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WASHINGTON, D.C. 20460

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

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**MEMORANDUM**

**SUBJECT:** Revised Response Selection and Settlement Approach for  
Superfund Alternative Sites

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**TO:** Superfund National Policy Managers, Regions I - X  
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This memorandum provides response and settlement strategies for sites that are eligible to be placed on the National Priorities List (NPL) but are not listed. At these "Superfund Alternative" (SA) sites the U.S. Environmental Protection Agency (EPA) should generally act in accordance with the practices normally followed at sites listed on the NPL and strive for equivalency in the absence of an NPL listing. It is critical to ensure that settlements covering SA response actions achieve cleanup levels equivalent to those required at NPL sites and that EPA provide the States, Tribes, Federal natural

resource trustees, and communities the same opportunity for involvement as that provided at NPL sites. EPA's enforcement posture at SA sites also should be equivalent to its enforcement posture at NPL sites. Nothing in this guidance should be construed to limit EPA's enforcement discretion.

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## **I. Background**

Since 1992, potentially responsible parties (PRPs) have performed more than 70% of new remedial action (RA) starts at NPL sites. In addition, at a number of sites that are eligible for listing on the NPL, EPA Regions have secured settlement agreements for PRP-lead cleanups without listing the site on the NPL. EPA's principal goal in issuing this guidance is to facilitate settlements and cleanups at SA sites that are equivalent to settlements and cleanups at sites listed on the NPL. A settlement agreement at an SA site should provide for timely action that meets the same cleanup standards as if the site were listed on the NPL.

EPA will continue to focus on sites listed on the NPL and to pursue construction completion goals. Listing appropriate sites on the NPL continues to be an important element of EPA's Superfund program. Regional offices, however, may determine that the approach outlined in this guidance is appropriate for use in certain circumstances.

## **II. Criteria and Designation of Superfund Alternative Sites**

On its own initiative or at the suggestion of interested parties, a Region has the discretion to determine whether the SA approach is appropriate at a particular site and, if so, should discuss the SA approach with PRPs in advance of negotiations. SA sites should be sites that would otherwise appropriately be listed on the NPL. The approach outlined in this guidance does not affect the many other Federal and State cleanup programs.<sup>1</sup>

For purposes of this guidance, SA sites should include only those sites that the Region has determined:

1. Would meet the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) criteria for listing on the NPL. A Region should have adequate documentation to demonstrate a score of 28.5 or greater on the Hazard Ranking System (HRS);
2. Require long-term response (*i.e.*, an RA); and
3. Have viable PRPs that the Region believes are capable of and agreeable to performing the cleanup work under an Administrative Order on Consent (AOC) or Consent Decree (CD). [Regions should seek to have the PRP perform all remedial pipeline activities at SA sites; however SA sites must be PRP-lead under a CD for RA].

SA sites may include both sites that have not been proposed for the NPL and sites that have been

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<sup>1</sup> The approach would not be used at brownfield sites meeting the definition of eligible response sites for persons in compliance with a State response program because Section 128(b) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) prohibits the use of judicial or administrative enforcement actions under CERCLA § 106(a) or judicial enforcement actions to recover response costs under CERCLA § 107(a).

proposed for the NPL through a notice in the Federal Register.<sup>2</sup>

### **III. EPA/State Relationship for Superfund Alternative Sites**

The EPA Regional Office shall notify the State of EPA's desire to address a site using the SA approach and consult with the State on: 1) the decision to address the site as an SA site; 2) remedy selection and site management; and 3) negotiations for settlement. Throughout the cleanup process, the State shall be afforded the same opportunities for involvement at an SA site as at an NPL site.<sup>3</sup>

*Superfund Alternative Site Designation.* The Region should work with the State to resolve concerns the State may have regarding an SA site designation. There is a general expectation that the Region and State will agree on the SA site designation. If the Region believes an SA designation is appropriate but the State's Governor has requested NPL listing, the Region should reach an agreement with the State on pursuing an SA approach. If the Region and State do not agree on an SA approach, the Region shall notify OSRE and OSRTI prior to proceeding.

