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

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MEMORANDUM

SUBJECT: Transmittal of Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach (SAA Guidance)

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TO: Superfund National Policy Managers, Regions 1-10
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This guidance updates and supersedes the 2004 *Revised Response Selection and Settlement Approach for Superfund Alternative Sites*. The guidance is updated to ensure consistency between the use of Superfund authority at sites listed on the National Priorities List (NPL) and at sites with Superfund Alternative approach (SAA) agreements. Updates are also responsive to EPA's continuing commitment to transparency in its use of Superfund authority.

This updated guidance addresses, as did the 2004 guidance, use of Superfund agreements at sites that are eligible to be listed on the National Priorities List (NPL) but are not listed. At sites with SAA agreements, regions should continue to act in accordance with the practices normally followed at sites listed on the NPL, using the same response techniques, standards and guidance, and achieving comparable cleanup levels. Superfund settlements addressing response actions at SAA agreement sites should use the same guidance and policies and achieve the same goals as settlements at NPL sites. States, tribes, natural resource trustees, and communities should have the same opportunity for involvement as that provided at NPL sites. EPA's enforcement posture at SAA agreement sites should be equivalent to its enforcement posture at NPL sites. Finally, regions should make every effort to be transparent in the implementation of this approach.

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Updates to the guidance include: new sections on *Relationship with Communities* and *Transparency and Accountability*; notice of sites going to the NPL-Listing panel; updated Tribal/State discussion; the model agreement language has been deleted from the guidance (it is included in the various model agreements); a more affirmative special notice intent than the previous guidance; new language within the community involvement section (Section IV) re: notifying communities prior to using SAA and after the remedy is complete (and conforming changes throughout); and a statement regarding strong initial presumption for listing sites on the NPL where the federal Superfund program is managing the cleanup (in the *Background* section). In addition, minor modifications were made for clarity and consistency throughout. Most references were moved to footnotes to improve readability.

If you have questions regarding the settlement or enforcement elements of this guidance, please contact Nancy Browne (202-564-4219) of OSRE. If you have questions regarding NPL-eligibility or response selection at a SAA agreement site, please contact David Yogi of OSRTI (703-347-8835). If you have questions regarding Technical Assistance Plans (TAPs), please contact Mike Northridge (202-564-4263) of OSRE.

Attachment

cc: Federal Facility Enforcement Office
Office of Emergency Management
Department of Justice

EPA
United States Environmental Protection Agency

Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach (SAA)

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This guidance addresses use of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) agreements at sites that are eligible to be listed on the National Priorities List (NPL) but are not listed.[1]

At sites using SAA, the U.S. Environmental Protection Agency (EPA) should act in accordance with the practices normally followed at sites listed on the NPL, using the same response techniques, standards and guidance, and achieving comparable cleanup levels. CERCLA settlements addressing response actions at sites using SAA should use the same guidance and policies and achieve the same goals as settlements at NPL sites. States, tribes, natural resource trustees, and communities should have the same opportunity for involvement as that provided at NPL sites. Also, EPA's enforcement posture at sites using SAA should be equivalent to its enforcement posture at NPL sites. Nothing in this guidance should be construed to limit EPA's enforcement discretion.

I. Background

EPA routinely seeks the best path to address a site contaminated with hazardous substances. In deciding how to address a contaminated site, EPA considers: the size and nature of the contamination, the urgency of the situation, what cleanup programs are available, the availability of public and private cleanup resources, and the willingness and ability of those parties responsible for the contamination to lead the cleanup. While this analysis can result in placement of a site on the NPL, such sites can also be directed toward other federal or state approaches.

EPA's Superfund program traditionally focuses on: 1) cleaning up sites listed on the NPL, which generally require long-term cleanup activities, and 2) responding to smaller near-term threats. EPA first looks to the potentially responsible parties (PRPs) to investigate and cleanup Superfund sites before using Superfund money to do so.[2]

Beginning in the 1990s, situations arose where PRPs, communities, or States preferred that a site be addressed without listing it on the NPL. At some of these sites that were eligible for the NPL, but not listed, PRPs were willing to enter into CERCLA agreements to perform site cleanup with EPA oversight. EPA determined that, as a policy matter, such agreements would be appropriate in circumstances where specific criteria are met. This concept became known as the "NPL-

[1] Not all sites that are eligible for listing on the NPL are addressed by CERCLA; such sites may be addressed by other authorities in certain circumstances (e.g., the Resource Conservation and Recovery Act (RCRA) corrective action program, State clean-up programs).

[2] EPA's *Enforcement First* policy originated with the 1989 Superfund 90-Day Report.

equivalent" approach, and by 2000, the Superfund Program Implementation Manual (SPIM) had formally incorporated the concept of a "NPL-equivalent" approach to site remediation.[3]

EPA identified three main legal differences between NPL sites and non-NPL sites: access to Superfund money for remedial actions; eligibility for Technical Assistance Grants (TAGs); and the statute of limitations (SOL) for natural resource damage (NRD) claims.[4,5] EPA developed settlement provisions to address these legal issues. The intent of these provisions was to ensure that CERCLA settlements at sites using SAA:

1. achieve cleanups equivalent to those at NPL sites;
2. place EPA in the same enforcement posture as at NPL sites; and
3. 3. provide the states, trustees, tribal governments and communities the same opportunities for involvement as provided for at NPL sites.

