

parties ("PRPs") that the Model is overly stringent in certain respects. At a number of sites PRPs have indicated that the Model was an impediment to settlement, contributing to an increase in the need to use unilateral orders to accomplish cleanup. Since settlement requires agreement by both sides, we have taken seriously comments by PRPs regarding provisions that they claim create serious obstacles to settlement.

The revised Model represents a major effort to respond to PRP concerns and to protect the interests of the people of the United States. The revised Model also clarifies provisions whose meaning was unclear and brings the Model RD/RA Consent Decree into conformity with other model settlement documents being developed by EPA and the Department of Justice. The new Model decree reflects the sustained efforts of a Headquarters/Region/ DOJ workgroup and considerable input from numerous regional personnel.

### Specific Revisions From Old Model

#### *Additional Response Actions*

The "Additional Response Actions" section in the old Model has been the subject of by far the most frequent and vociferous criticism by PRPs. This provision required the settling defendants to undertake any additional response actions that EPA may later determine to be necessary in the event that the original remedial action fails to meet the "performance standards" specified in the Decree. PRPs characterized this obligation as a "blank check" that unfairly subjected them to potentially large and unknown costs. Some PRPs indicated that, although they recognize the need for EPA to reserve its rights to seek additional work in the event of remedy failure, it is unfair and unduly burdensome to require PRPs to accept the obligation to perform such unknown work as an affirmative obligation under the Decree.

We are addressing this concern by deleting the "Additional Response Actions" section of the Interim Model, in favor of two new provisions addressing the questions of remedy failure and modifications of the remedial action plan that may be needed as the remedy is implemented.

#### *Modification of the Statement of Work*

First, a new paragraph entitled "Modification of the Statement of Work or Related Work Plans" has been added to Section VI of the Model ("Performance of the Work by settling defendants"). This provision will enable EPA to require the settling defendants to implement modifications to the

Statement of Work or "SOW" (usually attached to the consent decree), or to work plans submitted under the decree, if such modifications become necessary as the remedy is implemented. Such modifications, however, may be required only to the extent they are "consistent with the scope of the remedy selected in the ROD" (Record of Decision) that the settling defendants have agreed to implement. In order to assure that there is clarity and a common understanding about the scope of the settling defendants' obligations under this provision, the revised Model calls for a site-specific definition of "the scope of the remedy selected in the ROD" to be drafted and negotiated in each decree. This definition should be crafted in terms of the remedial approach stated in the ROD, and not in terms of performance standards or other general remedial goals.

#### *Reservation of Rights*

Second, the revised Model contains a new provision in the "General Reservations of Rights" paragraph in Section XXI (Covenants Not To Sue by Plaintiffs), that allows the government to seek, in new litigation, additional response actions necessary to achieve performance standards that are beyond the scope of the remedy selected in the ROD. This reservation is significantly different from the "Additional Response Actions" provision of the current model, in that it does not impose the obligation to perform such response actions as an affirmative obligation under the Decree. This new reservation is accompanied by a footnote stating that it may be omitted in appropriate circumstances, such as in exchange for a premium or other consent decree provision(s), taking into account the risk (of remedy failure) being assumed by EPA.

These revisions represent a significant departure from the approach of the "Additional Response Actions" Section of the old Model. We believe they strike a careful balance between the public's interest in achieving successful remediation of Superfund sites through consent decrees, and the settling defendants' interest in obtaining reasonable certainty regarding the scope of the affirmative obligations they are accepting in entering into a settlement. The revisions address the "blank check" objection to the old Model by limiting the modifications to the work that EPA can require under the Decree to modifications that are consistent with the scope of the remedy set forth in the ROD. By focusing negotiations on the site-specific definition of this term, the revised Model is intended to afford

settling defendants certainty regarding the breadth of their affirmative obligations.

Where the new reservation of rights provision is used, settling defendants retain all defenses to liability, as well as their ability to challenge EPA's remedial determinations. Thus, instead of requiring settling defendants to perform additional, unknown response actions, this provision simply reserves the rights and arguments of both sides with respect to liability for additional response actions, beyond the scope of the ROD, that are necessary to achieve performance standards.

Moreover, the Regions will have substantial discretion to omit this reservation in appropriate circumstances, taking into account the risk being assumed by the agency. The magnitude of this risk depends on such factors as the nature and extent of the contamination, physical site conditions, and the reliability of the selected remedial technology. In many cases, this risk may not be substantial, and the considerations (such as a premium or other consent decree provisions) that the government should obtain in consideration for its deletion should reflect this circumstance. Conversely, in those cases where the risk is particularly acute, it may be necessary to retain the reservation or to require a more substantial premium or other consideration in return for its deletion.

In EPA's experience, there have been few situations in which it has been necessary to seek further response actions that go beyond the scope of the remedy selected in the ROD. As the agency's experience with various site conditions, contaminants, and remedial technologies increases, we expect these situations to become even more rare. The ultimate consideration in omitting the new reservation will be whether the final decree, taken as a whole, represents an appropriate settlement in light of all relevant factors, including the risk being accepted by the government on behalf of the American public.

#### *Other Revisions*

As required by Section 122(f)(6) of CERCLA, the standard reservations of liability contained in paragraphs 80 and 81 of the old Model (the "reopeners" for "unknown conditions" and "new information") are retained. In addition, the revised Model retains the provision of Paragraph 22 of the old Model (in the "Periodic Review" provision),<sup>1</sup> pursuant to which Settling defendants can be

<sup>1</sup> This section is renumbered as Section VII of the revised Model, titled "Remedy Review."