




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

JUN 20 2019

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: 2019 Remedial Design/Remedial Action: Process for Expediting Negotiations and PRP Cleanup Starts

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

TO: Regional Counsels, Regions 1-10
Superfund National Program Managers, Regions 1-10
Chief, Environmental Enforcement Section,
Environment and Natural Resources Division, Department of Justice

This 2019 Remedial Design/Remedial Action (RD/RA) Negotiation Policy memorandum (“2019 Negotiation Policy”) encourages Regions to plan for and promptly obtain potentially responsible party (PRP) commitments to initiate cleanup actions following remedy selection. The Office of Site Remediation Enforcement (OSRE) believes that streamlining the RD/RA negotiations process will expedite the initiation of PRP cleanup and result in timelier actions to protect human health and the environment. This policy supersedes the 2012 “Revised Policy on Managing the Duration of Remedial Design/Remedial Action Negotiations” (2012 Policy) that set forth revised procedures for managing the duration of RD/RA negotiations but reinforces the underlying principles and goals of the 2012 Policy.¹

The 2019 Negotiation Policy requires Regions to consult with OSRE only if RD/RA negotiations are expected to extend beyond 300 days after issuance of a special notice letter (SNL). For all **new** RD/RA negotiations, the Regions should follow the processes set forth in this memorandum. We will work closely with the Department of Justice (DOJ) to implement this revised policy and to move quickly to lodge and enter settlements.

¹ See also Negotiation and Enforcement Strategies to Achieve Timely Settlement and Implementation of Remedial Design/Remedial Action at Superfund Sites (“Negotiation Strategies”), OSRE, June 17, 1999, pp. 5-6 available at <https://www.epa.gov/enforcement/guidance-strategies-achieve-timely-settlement-and-implementation-rdra-superfund-sites>.

I. Purpose – To Expedite PRP Lead Cleanups by Strengthening the Negotiation Process

In July 2017, the Environmental Protection Agency (EPA) issued the Superfund Task Force Report to reinvigorate the Superfund program.² Recommendation 16.2 from that report focuses on expediting negotiations and speeding up enforcement lead cleanups.

Meeting the Agency’s cleanup goals is a top priority for Superfund enforcement, and enforcement plays an important role in helping achieve timely RD/RA cleanups. As part of the Superfund Task Force Recommendations, OSRE is issuing this 2019 Negotiation Policy to strengthen RD/RA negotiations and promote the use of all available enforcement tools to expedite the commencement and eventual completion of responsible party cleanup. By working vigorously to either reach settlement or issue a unilateral administrative order (UAO) in response to delays, EPA can advance the goals of the cleanup program, improve the negotiation process, and ultimately accomplish more prompt cleanups. OSRE is committed to work with the Regions, the Superfund Program, and DOJ to shorten negotiation durations.

II. Policy Implementation

By issuing this 2019 Negotiation Policy, OSRE is establishing a goal to conclude RD/RA negotiations within 300 days of issuance of special notice. We expect that case teams will use appropriate enforcement tools to meet this goal; recognizing, however, that circumstances may sometimes require negotiations to continue past this goal. Implementation of an efficient RD/RA negotiation involves several key elements: (1) earlier enforcement planning at the proposed plan stage; (2) contingency planning; and (3) a case team strategy that commits to specific timeframes and benchmarks. As negotiations progress, please share significant enforcement updates with your OSRE regional liaison. While monitoring the status of the negotiations, liaisons will raise to OSRE management any identified barriers to reaching a timely settlement.

A. Negotiation Plans

The first step for achieving the goals outlined below is the development of an RD/RA negotiation plan, including an overall strategy, benchmarks, and deadlines, prior to the issuance of the Record of Decision (ROD).³ A draft should also be shared with the OSRE regional liaison prior to the issuance of the ROD. By drafting a negotiation plan early in the enforcement process the case team can lay the groundwork for efficient and productive negotiations. The case team strategy should identify available enforcement and settlement tools throughout the negotiation process. The plan may include:

- establishing when and under what conditions a UAO would be issued;

² Superfund Task Force Recommendations, July 25, 2017, available at <https://www.epa.gov/superfund/superfund-task-force-recommendations>. See also, Superfund Task Force Recommendations 2018 Update Report, July 23, 2018, available at <https://semspub.epa.gov/src/document/HQ/197209>.

³ See CERCLA Enforcement Project Management Handbook, November 2002, p. 8-1 (“Enforcement Handbook”). For a list of topics to be included in the negotiation plan, see Section 8.2.B.1 of the Enforcement Handbook, available at: <http://intranet.epa.gov/oeca/osre/tools/hbk-pdf/chapter8.pdf>.