In June 2002, EPA issued formal guidance on this approach to promote national consistency and address the legal issues identified above. The guidance changed the name of the approach from "NPL-equivalent" to "Superfund Alternative" (SA). [6] The 2002 guidance established the threshold criteria for considering use of CERCLA settlement authority leading to remedial action at a non-NPL site:

1. the site would qualify for listing on the NPL,
2. the site is expected to need remedial action (RA), and
3. there is a viable, capable and cooperative PRP willing to enter into an enforceable agreement with EPA and perform the remedial work.

The guidance provided the parameters of using the approach should the regions determine it was appropriate but did not require the regions to enter into agreements at non-NPL sites.

In June 2004, EPA issued the *Revised Response Selection and Settlement Approach for Superfund Alternative Sites*. The 2004 guidance provided clarifications to the 2002 guidance and model language for settlement provisions.

EPA's goals in updating the 2004 guidance are to: 1) provide for additional transparency in the use of Superfund authorities at sites with SAA agreements; 2) facilitate settlements and cleanups at sites with SAA agreements that are equivalent to settlements and cleanups at sites listed on the NPL; and 3) continue the refinement of a consistent framework for such responses and settlements. At the core of each of these guidance documents is the intent to have SAA

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[3] See OSWER Directive 9200.3-14-F-P (October 2000), Change 1 of the FY 2001 SPIM, page B-4, discussion of "NPL-equivalent" site.

[4] A fourth legal difference, in CERCLA section 104(i)(6)(A), requires the Agency for Toxic Substances and Disease Registry (ATSDR) to perform health assessments at NPL sites. ATSDR has discretion under section 104(i)(6)(B) to also perform assessments at certain non-NPL sites, and EPA and ATSDR are developing a Memorandum of Understanding regarding sites using SAA so that ATSDR will perform assessments at those sites, making this legal difference not relevant for SAA.

[5] The Small Business Liability Relief and Brownfields Revitalization Act amendments to CERCLA are addressed universally in the CERCLA model agreements and so do not require language specific to SAA agreements.

[6] See "Response Selection and Enforcement Approach for Superfund Alternative Sites" (the SAS Guidance). The guidance was the first place the name "Superfund Alternative" approach was used rather than "NPL-equivalent."

agreements provide for responses that meet the same cleanup standards as if the site were listed on the NPL and for timely and enforceable action.

Listing appropriate sites on the NPL remains an important element of EPA's Superfund program, and in general, once a site is determined to be NPL-caliber and a decision is made that the federal Superfund program should manage the site cleanup, there is a strong initial presumption in favor of listing the site on the NPL. Regional offices, however, may determine if the approach outlined in this guidance is appropriate for use in certain circumstances. This guidance is not intended to encourage the regions to suspend NPL listing of any site.

II. Criteria for Use of SAA

For purposes of this guidance, use of SAA should only be considered at 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) (*i.e.*, the site is NPL-caliber);
2. are expected to need 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). [While the regions should seek to have the PRP perform all remedial pipeline activities at SAA agreement sites, they must, at a minimum, have a consent decree with the PRP to perform the RA].

On its own initiative or at the suggestion of interested parties,[7] a region has the discretion to determine whether the SAA is appropriate at a particular site. Once that determination is made, regional offices should: 1) discuss EPA's proposal to address the site using SAA with the state and/or tribe; 2) discuss SAA with PRPs in advance of negotiations; 3) bring potential SAA agreement sites to the NPL listing panel for discussion regarding site characteristics[8] and planned use of SAA; and 4) notify the public of EPA's intent to use CERCLA authority at the site. The approach outlined in this guidance does not affect other federal and state cleanup programs.[9]

SAA may be used at sites that have not been proposed for the NPL and at sites that have been proposed for the NPL through a notice in the Federal Register.

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[7] Interested parties include, *e.g.*, state, PRPs, and communities.

[8] Information for the NPL Listing Panel should include documentation supporting an HRS score > 28.5. The Region may rely on the draft HRS document record or other adequate documentation.

[9] SAA would not be used at Brownfield sites meeting the definition of eligible response sites (CERCLA § 101(41)) for persons in compliance with a State response program because CERCLA § 128(b) prohibits the use of judicial or administrative enforcement actions under CERCLA § 106(a) or judicial enforcement actions to recover costs under CERCLA § 107(a) at such sites.

