

Corrective Action Streamlined Consent Orders

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R5: Today's internet presentation is on streamlined orders. Streamlining Orders is just one of several more efficient approaches EPA is using to initiate corrective action at RCRA facilities. My name is Tom Krueger and I'm an attorney in Region 5. Region 5 is based in Chicago and oversees cleanups in the Great Lakes states (with the exception of NY and PA). Region 5's first streamlined Order was executed in August 1999. My co-presenter is Deb Goldblum.

R3: My name is Deb Goldblum and I am a project manager and geologist in Region 3. Region 3 is based in Philadelphia and oversees cleanups in the mid-Atlantic states. Region 3's recycled Region 5's idea and issued its first streamlined Order in May 2002.

We will go through the presentation and have a break for questions in the middle (after slide 17) and then at the end. You can ask questions either through the phone or via internet with the help of Guy at Clu-in. We are requesting that you hold your questions to those breaks to keep the continuity of the presentation. To keep you following along, we will announce what slide we are on as we go through the PowerPoint presentation.

Initiating Corrective Action

- ◆ HSWA Permit
- ◆ Traditional Order/Settlements
- ◆ Facility Lead Agreements
- ◆ Use of Alternative Authorities
- ◆ Streamlined Orders



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R5: We are now on slide 2. Facility-wide Corrective Action can be initiated in several ways. There are permit requirements for facilities operating with a permit. There are traditional orders, typically issued to interim status facilities. Regions are also utilizing some more innovative approaches. One of them is the facility lead agreements, also known as voluntary agreements. Region I was the first region to introduce generic informal agreements to initiate corrective action. Since that time, Region 3 and Region 5 have also adopted this approach. Region 3 now has over twenty sites with facility lead agreements. Also, several states are also implementing corrective action under generic agreements with facilities. An internet seminar devoted to facility lead agreements will occur in the near future. In-line with the one cleanup approach, Regions and states are also putting increased reliance on other cleanup programs to meet corrective action objectives. This includes State voluntary cleanup programs, the UST program and Superfund. However, today Deb and I want to talk to you about an approach that has worked well in Region 3 and Region 5, the Streamlined Order.

Streamlined Order Authorities

- ◆ § 3013
- ◆ § 3008h
- ◆ § 7003 (under certain circumstances)

EPA implements Corrective Action through guidance



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R5: We are now on Slide 3. Accidents or other activities at facilities that treat, store or dispose of hazardous wastes have sometimes led to the release of hazardous waste or hazardous constituents into soil, ground water, surface water, or air. Prior to the 1984 HSWA amendments, cleanup of these releases focused primarily on protecting groundwater from special kinds of RCRA-regulated land disposal units that received hazardous wastes after July 1982. HSWA made it clear that owners or operators of treatment, storage or disposal (TSD) facilities are responsible for investigating and, as necessary, cleaning up releases at or from their facilities, regardless of when the releases occurred. Currently, EPA believes that there are over 6,500 facilities subject to RCRA corrective action statutory authorities. Of these, approximately 3,800 facilities have corrective action already underway or will need to implement corrective action as part of the process to obtain a permit to treat, store, or dispose of hazardous waste.

For those facilities where corrective action isn't handled through the permit process, EPA can issue an administrative order to address various circumstances. EPA has three main authorities available for issuing corrective action orders. They are 3013, 3008(h) and 7003. Section 3013 gives authority to issue orders to require monitoring, testing, analysis and reporting concerning hazardous wastes that may present a substantial hazard to human health and the environment. Section 3008(h) gives authority to issue a corrective action order based on a release of hazardous waste from an interim status facility. Section 7003 gives authority to issue orders to address an imminent and substantial endangerment arising from handling, storage, treatment, transportation or disposal of solid or hazardous waste. The corrective action regulations appear in 40 CFR Part 264, Subpart F, so they technically apply only to permitted facilities. The regulations are limited and general, giving EPA flexibility. EPA proposed more detailed and comprehensive corrective action regulations in 1996, but those provisions were never finalized. They are, however, helpful guidance on EPA's corrective action expectations. Which mechanism we choose to use is a site-specific decision based on enforcement considerations and on the capabilities and motivation of the regulated facility.

