



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

MAR 20 2012

OSWER Directive 9200.2-109

MEMORANDUM

SUBJECT: Promoting Enforcement First for Remedial Investigation/Feasibility Studies at Superfund Sites

FROM: Elliott J. Gilberg, Director *Elliott J. Gilberg*
Office of Site Remediation Enforcement
Office of Enforcement and Compliance Assurance

James E. Woolford, Director *James E. Woolford*
Office of Superfund Remediation and Technology Innovation
Office of Solid Waste and Emergency Response

TO: Superfund National Policy Managers, Regions 1-10
Superfund Regional Counsel Branch Chiefs, Regions 1-10
Superfund Remedial Branch Chiefs, Regions 1-10

The purpose of this memorandum is to reaffirm the EPA's commitment to having potentially responsible parties (PRPs) conduct the remedial investigation/feasibility study (RI/FS) at Superfund sites wherever appropriate. Regions should continue to carefully review each case to ensure that the EPA is effectively using its enforcement authorities to maximize PRP performance of the RI/FS, thus preserving Hazardous Substances Trust Fund (fund) resources for sites where there are no viable responsible parties capable of performing the RI/FS. When a region decides to proceed with a fund-lead RI/FS, it should complete an enforcement decision document for the site (RI/FS enforcement decision document). Regions should also consult with the Office of Site Remediation Enforcement (OSRE) and the Office of Superfund Remediation and Technology Innovation (OSRTI) before committing fund dollars to pay for an RI/FS project expected to exceed \$2 million.

Background

40 C.F.R. 300.400(c) of the National Oil and Hazardous Substances Pollution Contingency Plan provides that in determining the need for and in planning or undertaking fund-financed action, EPA shall, to the extent practicable, and among other things: engage in prompt response and conserve fund monies by encouraging private party response. In 2005, OSRE and OSRTI jointly issued a memorandum which encourages regions to conduct early and thorough PRP searches and to consider carefully whether

it is appropriate for the identified PRPs to conduct the RI/FS at a site. *See* “Enforcement First at Superfund Sites: Negotiation and Enforcement Strategies for Remedial Investigation/Feasibility Studies (RI/FS),” OSWER Directive 9355.2-21 (August 9, 2005) available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/enf-first-rifs.pdf> (“2005 RI/FS Enforcement Guidance”). That guidance also encourages regions to consider, where appropriate, negotiating an administrative order on consent (AOC) or issuing a unilateral administrative order (UAO) for PRP performance of the RI/FS.

The 2005 RI/FS Enforcement Guidance further provides that, if a region decides to proceed with a fund-lead RI/FS at a site, it should create a written record of its decision (i.e., the RI/FS enforcement decision document) which memorializes the decision that “enforcement first” is neither possible nor practicable. This document is enforcement confidential and should be labeled as such.

The RI/FS enforcement decision document should contain general information about the site (e.g., site name, identifier number, location, response activities to date) and answers to the following questions:

- What PRPs have been identified at this site?
- If no PRPs have been identified, what steps have been taken to identify PRPs at this site?
- If PRPs have been identified, provide a list of the PRPs and indicate how the region has evaluated [each] PRP using the criteria listed [in the 2005 RI/FS Enforcement Guidance], including but not limited to:
 - documented liability;
 - financial viability;
 - technical capability;
 - [the] EPA’s prior experience in working with [that particular] PRP;
 - other site-specific considerations; and
 - why the region has decided not to pursue a PRP-lead RI/FS.

In accordance with the 2005 RI/FS Enforcement Guidance, our offices have periodically reviewed selected regional RI/FS enforcement decisions to proceed with fund-lead RI/FSs to better understand the circumstances that led to such decisions.

Completion of “Preliminary PRP Search” Prior to a Fund-Lead RI/FS

In 2009, the EPA’s Office of Inspector General recommended that OSRE develop and implement a control to monitor the status and timeliness of PRP searches at non-national priority list sites. *See* Evaluation Report, “EPA Needs to Improve Internal Controls to Increase Cost Recovery,” Report No. 09-P-0144 (April 27, 2009) available at <http://www.epa.gov/oig/reports/2009/20090427-09-P-0144.pdf>. Consistent with this recommendation, in June 2011, OSRE, in close coordination with the EPA’s National PRP Search Enhancement Team, issued a definition for “Preliminary PRP Search” and a method for tracking the completion of the preliminary PRP search in the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS). *See* Attachment 1. Tracking the completion of the preliminary PRP search is intended to allow the EPA to assess whether basic search activities have been completed for the purpose of ensuring timely PRP response and/or cost recovery.