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III. EPA's Relationship with States and Tribes at Sites Using SAA

The EPA regional office should notify the state and tribes of EPA's proposal to address a site using SAA and coordinate with them on: 1) EPA's proposal to address the site using SAA; 2) remedy selection and site management; and 3) negotiations for settlement. Throughout the cleanup process, states and tribes shall be afforded the same opportunities for involvement at a site using SAA as at an NPL site. EPA shall engage in tribal consultation where appropriate as well as engage tribal communities, members, grassroots organizations and non-federally recognized tribal governments. EPA shall work with state agencies or elected officials, as appropriate, as well as individuals or community organizations.

Using SAA. The regional office should work with the states and tribes to resolve concerns they may have regarding using SAA. There is a general expectation that the region and state or tribe will agree on using SAA at a site. If the region and state or tribe cannot reach agreement on using SAA, the region shall notify and seek input from OSRE and OSRTI before proceeding on the SAA path. As at NPL sites, when working with tribes at sites using SAA, the regions will adhere to the Agency's *Consultation and Coordination with Indian Tribes* policy (2011) as well as the guidelines set forth in EPA's booklet, "Consulting with Indian Tribal Governments at Superfund Sites" (2006).[10]

Remedy Selection. The region shall request state and tribal review, comment, and involvement in the remedy selection process as provided in CERCLA and the NCP[11] and on the other elements listed below. Coordination between the region and states and tribes includes the following:

1. State or tribal participation in the long-term planning process for potential SAA agreement sites within their jurisdiction.
2. A reasonable opportunity for the state or tribe to review and comment on each of the
    a. following:
        i. the remedial investigation and feasibility study (RI/FS) and all data and
    b. technical documents leading to its issuance;
        i. the RA alternatives identified in the RI/FS;
        ii. the engineering design following selection of the final RA; and
        iii. other technical data and reports relating to implementation of the remedy.
3. Notice to states and tribes, and an opportunity for stakeholders to comment on EPA's proposed plan for RA and subsequent draft record of decision (ROD). A response to comments submitted by the state and/or tribe should accompany EPA's proposed decision regarding selection of the RA.

Negotiations. EPA should provide notice to the state or tribe of negotiations with PRPs regarding any response action at a facility in the State or on Tribal Lands and an opportunity for the state or tribe to participate in the negotiations and settlement.

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[10] 2011 Tribal Consultation policy can be found at: http://www.epa.gov/indian/consultation/consult-policy.htm; EPA's booklet, "Consulting with Indian Tribal Governments at Superfund Sites" (2006) can be found at: http://www.epa.gov/superfund/partners/osrti/booklet_text.htm.

[11] CERCLA § 121(f) and 40 CFR § 300.500, State Involvement in Hazardous Substance Response.

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IV. EPA's Relationship with Communities at Sites Using SAA

As with all of the other aspects of the response process, EPA will generally follow the same practices for community engagement at sites using SAA as it does for NPL sites. One important part of that practice is the availability of technical assistance for communities impacted by the site. At sites listed on the NPL or proposed for listing on the NPL, support for technical assistance for communities is available through a technical assistance grant (TAG). For sites not eligible for TAGs, EPA has issued guidance[12] on making technical assistance to communities available through a provision negotiated with the PRP as part of a SAA agreement. More information on this provision (referred to as the Technical Assistance Plan (TAP)) is provided in Section VI.B.1 of this guidance.

Community Involvement Prior to Using SAA. Prior to negotiating an SAA agreement, the regions should notify the public of EPA's intention to use its Superfund authority to cleanup a site using SAA by performing community outreach notification activities.

Outreach activities to notify the residents and businesses surrounding the site of the intent to use Superfund authority should be determined on a community-by-community basis, and may include, but are not limited to:

- Publishing a notice in, *e.g.*, a major or local weekly newspaper, community or homeowner association newsletter, or shopping guide.
- Distributing mailings to individual residents.
- Broadcasting information via local radio or community television networks.
- Making information available in a local information repository (*e.g.*, public library).
- Hosting public meetings.

EPA is preparing a site assessment community involvement memo to provide more information on public outreach activities at potential SAA agreement sites, "Guidance for Incorporating Community Involvement into Superfund Site Assessment Activities."[13]

Community Involvement at Removals. The NCP requirements for community involvement apply to all Superfund removals at non-NPL sites as they would for removals at NPL sites.[14,15] For example, EPA will, as specified by the regulations, interview community residents, prepare a community relations plan, and publish a notice about the availability of the administrative record file.

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[12] Interim Guidance: Providing Communities with Opportunities for Independent Technical Assistance Superfund Settlements (9/3/09) is available at: http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/.

[13] EPA's guidance on community involvement during the site assessment phase of the remedial process is anticipated to be final in the fall of 2012. Although the community outreach activities detailed in this memo are focused on the site assessment phase of the NPL listing process, many of the activities can be employed to ensure communities at sites with SAA agreements are active and engaged in the remediation process.

[14] 40 CFR 300.415(n).

[15] Many removal actions are the final Superfund action at a site; these removals do not meet the criteria for SAA because the site will not need long-term remedial action. However, NCP community involvement criteria still apply.

