



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

9/20/2007

MEMORANDUM

SUBJECT: Evaluation of the Superfund Alternative Approach Implementation

FROM: Granta Y. Nakayama, Assistant Administrator /s/
Office of Enforcement and Compliance Assurance

Susan P. Bodine, Assistant Administrator /s/
Office of Solid Waste and Emergency Response

TO: EPA Regional Administrators, Regions I-X

Our offices have completed the evaluation of the implementation of the Superfund Alternative (SA) approach, undertaken as a follow-up to the issuance of the June 17, 2004 *Revised Response Selection and Enforcement Approach for Superfund Alternative Sites Guidance* (commonly referred to as the Revised Superfund Alternative Sites (SAS) Guidance) and in response to comments raised by the Office of the Inspector General (OIG) and external stakeholders. The evaluation focused on determining the status of the 109 sites identified with an SA flag in CERCLIS as of February 2005 and on examining the agreements at these sites for their consistency with the guidance.

Attached is a document titled, "Results of the Superfund Alternative Approach Evaluation," which includes the Evaluation Team's findings and recommendations. EPA is committed to improving the consistency and transparency of the SA approach. Toward that end, we will soon publish an announcement of this report in the *Federal Register* and invite stakeholders to submit their comments. We also encourage Regions to share this report with potentially responsible parties (PRPs) and other outside stakeholders as appropriate.

Even while the evaluation was underway, we began addressing concerns that the SA approach be more transparent to affected and interested parties. Specifically, the Office of

Site Remediation Enforcement (OSRE) and the Office of Superfund Remediation and Technology Innovation (OSRTI):

- developed a sample General Notice Letter for Regional offices to send to PRPs that includes language on the SA approach (January 5, 2005);
- initiated work on making CERCLIS data more accurately reflect SA approach activity;
- encouraged Regions to develop and make public site-specific fact sheets for sites using the SA approach; and
- developed the soon-to-be issued Technical Assistance Plan (TAP) guidance, which provides information to Regions, communities and PRPs on the availability of technical assistance to qualified community groups at SA approach sites.

As we conducted our evaluation, OIG conducted an evaluation of its own and concluded, in its June 2007 final report, that we could improve our management tools and controls of the approach as well as our communication with external parties (including PRPs). We agree with some of OIG's recommendations. Currently, we are evaluating additional follow-up actions based on the findings and recommendations in both our and OIG's reports.

We are grateful for the assistance many of you provided throughout this evaluation effort, and ask you to continue your efforts in making the approach as transparent as possible to interested parties.

If you have any questions about this report, please contact Nancy Browne (browne.nancy@epa.gov) in OSRE or Joan Fisk (fisk.joan@epa.gov) in OSRTI. The Results report is available on EPA's Web Site at <http://www.epa.gov/compliance/resources/publications/cleanup/superfund/saa-eval-results.pdf>.

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Results of the Superfund Alternative Approach Evaluation

Office of Site Remediation Enforcement
Office of Superfund Remediation and Technology Innovation

INTRODUCTION

In June 2002, EPA issued a guidance document titled, “Response Selection and Enforcement Approach for Superfund Alternative Sites” (the “SAS Guidance”). This guidance addressed technical and enforcement issues for sites using the Superfund Alternative (SA) approach – sites that require long-term response (i.e., remedial action) and are eligible for, but are not listed on, the National Priorities List (NPL). Because Superfund monies cannot be used to fund remedial actions at sites not listed on the NPL, a viable potentially responsible party (PRP) must be willing to perform the remedial action.

When the SAS Guidance was revised and reissued in June 2004 (the “Revised SAS Guidance”), EPA announced it would pilot the SA approach for 18 months. The Office of Site Remediation Enforcement (OSRE) and the Office of Superfund Remediation and Technology Innovation (OSRTI) were tasked with conducting an evaluation of this pilot to better understand how EPA Regions are implementing the SA approach, whether it leads to successful site cleanups, and the concerns expressed by stakeholders. The evaluation focused on sites identified in

CERCLIS¹ as SA sites as of February 2005 and on SA agreements signed between June 2002 and December 2005. The evaluation involved several rounds of data gathering and analysis, discussions with stakeholders, and document review.

The SA Evaluation Team found that the SA approach yielded 19 agreements with SA provisions during the pilot period. Most of the SA activity took place in Region 4 (Southeast states) and Region 5 (Great Lake states). Generally, the SA agreements use language consistent with the SAS Guidance. The Team recommends retaining the SA approach as an available option in appropriate circumstances and recommends several specific next steps.²

¹ CERCLIS (Comprehensive Environmental Response, Compensation and Liability Information System) is the EPA database to track activity at all sites evaluated and/or responded to under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

² This report does not create any legal or policy obligation. How EPA responds to the information provided in this evaluation is at EPA’s discretion.