Regions should complete a preliminary PRP search prior to committing funds to initiate a fund-lead RI/FS. The requirements of a preliminary PRP search are similar to the elements of an RI/FS enforcement decision document. Thus, to avoid duplication of efforts, regions should consider using the RI/FS enforcement decision document to memorialize the activities taken to complete the preliminary

PRP search prior to a fund-lead RI/FS. The date of the RI/FS enforcement decision document should be recorded as the date of the preliminary PRP search completion in CERCLIS. Attachment 2 contains a recommended outline of the minimum information that should be included in the RI/FS enforcement decision document. This recommended outline combines the recommendations found in the 2005 RI/FS Enforcement Guidance and the recommendations for completing a preliminary PRP search presented in the June 2011 memorandum.

The RI/FS enforcement decision document will provide the rationale for proceeding with a fund-financed RI/FS and should help ensure that the EPA fully considers its enforcement options prior to deciding to proceed with a fund-lead RI/FS. In addition, documentation of the region's enforcement activities at the RI/FS stage, including completion of a preliminary PRP search, will assist the region in any subsequent requests for fund monies, e.g., evaluation by the National Risk Based Priority Panel for a fund-lead remedial design/remedial action.

Headquarters Consultation Prior to Committing Superfund Dollars to Fund an RI/FS Expected to Exceed \$2 Million

Prior to committing fund monies to pay for an RI/FS project expected to exceed \$2 million, regions are requested to consult with headquarters. Regions should initiate consultation with the Director of the Regional Support Division (RSD) of OSRE and the Director of the Assessment and Remediation Division (ARD) of OSRTI by sending an email to these two officials and their designated staff contacts before a decision is made to commit funding for the RI/FS. In its request, the region should attach a copy of the draft RI/FS enforcement decision document.

Regions are encouraged to initiate consultation early. During the consultation, headquarters staff will review the draft RI/FS enforcement decision document to ensure that the EPA is effectively using enforcement authorities to secure PRP-lead RI/FSs. As needed, headquarters will consult with regions if potential additional enforcement opportunities are identified.

Headquarters intends to complete its review within two weeks of the region's request for consultation, assuming sufficient enforcement history is provided, unless the region requests a shorter turnaround time due to conditions at the site.

Headquarters Enforcement Work Planning, Oversight, and Assistance

OSRE and OSRTI also plan to have discussions with the regions regarding enforcement issues as part of work planning meetings. Further, headquarters may conduct periodic after-the-fact reviews of draft and final enforcement decision documents under \$2 million to analyze the impact of this memorandum. OSRE staff is also available to assist regions in taking an enforcement action against a PRP at any site. Areas of such assistance may include issuing a UAO, insurance reviews, ability-to-pay analysis, *de minimis* settlements, and advice on allocation.

Conclusion

Early analysis and strategic use of CERCLA's enforcement authorities will maximize performance of RI/FSs by PRPs and help preserve fund dollars for those Superfund sites where there are no viable PRPs capable of performing the RI/FS. Regions should evaluate each case carefully to determine whether opportunities exist to have PRPs perform the RI/FS and develop decision documents for all fund-lead

RI/FSs. Further, regions should consult with headquarters prior to committing Superfund money to pay for an RI/FS expected to exceed \$2 million.

This memorandum may be revised or additional guidance issued in the future as a result of experience gained through consultations and dialogue with the regions. This document is available on the EPA's website at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rifs-first-2012.pdf>. For questions about this document, contact Rebekah Reynolds in OSRE at (202) 564-4306 or Robin Anderson in OSRTI at (703) 603-8747.

Disclaimer

This memorandum is intended exclusively to provide information to employees of the EPA. This document is not a rule and does not create any legal obligations or enforceable rights. Whether and how the EPA applies this information to any particular site will depend on the facts at the site. The EPA decision makers retain the discretion to adopt approaches that differ from the guidance provided in this memorandum, where appropriate, on a case-by-case basis and in accordance with the statute and regulations. This document does not affect determinations of CERCLA liability, and does not provide any relief from or limitation of liability.

