



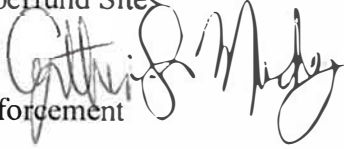
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 21 2018

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Bifurcating Remedial Design and Remedial Action to Accelerate Remedial Design Starts at PRP-Lead Superfund Sites

FROM: Cynthia L. Mackey, Director
Office of Site Remediation Enforcement 

TO: Superfund National Program Managers, Regions 1-10
Regional Counsels, Regions 1-10

This memorandum implements part of Recommendation 12 of the Superfund Task Force Report and recommends a discrete strategy that Regions can use to expedite Superfund settlements and accelerate remedial design starts by potentially responsible parties (PRPs).

I. Background

The Superfund Task Force ("Task Force") was commissioned by U.S. Environmental Protection Agency (EPA) Administrator Scott Pruitt on May 22, 2017, to identify ways EPA can better streamline and improve the Superfund program.¹ On July 25, 2017, in response to this charge, the Task Force issued a report identifying 42 recommendations, organized around five goals.²

By this memorandum, the Office of Site Remediation Enforcement recommends that Regions consider using separate settlement tracks for remedial design and remedial action where negotiations for a single consent decree addressing both remedial design/remedial action (RD/RA) are likely to be protracted. In these situations, Regions should consider whether to approach the PRPs to perform the remedial design pursuant to a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) administrative settlement agreement. This alternative settlement approach can allow the remedial design work to begin while negotiations continue over performance of the remedial action.

¹ "Prioritizing the Superfund Program," May 22, 2017, available at <https://www.epa.gov/superfund/prioritizing-superfund-program-memo-epa-administrator-scott-pruitt-agency-management>.

² "Superfund Task Force Recommendations," July 25, 2017, available at <https://www.epa.gov/superfund/superfund-task-force-recommendations>.

Remedial design is the engineering phase of the Superfund response process that precedes and details the steps to be taken during the remedial action.³ Generally, it is common practice that after EPA selects a remedy in a record of decision (ROD), the case team from EPA and the Department of Justice will approach the viable PRPs identified for the site to negotiate an RD/RA consent decree. In that context, even assuming negotiations are successful, initiation of the remedial design is typically dependent on entry of the RD/RA consent decree in federal district court. This approach may result in a considerable lapse of time between signature of the ROD and the start of the remedial design. In situations where RD/RA negotiations are protracted, the RD/RA consent decree is challenged, or entry of the consent decree is delayed for other reasons, the timeframe from ROD signature to the start of the remedial design will be even longer, which in turn delays getting work started at the site.

II. Previous Agency Guidance

EPA has previously issued two policies, in 1988⁴ and 1992⁵, aimed at accelerating remedial design starts at PRP-lead sites. These policies suggested three approaches to support this effort: (1) include language in RD/RA consent decrees requiring remedial design to start upon lodging of the RD/RA consent decree in federal court; (2) use administrative enforcement alternatives for the performance of the remedial design; and (3) where a complaint has already been filed, enter into a stipulation with the PRPs in the pending litigation whereby the PRPs agree to perform the remedial design prior to the lodging of an RD/RA consent decree.

III. Statement of Updated Policy

In situations where the Region identifies factors that will likely present a barrier to completing negotiations on a comprehensive RD/RA consent decree within a reasonable time, this memorandum encourages consideration of administrative enforcement alternatives to accelerate the start of the remedial design. What constitutes a “reasonable time” at which to trigger the use of this approach will vary from site to site, depending on various factors, most particularly on the target date by which the Region hopes to have an agreement for remedial action in place. Upon departing from the path of negotiating the remedial design and remedial action together in one consent decree, Regions should first attempt to enter into an administrative settlement agreement with the PRPs for the remedial design work. Regions should use the model remedial design administrative settlement agreement and order on consent and accompanying statement of work, which were developed to further standardize and streamline the remedial design negotiation process.⁶ However, if negotiations for an administrative settlement agreement for remedial

³ “Remedial Design/Remedial Action Handbook,” EPA 540/R-95/059 (June 1995), available at: <https://semspub.epa.gov/work/HQ/156935.pdf>.

⁴ “Initiation of PRP-financed Remedial Design in Advance of Consent Decree Entry,” (Nov. 18, 1988), OSWER Directive Number 9835.4-2a, available at: <https://www.epa.gov/enforcement/guidance-initiating-prp-financed-rd-advance-consent-decree-entry>.

⁵ “Accelerating Potentially Responsible Party Remedial Design Starts: Implementing the 30-Day Study,” (April 2, 1992), OSWER Directive Number 9835.4-2b, available at: <https://www.epa.gov/enforcement/guidance-accelerating-prp-remedial-design-starts>.