Community Involvement during RI/FS Negotiation and Implementation. The NCP requirements for community involvement will apply to RI/FSs at sites using SAA as they would for RI/FSs at NPL sites.[16] For example, EPA will interview community residents, prepare a community relations plan, and inform interested parties of the establishment of the information repository. However, instead of informing the community of the availability of a TAG, EPA and/or the PRPs will inform the community of the availability of technical assistance through the TAP. (See Section VI.B.1)

Community Involvement at Remedy Selection. The statutory and NCP requirements for community involvement in remedy selection will apply in the same manner at sites using SAA as for NPL sites.[17] Technical assistance for communities provided in the RI/FS agreement should extend through review of the ROD.

Community Involvement during RD/RA Negotiation and Implementation. The statutory and regulatory requirements for community involvement during RD/RA CD negotiation and RD/RA implementation will apply to the same extent at sites using SAA as they would for such settlements involving NPL sites.[18] As with the RI/FS, EPA and/or the PRP will inform the community of the availability of technical assistance through the TAP.

Community Involvement at Completion of the Remedy. EPA should allow for interested parties to comment on the completion of response actions at SAA agreement sites.[19] Completed response actions will be outlined in a site fact sheet to be posted on the appropriate regional site webpage, initiating a 15-day public comment period. If EPA receives significant comments on this notification, EPA will post a responsiveness summary on the appropriate regional webpage. Completion of this step will result in the site receiving "SAA Site Completion" status in CERCLIS.

At any time during the SAA response action process, EPA can conduct community and outreach activities as appropriate. At NPL sites, the Agency often goes further than the minimum regulatory requirements and may, for example, conduct public meetings, host availability sessions, establish an office at the scene, issue fact sheets about the ongoing work, or share drafts of technical documents. EPA will undertake these additional measures for sites using SAA to the same extent that it would if the site were listed on the NPL. These activities can include those stated in the section of this document entitled, "*Community Involvement Prior to Using the Superfund Alternative Approach*."

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[16] 40 CFR 300.430(c).

[17] *See*, e.g., CERCLA §§ 113(k) and 117; 40 CFR 430(f)(1)(C); 40 CFR 300.430(f)(1)(ii) and 40 CFR 300.430(f)(2); 40 CFR 300.430(f)(3); 40 CFR 300.430(f)(6).

[18] CERCLA § 122(d)(2)(B) and 40 CFR 430(c)(5)(ii), 28 CFR 50.7; 40 CFR 435(c).

[19] When EPA deletes a site from the NPL, the public has an opportunity to comment on the deletion proposal through the Federal Register process. As site deletion is not applicable at sites with SAA agreements, this second opportunity for public participation is unavailable. Soliciting comment on the completion of response actions will provide an equivalent avenue for public participation at sites with SAA agreements.

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V. EPA's Response Selection and Oversight at Sites using SAA

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

1. Continue to make appropriate use of its removal authorities (time critical and non-time critical) at these sites to address the more immediate and less complex threats posed by the site in accordance with CERCLA § 104(a)(2) and all other associated EPA guidance.[20]
2. Notify and share relevant data with the 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 sites.
3. Conduct or oversee the performance of an RI/FS in accordance with the NCP[21] and all other associated EPA guidance. [22]
4. Select a RA consistent with CERCLA § 121 and the NCP.[23]
5. Prepare, or oversee the preparation of a ROD[24] that selects a remedy consistent with CERLCA § 121, the NCP[25] and all other associated EPA policy and guidance.
6. Assure that the remedy attains applicable or relevant and appropriate requirements (ARARs) consistent with CERCLA § 121 and the NCP.[26]
7. Involve states and/or tribes in decisions in the same manner as at NPL sites consistent with CERCLA § 117, the NCP[27] and EPA's *Policy on Consultation and Coordination with Indian Tribes*. [28]
8. Involve communities in decisions in the same manner as at NPL sites.[29]
9. Coordinate with trustees in accordance with CERCLA §§ 104(b)(2) and 122(j).
10. Conduct oversight to ensure that selected remedies being conducted by the PRPs are protective of human health and the environment and that the RA is in compliance with the settlement agreement.[30]
11. Conduct five-year reviews for RAs selected under CERCLA § 121 which result in any hazardous substances, pollutants, or contaminants remaining at the site above levels that allow for unlimited use and unrestricted exposure.[31]

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[20] 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.
[21] 40 CFR 300.430(a-e).
[22] Including the *Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA*, Interim Final (OSWER 9355.3, October 1988).
[23] 40 CFR 300.430(f).
[24] Including *A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Decision Documents* (OSWER 9200.1-23P).
[25] 40 CFR 300.430(f).
[26] 40 CFR 300.430.
[27] 40 CFR 300.430(c).
[28] 2011 Tribal Consultation policy can be found at: http://www.epa.gov/indian/consultation/consult-policy.htm;
[29] 40 CFR 300.430(f)(3).
[30] See *EPA Oversight of Remedial Designs and Remedial Actions Performed by Potentially Responsible Parties – Interim Final*, April 1990.
[31] See *Comprehensive Five-Year Review Guidance*, June 2001.

