

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

June 24, 2002

OSWER 92-08.0-17

MEMORANDUM

SUBJECT: Response Selection and Enforcement Approach for Superfund Alternative Sites

FROM: Barry Breen, Director *s/Barry Breen*
Office of Site Remediation Enforcement

Michael B. Cook, Director *s/Michael B. Cook*
Office of Emergency and Remedial Response

TO: National Program Managers, Regions I - X
Regional Counsel, Regions I - X

This memorandum identifies enforcement and settlement approaches for sites that require long-term response and are eligible to be placed on the National Priorities List (“NPL”), but are not yet listed. At these “Superfund Alternative” sites EPA should employ a number of enforcement provisions in addition to the processes and practices normally followed at listed sites. It is critical to ensure that settlements covering these response actions achieve cleanup levels equivalent to those required at NPL sites. Where EPA suspends listing of such Superfund Alternative sites, EPA’s enforcement posture should be equivalent to its enforcement posture at NPL sites. It is also critical that EPA provide the states, natural resource trustees, tribal governments, and communities the same opportunity for involvement as that provided at NPL sites. Nothing in this guidance should be construed to limit EPA’s enforcement discretion.

Background

For sites addressed by CERCLA, EPA's top priority is initiating cleanup and achieving construction completions at NPL sites. Since 1990, EPA's "enforcement first" approach has resulted in over 70% of new remedial action starts at NPL sites being performed by potentially responsible parties (“PRPs”). In securing these PRP-lead cleanups, however, there has been an increasing number of

requests for EPA to suspend the listing process and give the PRPs an opportunity to enter into an agreement that commits them to clean up the site in the same manner as if it were listed on the NPL. Where these agreements prove successful, EPA anticipates that more timely cleanups will result.

The enforcement approach outlined in this guidance may be appropriate for use in certain circumstances as determined by each Regional Office.¹ EPA's continuing Superfund priorities are to focus on sites listed on the NPL and pursue construction completion goals. This guidance is not intended to encourage Regions to suspend NPL listing of any site; listing of appropriate sites on the NPL and NPL cleanup completion continues to be an important element of EPA's Superfund program. Similarly, this approach is not intended to supercede or replace the many cleanup programs available at the federal or state level.

Criteria for Superfund Alternative Sites

For purposes of this guidance, Superfund Alternative sites include only those sites which the Region has decided meet the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP") criteria for listing on the NPL and require long term response.² These are sites entered into the Comprehensive Environmental Response, Compensation, and Liability Information System ("CERCLIS"), which typically score 28.5 or greater on the Hazard Ranking System ("HRS"). Superfund Alternative sites may include:

- 1) sites proposed for the NPL through a notice in the Federal Register;
- 2) Federal facilities (i.e., facilities currently owned by the federal government) provided that the affected Federal agency enters into an enforceable agreement or consent order with EPA for each site³;

¹ The approach would not be used at brownfield sites meeting the definition of eligible response sites with respect to persons in compliance with a state response program against whom CERCLA section 128(b) prohibits the use of judicial or administrative enforcement actions under CERCLA section 106(a) or judicial enforcement actions to recover response costs under CERCLA section 107(a).

² These are sites which would otherwise be listed on the NPL. Accordingly, these are not sites which: 1) are deferred under the NPL/RCRA deferral policy [(48 FR 40662, September 8, 1983) unless the conditions exist for placing a RCRA site on the NPL apply, as discussed in "Releases from Resource Conservation and Recovery Act (RCRA) Sites" (51 FR 21057), with Federal Facilities amendment (62 FR 62523)]; and 2) the Region and State have agreed will be addressed through a State deferral.

³ If a Region is interested in pursuing a Superfund Alternative approach at a Federal facility, please contact the Federal Facilities Enforcement Office (OECA) to discuss how this may be

- 3) privately-owned Formerly Used Defense Sites (“FUDS”); and
- 4) mixed-ownership sites.

EPA/State Relationship for Superfund Alternative Sites

The EPA Regional Office will notify the State of EPA’s desire to address a site as a Superfund Alternative site. Prior to initiating negotiations with the PRPs for cleanup, the Region should consult with the State on addressing the site as Superfund Alternative, on remedy selection and site management, and on the proposed enforcement actions.

Superfund Alternative Designation: The Region should work closely with the State to resolve any concerns the State may have regarding a Superfund Alternative designation. There is a general expectation that the Region and State will agree on a plan. If the Governor has provided a letter requesting NPL listing, the Region should reach an agreement with the State on pursuing a Superfund Alternative approach. If the Region and State do not agree on a Superfund Alternative approach, the Region should notify Headquarters (OSRE and OERR) prior to proceeding.

