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Negotiating Superfund Settlements

EPA prefers to reach an agreement with a potentially responsible party (PRP) to clean up a Superfund site instead of issuing an order or paying for it and recovering the cleanup costs later. Settlement agreements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) must be:

1. In the public interest, and
2. Consistent with the National Contingency Plan.

A special notice letter invites a PRP to enter into good faith negotiations and gives the PRP 60 days to provide EPA with a good faith offer to do site work or pay for cleanup. If the PRP provides a good faith offer, there is generally another 60 days for negotiation. If the PRP does not submit a good faith offer at the end of 60 days, EPA may start the cleanup work or issue a unilateral administrative order, requiring the PRP to do the work.

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Types of Superfund settlement agreements with PRPs

A Superfund cleanup agreement is written in the form of an administrative settlement agreement and order on consent (ASAOC) or a judicial consent decree (CD). Negotiations are based on model settlement agreements, which are usually modified to fit the circumstances at a particular site. Model settlement documents are available from the [Cleanup Enforcement Model Language and Sample Documents database](#). Additional information on Superfund settlements is available from the [Superfund enforcement cleanup policy and guidance database](#).

Administrative Settlement Agreement and Order on Consent

An ASAOC is a legal document that formalizes an agreement between EPA and one or more PRPs, to address some or all of the parties' responsibility for a site. Administrative orders on consent do not require approval by the court.

EPA uses ASAOCs for

- removal activity (short-term cleanup),
- remedial investigation and feasibility studies, and
- remedy design work.

EPA also uses ASAOCs for cost recovery when the payments are made as part of an agreement for work and for *de minimis* cashout payments.

Judicial Consent Decrees

A consent decree (CD) is a legal agreement entered into by the United States (through EPA and the Department of Justice) and PRPs. CDs are lodged with a court.

Consent decrees are the only settlement type that EPA can use for the final cleanup phase (remedial action) at a Superfund site. EPA also uses CDs to recover cleanup costs in cost recovery and cashout settlements and on rare occasions to perform removal work or remedial investigations/feasibility studies.

A consent decree is final when it is approved and entered by a U.S. district court.

Types of Settlement Agreements

- Administrative Agreement
- Agreement for "Work"
- Cost Recovery Agreement
- "Cashout" Agreement

Administrative Agreement

An administrative agreement is a legal document that formalizes an agreement between EPA and one or more PRPs to reimburse EPA for costs already incurred (cost recovery) or for costs to be incurred (cashout) at a Superfund site. (Cashout settlements generally include payments for both past and future costs, but always include a future cost component.)

An Administrative agreement does not require approval by the court. All types of payment agreements that do not include performance of work are generally written as an administrative agreement.

Agreement for "Work"

EPA prefers that PRPs do the work of investigating, cleaning up, and maintaining the cleanup of Superfund sites. EPA negotiates an agreement (in the form of an ASAOC or CD) with the PRP that outlines the work that is to be done.

The term "work agreement" is used to cover a variety of agreements that involve the PRP doing the work (versus EPA doing the work). The most common agreements are for:

- site investigation (remedial investigation and feasibility study),
- short-term clean up (removal action), and
- long-term cleanup (remedial design / remedial action).

Cost Recovery Agreement

When EPA performs investigations or cleanup work, it can recover its costs from PRPs through a cost recovery agreement.

When an agreement only addresses reimbursing EPA costs, it is referred to as a Cost Recovery Agreement and takes the form of an Administrative Agreement.

Administrative orders on consent for work may include a provision for the PRP to reimburse EPA for past work costs and will include a provision for the PRP to pay EPA's future costs in overseeing the PRP's work (considered "cost recovery" because such costs are billed to PRPs after the costs are incurred by EPA).

"Cashout" Agreement

There are a few situations when it is more appropriate for PRPs not to be involved in performing work at a site. In such cases, EPA may negotiate a "cashout" agreement with the PRP, where the PRP pays an appropriate amount of estimated site costs in advance of the work being done. That money will generally be used to help pay for the cleanup.

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Third-Party Agreements

- Bona Fide Prospective Purchaser Agreement
- Prospective Purchaser Agreement
- Other Third-Party Agreement

Bona Fide Prospective Purchaser Agreement

The activities of most bona fide prospective purchasers (BFPPs) will not require liability protection beyond what is provided by the self-implementing BFPP protection in CERCLA § 107(r). However, if a BFPP wants to perform cleanup work at a contaminated site of federal interest that exceeds the BFPP's statutory requirements (e.g., reasonable steps), a work agreement may be used to address potential liability concerns associated with that cleanup work.

Prospective Purchaser Agreement

In limited circumstances, a prospective purchaser agreement (PPA) may be appropriate for a party who does not qualify for the statutory BFPP protection. Prospective purchaser agreements, similar to BFPP agreements, provide liability protections in exchange for cleanup work at a site of federal interest.

Other Third-Party Agreements

EPA may consider entering into a windfall lien agreement when a BFPP

wants to satisfy any existing or potential windfall lien before or close to the time of acquisition.

For contiguous property owners (CPOs) who have been sued under CERCLA, or can demonstrate a real and substantial threat of such litigation, especially where the EPA has conducted a response action on the neighboring contaminated property or the contiguous property owner's property, EPA will consider whether a CPO agreement is appropriate to provide the owner with cost recovery or contribution protection from PRPs at the site.

EPA also developed a Good Samaritan settlement agreement to provide a federal CERCLA covenant not to sue and contribution protection, when appropriate, to certain parties who volunteer to perform cleanup work at an orphan hard rock mine site.

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Long-Term Stewardship/Institutional Controls in Superfund Settlements

Superfund settlement agreements usually include long-term stewardship obligations to maintain the cleanup. Long-term stewardship activities typically include physical and legal controls to prevent exposure to contamination left in place at a site. For example, a groundwater cleanup may involve operating a treatment system for 30 or more years. At such a site, a legal control such as a groundwater use regulation may be used to meet the long-term stewardship obligation.

The legal controls are generally referred to as "institutional controls" (ICs). EPA uses ICs to help:

- minimize human exposure to contamination, and
- protect structures and systems that are part of the cleanup (such as groundwater monitoring systems and landfill covers).

Institutional controls are considered part of the remedy for the site. How ICs are enforced depends on the nature of the control and how it is initiated (e.g., through a local ordinance; in an enforceable agreement).

EPA continually assesses the status of ICs at Superfund sites and gathers IC data from Superfund sites where construction of the remedy is

complete.

Examples of ICs include:

- conservation
- covenants
- deed or hazard notices
- environmental easements
- restrictions on groundwater use
- special building permit requirements
- state or local ordinances
- state registries of contaminated properties
- well drilling prohibitions
- zoning restrictions

Further information on institutional controls is available on the [Institutional Controls webpage](#) and from the [institutional controls category within the Superfund enforcement policy and guidance database](#).

Learn More about Negotiating Superfund Settlements:

- [Incentives for Negotiating Superfund Settlements](#)
- [Financial Assurance in Superfund Settlements](#)
- [Superfund Alternative Approach Sites with Superfund Alternative Approach Agreements](#)
- [Addressing Liability Concerns to Support Cleanup and Land Reuse](#)

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LAST UPDATED ON JULY 15, 2019