Overarching Goals of Streamlining Corrective Action

- ◆ Shorter timeframe for issuance & implementation
- ◆ Focus on achieving Environmental Indicators
- ◆ Focus on achieving acceptable cleanups rather than following a particular process
- ◆ Shorter Orders



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R3: Slide 4. The overarching goals of streamlining corrective action consent orders are:

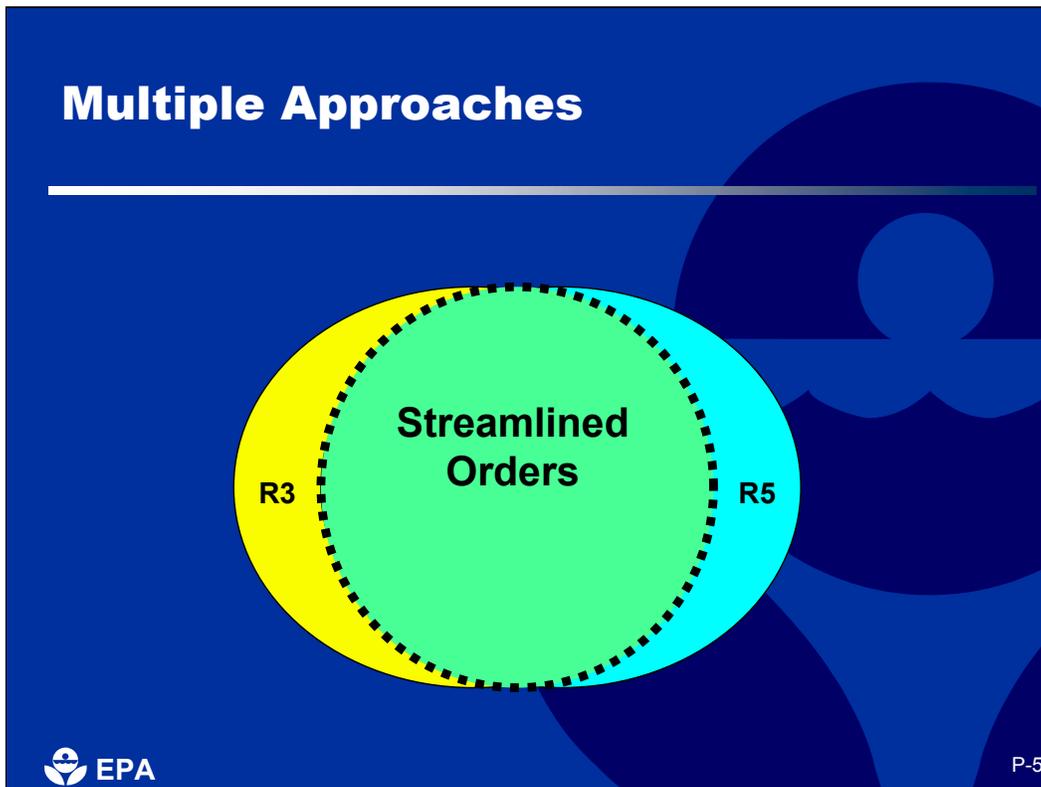
Key is that they can be issued and implemented more quickly than a traditional mechanisms

They focus on achieving the agency's Environmental Indicators: Human Exposures Under Control and the Migration of Contaminated Groundwater Under Control.

They focus on achieving acceptable cleanups rather than following on a particular process – which utilizes agency and facility resources more efficiently.

They are a shorter document with fewer pages – less paper both in the document and throughout the process. Facilitates negotiations by being less threatening;

Multiple Approaches



R3: Slide 5. The reason Tom and I are both speaking at this presentation, is that although Region 3 and Region 5 's are both issuing streamlined orders, and in general they are the similar, there are some differences and we will bring them to your attention as we go through the presentation. Most Regions have been working on streamlining the corrective action process in varying ways and to varying degrees, so I'm sure that if there were representatives from other regions here we would have more overlapping circles.

Over time the program has learned that for certain facilities we can streamline administrative steps and we modified our traditional strategies so that's resulting in faster cleanups.

Streamlined orders are working well in our regions and we will talk about our approaches as examples of techniques that can be used in appropriate cases. We hope that at the end of the presentation regions and states will share their streamlining approaches to facilitate cleanups at corrective action sites so that we can learn from each other.