12. Certify that the work is complete and that cleanup levels have been achieved and RA objectives attained at SAA agreement sites using the same process used for NPL sites (*e.g.*, documentation of remedial action completion, construction completion, and site completion). Draft completion reports should be consistent with Chapters 1-4 of EPA's May 2011 guidance document, *Close Out Procedures for National Priorities List Sites,* [32] thus maintaining consistency with EPA's "remedial action completion," "construction completion," and "site completion" guidelines.

Just as the Agency does at NPL sites, EPA will strive to implement cleanup remedies at sites using SAA 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 hazardous waste sites to productive use.

VI. Settlements at Sites Using SAA

CERCLA settlements at sites using SAA should be negotiated to 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 sites using SAA upon a determination that such action will be done properly and promptly.[33]

A. Settlement Process

The regions should use the same PRP search guidance and practices and identify and pursue the same PRPs as they would pursue if the site was on the NPL. The regions should issue a general notice letter[34] and/or a CERCLA § 122(e) special notice letter, as appropriate, to identified PRPs.[35]

Negotiations. Standard Superfund negotiation practices should be followed for negotiation of SAA agreements.[36] For example, when negotiating for RI/FS actions using SAA, the regions should use the latest model AOC for RI/FS as a starting point for preparing a site-specific AOC and include the language provided in the model for sites using SAA. For a PRP-lead RA, CERCLA § 122(d) requires settlements to be in the form of a CD. The regions should begin with

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http://epa.gov/superfund/programs/npl_hrs/closeout/pdf/2011guidance.pdf.

[33] See CERCLA § 104(a)(1).

[34] See model SAA general notice letter, available at: http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/.

[35] See model special notice letter, available at: http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/.

[36] See *Negotiation and Enforcement Strategies to Achieve Timely Settlement and Implementation of Remedial Design/Remedial Action at Superfund Sites*, 6/17/99, available at: http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/

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the latest model CD for RD/RA and include the language provided for SAA agreements.[37,38] The regions should use the latest guidance regarding the duration of RD/RA negotiations.[39]

All applicable Superfund enforcement and program policies apply when negotiating SAA settlements. Examples include the offering of, where appropriate: orphan share compensation;[40] opportunities to improve the cost effectiveness of remedies;[41] and the opportunity to discuss oversight expectations.[42]

Provisions. Depending on the phase of clean-up, the regions should negotiate one or more of the provisions discussed below into SAA settlement agreements. The table on page 10 entitled, "Summary of SAA Settlement Provisions," indicates the provisions the regions should include in RI/FS and RD AOCs and RD/RA or RA CDs. Model language for each provision is included in the CERCLA model agreements.

Modifying/Omitting a Provision. If a site at which SAA is being used 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 revise or omit 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 the United States Department of Justice (DOJ).

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

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[37] Current CERCLA model documents are available at: http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/.

[38] To ensure adequate protections for EPA, the regions should negotiate the Listing provision and consider negotiating the other three provisions in AOCs for Removal Action at sites with SAA agreements where RA is anticipated. The Listing provision may be particularly relevant in agreements for Non-Time Critical removals. As noted above, sites with SAA agreements are anticipated to require remedial action.

[39] The current guidance is: *Interim Policy on Managing the Duration of Remedial Design/Remedial Action Negotiations*, September 30, 2009, available from: http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/. [An update to this guidance is anticipated in the fall of 2012.]

[40] See *Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-time Critical Removals*, 6/3/96, available from: http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/

[41] Superfund Reforms: Updating Remedy Decisions, OSWER Directive 9200.2-22, 9/27/96, available at: http://www.epa.gov/oerrpage/superfund/programs/reforms/doc/.

[42] See *Interim Guidance on Implementing the Superfund Administrative Reform on PRP Oversight*. OSWER Directive #9200.0-32P, 5/17/00.

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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 pursue stipulated and civil penalties and damages;[43]
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 the site, and pursue cost recovery).[44]

B. Settlement Provisions

Depending on the work to be performed (see chart below), the regions should negotiate one or more of the following provisions into settlement agreements at sites using SAA:

- Technical Assistance Plan for Local Communities (TAP).
- Performance Guarantee for Work Continuance (Liquid Financial Assurance).
- Agreement Not to Challenge Listing After Partial Cleanup (Listing).
- Natural Resource Damages (NRD).

The TAP provision makes technical assistance for the community available for sites using this approach (such assistance is available through a TAG for sites proposed to and listed on the NPL). Since access to the CERCLA Trust Fund for remedial action is limited to NPL sites, the Liquid Financial Assurance portion of the Performance Guarantee provision is intended to provide EPA with funding to keep the work going when the site needs to be listed on the NPL. 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 trustee interests to the same degree these interests are protected at NPL sites. These provisions, which are discussed below, will support EPA's and DOJ's subsequent assertion that these settlements are fair, reasonable, and in the public's interest.

