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

SIGNED MAY 17, 2000

OSWER Directive No. 9200.0-32P

MEMORANDUM

SUBJECT: Interim Guidance on Implementing the Superfund Administrative Reform on PRP Oversight

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TO: Superfund Division Directors (Regions I-X)
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PURPOSE

This memorandum provides direction and guidance to Regions on implementation of the Superfund Reform on the Administration of Potentially Responsible Party (PRP) Oversight. The memorandum directs Regions to focus on efforts to engage in open dialogues with PRPs that have settlements with EPA as a means to promote appropriate oversight that ensures the development and implementation of protective cleanups; gives careful consideration to the associated costs being charged to PRPs; and maximizes EPA recovery of oversight costs. Additionally, this directive provides several ideas on oversight management and potentially cost-saving practices for RPMs to consider when planning and conducting oversight of PRP-lead response actions. This guidance supersedes the OSWER directive (9200.4-15) on "Reducing Federal Oversight at Superfund Sites with Cooperative and Capable Parties."

BACKGROUND

In 1995, Administrator Browner announced several new Superfund Reforms including an

initiative to reward capable and cooperative PRPs by reducing oversight where quality work was being performed. In August 1996, EPA issued guidance on "Reducing Federal Oversight at Superfund Sites with Cooperative and Capable Parties" that intended to foster improved relationships, or recognize existing good relationships, with cooperative parties.

Based on EPA experience and input from stakeholders, the Agency has concluded that developing a "baseline of oversight", against which site-specific oversight cost reductions can be measured, is not practical. Logical variation in site-specific oversight based on site-characteristics, already reduced levels of oversight, changing relationships with PRPs and communities, and the evolving nature of response activities as cleanups progress is to be expected and encouraged. However, EPA is committed to the goal of reducing Superfund transaction costs where practicable and thus continues to seek opportunities to provide oversight that ensures the implementation of protective cleanups and gives careful consideration to cost.

OBJECTIVE

In light of EPA's experience and continuing policy commitment, the Agency has elected to focus on efforts to engage in open dialogues with PRPs that have settlements with EPA as a means to promote appropriate oversight that ensures the development and implementation of protective cleanups; gives careful consideration to the associated costs being charged to PRPs; and maximizes EPA recovery of oversight costs. EPA intends to work cooperatively with settling PRPs to use limited Federal and PRP resources even more effectively to achieve timely and protective site cleanups by tailoring oversight activities to the complexity of the cleanup, the experience level of the performing parties, and the interests of the community. EPA is committed to informing these PRPs of EPA's oversight expectations, providing them with opportunities to suggest ways to improve or streamline oversight, and engaging them in open and meaningful dialogue on oversight efforts to achieve timely and protective cleanups. We believe that by maintaining good working relationships with settling PRPs during oversight planning and throughout the work period, EPA can potentially save oversight costs through more focused planning, reduce the element of surprise some PRPs face when receiving an oversight bill, and reduce the number of billing disputes without sacrificing the quality of the cleanup. A secondary benefit is that any resource savings may result in funds being freed up for other response activities.

At the same time, EPA recognizes that this approach to site cleanups depends on the PRPs' ability and willingness to comply with settlement agreements and adhere to Agency standards, as outlined in Agency regulations and policies. In effect, PRPs themselves have a significant degree of control over the oversight costs that EPA incurs. PRP cooperation, quality work, timeliness, good contractor management, and overall competence may largely dictate the level of oversight required for a site. Conversely, the Agency also recognizes that where PRPs are not fulfilling their responsibilities under a settlement, EPA has the responsibility to continue to assert its enforcement authorities as

appropriate.

Successful working relationships depend on regular, clear, and open communications between parties, shared commitment to reaching common goals, mutual understanding of expectations, flexibility to changing conditions, and a willingness to listen. We have seen that many RPMs across the Regions are striving to incorporate good management practices as they work with PRPs to achieve cleanups. We appreciate the effort of these RPMs to facilitate cooperation between the Agency and PRPs, and we encourage Regional managers to acclaim their accomplishments as models to others.

