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Enforcement Under SACM — Interim Guidance

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The purpose of the Superfund Accelerated Cleanup Model (SACM) is to make Superfund cleanups more timely and efficient. This will be accomplished through more focus on the front end of the process and better integration of all Superfund program components. The approach involves:

- A continuous process for assessing site-specific conditions and the need for action;
- Cross-program coordination of response planning;
- Prompt risk reduction through early action (removal or remedial);
- Appropriate cleanup of long-term environmental problems;
- Early public notification and participation; and
- Early initiation of enforcement activities.

SACM is a process change that should be considered for all Superfund activities. Implementation of this policy will be consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Overall Superfund priorities remain the same: deal with the worst problems first; aggressively pursue enforcement; and involve the public and relevant State agencies at all appropriate stages of the work.

Overview

All actions taken under SACM must be consistent with CERCLA and the NCP, and each response selection must be adequately documented by an administrative record. EPA's enforcement first policy will continue under SACM. Potentially Responsible Parties (PRPs) are performing approximately 70 percent of the new work at NPL sites, and EPA remains committed to maximizing PRP involvement when applying the principles of SACM. Successful enforcement under SACM will require careful consideration of the nature and timing of PRP participation in particular.

Major enforcement areas affected by SACM include:

- The timing and methodology of PRP searches;
- The timing and content of negotiations with PRPs;
- Notice letters;
- Consultations for early actions;
- State involvement in enforcement;

- De minimis settlements;
- The availability and adequacy of administrative records; and
- Cost recovery and cost documentation.

This document highlights the need to maintain an enforcement first stance and discusses appropriate approaches for addressing the issues listed above.

Enforcement First

SACM does not change the Superfund program's emphasis on enforcement first. Coordination of site activities, including decisions and recommendations made by the Regional Decision Team (RDT), should anticipate the activities required for enforcement and ensure that they are carried out in a timely manner so that the response lead can be passed to

PRPs as early as possible without delaying work at the site. EPA expects much of the early site assessment activities to be Fund-lead. However, response lead changes can occur at any of the following points in the process:

1. During the site assessment activities.



2. Prior to development of an Engineering Evaluation/ Cost Analysis (EE/CA);
3. Prior to a removal action;
4. Prior to a Remedial Investigation/Feasibility Study (RI/FS);
5. Prior to a Remedial Design/Remedial Action (RD/RA); and
6. Prior to an RA contract solicitation, when funding the RA would have significant implications for the Fund and when no significant delay will occur.

EPA may take back the response lead from a PRP when the Agency deems a lead change would be appropriate to maintain response integrity or to protect human health and the environment.

The Region should identify the earliest point that the PRP search should begin and when negotiations should occur at each site.

PRP Searches: Timing and Methodology

Conducting adequate PRP searches can be crucial when preparing for negotiations and other enforcement activities. EPA does not anticipate that SACM will lead to changes in PRP searches for sites that require only emergency or time-critical removal actions. However, SACM's integrated site assessment process may lead to changes in PRP search methodology for non-time-critical removals and remedial actions for several reasons. First, because an RI may begin with or during a Site Investigation (SI), giving PRPs an opportunity to participate in the RI/FS will require that PRPs be identified earlier in the process than they are traditionally identified. Second, because the integrated site assessment is envisioned to require less time to complete than under the current process, there may be less time to develop liability information before a non-time-critical removal or remedial design begins. In addition, the greater emphasis on early risk reduction is expected to increase the use of non-time-critical removals to address some threats that previously were addressed with remedial actions. This will mean that there may be less time available before initiation of the response than in the past. For all of these reasons, there will be less time to conduct the PRP search and an increased emphasis on Regions' PRP search programs.

As a general rule, PRP search activities should begin as soon as possible after the Region decides that a response

action is likely to be required at the site. PRP searches for some sites, such as multi-generator landfills, may require substantial effort. Early initiation of PRP search activities may be valuable at these sites to ensure adequate time for carrying out enforcement activities such as issuing general notice letters. Many other sites, however, may require no action beyond the initial site assessment activities. Expedited searches at these sites probably would be unnecessary and not cost-effective in most instances.

