U.S. Environmental Protection Agency
Office of Enforcement and Compliance Assurance

Community Engagement Initiative

Encouraging Community Engagement in Superfund Enforcement: A Compilation of Possible EPA Activities to Engage Communities

Request for Public Comment

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I. Introduction

The U.S. Environmental Protection Agency (EPA) is seeking public comment on options for more meaningful involvement of communities in the Superfund enforcement process. As an initial step, the EPA Headquarters asked the Regional offices to provide examples of activities they have used in the past or other ideas to engage communities in enforcement cases. Below is a preliminary compilation of relevant activities, organized according to seven different types of Superfund enforcement activities. The Agency now seeks input from external stakeholders (including communities, potentially responsible parties (PRPs), and state, tribal and local governments) about these ideas and any others that might prove beneficial. The EPA plans to consider such input when, in the future, it prepares a final compendium of practices for Agency personnel to consider in future enforcement cases.

II. Background

Background on Community Engagement Initiative: In late 2009, the EPA announced the Community Engagement Initiative (CEI) to promote community involvement in Superfund and other waste programs. In May 2010, the Agency publicly issued an "Implementation Plan" for the initiative. (See www.epa.gov/oswer/engagementinitiative.) The CEI Plan set forth 16 actions. Action 5 identified several measures that the EPA would undertake to promote community engagement in **enforcement** activities stemming from the EPA's waste programs. One of these measures (5.E) called for preparation of a compendium of practices for successfully engaging communities in enforcement.[1]

Background on Superfund enforcement: For a general overview of the Superfund enforcement process, see http://www.epa.gov/enforcement/cleanup/superfund/index.html. Below is a summary of the process, beginning with the discovery of contaminated sites.

The Superfund law requires a person in charge of a facility to notify federal authorities if a hazardous substance is released in an amount that exceeds a specified level. (See CERCLA § 103(a).) The EPA can take an enforcement action against persons who fail to provide such notifications (or who fail to provide notification in a timely manner).

Relying on these notifications or other reports, the EPA initiates steps to determine whether the releases have resulted in contamination of a site. Under the Superfund law, the EPA has two methods for addressing sites contaminated with hazardous substances. One involves the EPA pursuing the parties responsible for the contamination in an effort to have them conduct the cleanup themselves, pursuant to Agency oversight. The other involves the EPA and its contractors using Superfund monies to clean up such sites; this may be followed by the Agency's efforts to pursue any viable responsible parties in order to recover the monies that the EPA has spent.

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[1] The EPA took this CEI commitment to develop such a compendium and subsequently adopted it as a commitment for its initiative on Environmental Justice (EJ) as well. See the discussion of activity #4.3 on page 75 of the EPA's implementation plan for the "Plan EJ 2014" initiative at http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-2011-09.pdf.

The Agency begins any Superfund cleanup enforcement effort with a search for the parties responsible for the contamination. This PRP search effort often involves the EPA issuing requests to parties to provide records, documents and other information. In addition, the Agency invariably requests access to properties in order to assess site conditions, conduct sampling and perform other response activities. Persons who do not comply with such requests for information or access may be subject to an enforcement action.

After identifying the parties responsible for the contamination, the EPA typically attempts to negotiate settlements that require these parties to study the conditions at a contaminated site. For a longer-term permanent cleanup, which is known as a remedial action (RA), such studies are referred to as a remedial investigation (RI) and a feasibility study (FS). The remedial investigation is intended to determine the nature and extent of the contamination, while the feasibility study is an evaluation of the cost and performance of technologies that could be used to clean up the site. If a settlement agreement cannot be reached for such studies, the EPA may issue an order unilaterally for a party to conduct them or the Agency may work with the Justice Department to seek a judicial order requiring them. Alternatively, the EPA also has the authority to perform the RI/FS itself and seek to recover its costs from the responsible parties. In recent years, PRPs have conducted slightly more than half of the RI/FSs (mostly through negotiated agreements known as Administrative Orders on Consent (AOCs)).

Elements of Cleanup Settlement Agreements

In some cases, it might be important for the EPA to reassure the public that it does not negotiate the cleanup standards or selected cleanup with the PRPs behind closed doors. For such sites, the Agency could be clear that it merely negotiates the *terms obligating the PRPs to carry out the cleanup*. These terms can include:

- EPA's promise not to sue the PRPs again if they perform the specified cleanup and attain the cleanup standards,
- the penalties they will have to pay if they violate the settlement in the future,
- the process they can use if they believe that EPA is asking for unreasonable steps beyond the ROD,
- their legal protection from lawsuits by other PRPs, and
- the arrangement wherein EPA can periodically send them a bill for the costs incurred in overseeing their work.

Once the RI/FS is complete, the EPA goes through a public comment process before selecting the remedial action. The process that the Agency uses to select the cleanup for a site is transparent and subject to public review and comment. In its record of decision (ROD), the Agency spells out the reasons underlying its selection of the cleanup. The ROD also includes a summary of the Agency's analyses of, and responses to, the public comments it received when it first proposed the cleanup.

After the cleanup is selected, the Agency typically attempts to negotiate a judicial consent decree (CD) requiring the PRPs to conduct the Remedial Design and Remedial Action (RD/RA) under EPA

oversight. Again, if an agreement cannot be reached, then the EPA might issue a unilateral administrative order (UAO) for the cleanup or work with the Justice Department to seek a judicial order requiring the cleanup. Over the years, PRPs have commenced more than 70% of the RD/RAs (mostly via judicial consent decrees).

For sites needing "removal" actions (which generally involve shorter-term cleanups that need to be started sooner than a remedial action), Agency policy calls for case teams to follow the same enforcement path where possible. In emergency situations, however, the EPA typically undertakes the response itself (or at least the initial portion) and then takes enforcement action later for recovery of its costs. But for some removals (especially the non-time-critical removals), the Agency generally follows a course of trying to get the PRPs to do the cleanup themselves, preferably via settlement. In the event a cleanup is a non-time-critical removal, the EPA may initially attempt to negotiate a settlement for a study known as an Engineering Evaluation/Cost Analysis (EE/CA). As with RI/FS and RD/RA, the Agency does not negotiate with the PRPs on what the removal will entail or what the cleanup standards will be. If negotiations for such studies or the physical removal activities appear infeasible or prove unsuccessful, the Agency may issue a UAO obligating the recipients to perform the activity. The EPA issues the majority of its UAOs for time-critical removals and non-time-critical removals.

