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

JAN 16 2020

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Use of the "Look-First" Approach in Comprehensive Environmental Response, Compensation, and Liability Act Settlement Agreements Involving Third Parties

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

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

In furtherance of Recommendation 22 of the Superfund Task Force,[1] this memorandum confirms the U.S. Environmental Protection Agency's (EPA) commitment to support, in appropriate cases where it furthers the interest of the Superfund program, the use of "look-first" provisions in Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) settlement agreements. These settlement agreements involve potentially responsible parties (PRPs), the government, and a third party who was not originally a PRP but who agrees (usually in return for compensation) to perform cleanup work at a site. Under this approach, the EPA would agree to "look first" for performance to the third-party settlor who has agreed to stand first in line to perform all response actions and corrective measures[2] and pay all stipulated penalties defined by their settlement. The EPA would look to the original settling PRP(s) to perform the work called for by the settlement only in the event of the failure of that third party to perform or upon some other exigency also defined in the settlement.

The EPA is issuing this memorandum to: raise awareness of the "look-first" approach that has been used in a few past settlements; encourage Regions to consider the "look-first" approach in future settlements, where appropriate; and establish a national center of expertise on the "look-first" approach by identifying experienced, subject-matter experts in the Office of Site Remediation Enforcement (OSRE) who are available to consult with the EPA Regions on this settlement strategy. Although language from the past agreements may illustrate the kinds of provisions to consider in negotiating a look-first settlement, the EPA Regions should work with

[1] The Superfund Task Force Report and other information is available on EPA's website at https://www.epa.gov/superfund/superfund-task-force.

[2] "Corrective measures" in this context refer to actions taken to correct a party's inadequate performance of cleanup obligations at a site.

Internet Address (URL) • http://www.epa.gov
Recycled/Recyclable • Printed with Vegetable Oil Based Inks on Recycled Paper (Minimum 50% Postconsumer content)

EPA Headquarters and the Department of Justice to take a fresh look at what provisions are necessary to best protect the government's interests.[3]

I. Introduction

The Superfund Task Force was commissioned on May 27, 2017, to identify ways the EPA can better streamline and improve the Superfund program to further promote cleanup, redevelopment, and community revitalization.[4] On July 25, 2017, the Task Force issued a report identifying 42 recommendations, organized around five goals, in response to this charge.[5] This memorandum is being issued in support of Task Force Recommendation 22, which directed the EPA to explore different approaches being used in the marketplace to transfer environmental response obligations and other risk-management tools that may encourage private investment and promote third-party participation in Superfund sites. These tools may help accelerate cleanup activity at contaminated property, resulting in protection of public health and the environment and helping to prepare sites for future productive use.

Over the past two years, the EPA has conducted external-stakeholder outreach to parties engaged in the purchase and sale of contaminated properties, the management of large portfolios of contaminated properties, the contractual assumption of Superfund cleanup obligations, and the issuance of environmental insurance policies. The EPA has also held two public "listening sessions" on Task Force Recommendation 22. During and following the listening session on the "look-first" approach, the EPA accepted verbal and written remarks from the public on this settlement practice.[6] EPA has considered all the input it received as a result of its outreach efforts on this recommendation.

II. CERCLA Background

The liability scheme established by CERCLA allows that, wherever possible, PRPs finance and perform cleanups – rather than the public taxpayer.[7] This principle is advanced by placing responsibility for response actions on those parties responsible for the contamination.[8] As

---

[3] The three prior settlements that have used a "look-first" approach are: Mattiace Petrochemical Superfund Site (New York, 2003), available on the National Oceanic and Atmospheric Administration's website at https://darrp.noaa.gov/hazardous-waste/mattiace-petrochemical; the Sheboygan River and Harbor Superfund Site (Wisconsin, 2006), available on EPA's website at https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0505188; and the St. Maries Creosote Superfund Site (Idaho, 2009), available on EPA's website at https://semspub.epa.gov/work/10/883103.pdf.

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

[5] "Superfund Task Force Recommendations," July 25, 2017, available at https://www.epa.gov/superfund/superfund-task-force-recommendations.

[6] More information on the listening sessions, including the presentations and recordings of the webinars, is available at https://www.epa.gov/enforcement/listening-sessions-superfund-task-force-recommendations.

[7] *See United States v. Bestfoods*, 524 U.S. 51, 55-56 (1998) *citing* S. Rep. No. 96-848, at 13 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6119.