Once Regions have decided to begin PRP search activities, they are encouraged to adopt a phased PRP search approach that focuses first on establishing liability for PRPs about whom information is most readily available from site assessment activities and other available sources and then expands to address the remaining PRPs. If a core group of PRPs is identified before a discrete phase of a combined site assessment, negotiations may begin for the conduct of data collection associated with the site assessment activities (i.e., SI, RI, FS, etc.), even if the Region believes that additional PRPs may be found later. (Keep in mind that under the current policy, EPA has the lead responsibility for the site assessment activities - Preliminary Assessment (PA), SI, and Expanded Site Investigation (ESI). This should continue under SACM. PRPs may collect data, but final responsibility for interpreting that data in reports and making site decisions remains with EPA.) Similarly, negotiations for conducting a response action (i.e., RD/RA, removal, etc.) may be initiated with known PRPs even if all PRPs have not been identified. Once potential liability has been established for the core group, the PRP search can be extended to the remaining PRPs whose liability is more difficult or more time consuming to establish. Regions should share information with known PRPs as soon as possible to facilitate PRP organization.

In conducting PRP searches, Regions should coordinate and share information with other parts of the program and with States. Where the Regional office uncovers information on PRPs as part of an emergency or time-critical action, the RDT should make full use of the information from these activities to support later enforcement actions at the site. Similarly, site assessment should include PRP search activities such as the documentation of evidence that identifies owners, operators, and witnesses; the collection of drum label information; the identification of the location and condition of generator records; and other activities that may help establish liability or waste contribution. Site assessment activities might include a more detailed or targeted waste analysis to tie wastes to specific PRPs. Where available, Regions should make use of States' authority to search for and notice PRPs. Regions should

consider writing a generic PRP search work assignment that can be used for a number of searches, each of which is initiated with a separate technical direction memorandum. Coordination of the PRP search and other site activities will require close communication between the PRP search team and the RDT.

Negotiations: Timing and Content

Generally, it is anticipated that by using the phased PRP search approach and some of the additional techniques listed above, there will be sufficient time before initiation of non-time-critical removals and early remedial actions to allow those actions to be PRP-lead. For example, if the RDT decides, based on the early results of a PRP search, to initiate a Fund-lead EE/CA to support a non-time-critical removal action, the Region can continue PRP search activities during the EE/CA. Upon completion of the EE/CA, the RDT can decide, based on the supplemented PRP search, whether to seek PRP participation in the non-time-critical removal action. There may be even more time for the PRP search if it begins during an emergency or time-critical removal action, or during the SI.

With the exception of non-time critical removals, it may be appropriate in some cases to conduct additional PRP search activities before initiating a response action at a site if the Region believes that a more thorough PRP search will increase the likelihood of settlement (for example, by identifying more PRPs). Any delays in work should be brief. Establishing liability against additional PRPs may have other benefits such as similar treatment of all PRPs, reduced risk of contentious cost recovery actions, and conservation of the Fund.

The Region should identify logical points during the site assessment process when negotiations with PRPs should be considered. Some of the major criteria for this decision include:

1. PRPs:
 - a. the availability of viable parties for which Regions have liability evidence;
 - b. the degree to which the identified PRPs appear willing to settle; and
 - c. the ability of PRPs to conduct response activities.
2. Site conditions and work to be performed:
 - a. the risk posed by the site and the need to move forward with the response quickly;
 - b. the probable sequence and nature of cleanup activities scheduled for the site; and
 - c. the action to be negotiated.

3. Cost:
 - a. if the activity to be negotiated is a removal costing more than \$2 million, enforcement will minimize the need for waivers under CERCLA Section 104(c); and
 - b. State matching funds for remedial actions at NPL sites are not required if PRPs conduct remedial actions under, for example, a consent decree or unilateral administrative order.

