

US EPA ARCHIVE DOCUMENT

Module 6:

Consent Decree Settlements



# Consent Decree Settlements

## Module: Objectives

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- ◆ Discuss crucial settlement planning and preparation activities
- ◆ Define settlement objectives
- ◆ Describe stages in reaching settlement
- ◆ Identify major provisions of a CD
- ◆ Identify major elements involved in managing negotiations
- ◆ Identify potential problems in settlement negotiations and solutions
- ◆ Describe requirements for approval of and concurrence with a settlement

# Why Settle with EPA

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- ◆ Incentives for PRPs to negotiate a settlement
  - » More stringent provisions possible under a UAO
  - » Contribution protection provided through settlement
  - » Settlement can resolve past costs, and help avoid future litigation
  - » PRP has more control
  - » Settlement provides long-term resolution of a problem

# "Hey, Let's Just Issue an Order to the PRPs and Be Done With It - EPA Doesn't Have Time to Negotiate"

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- ◆ Incentives for EPA to negotiate a settlement
  - » There is opportunity for greater long-term cooperation
  - » Settlers may agree to perform more work
  - » Mechanisms for resolving possible future disputes are established

# RD/RA Settlement Objectives and the CD Process

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- ◆ Settlement objectives
  - » PRPs perform and finance 100 percent of RD
  - » PRPs perform and finance 100 percent of RA
  - » The government is reimbursed for 100 percent of past response costs and future oversight costs
- ◆ Potential compromises

# Settlement Planning and Preparations: Case Management Plans

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- ◆ Case management plans
  - » Set the agenda for all members of the negotiation team
  - » Lay out the strategic objectives for a settlement

# Settlement Planning and Preparations: Roles and Responsibilities

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- ◆ RD/RA settlement negotiation team: typical roles and responsibilities
  - » RPM
  - » Regional case attorney
  - » DOJ
  - » OSRE
  - » State
  - » Other Federal agencies

# Settlement Planning and Preparations: Review and Compile Supporting Documentation

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- ◆ A complete PRP search supports settlement negotiations
- ◆ The AR is the basis for judicial review
- ◆ Cost documentation should be prepared in advance of negotiations

# Settlement Planning and Preparations: Notification of Other Parties

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- ◆ Informal communications with PRPs should be initiated early
- ◆ The state may participate in negotiations and may be a party to the CD
- ◆ Natural resource trustees may participate in negotiations

# Settlement Planning and Preparations: Funding Options Completed

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- ◆ Funding options and considerations
- ◆ Determination of funding options if no settlement is achieved
  - » National prioritization panel
  - » Regional allowances and funding priorities
  - » State cost share
  - » Special account funds

## Stages of the Settlement Process: Prereferral Stage

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- ◆ Prereferral litigation report prepared and submitted to DOJ
  - » Often called “mini-lit reports” or “PRNs”
  - » Written before settlement negotiations begin
  - » Designed to allow regions, headquarters, and DOJ to discuss strategy before negotiations with PRPs begin
- ◆ Contents of the prereferral litigation report

## RD/RA CDs

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- ◆ Uses of CDs
- ◆ EPA's 2001 version of the model RD/RA CD
- ◆ Major provisions of the RD/RA CD
  - » What is generally negotiable
  - » What is generally nonnegotiable

# Drafting a Site-Specific Consent Decree

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- ◆ Deviating from the model RD/RA CD
- ◆ Considering compromises to achieve settlement
  - » Case- and site-specific circumstances
  - » Cost compromises

# Special Notice Letters

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- ◆ Issuance of SNLs begins formal negotiations
- ◆ Contents of and attachments to the SNL
- ◆ Negotiation extensions

# Good Faith Offer

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- ◆ A GFO responds to the draft CD and SOW
- ◆ The PRP must demonstrate capabilities
- ◆ The PRP must state its ability to reimburse EPA

# Managing the Negotiations: Managing Time and Participants

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- ◆ Time management
- ◆ Strategic considerations
- ◆ Getting information from the PRPs
- ◆ Giving information to the PRPs

# Managing the Negotiations: Navigating to Closure

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- ◆ Show team unity
- ◆ Use a negotiation notebook
- ◆ Be prepared to close negotiations
  - » Reciprocity
  - » Understanding of issues
  - » Group decision-making