[8] *See* "Superfund Enforcement Strategy and Implementation Plan," EC-G-2000-0159800.0 (Nov. 3, 1989), available at https://www.epa.gov/enforcement/guidance-superfund-enforcement-strategy-and-implementation-plan; *see also* "Enforcement First for Remedial Action at Superfund Sites" (OECA/OSWER Sept. 20, 2002), available at https://www.epa.gov/enforcement/guidance-enforcement-first-remedial-action-superfund-sites; "Enforcement First

described in Section 107(a) of CERCLA, the following categories of persons may be held liable for the costs or performance of a cleanup under CERCLA:

- any owner or operator of a facility;
- any owner or operator of a facility at the time of disposal of a hazardous substance;
- any person who arranged for the disposal or treatment of a hazardous substance; or
- any person who accepted a hazardous substance for transport to a disposal or treatment facility that such person selected.[9]

The EPA typically seeks to enter into CERCLA settlements that provide for PRPs to perform work.[10] Work settlements can be effective for conserving Hazardous Substance Trust Fund (Fund) resources, reducing transaction costs, and expediting cleanups. These settlements can also provide some level of certainty to settling parties in return for assuming cleanup responsibilities, through covenants not to sue and contribution rights.[11] Settling parties may also be eligible to benefit from various financial incentives under existing EPA policy, including orphan share compensation, special account disbursements, and mixed funding.[12]

PRPs have long used insurance products, indemnities, and other contractual cost-allocation mechanisms to manage risks associated with the financial impact of Superfund cleanup obligations. More recently, other business approaches have also been developed to help finance and perform site cleanups. These approaches involve third parties assuming the financial risk from PRPs to perform cleanup activities, often for consideration, such as a lump sum payment and/or title to real property. In return, the third party indemnifies the responsible party for the assumed obligations. These types of transactions may be supported by environmental insurance, which is used to help protect against the risk of incomplete or inaccurate evaluations of the cost of the cleanup or other assumed obligations.[13]

---

to Ensure Effective Institutional Controls at Superfund Sites" (OECA/OSWER March 17, 2006) available at https://www.epa.gov/enforcement/guidance-enforcement-first-policy-superfund-institutional-controls; "Enforcement First for Removal Actions" (OECA/OSWER August 4, 2011), available at https://www.epa.gov/enforcement/guidance-enforcement-first-removal-actions.

[9] 42 U.S.C. § 9607(a).

[10] *See* "Interim CERCLA Settlement Policy," OSWER 9835.0 (Dec. 1984) available at https://www.epa.gov/enforcement/guidance-cercla-settlement-policy-interim; "Addendum to the Interim CERCLA Settlement Policy," (OECA/DOJ Sept. 30, 1997) available at https://www.epa.gov/enforcement/guidance-cercla-settlement-policy-interim.

[11] *Id.*

[12] *See e.g., "*Evaluating Mixed Funding Settlements under CERCLA," OSWER Dir. 9834.9 (Oct. 20, 1987) available at https://www.epa.gov/enforcement/guidance-superfund-mixed-funding-settlement-evaluation; "Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time-Critical Removals," (OECA Jun. 3, 1996) available at https://www.epa.gov/enforcement/guidance-orphan-share-compensation-rdra-and-non-time-critical-removal-settlors; and "Guidance on Disbursement of Funds from EPA Special Accounts to Entities Performing CERCLA Response Actions," (OLEM Mar. 27, 2018) available at https://semspub.epa.gov/work/HQ/100001089.pdf.

[13] For example, cost cap policies may be used to cover cost overruns addressing known environmental conditions at the property. In addition, pollution legal liability policies may be used to cover risks associated with unknown environmental conditions at the site. The types of specialty environmental insurance available on the market continue to evolve.

A PRP is not prohibited from entering into agreements for indemnification or other risk allocation mechanisms with third parties to allocate responsibility for response activities at Superfund sites. However, as explicitly provided by the statute, and confirmed by case law, a PRP cannot transfer or divest itself of its liability under Section 107 of CERCLA.[14] A settlement agreement can resolve liability to the federal government. The "look-first" approach is another tool to foster cleanup and allocate risk in the settlement context.

III. Policy Statement on "Look-First" Approach in CERCLA Settlements

The EPA supports the cleanup and productive reuse of contaminated properties by addressing Superfund liability concerns and by using site-specific enforcement tools, consistent with the EPA's statutory obligations described above. One tool to be considered is the "look-first" approach in a CERCLA settlement agreement that includes the government and both the original PRPs and third parties who agree to stand first in line to perform environmental cleanup obligations at a site.[15] Under the "look-first" approach, the EPA would agree, where appropriate, to first seek performance, corrective measures, and stipulated penalties from the third party settlor(s) before pursuing the settling PRPs for such actions.