SUPERFUND ALTERNATIVE APPROACH HISTORY

EPA's primary goal under Superfund is cleaning up the nation's most contaminated sites. The "polluter pays" principle is a fundamental tenet of the Superfund enforcement program. In the 1980s, EPA generally implemented this principle by performing cleanups using Superfund money and then bringing a cost recovery action against the PRP for costs. Starting around 1989, EPA initiated the "Enforcement First" policy and typically first looks to the PRP to investigate and clean up a Superfund site before using Superfund money. Under this policy, PRPs conduct most cleanups ongoing today.

In the 1990s, situations arose where PRPs or communities preferred that a site be addressed without listing it on the NPL. At some of these sites eligible for, but not listed on, the NPL, PRPs were willing to perform the cleanup under EPA oversight and to enter into CERCLA agreements.³ This concept became known as the "NPL-equivalent" approach. Some EPA Regions advocated this approach, anticipating time and resource savings that would result from not preparing a final Hazard Ranking System (HRS) and NPL-listing package.

In June 2002, EPA issued the SAS Guidance, which reflected the name change from "NPL-equivalent" to "Superfund Alternative." The guidance is intended to promote national consistency and to ensure that settlements at sites using the SA approach:

- achieve cleanups equivalent to those at NPL sites;

³ EPA has the authority to enter into cleanup agreements under CERCLA section 122.

- place EPA in the same enforcement posture as at NPL sites; and
- provide the states, natural resource trustees, tribal governments and communities the same opportunities for involvement as provided for at NPL sites.

The SAS Guidance does not require that EPA regional offices negotiate SA agreements, nor does it establish "targets" for an expected number of SA agreements.

The SAS Guidance discusses the three main legal differences between NPL sites and the SA approach. First, under the NCP, sites must be listed on the NPL to be eligible for Fund-financed remedial action.⁴ Therefore, remedial actions at sites using the SA approach cannot be financed by Fund monies. Second, at sites using the SA approach that are not proposed for the NPL, community groups are not eligible for Technical Assistance Grants (TAGs). Third, pursuant to CERCLA Section 113(g)(1), the statute of limitations (SOL) for natural resource damage (NRD) claims at NPL sites or sites at which an RA is otherwise scheduled is three years after completion of the remedial action. It is unclear that this SOL applies at sites using the SA approach.

EPA developed four settlement provisions to address these legal issues in SA agreements. To address the limitation on the use of Fund monies for remedial actions, a PRP agrees not to challenge NPL listing after partial cleanup and to provide liquid financial assurance to keep cleanup work progressing if listing becomes necessary. To address the TAG eligibility issue, EPA developed a "Technical Assistance Plan" (TAP) provision under which the PRP agrees to provide funds for independent technical assistance should a qualified community group come forward. Finally, to address the

⁴ See 40 C.F.R. § 300.425(b)(1).

NRD issue, EPA developed a provision that clarifies the relevant SOL is CERCLA Section 113(g)(1).

Several stakeholders provided feedback on the SAS Guidance. Some expressed concerns about transparency, especially whether PRPs and communities would have access to information in the same way as at NPL sites and whether the approach would be used to avoid NPL listing and National Oil and Hazardous Substances Pollution Contingency Plan (NCP) requirements. Others were worried about flexibility in selecting a cleanup approach. Some PRPs were concerned that there was too little flexibility because the guidance states EPA Regions should follow the NCP; other stakeholders were concerned about too much flexibility because the approach is an “alternative” to Superfund. The final report of the Superfund Subcommittee for the National Advisory Council for Environmental Policy and Technology (NACEPT) (April 2004) recommended that the SA approach “remain a small pilot program until significantly more input is received from a broad range of perspectives....”

EPA responded to this and other stakeholder feedback. EPA’s April 2004 report, *Superfund: Building on the Past, Looking to the Future* (the “120-Day Study” report), recommended, among other things, that EPA revise the SAS policy to ensure uniform eligibility criteria for SA sites and to improve transparency. In June 2004, EPA issued the Revised SAS Guidance clarifying the criteria for the approach and providing model language for the SA approach provisions. As mentioned above, EPA also announced that it would pilot the SA approach for 18 months and perform this evaluation.

EVALUATION PLAN

EPA’s evaluation had four phases. **Phase 1** was a rigorous review of CERCLIS SA data to determine if sites flagged SA met the criteria and that related information was accurate. **Phase 2** involved: (1) a check-in with stakeholders to hear their feedback and (2) identification of a subset of sites using the SA approach for closer examination. **Phase 3** was an in-depth review of the subset of sites where EPA entered an agreement between June 2002 and December 2005 and interviews with the regional attorney and/or the remedial project manager for those sites. **Phase 4** was preparation of written documents summarizing the evaluation findings and recommendations.