IMPLEMENTATION

Through the Superfund reform on PRP oversight, EPA will offer settling PRPs the opportunity to discuss oversight expectations and to provide suggestions on possibilities for conducting oversight in an efficient and effective manner while achieving timely and protective cleanups. EPA will continue to encourage PRPs to perform response work through cooperative settlements (e.g., consent decrees (CDs) and administrative orders on consent (AOCs)) and view the opportunity to meet and discuss planned oversight activities as a benefit to PRPs and an incentive to settle. Moreover, where PRPs have entered into agreements with EPA to pay oversight costs, EPA will strive to issue timely (e.g., annual) oversight bills based on known or available costs at the time of billing.

During annual work planning, Regions will identify sites at which PRPs are conducting response work under CDs, AOCs or other settlement documents in place with EPA that provide for payment of oversight costs. The annual Superfund Program Implementation Manual (SPIM) will contain specific definitions of eligibility and targeting requirements and measures for reporting accomplishment of the reform.

As part of this reform, EPA has certain expectations regarding the interaction between EPA and PRPs as work progresses at a site. Implementation of these expectations will help develop and maintain effective working relationship practices and should be commonplace components of EPA's oversight management process for settling PRPs. Such practices include, but are not limited to:

1) Oversight kickoff meetings at which EPA and PRPs discuss performance and oversight expectations. Such meetings are prescribed in RI/FS and RD/RA oversight guidance[1] and

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[1] OSWER, EPA. July 1991. Guidance on Oversight of Potentially Responsible party Remedial Investigations and Feasibility Studies. Final, Volume 1. OSWER Directive 9835.1(c). PP1-27.

OSWER, EPA. April 1990. Guidance on EPA Oversight of Remedial Designs and Remedial Actions Performed by Potentially Responsible Parties. Interim Final.

should be conducted whenever a major change in the phase of cleanup occurs.

2) Annual discussions during which EPA and PRPs review the past year's oversight activities and discuss future work and oversight expectations. The Superfund reform on PRP oversight specifically requires Regions to offer to discuss oversight expectations with PRPs annually. To the extent practicable, discussions should include consideration of other stakeholders' interests and estimates of possible oversight contractor costs to be incurred. (RPMs should take care to remind PRPs that all cost estimates are preliminary, may represent only a portion of EPA's oversight costs, are non-binding, and that PRPs will be expected to pay all oversight costs, including those that exceed estimates.) In some cases, PRPs may not find value in having such conversations, or their concerns may be fulfilled through other avenues of communication. Thus, they have the discretion to decline such invitations. However, Regions are expected to honor PRP requests for such meetings or discussions where there is ongoing PRP response work pursuant to a settlement.

3) Regular communication with PRPs on the progress of work and the oversight being conducted. EPA expects that RPMs will communicate with PRPs or their contractors on the progress of work at all sites according to the mechanisms of review and approval of deliverables as specified in each settlement agreement. The frequency of communication will necessarily be based on site-specific activities, the nature of the deliverables being produced, and the relationship between the RPM and PRPs. In addition, when appropriate, RPMs are encouraged to inform PRPs of significant shifts in the level of oversight from those previously planned. This information can help the PRPs anticipate potential cost increases (or decreases) that may appear in an upcoming oversight bill, give them opportunity to be responsive to issues that may concern the RPM, and assist the PRPs when offering suggestions on ways to conduct oversight more efficiently for the RPM's consideration. This exchange of information should not affect EPA's ability to use any practices, such as unannounced inspections, that an RPM deems to be effective oversight tools. Furthermore, such communication between a PRP and RPM does not limit the RPM's oversight authority nor create additional PRP "rights" to limit the amount of oversight EPA conducts.