	Removal AOC*	RI/FS AOC RD AOC	RD/RA CD RA CD
TAP Provision *At sites already proposed for the NPL and where a response action has begun, prior written approval is not needed to omit or modify this provision.*		✓	✓
Performance Guarantee/Liquid Financial Assurance Provision *For at least part of estimated RA costs.*			✓
Listing Provision *At sites already proposed for the NPL a prior written approval is not needed to omit or modify this provision.*	✓		✓
NRD Provision *This provision need not be considered in AOCs for RD only.*		✓	

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

[43] See CERCLA §§ 106(b)(1), 107(c)(3), 122(1).

[44] The regions should ensure that actions taken in response to a breach of settlement are not inconsistent with the settlement agreement.

1. Technical Assistance Plan (TAP) for the Local Community

An important element of a Superfund response action is the availability of technical assistance to the local community. EPA is authorized to provide TAGs to qualified community groups only at sites listed on the NPL and at sites proposed for listing on the NPL and at which response action has begun.[45] At sites with SAA agreements that are not proposed for the NPL,[46] the regions should negotiate a TAP provision in settlements for RI/FS, RD, and RD/RA.[47] 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 SAA agreement sites is at least equivalent to the opportunity at sites listed on the NPL.

A TAP provision is contingent on demonstrated community interest.[48] The PRP need not take any steps until EPA has determined that a qualified community group has come forward. EPA has issued detailed interim guidance on TAPs.[49]

Model Agreement Language
RI/FS AOC: Regions should modify paragraph 34.b., *Community Relations Plan* of Section IX, of the Model AOC for RI/FS, by adding the SAA-specific language provided in the model.

RD/RA CD: Regions should modify paragraph 128 in Section XXIX, *Community Relations*, of the Model CD for RD/RA, by adding the SAA-specific language provided in the model.

2. Performance Guarantee for Work Continuance/Liquid Financial Assurance

SAA remedial action agreements should address at least some portion of the performance guarantee[50] as liquid financial assurance.

One of the primary differences between a site with an SAA agreement 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*

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[45] 40 CFR § 35.4025.
[46] If a SAA agreement site was proposed for listing on the NPL and a TAG was not awarded, the regions may negotiate a TAP provision. Where a TAG was awarded, the regions should continue to administer the TAG and recover TAG costs as part of the site costs.
[47] If the PRP has already agreed to a TAP provision during an early phase of cleanup (e.g., in an AOC for the RI/FS), the regions may only need to negotiate an extension through the RD/RA phase.
[48] EPA has awarded TAGs at approximately fifteen percent of the sites listed on the NPL and has seen a similar level of interest at sites with SAA agreements.
[49] *See Interim Guidance: Providing Communities with Opportunities for Independent Technical Assistance in Superfund Settlements*, 9/3/09, available at: http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/.
[50] EPA is considering using the term "financial assurance" as a term of art in CERCLA models and guidance documents in lieu of "performance guarantee."

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> *planning activities, RI/FSs, and other actions taken pursuant to CERCLA section 104(b)) are not limited to NPL sites.* (40 CFR § 300.425(b)(1)).

SAA settlements for RA, therefore, should include adequate performance guarantee (also known as financial assurance) mechanisms to protect work continuity and assure completion of the work. Specifically, the regions should negotiate for PRPs to provide performance guarantee instrument(s) that are sufficiently liquid for use in the event that EPA must complete part or all of the remedial work, including operation and maintenance (O&M) costs. The Model CD for RD/RA identifies several possible mechanisms that PRPs at NPL sites may use to provide the performance guarantee. 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 are generally 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 money for work takeover and are intended to prevent any delays in cleanup.[51]

Just as at NPL sites, the regions should negotiate for PRPs at sites using SAA to provide a performance guarantee for the entire amount of the estimated costs of the RA. However, due to limitations on EPA's ability to access the Trust Fund, the regions should negotiate language that PRPs provide some amount of that performance guarantee through liquid instruments at least equal to the costs that would be imposed on EPA to keep cleanup work going through the NPL listing process, in the event the site needs to be listed. The PRP should post the *remaining* amount of the necessary performance guarantee through an alternative mechanism and may use a less liquid instrument.[52] Based on site-specific circumstances, the regions may require PRPs to provide liquid performance guarantee instruments for the entire amount of the estimated cost for the RA and O&M.

Model Agreement Language

RD/RA CD: When a region determines that the PRP shall either (1) use a combination of liquid and non-liquid instruments to meet its performance guarantee obligations in a SAA settlement, or (2) guarantee the entire cost of RA and/or O&M through a liquid financial assurance instrument, the regions should modify accordingly paragraph 44 in Section XIII *Performance Guarantee* of the Model CD for RD/RA.

