Module 6: Consent Decree Settlements
Consent Decree Settlements
Module: Objectives

- 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

- 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"

- 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

◆ 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

- 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

- 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

- 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

- 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

- 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

◆ 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

♦ 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

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

◆ Issuance of SNLs begins formal negotiations
◆ Contents of and attachments to the SNL
◆ Negotiation extensions
Good Faith Offer

- 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

- Time management
- Strategic considerations
- Getting information from the PRPs
- Giving information to the PRPs
Managing the Negotiations: Navigating to Closure

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

- 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

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

1. DOJ lodges CD in Federal District Court
2. DOJ puts notice in Federal Register for 30-day comment period
3. DOJ and EPA review comments
   - DOJ writes response to comments (with assistance from regional attorney)
4. Court reviews public comments and response to comments
5. DOJ files motion for entry
6. Judge signs CD, which is “entered” as a final judgment of the court
Potential Issues and Obstacles

◆ Challenges to the ROD
◆ State and Federal agencies as PRPs
◆ Conflicting interests among PRPs
Anticipating Potential Issues and Obstacles

- Work with PRP steering committees
- Communicate with and educate stakeholders
Ensuring Compliance with the CD and Regulatory Requirements

- 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

- 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

- Imposition of penalties
  - Stipulated penalties
  - Statutory penalties
- Enforcement options
  - Work takeover
  - Referral to court
In Review

- 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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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.