EVALUATION FINDINGS

The Superfund Alternative universe is smaller than suggested by 2005 CERCLIS data.

In February 2005, 109 sites were identified – “flagged” – in CERCLIS as SA. Prior to this evaluation, there had been little analysis of these flagged sites. EPA was aware, primarily through anecdotal information, that some of the SA flags did not accurately reflect the site’s status. For example, at some sites an “NPL-equivalent” flag was merely converted to an SA flag without consideration of the criteria set forth in the SAS Guidance.

After analysis, the Team found that flagging “SA agreements” may be more accurate than tracking a universe of “SA sites.” This is because an EPA Region may issue multiple agreements or orders at a single site, with different PRPs or at different operable units, and not all may have the SA provisions. In

addition, a site may have both PRP- and Fund-lead work.

Of the 109 sites, the Team identified 22 sites where the SA approach was implemented during the evaluation period. These are non-NPL sites with an agreement finalized after June 2002 for remedial investigation / feasibility study (RI/FS), remedial design (RD), remedial action (RA), or non-time critical removal action (NTCRA). The Team separated these 22 sites into 2 sub-categories.⁵ At 17 of these sites, EPA Regions have entered into 19 agreements with the model SA provisions or modified/omitted provisions with the approval of EPA headquarters. These 19 agreements represent about 2% of all CERCLA agreements and orders issued during the evaluation period.⁶

At eight of the 22 sites, EPA has entered agreements or taken enforcement actions that are consistent (or not inconsistent⁷) with the SAS Guidance.

The SA Evaluation Team concluded that for 84 of the remaining 87 sites, the site status had changed, the site was incorrectly flagged, or there had not been an agreement since the June 2002 guidance. At three sites, EPA entered into agreements since June

⁵ At three sites, EPA entered more than one agreement, and the agreements fell within different sub-categories. Thus, the subcategories add up to 25 rather than 22 sites.

⁶ Through FY 2005, CERCLIS shows 6,999 Superfund orders, consent decrees (CDs), agreements and judgments at NPL and non-NPL sites. Since June 2002, EPA has issued approximately 856 orders, CDs, and agreements (excluding judgments, unilateral administrative orders, and Oct-Dec 2005). The 19 SA agreements represent about 2% of this volume.

⁷ Some of these are removal actions, agreements that do not require SA provisions because the site is already proposed for listing or agreements for cost recovery only.

2002 without SA provisions (i.e., agreements inconsistent with the guidance). At two of these three sites, there are site-specific circumstances that explain why the SA provisions were omitted. The Evaluation Team divided the 87 sites into three categories. Data results are summarized in the chart attached as Appendix 1.

Variation among the SA agreements is within an acceptable range.

The Evaluation Team reviewed the agreements finalized between June 2002 and December 2005 at the 22 sites using the SA approach. The Evaluation Team found that most of the agreements either contain the appropriate SA provisions or the Region received Headquarters' approval to modify or omit the provisions. Although there is variation in the wording of the provisions, the agreements are generally consistent with the intent of the guidance.

Although the Team identified some inconsistencies in agreement language and the implementation process, no single issue emerged as a significant problem. Moreover, the variations identified are within reasonable bounds and similar to the variations expected due to site-specific circumstances affecting any subcategory of Superfund response tools (e.g., variations in RI/FS or RD/RA agreements at NPL sites).

The transparency of the SA approach to stakeholders is improving slowly.

EPA is making progress with informing stakeholders about the SA approach and the nature of the risks to human health and the environment at the site (i.e., improving transparency). The Regions report notifying PRPs earlier in the process about the potential for use of the SA approach.

However, the Evaluation Team found significant variation among regional staff in their knowledge and understanding of the SA approach.

External parties provided mixed feedback on the SA Approach

The Team sent surveys on the SA approach to nine external stakeholders and received usable responses from three groups.

- The state response on the approach was neutral, describing the circumstances under which the approach was being used rather than opining on the approach, but overall indicating general satisfaction with the SA approach.
- A private-practice attorney representing multiple PRP groups responded favorably, expressing his support for the SA approach and his hope that it continues.
- A representative of the PRP that negotiated the first SA RD/RA Consent Decrees (CDs) was unhappy with their negotiations and the resulting agreement, finding it aggressive, punitive and unfair. However, as circumstances played out, this PRP reports the “negative” aspects of the SA provisions have been mitigated in large part by a good working relationship with EPA.
- A fourth group, representing a coalition of PRPs, also responded to the survey. Their response was generally negative.⁸

On balance, EPA regional attorneys and RPMs favor keeping the SA approach as an option in appropriate circumstances.