The Role Of States

To varying degrees, States will have interest in cleanup activities that are performed by PRPs under the oversight of EPA. A State may have a significant technical oversight role in PRP-conducted cleanups, particularly where the State is conducting the oversight for EPA under a cooperative agreement and/or is a signatory to an enforcement agreement. A State may also be interested in performing oversight tasks where community interests or implementation of State standards are of concern.

OSWER Directive 9355.5-01. P5-6.

States that have active interest in oversight may be included in annual discussions with PRPs about oversight expectations and project progress. Although some overlap may be

unavoidable, RPMs should work with States to facilitate options that prevent unnecessary redundancies and maximize efficient use of limited State/EPA resources.

Oversight Billing

Timely billing is another important component of maintaining good working relationships with PRPs that facilitates recovery of EPA costs. Under the Superfund reform on PRP oversight, Regions are required to issue a timely bill for future response costs (including oversight costs addressed by this guidance) that, to the extent called for by the underlying settlement agreement, is accompanied by appropriate cost information or documentation. Alternatively, if a Region will not issue a bill for the full amount owed (e.g., in cases where site-specilic accounts have been established expressly to pay for oversight costs), the Region will provide the PRPs an accounting of its oversight costs. In transmitting the bill to the PRPs, the Region should identify an EPA contact person whom the PRPs may call if they have questions related to the bill.

Potentially Cost-Saving Oversight Management Techniques

The attachment to this memorandum describes several concepts Headquarters and the Regions have identified that can potentially improve the effectiveness and efficiency of oversight management at Superfund sites. This guidance does not prescribe the use of these ideas for any particular site, but encourages RPMs to consider these tools while planning and conducting oversight. RPMs have discretion to use any or all of the approaches described and may modify any of the ideas within the scope of the settlement and existing Agency policy and guidance to suit individual site needs. Finally, although the Agency broadly advocates the use of these techniques to improve the management of oversight, facilitate cleanup, and provide an open forum for suggestions, we recognize some techniques may be inappropriate in site-specific situations.

If you have any questions regarding this Directive, please contact either Alan Youkeles, OERR (703-603-8784), or Bruce Pumphrey, OSRE (202-564-6076), or a Headquarters or Regional work group representative listed below.

NOTICE: This document is intended solely to provide information to EPA personnel, the public and to CERCLA potentially responsible parties regarding the conduct of CERCLA response actions. While the guidance contained in this document may assist industry, public and federal and state regulators in applying statutory and regulatory requirements of CERCLA, the guidance is not a substitute for those legal requirements; nor is it a regulation itself. Thus, it does not impose legally-binding requirements on any party, including EPA, States or potentially responsible parties.

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cc: Office of Regional Counsel Superfund Branch Chiefs

Attachment: Potentially Cost-Saving Oversight Management Techniques

1. **Conduct sporadic and unscheduled inspections instead of continuous oversight.**

Where a PRP's contractors have shown themselves to be reliable and technically competent, the use of sporadic inspections rather than continuous oversight can result in significant cost savings. RPMs should realistically examine and plan time to be spent in the field, determining what points in the process are critical and which are not (for example, the beginning of a particular construction phase or particularly complex or critical process). Using unscheduled inspections will be most appropriate where a construction project is fairly routine and/or a particular process is to be repeated multiple times. At some sites, the addition of unannounced inspections may give RPMs additional confidence in using sporadic oversight. However, many inspections must be preplanned to coincide with particular activities and personnel onsite.

2. **Work directly with PRP contractors and encourage information exchanges between EPA oversight contractors and PRP contractors.**

In addition to working with PRPs, EPA can communicate with the PRP contractor if the PRPs are willing. At sites where EPA and the PRP are working well together and have established some degree of trust and confidence, oversight cost savings may be realized by this technique. By communicating directly with the PRP's contractor, EPA can more rapidly and more accurately exchange information and advance the progress of the project. In some instances the PRP project manager may allow EPA to work directly with the contractor through all phases of the cleanup. The RPM should get approval from the PRP before working directly with the PRP's contractor and should clearly establish the nature of the information exchange that can take place between EPA and the contractor without the presence of the PRP. EPA should keep the PRPs informed throughout the process.