Regardless of what type of response activity (RI/FS, RD/RA, or removal) is the subject of the EPA's negotiations with the responsible parties, such negotiations are usually conducted in confidential sessions. Community members may not participate in the negotiations unless everyone agrees to allow such participation. (One relevant scenario, discussed further below in section VI.b.2, involves meetings with community members relating to technical issues. But these are not negotiations, but rather separate discussions focused on explaining technical information and soliciting feedback.) The confidentiality of statements made during negotiations is a well-established principle of the American legal system and is intended to promote a thorough and frank discussion of the issues between the parties in an effort to resolve differences. Confidentiality ensures that offers and counter-offers, made during negotiations, will not be used by one party against the other in any ensuing litigation. Parties may be unwilling to negotiate without a guarantee of confidentiality, fearing public disclosure of sensitive issues that may damage their potential litigation position.

Finally, a common enforcement-related thread for these different types of Superfund response activities (RI/FS, RD/RA, removal) is EPA's monitoring of compliance by the PRPs after the enforcement instrument (e.g., AOC, CD, UAO or court injunction) takes effect. The Agency oversees the PRPs' activities to ensure that they are in compliance with their obligations. This oversight process includes the PRPs' submittal of draft work plans and other deliverables, the EPA review of such documents, and PRPs' revisions to incorporate EPA's requested changes.

Background on community engagement in Superfund enforcement: The public can sometimes provide input to EPA on specific enforcement activities. Some of the steps that the EPA takes to involve communities in its Superfund enforcement activities are required by statute or regulation. For example, when the Justice Department submits a Superfund cleanup settlement on the EPA's behalf to a federal

court for the judge's approval, the law requires that the public have an opportunity to review and comment on the settlement. The steps required by statute or regulation are often sufficient to ensure robust involvement by the community.

That said, the final compendium will not dwell on what is legally required. Instead, the EPA HQ will strive to present the Regions with examples of activities that go beyond these requirements. For example, some types of administrative Superfund settlement agreements are not required to undergo a public notice-and-comment process before taking effect. Nevertheless, site-specific circumstances have led several EPA case teams to go beyond the legal minimum and provide communities with opportunities to provide input on such settlements.

III. Organization of initial compilation

This compilation is organized according to seven different types of Superfund enforcement activities.

- Section VI.a relates to the EPA's efforts to search for the parties responsible for the contamination. It identifies the EPA activities intended to maximize information from the public as to the identity of PRPs and their waste-handling practices.
- Section VI.b relates to the EPA's enforcement efforts to legally obligate PRPs to conduct RI/FSs. It identifies multiple relevant Agency measures, including several intended to increase community awareness of, and input to, the EPA's efforts to negotiate settlements for these studies.
- Section VI.c relates to community engagement with (and awareness of) the EPA's enforcement efforts to get PRPs legally obligated to design and conduct remedial actions. Many of the activities discussed in the prior section are equally applicable here.
- Section VI.d relates to the EPA's enforcement efforts to legally obligate PRPs to conduct removal actions. Given the relatively urgent nature of such actions, any enforcement associated with such cleanups might not allow for the same degree of public participation as, for example, enforcement with longer-term remedial actions.
- Section VI.e relates to the EPA's enforcement efforts to recover monies from PRPs for the government's costs in responding to contaminated sites.
- Section VI.f relates to enforcement efforts against parties that fail to comply with their Superfund obligations, such as reporting releases of hazardous substances, conducting required studies, performing a cleanup, or providing relevant information or access to property needed for sampling or other cleanup activities.

Different types of Superfund enforcement activities

1. PRP searches
2. RI/FS enforcement
3. RD/RA enforcement
4. Removal enforcement
5. Enforcement for cost-recovery only
6. Enforcement for non-compliance

IV. Planned scope of the final compendium

The Agency plans to have the final compendium focus on Superfund enforcement involving non-federal facilities. EPA is addressing community involvement for Superfund federal facility enforcement separately. In particular, the Agency has been hosting Federal Facility Cleanup Dialogue meetings (with the most recent meetings held in Arlington, Virginia, on September 21-22, 2011). Similarly, the EPA is addressing community engagement for RCRA Subtitle C enforcement separately, as part of its overall effort to promote community involvement in RCRA; see Action #3 of OSWER's CEI. The EPA is also addressing community engagement for underground storage tank (UST) enforcement separately, as part of its overall effort for UST; see CEI Action #2. That doesn't mean, however, that the EPA isn't open to considering activities that have proven successful in one of these other contexts and using them here, or vice versa.

The final compendium will not directly address CERCLA enforcement for natural resource damages (NRD). The CERCLA statute authorizes certain federal, state and tribal trustees to seek damages when natural resources are lost or destroyed. The EPA generally doesn't have jurisdiction to take such enforcement actions; instead, any Agency role tends to be secondary. For example, some CERCLA settlements address both cleanup and NRD. In those cases, DOJ represents EPA with respect to the cleanup and the federal trustee with respect to NRD issues. Granted, any steps that the EPA takes to involve the public in such settlements might have a secondary effect of raising their awareness of the NRD issues. The issue of community involvement in such enforcement has been raised separately with the various trustees,[2] and the EPA encourages the trustees to involve the public in such enforcement where appropriate.

Finally, the compilation generally won't cover CERCLA criminal enforcement, which is not addressed by OSWER's CEI. The CERCLA statute contains criminal enforcement authorities (see, e.g., section 103(d)'s provision for illegal destruction of records) and citizens can sometimes get involved with such efforts, e.g., by providing information leading to the arrest and conviction of any person for a CERCLA criminal violation (see section 109(d)) or by providing a victim impact statement as part of any CERCLA criminal sentencing process.

[2] See, e.g., http://www.darrp.noaa.gov/partner/cap/pdf/CAPpubrole.pdf.

V. Focus of the initial compilation

This initial compilation focuses on activities that relate to the enforcement process. Admittedly, the distinction between the enforcement process and the process of determining specifics about the response can sometimes get blurry. For example, after RD/RA CD negotiations, the EPA may give the public an opportunity to review a PRP's draft work plan and provide input on issues that may affect the residents' quality of life such as the time of day when contaminated soils are excavated and the route that trucks transporting the soils will take through the neighborhood. Such activities are connected not only to the enforcement process but also to the process of determining potentially significant details relating to the implementation of the selected response action. In preparing this compilation, the Agency has tried to remain mindful of this distinction and to maintain the focus on enforcement-related aspects.

Additionally, the EPA is aware that several of the ideas described in this enforcement compilation might also translate into non-enforcement scenarios. For example, the concept of sharing a PRP's draft deliverables with community representatives is a concept that can be tailored to, and implemented in, a Fund-lead context (sharing an EPA contractor's draft deliverables with community representatives). Implementing this idea can raise issues, however, in the PRP-lead context that wouldn't necessarily arise in the Fund-lead context. The EPA's awareness of these potential overlaps informs its analyses in other CEI actions, which are aimed more at improving community engagement for Fund-lead responses (see, e.g., CEI action 1). At the same time, this awareness underlies its effort to maintain the focus of this compilation on enforcement-related activities.

