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

AUG 2 1996

OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Documentation of Reason(s) for Not Issuing CERCLA §106 UAOs to All Identified PRPs

FROM: Jerry Clifford, Director
Office of Site Remediation Enforcement, OECA

TO: Addressees

This memorandum is being issued as part of the third round of CERCLA Reforms, announced October 2, 1995. Like many of the other Reforms, this Reform is intended to promote fairness and minimize transaction costs. The Agency expects that ensuring the equitable issuance of UAOs will ultimately increase the likelihood of settlements and reduce private party litigation.

The purpose of this memorandum is to establish procedures that will ensure that Regional staff document their reason(s) for proposing that certain Potentially Responsible Parties ("PRPs") be excluded from CERCLA §106 unilateral administrative orders ("UAOs") to be issued. It also establishes procedures for situations when Regional staff propose not to issue UAOs to late-identified PRPs, i.e., PRPs who are identified after other PRPs assume the obligation to conduct the response action.

Background

A. Policy on Issuance of UAOs

It has long been EPA's policy to issue UAOs to the largest manageable number of parties, following consideration (as appropriate) of the adequacy of evidence of the party's liability, the party's financial viability, and the party's contribution to the site. See, e.g., EPA's Interim CERCLA Settlement policy, dated December 5, 1984 (OSWER Directive number 9835.0); this policy was reiterated in guidance issued March 7, 1990 (OSWER Directive Number 9833.0-1a) and again in guidance issued June 20, 1991 (OSWER Directive Number 9833.2c). This policy remains the same as in the past. Thus, for example, whenever it is determined that it would not be fruitful to

commence or continue settlement negotiations, the Regions should issue a UAO, and the Respondents receiving the order should be the largest manageable number considering these three factors.

Although the policy on who should receive a UAO remains unchanged, two aspects need clarification. First, the phrase "largest manageable number" refers to the largest number of PRPs that a Region can readily handle within the constraints of its limited resources. In some cases, Regions make a determination not to include de minimis parties in order to keep the total number of UAO recipients manageable. (Depending on the circumstances, exclusion of de minimis parties may be consistent with other CERCLA reforms, which are designed to protect small contributors.) In other cases, the PRPs (including de minimis PRPs) organize themselves into a Steering Committee; concerns regarding manageability are lessened when a Region is dealing with numerous PRPs as a single group, rather than individually. The Region may be able to issue the UAO to a larger "manageable" number of PRPs when they are organized into a Steering Committee. Second, Regions may interpret the term "contribution" to take into consideration a particular PRP's participation in previous phases of the response action. The Agency's existing guidances generally use this term to reflect a particular PRP's relative contribution to the contamination (e.g., the volumetric contribution of a generator-PRP or any disproportionate toxicity of the waste contributed by a generator-PRP). It is appropriate, however, for Regions to have the flexibility to interpret this term to also include consideration of work that a particular PRP may have already conducted at the site, especially where such work is equivalent to that PRP's "fair share."[1]

B. Past Record in Issuance of UAOs; Administrative Reform

The Agency believes that, consistent with existing guidances, our issuance of UAOs has generally been sound and sufficiently supported. For example, we previously conducted an in-depth evaluation of UAOs issued during fiscal year 1990 and concluded that the process the Regions were using to select PRPs for UAO issuance appeared "reasonable and fair." See 6/20/91

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[1] Suppose, e.g., a particular PRP contributed approximately one third of the waste at a site, and that this PRP alone conducts one of two operable units of a cleanup, say at a cost of $1 million. If the Region has reliable cost information indicating that the other operable unit will total $2 million, then it would be appropriate to exclude this PRP from any UAO being issued to the viable PRPs that contributed the other two-thirds of the waste. However, if the subsequent OU is expected to total $20 million, then it would not be appropriate to exclude this PRP from any UAO because it has not yet borne its "fair share."

guidance referenced above. The evaluation found that the Regions' reasons for selecting certain PRPs to receive UAOs "appear to relate to legitimate matters of enforceability and sound enforcement discretion."

Some industry representatives disagree with the proposition above, and criticize the Agency for failing to issue UAOs to all identifiable PRPs, including PRPs that are municipalities or federal agencies. The criticism is targeted more at EPA's record in issuing such UAOs, rather than at EPA's underlying policy.

EPA recognizes that, for various reasons, UAOs may not have been issued to the largest manageable number of identified PRPs at some sites. Thus, in announcing our third round of Administrative Reforms of the Superfund program in October 1995, EPA committed to ensuring that UAOs are issued in an equitable manner in the future. This includes a commitment to issue UAOs, as appropriate, to other government entities (federal, state or local) that are PRPs.[2]

Procedures for Documenting Reason(s) for Excluding Certain PRPs

Henceforth, EPA will identify, for internal management review purposes only, reasons for excluding PRPs from any order proposed to be issued. Specifically, the UAO package submitted to the Regional decision-maker for signature/approval/concurrence should include sufficient information regarding the parties that are proposed to be excluded from the UAO as well as those being proposed to receive the UAO. The usual privileges and/or FOIA

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[2] The Agency's policy and procedures for federal agencies remain unchanged: such agencies "will be issued notice letters and administrative orders where appropriate" (see 12/5/84 guidance referenced above; see also U.S. Department of Justice guidance, "Procedures and Criteria for Department of Justice Concurrence in EPA Administrative Orders to Federal Agencies," December 27, 1988). Pursuant to the applicable procedures, DOJ must concur with any EPA decision to issue a UAO under CERCLA section 106 to a federal agency. As to municipal entities, the Agency recognizes that they have unique characteristics; they might, for example, manage drinking water supplies or publicly-owned treatment works ("POTWs"). Moreover, they may not have the financial resources to afford certain expensive components of a response action. Consequently, the Agency has previously indicated its willingness to issue UAOs that "carve out" certain obligations that a municipality may be in a position to readily provide toward the response action. (Interim Municipal Settlement Policy, dated December 6, 1989, OSWER Directive #9834.13.) Such in-kind services might include treatment of leachate at POTW facilities, hook-up to drinking water supplies, police security, hauling of non-hazardous waste, or O&M.

exemptions concerning the releasability of enforcement-sensitive information will, where appropriate, apply to such information contained in the UAO package.