It is also often beneficial for an EPA oversight contractor and a PRP contractor to exchange information directly, especially in the field. For example, during design, it may be advantageous for the RPM to direct the EPA oversight contractor to explain a technical matter directly to the PRP's contractor. In other situations, such as during field work, the RPM may direct the oversight contractor to bring concerns directly to the PRP contractor, after confirming that the oversight contractor will bring major concerns first to the RPM. In all cases, however, all parties should be clear that only authorized EPA personnel may speak on behalf of EPA with respect to changes to, or acceptance of, work.

3. Consider using State personnel to conduct oversight instead of, or in coordination with, EPA.

Although a State and EPA may each have unique interests in the specifics of a cleanup, they also generally have numerous common concerns as well. An option for reducing potential duplication of oversight efforts by the State and EPA is to consider using State personnel, under a cooperative agreement with EPA, to conduct oversight of discreet activities instead of, or in coordination with, EPA. In addition to reducing potential duplications of effort, relying on State personnel may offer other advantages. First, the cost of using States to conduct oversight may be less than using Federal in-house or contractor resources. Further, where travel is a large part of the cost of oversight, reliance on nearby State personnel can sometimes result in considerable savings. Another advantage to having State personnel conduct oversight is that it may help the State enhance existing capabilities (consistent with OSWER guidance on enhancing State capabilities).

For this oversight strategy to be successful, it is essential that there be a good working relationship between the State and federal project managers, substantial agreement about investigation/construction work to be conducted by the PRP, and agreement on the chain of command for directing work at the site. For this idea to work the State must have personnel capable to conduct the required oversight and resources sufficient to conduct the task under the State/EPA cooperative agreement. This arrangement is not appropriate for sites where the State is a PRP, or may not be appropriate where the public has expressed a preference for EPA direct oversight.

4. **Consider using interagency agreements with other federal agencies to use government personnel to conduct timely and effective oversight or review of documents.**

Using government personnel from other federal agencies to conduct oversight or document review can, in certain cases, be an effective management tool, especially when in-house oversight resources are unavailable. If an RPM decides to use another government agency to conduct oversight, the RPM should obtain a commitment from the agency for the oversight work to be performed. A partnering agreement is a useful tool to assure appropriate personnel are provided when needed and that a successful relationship occurs. The RPM should also evaluate the expertise and the approach the agency would use to perform the oversight or review.

RPMs can rapidly obtain personnel resource support from other federal agencies, especially where EPA already has an interagency agreement (IAG) in place with the government agency being considered. Several EPA Regions have generic IAGs with the US Army Corps of Engineers (USACE) that enable the Regions to fill out a short form to initiate work quickly at any site. Once EPA makes a request for work through one of these generic IAGs, work can often start in about a week. Work under other IAGs, such as site-specific technical assistance IAGs, may take three weeks to six months or longer to put into place. Certain Regions may also have IAGs with the US Bureau of Reclamation (USBR) or US Geological Survey (USGS) that can be accessed for oversight work.

5. Streamline the Agency's approval of **PRPs'** choice of commercial laboratories, for those laboratories that are NELAP accredited or currently have a CLP analytical contract.

For Federal fund-lead Superfund sites, a significant portion of the Superfund program's analytical work is performed by commercial laboratories that are participants in the Contract Laboratory Program (CLP). The CLP represents a set of commercial laboratories that have fixed-price contracts with the Agency. Laboratories in the CLP rely on prescriptive analytical statements of work (SOWs) and a thorough Quality Assurance Program to provide analytical data of known and documented quality that are able to withstand independent review and verification. To be eligible as a CLP laboratory, the laboratory must have successfully analyzed pre-award Performance Evaluation (PE) Samples and passed an on-site audit. The National Environmental Laboratory Accreditation Program (NELAP) has also developed Quality Assurance requirements that a laboratory must meet before it may be awarded NELAP accreditation which also includes successfully analyzing PE samples and passing an on-site audit.