VI. Possible activities for engaging communities in Superfund enforcement

Below are some activities that the EPA Regions have used to engage communities in the Superfund enforcement process. Superfund enforcement cases vary greatly and there's no one-size-fits-all when it comes to activities for involving communities in such cases. For example, for many sites, EPA can readily identify the parties that caused the contamination; there would not be any need for the Agency to aggressively solicit information from the public on who may have caused the particular contamination. Similarly, community members often have nothing directly at stake in an EPA cost-recovery action; consequently, there wouldn't be any need for the Agency to expend significant resources in alerting the public to such enforcement actions. The mere fact that the EPA used a particular technique with success in a specific case does not necessarily mean, however, that it should use it in other cases. Accordingly, the final compendium will advise case teams to continue exercising discretion and to consider employing the activities described below only as appropriate given the specific circumstances of their particular site.

a. Community engagement with PRP searches

Possible activity: Solicit information from the public for the PRP search. One practice that the EPA has used successfully is for case teams to actively solicit information from the public as to the identity of PRPs and their waste-handling practices. For example, for the Operating Industries site, Region 9 placed advertisements in local newspapers (in English or Spanish, as appropriate) asking anyone who had ever worked for certain PRP-companies to call an Agency toll-free number and provide information on the company's disposal practices. For the Anodyne Plating site in Florida, Region 4 asked a local reporter who was writing an article about the site to include a request for former employees to contact the Agency with any relevant information. In some cases, the ads are not necessarily focused on former employees or a specific company, but rather worded more broadly. For example, Region 9's ad for the San Gabriel Valley site asked for information from anyone who may have witnessed the disposal of industrial solvents in the area. A variation of this activity is for EPA to include its request on its webpage for the particular site or for Regional staff to use other social media to seek such input.

Advertisement: Outreach to the community

EPA has placed similar ads for many other sites, including (but not limited to) the Ottawa Township Flat Glass site in Illinois, the Camp Perry Landfill site in Ohio, the Tucson International Airport site in Arizona, and the Petroleum Products site in Florida.

Another variation of this concept is for Agency personnel who conduct community interviews to ask directly for information relating to PRPs and their waste-handling practices. Such interviews are typically conducted by EPA's Community Involvement Coordinators (CICs) and usually focus on soliciting community members' views on the cleanup. However, CICs can (and often do) expand such interviews to cover PRP-related information in an effort to assist EPA's enforcement personnel. Separately, the EPA's civil investigators occasionally canvass door to door in order to obtain PRP information. For the Ottawa Township Flat Glass site, Region 5's investigator conducted a house to house canvass, asking residents for enforcement-related information.

b. Community engagement with enforcement for RI/FSs

i. Relevant provisions in EPA's Model AOC for RI/FS (issued in 2004)[3]:

When the EPA negotiates a settlement agreement for RI/FS, it invariably seeks to include several provisions relating to community engagement. Two of these provisions take activities contained in Superfund's primary regulation, the National Contingency Plan (NCP), and make them potentially binding obligations for the respondents. Paragraph 34.b of EPA's model AOC for RI/FS requires the respondents, at the EPA's request, to provide information supporting the Agency's community relations

[3] See http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rev-aoc-rifs-mod-04-mem.pdf.

plan and to participate in the preparation of such information for dissemination to the public and in public meetings. This echoes the NCP provision in 40 CFR 300.430(c)(3). Similarly, paragraph 102 requires the respondents, at the EPA's direction, to establish a community information repository near the site, to house one copy of the site's administrative record. Compare 40 CFR 300.430(c)(2)(iii).

Other model RI/FS AOC provisions reflect the public's rights to certain records or notifications. For example, while model paragraph 51.b notes the respondents' rights to claim confidentiality as to certain documents, it also notes that if there is no issue of confidentiality for certain site-related documents, then the public may be given access to them without further notice to the respondents. Additionally, if the AOC contains a cost recovery compromise, then the model AOC notes that the EPA is required to publish notice of the proposed settlement in the *Federal Register* in order to provide persons who are not parties to the proposed settlement an opportunity to comment on this component. (See the optional "Public Comment" section of the model AOC.)

ii. Community engagement activities relating to RI/FS enforcement

Possible activity: Require PRPs to assist with EPA's community involvement efforts. One possible option is for case teams to invoke the provisions described above that require the PRPs to assist with EPA's community involvement efforts. Doing so can help CICs to leverage their own limited resources. Region 10 relied on such a provision in the RI/FS AOC for the Lower Duwamish Waterway site to obtain the PRPs' assistance in reaching diverse communities.

Possible activity: Issue site-specific fact sheets that explain the settlement negotiations. Another idea is for case teams to consider issuing site-specific fact sheets about the settlement negotiations themselves in order to "de-mystify" the enforcement process for the public. Region 5 issued a fact sheet several years ago for its settlement negotiations with Dow Chemical for the RI/FS and removal at the Midland site.[4] In that case, some community members were concerned that EPA might negotiate the cleanup standard with the PRP behind closed doors. Region 5's fact sheet explained in general terms what topics would be covered by the settlement negotiations and, more importantly, what topics would not be covered. This helped to reassure the community that cleanup standards would not be a topic of negotiation.

Possible activity: Distribute generic fact sheet on the Superfund enforcement process (and/or present generic workshop on Superfund). One simple variation of the concept above is to make a generic fact sheet about Superfund enforcement available to a particular community. The EPA HQ has previously issued a generic fact sheet titled, "The Superfund Enforcement Process: How It Works" (August 1988).[5] CICs can make hard-copies of this fact sheet, along with the other general background

[4] See June 2009 fact sheet at the site's webpage at www.epa.gov/region5/cleanup/dowchemical.

[5] See http://www.epa.gov/compliance/resources/policies/cleanup/superfund/fs-howitworks-rpt.pdf. Pursuant to CEI action 5D, EPA plans to slightly revise this fact sheet (e.g., to emphasize that EPA does not negotiate remedies with PRPs).

materials on the Superfund program, available for community members at any public meetings the EPA holds before and during the negotiations. Another variation is for the EPA to present a generic workshop that explains the basics of the Superfund program (including the enforcement components) to an interested community. The EPA HQ has previously developed materials for such a presentation, titled, "Introduction to Superfund: A Public Awareness Workshop."[6]

Possible activity: Provide opportunity for public comment on administrative settlements for RI/FS. Another possible option is to give the public an opportunity to comment on an AOC for RI/FS before it goes into effect even if it does not contain a cost-recovery compromise. To date, the EPA has done this only in very rare situations (primarily because of the potential for delay in initiating the RI/FS). Region 5 did this in the Dow Midland case; after the PRPs had signed the administrative agreement (but before EPA signed it), the Region solicited public comment on the proposed settlement. Under the statute, the EPA is required to take public comment only on RI/FS AOCs that include a compromise of an EPA cost-recovery claim. Even in that rare scenario, given section 122(i)'s focus on cost-recovery compromises, the EPA's model AOC for RI/FS advises case teams to invite comment only on the cost-recovery compromise element and not on other aspects of the proposed AOC (e.g., the proposed scope of the RI/FS).

