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DIRECTIVE DIRECTIVE



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

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OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE
OSWER Directive 9230.0-3a

MEMORANDUM

SUBJECT: Community Relations Activities at Superfund
Enforcement Sites -- Interim Guidance

FROM: *Jack W. McGraw*
Jack W. McGraw
Acting Assistant Administrator

TO: Regional Administrators

Attached is the interim guidance for conducting community relations activities at Superfund enforcement sites. The guidance is in the form of Chapter VI that will be added to the September 1983 document entitled "Community Relations in Superfund: A Handbook," which contains Chapters I through V. The Handbook is being revised to reflect experience with the community relations program to date. Based on experience to be gained over the next several months, the enforcement chapter will be revised as necessary and issued as final guidance early in 1986 as part of the overall Handbook revisions.

The chapter has been developed in coordination with interested offices within EPA and with the Department of Justice. It represents a carefully constructed consensus as to how to enable an extensive community relations program in the course of enforcement actions while at the same time preserving the integrity of the enforcement process. Because of the complexity and differing circumstances involved in enforcement actions, the chapter cannot address every situation that will arise; it does, however, provide a sound structure for determining the nature and scope of site-specific community relations activities. A particularly important emphasis is placed on consultation among Regional community relations, technical enforcement, and Regional Counsel staff, and between these staff and Department of Justice personnel once a case has been referred, or is likely to be referred, for litigation. This consultation is key to successful implementation of the chapter.

CHAPTER 6

COMMUNITY RELATIONS DURING ENFORCEMENT ACTIONS

An effective community relations program is an essential part of every Superfund enforcement action. This chapter provides guidelines for developing and administering community relations programs during enforcement proceedings brought under the authorities of CERCLA.*

The purposes of community relations activities related to Superfund actions, described in the preceding chapters, essentially are to ensure that:

- (1) community concerns are considered to the greatest extent practicable in determining site remedies;
- (2) affected citizens have an opportunity to participate in the remedy-selection process, principally through review and comment; and
- (3) communities are kept informed during Agency actions.

It must be recognized, however, that the enforcement process is by its nature adversarial, even where there is an apparent interest on the part of potentially responsible parties to work willingly with the Agency to arrive at appropriate site cleanup. In order for the government to protect its enforcement position, both in court and during negotiations, there are necessary limitations on the release or discussion of certain information. For example, there can be no discussion of enforcement strategy and timing, nor can there be release of information that might disclose the strengths and weaknesses of a case or that is otherwise privileged and protected under the law. In addition, depending upon specific circumstances, there may be other limitations on the scope of community relations activities, particularly where a case has been referred to the Department of Justice for litigation.

*CERCLA and the National Contingency Plan, including requirements regarding community relations, apply to actions carried out by a State where CERCLA funds are used to support the State activity. As of the date of issuance of this chapter, no CERCLA funds have been used to underwrite State costs where the State has assumed lead enforcement responsibility for a site. Consequently, there has been no basis in the past for requiring States to conduct community relations activity at State enforcement-lead sites. However, OSWER is planning to begin funding remedial investigations and feasibility studies (RI/FS) at selected State-lead enforcement sites, and may in the future be able to provide a broader range of assistance. Accordingly, the appropriate provisions of this chapter will apply to that aspect of State activity at a State-lead enforcement site that is funded in whole or in part by CERCLA monies.

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- Community relations during responsible party cleanup (Section H); and
- Community relations during removal actions (Section I).

A. THE ENFORCEMENT PROCESS

The enforcement process under CERCLA will vary with the circumstances of each site. However, a description of the basic approach is set forth here to help the reader follow the later discussions in this chapter.

CERCLA section 104 authorizes the government to respond to releases or threatened releases of hazardous substances, pollutants, and contaminants, unless the government determines that the responsible parties will respond in a timely and proper manner. EPA may seek to compel potentially responsible parties through litigation or administrative order to clean up hazardous substances or to pay the costs of government response, or EPA may negotiate and settle with potentially responsible parties regarding cleanup and cleanup costs.

The enforcement process begins with a search for potentially responsible parties associated with each site, including generators, transporters, and facility owners and operators. When potentially responsible parties (PRPs) are identified, EPA evaluates their ability to undertake cleanup actions properly. Usually, before the Agency begins its own response activities, EPA attempts to send notice letters to the potentially responsible parties, informing them of their potential liabilities, requesting information under section 104(e) of CERCLA and section 3007 of the Resource Conservation and Recovery Act (RCRA), and providing an opportunity to meet with the Agency to discuss possible cleanup activities that the PRPs might undertake. For example, PRPs may perform the RI/FS if they agree to follow the work plan for the RI/FS developed by EPA. (See the memorandum entitled "Participation of Potentially Responsible Parties in Development of Remedial Investigations and Feasibility Studies Under CERCLA, signed March 20, 1984, by Lee M. Thomas, Assistant Administrator for Solid Waste and Emergency Response, and Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring.) Or, EPA may conduct the RI/FS, then seek to compel or negotiate with potentially responsible parties to design and construct the remedy.