Attachments (2)

cc: Cynthia Giles, OECA
Mathy Stanislaus, OSWER
Lisa Feldt, OSWER
Barry Breen, OSWER
Larry Stanton, OSWER/OEM
Suzanne Rudzinski, OSWER/ORCR
David Lloyd, OSWER/OBLR
Reggie Cheatham, OSWER/FFRRO
Carolyn Hoskinson, OSWER/OUST
Dave Kling, OECA/FFEO
Mary Kay Lynch, OGC
John Michaud, OGC/SWERLO
OSRTI Managers
Chloe Metz, Superfund Lead Region Coordinator, Region 2
NARPM Co-Chairs
Rebekah Reynolds, OECA/OSRE
Robin Anderson, OSWER/OSRTI



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

JUN 23 2011

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Transmittal of "Preliminary Potentially Responsible Party Search Completion" Measure Definition for Incorporation into the Superfund Program Implementation Manual for FY2012

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

TO: Superfund National Policy Managers, Regions I – X
Superfund Regional Counsel Branch Chiefs, Regions I – X

Attached is the "Preliminary Potentially Responsible Party (PRP) Search Completion" guidance document which describes preliminary search activities for identifying PRPs related to a site. This document also provides guidance on how to properly document the activities conducted in order to determine if there are PRPs to perform, or finance, all or a portion of the initial non-emergency CERCLA removal or remedial response action at a site. The guidance contained in this document will be incorporated as a reporting measure into the Superfund Program Implementation Manual (SPIM) for implementation beginning in FY2012.

The "Preliminary PRP Search Completion" measure was developed in response to the Office of Inspector General(OIG) Evaluation Report titled "EPA Needs to Improve Internal Controls to Increase Cost Recovery," Report Number: 09-P-0144, dated April 27, 2009. The OIG recommended that the Assistant Administrator for the Office of Enforcement and Compliance Assurance (OECA) develop and implement a control to "monitor the status and timeliness of PRP searches at non NPL sites." OECA agreed with the recommendation and worked with the Regions, via the National PRP Search Enhancement Team, Superfund Policy Managers and Office of Regional Counsel Superfund Branch Chiefs to develop the measure. "Preliminary PRP Search Completions" will be tracked in CERCLIS to help EPA determine if basic PRP search activities have been completed and if they led to timely PRP response and/or cost recovery actions. When developing the measure, our focus was to ensure that the completion of the activities outlined in the guidance would maximize the opportunity for PRP response while not causing undue delays in initiating a timely Fund or PRP-lead initial "non-emergency" response action at a site.

Regions are expected to begin reporting “Preliminary PRP Search Completions” beginning in FY2012 for NPL and non-NPL sites where a non-emergency removal or remedial response action is expected at a site. The Preliminary PRP Search enforcement action is being added to CERCLIS and will be available for update beginning in FY2012. Should you have any questions or concerns, please contact Bruce Pumphrey of my staff at 202-564-4222 or via e-mail at pumphrey.bruce@epa.gov.

Attachment

cc: National PRP Search Enhancement Team
Monica Gardner
Karin Leff
Benjamin Lammie
Helena Healy

Attachment

Preliminary Potentially Responsible Party Search Completion Definition and Documentation/Reporting Requirements

Definition: “Preliminary PRP Search Completion:” the completion of certain activities taken to make an initial identification of PRPs at a site in order to determine if there are PRP(s) that are able to perform or finance all or a portion of the initial non-emergency CERCLA removal or remedial response action at a site.

The Preliminary PRP Search will be considered complete when the Regions perform the PRP Search tasks steps outlined in section 1 or 2 below.

1. Regions have completed and properly documented PRP Search tasks A-E, below, as appropriate and practicable.

A. Site Location and Property Description

The Region has, as thoroughly as possible, identified the site location (*including one or more of the following: street address; parcel ID#; legal description from current deed of ownership; and/or tax map*) as necessary to complete requirement 1.B. below.

B. Current and Past Site Ownership Identification/Notification

The Region has, using the tools most appropriate for the site, conducted activities to identify current site owners as well as past site owners at the time of disposal of hazardous substances and where those site owner PRPs exist and can be located within a reasonable time, considering the exigencies of the situation, the Region has provided verbal notice and/or issued General Notice Letters to those parties the Region determines to be liable and capable of performing the initial response action at the site¹. In addition, as a part of this task, Regions have obtained information necessary to secure site access in order to allow for performance of the initial non-emergency response action at the site.