3. Agreement Not to Challenge Listing After Partial Cleanup

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

[51] Insurance policies require compliance with various terms and conditions that could hinder EPA's ability to readily access insurance proceeds for cleanup and are considered less liquid than letters of credit, payment bonds and fully-funded trusts.

[52] Due to the inaccessibility of Trust Fund money for remedial actions at non-NPL sites, EPA allows a combination of liquid and illiquid mechanisms to make up the performance guarantee at sites with SAA agreements. This is contrary to the language in the model RD/RA CD which allows only for one or the other (*i.e.*, all liquid or all illiquid).

inadequate cleanup or interruption in response actions caused by unforeseen events. Therefore, in AOCs for removal and CDs for RA, the regions should negotiate with the PRPs for their 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. It will allow EPA to list the site based on conditions at the site prior to initiation of any work pursuant to an AOC for removal or CD for RA. The ability to move quickly to list the site will help avoid delays in implementing the response action.

To help such a listing be accomplished quickly if necessary, EPA should have adequate documentation supporting an HRS score of 28.5 or greater before any work is initiated.[53] Generally, in computing the HRS score for a site, EPA does not take into account response actions that were incomplete 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.[54]

Model Agreement Language

Removal AOC: The regions should insert the SAA agreement-specific paragraph after paragraph 61, Section XXI, *Covenants Not to Sue by Respondents*, of the Model AOC for removal action if there is any chance that long-term response (*i.e.,* R.A.) will be needed at the site.

RD/RA CD: The regions should insert the SAA agreement specific paragraph after paragraph 111 in Section XXII, *Covenants by Settling Defendants*, of the Model CD for RD/RA.

RI/FS AOC: If a SAA agreement for RI/FS includes response work that may change site conditions (*i.e.*, response actions beyond investigative studies), regions should insert the SAA agreement-specific paragraph after paragraph 85 in Section XXI, *Covenants Not to Sue by Respondent*, of the Model AOC for RI/FS.

4. Natural Resource Damages (NRD)

EPA encourages participation by all affected trustees at every stage in the CERCLA response and enforcement process. Coordination activities are intended, among other things, to help trustees identify actions that may trigger the statute of limitations (SOL) for NRD actions.

The region has the responsibility to notify all potentially affected trustees of EPA's intention to use SAA at a site and of the commencement of investigations and negotiations at all sites using SAA. EPA's trustee notification and coordination efforts should provide trustees with the information needed to: meet their legal obligations for action; share information to better protect public health and the environment; and reduce the time for settlement of all liabilities.

[53] The Region may rely on the draft HRS Document Record or on other adequate documentation supporting a HRS score of 28.5 or greater.

[54] See *The Revised Hazard Ranking System: Evaluating Sites After Waste Removals*, OSWER Directive # 9345.1-03FS, October 1991, and *Revisions to OSWER NPL Policy, The Revised Hazard Ranking System: Evaluating Sites After Waste Removals*, OSWER Directive #9345.1-25, 4/4/97.

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The general SOL provision for NRD claims states that an action must be commenced within three years after the *discovery* of the natural resource loss and its connection with the release.[55] CERCLA provides an exception to this general SOL period for NPL sites or any facility "at which a [RA] ... is otherwise scheduled;" actions for NRD claims at these sites must be commenced within 3 years after *completion of the RA*.[56] Because EPA anticipates an RA will be performed at any SAA agreement site addressed in accordance with this guidance, sites with SAA agreements are covered under this exception.

The regions should negotiate language which clarifies that this SOL applies to any SAA agreement for RI/FS. The language indicates that the parties agree that upon issuance of the settlement, an RA is scheduled at the site for purposes of CERCLA § 113(g)(1). 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 negotiated regardless of whether the NRD claims are known at the time of the agreement. Any omission or modification of this language from a SAA agreement for RI/FS should be coordinated in advance with DOJ on behalf of the trustees (the region does not need prior written approval from RSD).

Model Agreement Language. The regions should insert the SAA agreement-specific paragraph after paragraph 59 in a new Section XIV, *Natural Resource Damages*, of the Model AOC for RI/FS.

VII. Transparency and Accountability

Transparency and accountability are important components of SAA and EPA is committed to sharing relevant information with the public. Transparency enhances EPA's credibility, boosts public trust in our actions, improves the quality of our decisions and helps to level the playing field for all stakeholders. The regions should have a similar level of transparency and accountability at sites using SAA as it has at sites listed on the NPL. To this end, EPA will do the following:

- Prior to starting negotiations for SAA agreement, the regions should bring the site to the NPL-listing panel for discussion regarding site characteristics (including adequate documentation supporting an HRS score of $\geq$ 28.5) and planned use of SAA. This is the same panel that reviews sites that the regions propose to list on the NPL.
- The regions should notify the public of its intent to use CERCLA authority at the site.
- The regions should use CERCLIS[57] to track the same progress milestones for sites with SAA agreements as those that are tracked for PRP-lead sites listed on the NPL.[58]

[55] CERCLA § 113(g)(1)(A).
[56] CERCLA § 113(g)(1).
[57] The Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS).
[58] EPA is developing necessary intermediate step codes for tracking the progress of remedial work at sites using SAA. EPA is also developing an "Attainment of Remedial Action Objectives" site status code for sites using SAA; this code will be analogous to the site "deletion" code used at NPL sites.