The following examples show some stages in the process where negotiations may be appropriate, and the possible scope of the negotiations:

1. The initial assessment indicates that there is a hazardous substance release at the site and there is a high probability that the site may be listed on the NPL. In addition, some removal action is needed. In this case, the Region could negotiate with PRPs to perform the site assessment data collection activities—including any necessary sampling—and the EE/CA or RI/FS. The Region could also include performance of the EPA-selected removal action in the negotiations. Keep in mind that although PRPs may conduct sampling and data collection, EPA retains responsibility for decision making.
2. The initial assessment indicates that a non-time-critical removal action should be taken. The Region could negotiate an order with the PRPs for the EE/CA, and in some cases could include the eventual non-time-critical removal action in the order.
3. The initial assessment shows that additional site evaluation is needed to determine if the site will require any action (early action or long-term action). In most cases EPA should continue performing the site assessment activities while continuing the PRP search. Negotiations should occur after a determination is made that a time-critical removal, an EE/CA, or an RI/FS is needed.

Under all of these scenarios EPA retains the responsibility to perform the risk assessment for removal and remedial actions, to prepare Hazard Ranking System scoring packages, and to make all response selection decisions.

Notice Letters

CERCLA and current EPA guidance encourage the use of special notice letters (or issuance of waivers) for RI/FSs and RD/RAs. When Regions anticipate conducting a com-

bined SI/RI/FS, they should use special notice letters if they believe that such letters could facilitate a settlement.

Regions also should use special notice letters for non-time-critical removals when they believe that such letters could facilitate a settlement.

A special notice letter initiates a moratorium on response activity and enforcement. Such moratoria generally last 90-120 days (if EPA receives a good faith offer from the PRPs within the first 60 days of the moratorium). Therefore, when Regions expect that they will be issuing special notice letters, the letters should be sent out far enough in advance of the planned activities so that work is not significantly delayed. Certain investigatory and planning activities set forth in Section 104(b) of CERCLA should occur during the negotiation moratoria.

Consultations for Early Actions

In implementing SACM, careful site and case selection is important. When identifying appropriate sites for non-time-critical removal actions, Regions may wish to consult with Headquarters.

Regions must follow the existing rules for justifying and obtaining exemptions for removal actions estimated to cost over \$2 million or exceed one year in duration. Also, Regions must consult with Headquarters prior to taking an early action which will require funding beyond what the Region has in its allowance.

When a State does not participate in the conduct and financial support of a Fund-lead non-time-critical removal action, the RDT must evaluate whether the urgency and need are great enough to justify the loss of the State contribution. (Until such time as the authority for approving \$2 million waivers at non-NPL sites is delegated to the Regions, Headquarters will have to be involved in this decision on a site-by-site basis.) Until a final policy is developed, Headquarters will generally support projects costing less than \$5 million, as long as there is a good justification, even if a State is unable to participate. Headquarters also will consider projects costing over \$5 million, but there will have to be a compelling case for undertaking the work in the absence of a State contribution.

In order to ensure consistent use of non-time-critical authority, Regions must consult with Headquarters on PRP- or Fund-lead non-time-critical removals costing over \$5 million.

If an early action under SACM presents particularly difficult issues or may be controversial with States, PRPs,

communities or other interested parties, the Regions are strongly encouraged to consult with the appropriate Regional coordinator at Headquarters. Regional staff responsible for public involvement may be consulted to assist in gauging the level of public interest.

State Involvement in Enforcement

State capabilities and authorities differ. Each Region should work with each of its States to develop a general strategy for enforcement and the manner in which the State will be involved. Actions planned under State enforcement-lead must be under documents enforceable under State law and overseen by the States. Sites may be designated as State-lead if the Region agrees and the State has the capability and authority under State law to undertake the action. States should be kept informed of negotiations concerning site assessment activities and early actions to the same extent that they are notified and kept informed currently under CERCLA Section 121(f) and the NCP.

Late-identified PRPs

When the decision is made to take either a Fund-lead or PRP-lead action, and the Region expects that additional PRPs will be identified subsequent to initiation of the action, the Region should take steps to provide some type of constructive notice to PRPs who may be found at a later date (that is, "late identified" PRPs). For example, Regions could send letters providing information about a site to prospective PRPs. Regions might also place an announcement of site activity or of availability of the administrative record file in a major local newspaper and the *Federal Register*. (A *Federal Register* notice generally would be more effective than newspapers for reaching PRPs located outside the area of the site and the newspaper circulation area.)