*Remedy Selection.* The Region shall request State review, comment, and involvement in the remedy selection process as provided for in CERCLA § 121(f) and the NCP (40 C.F.R. § 300.500: State Involvement in Hazardous Substance Response), and on the other elements listed here. Coordination between the Region and the State includes the following:

1. State participation in the long-term planning process for potential SA sites within the State;
2. A reasonable opportunity for the State 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 RA alternatives identified in the RI/FS;
  - c. the engineering design following selection of the final RA;
  - 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

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<sup>2</sup> SA sites may also include privately-owned Formerly Used Defense Sites (FUDS) or Federal facilities (*i.e.*, facilities currently owned by the Federal government) where the affected Federal agency enters into an enforceable agreement or consent order with EPA. Regions interested in pursuing an SA approach at a Federal facility should contact the Federal Facilities Enforcement Office (FFEO) to discuss how this may be accomplished.

<sup>3</sup> See CERCLA § 121(f) and 40 C.F.R. § 300.500 for State Involvement. In addition, CERCLA §126 provides that Tribes should be treated substantially in the same manner as States. Therefore, as at NPL sites, Regions should ensure that any affected Tribe is provided appropriate opportunities for participation at SA sites. For example, Regions should consult with an affected Tribe prior to proceeding with a cleanup action at an SA site and provide opportunities for support agency cooperative agreements/grants between EPA and the Tribe.

RA and the subsequent draft Record of Decision (ROD). EPA's proposed decision regarding selection of the RA should be accompanied by a response to the comments submitted by the State.

*Negotiations.* EPA shall provide notice to the State of negotiations with PRPs regarding any response action at a facility in the State and an opportunity for the State to participate in the negotiations and settlement.

#### **IV. Response Selection and EPA Oversight for Superfund Alternative Sites**

The response selection process should be the same for SA sites as for NPL sites. EPA should:

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.<sup>4</sup>
2. Notify and share relevant data with Agency for Toxic Substances and Disease Registry (ATSDR) to ensure ATSDR considers whether a health assessment, or other appropriate activities, should be conducted at the site.<sup>5</sup>
3. Prepare, or oversee the preparation of, an RI/FS and ROD that documents the final cleanup decision (40 C.F.R. §§ 300.430(d), (e), and (f)).
4. Select and assure that PRPs attain Applicable or Relevant and Appropriate Requirements (ARARs) (CERCLA § 121; 40 C.F.R. § 300.430).
5. Involve communities in decisions in the same manner as at NPL sites (40 C.F.R. § 300.430(c)).
6. Coordinate with Natural Resource Trustees in accordance with CERCLA §§ 104(b)(2) and 122(j).
7. Provide oversight when the response is pursuant to an EPA order or Federal consent decree (40 C.F.R. § 300.400(h)).
8. Ensure a complete cleanup in accordance with NCP requirements.
9. Certify that the work is complete and that performance standards have been attained at SA sites using the same process used for NPL sites (*e.g.*, documentation of five-year reviews and construction completion).

Just as the Agency does at NPL sites, EPA will strive to implement cleanup remedies at SA sites that are consistent with the anticipated future use of the site. Consideration of future use is part of a coordinated national effort to facilitate the return of the country's hazardous waste sites to productive use.

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<sup>4</sup> 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 by OERR and OSRE, February 14, 2000.

<sup>5</sup> The Region should notify ATSDR when the Region designates an SA site. Just as it does at NPL sites, ATSDR will then consider whether a health assessment, or other appropriate activities, should be performed. See relevant provisions regarding NPL sites. CERCLA § 104(i)(6)(A), 40 C.F.R. § 300.400(f).

## **Settlements at Superfund Alternative Sites**

Settlements at SA sites should achieve the same results as those achieved at NPL sites. Just as at NPL sites, EPA may authorize PRPs to perform investigation, removal, or RA consistent with the NCP at SA sites upon a determination that such action will be done properly and promptly. *See* CERCLA § 104(a)(1).

### **A. Overview of Settlement Negotiations**

Depending on the phase of clean-up, Regions should negotiate one or more of the following provisions into settlement agreements at SA sites:

1. Technical Assistance Plan for Local Communities (TAP) provision
2. Financial Assurance Mechanisms for Work Continuance (Liquid Financial Assurance) provision
3. Agreement Not to Challenge Listing After Partial Cleanup (Listing) provision
4. Natural Resource Damages (NRD) provision

The first two provisions are intended to put EPA in an equivalent position to its position at NPL sites with respect to accessing the CERCLA Trust Fund. The Listing provision puts EPA in a position equivalent to its position at sites already proposed for listing or listed on the NPL with respect to EPA policy on rescoring sites after partial cleanup. The NRD provision protects Federal Trustee interests to the same degree these interests are protected at NPL sites. These provisions, which are discussed below, will support EPA's and the U.S. Department of Justice's (DOJ's) assertion that these settlements are fair, reasonable, and in the public interest.