Administrative Orders on Consent (AOC) and Consent Decrees generally require the Agency to approve a PRP's choice of a laboratory. Since laboratories that have NELAP accreditation or a current CLP contract have already demonstrated their capability to generate quality data, RPMs may quickly approve the PRP's choice of laboratories based on their NELAP accreditation or CLP contracts. This streamlined laboratory approval process should avoid repetitive Federal and State assessments of the laboratory's capability to generate quality data. However, when RPMs approve PRP's choice of laboratories in this manner, the RPMs should be mindful that these laboratories are under contract to the PRPs and have no obligation to EPA to conduct analyses pursuant to CLP contract or NELAP certification specifications.

Actual laboratory performance on any given environmental case and the laboratory's demonstrated capability to generate quality data are separate concepts. Although a laboratory may have the demonstrated capability to generate quality data, the Region must still review a PRP's analytical data and verify that the data are of acceptable quality to support site decisions. The CLP program, for example, requires the submission of electronic and hard copy data packages that are assessed electronically by its Data Assessment Tool for contract compliance and quality control criteria on a case-by-case basis. Electronic spreadsheets (e.g., Lotus) are then sent within 24 to 48 hours from the receipt of the laboratory data to Regional data validators.

6. Consider alternatives to using standard split sampling methodology.

Depending upon site-specific circumstances, especially with respect to PRPs' capability and the public's confidence in the PRPs' effort, alternatives to the standard split sampling protocol may reduce the costs associated with split sampling without sacrificing EPA's independent verification of PRP activities. One alternative is to allow the PRPs to use a field laboratory for their analysis while EPA sends split samples to a conventional laboratory or to OERR's Contract Laboratory Program (CLP). For this option to be effective, EPA would have to ensure that the analytical methods of the laboratories are the same (comparable methods might also be used but would require additional comparability evaluations). This process could save the PRPs analytical resources while still providing EPA with confidence in the sampling results.

Another possibility is for the PRPs, under the oversight of EPA or its contractors, to take their own split samples and ship them to an EPA laboratory or via the Regional Sample Control Center Coordinators ship them to the CLP for analysis. This method would save EPA the cost of developing its own Quality Assurance Project Plan (QAPP) for sample collection as well as costs of taking, handling, and shipping the samples. EPA would necessarily still incur the cost of observing the sampling effort but would not require an entire field team to take samples.

7. Provide PRPs with access to models and good examples for work planning documents such as Quality Assurance Project Plans and Health and Safety Plans.

PRPs that use task-appropriate models can better focus their efforts as well as facilitate EPA review, thus potentially streamlining PRP and EPA oversight costs. Although models may provide valuable assistance in producing deliverable documents, models should be tailored to site-specitic circumstances. RPMs should employ appropriate flexibility when relying on the models to ensure that the documents produced are commensurate with the work to be performed.

Several Regions have model or sample documents or checklists that they make available to the regulated community. Numerous guidance and model documents are also available on the Internet. Suggested links for information on quality assurance documents include:

http://www.epa.gov/region09/qa/index.html
http://es.epa.gov/ncerqa/qa/qa_docs.html

8. **When appropriate, consider writing remedial design (RD) and remedial action (RA) Scopes of Work and Consent Decrees that combine and/or eliminate unnecessary or duplicative RD and RA submittals.**

Reducing the number of deliverables that PRPs submit or combining multiple deliverables into single documents may help streamline and focus PRP work and EPA oversight. For example, depending on the complexity of a specific design, an RPM may determine that only preliminary and final design submittals are necessary, or that several plans can be incorporated into one document. In some cases, the RPM may also decide that working meetings may be adequate replacements for certain interim deliverables. Where appropriate, Consent Decrees and Scopes of Work should be written to provide such flexibility.