Regional Approaches

Region 3

- ◆ Quick way to initiate corrective action
- ◆ Implemented similar to other mechanisms
- ◆ All Corrective Action mechanisms utilize enhanced communication, as appropriate

Region 5

- ◆ Performance-based approach
- ◆ Enhanced informal communication
- ◆ Limited number of formal submissions
- ◆ From investigation to completion



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R3: Slide 6. Now we want to discuss the regional difference. Region 3 is using streamlined orders to initiate corrective action faster by streamlining portions of orders that can otherwise often lead to protracted negotiations. Once executed, the orders are implemented in a manner similar to any other mechanism (order, permit facility lead) we are using to implement corrective action. But all of these tools have streamlined their implementation approach using enhanced communication and reducing the amount of detailed written comments. The amount of streamlining available and the ways in which it will be done really depends on the relationship between the facility and the agency. Certain recalcitrant facilities need every issue formalized in writing with specified dates. While others, meet with the project manager upfront, discuss objectives and then formalize the approach for approval.

R5: In Region 5, we are also using streamlined orders to simplify the negotiations and move corrective actions forward more quickly. In addition to that, our streamlined orders take a flexible approach to implementation. In a sense our streamlined order is a more formalized type of facility lead agreement. Because a typical facility lead agreement is “voluntary,” it is generally used at lower priority sites and it allows the facility a fair amount of flexibility in achieving corrective action objectives. By making it enforceable through a streamlined order, we can apply this more flexible, performance-based approach to more complex or serious sites. In our streamlined orders, as a condition of giving the facilities more flexibility in designing and implementing the investigation, we expect typically them to agree to implement the corrective measures EPA selects at the end of the investigation.

Factors Affecting Decision to Pursue a Streamlined Order Region 5

- ◆ Compliance/enforcement history of the facility
- ◆ Status of corrective action/investigative activity at the facility
- ◆ Cooperativeness of the company
- ◆ Technical capabilities of the company
- ◆ Financial capability of the company
- ◆ Complexity of the facility
- ◆ Motivation of facility to move forward quickly



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R5: Slide 7. Before implementing a Streamlined Order in Region 5 we look at a number of factors to decide whether the facility is a good candidate for the more expedited, flexible approach we take under the streamlined order. We look at these factors as a whole; there's no particular one or no particular "scoring criteria" that dictates our decision.

Factors Affecting Decision to Pursue a Streamlined Order

Region 5

- ◆ Assessment of how much of the corrective action can be expedited
- ◆ State acceptance
- ◆ Litigation risk of conventional approach
- ◆ Public interest
- ◆ Other factors



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R5: Slide 8. Overall we're looking at whether the facility has the capabilities and the motivation to help us succeed under the circumstances. This is important because in a real sense it's more of a teamwork approach.

Factors Affecting Decision to Pursue a Streamlined Order

Region 3

- ◆ Facility agrees to quickly negotiate Order
- ◆ Facility agrees not to contest jurisdiction to issue or enforce the order
- ◆ Facility agrees to conduct the work in accordance with:
 - » RCRA and all relevant regulations and guidance
 - » Environmental Indicator determination guidance
 - » Relevant portions of the corrective action model SOW
 - » Risk assessment guidance



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R3: Slide 9. The factors listed on the past two-slides are more relevant to Region 3 when we are considering a facility-lead agreement, which is just an agreement and not enforceable. In Region 3, because this is an Order, with enforcement capabilities, we are willing to issue a streamlined order (RFI or CMI) to most any facility that is willing to negotiate quickly. Otherwise we will opt for a unilateral order.

Critical Region 3 factors are:

Streamlining Opportunities

- ◆ Findings of Fact & Conclusions of Law
- ◆ Penalty Section
- ◆ Administrative Process
- ◆ Scopes of Work
- ◆ Implementation



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R3: Slide 10. When EPA was given authority for corrective action orders, it was a new tool without much specific direction given in the statute or the regulations, and therefore one that might be subject to challenge. Because EPA wanted to make sure that corrective actions were developed and implemented consistently and carefully, the Agency developed a model Order and Scope of Work that were very lengthy and detailed, and that placed a lot of emphasis on careful, painstaking review of a series of technical documents. This typically made corrective action a very time-consuming process.