Possible activity: Put the RI/FS settlement in a consent decree to allow opportunity for public comment. A variation of the concept above would be to put the RI/FS settlement agreement in the form of a judicial consent decree, which necessarily goes through a public comment process and a review by an independent third party (i.e., the district court judge), rather than in the form of an administrative agreement. To date, the EPA has done this in only rare situations (given the additional time and resources that this activity usually requires). It can be useful in situations where the community mistrusts the EPA and needs significant assurance that the Agency and the PRPs have negotiated at arms' length.

Examples of RI/FS consent decrees: In the Anniston PCBs Superfund case, Region 4 negotiated with Pharmacia Corporation and Solutia Inc. for a consent decree that covered RI/FS and removal activities. The public submitted comments on the proposed decree. The Region and DOJ reviewed and considered the comments and revised the decree accordingly. The district court subsequently undertook its own independent review of the decree before ultimately approving it. Other case teams have also done this; Region 7, e.g., recently negotiated an RI/FS consent decree with U.S. Borax, Inc. for the Armour Road site.

Possible activity: Explicitly reserve EPA's right to request modifications to an administrative agreement in light of later public comments. Yet another variation of this idea is for the EPA to

[6] The workshop materials, which were developed by EPA's Office of Emergency and Remedial Response in 1995, are not currently available online.

explicitly reserve its right to seek modifications to the final AOC in the event that, during the subsequent public comment period, it receives public comments that disclose facts or considerations which indicate that the AOC is inappropriate, improper, or inadequate.[7] This is what Region 4 did in its 2009 administrative settlement with the Tennessee Valley Authority (TVA) for the coal ash release in Kingston, Tennessee. While the Region wanted to expedite TVA's response, it also wanted to extend the opportunity for the public to provide input. Accordingly, in order not to delay the PRP's initiation of response activities, the EPA finalized the AOC but explicitly reserved its right to seek modifications later based on input it received during the public comment period. Similar to above, it has been unusual for EPA to obtain such settlement language.

Possible activity: Conduct outreach to solicit public input on proposed settlements. Another measure that was employed in the Dow Midland case involved Region 5's heightened efforts to solicit public input on the proposed settlement. In public meetings and on the site's webpage, the Region repeatedly notified the public of the opportunity to provide comments. As a result, the Agency subsequently received public comments on virtually every aspect of the proposed settlement, including provisions that rarely draw public comment such as stipulated penalties and the conclusions of law and findings of fact.

Possible activity: Have the Community Involvement Plan reviewed by the Regional attorney. Another possible option is to increase awareness among the Region's community involvement personnel and technical staff about PRP obligations to provide assistance with the EPA's community involvement activities. PRPs are typically obligated by an enforcement instrument to provide such assistance, subject to the EPA's discretion and oversight. Such obligations should be discussed in the Agency's Community Involvement Plan (CIP), which the EPA is required, to the extent practicable, to have in place before remedial investigation field activities start. (See 40 CFR 300.430(c)(2).) Regional attorneys are familiar with the legal provisions that require PRPs to assist with community involvement activities. Thus, they are well-positioned to review draft CIPs and help Regional program personnel identify opportunities for PRP involvement and reassure such personnel that the PRPs' activities will be subject to the EPA direction.

Possible activity: Make draft deliverables submitted by PRPs available to the public. Another concept is to make more documents stemming from Superfund enforcement available to the public. This includes, e.g., draft RI/FS work plans and other deliverables submitted by PRPs. The EPA already has

[7] This is different than the provision in the model AOC for RI/FS, which provides (in paragraph 103, the Effective Date and Subsequent Modification section) that if the settlement includes a cost recovery compromise, then the AOC doesn't take effect until EPA notifies the Respondents that the public comments (if any) received do not require the Agency to modify the order or withdraw from it. The model AOC also provides (paragraph 104) that the order may be amended by mutual agreement of EPA and the Respondents.

a policy encouraging this activity.[8] Moreover, this idea builds on the pilot projects that the Regions conducted in 1995 as part of the EPA's administrative reform aimed at increasing community involvement in the Superfund enforcement process.[9] Many of those pilot projects resulted in the EPA taking the draft remedial design work plans it received from the PRPs and sharing them with the public. One project involved giving community representatives an opportunity to review draft treatability study documents prepared by PRPs.

The EPA is piloting a new web-based tool that provides information to the public on the next planned activity at a given Superfund site. The new tool is currently in use in three EPA regions, with expansion to three or more additional regions planned by the end of 3rd quarter fiscal year 2013. An example of the new information available to the public can be seen on the Site Progress Profile for the Davis Liquid Site in Smithfield, Rhode Island: http://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0101283 (scroll down to "Next Activities" and see that the PRP-lead RD for the groundwater cleanup is scheduled to be completed in September 2013).

Possible activity: Facilitate the process of making enforcement-related information available. There are other techniques for improving public access to enforcement-related information from the outset. The EPA could, e.g., routinely add relevant documents to the "site file" (which is broader than the site's administrative record on its response selection). To boost transparency, case teams could also post site documents in Regional online Freedom of Information Act (FOIA) "reading rooms."[10] Additionally, in filed cases where the EPA faces discovery requests, the Agency could exercise restraint when considering whether to invoke the deliberative process privilege.[11] The EPA personnel are directed to exercise similar restraint on invoking exemptions when facing FOIA requests. Specifically, per Justice Department guidance[12], EPA offices should exercise their discretion in favor of disclosing documents whenever possible under FOIA. In sum, such transparent practices can lead to increased public access to Superfund enforcement-related information.

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[8] See pages H-24 and H-25 of EPA's November 1990 policy encouraging Regions to make Superfund documents more available to the public, at http://www.epa.gov/superfund/community/cag/pdfs/directives/public_docs.pdf. This policy applies to Fund-lead response actions as well, but this effort focuses on PRP-lead responses.

[9] See www.epa.gov/superfund/programs/reforms/reforms/2-6.htm.

[10] See, e.g., Region 4's FOIA electronic reading room: http://www.epa.gov/region4/foiapgs/readingroom/index.htm.