9. Use in-house EPA experts for document review and/or oversight when available, in lieu of contractors.

Using EPA personnel rather than oversight contractors to conduct document review or routine field oversight may result in cost savings at certain sites depending on the availability of in-house expertise for such activities. This is especially true where, even with contractor assistance, much of the RPM's involvement is still necessary. Alternatively, cost savings may also be achieved by directing EPA oversight contractors to selectively review components of documents that the RPM does not have the expertise to review or when no in-house expert is available.

Although direct oversight by EPA personnel may save costs on a site-specific basis, Regional priorities may require RPMs and other in-house experts to work on several sites at one time. Where in-house resources are limited, oversight contractor assistance may be necessary to assist RPMs who are overseeing the activities of several sites simultaneously. RPMs and their managers will need to balance the potential cost savings associated with RPM's and other technical experts' commitments to any individual site and the Region's commitments to accomplish work at several other sites.

10. Provide flexibility in developing payment schedules if necessary.

Circumstances may require some flexibility in establishing schedules for payment of EPA's oversight costs. Where such circumstances exist, EPA may consider a private party's proposal for an alternate payment arrangement. Proposals should include a justification as to why an alternate payment arrangement is necessary (e.g., documented inability to pay on the standard or existing schedule). If EPA elects to adopt an alternate payment arrangement, EPA will ensure that future payments reflect the present value of money.

11. The use of the facilitator, especially a trained mediator, may help increase the efficiency of meetings and the project process under certain situations.

A key to successful site work is the development of trust between EPA, the State, the PRPs, and the community. In certain situations, where conflicting interests among interested parties may threaten to slow the progress of a project, facilitators may help improve discussions and move the project forward. A facilitator or mediator can be used at almost any point in the process where the input, or agreement of the multiple parties, would expedite progress. A facilitator may be especially useful when numerous parties are involved or where relationships among the PRPs, EPA, and/or the State may be strained. Facilitators have been used successfully at several sites. For example, a mediator/facilitator has been successfully used to address tensions among landowners, city officials, and PRPs to resolve land owner concerns regarding the city's redevelopment plans and the remedial action objectives of the selected remedy. At another site, a mediator helped the interested parties (State, local government, PRP, and community groups) understand the uncertainties regarding residual risks associated with various levels of cleanup and become comfortable with the selected cleanup level of the remedy.

12. Make use of available Response Action Contracts (RACs) tools to review EPA contractor bills.

Response Action Contracts (RACs) are the long-term cleanup contracting component of EPA's Superfund Long-Term Contracting Strategy (LTCS), released in September 1990, which defined the portfolio of Superfund Contracts. Under RACs, the work assignment manager (WAM) has the responsibility to ensure that contractor work assignments are managed effectively. Standard reporting requirements have been developed for RACs as cost management tools that the WAM (who is often the RPM) is to use to assist the review of contractor performance and costs. For example, the Monthly Progress Report includes a narrative that describes the work done over the given reporting period and a financial backup that provides documentation of the costs for the reporting period. By carefully reviewing these reports, the WAM is able to verify that the assigned work was accomplished, was within the scope of work of the work assignment, and that the costs were reasonable and allowable. The WAM should use this review to help determine that contractor oversight tasks and costs are appropriate and can use this tool as a means to control oversight costs.

13. Consider using language in Administrative Orders and Consent Decrees that minimize cleanup down time.

Regions may consider using Administrative Orders that combine the RI/FS and RD to reduce down time for PRP contractors who are waiting for RA negotiations and entry of Consent Decrees to be completed. Another option is to build provisions into Consent Decrees that enable PRPs to start the RD at the point of Consent Decree lodging. Regions also might consider negotiating for an Administrative Order on Consent for an RD and then negotiating a Consent Decree for the RA. These techniques can save one to three years of project down time.