The table on page 14, "Summary of SAS Settlement Provisions," indicates the provisions Regions should include in RI/FS and RD AOCs and Remedial Design/Remedial Action (RD/RA) or RA CDs.<sup>6</sup> Model language for each provision is included in italics in Section V. B. below.

*Modifying/Omitting a Provision.* If an SA site presents facts that would seem to make the TAP, Liquid Financial Assurance or Listing provisions unnecessary or in need of significant modification, the Region should receive prior written approval from the Director of the Regional Support Division (RSD) in OSRE before offering to omit or revise the provision. If a Region wishes to modify or omit the Listing provision for a site that is already proposed for the NPL, prior written approval is not needed. Proposals to modify or omit the NRD provision should be coordinated with DOJ.

*Negotiations.* When preparing for negotiations at SA sites, standard Superfund negotiation

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<sup>6</sup> To ensure adequate protections for EPA, Regions should negotiate the Listing provision and should consider negotiating the other three provisions in AOCs for Removal at *SA sites*. The Listing provision may be particularly relevant in agreements for Non-Time Critical Removals. As noted above, all SA sites are anticipated to require long-term response (*i.e.*, an RA).

practices should be followed.<sup>7</sup> For example, when negotiating for RI/FS actions at SA sites, Regions should use the latest Model AOC for RI/FS as a starting point for preparing a site-specific AOC. For a PRP-lead RA, CERCLA § 122(d) requires settlements to be in the form of a CD, and Regions should begin with the latest Model CD for RD/RA.<sup>8</sup>

As with any negotiation for RI/FS or RD/RA at an NPL site, Regions should perform a comprehensive PRP search and Regions have the discretion to issue a Section 122(e) special notice letter (which starts the relevant negotiation moratorium) to identified PRPs. Where special notice is issued, Regions also have the discretion to proceed with listing should the negotiations not result in a timely settlement. If a Region elects to waive special notice, the Region should notify the PRPs in writing of its decision and explain why use of special notice is inappropriate.<sup>9</sup> See CERCLA § 122(a). Regions should pursue the same PRPs for the conduct of, or payment for, cleanup activities at an SA site that they would pursue if the site was on the NPL.

When negotiating these settlements, all applicable Superfund enforcement and program policies and reforms apply. Examples include the offering of, where appropriate: orphan share compensation;<sup>10</sup> opportunities to improve the cost effectiveness of remedies;<sup>11</sup> the opportunity to discuss oversight expectations and to provide suggestions on conducting oversight in an efficient and effective manner while achieving a timely and protective cleanup.<sup>12</sup>

*Negotiation Impasse.* If a provision is appropriate pursuant to this guidance but a PRP is unwilling to incorporate it into the settlement, RSD and the Region will discuss options and determine how to proceed based on site-specific circumstances. Options include:

1. Finding an adequate alternative to the provision;
2. Issuing a Unilateral Administrative Order (UAO) and proceeding to list the site; or

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<sup>7</sup> See “Negotiation and Enforcement Strategies to Achieve Timely Settlement and Implementation of Remedial Design/Remedial Action at Superfund Sites,” June 17, 1999.

<sup>8</sup> The current model AOC for RI/FS was issued on Jan. 21, 2004; the current model CD for RD/RA was issued on June 15, 2001. Both documents are available at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm>.

<sup>9</sup> See “Interim Guidance on Notice Letters, Negotiations, and Information Exchange,” OSWER Directive #9834.10, October 19, 1987.

<sup>10</sup> See “Interim Guidance on Orphan Share Compensation for Settlers of Remedial Design/Remedial Action and Non-Time Critical Removals,” June 3, 1996.

<sup>11</sup> Superfund Reforms: Updating Remedy Decisions, OSWER Directive 9200.2-22, dated September 27, 1996. This guidance is available at <http://www.epa.gov/oerrpage/superfund/programs/reforms/doc/>.

