

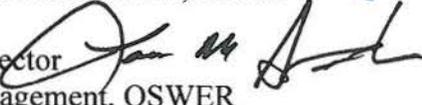


UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 26 2013

SUBJECT: Timing and Procedures for Review of Certain Time-Critical Removal Actions by EPA Headquarters Offices

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

Lawrence M. Stanton, Director 
Office of Emergency Management, OSWER

TO: Superfund National Program Managers, Regions 1-10
Regional Counsel, Regions 1-10

This memorandum addresses circumstances when Regions should consult with Headquarters and/or seek Headquarters approval for time-critical removal actions conducted under Section 104(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). In particular, this memo describes the roles of EPA Regions, the Office of Emergency Management (OEM), the Office of General Counsel (OGC), and the Office of Site Remediation Enforcement (OSRE).¹ This memo supplements the review and approval procedures set forth in OEM's September 21, 2009 guidance document, "Superfund Removal Guidance for Preparing Action Memoranda" ("the 2009 AM Guidance").²

This memorandum does not impose legally binding requirements on EPA, states, or the regulated community and may not apply to a particular situation based upon specific circumstances. Any decision regarding a particular site will be made based on the statute and regulations, and EPA retains discretion to adopt different approaches on a case-by-case basis.

¹ This memo addresses only time-critical removal actions. However, the Office of Superfund Remediation and Technology Innovation (OSRTI) is expected to issue a similar memo in the near future, which would extend, in particular, the OSRE consultation procedures to certain non-time-critical removal actions.

² The 2009 AM Guidance can be found at on EPA's website.

A. Legal Background

Pursuant to CERCLA Section 104(c)(1), a removal action is limited to twelve months and \$2,000,000 (\$2 million) of Hazardous Substance Superfund (“Fund”) monies. A Fund-lead removal may be exempt from these limitations in two circumstances. First, a removal may fall under the “emergency” exemption when, “[c]ontinued response actions are immediately required to prevent, limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or the environment, and (iii) such assistance will not otherwise be provided on a timely basis.” CERCLA 104(c)(1)(A); 40 CFR 300.415(b)(5)(i). Second, a removal may fall under the “consistency” exemption when “[c]ontinued response action is otherwise appropriate and consistent with the remedial action to be taken.” CERCLA 104(c)(1)(C), 40 CFR 300.415(b)(5)(ii). Regions should receive appropriate authorization for these exemptions prior to reaching the time or monetary limit.³

Delegation 14-2 sets forth the appropriate official to approve these exemptions. Regional Administrators (RAs) have been delegated the authority to approve removal actions expected to cost up to \$6 million of Fund monies. The Assistant Administrator of OSWER (AA/OSWER), however, must approve (1) removals at sites not proposed to or listed on the National Priorities List (NPL), costing more than \$2 million of Fund monies and using the consistency exemption and (2) removals costing more than \$6 million of Fund monies and requiring the emergency waiver.⁴

Regions should consult with OGC and OSRE on any time-critical removal action expected to cost more than \$2 million of Fund monies. These consultations do not infringe on the Region’s delegated authority but rather are intended to allow review of removal decisions involving significant legal, fiscal or policy issues. OSRE’s consultation, in particular, furthers the Agency’s commitment to strong enforcement at removal sites and to limiting use of Fund monies to sites without viable PRPs.⁵

B. Headquarters Review Procedures

The discussion below clarifies when OEM, OGC, and OSRE should review Action Memos and enforcement addenda for Fund-lead time-critical removal actions. In addition, the chart (included as Attachment 1) provides a summary of this information.

³ For further guidance on these exemptions, see the 2009 Action Memo Guidance, pp. 28-40.

⁴ In addition to these delegations, OSWER and the Region may have additional ones. Notably, the Office Director of OEM concurs (and the AA/OSWER non-concurs) on the initiation of removals at non-NPL sites where the action is considered nationally significant or precedent-setting. Additionally, business relocations are considered special circumstances. While the RA may approve business relocations, the OSC should consult with OEM, OGC, and regional counsel. See 2009 AM Guidance, p. 48; “Superfund Response Actions: Temporary Relocation Implementation Guidance,” OSWER 9230.0-97 (April 2002).