Remedy selection: The Region will request State review, comment, and involvement in the remedy selection process provided in CERCLA §121(f) and the NCP (§ 300.500: State Involvement in Hazardous Substance Response). Coordination between the Region and the State includes the following:

- 1) State participation in the long-term planning process for all remedial sites within the State;
- 2) A reasonable opportunity for States to review and comment on each of the following:
 - a) the Remedial Investigation and Feasibility Study (“RI/FS”) and all data and technical documents leading to its issuance;
 - b) the proposed remedial action identified in the RI/FS;
 - c) the engineering design following selection of the final remedial action;
 - d) other technical data and reports relating to implementation of the remedy; and
- 3) Notice to the State and an opportunity to comment on the EPA’s proposed plan for remedial action as well as alternative plans under consideration.

EPA’s proposed decision regarding selection of the remedial action should be accompanied by a response to the comments submitted by the State.

Enforcement: EPA should provide notice to the State of negotiations with PRPs regarding the scope of any response action at a facility in the State. Finally, EPA should provide the State an opportunity to participate in the negotiations and settlement.

Response Selection Approach for Superfund Alternative Sites

accomplished.

Suspending the listing of a site on the NPL should not impact the response selection process. As in the case of NPL sites, EPA will:

- 1) Continue to make appropriate use of its removal authorities at these sites to address the more immediate and less complex threats posed by the site.⁴
- 2) Prepare an RI/FS and a Record of Decision (“ROD”) that documents the final cleanup decision (NCP §300.430 (d), (e), and (f)).
- 3) Select and attain Applicable or Relevant and Appropriate Requirements (“ARAR”)s. Superfund Alternative sites should attain the same cleanup standards as NPL sites. (CERCLA § 121 and the NCP, §300.430).
- 4) Involve communities in decisions in the same manner as at NPL sites (NCP, §300.430).
- 5) Coordinate with Natural Resource Trustees in accordance with CERCLA §§ 104(b)(2) and 122(j).
- 6) “[P]rovide oversight when the response is pursuant to an EPA order or federal consent decree”(NCP states in § 300.400(f)). A Superfund Alternative consent decree should require the PRPs to implement the remedy with the appropriate level of EPA oversight. Regions are encouraged to seek advance oversight funding from the PRPs when entering into an enforcement agreement.
- 7) Ensure a complete cleanup in accordance with NCP standards.
- 8) Certify that the work is complete and that performance standards have been attained at Superfund Alternative sites using the same process used for NPL sites.

Enforcement Approach for Superfund Alternative Settlements

Settlements at Superfund Alternative sites should achieve the same results as those achieved at NPL sites. EPA may allow PRPs to perform investigation, removal or remedial action consistent with the NCP at sites which are not on the NPL upon a determination that such action will be done properly and promptly.

The primary impact of a decision to suspend listing a site where the Region anticipates remedial action is the inability to access Trust Fund dollars. The NCP provides that:

Only those releases included on the NPL shall be considered eligible for Fund-financed remedial action. Removal actions (including remedial planning activities, RI/FSs, and other actions taken pursuant to CERCLA section 104(b)) are not limited to NPL sites. (40 CFR § 300.425(b)(1)).

Based on this funding limitation, it is especially important that a settlement at a Superfund Alternative site

⁴ For a summary of pertinent NCP criteria and guidance to be considered in determining whether the use of remedial or removal authority is most appropriate, see “Use of Non-Time-Critical Removal Authority in Superfund Response Actions” issued jointly by OERR and OSRE, Feb. 14, 2000.

places EPA in an enforcement posture equivalent to that which EPA would have if the site were listed.

When negotiating for removal and RI/FS actions at Superfund Alternative sites, Regions should use the existing Administrative Order on Consent (“AOC”) models in drafting the settlement document. For a PRP-lead remedial action, CERCLA § 122(d) requires settlements be in the form of a consent decree, and Regions should use the latest revised Model RD/RA Consent Decree (June 15, 2001). As with any negotiation for RD/RA at an NPL site, Regions have the discretion to issue a Section 122(e) special notice letter (which starts the 120 day negotiation moratorium) for a Superfund Alternative site. Regions also have the discretion to proceed with listing should the negotiations extend beyond the negotiation moratorium. If a Region elects not to issue a special notice letter, it should complete a waiver pursuant to 122(a).⁵ All applicable administrative reforms may be made available at these sites.

The provisions identified below should be added to all orders and settlement agreements (as indicated in the “Summary of Select Enforcement Elements to Address Superfund Alternative Sites” table on page 8) to address the lack of NPL listing and may not be omitted from any agreement without Prior Written Approval from the Director of the Regional Support Division in EPA’s Office of Site Remediation Enforcement.