<sup>12</sup> See “Interim Guidance on Implementing the Superfund Administrative Reform on PRP Oversight,” OSWER Directive #9200.0-32P, May 17, 2000.

3. Performing Fund-lead activities prior to RA, proceeding to list the site, and pursuing cost recovery.

*Breach of Settlement.* In the event EPA and a PRP reach a settlement but the PRP subsequently stops work or otherwise breaches the settlement agreement, EPA should:

1. Take steps to enforce the agreement and to pursue stipulated and civil penalties and damages (CERCLA §§ 106(b)(1), 107(c)(3), 122(l));
2. Issue a UAO and proceed with listing procedures; and/or
3. Pursue other options to ensure that cleanup continues (*e.g.*, perform Fund-lead cleanup activities; proceed to list; and pursue cost recovery).<sup>13</sup>

## **B. Settlement Provisions**

### **1. Technical Assistance Plan for the Local Community**

*Discussion.* An important element of a Superfund response action is the availability of technical assistance to the local community. EPA is authorized to provide technical assistance grants (TAGs) to qualified community groups only at sites listed on the NPL and sites proposed for listing on the NPL and at which response action has begun (40 C.F.R. § 35.4025). At SA sites that are not proposed for the NPL,<sup>14</sup> Regions should negotiate a Technical Assistance Plan (TAP) provision in settlements for RI/FS, RD, and RD/RA.<sup>15</sup> Such a provision would require PRPs, with EPA oversight, to administer and fund a TAP, under which a qualified community group can receive funds to hire an independent technical advisor. The TAP provision would ensure that the opportunity for technical assistance at SA sites is comparable to the opportunity at sites listed on the NPL.

EPA has awarded TAGs at approximately fifteen percent of the sites listed on the NPL and expects a similar level of interest at SA sites. Regions, therefore, should generally negotiate a TAP provision that is contingent on demonstrated community interest, under which the PRP need not take any steps until EPA has determined that a qualified community group has come forward. With the approval of RSD, Regions also may negotiate a TAP that is funded by the PRP but administered by EPA. In this situation, when EPA notifies the PRP that a qualified group has come forward, the PRP would provide \$50,000 to be placed in a site-specific special account and EPA would handle the administrative work associated with the TAP.

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<sup>13</sup> Regions should ensure that actions taken in response to a breach of settlement are not inconsistent with the settlement agreement.

<sup>14</sup> If an SA site was proposed for listing on the NPL and a TAG grant was not awarded, Regions may negotiate a TAP provision. Where a TAG was awarded, Regions should continue to administer the site TAG grant and recover TAG costs as part of the site costs.

<sup>15</sup> If the PRP has already agreed to a TAP provision during an early phase of the cleanup (*e.g.*, in an AOC for the RI/FS), the Region may only need to negotiate an extension through the RD/RA phase.

EPA is developing detailed guidance on TAPs.<sup>16</sup> The TAP Guidance will address, for example, the responsibilities of the PRP, the necessary coordination among members of EPA's site team (*i.e.*, the Regional Attorney, Remedial Project Manager, and Community Involvement Coordinator), and selection of the community group and Technical Advisor. The Region's site team will have responsibility for informing the community about the availability of a TAP. At all SA sites, EPA should continue to provide information to the community early in the process and maintain its traditional role of involving the community throughout the response action.

*Model Language.* Regions should modify paragraph 34.b. of Section IX, of the Model AOC for RI/FS<sup>17</sup> in the following way:

*Community Relations Plan and Technical Assistance Plan.* EPA will prepare a community relations plan, in accordance with EPA guidance and the NCP. Respondents shall provide information supporting EPA's community relations programs. *When requested by EPA, Respondent(s) also shall provide EPA with the following deliverable:*

*Technical Assistance Plan: Within 30 days of a request by EPA, Respondent(s) shall provide EPA with a Technical Assistance Plan (TAP) for providing and administering up to \$50,000 of Respondent(s') funds to be used by a qualified community group to hire independent technical advisors during the Work conducted pursuant to this Consent Order. The TAP shall state that Respondent(s) will provide and administer any additional amounts needed if EPA, in its discretion, determines that the selected community group has demonstrated such a need prior to EPA's issuance of the ROD contemplated by this Order. If EPA disapproves of or requires revisions to the TAP, in whole or in part, Respondent(s) shall amend and submit to EPA a revised TAP that is responsive to EPA's comments, within \_\_ days of receiving EPA's comments.*

If necessary, Regions should modify paragraph 117 in Section XXX, "Community Relations," of the Model CD for RD/RA<sup>18</sup>:

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<sup>16</sup> Until the TAP Guidance is issued, Regions should contact Anne Berube (202-564-6065) in OSRE for the latest draft of the guidance.