C. Site Operation Identification/Notification

If the operator(s) of the site/facility that caused the release or threat of release of hazardous substances are different from the site/facility owner(s) at the time of disposal, the Region has undertaken PRP Search activities necessary to identify site/facility operators and where those site operator PRPs exist and can be located within a reasonable time, considering the exigencies of the situation, the Region has provided verbal notice and/or issued General Notice Letters to those parties the Region determines to be liable and capable of performing the initial non-

¹ Regions may decide not to provide notice to certain liable and capable parties identified under tasks 1B, 1C, and 1E, , but should document the basis for such decisions to the site file through such mechanisms as the Removal Action Memo Enforcement Addendum or the RI/FS Enforcement Decision Document.

emergency response action at the site

D. Site Owner/Operator Liability/Financial Viability Determination

For each party identified under A., B. or C. of this section, the Region has determined, based on publicly available information whether: (1) the party may be liable under Section 107(a) of CERCLA; and (2) the party may be financially capable of performing or paying for all, or a portion of, the initial non-emergency response action at the site.

E. Arranger/Transporter(A/T) Identification/Notification

The Region has determined, based on readily available information such as site records, that either (1) no A/T PRPs appear to exist at the site or (2) there are A/T PRPs at the site, and the Region has provided verbal notice and/or issued General Notice Letters to those A/T PRPs initially identified through such information who the Region determines to be liable and capable of performing the initial non-emergency response action at the site and determined that, to the extent that A/T PRPs exist, additional PRP search efforts may be required.

OR

2. The Region has completed all, or a portion of, the above PRP Search tasks and entered into a settlement with or issued orders to compel the identified PRPs to perform the initial non-emergency response action at the site.

Reporting and requirements for documentation of Preliminary PRP Search Completion

If the Region has satisfied the Preliminary PRP Search Completion requirement by satisfying the tasks identified in Section 1, above, the Region should document this accomplishment in CERCLIS and in the site file. The documentation of the Preliminary PRP Search Completion for the site file should include a summary of the PRP Search tasks completed for each site. Such documentation can follow the format referenced in the January 2011 PRP Search Reference Summary guidance document, or the Region can follow a format already established, as long as it documents the Preliminary PRP Search Completion tasks performed and results (e.g., Removal Action Memorandum Enforcement Addendum, RI/FS Enforcement Decision Document as outlined in the 2005 RI/FS Guidance, OSWER Directive 9355.2.21(August 9, 2005)). The date that the documentation summarizing the PRP search tasks is created should be recorded as the completion date of the Preliminary PRP Search Completion milestone in CERCLIS.

If the Region has satisfied the Preliminary PRP Search Completion requirement by performing the tasks identified in Section 2., above, the date of the enforcement action/settlement to compel the initial non-emergency response action at the site should be recorded in CERCLIS. That date should also be used as the completion date of the

Preliminary PRP Search Completion milestone in CERCLIS, while not required, Regions may also want to document the PRP search activities accomplished prior to meeting the requirements in section 2 in the site file, through the use of the PRP Search Documentation Summary or other Regional mechanism.

Recommended Outline of Fund-Lead RI/FS Enforcement Decision Document

A. Site Location and Property Description

Identify the site location, including: street address; parcel ID#, legal description from current deed of ownership and/or tax map.

B. Identify PRPs

For all PRPs, include business name and contact information.

1. Current and past ownership identification. Identify the current site owners as well as past site owners at the time of disposal of hazardous substances. PRP search there should be sufficient information on current ownership to secure site access in order to allow for performance of the RI/FS.
2. Site Operation identification. Identify facility operators that caused the release or threat of release of hazardous substances if different from the site owner(s) at the time of disposal.
3. Arranger/Transporter Identification/Notification. Identify arrangers/transporters.

C. If no PRPs have been identified, what steps have been taken to identify PRPs at this site?

To satisfy the preliminary PRP search, operators should be identified. In addition, Regions should determine, based on readily available information such as site records, that either (1) no Arranger/Transporter PRPs appear to exist at the site or (2) there are Arranger/Transporter PRPs at the site and the Region has issued Oral Notice and/or General Notice Letters to those Arranger/Transporter PRPs identified through such information and determined that, to the extent that arranger/transporter PRPs may exist, additional PRP search efforts may be required.

D. PRP Evaluation

For each PRP identified, describe the criteria used to evaluate each PRP, including but not limited to:

1. Documented liability of the PRP, including likely defenses.
2. Financial viability of the PRP.
3. Technical capability of the PRP.
4. EPA's prior experience in working with the PRP.
5. Other site-specific considerations.

6. If the region has decided not to pursue the PRP, the rationale for such decision.