# Frequently Disputed Provisions

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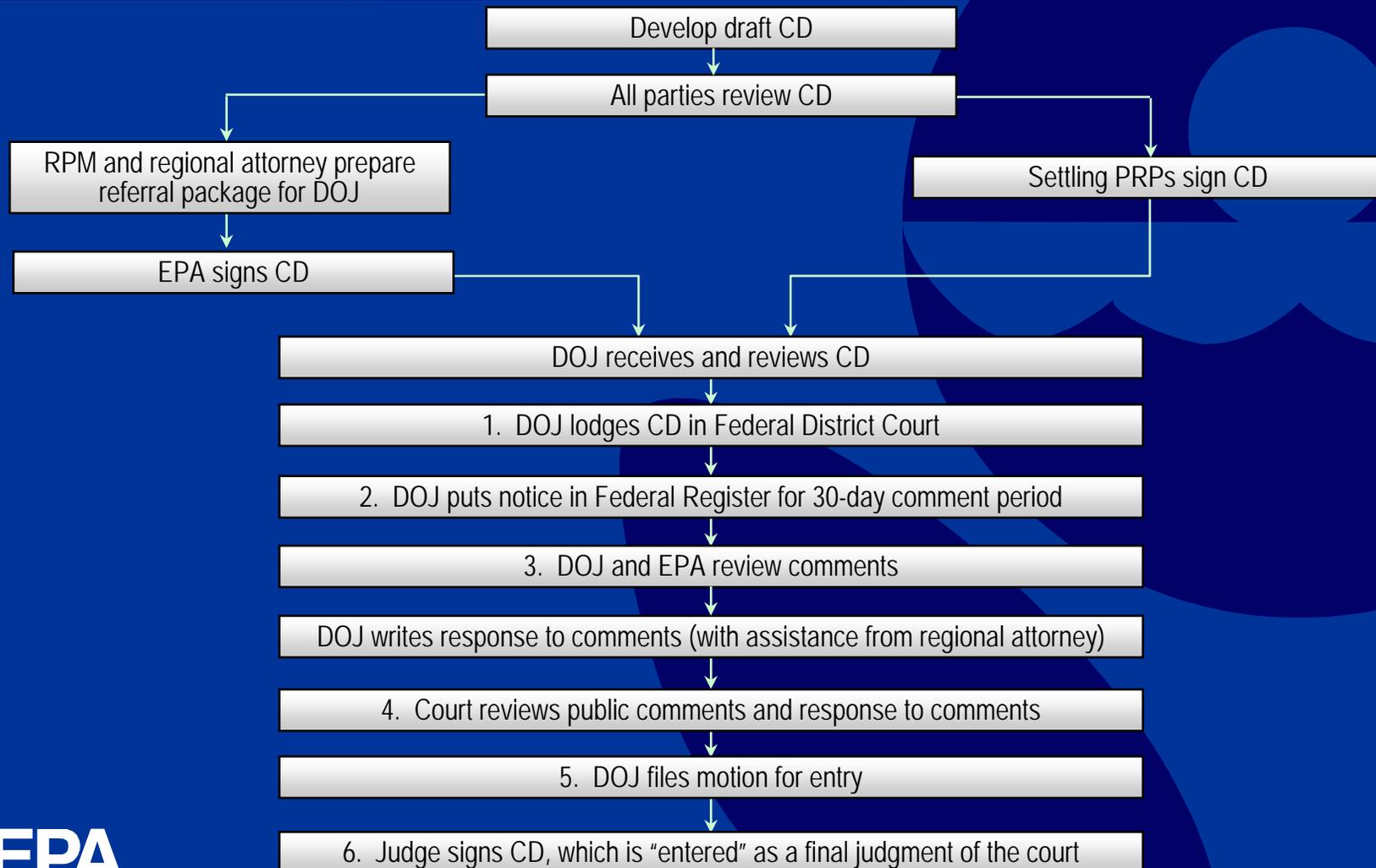
- ◆ Covenants not to sue given by the U.S. government
- ◆ Reopener provisions and reservations
- ◆ Work takeover
- ◆ Covenants not to sue given by settling parties
- ◆ Contribution protection and matters addressed
- ◆ Financial assurance

# Finalizing the Settlement Within the Government

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- ◆ Necessary concurrence should be obtained or consultation sought
- ◆ Referral package must be prepared
- ◆ Ten-point settlement criteria

# Settlement Completion Process



# Potential Issues and Obstacles

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- ◆ Challenges to the ROD
- ◆ State and Federal agencies as PRPs
- ◆ Conflicting interests among PRPs

# Anticipating Potential Issues and Obstacles

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- ◆ Work with PRP steering committees
- ◆ Communicate with and educate stakeholders

# Ensuring Compliance with the CD and Regulatory Requirements

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- ◆ PRP-lead response actions must conform to the requirements of the NCP
- ◆ EPA determines whether PRP response actions are acceptable
  - » Meet with PRP contractor
  - » Monitor the PRP's field work
  - » Use EPA's oversight assistant
  - » Maintain routine communications

# Violations and Penalties

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- ◆ Types of violations
- ◆ Detection of a violation
  - » Notification
  - » Informal resolution
  - » Formal dispute resolution procedures
  - » Alternate dispute resolution
- ◆ Substantial noncompliance

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# Violations and Penalties

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- ◆ Imposition of penalties
  - » Stipulated penalties
  - » Statutory penalties
- ◆ Enforcement options
  - » Work takeover
  - » Referral to court

# In Review

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- ◆ Working as a team
- ◆ Ensure that supporting documentation is complete and in place before negotiations begin
  - » PRP search report
  - » AR
  - » Cost documentation
- ◆ The settlement objectives are to obtain the PRP's agreement to perform and finance the response and to collect 100 percent of EPA's response costs

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## In Review

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- ◆ States and natural resource trustees must be notified and can participate in negotiations
- ◆ The settlement process involves group decision making, effective time management, and a thorough understanding of the risks
- ◆ The negotiation team should anticipate potential obstacles or disputes