<sup>17</sup> The modifications above are based on the current model AOC for RI/FS, issued Jan. 21, 2004. The document is available at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm>.

<sup>18</sup> The most recent CD for RD/RA was issued on June 15, 2001. The document is available at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm>.



*Within 30 days of a request by EPA, Settling Defendants also shall provide EPA with a Technical Assistance Plan (TAP) for providing and administering up to \$50,000 of Respondent(s') funds to be used by a qualified community group to hire independent technical advisors during the Work conducted pursuant to this Decree. The TAP shall state that Settling Defendants will provide and administer any additional amounts needed if EPA, in its discretion, determines that the selected community group has demonstrated such a need. Upon its approval by EPA, the TAP shall be incorporated into and become enforceable under this Consent Decree.*

## **2. Financial Assurance Mechanisms for Work Continuance**

*Discussion.* One of the primary differences between an SA site and an NPL site is the availability of Trust Fund money for RA. 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 C.F.R. § 300.425(b)(1)).

SA site settlements for RA, therefore, should provide adequate financial mechanisms to protect work continuity and assure completion of the work. Specifically, Regions should ensure that PRPs provide financial assurance instrument(s) that are sufficiently liquid for use in the event that EPA must complete part or all of the remedial work. The Model CD for RD/RA lists several possible mechanisms that PRPs at NPL sites may use to demonstrate financial assurance. Some of these mechanisms are considered more liquid than others. For example, because a PRP must set money aside, letters of credit, payment bonds, and fully-funded trust funds generally are considered more liquid than incrementally-funded trust funds or performance bonds. Financial tests and/or corporate guarantees are not considered liquid. Liquid financial assurance instruments generally provide EPA with easier and faster access to monies for work takeover and are intended to prevent any delays in cleanup.

Just as at NPL sites, Regions should require PRPs at SA sites to provide financial assurance for the entire amount of the estimated costs of the RA. But because of limitations on EPA's ability to access the Trust Fund, Regions should ensure that PRPs provide some amount of that financial assurance through a liquid instrument(s) at least equal to the costs that would be imposed on EPA to keep cleanup work going through the listing process, in the event the site needs to be listed. The PRP should post the remaining amount of the necessary financial assurance through an alternative mechanism and may use a less liquid instrument. Based on site-specific circumstances, Regions may require PRPs to provide a liquid financial assurance instrument(s) for the entire amount of the estimated cost for the RA.

A Region may decide to require a liquid financial instrument(s) for only part of the costs to cover continuation of an EPA cleanup through the listing process when there is *unobligated money* available in an SA site's special account as a result of settlements with other PRPs at the

site. 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 the Region may find it appropriate to request only \$1 million in a separate, liquid financial assurance instrument(s). However, if some of the special account money is already designated for a particular use, or to cover specific costs, or is scheduled to be disbursed to the performing PRPs before the work is completed, then reducing the amount of the financial assurance instrument based on that portion of the special account funds is not appropriate.

*Model Language.* Where a Region determines that a PRP may use a combination of liquid and non-liquid instruments to meet its financial assurance obligations, Regions should:

- i) insert a new paragraph before paragraph 46 in Section XIII Assurance of Ability to Complete Work of Model CD for RD/RA, and
- ii) modify paragraph 46 of the model.

If the Region determined that the entire cost of the RA should be covered through a liquid financial assurance mechanism, Regions should:

- i) insert a new paragraph before paragraph 46, and
- ii) delete paragraph 46 and 47 of the model.

