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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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MEMORANDUM

SUBJECT: Initiation of PRP-financed Remedial Design in Advance of Consent Decree Entry

FROM: *J. Winston Porter*  
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Solid Waste and Emergency Response

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Assistant Administrator for  
Enforcement and Compliance Monitoring

TO: Regional Administrators

This memorandum addresses a process for expediting the initiation of response work by potentially responsible parties (PRPs) at sites where agreements with PRPs have been reached and where PRPs will agree to begin remedial design work promptly, but where a consent decree has not yet been entered by the court.

For PRP-financed remedial design/remedial action (RD/RA) activities, the initiation of response work, including the remedial design, has historically been dependent on the entry of a consent decree. This usually means a delay of at least several months between the time agreement is reached and when the consent decree is entered and work actually begins. Delays in initiating remedial designs and consequently remedial actions, are inconsistent with EPA's effort to expeditiously remediate sites and meet the statutory goal for remedial action starts. It is in the interest of both the government and PRPs to begin work as quickly as possible.

EPA's strategy is to encourage PRPs to agree to settlements wherein engineering design work can proceed upon the lodging of a consent decree by EPA, or where litigation is already pending, upon execution of a stipulation. Where PRPs have agreed to early initiation of a remedial design and a complaint has not been

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filed prior to the lodging of a consent decree, the proposed consent decree should provide for conduct of the remedial design upon lodging. The consent decree should specify the obligations regarding design that start upon lodging. In addition, the consent decree should clarify that, following entry of the consent decree, these obligations concerning remedial design are subject to enforcement (including stipulated penalties) pursuant to the consent decree retroactive to lodging. Where a complaint has been filed, alternatively, a stipulation for conduct of the remedial design may be filed after the ROD is signed, if negotiations are sufficiently well along that EPA is confident that the PRPs will agree to commit to conduct the remedy. Such a stipulation should include schedules and be enforceable by the court. The stipulation should specify that the obligations thereunder shall be obligatory until expressly superceded by any subsequently entered consent decree. Another way which is less preferred, but may be used to accomplish this same goal where PRPs have agreed to early initiation of a remedial design, is for EPA to issue an administrative order solely for the remedial design, leaving the remaining portions of the remedial action for a consent decree under Section 122 of CERCLA.<sup>2</sup> In determining whether to issue an order for a remedial design, Regions should consider the preference for a complete remedial design/remedial action settlement and whether it is likely that the PRPs will not agree to conduct the remedial action.

EPA recognizes that there are limited risks in requiring the remedial design to begin prior to the entry of a consent decree. First, it is conceivable that the settlement will not be agreed upon by the parties or ultimately approved by the court, which would require additional expenditures by the PRPs to modify the remedial design. In keeping with the public's right to review consent decrees, the Federal Register notice prepared by DOJ

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<sup>1</sup> Under either approach, remedial design work would not have to be delayed pending completion of CERCLA Section 122(d) procedures for public comment of proposed consent decrees. Consistent with established Agency policy, a remedial design is considered to be a removal action, and thus outside the scope of Section 122(d)(1), which covers proposed agreements concerning remedial action under Section 106. Thus, while the Agency may voluntarily agree to subject the terms of the remedial design portion of a proposed Section 106 remedial action consent decree to the procedures of Section 122(d), there is no legal requirement to do so.

<sup>2</sup> A Section 106 unilateral administrative order is not subject to Section 122(d) requirements, so that remedial design work could begin immediately.

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should specify that certain actions are triggered by, and start upon, lodging a consent decree or filing a stipulation. Since the public will have already had the opportunity to comment on the remedy, where the remedial design is consistent with the remedy, no additional comment is required. Comments should, therefore, be directed toward the settlement itself and the risk of remedial design modification is minimal. Second, Regions should ensure that the PRP's remedial design, upon approval by EPA, is acceptable for implementation by EPA in the event that the PRPs do not agree to implement the remedial action. Notwithstanding these risks, the requirement for early initiation of remedial design work is important in the context of all RD/RA negotiations. Language requiring these actions should go to the PRPs as part of, or along with, the draft consent decree at the time special notice is issued. A model stipulation is attached.

The effect of this strategy will be to reduce the time involved prior to initiation of on-site response work in those cases where PRPs are committed to undertaking the remedial action and willing to begin early design. This will further the statutory and programmatic goal to facilitate remedial action starts. For more information please contact Brad Wright in OWPE at FTS 382-4837 or Janice Linett in OECM-Waste at FTS 475-8173.