- consideration of whether RD bifurcation would be useful;⁴
- an analysis of relevant PRP liability case law;
- coordination with/participation of Natural Resource Trustees, the state or tribes, and/or the involvement of federal PRPs; and
- identification of potential incentives to offer such as orphan share compensation, special account disbursement, or where appropriate, availability of mixed funding or mixed work.

The Superfund Task Force Report supports bifurcation of RD in appropriate circumstances and use of EPA’s UAO authority to expedite cleanup. As the 2018 Bifurcation Policy notes, negotiating an RD administrative settlement agreement and order on consent (ASAOC) “is typically faster and less resource-intensive compared to negotiating an RD/RA consent decree.”⁵ Therefore, bifurcation may be an attractive option to expedite the start of design work at a complex site. However, if RD and RA are bifurcated, Regions should begin negotiations for the RA while the RD is being performed to avoid delays in the initiation of the RA. This will help ensure that there is no break in the cleanup (i.e., no delay between the completion of the RD and initiation of the RA). In addition, Agency guidance promotes the use of a UAO in the face of unsuccessful negotiations, either by issuing a UAO with a delayed effective date, issuing a UAO for RD only while continuing to pursue a settlement for RA, or issuing UAOs to all appropriate parties for RD and RA.⁶ PRPs should know during negotiations that EPA is willing and ready to issue a UAO if a settlement cannot be achieved in a reasonable time.

When developing the negotiation plan, the case team should establish a firm negotiation schedule and identify potential obstacles, along with strategies to address them. A negotiation plan template is attached. Regions should submit the negotiation plan, along with the pre-referral negotiation (PRN) package to DOJ and OSRE approximately 30 days after the ROD is issued. The schedules should be conveyed to all co-plaintiffs, (e.g., state, Natural Resource Trustees) to establish Agency expectations.

B. Negotiation Approach: Benchmarks and Accountability

OSRE’s goal with the 2019 Negotiation Policy continues to be to streamline our negotiation practice and expedite cleanup. Specifically, the intent is to complete negotiations within 485 days from issuance of the ROD (i.e., 90 days plus an additional 30 days), if necessary to issue SNL and up to 365 days to negotiate and enter into a RD/RA consent decree (CD) or RD only administrative settlement, or issue a UAO.

⁴ See Bifurcating Remedial Design and Remedial Action to Accelerate Remedial Design Starts at PRP-Lead Superfund Sites (“2018 Bifurcation Policy”), June 21, 2018, available at <https://www.epa.gov/enforcement/bifurcating-rdra-accelerate-remedial-design-starts-prp-lead-superfund-sites>.

⁵ *Id.*, pg. 3.

⁶ See Negotiation Strategies, June 17, 1999, pp. 5-7.

1. Timeline for Tracking Negotiation Status – SNL Issuance

For purposes of tracking in EPA’s Superfund Enterprise Management System (SEMS), RD/RA negotiations start on the date the SNL is issued.⁷ EPA guidance anticipates that SNL would be issued soon after the ROD is issued.⁸ Through this 2019 Negotiation Policy, OSRE is establishing a goal of issuing SNL within 90 days after the ROD is issued. Using this 90-day timeframe is consistent with, and integral to, the policy of submitting the PRN and negotiation plan to DOJ shortly after issuance of the ROD. If the Region does not issue an SNL within 90 days, the OSRE regional liaison will schedule a call with the Regional attorney, the Office of Regional Counsel branch chief, and the Regional Support Division branch chief to decide on a concrete plan to issue SNL within the next 30 days.