At many sites, however, a Fund-financed removal action or RI/FS will be conducted before the final decision is made whether or not to pursue enforcement actions. When the removal action or RI/FS is completed, EPA may seek to secure responsible party funding and management of any later stages of the response through issuance of an administrative order or filing of a lawsuit, both of which may involve negotiations, or some combination of these actions.

Where there are to be negotiations, a government negotiating team is formed. The leader of the negotiating team (or the team's designee) serves as a liaison between the negotiating team and the Regional Superfund Community Relations Coordinator. The negotiating team leader is responsible for keeping

Community relations staff must consult with enforcement staff prior to conducting the community discussions to determine what is already known about the site, any special cautions that should be observed in the course of the discussions, and whether site circumstances make it appropriate for enforcement staff to participate. Further, where discussions with the affected community provide the Agency with information concerning site conditions or potentially responsible parties, or other relevant enforcement information, community relations staff must ensure that this information is provided as soon as possible to enforcement staff.

It also should be noted that circumstances at sites are constantly changing, and the need for enforcement action may arise suddenly in connection with a site where no enforcement action had been foreseen. The enforcement staff should keep the community relations staff advised of these changes.

Community relations plans for enforcement-lead remedial action sites should be prepared as soon as possible following the discussions with the affected community. The plan must make provision for the following major activities, recognizing that referral of the case to the Department of Justice for litigation may occur at any point in the enforcement process and may require the plan to be revised:

- (1) public meetings and information dissemination prior to and during the remedial investigation/feasibility study stage (see Sections C and D);
- (2) public comment on the RI/FS (see Section D);
- (3) preparation of a summary of public comments on the RI/FS to accompany the draft negotiations decision document (see Section D);
- (4) potential public participation in technical discussions with potentially responsible parties and government representatives to discuss aspects of site remedy (see Section E);
- (5) dissemination of information during negotiations (see Section F);
- (6) preparation of a responsiveness summary of public comments on the RI/FS to accompany the Enforcement Decision Document and the proposed administrative order on consent or proposed consent decree (see Sections F and G); and
- (7) preparation of a summary of public comments on the Enforcement Decision Document and the administrative order on consent or consent decree (see Sections F and G).

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conducts the RI/FS, or has reached agreement with the Agency for site cleanup, or both, the responsible party may wish to participate in public meetings or in the preparation of fact sheets. It may also be appropriate, at the sole discretion of the Agency, for the responsible party to participate in implementing the plan during negotiations where the responsible party is willingly working with the Agency to come to agreement on site cleanup, although these occasions may be few. However, the responsibility for development and implementation of the plan must remain with EPA.

In most instances, the decision regarding responsible party participation in the community relations plan will be made after the plan has been developed. As a result, the plan will need to be modified to reflect the EPA and responsible party roles and responsibilities. Any modifications must be approved by the technical enforcement and Regional Counsel offices and, once a case has been referred, by the Department of Justice.

C. COMMUNITY RELATIONS PRIOR TO THE RI/FS

At the time notice letters are sent, EPA Regional community relations staff should contact local officials and citizens who have expressed concern about site issues to inform them that enforcement efforts have begun. Staff also should announce the community relations activities planned to take place with regard to the site. These actions should serve primarily to provide information on EPA's understanding of the nature of problems at the site and on EPA's general enforcement process. In discussing the community relations activities planned for the site, community relations staff should point out that some modification in planned activities likely will be necessary if the site is referred for litigation. The reasons should be explained to ensure public understanding of the legitimate constraints that apply in such circumstances.

In all cases, community relations staff must coordinate their activities with technical enforcement and legal staff and the site project manager to ensure that any releases of information are reviewed and approved in advance.

D. COMMUNITY RELATIONS DURING AND UPON COMPLETION OF THE RI/FS

In general, if the case has not been referred to the Department of Justice for litigation, community relations activities during the remedial investigation and the development of the feasibility study for enforcement sites should be basically the same as for Fund-lead sites. Activities for most sites should include one or more public meetings and additional informal meetings with interested citizens to discuss site conditions and alternative remedial actions under study, and to respond to questions on these issues. These and other standard activities conducted in connection with Fund-lead RI/FSs are appropriate for most enforcement remedial action sites because responsible party participation in the RI/FS, and in some instances actual conduct of the RI/FS, are being encouraged as a matter of Agency policy. In other words, since the RI/FS process will not generally be closed to potentially responsible parties, there generally should be no bar to full public disclosure and participation. However, consistent with the

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proposed remedy (see Sections F and G and the above-cited policy memorandum). Community relations staff also should advise the community of the next anticipated steps in the enforcement process and explain negotiation or litigation procedures (as appropriate to the site) through small group briefings, fact sheets, or brief informational materials deposited in a local information repository. As with other activities, community relations staff should consult with and obtain the approval of appropriate technical enforcement and Regional Counsel personnel to ensure that enforcement or negotiation positions are not jeopardized. Where the case has been referred for litigation, approval from the Department of Justice also is necessary.