Attachment

cc: Directors, Waste Management Division,  
Regions I, IV, V, VII, VIII  
Directors, Hazardous Waste Management Division,  
Regions III, VI  
Director, Emergency and Remedial Response Division,  
Region II  
Director, Toxics and Waste Management Division, Region IX  
Director, Hazardous Waste Division, Region X  
Regional Counsels, Regions I-X  
Superfund Enforcement Branch Chiefs  
RCRA/CERCLA ORC Branch Chiefs  
David Buente, DCJ

ATTACHMENT

PRE-SETTLEMENT REMEDIAL DESIGN STIPULATION AND AGREED ORDER

UNITED STATES DISTRICT COURT  
DISTRICT OF \_\_\_\_\_

\_\_\_\_\_  
UNITED STATES OF AMERICA,

CIVIL ACTION

PLAINTIFF

NO. \_\_\_\_\_

v.

\_\_\_\_\_  
DEFENDANTS.  
\_\_\_\_\_

STIPULATION AND AGREED ORDER

Plaintiff, the United States of America, ("United States") has filed an action under Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. Section 9606, 9607 et seq., (CERCLA) against \_\_\_\_\_, ("Settling Parties").

In order to expedite the commencement of the remedial action at the \_\_\_\_\_ site, which is the subject of this action, the United States and the Settling Parties, stipulate as follows:

[The following provisions of the stipulation are provided as examples. The provisions should be developed on a site-specific basis and reviewed for completeness by the Region. OSWER Directive No. 9350.0-4A "Superfund Remedial Design and Remedial Action Guidance" may be consulted for guidance on steps and deliverables. State and/or Regional Remedial Project Manager review requirements should be included as appropriate. Language in the stipulation should closely track that used in the workplan attached to the Consent Decree so as to eliminate any possibility of inconsistency].

- A. 1) Within thirty (30) days of the filing of this stipulation the Settling Parties shall retain qualified personnel to prepare detailed plans and specifications for implementation of each element of the selected remedy described in the EPA Record of Decision ("ROD") for \_\_\_\_\_ site dated \_\_\_\_\_.
- 2) Within thirty (30) days of the filing of this stipulation the Settling Parties shall submit to the United States for its review and approval a detailed schedule for the completion of the Remedial Design including specific milestones for submissions of plans and specifications, set forth in the Workplan, dated \_\_\_\_\_ which is attached. [The stipulation should include a specific schedule for the preliminary 30, 60, 90, and the final 100 percent design completion milestones as well as any intermediate submissions that the Region deems necessary.]
- 3) The Settling Parties shall provide monthly reports to the United States in accordance with the schedule developed pursuant to paragraph A.2. above, together with all background data, analyses and other supporting information for review and written approval by EPA. In the event that the United States disapproves of any plan or portion thereof, it shall specify in writing the reasons why it believes such plan or portion thereof does not conform to the ROD or applicable law or regulation including the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R. Part 300.

B. All plans and specifications shall be consistent with applicable requirements contained in the ROD and in accordance with CERCLA and the NCP.

[It is important to re-emphasize here that the above provisions should be used as a point of departure for framing those which will actually be included in the stipulation. Such a stipulation is valid only for Remedial Design work and will be entered into by the United States in conjunction with the lodging or anticipated lodging of a Consent Decree for RD/RA. Actual stipulations made should be consistent with this definition.]

C. The Parties to this stipulation acknowledge that this stipulation has been entered into in anticipation of settlement and may be affected by a consent decree expected to be entered subsequent to this filing. The Parties agree to comply with the terms of this stipulation unless the terms of any subsequently entered consent decree expressly supersede the terms of this stipulation.

Stipulated by:

ROGER MARZULLA  
Acting Assistant Attorney  
General  
Land and Natural Resources  
Division  
U.S. Department of Justice  
Washington, D.C. 20530

[PRP #1]  
[Address]

[PRP #2]  
[Address]

THOMAS L. ADAMS, JR.  
Assistant Administrator  
for Enforcement and  
Compliance Monitoring  
U.S. Environmental Protection  
Agency  
Washington, D.C. 20460

[REGIONAL ADMINISTRATOR]  
[Regional Address]

[ORC ATTORNEY]

It is so ordered this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_\_.

United States District Judge