(1) Technical Assistance for the Local Community. An important element of a Superfund Alternative response action is the availability of technical assistance to the local community. EPA is authorized to provide technical assistance grants (TAGs) to qualified groups only at proposed or final NPL sites (40 CFR § 35.4025). If a Superfund Alternative site was proposed on the NPL and a TAG grant was awarded, Regions should continue to administer the site TAG grant and recover TAG costs as part of the site costs. If, however, a TAG grant has not been awarded by the time of the Superfund Alternative enforcement agreement, PRPs should provide funds for technical assistance to communities in substitution for EPA to be consistent with an NPL cleanup.

Generally, Regions should seek to have PRPs provide and administer funds to qualified groups to hire an independent technical advisor who can explain technical information related to site cleanup and help voice the community’s concerns. Under the arrangements that have been negotiated to date, PRPs solicit proposals from the community, evaluate any applications based on EPA-approved criteria, and select a community group based on those criteria.⁶ If a community group is selected to receive funding, the PRPs should assist the group in choosing an independent technical advisor and facilitate payment of expenses. If the PRPs have agreed to such arrangements during an early phase of the cleanup (e.g., in an

⁵ See “Interim Guidance on Notice Letters, Negotiations, and Information Exchange” OSWER Directive #9834.10, October 19, 1987.

⁶ EPA is currently working on guidance concerning PRP funding of technical assistance for community groups. Until this guidance is issued, Regions should look at the general principles in 40 CFR §§ 35.4025; 4030; 4035 for establishing criteria in the settlement.

AOC for the RI/FS), the Region may merely need to negotiate an extension through the RD/RA phase. Even though the PRPs agree to this funding, EPA should continue to provide information early in the process to the community and maintain its traditional role of involving the community throughout the response action.

(2) Natural Resource Damages Stipulation. In all cases, the Region has the responsibility to notify all potentially affected trustees (federal, state, and tribal) of the Superfund Alternative designation and commencement of investigations and negotiations at Superfund Alternative sites. To address potential future Statute of Limitations (“SOL”) concerns and to provide adequate protection for the interests of the Federal Trustees, Regions should ensure any settlement contains a stipulation from the PRPs that they will not assert a challenge to the United States’ NRD claims based on a SOL defense. The stipulation should be included regardless of whether the NRD claims are known at the time of the agreement.⁷

The general SOL provision for NRD claims (CERCLA §113(g)(1)(A)) is that an action must be commenced three years after the discovery of the loss and its connection with the release. CERCLA §113(g)(1) provides an exception to this general SOL period. An action for NRD claims at NPL sites or any facility “at which a remedial action ... is otherwise scheduled” must be commenced within 3 years after completion of the remedial action. This creates a new SOL period for remedial action sites. While we believe that Superfund Alternative sites would be covered under this provision, as a precautionary measure, EPA should require a stipulation with respect to natural resource damage claims in all settlements.

Where a State or Tribe is a party to the settlement, the stipulation should also address their potential claims. Where the State or Tribe is not a party to the settlement, they should consider negotiating a similar stipulation in a separate agreement (as they would at NPL sites).

(3) Agreement not to Challenge Listing After Partial Cleanup. While EPA presumes that the PRPs will negotiate in good faith and meet their settlement obligations, EPA’s concern is that human health and the environment are not jeopardized by an inadequate cleanup or an interruption in response actions. EPA should obtain from PRPs a waiver of their ability to challenge the listing based on changed site conditions due to partial cleanup. Some of the benefits of early cleanup are lost if PRPs challenge the listing on the basis of site information taken after partial performance of the work. To avoid delay in response action, EPA should be prepared to quickly finalize a listing package should it be necessary to list the site (i.e., Regions should ensure that a draft listing package is prepared prior to entering a Superfund Alternative agreement for removal or remedial action and maintain a current Administrative Record). In the event PRPs perform only a portion of the anticipated response, EPA

⁷ If the settlement ultimately contains a covenant for natural resource damages, or if the trustees have already reached a satisfactory agreement with the PRPs, a stipulation provision is no longer necessary and should not be added.

should proceed to list the site based on site conditions documented in the draft listing package prepared prior to initiation of PRP-lead removal or remedial action work. EPA should use the initial scoring included in the draft listing package and should not take response actions performed by PRPs after the agreement was signed into account in evaluating the site.⁸