De Minimis Settlements

SACM is expected to produce more site information earlier than in the past, allowing Regions to develop de minimis settlements earlier. In some cases, Regions will pursue PRP-lead early actions before developing the waste-in lists and volumetric rankings normally needed for de minimis settlements, making de minimis settlements at that time less likely. In such cases, de minimis settlements may still be developed prior to a subsequent early action decision (Action Memorandum, Record Of Decision) when the required information becomes available. Regions should follow EPA guidance on early de minimis settlements (including OSWER Directive Number 9834.7-1C) and strive to develop such settlements as early in the process as possible.

The Department of Justice

SACM does not change the delegations under CERCLA. The Department of Justice (DOJ) should be consulted for enforcement strategy planning when judicial enforcement of an administrative order is likely, consent decrees are planned, and certain de minimis and cost recovery activities are contemplated (e.g., DOJ must concur on de minimis and cost recovery settlements where the total response costs for a site exceed \$500,000).

Administrative Records

The administrative record, required under CERCLA, contains the documents that form the basis for the selection of a response action and serves as the basis for judicial review of EPA's response action. High quality administrative records are necessary to ensure the defensibility of response decisions made under the expedited procedures of SACM and are particularly important for SACM projects that may set precedents. Regions must establish an administrative record for each response action in accordance with CERCLA, the NCP, and OSWER administrative record guidance (OSWER Directive Number 9833.3A-1). All decisions concerning the selection of the appropriate response action should be documented in the administrative record file in accordance with EPA guidance. In particular, the administrative record should include documentation showing that the action taken is not inconsistent with the NCP.

CERCLA also requires that EPA provide the public (including PRPs) with an opportunity to participate in the development of the administrative record. According to the NCP Subpart I, the administrative record file for a non-time-critical removal must be available for public inspection when the EE/CA is made available for public comment. For time-critical removals, the administrative record file must be made available within 60 days after the start of on-site removal activity. The administrative record file for the selection of a remedial action must first be made available when the RI/FS begins. When the Region is conducting a combined SI/RI/FS, the administrative record file must be made available at the point when work characteristic of an RI/FS begins. In order for the record to be ready for public inspection when the RI/FS begins, Regions should begin compiling the administrative record file when the RDT decides a combined SI/RI/FS is needed.

Cost Recovery and Cost Documentation

SACM may increase the number of cost recovery actions subject to the removal statute of limitations (SOL) because more sites may be addressed with non-time-critical removals than in the past. The SOL for removals is three years

from a removal completion, unless a remedial action is initiated within three years of the completed removal. Early remedial actions would fall under the remedial SOL which is six years after initiation of physical on-site construction of the remedial action.

Documentation of cost and work performed needs to be compiled whenever cost recovery actions are taken. EPA's past costs should be sought in all negotiations with PRPs for response work at SACM sites. The cost recovery rule is expected to assist in defining documentation requirements.



NOTICE: The policies set out in this fact sheet are not final Agency action, but are intended solely as guidance. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials should follow the guidance provided in this fact sheet, or may act at variance with the guidance, based on an analysis of site-specific circumstances. The Agency also reserves the right to change this guidance at any time without public notice.

Enforcement Under the Superfund Accelerated Cleanup Model (SACM) - Interim Guidance

This paper is one of five fact sheets published by EPA under publication number 9203.1-05I (Volume 1, Numbers 1-5) to describe the Superfund Accelerated Cleanup Model (SACM) and should be reviewed in conjunction with the other SACM fact sheets. Comments on this document should be directed to Maria Bywater of the Office of Waste Programs Enforcement (703) 603-8929.

There are two other important sources of information: "SACM concept paper" (8/5/92) and *Guidance on Implementation of the Superfund Accelerated Cleanup Model Under CERCLA and the NCP* [OSWER Directive No. 9203.1-03 (7/7/92)]. General SACM information can be obtained by calling the Superfund Document Center (202) 260-9760.