



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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MEMORANDUM

SUBJECT: "Enforcement First" to Ensure Effective Institutional Controls at Superfund Sites

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TO: Superfund National Policy Managers, Regions I-X
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Purpose

On September 20, 2002, OSWER and OECA jointly issued a memorandum requesting Regions to redouble their attention to EPA's "enforcement first" policy.¹ While that memorandum focused largely on Remedial Action construction activities, it also noted that the "enforcement first" policy applies throughout the Superfund cleanup process. The purpose of today's memorandum is to state explicitly that the "enforcement first" policy also applies to any actions needed to ensure the implementation and effectiveness of institutional controls.

¹ Available on the EPA Web site at <http://www.epa.gov/compliance/resources/policies/superfund/enffirst-mem.pdf>

The Agency is committed to pursuing “enforcement first” for all phases of response actions at Superfund sites. This policy promotes the “polluter pays” principle and helps conserve the resources of the Hazardous Substance Response Trust Fund (Fund) for sites where no viable responsible parties exist. By applying this policy to institutional controls, EPA can further advance its program goals.²

Background

In September 2004, EPA launched the implementation of its national five-year *Strategy to Ensure Institutional Control Implementation at Superfund Sites* (Strategy).³ Institutional controls are administrative and legal instruments that help minimize the potential for human exposure to contamination and protect the integrity of the remedy. Institutional controls work by limiting land or resource use and by providing information that helps modify or guide behavior at properties where hazardous substances at a site prevent unlimited use and unrestricted exposure. Institutional controls are a critical component of the cleanup process, used to ensure both short- and long-term protection of human health and the environment, and as such they should be identified and analyzed early in the cleanup process as part of the Remedial Investigation/Feasibility Study.

The Agency has made significant progress in its efforts to address the complexities and challenges associated with institutional controls. For example, EPA is actively implementing the Strategy to identify, review and resolve any problems with institutional controls at Superfund sites, with an emphasis on evaluating institutional controls at sites where the construction of all remedies is complete (construction complete sites). EPA recognizes that the implementation of this Strategy will require significant coordination and communication with stakeholders, in particular, potentially responsible parties (PRPs) and current owners of these sites. PRPs play a significant role in supporting a robust analysis of the effectiveness of institutional controls and in implementing necessary controls at Superfund sites. Institutional control activities at sites may include, for example:

- conducting studies and evaluations to evaluate the design, monitoring, implementation and enforcement of institutional controls at sites, including evaluations of current and potential future land uses, and whether different, additional or layered institutional controls are needed;
- analyzing real property title information to ensure that proprietary controls are properly implemented, and resolving any issues that may impact the effectiveness of the institutional control, including acquisition of subordination agreements as necessary;

² The enforcement principles and processes outlined in this memorandum may also apply to EPA’s implementation of the *National Strategy to Manage Post Construction Completion Activities at Superfund Sites*, OSWER 9355.0-10, October 2005, http://www.epa.gov/superfund/action/postconstruction/pcc_strategy_final.pdf.

³ Available on the EPA Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/ic-strategy-04-mem.pdf>.

- utilizing current state-of-the-art institutional control tools such as “One-Call” systems, new monitoring and mapping technologies, or environmental covenants under state adopted versions of the Uniform Environmental Covenants Act; and
- improving site-specific plans and procedures by addressing the long-term stewardship of institutional controls. This may include updating site Operation and Maintenance Plans, developing Institutional Control Implementation and Assurance Plans, and ensuring the adequacy of periodic status reporting and financial assurance mechanisms.

EPA Headquarters continues to conduct outreach to the PRP community to talk about their expected role as partners in implementing this Strategy and supports the efforts of EPA Regions to encourage PRP cooperation at these sites. We believe we share a common goal with the PRP community in maintaining the effective long-term stewardship of cleaned up sites to ensure the continued protection of human health and the environment.

Implementation

EPA maximizes PRP participation in the design and implementation of Superfund site cleanups by using a variety of negotiation and enforcement tools including, as appropriate, issuing unilateral administrative orders. See *Negotiation and Enforcement Strategies to Achieve Timely Settlement and Implementation of Remedial Design and Remedial Action at Superfund Sites*, OSRE, June 17, 1999 (Negotiation and Enforcement Strategies Memorandum).⁴ For remedies that rely in whole or in part on institutional controls, EPA strives to ensure that the PRPs remain responsible for the implementation of the institutional controls, including the identification and resolution of any issues impacting the continued effectiveness of the institutional controls.