2. Day 300 from RD/RA Negotiation Start

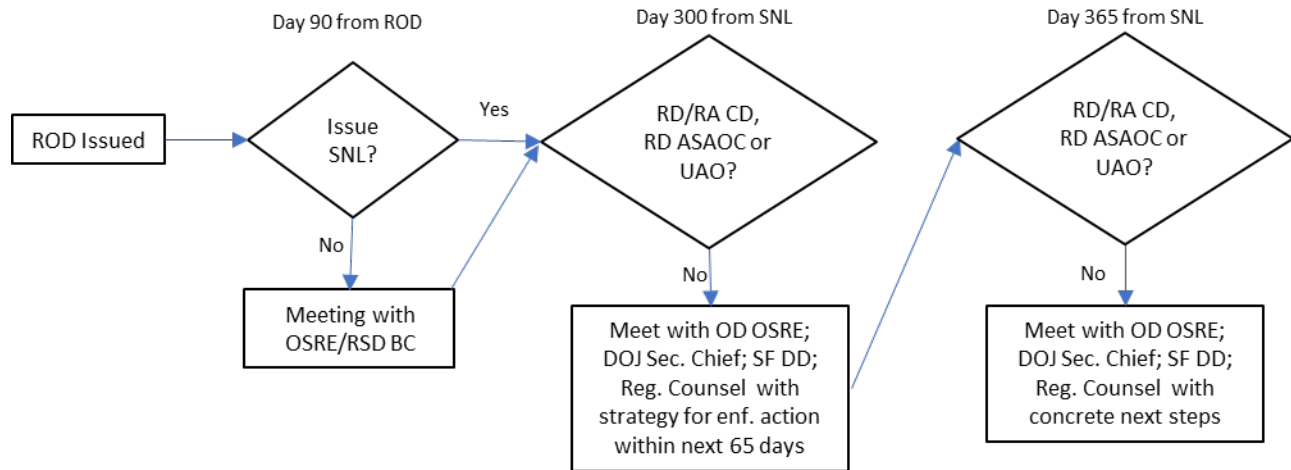
The negotiation moratorium in CERCLA Section 122(e)(2) provides 60 days from special notice for the PRP to provide a “good faith offer” and another 60 days for negotiations to continue, if a good faith offer is received, before EPA may take enforcement action. Because many RD/RA negotiations are extremely complicated, they frequently require additional negotiation time beyond 120 days. Nevertheless, at some point the value of continuing protracted negotiations is outweighed by the necessity to implement the ROD’s selected remedial action. OSRE believes that 300 days from the date the SNL is issued is the point at which case teams need to evaluate other options to get the cleanup started.

If the Region expects that negotiations will extend beyond 300 days from issuance of SNL, on day 300 or before, the Region, on behalf of the case team, will submit a written plan to the OSRE regional liaison that outlines the strategy to finalize a CD or issue a UAO within the next 65 days (300 days plus 65 days equals one year from SNL issuance). The plan only needs to be a short 2-3-page memo. The regional liaison will also schedule a conference call with the OSRE office director, the regional counsel, the Superfund division director, and the DOJ section chief or deputy chief, the Regional attorney assigned to the case, and the remedial project manager to discuss the strategy and the obstacles that have impeded negotiations. If at day 365 the Region has not taken an enforcement action (RD ASAOC or UAO or RD/RA CD or UAO), the Region will modify the plan and reconvene the same management team to discuss concrete next steps.

⁷ See Superfund Program Implementation Manual, Fiscal Year 2019, December 14, 2018 at X.A.7.i., available at <https://semspub.epa.gov/work/HQ/100001805.pdf>.

⁸ See Enforcement Handbook, November 2002, p. 8-3; Integrated Timeline for Superfund Site Management, June 11, 1990, p. 2.

Flowchart for RD/RA Negotiations



a. Monitoring Consent Decree Lodging and Entry

According to EPA guidance, DOJ should lodge the CD within 30 days of receipt of the final executed settlement from the Region and should move for entry of the CD within 45 days after lodging (assuming there are no significant comments).⁹ We encourage the Regions to work with DOJ, and OSRE where appropriate, to prepare and file the settlement with the relevant U.S. District Court as quickly as possible in order to facilitate the initiation of the cleanup. As the Regional attorney monitors the progress of the case after referral, they should promptly elevate the matter if there are any unreasonable delays.

b. Decision not to Issue Special Notice Letter

In certain situations, the negotiation team may recommend, pursuant to CERCLA Section 122(a), that special notice procedures not be used, but that RD/RA negotiations will ensue without special notice. The Regional case team should notify their respective liaison of the intended waiver of the SNL procedures. In those cases, a Section 122(a) waiver should be signed promptly and the date the 122(a) waiver is signed will trigger the start of negotiations in SEMS.¹⁰

c. Bifurcation of RD and RA: Subsequent Negotiations

If a Region issues an ASAOC or UAO for RD or an order is issued for a portion of the RA, the date of that settlement or the date that the order is issued will serve as (a) the completion date for

⁹ Pre-Referral Negotiation Procedures for CERCLA Judicial Enforcement Cases, Sept. 30, 2015, Appendix A. Available at <http://intranet.epa.gov/oeca/osre/documents/prn-docs/prn-process-2015-mem.pdf>. Additional information is available on the OSRE's PRN Procedures for CERCLA Judicial Cases intranet page at <http://intranet.epa.gov/oeca/osre/documents/pre-ref-proc.html>.

¹⁰ See Superfund Program Implementation Manual, Fiscal Year 2019, December 18, 2018 at X.A.7.i., available at <https://semsub.epa.gov/work/HQ/100001805.pdf>.

the initial negotiations and (b) the start date for the subsequent negotiations.¹¹ For the subsequent RA negotiations, the Region should establish a new RD/RA negotiation date in SEMS based on the above-referenced date.

For the subsequent RA negotiations, the timing of the day 300 status conference will follow the same schedule as the standard negotiation timeline. If bifurcating RD from RA, case teams are expected to complete the RA negotiation before the RD is complete so that the RA can commence as soon as the RD is done.