Regional attorneys and RPMs who have been involved at sites with SA agreements

⁸ Although this group’s response to the evaluation survey was inconsistent with Paperwork Reduction Act requirements, EPA had previously received extensive feedback on the SA approach from this particular stakeholder.

support keeping the approach as an option in appropriate circumstances. Some felt cleanup work could begin sooner because negotiations are not delayed by the NPL listing process. Others mentioned that both EPA and the PRP can benefit if the PRP enters an agreement to conduct the work without the expense of listing the site. A few mentioned that the difficulties in negotiating the SA provisions make them favor listing the site.

RECOMMENDATIONS

Based on its findings and feedback from external and internal parties, the Evaluation Team recommends the following:

- (1) Keep the SA approach as an enforcement / cleanup option.
- (2) Track SA *agreements* rather than SA sites.
 - Use the “SA flag” in CERCLIS only for agreements consistent with the guidance at sites satisfying the SA eligibility criteria.
- (3) Improve consistency in implementing the SA approach.
 - Offer training to regional staff on the SA approach, including understanding the SA criteria, setting the CERCLIS flag, negotiating model language, improving transparency, approaching the PRP and community, and understanding how the SA approach fits with other enforcement tools.
 - Ensure that EPA regions know that PA, SI, and ESI reports can be provided to PRPs at sites following the SA approach. PRPs can use the data from those reports to generate their own HRS score using tools available on-line.

- As necessary, revise the Superfund Program Implementation Manual (SPIM) and educate EPA Regions on tracking sites using the SA approach.
- (4) Continue to improve the transparency of the SA approach.
- Use CERCLIS to provide an accurate picture of how the SA approach is used, e.g., develop standardized national reports.
 - Standardize terminology to refer to sites that have a signed SA agreement.
 - Develop a fact sheet to help educate the public about the SA approach.
 - Improve presence of SA approach on EPA's national web site and encourage EPA Regions to do the same.
 - Finalize and issue the TAP Guidance.

CONCLUSION

While EPA uses the SA approach in only limited situations, it should be retained as a viable option for consideration in appropriate circumstances. The SA approach is one more tool for cleaning up seriously contaminated sites through agreements with PRPs. However, the Agency can do more to improve consistency in implementing the approach and helping stakeholders understand the process and benefits of the SA approach.

Disclaimer. This report is intended to inform policy decisions and to provide increased transparency to the SA approach. It does not provide legal advice, have any legally binding effect, or expressly or implicitly create, expand, or limit any legal rights, obligations, responsibilities, or benefits for any person. This document is not intended as a substitute for reading the statute or the guidance documents described above.

ANALYSIS OF SA DATA

In February 2005, 109 sites were “flagged” in CERCLIS as SA. After analysis, the Evaluation Team separated the 109 sites into the following four categories:

- (1) **Sites Actively Using the SA Approach.** These are non-NPL sites with an agreement for RI/FS, RD, RA or NTCRA finalized after the June 2002 Guidance. The Team sorted these sites into two subcategories: (a) sites with agreements containing the SA provisions or with prior written approval (PWA) to omit the provisions, and (b) sites with agreements consistent with the SA Guidance.

- (2) **Sites with possible future SA agreement.** These sites appear to meet the SA criteria, but the Region has not yet entered into agreements since the June 2002 Guidance. The SA approach will not necessarily be pursued at these sites. The Team identified two subcategories: (a) sites that have issued only a Unilateral Administrative Order (UAO) since June 2002 and (b) sites with agreements without SA provisions.⁹

- (3) **Sites with final enforcement actions in place prior to the June 2002 SAS Guidance.** These are sites with final enforcement actions in place prior to the June 2002 SAS Guidance. These are older sites and the majority are in the final phase of the cleanup.

- (4) **Sites where SA flag will be removed.** The Team determined that these sites either do not meet the SA site criteria or the Region does not plan to pursue an SA agreement.

Summary of SA Data Categories*

| Category | # of Sites | | # of Agreements |
|---|------------|----|-----------------|
| (1) Sites actively using the SA approach.** | | | |
| Total | 22 | | |
| a) Agreements w/ SA provisions | | 17 | 19 |
| b) Agreements consistent with SA Guidance | | 8 | 9 |
| (2) Sites where SA agreement possible in the future. | 40 | | |
| a) Sites with UAOs | | 5 | 5 |
| b) Agreements without SA provisions | | 3 | 3 |
| (3) Sites with final enforcement action pre-SAS Guidance. | 19 | | -- |
| (4) Sites where SA flag will be removed. | 28 | | -- |

* This reflects the Team's understanding of the status of these sites / agreements as of August 2006.

** There is overlap within these sub-categories. For example, at three sites, EPA entered into more than one agreement, and the agreements fell within different subcategories; thus the subcategories sum to 25 rather than 22.

⁹ At two sites counted in Category 1, a “Participate & Cooperate” UAO was issued to parties that didn’t join the corresponding agreement.