[11] Memorandum from Administrator William D. Ruckelshaus, "Guidance for Assertion of Deliberative Process Privilege" (October 3, 1984): "… [I]t is EPA policy that the Agency will not assert the [deliberative process] privilege in every case where it applies. The Agency has a responsibility to the public to provide the relevant facts which underlie a particular policy. This responsibility suggests that we disclose data and the reasons supporting a policy on occasion which might otherwise fall within the scope of the privilege…"

[12] U.S. Attorney General Eric Holder memorandum (3/19/2009) transmitting new FOIA guidelines.

Possible activity: Meet with the public about technical issues while confidential settlement negotiations are ongoing. Another possibility, one arising during settlement negotiations, is to allow community members to participate in sessions that focus on the cleanup's technical issues. As discussed above, the EPA usually conducts negotiations with PRPs in confidential sessions. The two sides can, however, agree to meet with the public on technical issues while negotiations are ongoing. Specifically, the relevant NCP provision states: "The lead agency may conduct technical discussions involving PRPs and the public. These technical discussions may be held separately from, but contemporaneously with, the negotiations/settlement discussions." (40 CFR 300.430(c)(4).) This activity can be a valuable opportunity to engage the community on cleanup implementation issues that are of large significance to them.

Possible activity: Remind the public that PRP activities are subject to EPA oversight and approval. Another measure can be to ensure that the EPA's periodic fact sheets about ongoing response activity note that the Agency is overseeing the PRPs' activities to ensure correct performance. This issue arose at the Ringwood Mines/Landfill site in New Jersey where residents expressed concern as to whether the EPA was ensuring that the PRP was adequately performing the response.[13] Region 2 subsequently increased its communications with the residents about its various efforts to oversee the PRP's site activities (including, e.g., information about the EPA's reviews of PRP-submitted plans and changes to such plans as the result of the Agency's reviews).

Possible activity: Include a technical assistance plan as a provision of the settlement. Finally, another practice can be the inclusion of settlement provisions calling for a Technical Assistance Plan (TAP).[14] Such provisions are required for settlements using the Superfund Alternative Approach, which typically is employed first at the RI/FS stage. A TAP provision in a settlement obligates the PRPs, at the EPA's request, to arrange at their own expense for a community group to obtain the services of an independent technical advisor and share information with others in the community. The EPA has secured TAP provisions in approximately sixty settlements to date (mostly AOCs for RI/FS), and more than a dozen have been triggered thus far. Pursuant to the EPA oversight, the responsible parties have arranged for these communities to receive more than $1 million in independent technical assistance and information-sharing resources.

Jacksonville Ash Superfund site TAP

Pursuant to a TAP provision in a 2008 consent decree for RD/RA, the PRP is providing $200,000 to enable several community groups to obtain assistance from their own independent technical advisors.

[13] OIG Report 2007-P-00016, "Environmental Justice Concerns and Communication Problems Complicated Cleaning Up Ringwood Mines/Landfill Site" (April 2, 2007), page 8.

[14] EPA's interim guidance on TAPs, which is dated September 3, 2009, is available at: http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-tap-sf-settle-mem.pdf.

TAPs perform the same functions as the EPA's Technical Assistance Grants (TAGs), namely providing resources for community groups to obtain technical assistance and to facilitate communication with other community members, respectively. TAPs and TAGs generally rely on the same or similar criteria for which community groups can be eligible, which activities are covered (e.g., review of technical documents), which expenditures are not covered (e.g., litigation, political lobbying), etc. There can, however, be differences between the two. For example, while Community Advisory Groups (CAGs) are typically ineligible to receive TAGs, they might (depending on the circumstances) be eligible to receive a TAP. (See, e.g., the TAP that the Roane County CAG received for the TVA Kingston site in Region 4.) In addition, TAPs typically have the potential to reduce the administrative burden facing interested community groups. For example, unlike with TAGs, a TAP may not necessarily require a community group to incorporate.

c. Community engagement with enforcement for RD/RA

i. Relevant provisions in EPA's model CD for RD/RA (issued 2011)[15]

Similar to the model AOC for RI/FS, EPA's model consent decree for RD/RA contains a provision obligating settling defendants to assist with community involvement if requested by the EPA. It also contains several other provisions relevant to community engagement. See the Appendix for the exact language of these provisions.

ii. Community engagement activities relating to RD/RA enforcement

Many of the possible activities discussed in the RI/FS-enforcement section above are also potentially applicable to RD/RA enforcement:

- Invoke CD/UAO provisions that obligate PRPs to assist the EPA with its community involvement efforts
- Issue fact sheets about the RD/RA negotiations themselves
- During RD/RA decree negotiations, invite the public to attend separate concurrent sessions and discuss technical issues (per 40 CFR 300.430(c)(4))
- Conduct outreach to alert community members to their opportunity to provide comments on an RD/RA decree after it is lodged with the court (and before the U.S. seeks the judge's approval)
- In the pre-RD review of the existing Community Involvement Plan, ensure that it discusses PRP obligations to provide assistance with community involvement activities (subject to EPA oversight)
- Make more documents stemming from RD/RA enforcement (e.g., deliverables submitted by PRPs) available to the public

[15] See http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rdra-2012-amd.pdf.

- Ensure that EPA's fact sheets about ongoing RD/RA activity note that the Agency is overseeing the PRPs' activities to ensure that they are being performed correctly
- Include provisions for Technical Assistance Plans in RD/RA consent decrees, especially those using the Superfund Alternative Approach.

Possible activity: Conduct additional outreach to alert public to proposed settlements. The Superfund law requires the Justice Department to provide an opportunity for the public to comment on an RD/RA consent decree before the court enters it as a final judgment. (CERCLA § 122(d)(2)(B).) This is effectuated via a notice in the *Federal Register*. (See 40 CFR 300.430(c)(5)(ii) and 28 CFR 50.7.) The EPA occasionally goes further and (either alone or jointly with the Justice Department) issues a press release when the CD is submitted to the court for its review. For example, Region 1 routinely issues a press release whenever DOJ lodges an RD/RA CD with the court on its behalf.[16] Such press releases can sometimes be more effective than a *Federal Register* notice in reaching community members affected by the settlement.

Outreach to EJ Communities

Especially for EJ communities, the EPA should consider how best to alert the public (e.g., by outreach to tribes or local churches). This is true for many of the options in this compilation --- while the activity might be applicable for both EJ and non-EJ communities, the EPA should consider whether a particular activity ought to be implemented differently in an EJ community.

Possible activity: As in the RI/FS stage, have the Regional attorney review the Community Involvement Plan. The Regional attorney will be familiar with the requirements of the community involvement activities required at this stage of the cleanup and may be able to facilitate additional community engagement efforts. The NCP requires EPA to re-visit the existing Community Involvement Plan prior to initiating the remedial design and "determine whether it should be revised to describe further public involvement activities during RD/RA that were not already addressed" by the CIP. (40 CFR 300.435(c).) In this context, one idea is to have Regional attorneys participate in this review in order to help, e.g., in identifying opportunities for PRP involvement (subject to EPA oversight) in community involvement activities.

