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OFFICE OF  
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Limiting Lead Transfers to Private Parties During Discrete Phases of the Remedial Process

FROM: *for* Bruce M. Diamond, Director *Elaine Starkey*  
Office of Waste Programs Enforcement

TO: Waste Management Division Directors

The success of Superfund's enforcement efforts can be seen in the increasing value of PRP settlements to conduct remedial work: from \$512 million in FY88 to over \$1 billion in each of the past two years.

In an effort to make additional improvements in the enforcement program we examined potential sources of delay in a Superfund 30-Day Task Force Report commissioned by Don R. Clay, Assistant Administrator for Solid Waste and Emergency Response. We found that despite the benefits of PRPs taking lead responsibility in remedial activities, when PRPs assume the lead from EPA during a discrete phase of the project -- such as the remedial investigation/feasibility study (RI/FS), the remedial design (RD), or the remedial action (RA) -- the remedial process can be delayed significantly.

Allowing PRPs to assume the lead once EPA has obligated its own funds for a project introduces a number of time-consuming activities: negotiating an enforceable order or consent decree, changing contractors and funding mechanisms, and demobilizing and re-mobilizing operations and equipment in the field. After EPA has begun work on the RI/FS, negotiating with PRPs to transfer the project to them can take as long as six to nine months.

Because of these delays, we are establishing an Agency-wide policy limiting lead changes from EPA to PRPs in the middle of discrete phases of the Superfund process (such as the RI/FS, RD, or RA) except in situations where the change

will not cause undue delay. The policy applies to lead changes from EPA to PRPs only; not EPA takeovers of PRP work or lead changes involving states. The policy is not intended to alter Superfund's goal of "enforcement first" or to eliminate the opportunity for PRPs to conduct remedial work. The intent, rather, is to avoid delays by limiting the points in the process at which PRPs may take the lead to times that are least disruptive.

We recommend that Regions make clear to PRPs during RI/FS and RD/RA negotiations that once EPA begins work on a phase of the cleanup, requests for lead changes will not be entertained except in unusual circumstances. Emphasizing this during initial negotiations, especially as a nationwide practice, may encourage PRPs to agree more readily up front to conduct remedial work.

When circumstances warrant passing the lead to PRPs during a phase of the cleanup, we recommend taking preemptive steps to minimize potential causes of delay. For example, when PRPs assume the lead during the RI/FS, they should be given a limit of sixty days in which to enter into an administrative order on consent or consent decree to perform the work.

Lead changes between discrete phases of the Superfund process (such as between the RI/FS and the RD) are generally preferable to changes during phases. However, lead changes from EPA to private parties between the RD and the RA are a concern because of the potential for significant delay. PRPs, for instance, may request changes in the design, and have done so after signing the consent decree at some sites.

In some cases, letting PRPs assume the lead between the RD and RA is entirely appropriate, such as when a state is unable to contribute funds for the RA -- preventing EPA from funding the work -- and a PRP lead is the only alternative, or when there are significant implications for the Fund. When the cost of the RA is exceptionally high, and new PRPs who are viable and able to carry out the remedy are identified, a lead change may be the preferred alternative.

When a lead change between the RD and RA is being contemplated, steps should be taken to minimize the time required for the change. Design changes should be discouraged, for instance, and Regions should examine whether any preparations for carrying out the remedial action would best be completed by EPA before PRPs assume responsibility for the lead.

Finally, nothing in this memorandum is intended to discourage Regions from exercising the right to take back the responsibility to perform an RI/FS or implement an RD/RA if the PRP is recalcitrant or if circumstances otherwise warrant.

cc: Regional CERCLA Branch Chiefs  
Regional Counsel CERCLA Branch Chiefs