

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WSG 50

Date Signed: February 6, 1990

MEMORANDUM

SUBJECT: Multi-Media Settlements of Enforcement Claims

FROM: James M. Strock
Assistant Administrator

TO: Regional Administrators, Regions I-X
Regional Counsel, Regions I-X
Associate Enforcement Counsel
Program Compliance Office Directors

A. PURPOSE

The purpose of this memorandum is to provide guidance which explains 1) EPA policy strongly disfavoring judicial and administrative settlements of enforcement cases which include releases of potential enforcement claims under statutes which are not named in the complaint and do not serve as the basis for the Agency bringing the enforcement action, and 2) how approval for any multi-media settlements of enforcement claims should be obtained in civil judicial enforcement cases in the Region and at Headquarters.

B. DISCUSSION

As a general rule, a settlement of a hazardous waste enforcement action, for example, may include a covenant not to sue providing the settling party with protection from subsequent civil enforcement action under some or all provisions of CERCLA and/or RCRA.¹ Similarly, a Clean Water Act enforcement settlement may expressly settle EPA claims under some or all provisions of the Clean Water Act. A settlement which extends to potential EPA enforcement claims under any statute(s) outside of the program medium under which the case was brought, e.g., a CWA release in a CERCLA case, or a release in a CERCLA case under all statutes administered by EPA, should not be given except under exceptional circumstances, because it is

¹The United States generally gives covenants not to sue, not releases, in the CERCLA context. This guidance, however, uses the terms "covenant not to sue" and "release" interchangeably. Use of the word "release" is not intended to signify any differing effect of the settlement but is merely used for ease of exposition.

standard EPA policy that releases, when granted, should be no broader than the causes of action asserted in the complaint.²

Although defendants often seek releases broader than the specific medium at issue in the case, multi-media releases for single-medium enforcement cases are strongly discouraged and will be granted only in exceptional cases. A proposal to enter into such a settlement will undergo close scrutiny at both the Regional and Headquarters level. When deciding whether to entertain a request for a multi-media release, the Region should consider the following factors:

1) The extent to which EPA is in a position to know whether it has a cause of action warranting further relief against the settling party under each of the statutes included in the release. If, after investigation, it is determined that no cause of action exists, then it is somewhat more likely that the release might be considered;

2) Whether the settlement provides adequate consideration for the broader release. If the relief to be obtained under the settlement includes appropriate injunctive relief and/or penalties for any actual or potential violation/cause of action under the other media statutes, then it is somewhat more likely that the release might be considered; and

3) Whether the settling party is in bankruptcy. If the relief obtained through the settlement is all the Agency can obtain from the settling party, and the settling party will be ceasing operations, then it is somewhat more likely that the multi-media release might be considered if the settlement is otherwise favorable to the Government. This rationale is far more persuasive in the Chapter 7 or Chapter 11 liquidation context than in the Chapter 11 reorganization context.

In addition, the only possible statutory releases or covenants not to sue that EPA will grant are for statutes administered by EPA. Multi-media settlements should not grant releases phrased in broad terms such as “all statutes administered by EPA.” Rather, all such releases should specifically name the EPA statutes included in the release. Further, releases should not include broad statements reaching beyond EPA-administered statutes such as “all claims or causes of action of the United States.” A settlement should also not release any common law claims EPA may have, because it is not clear what, if any, Federal common law exists in the environmental area, and thus a release of this kind is of undefined scope. Similarly, State law claims should not be released by the Federal government, since it is unclear what, if any, Federal causes of action derive from State law. Moreover, as a matter of practice and policy, we should

²If multi-media causes of action have been asserted in the United States’ complaint, then settlement of and releases under all statutes involved in the action would not be unusual, provided that appropriate relief is obtained under each statute. Such settlements would, however, require the concurrence of all Regional and Headquarters media offices involved, as described in Part C below.

not purport to bind States when they are not directly involved in our enforcement cases.³ As always, releases may be granted only for civil liability, not for criminal liability.⁴

C. PROCEDURES

All settlements involving multi-media resolution of enforcement claims require the approval of the appropriate EPA official(s) consistent with Agency delegations of authority. For civil judicial enforcement cases specifically, all multi-media settlements, including all CERCLA settlements resolving claims under other EPA-administered statutes, require the approval or concurrence of the AA-OECM.⁵ In any case in which the Region wishes to propose to the AA-OECM that EPA enter into such a settlement, certain procedures must be followed.