[16] See, e.g., the press release that Region 1 issued to alert the public of the opportunity to review and comment on the RD/RA consent decree lodged for the Blackburn & Union site. http://yosemite.epa.gov/opa/admpress.nsf/6d651d23f5a91b768525735900400c28/f93be493b6f86ee28525776e006f605e!OpenDocument.

d. Community engagement with enforcement for removals

i. Relevant provisions in EPA's model administrative order on consent (AOC) for removal (issued 2007)[17]

EPA's model administrative settlement agreement and order on consent for removal contains several provisions relating to community engagement. These reflect what is legally required or provided. For example, if the agreement contains a cost recovery compromise, then the EPA is required to publish notice of the proposed settlement in the *Federal Register* to provide persons who are not parties to the proposed settlement an opportunity to comment on this component. (See model paragraph 82.) In addition, model paragraph 26 notes that certain site documents may be made available to the public without further notice to the Respondents if they don't assert any rights of confidentiality.

ii. Community engagement activities relating to removal enforcement

Similar to above, some of the possible activities discussed in the RI/FS-enforcement section are also potentially applicable to removal enforcement. These include:

- Solicit public input on the proposed AOC before and/or during removal settlement negotiations
- Give the public an opportunity to comment on a removal AOC before it goes into effect
- Put the removal settlement agreement in the form of a judicial consent decree, rather than in an AOC
- Ensure that the Community Involvement Plan includes a discussion of PRP obligations to provide assistance with community involvement activities (subject to the EPA oversight)
- Make more documents stemming from enforcement (e.g., draft deliverables submitted by PRPs) available to the public
- During negotiations, allow community members to participate in separate concurrent sessions focused on technical issues (consistent with 40 CFR 300.430(c)(4))
- Ensure that the EPA's fact sheets note that the Agency is overseeing the PRPs' activities to ensure that they are being performed correctly.

Possible activity: Provide opportunity for public comment on administrative settlement for removal. An example of soliciting public input on a proposed removal AOC occurred during Region 1's negotiations with Aerovox Corporation for a non-time-critical removal (demolition of a vacant contaminated building) at a site in New Bedford MA. The case team worked with the PRP to seek input from the community on its concerns. Residents provided a wide range of input.

One of the community's concerns related to the risk of fire as a result of vandals seeking to salvage copper piping from the building. The PRP responded by voluntarily providing site security before the AOC was finalized. Community members also expressed concern about the risk of fire associated

[17] See http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rev-aoc-remove-mem.pdf.

with the planned demolition (and the need for an evacuation plan). The EPA and the PRP addressed this concern as well. The EPA and the PRP also reached out and met with representatives from two industrial facilities that abutted the site. Like the residents, these businesses also had concerns, e.g., about the dust and potential airborne contaminants that the demolition would cause. They provided information about their respective workforces and the timings of the different shifts. The Region and the PRP considered these concerns and agreed to stringent standards for air monitoring and management of water runoff as part of the AOC that was finalized in April 2010.

As noted above, another possible idea might be to provide an opportunity for public review and comment on a Superfund removal settlement before it takes effect. To date, the EPA has done this only rarely. In the Dow Midland case, the administrative settlement that Region 5 negotiated with the PRP covered both RI/FS activities and removal activities. The Region went beyond the legal requirement and solicited public comment on the proposed agreement before deciding whether to sign it.

Possible activity: Put the removal settlement in a consent decree to allow opportunity for public comment. A variation of this concept is to put the removal settlement agreement in the form of a judicial consent decree, which necessarily goes through a review by the public and the district court, rather than in the form of an administrative agreement. Region 10 did this in the Coeur d'Alene Basin case, negotiating a removal consent decree with Union Pacific Railroad. The public submitted numerous comments on the proposed decree. Region 10 reviewed and considered the comments before the district court ultimately approved the decree in 2000.[18]

Examples of use of consent decrees for removal actions

Region 4 also did this for a settlement involving RI/FS and removal activities at the Anniston PCBs site. Other case teams have also done this. See, e.g., Region 6's consent decree in 2010 obligating ConocoPhillips Company and Sasol North America, Inc. to conduct a removal for the Bayou Verdine site in Louisiana. See also Region 7's consent decree with the Blue Tee Corporation in 2007 for a removal at the Newton County Mine Tailings site.

Possible activity: Have the Community Involvement Plan reviewed by the Regional attorney. For longer-term removal actions, EPA is required to prepare a community involvement plan (CIP). (40 CFR 300.415(n)(3),(4).) Similar to RI/FS and RD/RA, one activity is to ensure that such CIPs discuss PRP obligations to provide assistance with EPA's community involvement activities. This may be potentially facilitated by having Regional attorneys review the draft CIP and help in identifying opportunities for PRP involvement subject to EPA direction.

[18] "Cleaning Up at the Tracks: Superfund Meets Rails-to-Trails," Clifford J. Villa, 25 Harv. Envtl. L. Rev. 481, 531-533 (2001). While a majority of commenters expressed support for the proposed consent decree, one group (Citizens Against Rails-to-Trails, "CART") expressed strong opposition. Its objections essentially related, however, to the substance of the EPA's removal selection decision (which had previously undergone a separate notice-and-comment process), not the proposed decree itself.

e. Community engagement with enforcement for cost-recovery only

Over the years, the conventional wisdom has been that community interest in this type of enforcement (and, hence, the need for the EPA measures to engage the public) was relatively minimal. Cost-recovery enforcement tends to focus on how much of the cleanup costs should be borne by the PRPs and how much should be borne by the EPA. It was presumed that the public is primarily interested in the cleanup itself and how it was implemented (e.g., schedule, specific methods) and that cost-recovery enforcement didn't affect those concerns. Accordingly, over the years, the EPA hasn't emphasized community involvement with cost-recovery enforcement.

