare the settlement referral package, and the appropriate regional official may sign the settlement agreement on behalf of all affected Regions (upon receiving approval from the participating Region(s)) and is responsible for forwarding the consolidated signed settlement agreement (with a copy to HQ) to DOJ.<sup>17</sup>
    - b. When the HBC is the Lead Bankruptcy Coordinator, HQ will provide final signature (on behalf of, and upon receiving approval from, all affected Regions) by OECA's AA or, upon delegation, by the appropriate Office Director. Upon final signature, HQ will forward the signed agreement to DOJ.

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<sup>15</sup> In cases where a few Regions may each have one or two cases involving the debtor(s), the affected Regions (after consultation with HQ and DOJ) may directly submit their own bankruptcy referrals to DOJ. See id. (defining the phrase bankruptcy referral).

<sup>16</sup> See id.

<sup>17</sup> OSRE is proposing to update CERCLA Delegation 14-13-B, "Concurrence in Settlement of Civil Judicial Actions," as well as the Roles Chart, to reflect that the Lead Bankruptcy Coordinator is authorized to sign national bankruptcy settlements on behalf of all affected Regions.

5. Distribute final documents to all other participating RBCs<sup>18</sup> and the HBC (if a RBC or other Regional attorney is the Lead Bankruptcy Coordinator) or to all participating RBCs (if the HBC is the Lead Bankruptcy Coordinator). These documents include:
    - a. The final bankruptcy referral document (*i.e.*, POC or settlement) from the Lead Bankruptcy Coordinator to DOJ.
    - b. The final document (*i.e.*, POC or settlement) that DOJ files in court.
  6. When a bankruptcy settlement is completed, the Lead Bankruptcy Coordinator (or regional staff attorney assigned to the case if a Region is the Lead) should provide a copy of the final settlement agreement<sup>19</sup> to the appropriate CERCLIS data entry contact.
  7. The Lead Bankruptcy Coordinator will work with the appropriate ICIS contact to ensure that the appropriate Region obtains credit in ICIS for the bankruptcy referral and settlement agreement.
- D. Duties of the non-lead Region. When HQ, or another Region, is the Lead Bankruptcy Coordinator, the other affected Regions that hold claims against the debtor should perform the following duties to the extent possible:
1. Timely submit a consolidated regional claim, which will be included in the national bankruptcy referral.<sup>20</sup>
    - a. Notification to DOJ. Referrals should, if possible, be made at least 30 days prior to the bar date.<sup>21</sup> If that is not possible, a working draft of the referral should be provided as soon as it is available so that assignment and work can get underway at DOJ. Where the RBC learns of an imminent bar date and insufficient time exists to prepare a formal referral, the RBC (or the regional attorney assigned to the case) should contact DOJ and pre-refer the matter informally with a written referral to follow.
    - b. If a Region decides not to submit a referral, it should provide written notification to the Lead Bankruptcy Coordinator of that decision.
  2. During settlement negotiations, provide case support as needed by:
    - a. Participating in case discussions with DOJ and Debtor's counsel.
    - b. Providing updated clean-up status and cost documentation.

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<sup>18</sup> The final documents should be distributed electronically to all participating RBCs. These documents should also be made available to the Regional Finance Office or the CFC, see supra note 6, as appropriate.

<sup>19</sup> If available, a summary of the settlement agreement should also be provided to the CERCLIS contact.

<sup>20</sup> See supra note 14 (defining the phrase bankruptcy referral).

<sup>21</sup> In addition, verbal notification to DOJ should be made, if possible, at least 60 days prior to the bar date that a referral is anticipated.

3. Work with the Lead Bankruptcy Coordinator and DOJ in coordinating the responses of the Region to discovery requests and in preparation for claims or estimation hearings.
4. Each Region will approve the portion of the settlement agreement that affects sites or facilities within such Region in accordance with regional delegations and regional policy.

Attachment

## **ATTACHMENT**

### **BANKRUPTCY CONTACTS**

<b><u>HEADQUARTERS CONTACTS</u></b>	<b><u>NAME</u></b>	<b><u>PHONE</u></b>
OECA-OSRE-RSD	Theodore J. Kim	(202) 564-1136
	Helena Healy	(202) 564-5124
	Maria Cintron-Silva	(202) 564-4227
OECA-OSRE-PPED	Robert Kenney	(202) 564-5127
OECA-ORE-SLPD	Peter Moore	(202) 564-6014
OECA-ORE-RED	Diana Sáenz	(202) 564-4209
NEIC	Nancy Nibling	(303) 462-9060
OGC	Alan Carpien	(202) 564-5507

### **REGIONAL CONTACTS**

Region I	Eve Vaudo	(617) 918-1089
	Diane Boudrot	(617) 918-1776
Region II	Douglas Fischer	(212) 637-3180
Region III	Carlyn W. Prisk	(215) 814-2625
	Tom Cinti	(215) 814-2637
Region IV	Kevin Beswick	(404) 562-9580
Region V	Rick Nagle	(312) 353-8222
Region VI	Terry Sykes	(214) 665-2158
Region VII	Barbara Peterson	(913) 551-7277
	Howard Bunch	(913) 551-7879
Region VIII	Andrea Madigan	(303) 312-6904
Region IX	Lewis Maldonado	(415) 972-3926
	Sara Goldsmith	(415) 972-3931
Region X	Ted Yackulic	(206) 553-1218
	Dean Ingemansen	(206) 553-1744

### **DEPARTMENT OF JUSTICE CONTACTS**

National Coordinator	Alan Tenenbaum	(202) 514-5409
Regions I & II	Henry Friedman	(202) 514-5268
Regions III & VIII	David Street	(202) 514-5471
Regions IV & IX	Tom Carroll	(202) 514-4051
Region V	Randy Stone	(202) 514-1308
Region VI	Sam Blesi	(202) 514-1466
Regions VII & X	Fred Phillips	(202) 305-0439
AUSA-Delaware	Ellen Slights	(302) 573-6277
AUSA-Southern District of New York	David Jones	(212) 637-2800
	David Kennedy	(212) 637-2800

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