First, cross-media consultation among all affected Regional program offices and Office of Regional Counsel branches must be undertaken. This consultation should involve joint investigation as to whether there are any actual or potential causes of action under any statute under which a release is contemplated. An appropriate investigation, for example, is likely to include a check of all relevant files, a determination of whether a field inspection is warranted, and, if so, an inspection, and an inquiry to State program and legal counterparts to ensure that EPA is not unknowingly settling or waiving any potential claims it may have based upon relevant and available information. In the event that an appropriate cross-media investigation cannot be undertaken, a release for any uninvestigated medium cannot be given.

Second, when the settlement is referred to Headquarters for approval or concurrence, the Regional Administrator's cover memorandum to the AA-OECM should highlight the existence of the multi-media settlement or release. It should also include a statement by the Regional

³Ordinarily, State claims are independent of Federal enforcement authorities and are not compromised by settlement under the Federal authorities.

⁴Releases should also be drafted in accordance with the policy and practice of each medium involved. In most enforcement actions, this means that the release is based upon information known to EPA at the time of the settlement and does not extend to undefined future violations or site conditions.

⁵For administrative enforcement cases which include multi-media releases, the Regions similarly should obtain the concurrence of all EPA officials (at Headquarters or in the Region, as the case may be) consistent with the relevant EPA delegations covering administrative settlements under each statute included within the release. (If all authorities included within the release are delegated to the Regions, then no Headquarters concurrence is needed.) Of course, some administrative settlements with multi-media releases will also require approval by the Department of Justice when a DOJ role is established by statute.

Administrator (or any other Regional official delegated responsibility to approve the settlement on behalf of the Region) that the Region has evaluated all possible claims under all EPA-administered statutes included within the release and, after diligent inquiry, has determined that, to the best of its knowledge, no claims exist, or, if any claims do exist, that it is in the best interest of the Agency to settle the claims in the manner included in the proposed settlement. If claims do exist, the RA's memorandum should explain why the settlement is in the best interest of the Agency.

Lastly, the OECM Division for the program area that has the lead in the settlement must take certain steps to ensure that the other affected OECM Divisions and their program counterparts at Headquarters do not object to the multi-media release. The lead Associate Enforcement Counsel should provide a copy of the settlement, the RA's cover memorandum, and any other relevant supporting material from the Region (e.g., in the case of a CERCLA settlement, the Ten Point Settlement Analysis) to all other OECM Associates who are responsible for any statutes included in the release with a request for written concurrence within 21 days. Each Associate should in turn consult with, and, if part of standard procedure, obtain the concurrence of, his/her Headquarters program counterpart on the settlement. The lead Associate and his/her staff should coordinate all OECM comments or requests for additional information from the Region to help avoid presenting the Region with conflicting comments or requests.

After all necessary concurrences have been received, the lead Associate Enforcement Counsel will transmit the settlement to the AA-OECM for final action, with a copy of all Headquarters concurrences attached to the package. Although OECM will strive to meet its standard 35-day turnaround time for civil judicial settlement referrals, because multiple Headquarters offices are involved, the Regions should expect that multi-media release settlements may take greater time to be reviewed and approved by Headquarters than single-medium settlements. To assist OECM in obtaining concurrences as expeditiously as possible, the Region should actively consult with the lead OECM Division during negotiations so that OECM will have advance notice of the cross-media release issue and will be able to consult with other OECM Divisions before the settlement is referred to the AA-OECM.

D. DISCLAIMER

This memorandum and any internal office procedures adopted for its implementation is intended solely as guidance for employees of the U.S. Environmental Protection Agency. It does not constitute a rulemaking and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this memorandum or its internal implementing procedures.

If your staff has any questions on this matter, please ask them to contact Sandra Connors of OECM-Waste at 382-3110.

cc: Richard B. Stewart, Assistant Attorney General, Land and Natural Resources Division,
U.S. Department of Justice
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