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- Final SAA agreements will be reviewed at EPA Headquarters and catalogued on EPA's website so that all interested parties can know what sites have a SAA agreement.
- The regions will develop and maintain on the internet the same site-specific fact sheets that are developed for sites listed on the NPL.
- EPA will report annually on progress at sites using SAA.
- EPA will maintain and update SAA web pages as a source of public information on the approach. SAA web pages include a list of sites with SAA agreements, links to their site-specific fact sheets, and links to related information.

VIII. Summary

As described throughout this guidance, the regional offices should:

- Prepare adequate documentation to demonstrate an HRS score of 28.5 or greater.
- Submit the site to the NPL Listing panel for discussion and review.
- Notify the state, tribes, communities, and trustees of EPA's desire to address a site with an SAA agreement and afford them the same opportunities for involvement as at an NPL site.
- Notify ATSDR of the region's decision to address a site using SAA and request that ATSDR consider whether a health assessment, or other appropriate alternative, should be performed.
- Provide information to the community about using SAA at a site and the availability of technical assistance.
- Follow standard Superfund negotiation practices and enforcement and program policies and reforms when negotiating a SAA settlement.
- Negotiate necessary settlement provisions (*i.e.*, TAP, Liquid Financial Assurance, Listing and NRD provisions) for the settlement agreement. Seek prior written approval from OSRE as necessary on modifications to, or omission of, the TAP, liquid financial assurance or listing provisions. Coordinate with DOJ on modifications to, or omission of, the NRD provision.
- Provide OECA/OSRE an electronic copy of all signed SAA agreements.
- Follow the same procedures for investigation, remedy selection, and oversight that are used at sites listed on the NPL.
- Follow the transparency and accountability processes outlined in this document.
- Allow interested parties to comment on the completion of the response actions at sites using SAA.

IX. Conclusion

Regional offices should be consistent in their cleanup and settlement approach and enforcement actions at sites using SAA. The 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, SAA settlements 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. States, tribes,

trustees, and communities should be afforded the same opportunity for involvement as that provided at NPL sites. EPA should make every effort to be transparent in the implementation of this approach.

If you anticipate using SAA and you have questions regarding the settlement or enforcement elements of this guidance, please contact Nancy Browne (202-564-4219) of OSRE. If you have questions regarding NPL-eligibility or response selection at a site using SAA, please contact David Yogi of OSRTI (703-347-8835). If you have questions regarding TAPs, please contact Mike Northridge (202-564-4263).

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.

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ATTACHMENT 1
Summary of Internal and External Reviews of the Superfund Alternative Approach 2004-2011

In April 2004, EPA issued *Superfund: Building on the Past, Looking to the Future* (the "120-Day Study" report), which recommended, among other things, that the Superfund alternative approach (SAA) policy be revised to ensure uniform criteria for qualifying as a site eligible for the approach and to improve transparency during the SAA. Also in April 2004, the Superfund Subcommittee for the National Advisory Council for Environmental Policy and Technology (NACEPT) issued its final report, which recommended that "EPA's strategy for Superfund Alternative Sites should remain a small pilot program until significantly more input is received from a broad range of perspectives…."

From 2005 to 2007, two EPA evaluations of SAA were ongoing. The OIG evaluation resulted in a June 2007 report: *EPA Needs to Take More Action in Implementing Alternative Approaches to Superfund Cleanups.* The report recommended that EPA track and report cleanup progress at sites with SA agreements, and improve its communication, information, and transparency about SAA. (OIG Report No. 2007-P-00026. June 6, 2007)

The second evaluation was jointly undertaken by the Offices of Solid Waste and Emergency Response (OSWER) and Enforcement and Compliance Assurance (OECA). That evaluation's findings were summarized in a September 2007 report: *Results of the Superfund Alternative Approach Evaluation.* The major finding of that evaluation was that the SAA universe was much smaller than suggested by the CERCLA database; at that time there were 19 SAA agreements. The OSWER/OECA report recommended keeping SAA as an option, and improving data management, consistency in implementation, and transparency.

In November 2010, EPA's Office of Policy issued its *Effectiveness Assessment of the Region 4 Superfund Alternative Approach.* The assessment was done at Region 4's request. The overall findings of the assessment were that uniformly positive opinions of SAA were expressed by interviewees, and that, based on a very small sample, SAA does not appear to result in significant time or cost savings for EPA.

In March 2011, as part of EPA's Integrated Cleanup Initiative, OSWER prepared a *Superfund Alternative Approach Baseline Assessment.* That assessment concluded that SAA is an effective tool for getting private parties to conduct site assessments and remedial activities.

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