Insert a new paragraph before paragraph 46 in Section XIII, “Assurance of Ability to Complete Work” of the Model CD for RD/RA:

*Within 30 days of entry of this Consent Decree, Settling Defendant also shall establish and maintain financial security in the amount of \$ [insert estimated cost of Work at least equal to cost of work takeover until listing OR the total estimated costs of the Work ] in one or more of the following forms:*

- a. A surety bond guaranteeing payment;*
- b. One or more irrevocable letters of credit;*
- c. A fully-funded trust fund; or*
- d. [Insert any other liquid method(s) appropriate to the particular case.]*

Modification of paragraph 46 of the Model CD for RD/RA:

*Within 30 days of entry of this Consent Decree, Settling Defendant also shall establish and maintain financial security in the amount of \$ [insert the difference between amount provided in liquid instrument(s) above and total estimated cost of Work] in one or more of the following forms:*

- a. A surety bond guaranteeing performance of the Work [amount not covered by liquid instrument(s)];*
- b. A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with at least one of the Settling Defendants;*
- c. A demonstration that one or more of the Settling Defendants satisfy the requirements of 40 C.F.R. Part 264.143(f)*
- d. [Insert any other illiquid method(s).]*

### **3. Agreement Not to Challenge Listing After Partial Cleanup**

*Discussion.* While EPA presumes that the PRPs will negotiate in good faith and meet their settlement obligations, EPA should ensure that human health and the environment are not jeopardized by an inadequate cleanup or an interruption in response actions caused by unforeseen events. Therefore, in AOCs for removal and CDs for RA work, Regions should obtain from PRPs an agreement not to challenge the listing of the site based on changed site conditions due to partial cleanup. This provision puts EPA in the same position as if the site has been proposed to the NPL, and will allow EPA to avoid delay in response action by listing the site based on conditions at the site prior to initiation of any work pursuant to an AOC for removal or CD for RA.

To ensure that such a listing can be accomplished quickly if necessary, EPA should have adequate documentation supporting an HRS score of 28.5 or greater before any work is initiated.<sup>19</sup> Generally, in computing the HRS score for a site, EPA does not take into account response actions that were not completed before the site is proposed to the NPL. Moreover, only certain response actions that are completed prior to proposal are considered, and those are only considered where certain conditions are met.<sup>20</sup>

*Model Language.* Regions should insert the following new paragraph after paragraph

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<sup>19</sup> The Region may rely on the draft HRS Document Record or on other adequate documentation supporting an HRS score of 28.5 or greater.

<sup>20</sup> See “The Revised Hazard Ranking System: Evaluating Sites After Waste Removals” OSWER Directive #9345.1-03FS, October 1991, and “Revision to OSWER NPL Policy, The Revised Hazard Ranking System: Evaluating Sites After Waste Removals,” OSWER Directive #9345.1-25, April 4, 1997.

63, Section XXI, “Covenants Not to Sue by Respondents,” of the Model AOC for Removal Action<sup>21</sup>:

*Respondents agree not to seek judicial review of the final rule listing the Site on the NPL based on a claim that changed site conditions that resulted from the performance of the Work in any way affected the basis for listing the Site.*

Regions should insert the following new paragraph after paragraph 101 in Section XXII, “Covenants of the Settling Defendants,” of the Model CD for RD/RA:

*Settling Defendants agree not to seek judicial review of the final rule listing the Site on the NPL based on a claim that changed site conditions that resulted from the performance of the Work in any way affected the basis for listing the Site.*

In the event that an RI/FS AOC includes response work, Regions should insert the following new paragraph after paragraph 85 in Section XXI, “Covenants Not to Sue By Respondent,” of the Model AOC for RI/FS<sup>22</sup>:

*Respondents agree not to seek judicial review of the final rule listing the Site on the NPL based on a claim that changed site conditions that resulted from the performance of the Work in any way affected the basis for listing the Site.*

#### **4. Natural Resource Damages**

*Discussion.* The Region has the responsibility to notify all potentially affected trustees (Federal, State, and Tribal) of the SA designation and commencement of investigations and negotiations at all SA sites. The general Statute of Limitations (SOL) provision for NRD claims (CERCLA § 113(g)(1)(A)) states that an action must be commenced within 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 [RA] ... is otherwise scheduled” must be commenced within 3 years after completion of the RA. Because EPA anticipates an RA will be performed at any SA site addressed in accordance with this guidance, SA sites are covered under this provision.

Regions should negotiate language that clarifies this SOL applies to SA sites in any settlement for RI/FS at an SA site. The language should indicate that the parties agree that upon issuance of the settlement, an RA is scheduled at the site for purposes of CERCLA § 113(g)(1).