As noted earlier in this memorandum EPA recognizes that PRPs play a significant role in supporting a robust analysis of the effectiveness of institutional controls and in implementing necessary controls at Superfund sites. Ensuring that institutional controls are properly implemented and remain protective is important to both EPA and the PRPs. Therefore case teams should first pursue a cooperative approach when working with PRPs, and use the agreements already entered into by the PRPs at the site. But as appropriate, case teams may use the approach outlined in the Negotiation and Enforcement Strategies Memorandum. For example, in the institutional controls context, a case team might first determine whether the PRPs at a site have already entered into a consent decree for Remedial Design/Remedial Action that requires them to conduct studies and investigations requested by EPA to assist in periodic reviews. Based on this obligation, the PRPs could be required to investigate the status or effectiveness of the institutional controls at a site. If the case team determines that additional

⁴ Available on the EPA Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/neg-enfst-mem.pdf>.

institutional control work is needed beyond further study or investigation, the case team should consider whether the agreements already entered into by the PRPs require them to implement the additional institutional control work or whether a modification to the Statement of Work (SOW) or related work plans is needed. Modifications to the SOW and/or work plans may be appropriate when the additional work is (1) necessary to achieve and maintain performance standards or to carry out and maintain the effectiveness of the remedy set forth in the Record of Decision (ROD) and (2) consistent with the scope of the remedy selected in the ROD.⁵

If the PRPs cannot be required to implement the additional institutional controls pursuant to the consent decree provisions discussed above, the case team should consider whether the decree has a reopener provision for new information or unknown conditions or a separate reservation of rights that will allow EPA to bring an action seeking to require the implementation of institutional controls. If the decree has a reopener provision and the need for the additional institutional controls is based on new information or unknown conditions, the case team will likely be able to require the PRPs to implement the additional institutional controls under the decree itself if the PRPs have agreed, in the decree, to implement any additional work needed to protect human health or the environment that falls within the scope of the reopener.⁶ Alternatively, if the PRPs have not so agreed, the decree usually will exclude any such matters from the covenant not to sue⁷ thereby allowing EPA to bring an enforcement action against the PRPs. The case team should also review the agreements entered into by PRPs at the site for any separate reservation of rights⁸ that will allow EPA to seek institutional controls. If present, the case team may be able to bring an enforcement action against the PRPs seeking the implementation of the additional institutional control work without having to establish the criteria necessary for the reopener for new information or unknown conditions.

Appropriate enforcement actions may include the issuance of a unilateral administrative order (UAO) seeking to have the PRPs implement the additional institutional controls. In recent years, EPA has issued a number of orders for Remedial Action that explicitly include institutional controls as well as several orders for institutional controls alone. A UAO for institutional controls must meet all statutory requirements of CERCLA §106(a) and other applicable requirements.

⁵ See, Paragraph 14, “Modification of the SOW or Related Work Plans,” of the Model RD/RA Consent Decree.

⁶ See, Paragraph 20, “Settling Defendants’ Obligation to Perform Further Response Actions,” of the Model RD/RA Consent Decree.

⁷ See, Paragraph 91, “United States’ Pre-certification Reservations,” and Paragraph 92, “United States’ Post-certification Reservations,” of the Model RD/RA Consent Decree.

⁸ See, e.g., Subparagraphs 94(g) and (i), “General Reservations of Rights,” and Paragraph 30 of the Model RD/RA Consent Decree.

Case teams should consider using Fund monies in those cases where the enforcement approach outlined above is not feasible, such as where the PRPs are incapable of conducting or paying for the work necessary to ensure that institutional controls are effectively implemented. Regions will generally use monies from the allocation for ongoing projects. In limited situations, however, the Agency's national risk-based priority panel may need to review the funding for institutional controls (e.g., if the panel had not previously reviewed this project, or if the panel's prior review of the remedial action was narrow in scope). In these situations, the usual procedures for enforcement screening and consultation with the Office of Site Remediation Enforcement's Regional Support Division would apply.

Conclusion

If you have any questions about this document, please contact Gregory Sullivan at (202) 564-1298, sullivan.greg@epa.gov. If you have any questions about EPA's "enforcement first" policy or would like assistance in evaluating the appropriate enforcement strategy at a particular site, please contact Mike Northridge at (202) 564-4263, northridge.michael@epa.gov. Questions about institutional controls should be directed to the regional or Headquarters institutional control coordinators.

This memorandum is intended solely for the guidance of employees of EPA and creates no substantive rights for any persons. It is not a regulation and does not impose legal obligations. EPA will apply this guidance only to the extent appropriate based on the facts.

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