EPA understands that transactions involving environmental-response obligation prioritization can be an effective mechanism for encouraging private investment in CERCLA sites. EPA also understands that as the environmental remediation and brownfields industry have matured alongside CERCLA, these types of prioritizations have emerged as a market solution to address liability concerns and can facilitate redevelopment opportunities at contaminated properties. Information provided to EPA indicates that private companies that have taken on cleanup obligations sometimes are specialists in that field and other times are specialty developers that intend to purchase the property, with engineering, regulatory, and other in-house expertise related to remediation and redevelopment. EPA also understands that, based on their business models, these companies can be financially motivated to perform timely and complete cleanups under the terms of certain settlement agreements with the EPA. As such, PRPs may be incentivized to pursue this approach, including at contaminated and inactive properties, to obtain added financial certainty with respect to cleanup costs through the receipt of indemnification or

---

[14] *See* 42 U.S.C. § 9607(e)(1) ("No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any . . . facility or from any person who may be liable for release or threat of release…to any other person the liability imposed under this section."); *see also Harley Davidson, Inc. v. Minstar, Inc.*, 41 F.3d 341, 342 (7th Cir. 1994) ("[W]e agree with every other appellate court that has been called on to interpret [Section 107(e)] that it does not outlaw indemnification agreements, but merely precludes efforts to divest a responsible party of his liability."); *Mardan Corp. v. C.G.C. Music,* 804 F.2d 1454, 1459 (9th Cir. 1986) ("Contractual arrangements apportioning CERCLA liabilities…are essentially tangential to the enforcement of CERCLA's liability provisions. Such agreements cannot alter or excuse the underlying liability, but can only change who ultimately pays that liability."); *The Coy/Superior Team v. BNFL, Inc.*, 174 Fed. Appx. 901 (6th Cir. 2006) ("Although [Section 107(e)] does not allow a party who is responsible for cleanup costs to escape liability vis-a-vis the federal government, parties may still contractually allocate the costs of environmental cleanup among themselves.").

[15] However, the EPA does not envision use of the "look-first" approach outside of the context where a third party is assuming cleanup obligations from the settling PRPs. For example, the "look-first" approach is not intended to apply where one group of PRPs are performing the response action and another group of PRPs are cashing out to the performing parties.

other contractual provisions provided by a third party assuming the environmental risks. EPA believes that this added certainty may accelerate the cleanup of contaminated, inactive properties not currently being addressed under CERCLA or other cleanup programs, many of which may have attractive real estate locations for future economic opportunities, along with accessibility to existing infrastructure resources.

The EPA's experience has shown that the "look-first" approach may be considered a useful tool at some sites, both to speed cleanup and to conserve Fund resources.[16] The "look-first" approach may not, however, be appropriate for all sites, or in situations where it will not accelerate cleanups and shorten the path to redevelopment and safe, productive reuse. The EPA retains the discretion to determine whether a "look-first" approach is appropriate for any given settlement.

IV. National Center of Expertise for the "Look-First" Settlement Strategy

To support the EPA Regions in their efforts to apply the "look-first" approach in practice, OSRE is establishing a national center of expertise for this settlement strategy. Greg Wall and Erik Hanselman, who lead the implementation of Superfund Task Force Recommendation 22, will serve as Headquarters' "look-first" subject matter experts. Greg and Erik are available to provide support in the development of site-specific agreements and to consult on general "look-first" approach issues. EPA regional staff should contact Greg (wall.gregory@epa.gov or 202-564-4498) or Erik (hanselman.erik@epa.gov or 202-564-4356) and the appropriate trial attorney in the Department of Justice when developing these types of agreements. To promote consistency and certainty, early involvement of these contacts is strongly advised.

V. Purpose and Use of this Memorandum

This memorandum is intended to notify EPA employees of the EPA's current thinking on this discretionary aspect of CERCLA implementation. It is not a regulation and does not confer legal rights or impose legal obligations. The extent to which the EPA applies this memorandum in a particular case will depend on the facts of the case.

cc: Office of Regional Counsel Superfund Branch Chiefs, Regions 1-10
Susan Bodine, Office of Enforcement and Compliance Assurance
Lawrence Starfield, Office of Enforcement and Compliance Assurance
Peter Wright, Office of Land and Emergency Management
Steven Cook, Office of Land and Emergency Management
James E. Woolford, Office of Superfund Remediation and Technology Innovation
John Michaud, Office of General Counsel
Thomas A. Mariani, Jr., DOJ Environment and Natural Resources Division

---

[16] One such situation might be where there is a well-founded basis for concluding that the protection provided by Section 119(a) of CERCLA, 42 U.S.C. § 9619(a), for certain response action contractors, is not adequate to foster appropriate cleanup and reuse (*e.g.*, because the third party will own the property and be a PRP). Section 119(a) of CERCLA was enacted to protect qualifying response action contractors hired to conduct cleanup activities at sites from CERCLA liability, unless that contractor's negligent, grossly negligent, or intentional misconduct caused a release. *See New Castle County v. Halliburton NUS Corp*., 903 F.Supp. 771, 775 (D. Del. 1995) *citing* H.R. Rep. No. 99-253(I) (1985), at 92, *as reprinted in* 1986 U.S.C.C.A.N. 2835, 2874. Section 119(a) of CERCLA does not apply to parties that conduct response actions on property that they own. *See* 42 U.S.C. § 9619(d).