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<sup>21</sup> The most recent AOC for Removal was issued on July 9, 2001. The document is available at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm>.

<sup>22</sup> The modifications above are based on the current model AOC for RI/FS, issued Jan. 21, 2004. The document is available at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm>.

Where a State or Tribe is a party to such a settlement, this language should protect its potential claims. Where the State or Tribe is not a party to the settlement, they should be notified by EPA or DOJ so that they may consider negotiating similar language in a separate agreement.

This language should be included regardless of whether the NRD claims are known at the time of the agreement. Any omission or modification of this language from an AOC for RI/FS at an SA site should be coordinated in advance with DOJ on behalf of the Federal trustees (the Region does not need prior written approval from RSD).

*Model Language.* Regions should insert the following new paragraph after paragraph 56 in a new Section XIV, "Natural Resource Damages," of the Model AOC for RI/FS<sup>23</sup>:

*For the purposes of Section 113(g)(1) of CERCLA, the parties agree that, upon issuance of this Administrative Order on Consent for performance of an RI/FS at the Site, remedial action under CERCLA shall be deemed to be scheduled and an action for damages (as defined in 42 U.S.C. § 9601(6)) must be commenced within 3 years after the completion of the remedial action.<sup>24</sup>*

## **Summary**

As described throughout this Guidance, Regions should:

- Prepare adequate documentation to demonstrate an HRS score of 28.5 or greater.
- Notify the State, Tribes, and Federal natural resource trustees of EPA's desire to address a site as an SA site and afford them the same opportunities for involvement as at an NPL site.
- Notify ATSDR of the Region's decision to address a site as an SA site and request that the Agency consider whether a health assessment, or other appropriate alternative, should be performed.
- Provide information to the community about the SA site and the availability of technical assistance.
- Follow standard Superfund negotiation practices and enforcement and program policies and reforms when negotiating a settlement at an SA site.

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<sup>23</sup> The modifications above are based on the current model AOC for RI/FS, issued Jan. 21, 2004. The document is available at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm>.

<sup>24</sup> Where an RI/FS is being performed at an operable unit ("OU") of a multi-OU site, this provision should usually be modified to state that the action for damages must be commenced "...within 3 years after the completion of the remedial action *for the last operable unit.*"

- Negotiate necessary settlement provisions (*i.e.*, TAP, Liquid Financial Assurance, and Listing provisions) for the settlement agreement. Seek prior written approval from OSRE as necessary on modifications to, or omission of, these provisions.
- Coordinate with DOJ on modifications to or omission of the NRD provision.

In addition, the following table highlights the settlement provisions that the Regions should negotiate into SA site agreements at various cleanup phases.

#### Summary of SAS Settlement Provisions

	RI/FS AOC RD AOC	RD/RA or RA CD
<b>TAP provision</b> <i>At sites already proposed to the NPL and where a response action has begun prior written approval is not needed to omit or modify this provision.</i>	✓	✓
<b>Liquid Financial Assurance provision</b> <i>Needed for at least part of estimated RA costs.</i>		✓
<b>Listing provision*</b> <i>At sites already proposed to the NPL a prior written approval is not needed to omit or modify this provision.</i>		✓
<b>NRD provision</b>	✓†	

\* Removal AOCs at sites where remedial action is anticipated should include the Listing provision.

† An NRD provision is not needed in AOCs for RD.

## VII. Conclusion

Regions should be consistent in their cleanup and settlement approach and enforcement actions at SA sites across the nation. Regions should follow practices normally employed at NPL sites, while also taking steps to ensure equivalency in the absence of an NPL listing. As a result, settlements addressing response actions at SA sites should achieve cleanup levels equivalent to those required at NPL sites and place EPA in an enforcement posture equivalent to its enforcement posture at NPL sites. In addition, States, Tribes, Federal natural resource trustees and communities should be afforded the same opportunity for involvement as that provided at NPL sites.

If you anticipate entering into a settlement at an SA site or if you have questions regarding the settlement or enforcement elements of this guidance, please contact Anne Berube of OSRE at (202) 564-6065. If you have questions regarding NPL-eligibility or response selection at an SA site, please contact Joan Fisk of OSRTI 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 SA agreements and NCP cleanup requirements.*