In recent years, however, the EPA has faced significant community concern with several bankruptcy settlements that were for cost-recovery only and with other cashout settlements where response activities remained to be performed. Given the limited Superfund Trust Fund monies available to the EPA, some community members have expressed interest in whether such settlements ensure that sufficient monies will be available to carry out the response actions in the future. The EPA has increasingly realized that cost-recovery settlements can have a significant impact on when response activities will occur in the future (and at what pace). Thus, one possible activity is for the EPA to provide interested communities with information about cost-recovery enforcement and the resultant resources (PRP and/or the EPA) available for future response activities. For example, for the Libby Asbestos site, Region 8 provided information to the community about its future plans for using the monies it received from the W.R. Grace bankruptcy settlement.[19]

f. Community engagement with enforcement for Superfund noncompliance

Sometimes a party may fail to comply with a Superfund-related obligation. For example, it might not report a release of hazardous substances, or it may fail to conduct studies or cleanups required by a UAO. It may balk at an Agency request for relevant information or access to property needed for sampling or other cleanup activities. Such noncompliance can give rise to claims for CERCLA statutory penalties. In negotiating a settlement for such penalty claims, the EPA can sometimes negotiate a provision for a Supplemental Environmental Project (SEP). One activity is for the Agency and the violator to seek public input on possible SEPs. The EPA has a policy encouraging such outreach.[20]

The EPA case teams often negotiate SEPs in settlements of Superfund penalty cases and typically consider community concerns when doing so. It is not uncommon, e.g., for the Agency to include a SEP provision in a settlement of a CERCLA § 103 reporting violation[21] --- and to consider community

[19] See the FAQ at http://www.epa.gov/region8/superfund/libby/askepa.html.

[20] Interim Guidance for Community Involvement in SEPs, 68 FR 35584 (6/17/2003) at http://www.epa.gov/compliance/resources/policies/civil/seps/sepcomm2003-intrm.pdf.

[21] Information about specific CERCLA SEPs can be found in the Enforcement Compliance History Online ("ECHO") at http://www.epa-echo.gov/cgi-bin/ideaotis.cgi. A search of ECHO shows that EPA has included SEPs in more than 150 settlements resolving CERCLA section 103 reporting violations in recent years.

concerns when negotiating such a provision. Similarly, the EPA has often considered community input in SEPs stemming from other types of Superfund enforcement. For example, Region 3 relied on community input in crafting the SEP provision of the settlement resolving a Superfund penalty claim for a violation involving the cleanup of the Centre County Kepone site.[22] Similarly, Region 9 took the concerns of the local municipality and others into account when negotiating a SEP provision worth $1 million in a 2006 settlement with several PRPs for their violation of a Superfund UAO covering the cleanup of the Phoenix-Goodyear Airport site.[23] Region 8 took community concerns into account when it negotiated the largest public-health SEP in the Agency's history in the Superfund case against W.R. Grace for its refusal to provide access to property needed for the Libby Asbestos site cleanup.[24]

Another possibility might be for the Agency to pro-actively invite the public to submit ideas for possible projects before any noncompliance has occurred. The EPA can then consider those ideas as SEPs in the future if noncompliance occurs. Region 3 did this for the Elizabeth River watershed, compiling project ideas from the public upfront. It subsequently incorporated one of the ideas into a settlement (albeit as a provision of a criminal plea agreement and not as a SEP in a Superfund civil enforcement action).

The Superfund law authorizes any person to bring a civil enforcement action against any person who is allegedly in violation of any Superfund requirement, order, etc. (See CERCLA § 310(a)(1).) Such actions can augment the EPA's enforcement efforts and/or highlight certain violations for EPA's attention.[25] For example, section 310(a)(1) citizen suits, by residents and others for alleged violations of the reporting requirements under CERCLA sections 103 or 111(g), have supplemented the Agency's own efforts to enforce these provisions.[26] On occasion, parties have also brought section 310(a)(1) citizen

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[22] 67 Fed. Reg. 54463 (August 22, 2002).

[23] See www.epa.gov/region09/enforcement/results/06/highlights.html.

[24] 66 Fed. Reg. 56859 (November 13, 2001).

[25] One court described the purpose of the CERCLA citizen suit provision as follows: "… The purpose of section 310 is not to reimburse citizens for out-of-pocket expenses, but to prod government agencies into vigorously enforcing CERCLA and to allow private actions to compel compliance when the EPA and state still fail to act. While section 107 concerns liability and compensation for pollution, section 310 is aimed at coercing governmental enforcement of hazardous waste laws." Regan v. Cherry Corp., 706 F.Supp. 145, 149 (D.R.I. 1989).

[26] Some of these citizen-suits are noted in reported caselaw. See, e.g., *Citizens Against Pollution v. Ohio Power Co.*, 65 ERC 1374 (S.D. Ohio 2007), *Sierra Club v. Tyson Foods Inc.*, 58 ERC 1076 (W.D. Ky. 2003), *Fried v. Sungard Recovery Serv., Inc.*, 900 F.Supp. 758 (E.D. Penn. 1995), *Pape v. Menominee Paper Co.*, 911 F.Supp. 273 (W.D. Mich. 1994), *City of Toledo v. Beazer Materials and Services, Inc.*, 833 F.Supp. 646 (N.D. Ohio 1993), *Heart of America Northwest v. Westinghouse Hanford Co.*, 820 F.Supp. 1265 (E.D. Wash. 1993), *Martin v. Kansas Board of Regents*, 32 ERC 1944 (D. Kan. 1991), and *Lutz v. Chromatex, Inc.*, 718 F.Supp. 413 (M.D. Pa. 1989).

suits for alleged violations of cleanup-related orders or settlements.[27] For example, at the Upper Columbia River site, Region 10 unilaterally issued an order under Superfund obligating a PRP to conduct studies of the contamination in the Lake Roosevelt area. Several parties subsequently brought a citizen suit alleging that the UAO recipient was violating this Agency order.[28] This citizen suit contributed to EPA later reaching a settlement agreement with the party to conduct the requisite studies. [29] There have been several other section 310(a)(1) citizen suits alleging violations of cleanup settlements/orders.[30]

In addition to CERCLA citizen suits, there are also instances where a non-Superfund citizen suit may benefit the EPA's Superfund program by triggering additional CERCLA cleanup. For example, one recent citizen suit under the Resource Conservation and Recovery Act led the EPA to subsequently negotiate a Superfund administrative settlement obligating the PRP to conduct multiple removal actions. (See *River Village West v. Peoples Gas*, 618 F.Supp.2d 847 (N.D. Ill. 2008).)

In part to assist potential citizen-suit plaintiffs, the EPA is required to make any records, reports or information obtained pursuant to CERCLA § 104 available, unless such information constitutes confidential business information (CBI). (See CERCLA § 104(e)(7)(A).) As discussed earlier, the more transparent the EPA is from the beginning of the Superfund process, the more information that will already be available to community members (including potential citizen-suit plaintiffs).

VII. Conclusions and next steps

The EPA has preliminarily identified a number of possible activities for engaging communities in Superfund enforcement. At this point, the Agency seeks input from external stakeholders (including communities, PRPs, and state, tribal and local governments) about these ideas and any others that might prove beneficial. Please submit comments to sf-enforcement-community-engagement@epa.gov.