⁵ Under the enforcement first policy, EPA seeks, as appropriate, to identify PRPs to perform response actions before EPA proceeds with a Fund-lead action. Earlier, more assertive PRP searches are essential to achieving this goal. See, “‘Enforcement First’ for Removal Actions,” August 4, 2011 (signed by Cynthia Giles, AA of OECA and Mathy Stanislaus, AA of OSWER).

1. OSWER Concurrence and Approval Procedures

A Region requires approval from the AA of OSWER when initiating a time-critical removal that: (1) is expected to cost more than \$6 million of Fund monies and requires the emergency exemption or (2) is expected to cost more than \$2 million of Fund monies, is not being performed at a site listed on the National Priorities List (NPL), and requires the consistency exemption. A Region should seek AA/OSWER concurrence on any increase of the removal action ceiling to more than \$6 million of Fund monies based on the emergency waiver. Finally, a Region should have OEM's concurrence (or AA/OSWER non-concurrence) on time-critical removals that are nationally significant or precedent-setting⁶ and should consult with OEM when a removal involves the relocation of a business.

When Action Memos need AA/OSWER approval or OEM concurrence, the regional On-Scene Coordinator (OSC) should work closely with the appropriate Regional Coordinator in OEM. (A list of current Headquarters contacts is included as Attachment 2.) OSCs are strongly encouraged to contact the Regional Coordinator early in the process, as soon as it becomes clear that OEM's approval or concurrence is necessary. OEM's Regional Coordinator, in turn, will contact OGC and OSRE and forward draft materials for their consultation. This early coordination will allow issues to be resolved while the Action Memo is being drafted and will expedite any subsequent Headquarters review.

After the Region has received and addressed comments from Headquarters' offices, the OSC should submit the complete Action Memo package (with a signed transmittal letter from the RA or designee) to the OEM Regional Coordinator. The package should be submitted at least **three weeks** before Action Memo approval is needed. This allows the necessary time for review by Headquarters offices. See 2009 AM Guidance, p. 54. Headquarters staff will work together to respond to these Regional requests as quickly as possible, recognizing the time-critical nature of the work.

2. OGC Consultation Procedures

A Region should consult with OGC when: (1) initiating a removal of more than \$2 million of Fund monies and/or (2) subsequently increasing the removal action ceiling to \$6 million or more of Fund monies.⁷ OGC will review the draft Action Memo to ensure that statutory criteria for the appropriate exemption are clearly established. In situations where OEM's review is not needed, a Region should contact OGC directly to accomplish this consultation. (See contact list at Attachment 2.) OGC will want to review the draft Action Memo, including the enforcement addendum, and will notify both the Region and OEM when the consultation is complete.

⁶ 2009 AM Guidance, p. 44.

⁷ Notably, further consultation with OGC is not required for ceiling increase requests that do not involve a change in the scope of the response. 2009 AM Guidance, p. 53.

3. OSRE Consultation Procedures

A Region should consult with OSRE when: (1) initiating a removal of more than \$2 million of Fund monies; (2) subsequently increasing the removal action ceiling to \$6 million or more of Fund monies; and/or (3) subsequently increasing the removal action ceiling by \$2 million or more (but still below an overall Fund total of \$6 million). In situations where OEM's review is not needed, a Region should send its draft enforcement addendum directly to the appropriate OSRE contacts. (See Attachment 2.)

Regions are strongly encouraged to contact OSRE as soon as it appears a Fund-lead removal of more than \$2 million is likely. This early coordination will allow issues to be discussed while the enforcement addendum is being drafted. OSRE will review the draft enforcement addendum to understand the Region's search for potentially responsible parties (PRPs), the consideration of possible enforcement actions, and the recommendation that the removal should be conducted with monies from the Fund. To that end, the draft enforcement addendum⁸ should include, but not necessarily be limited to, information on the PRP search, efforts to contact viable PRPs, the rationale for using Fund monies in lieu of PRP resources, and whether additional PRP-search work or contact with any known PRPs is appropriate at the site. The Region may wish to forward a copy of the draft Action Memo to provide relevant information about the site. In some cases, OSRE staff may request supplemental information (e.g., on divisibility, PRP insurance, PRP ability to pay analyses, or federal PRP issues).