⁶ See “Issuance of Revised Model Administrative Settlement Agreement and Order on Consent for Remedial Design and New Remedial Design Statement of Work,” (Sept. 29, 2016), available at: <https://www.epa.gov/enforcement/guidance-2016-rd-asaoc-and-sow>. The current version of the model

design are unsuccessful, Regions should proceed with issuing an order to the PRPs to perform either the remedial design only or the RD/RA, depending on the case team's assessment of which approach will best expedite cleanup at the site.⁷ If the Region enters a settlement agreement or issues an order for remedial design alone, Regions should, if possible, begin negotiations for the remedial action while the remedial design is being performed to avoid delays in the initiation of the remedial action.

EPA's experience has shown that bifurcating the remedial design from the remedial action offers benefits that can help expedite the Superfund cleanup process. Performing the remedial design is generally less costly than performing the remedial action. Consequently, negotiating a remedial design administrative settlement agreement is typically faster and less resource-intensive compared to negotiating an RD/RA consent decree. Entering into a remedial design administrative settlement agreement with PRPs can therefore help to get the remedial design work started sooner. Performing the remedial design also brings the PRPs together into the cleanup process earlier, and often provides information helpful for reducing uncertainty regarding the scope and cost of the remedial action. This additional information can facilitate internal PRP discussions on cost allocations at sites with multiple PRPs, and could lead to more focused and expedited negotiations with the case team for the remedial action.

Where the remedial design is separated from the remedial action, various practical approaches can be used to effectively bridge the gap between the remedial design settlement agreement or order and a subsequent consent decree covering the remedial action. Regional attorneys should work with Department of Justice attorneys on this process. For example, practitioners could add a provision to an RD/RA consent decree that upon its entry, the settlement agreement or order for the remedial design is terminated. Alternatively, practitioners could convert the model RD/RA consent decree into a consent decree solely for remedial action, in which case the existing remedial design settlement agreement or order would be kept in effect, and work in conjunction with the remedial action consent decree. In all instances, the language in a settlement agreement or order for remedial design should specify that the PRPs under such an instrument are obligated to conduct the remedial design until expressly superseded by any subsequent settlement agreement or order.

EPA recognizes that bifurcating remedial design and remedial action necessitates negotiating two legal documents and, therefore, may not expedite cleanups in all circumstances. Bifurcation may be well suited for sites where negotiating RD/RA consent decrees and statements of work will likely be protracted based on several factors, including the complexity of the cleanup and the number of PRPs involved at the site. Sites could also benefit from the bifurcation approach where the remedial design could help further delineate areas of contamination, or where the remedy selected in the ROD includes a contingent remedy and the remedial design will help clarify to what extent implementation of the contingent remedy will be necessary. Bifurcation

administrative settlement agreement and statement of work for remedial design are available on the Cleanup Enforcement Model Language and Sample Documents database ("Cleanup Enforcement Models Database") at <https://cfpub.epa.gov/compliance/models/>.

⁷ See "Issuance of Revised Model Remedial Design/Remedial Action Unilateral Administrative Order and New Statement of Work," (Sept. 30, 2015), available at: <https://www.epa.gov/enforcement/guidance-2015-cercla-rdra-uao-and-sow>. The current version of the model unilateral administrative order and statement of work for RD/RA are available on the Cleanup Enforcement Models Database at <https://cfpub.epa.gov/compliance/models/>.

may, however, be counterproductive at smaller sites with conventional cleanup remedies. At such sites, negotiating multiple documents is unlikely to expedite cleanup and re-use. Consistent with previous EPA guidance, Regions should consider, as appropriate, negotiating RD/RA consent decree and statement of work provisions at these sites requiring remedial design performance to start upon lodging, as opposed to entry, of the RD/RA consent decree.⁸

IV. Purpose and Use of this Guidance

This memorandum is intended as guidance for EPA employees. It is not a regulation and does not confer legal rights or impose legal obligations. The extent to which EPA applies this memorandum in a particular case will depend on the facts of the case.

V. Contact Information

If you have questions about this memorandum, please contact Greg Wall in the Office of Site Remediation Enforcement at (202) 564-4498 or wall.gregory@epa.gov.

cc: Office of Regional Counsel Superfund Branch Chiefs, Regions 1-10
James E. Woolford, Office of Superfund Remediation and Technology Innovation
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⁸ Please note that triggering remedial design obligations to begin upon lodging of the RD/RA consent decree requires some modification to the current model RD/RA consent decree and statement of work, which trigger remedial design obligations to begin upon entry of the consent decree. The current model RD/RA consent decree and statement of work are posted in EPA's Cleanup Enforcement Models Database available at <https://cfpub.epa.gov/compliance/models/>.