E. PUBLIC PARTICIPATION IN TECHNICAL DISCUSSIONS WITH POTENTIALLY RESPONSIBLE PARTIES AND GOVERNMENT REPRESENTATIVES REGARDING ASPECTS OF SITE REMEDY

There may be occasions where affected citizens may make valuable contributions to appropriate site remedy through participation in technical discussions with potentially responsible parties and government representatives. These discussions, which would deal with technical issues, and not questions of liability or other issues not relating to remedy, would be conducted separately from, but contemporaneously with, government/responsible party remedy negotiations. The purpose would be not only to facilitate public understanding of the technical issues, but also to better enable the government and responsible parties to arrive at a remedy that accommodates public concerns.

In developing the community relations plan for an enforcement site, consideration should be given to whether such discussions will be appropriate. In most instances, however, the final decision cannot be made at this point because circumstances that would make such discussions appropriate or inappropriate will not be known. Therefore, the community relations plan should address only the potential for such discussions, the conditions under which they might take place, and the criteria for public participation.

The decision on public participation will be made by the Regional Administrator upon the advice of the Regional Superfund Community Relations Coordinator, the chief Regional Office official responsible for technical enforcement, and the Regional Counsel. Where the case has been referred for litigation or there is a likelihood of litigation, the concurrence of the Department of Justice also must be obtained. (With regard to public participation in technical discussions for sites that are already in litigation, see Section G.) The following criteria should be considered in making the decision:

- (1) Has the interested public, including local government bodies, been able to agree on its representatives (generally no more than three or four);
- (2) Does the interested public have technical representation where the complexity of site issues requires such representation;

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for public comment, and the availability of the consent order and the Enforcement Decision Document that will have been prepared by the Region and that is the mechanism for Agency approval of the cleanup. [NOTE: In accordance with the policy memorandum of February 27, 1985, referenced earlier, a responsiveness summary of public comments on the RI/FS is to be prepared to accompany the Enforcement Decision Document and will be made available for public review as part of the EDD.] The announcement should consist of at least a public notice, a news release to local media, and a notice in the local repository. The announcement also should explain where copies of the settlement documents, order, EDD, and responsiveness summary may be found (e.g., in the local repository), and where comments should be sent. In some cases, community relations staff may want to provide personal notification to concerned and directly affected citizens. Any meetings or briefings planned regarding the order also should be announced. Communications to the public should focus on the technical provisions of the settlement agreement; details of the negotiations, such as the behavior, attitudes, or legal positions of responsible parties, any compromises incorporated in the settlement agreement, and evidence or attorney work product material developed during negotiations, must remain confidential.

After the close of the comment period, a summary of comments must be prepared and sent to the appropriate Regional official, who will recommend to the signing official either that the order go into effect unchanged or that negotiations be reopened to consider issues raised by the comments received. If agency negotiators and responsible parties agree to make changes in the order, the order may be modified. The order goes into effect once it is accepted unchanged or modified and subsequently approved, except that aspects of an order not affected by potential modifications may be implemented without delay.

G. COMMUNITY RELATIONS DURING AND UPON COMPLETION OF LITIGATION

A case may be referred to the Department of Justice to initiate litigation at any point in the enforcement process. When a case is referred, the needs for confidentiality and constraints on the scope and nature of community relations activities become greater. If litigation is initiated early in the enforcement process, the community relations plan for the site may need to be modified substantially. If it is initiated late in the process, at the conclusion of unsuccessful negotiations for example, the plan will require only an addition to accommodate the litigative process.

Where a case has been referred to the Department of Justice, community relations staff and Agency enforcement and legal personnel must consult with the lead Department of Justice attorney to determine the scope of community relations activities to be carried out. While strong consideration should be given to implementing the plan as developed and previously approved, the federal litigation process may require changes in the degree of public disclosure. For example, the court of jurisdiction may have rules regarding public disclosure. The court may or may not allow public meetings in the course of developing an RI/FS for a site in litigation, and similarly may limit public comment on the completed feasibility study. A court also may

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the Agency may arrive at an agreement with the PRPs to do the work, which would be embodied in an administrative order on consent. In addition, under certain circumstances, the Agency may refer the action to the Department of Justice to seek a court order to secure the removal. By their nature, the situations giving rise to an immediate removal or other urgent action do not allow for the same level of public comment. Adjustments to the community relations process must be made to fit the time constraints. However, once issued, a unilateral administrative order or administrative order on consent becomes a public document which should be made available to the affected community. In addition, community relations staff should discuss the terms of the order with citizens, local officials, and the media and describe the removal action. If, however, the responsible party fails to respond to the order, any statements or information releases regarding the status of actions at the site or prospective EPA actions must first be cleared with appropriate Regional technical and legal enforcement personnel.

Consent orders for removals normally should be subject to public review before becoming effective. However, if holding a comment period for an immediate removal might delay implementation of the order and endanger public health or the environment, this procedure may be modified. In such instances, community relations staff should discuss the order with citizens, local officials, and the media and explain why the need for immediate measures precludes establishing a formal comment period.

Community relations activities during removals carried out by responsible parties should be the same as for Fund-financed removals. Responsible parties may participate, subject to the same considerations described above in Section H.