OSRE will work with the Region to accomplish the consultation as soon as possible and will notify the Region and OEM when the consultation is complete.

C. Conclusion and Contacts

In this time of tight budgets, close coordination between the Regions and Headquarters on Fund-lead actions is more important than ever. While the removals addressed herein are time-critical, the need for timely action should be balanced with the need for consensus on the appropriate expenditure of limited funds.

Thank you in advance for your efforts to implement these procedures. If you have any questions, please contact the appropriate office. A current list of Headquarters' contacts is included as Attachment 2.

⁸ Guidelines for drafting the enforcement addendum and enforcement information for the Action Memo are set forth on pages 25 through 27 of the 2009 AM Guidance. The enforcement addendum is considered an enforcement confidential document and should not be distributed outside the Agency, nor should it be placed in the Administrative Record.

Attachments

cc: Mathy Stanislaus, OSWER
Lisa Feldt, OSWER
Barry Breen, OSWER
Dana Tulis, OEM
Cynthia Giles, OECA
Lawrence Starfield, OECA
Karin Leff, OSRE
Mary Kay Lynch, OGC
Earl Salo, OGC
John Michaud, OGC
Jim Woolford, OSRTI
Robin Anderson, OSRTI
Lisa Price, Superfund Lead Region Coordinator, Region 6
Superfund Regional Counsel Branch Chiefs, Regions 1-10
Superfund Removal Managers, Regions 1-10
Superfund Removal Attorney Workgroup
Superfund Removal Enforcement Workgroup
OSRTI Managers
OEM Regional Coordinators
OSRE Removal Team

Attachment 1

Headquarters' Approval, Concurrence, and Consultation on Certain Time-Critical Removal Actions			
Type of Action	Type of Site	Headquarters Office	Headquarters Action
Initiation of Time-Critical Removal >\$2M+ but <\$6M (emergency exemption)	NPL* or non-NPL	OSRE and OGC	Consultation
Initiation of Time-Critical Removal >\$2M+ (consistency exemption)	Non-NPL	OSRE and OGC (Thru OEM to) AA/OSWER	Consultation Approval
Subsequent increase to ceiling by \$2M+ but <\$6M	NPL or non-NPL	OSRE	Consultation
Subsequent increase to ceiling at or above \$6M+	NPL or non-NPL	OSRE and OGC (Thru OEM to) AA/OSWER	Consultation Approval
Initiation of Action >\$6M+ Fund monies (emergency exemption)	NPL or non-NPL	OSRE and OGC (Thru OEM to) AA/OSWER	Consultation Approval
Subsequent increase to ceiling by \$2M+ for removals already >\$6M+	NPL or non-NPL	OSRE	Consultation
Initiation of Removals that are Nationally Significant or Precedent Setting	Non-NPL	OGC OEM AA/OSWER	Consultation Concurrence Non-concurrence
Initiation of Removals involving Business Relocations	NPL or non-NPL	OEM	Consultation

* NPL refers to those sites listed on the National Priorities List and those proposed to the National Priorities List.

Attachment 2

Headquarters' Contacts as of January 2013

OSRE

Anne Berube: 202-564-4795

Rebekah Reynolds: 202-564-4306

OGC

Lee Tyner: 202-564-5524

OEM

Sherry Fielding: 202-564-3850 *Regions 5, 9*

Eugene Lee: 202-564-7988 *Regions 3, 8*

Lisa Boynton: 202-564-2487 *Region 6, 7*

Tim Grier: 202-564-2361 *Region 2*

Schatzi Fitz-James: 202-564-2521 *Region 4*

John Irizarry: 202-564-2520 *Region 10*

Jan Shubert: 202-564-2527 *Region 1*