

# ADMINISTRATIVE WATCH

ADMINISTRATIVE WATCH ADDRESSES ENVIRONMENTAL, HEALTH AND SAFETY ISSUES



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## “Fundamental Changes” Expected for CERCLA Settlement Negotiations

The United States has just announced a number of significant changes to the way that it intends to negotiate Remedial Design/Remedial Action (“RD/RA”) Consent Decree under CERCLA. These changes likely will lead to more rapid and less flexible negotiations, with an increased focus on governmental enforcement if negotiations begin to lag. As discussed below, these changes will be implemented through a revised Model RD/RA Consent Decree and a new EPA policy document that is designed to tighten the time it takes to negotiate these documents.

## Revised Model Consent Decree

At the beginning of this month, the Department of Justice (“DOJ”) issued a revision to its Model RD/RA Consent Decree (replacing the 2001 version). This document incorporates many of the changes that have been made through prior piecemeal revisions and/or through practice since the 2001 version was issued. It also includes many changes that are designed to “improve and clarify” standard provisions in the previous Model, including those related to financial assurance guarantees, long-term O&M of groundwater treatment remedies, the breadth and timing of covenants, etc. The Model also – for the first time – includes optional provisions relating to federal PRP settlers if they are included in the RD/RA negotiations. In light of the substantial number of changes made, DOJ has prepared a redline reflecting the revisions and a chart summarizing the key modifications. See link below.

## “Fundamental Changes” to EPA’s Negotiation Process and Timing

EPA also issued a new interim Policy on negotiating RD/RA Consent Decrees that it characterizes as “a new way of doing business.” This Policy is designed to strengthen and shorten EPA’s negotiation practices so as to achieve more timely settlements. This policy shift was prompted largely by the increasing delays between the issuance of a Special Notice Letter and a finalized Consent Decree. In the end, this new Policy likely will lead to a quickening of the pace of RD/RA negotiations and an increased use of alternative enforcement tools if those negotiations bog down. Among the key points to note:

- The threat (and likely use) of Section 106 Unilateral Administrative Orders (“UAOs”) will increase. The Policy “encourages” the use of UAOs as either negotiating leverage or ultimately a means to expedite the cleanup (“PRPs should know during negotiations that EPA is willing and ready to issue a UAO if settlement is unreasonably delayed”). In recent years, many PRPs have been more willing in appropriate cases to “take” a UAO because of what is perceived to be EPA/DOJ’s inflexibility in negotiating reasonable terms of a Consent Decree. Based upon a review of the revised Model Consent Decree, it does not appear that the United States is intending to be any more flexible in upcoming negotiations.
- EPA may be more willing to bifurcate the Remedial Design (“RD”) and the Remedial Action (“RA”) in appropriate circumstances, with the RD normally being done under the terms of a Consent Order, and the RA being done under a subsequent Consent Decree. Bifurcation may be a good thing in some situations, especially when a party believes that it can use the RD process to develop new information to significantly affect the remedy selected in the Record of Decision (“ROD”). In the past, some Regions have been hesitant to take this approach.

- The Policy establishes a series of internal EPA/DOJ Status Conferences throughout the negotiation process, with each succeeding Conference involving higher level EPA/DOJ officials and increasingly onerous reporting requirements/deliverables. These Conferences will demand a new level of personal responsibility/accountability from the regional negotiating team, and may make it less likely that additional extensions to negotiation periods will be granted.
- EPA will attempt to establish specific timeframes for each milestone in the RD/RA negotiation process. Under the Policy, we can expect to see Special Notice Letters being issued sooner (as soon as 90 days from the ROD), negotiation periods shrinking, and a tightening of the timeframes for the Consent Decree lodging/finalization process.
- As one would expect, there are exceptions for nearly every rule established in the Policy, but as noted above, the regional negotiating team will have to justify each exception at the applicable Status Conference.

The new 2009 Model Consent Decree and EPA's Interim Policy can be found using the following links:

<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rev-rdra-2009-mem.pdf>

<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rdra-neg-timeline-mem.pdf>

If you have any questions regarding the United States' revised Model Consent Decree or EPA's new negotiation Policy, please contact Lindsay P. Howard at (412) 394-5444 or via email at [lhoward@bccz.com](mailto:lhoward@bccz.com), or any of our other environmental lawyers at (412) 394-5400.