(4) Financial Assurance Mechanisms for Work Continuance. Superfund Alternative settlements must provide adequate financial mechanisms to protect work continuity, and ideally, assure completion of the work. As these sites are not yet on the NPL, and therefore are not eligible for Trust Fund money for remedial action, PRPs should provide financial assurance instrument(s) in the event that EPA must complete part or all of the remedial work.⁹ The Model Consent Decree for RD/RA lists several possible mechanisms that PRPs at NPL sites may use to demonstrate the requisite financial assurance. Some of these mechanisms are fully-secured (letter of credit, surety bond, performance bond, and a fully funded trust fund); other mechanisms are either not fully secured (trust fund incrementally funded); or not secured at all (financial test, and corporate guarantee). Fully-secured instruments provide EPA with easier and faster access to monies for work takeover and are intended to prevent any delays in cleanup. Regions should require PRPs who agree to conduct remedial action at Superfund Alternative sites to use one of the fully secured mechanisms. Where the Region elects to use fully secured mechanisms for less than the total cleanup estimate (e.g., for the amount needed to keep the work going through the listing process), the Region may still need to obtain an alternative mechanism to financially assure the remaining amount of cleanup.

If the Superfund Alternative site has a special account established, money in that account may be considered when determining the amount of the financial mechanism. For example, if there is \$1 million in a special account, and the Region estimates that the worst case take over scenario would require \$2 million to keep work going through the listing process, then it may be appropriate to require only \$1 million in a separate fully-secured financial assurance mechanism. However, if some of the special account money is scheduled to be disbursed to the performing PRPs before the work is completed, then reducing the amount of the financial mechanism based on that portion of the special account funds would not be appropriate.

⁸ See "Revision to OSWER NPL Policy, The Revised Hazard Ranking System: Evaluating Sites After Waste Removals," OSWER Directive #9345.1-25, April 4, 1997.

⁹ Since EPA may access the Fund for non-NPL removal actions, it is discretionary for the regions to include this in removal settlements.

Summary of Select Enforcement Elements to Address Superfund Alternative Sites*

| | RI/FS AOC RD AOC | Removal AOC | RA CD |
|---------------------------------------------------------------------------------------------------------------------------------------------|---------------------|----------------|-------|
| Prior to initiating negotiations, consult with the State on addressing site as Superfund Alternative, proposed actions, and site management | U | U | U |
| Draft Listing Package prepared prior to entering into agreement | | U | U |
| Technical Assistance provision in agreement | U | U** | U |
| NRD Stipulation in agreement | | U** | U |
| Waiver of challenge to listing based on partial site cleanup in agreement | | U | U |
| Financial assurance for work continuance in agreement | | Preferred | U |
| Applicable administrative reforms available to settling parties | U | U | U |

* Sites where the Region intends to address the contamination through RA under an Superfund Alternative program.

** Unless there is already a provision in the RI/FS agreement.

Conclusion

EPA anticipates that this approach for response action at Superfund Alternative sites will allow cleanup to proceed during the time that might otherwise be spent in the site listing process, encouraging earlier settlements and more timely PRP-lead cleanups. The principle of Superfund Alternative response action is to provide the same level of cleanup as if the site was listed on the NPL. Superfund Alternative sites should attain these same NCP cleanup standards. The model settlement documents should be used for response actions, and the additional elements discussed herein are to secure cleanup standards and enforcement tools equivalent to those of NPL sites. We believe these components will make a settlement for cleanup at a Superfund Alternative site on par with an NPL site cleanup. However, if PRPs are unwilling to incorporate these components into an agreement at Superfund Alternative sites, EPA will proceed with the listing process, unless the RSD Director has given written approval for the omission of a component (as explained in the section “Enforcement Approach for Superfund Alternative Settlements”, page 5). Similarly if a PRP stops work or otherwise breaches the settlement agreement, EPA should issue a Unilateral Administrative Order (UAO) for the response action required at the site. EPA may also develop other enforcement options to ensure cleanup continues. In addition, EPA should pursue all civil penalties available.

If you anticipate entering into a settlement of this type or if you have any questions, please contact Deniz Ergener of OSRE at (202) 564- 4233. If you have questions regarding response selection at an Superfund Alternative site, please contact Joan Fisk of OERR at (703) 603-8791.

Purpose and Use of This Guidance

This guidance and any internal procedures adopted for its implementation are intended

exclusively as guidance for employees of the U.S. Environmental Protection Agency. This guidance is not a rule and does not create any legal obligations. Whether and how EPA applies the guidance to any particular site will depend on the facts at the site. EPA may periodically review the implementation of this guidance to evaluate settling parties' compliance with the terms of Superfund Alternative agreements and NCP cleanup requirements.

cc: Federal Facilities Enforcement Office
OERR Documents Coordinator, 5202G