The EPA is especially interested in feedback on whether inclusion of these ideas in a final Agency document might unduly raise public expectations and, if so, how to avoid that. In developing this preliminary compilation, several Agency reviewers expressed strong concern that members of the public might insist that the EPA employ certain activities in their communities even though it would not be appropriate to do so. As stated earlier, Superfund enforcement cases vary greatly and there is no one-

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[27] Such suits must, however, satisfy the requirements of CERCLA section 113(h), which limits courts' jurisdiction to consider certain types of suits.

[28] See *Pakootas v. Teck Cominco Metals Ltd.*, No. CV04256AAM (E.D. Wash., Nov. 8, 2004), 2004 WL 2578982.

[29] See *Pakootas v. Teck Cominco Metals Ltd.*, 62 ERC 1705 (9th Cir. 2006).

[30] For example, several individuals brought a 310(a)(1) citizen suit against a metal plating facility for its noncompliance with a CERCLA removal settlement that had been negotiated with EPA. *States v. BFG Electroplating and Mfg. Co.*, 31 ERC 1174 (W.D. Pa. 1989). See also *M.R. (Vega Alta), Inc. v. Caribe General Electric Products, Inc.*, 31 F.Supp.2d 226 (D.P.R. 1998) (CERCLA 310(a)(1) citizen suit alleging noncompliance with a CERCLA RD/RA UAO).

size-fits-all when it comes to activities for involving communities in such cases. Case teams have discretion on whether to use certain measures, depending on the circumstances of their specific site. Some EPA reviewers indicated that Headquarters ought to consider spelling out the circumstances for when it would be appropriate to use select activities, particularly the activities that would likely necessitate the Agency spending considerable resources to effectuate and result in some delay at least in the short term. The EPA is interested in whether external stakeholders believe that such circumstances should be described and detailed.

Disclaimer: Neither this preliminary compilation nor the forthcoming final compendium is a rule and neither creates any legal obligations or enforceable rights. They may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. Whether and how the EPA applies the information in this compilation or the final compilation to any particular site will depend on the facts posed by the site. The EPA decision makers retain the discretion to adopt approaches that differ from the discussion in this compilation and the final compilation, where appropriate, on a case-by-case basis and in accordance with the statute and regulations. This document does not affect determinations of Superfund liability and does not provide any relief from or limitation of liability.

Appendix

Relevant excerpts from model Consent Decree for Remedial Design/Remedial Action (RD/RA CD)

The most relevant portion of the model decree is likely Section XXX (and related language in Section X). Model section XXX is consistent with the NCP provision allowing PRPs to participate in the aspects of the community relations program at the discretion of, and with oversight by, EPA (see 40 CFR 300.430(c)(3)).

Model section XXX provides as follows:

"*COMMUNITY INVOLVEMENT*

128. If requested by EPA [or the State], Settling Defendants shall participate in community involvement activities pursuant to the Community Involvement Plan to be developed by EPA. EPA will determine the appropriate role for Settling Defendants under the Plan. Settling Defendants shall also cooperate with EPA [and the State] in providing information regarding the Work to the public. As requested by EPA [or the State], Settling Defendants shall participate in the preparation of such information for dissemination to the public and in public meetings that may be held or sponsored by EPA [or the State] to explain activities at or relating to the Site. Costs incurred by the United States under this Section, including the costs of any technical assistance grant under Section 117(e) of CERCLA, 42 U.S.C. § 9617(e), shall be considered Future Response Costs that Settling Defendants shall pay pursuant to Section XVI (Payments for Response Costs)."

Model section X covers Reporting Requirements. It requires the Settling Defendants to submit to EPA and the State written [*monthly*] progress reports. Such reports must "*describe all activities undertaken in support of the Community Involvement Plan during the previous [month] and those to be undertaken in the next [six weeks]*."

Note that Model section XXX's bracketed references above to "State" are optional and intended for decrees where the State is a signatory party or when otherwise appropriate (e.g., given the degree of State involvement in the case).

Finally, model section XXX also contains language for a provision for a Technical Assistance Plan ("TAP"), which is generally required for any settlement using the Superfund Alternative Approach. (See discussion of TAPs in sections VI.b.ii and VI.c.ii of the compilation.)

Another significant provision in the model relates to the statutorily-required opportunity for the public to review and comment on a consent decree before the district court judge decides whether to approve it.

Model section XXXII provides as follows:

"*LODGING AND OPPORTUNITY FOR PUBLIC COMMENT*

132. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations that

indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

133. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties."

Note that EPA must go further and offer to provide a public meeting regarding the decree (and hold such a meeting if requested) if the United States' Covenant for the Settling Defendants (or the Covenant for Settling Federal Agencies in decrees that have such agencies) includes a covenant for RCRA section 7003 liability. See the model's note for paragraph 94.

Another provision of the model decree that relates to community engagement is Section VII ("Remedy Review"), which acknowledges the public's statutorily-required right to an opportunity to comment on any further response actions proposed by EPA as a result of a five-year review. Specifically, the model section provides:

"*REMEDY REVIEW*

17. …

18. …

19. Opportunity to Comment. Settling Defendants and, if required by Sections 113(k)(2) or 117 of CERCLA, 42 U.S.C. § 9613(k)(2) or 9617, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period."

Finally, another model CD provision that is potentially significant to community engagement is Section XXV, which covers "Access to Information."

"*ACCESS TO INFORMATION*

118. Settling Defendants shall provide to EPA [and the State], upon request, copies of all records, reports, documents, and other information (including records, reports, documents, and other information in electronic form) (hereinafter referred to as "Records") within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information regarding the Work. Settling Defendants shall also make available to EPA [and the State], for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

119. Business Confidential and Privileged Documents

a. Settling Defendants may assert business confidentiality claims covering part or all of the Records submitted to Plaintiff[s] under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Records determined to be confidential by EPA will be afforded the protection

specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies Records when they are submitted to EPA [and the State], or if EPA has notified Settling Defendants that the Records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such Records without further notice to Settling Defendants.

b. Settling Defendants may assert that certain Records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendants assert such a privilege in lieu of providing Records, they shall provide Plaintiff[s] with the following: (1) the title of the Record; (2) the date of the Record; (3) the name, title, affiliation (e.g., company or firm), and address of the author of the Record; (4) the name and title of each addressee and recipient; (5) a description of the contents of the Record; and (6) the privilege asserted by Settling Defendants. If a claim of privilege applies only to a portion of a Record, the Record shall be provided to the United States in redacted form to mask the privileged portion only. Settling Defendants shall retain all Records that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendants' favor.

c. No Records created or generated pursuant to the requirements of this Consent Decree shall be withheld from the United States [or the State] on the grounds that they are privileged or confidential.

120. No claim of confidentiality or privilege shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site."