Now that EPA, the regulated community and their consultants has been implementing the program for almost two decades, everyone has more experience and EPA has more confidence in deciding which legal elements are most critical (that is likely to be challenged) and which technical elements need the most oversight. The portions of the traditional corrective action order which Regions 3 and 5 have targeted for streamlining are:

The Findings of Fact and Conclusions of Law;

The Penalty Section;

The Administrative Process;

The Scopes of Work;

Overall implementation of corrective action.

As I said upfront there are some differences in how each region streamlined these targeted pieces, but the overall result is the same: a quicker, more efficient cleanup.

Next we will go through and discuss how each of these areas were streamlined. Keep in mind that within CA there is a significant range of flexibility that regulators can offer, but for the sake of this presentation, we are going to compare the traditional CA order with the streamlined order approaches we use in our Regions.

Traditional Findings of Fact & Conclusions of Law

- ◆ Several paragraphs defining jurisdiction
- ◆ Includes a detailed chronology to support jurisdiction including:
 - » Facility regulatory history
 - » Release information
 - » Constituents of concern
 - » Toxicological effects



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R5: Slide 11. While the formats might vary somewhat, a traditional order typically included a long discussion of the facility-specific background, covering every element that could potentially support EPA's jurisdiction to issue and enforce the Order:

Defining the respondent as a "person"

Operations and location of the "facility"

The date the facility submitted the Notification of Hazardous waste activity

The date they submitted a Part A, permit application

The date the EPA acknowledged the facility qualified for interim status

This is just information through the early 80's and the list would go on, including inspections, violations, delistings etc.

Then it would also include evidence of releases, the constituents detected at the site and the toxicological effects of these constituents.

This level of detail was meant to ensure that people would be less inclined to challenge EPA's basis and jurisdiction to issue or enforce the order and to demonstrate that EPA was coming into the negotiations from a position of strength.

Streamlined Findings of Fact & Conclusions of Laws

Minimum information to establish jurisdiction

- ◆ Respondent is a corporation and “person”
- ◆ Respondent is an owner/operator
- ◆ Facility is subject to RCRA
- ◆ Facility has had releases
- ◆ Finding for potential adverse impact to human health or the environment



P-12

R5: Slide 12. Over the years EPA has observed that its corrective action orders typically haven't been challenged on jurisdiction grounds. Moreover, the person most likely to make that challenge – the facility owner/operator – already agrees in the order to waive that argument. What was also apparent was that EPA and the facility could often get bogged down in long back-and-forths on shaping and fine-tuning the background discussions. Our Streamlined Orders limit the findings of fact and conclusions of law to those site specific facts which specifically support the jurisdictional needs. For 3008(h) they are as follows:

Advantages to Streamlined Findings of Fact & Conclusions of Law

- ◆Expedites issuance of order
- ◆Reduces internal preparation time
- ◆Minimizes negotiation of facts with facility
- ◆Shorter document



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R5: Slide 13. The advantages of the streamlined Findings of Fact are:
Expedites issuance of order
Reduces internal prep time;
Minimizes negotiation time;
And results in a shorter document.

Traditional Penalty Section

- ◆ Contains several non-compliance categories with a range of associated penalties



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R3: Slide 14. We used to have several paragraphs that tried to address every condition. For each category there were specified amount of dollars for failure to meet the obligation and then additional penalties added for each day where the facility failed to meet that obligation. There was another paragraph which added additional fines for non-compliance after notification for EPA. And then there was a catch-all paragraph to address any items not fitting in a category. This format led to a lot of points of negotiation.

We now have it down to three categories.

Streamlined Penalty Section Region 3

- ◆ Failure to commence, perform, or complete work
- ◆ Failure to comply with the provisions of the Order after receipt of notice of non-compliance from EPA
- ◆ Failure to submit any other deliverables required by the Order



P-15

R3: Slide15. Now our penalty section looks like this with specified amounts for each category.