III. Disclaimer

This memorandum is intended solely for the guidance of employees of EPA. It is not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States of America. EPA reserves the right to act at variance with this document and to change it at any time without public notice.

Attachment

cc: Superfund Regional Counsel Branch Chiefs, Regions I-X
Karen Dworkin, DOJ
DOJ Assistant Section Chiefs
James Woolford, OSRTI
Rafael DeLeon, OSRE
Kenneth Patterson, OSRE
Monica Gardner, OSRE

¹¹ *See id.* The Superfund Program Implementation Manual states that “[f]or Subsequent RD/RA Negotiations the start date is the same as the finish date of an existing set of RD/RA Negotiations from which an interim settlement/order arose.”

ATTACHMENT: NEGOTIATION PLAN TEMPLATE

Regions should modify this negotiation plan according to Regional practice or type of site.

MEMORANDUM

Subject: _____ Superfund Site, SSID, OU, RD/RA negotiations plan

From: (staff attorney)
(RPM)

To: (as appropriate: Program and Legal Branch Chiefs)

Date: _____

cc: (as appropriate at the end of the memorandum)

- I. The purpose of this memorandum is to outline a negotiations plan for RD/RA negotiations for the _____ Superfund Site, OU ____.
[Identify RPM/OSC, other relevant staff]
[Brief description of Work and costs to be recovered]
[Objectives of negotiations, i.e., all work? All costs?]
- II. Checklist [for each item, add date of proposed completion]
 - A. Proposed Plan issued: _____
 - B. Contact State Environmental Agency, state, tribes and/or federal Natural Resource Trustees to determine participation: _____
 - C. Consider redraft of PRN, CD, SOW as necessary based on ROD to be issued, and any issues raised during public comment period.
 - D. ROD _____
Attorney review of ROD _____
ARARs analysis complete _____
 - E. Prior to PRN:
Request cost documentation: _____
Review cost package: _____
Review Admin record: _____
Review PRP search: _____
Schedule supplemental PRP work: (Title Search, etc.) _____
Compile address list for all PRPs and counsel: _____
First Draft/ Outline CD: _____
First Draft/Outline SOW: _____
Identify issues that need resolution prior to SNLs:
 - F. Formal notification to state, tribes and Natural Resource Trustees:
 - G. PRN and negotiation plan to DOJ and OSRE regional liaison: _____
 - Date DOJ attorney assigned: _____
 - Initial comments sent by DOJ: _____
 - Resolve issues raised in comments from Trustees, State _____

ATTACHMENT: NEGOTIATION PLAN TEMPLATE

- Resolve issues relating to whom SNLs are issued _____
- H. Negotiation Process
- SNLs issued: _____ (within 90 days after ROD)
 - GFO received: _____
 - Schedule for meetings/conference calls
 - CD to be sent to PRPs for signature: _____
- III. List of Known Substantive Issues Expected to Affect Timing of Negotiations: Analyze for Potential Impediments to Timely Settlement/Strategy for Addressing Each Issue
- A. PRP liability or other PRP issues:
 - B. Technical Issues:
 - C. State, Tribe and Federal NRD issues:
 - D. Leverage Analysis/Settlement Tools:
 - E. Develop Strategy for Large PRP Groups:
- IV. Contingency Planning for alternative strategies to prevent extended delays
- A. UAO analysis (for RD or RD/RA, delayed effective date, enforcement)
 - B. ASAOC for RD analysis
 - C. Resource/funding needs, Superfund State Contract
 - D. Start Drafting UAO and/or ASAOC for RD if negotiations are going slowly
 - E. Finalize Admin Orders (UAO, ASAOC)
- V. Conference Schedule for delayed SNL or negotiations extending past 365 days
- *90 Days after ROD if no SNL*: Call with Reg. attorney, Reg. branch chief, RSD liaison, RSD branch chief with plan to issue SNL within next 30 days
 - *End of 300 days*: If no agreement reached, submit a plan to OSRE to finalize either CD or UAO within the next 65 days. OSRE will schedule conference with regional counsel, Superfund division director, OSRE director, DOJ section chief or deputy chief; memo to regional counsel, Superfund division director, OSRE director, DOJ section chief or deputy chief
 - *At Day 365*: Revise plan, reconvene same mgmt. team to discuss next steps.
- Goal: Reach Settlement or Issue UAO within 485 days from ROD to expedite cleanup.
- VI. Referral of completed settlement _____
- Draft complaint: All defendants and information needed to file complaint
 - 10 Point Settlement Document
- VII. DOJ action
- Signature by DOJ _____
 - Lodging (anticipated within 30 days of signature by EPA) _____
 - Motion to Enter (anticipated 45 days after lodging) _____