Where appropriate, Regional staff may provide explanations for excluding entire categories of PRPs, rather than requiring specific explanations for each individual PRP not receiving the UAO. While such explanations may be appropriate when the Regional staff's proposal not to issue a UAO is based on the PRPs' volumetric contribution, they might not be appropriate when the proposal is based on financial viability or the adequacy of liability evidence. In addition, the Regional staff in many instances will have already discussed its strategy regarding non-issuance of UAOs in an earlier document (e.g., a Pre-Referral Negotiations package). In order to minimize undue duplication, Regional staff may incorporate such documents into the UAO package by reference.

This documentation requirement has been phased in, initially applying only to RD/RA, and later (as of FY-97) being extended to UAOs for removals and RI/FSs. In RD/RA cases, Regional staff typically prepare UAO packages only after EPA has issued special notice letters pursuant to CERCLA §122(e)(1) and negotiations have been concluded without a settlement. For such cases, Regional staff will identify and explain, in writing, their reason(s) for excluding PRPs who received such letters from the UAO proposed to be issued.[3] Similarly, for RD/RA cases where EPA has only issued general notice letters, staff will document the reason(s) for any discrepancy between the universe of PRPs who received such letters and the universe of PRPs being proposed to receive the UAO.

As to UAOs for removals or RI/FSs[4], the Agency may not have

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[3] EPA's policy regarding who should receive general and special notice letters is similar to its policy for issuance of UAOs. Specifically, Agency guidance provides that the Regions should issue such letters "to all parties where there is sufficient evidence to make a preliminary determination of potential liability under §107 of CERCLA." It also indirectly indicates that consideration of a PRP's financial viability and contribution to the site, respectively, could be appropriate. Interim Guidance on Notice Letters, issued October 19, 1987 (OSWER Directive number 9834.10).

[4] There may even be RD/RA situations where the Agency has either not yet issued any notice letter or determined that issuance of a notice letter would not be worthwhile. Consistent with above guidance, Regional staff should use its best available information for purposes of identifying PRPs that ought to be excluded from the order.

issued any notice letters (special or general) prior to preparation of the UAO package. This might reflect the fact that Regions' previous PRP search efforts had not progressed to the point where there was sufficient evidence to make a determination of CERCLA liability. For example, in the situation of a time-critical removal, the Region may not yet have had sufficient time to conduct an exhaustive PRP search. In an instance where a list of notice letter recipients is unavailable, Regional staff should use its best available information on PRPs for purposes of identifying PRPs that are proposed to be excluded from the order. Note, however, that EPA policy still provides that a UAO should not, except in limited emergency situations, constitute an initial notice to a PRP.[5]

In many cases, PRPs already identified by EPA will provide the Region with a list of names of parties whom they believe should also be named as PRPs. For purposes of the preceding paragraph, the phrase "best available information" does not necessarily include any PRP-provided list. Regional staff are only required to justify non-issuance of UAOs in situations where the other PRPs provide sufficient information to support a preliminary determination on CERCLA liability.

Finally, Regional staff are required to prepare appropriate documentation for decisions not to issue UAOs to late-identified PRPs, i.e., PRPs who are identified after other PRPs assume the obligation to conduct the response action. When a Region identifies a PRP at such a stage, it should consider issuing a UAO requiring the respondent to participate and cooperate with the other PRPs. (Headquarters recently distributed model UAO language requiring late-identified PRPs to "participate and cooperate" with PRPs already conducting the cleanup pursuant to either a settlement agreement or an earlier UAO. It is similar to the "coordinate and cooperate" language contained in "parallel UAOs," discussed in the 3/7/90 guidance referenced earlier, although those orders are for already-identified PRPs who are recalcitrant and refuse to join other PRPs who are signing a consent decree.) In seeking Regional management's approval not to issue a "participate and cooperate" UAO to a late-identified PRP, the Regional staff should promptly document its rationale for non-issuance. Obviously, in cases where the work is substantially completed, issuance of "participate and cooperate" UAOs will generally be inappropriate.

Implementation

As noted earlier, the documentation requirement has been phased in, initially applying only to RD/RA, and later (as of FY-

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[5] Enforcement Project Management Handbook (OSWER Directive 9837.2B), p. II-7.

97) being extended to UAOs for removals and RI/FSs. An Agency workgroup is currently designing a process to evaluate the Regions' implementation of this Reform. The final process will emphasize Regional accountability for documentation of decisions to exclude certain PRPs from UAOs.

Use of This Memorandum

The procedures set out in this document are intended solely for the guidance of EPA personnel. They are not intended, and may not be relied upon, to create any rights (substantive or procedural) enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these procedures and to change them at any time without public notice.

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Please contact Mike Northridge (202-564-4263) of my staff if you have any questions on any aspect of this memorandum.

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