Streamlined Penalty Section Region 5

- ◆ Formal review & approval is limited to major deliverables
- ◆ Focus is on timeliness

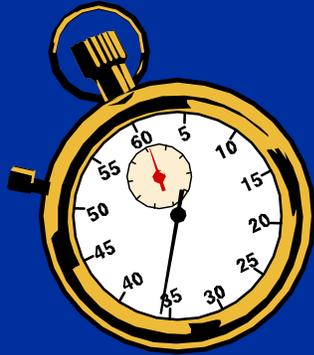


P-16

R5: Slide 16. Our streamlined order reduces the number of deliverables that require EPA review, comment and approval. Many of the submissions lead to technical discussions rather than to a review and approval process. Therefore, the number of potential triggers for penalties is smaller. The penalties are attached only to crucial documents/decision points: current conditions report, EI demonstrations, corrective measures proposal, implementing corrective measures on schedule, and submitting completion report on schedule. Only the EI demonstrations, corrective measures proposal and remedial implementation are linked to EPA's judgment on adequacy of the document as well as timeliness.

Advantages to Streamlined Penalty Section

- ◆ Reduces negotiation time with facility



P-17

R5: Slide 17. As with the findings of fact and conclusions of law, the penalty provisions could chew up a lot of negotiation time. That delay is now minimized.

Traditional Administrative Record for Consent Orders

- ◆ Prepared for all Consent Orders per guidance
- ◆ Records were paginated
- ◆ Significant time and cost for EPA preparation



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R5: Slide 18. Administrative Records were prepared for all corrective action orders per guidance and per 40 CFR 24.03, they were indexed and paginated, and they took a significant amount of time and money, if EPA contracted out the work.

Streamlined Administrative Record for Consent Orders

- ◆ File available from Project Manager
- ◆ Fact Sheets available on the web



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R5: Slide 19. There is always an administrative record for an EPA decision. It consists of the documents that EPA relied on in making the decision. Formally compiling the record at the time of the order serves 2 main purposes:

- They are there to support the order if the facility does not consent to the order; and
- They are there to provide the public with information

Since the Streamlined orders are issued only on consent, the need for a formal administrative record is greatly reduced; and to assist in public access to the information about facilities R3 and R5 have fact sheets which describe conditions and provide contacts for more information. The Regions have therefore read the regulatory language broadly and will just make reference to the fact that the record is available on request.

Advantages to Streamlined Administrative Record

- ◆ Speeds up order issuance
- ◆ Reduces cost
- ◆ Administrative burden



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R5: Slide 20. This approach to the administrative record saves a substantial amount of time and effort.

Traditional Scopes of Work

- ◆ Provides a framework for site specific workplans for RFI, CMS, & Interim Measures
- ◆ Rarely negotiated
- ◆ Are attached to the Order
- ◆ Require strict adherence to all provisions



P-21

R3: Slide 21. The traditional scopes of work provide a framework for the development of site specific workplans implemented during corrective action. They are typically not negotiated. Historically these scopes of work resulted in about 50 pages being attached to the order and the agency would require fairly strict adherence to all of their provisions.

Streamlined Scopes of Work Region 3

- ◆ Scopes have been streamlined; less detailed
- ◆ Utilized as guidance, not as a requirement
- ◆ Not attached to Orders; placed on the web
- ◆ Relevant guidance also referenced to web



P-22

R3: Slide 22. As part of reforms Region 3 streamlined the scopes of work to reduce duplicative steps and highlight the environmental indicators.

Then as part of the streamlined order we modified the language in the body of the order from "... work will be performed in accordance with at a minimum the SOWs and relevant guidance" to "...work will be performed as appropriate and in accordance with the SOW and relevant guidance." As implementers the program had evolved and in practical terms we were using the SOW as guidance and the order needed to reflect that.

We also removed the SOWs as an attachment and placed them on the web. This removed them as a negotiable item.

In addition we used to have a section which listed relevant guidance. Now we reference the web as the location to look for relevant guidance.

Streamlined Scopes of Work Region 5

- ◆ Reference to the models
- ◆ Utilized as guidance, not as a requirement
- ◆ Facility is responsible for identifying relevant guidance in communication with EPA



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R5: Slide 23. Similarly, the lengthy model SOW is not attached to the order. The order requires the facility to perform the work consistent with model and with the relevant guidance. The broad language essentially places the burden on the facility to identify the relevant standards and guidances, and to communicate closely with EPA along the way.

