



MEMORANDUM

SEP 28 2000

SUBJECT: Model Language Relating to Orphan Share Compensation Through the Compromise of Future Oversight Costs

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This memorandum suggests model language for inclusion in future RD/RA consent decrees ("CDs") and administrative orders on consent ("AOCs") for removal actions that provide orphan share compensation through the compromise of future oversight costs. The intent of the model language is to ensure that the compromise of future costs is limited to oversight costs and does not exceed the amount intended at the time the settlement is negotiated.

I. Revisions to the 2000 RD/RA Model CD

The 1996 Orphan Share Policy states that compensation for the orphan share component of the federal compromise may be provided through forgiveness of past costs and future oversight costs.¹ To ensure that any orphan share compensation provided in the form of a future cost compromise is limited to a compromise of oversight costs, and does not inadvertently compromise other categories of future response costs, future RD/RA CDs should define Future

Oversight Costs and should limit the compromise in the payment section to these costs; this will

¹ "Interim Guidance on Orphan Share Compensation for Settlers of Remedial Design/Remedial Action and Non-Time Critical Removals," S. Herman, June 3, 1996, at 3 ("1996 Orphan Share Policy").

ensure that the PRPs are obligated to pay all other Future Response Costs. Thus, future RD/RA CDs providing orphan share compensation should include the definition of Future Response Cost provided in the 2000 model RD/RA CD,² but should also add the following new definition of Future Oversight Costs:

“Future Oversight Costs” shall mean that portion of Future Response Costs that EPA incurs in monitoring and supervising Settling Defendant’s performance of the Work to determine whether such performance is consistent with the requirements of this Consent Decree, including costs incurred in reviewing plans, reports and other documents submitted pursuant to this Consent Decree, as well as costs incurred in overseeing implementation of the Work; however, Oversight Costs do not include, *inter alia*: the costs incurred by the United States pursuant to Sections VII (Remedy Review), IX (Access and Institutional Controls), XV (Emergency Response), and Paragraph 95 of Section XXI (Work Takeover), or the costs incurred by the United States in enforcing the terms of this Consent Decree, including all costs incurred in connection with Dispute Resolution pursuant to Section XIX (Dispute Resolution) and all litigation costs.

To ensure that the amount of orphan share compensation ultimately provided is in accordance with the intended amount of the compromise computed at the time the settlement is

² The Model RD/RA CD defines “Future Response Cost” as:

[A]ll costs, including, but not limited to, direct and indirect costs, that the United States incur[s] in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII [remedy review], IX [access and institutional controls](including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation), XV [emergency response], and Paragraph 95 of Section XXI [work takeover]. Future Response Costs shall also include all Interim Response Costs, and all Interest on the Past Response Costs that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from [insert the date identified in the Past Response Costs definition] to the date of entry of this Consent Decree.

negotiated, Regions should modify Paragraph 55(a) of the Model RD/RA CD as reflected below.

Settling Defendants shall pay to EPA all Future Response Costs not inconsistent with the National Contingency Plan, excluding the first [\$ insert amount of future oversight compromise³] of Future Oversight Costs. [The rest of paragraph 55(a) should remain the same as the model.]

In some cases, the intent may be to provide a complete compromise of oversight costs as orphan share compensation, regardless of whether the oversight costs ultimately surpass the amount estimated at the time the settlement is negotiated. This may be true, for example, where the MAAC is past costs plus oversight costs, and the other caps (i.e., 25% of the ROD estimate and the orphan share percentage of total site costs) are significantly higher than the MAAC. Where the intent is to provide a complete compromise of oversight costs, Paragraph 55(a) [payment] of the Model CD should be modified as reflected below:

Settling Defendants shall pay to EPA all Future Response Costs not inconsistent with the National Contingency Plan, except Future Oversight Costs. [The rest of paragraph 55(a) should remain the same as the model.]

II. Revisions to the 1993 Model AOC for Removal Actions

In the Model AOC, the stand-alone definitions section is optional. “Future Response Costs” is defined in Section VIII, “Reimbursement of Costs”.⁴ Regions should retain this

³ The total amount of the future oversight compromise should be inserted here. The 1996 Orphan Share Policy establishes certain limitations (caps) on the maximum amount appropriate for compensation (“MAAC”) under the policy. The Policy also states, “. . . the total amount of federal compromise in settlement incorporates other factors in addition to the presence or absence of an orphan share. . . .” 1996 Orphan Share Policy at 1.

⁴ Section VIII of the Model removal AOC provides:

Future response costs are all costs, including but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this AOC, verifying the Work, or otherwise implementing, overseeing, or enforcing this AOC. Future response costs shall also include all costs, including direct and indirect costs, paid by the United States in connection with the Site between (insert the date identified in the Past Response Costs definition in the above paragraph), and the effective date of this AOC and all interest on the Past Response Costs from (insert the date identified in the Past Response Costs definition in the above paragraph) to (the date of payment of the

definition (whether in a stand-alone section, or in Section VIII), and should insert the following definition of oversight costs in the appropriate place:

“Oversight Costs” shall mean that portion of Future Response Costs incurred by EPA in monitoring and supervising Respondent’(s)’ performance of the removal actions agreed to in this Order to determine whether such performance is consistent with the requirements of this Order, including costs incurred in reviewing plans, reports and other documents submitted pursuant to this Order, as well as costs incurred in overseeing implementation of the removal action; however, Oversight Costs do not include, *inter alia*, (1) the cost of activities by EPA pursuant to Paragraph 7 [Emergency Response] of this Order; (2) the cost of enforcing the terms of this Order, including all costs incurred in connection with Dispute Resolution pursuant to Section IX [Dispute Resolution]; and (3) the cost of securing access under Paragraph 3 [Access to Property and Information].

To ensure that the amount of orphan share compensation ultimately provided in a removal AOC is in accordance with the intended amount of the compromise computed at the time the offer is accepted, Regions should modify Section VIII of the Model removal AOC as provided in the redline/strikeout text below.

On a periodic basis, EPA shall submit to Respondent(s) a bill for Future Response Costs, excluding the first [\$ insert amount of the oversight cost compromise⁵] in Future Oversight Costs, ~~that includes~~ which bill shall include a (name of regional cost summary). . . . Respondent(s) shall, within (X) days of receipt of the bill, remit a cashier’s or certified check for the amount of the bill made payable to the “Hazardous Substance Superfund” [The rest of Section VIII should remain the same as the model.]

Where the intent is to provide a complete compromise of oversight costs as orphan share compensation, regardless of whether the oversight costs ultimately surpass the amount estimated at the time the settlement is negotiated (e.g., where the MAAC is past costs plus oversight costs, and the other caps are significantly higher than the MAAC), Section VIII of the Model removal AOC should be modified as follows:

On a periodic basis, EPA shall submit to Respondent(s) a bill for Future Response Costs, ~~except Future Oversight Costs~~, ~~that includes~~ which bill shall include a (name of regional cost summary). . . . [The rest of Section VIII should remain the same as the model.]

Past Response Costs).

⁵ Again, the total amount of the future oversight cost compromise inserted should reflect orphan share compensation as well as any federal compromise based on other factors.

Please direct questions regarding this memorandum to the RSD orphan share team member assigned to your region, as reflected below. If you cannot reach the contact listed below, please contact Deniz Ergener (Team Leader) at (202) 564-4233 or Nancy Browne (Team Advisor) at (202) 564-4219.

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