Advantages to Streamlined Scopes of Work

- ◆ Eliminates protracted negotiations with Facility
- ◆ Eliminates discussion about relevance of guidance
- ◆ Shorter, less threatening document



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R3: Slide 24. In common to both regional approaches is the fact that:
Protracted negotiations are eliminated
Discussions about which guidance needs to be included or excluded
and which are relevant are eliminated
You have a shorter, less threatening document

Traditional Implementation

- ◆ Facility submits a workplan
- ◆ EPA provides written comments
- ◆ After 30 days facility resubmits workplan
- ◆ EPA provides more comments
- ◆ After 30 days facility resubmits workplan
- ◆ EPA provides more comments
- ◆ After 30 days facility resubmits workplan
- ◆ EPA provides more comments
- ◆ After 30 days facility resubmits workplan
- ◆ EPA provides more comments



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R3: Slide 25. Prior to Reforms, a facility might submit a document, wait for formal EPA response, resubmit the document and then respond to a shorter list of comments. Often there would still be some lingering issues so the facility would respond again, and EPA would review the document again. Then, maybe because the facility did not exactly understand EPA's objectives, their response was not acceptable, so EPA would comment back and the facility would respond again and so on and so on.....

Streamlining Implementation Region 3

- ◆ Frequent communication and expanded use of e-mail
- ◆ Data tables in lieu of standard reports
- ◆ Field screening methods for data collection
- ◆ EPA sampling to fill data gaps
- ◆ Tailored oversight
- ◆ Early discussion of potential remedies
- ◆ Encourage use of Interim Measures
- ◆ Focused CMS studies



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R3: Slide 26. Since reforms we taken several steps to minimize the transfer of paper back and forth; These include....

and we are utilizing this approach, at all corrective action sites, independent of the mechanism utilized to implement corrective action. Obviously, some facilities still need the more formal approach, but even then we have found that the more we meet and discuss objectives the more quickly corrective action is implemented.

Streamlining Implementation Region 5

- ◆ Reduced deliverables
- ◆ Increased responsibility on the facility
- ◆ Frequent communication & expanded use of e-mail
- ◆ Early discussion of potential remedies
- ◆ Encourage use of Interim Measures
- ◆ From investigation to completion



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R5: Slide 27. As we've touched on previously, the Region 5 approach is focused on the facility identifying and achieving acceptable cleanup objectives rather than on process and formal review and comment. The rationale behind this approach is that by now facilities, contractors and EPA have enough experience with RCRA corrective action to know each others' expectations. This allows the parties to trust each other more and forego the rigid command and control approach at each step of the way.

Formal review and approval is limited to a small subset of the documents. This approach relies on communications (both formal and informal) between facility and EPA project managers to raise and resolve technical issues. In exchange for increased flexibility and reduced transaction costs, the facility agrees to complete corrective action on an expedited schedule. The facility is also taking the risk that at the end of the day it will have satisfied EPA's requirements.

Advantages of Streamlining Implementation

- ◆ Quicker cleanups
- ◆ More efficient use of resources



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R3: Slide 28. With the enhanced communication and putting more responsibility on the facility, the cleanups are happening more quickly and both EPA and the facility are more efficiently utilizing their resources.

Streamlined Order Examples

Region 3

Reforms

www.epa.gov/reg3wcmd/ca/pgm_reforms.htm

On-line Resources

www.epa.gov/reg3wcmd/ca/ca_resources.htm

Region 5

Corrective Action

www.epa.gov/reg5rcra/wptdiv/cars/index.html



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R3: Slide 29. In summary, both Region 3 and Region 5 are having great success using streamlined orders. If you'd like to see examples of how we streamline corrective action orders, you should go to our websites. For Region 3 I have included our Reforms page which contains two Streamlined Order examples and our On-line Resource page which includes our Scopes of Work, a broad list of guidance and helpful links.

Also you can find Region 5's streamlined order on their CA website.

Questions?

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R3: Slide 30. Now we can field questions and this is also a good time for other regions/states can share their streamlined approaches.

If you have specific question you want to discuss off-line, feel free to contact Tom or me.