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OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

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MEMORANDUM

SUBJECT: Post Construction Completion Considerations in Superfund State Contracts

FROM: James E. Woolford, Director *James E. Woolford*
Office of Superfund Remediation and Technology Innovation

TO: Superfund National Policy Managers, Regions 1 - 10

Purpose

This memorandum recommends that Regions consider certain Post Construction Completion (PCC) activities, including Operation and Maintenance (O&M), Long Term Response Actions (LTRA), and Institutional Controls (ICs), when drafting a Superfund State Contract (SSC).¹

The Environmental Protection Agency's (EPA) 2004 internal review, "Superfund: Building on the Past, Looking to the Future" (120-Day Study), recommended that the Agency offer new direction for preparing SSCs. In addition, on October 12, 2005, EPA issued its "Final National Strategy to Manage Post Construction Completion Activities at Superfund Sites" (PCC Strategy), which, among other things, recommended taking steps to more effectively evaluate PCC considerations when preparing an SSC. This memorandum is designed to carry out these recommendations in light of the May 2007, revisions to 40 CFR, Part 35, Subpart O, which covers Cooperative Agreements and Superfund State Contracts for Superfund Response Action.²

¹ This document provides guidance to EPA Regions concerning how the Agency intends to exercise its discretion in considering certain activities when drafting an SSC. This guidance is designed to provide national policy on these issues. Some of the statutory provisions described in this document contain legally binding requirements. However, this document does not substitute for those provisions or regulations, nor is it a regulation itself. Thus, it cannot impose legally binding requirements on EPA, states, or the regulated community, and may not apply to a particular situation based upon the circumstances. Any decisions regarding a particular situation will be made based on the statutes and regulations, and EPA decision-makers retain the discretion to adopt approaches on a case-by-case basis that differ from this guidance where appropriate.

² Attachment 1 provides a list of some key provisions in this regulation that relate to SSCs. Attachment 2 summarizes some of the key revisions to this regulation that were made in 2007. The Web page for the revised rule is <http://www.epa.gov/fedrgstr/EPA-GENERAL/2007/May/Day-02/g7990.htm>.

Background

The Subpart O regulation states that:

A Superfund State Contract (SSC) with a State is required before EPA can obligate or expend funds for a [Fund-financed] remedial action at a site within the State and before EPA or a political subdivision can conduct the [Fund-financed] remedial action. An SSC also ensures State or Indian Tribe involvement consistent with CERCLA sections 121(f) and 126, respectively, and obtains the required section 104 assurances (*See* § 35.6105(b)). An SSC may also be used to document the roles and responsibilities of a State, Indian Tribe, and political subdivision during any response action at a site. A political subdivision may be a signatory to the SSC.³

This memorandum provides some additional considerations the Region should evaluate when negotiating and drafting a SSC. We recommend that the Region's Superfund program consult with its Office of Regional Counsel, as appropriate, when drafting an SSC to ensure that the SSC meets CERCLA⁴, the NCP,⁵ and Subpart O requirements.

Implementation

When negotiating and drafting an SSC, it may be appropriate to include detailed provisions addressing PCC activities⁶ and assurances to better ensure management of sites over the long term.⁷

*Operation and Maintenance*⁸

Adequately addressing O&M issues throughout the life of a Superfund remedy can be critical to assuring the protectiveness of the remedy. Remedies that involve O&M generally include actions that may require statutory or policy five-year reviews (e.g., landfill caps; gas collection systems; ground water containment; ground and surface water restoration remedies, including monitored natural attenuation). For Fund-financed remedies, CERCLA section 104(c)(3) requires states to pay for or assure payment of all future O&M costs. Prior to initiating a Fund-financed remedial action, the state provides its assurance, in accordance with CERCLA section 104(c)(3)(A), to assume responsibility for O&M of the implemented remedial actions for the expected life of such actions. A state's O&M responsibilities generally should be designed to ensure that the remedy remains protective of human health and the environment and may include the repair and replacement of all damaged, worn and obsolete equipment and structures. These

³ See 40 CFR § 35.6800.

⁴ Comprehensive Environmental, Response, Compensation and Liability Act (CERCLA).

⁵ National Oil and Hazardous Substances Pollution Contingency Plan (NCP) 40 CFR part 300.

⁶ When including PCC considerations in an SSC, ensure that the provisions reflect and are consistent with the relevant guidance for the specific PCC activities. The PCC policies referenced in this document can be found at Web page <http://www.epa.gov/superfund/cleanup/postconstruction/index.htm>.

⁷ This guidance may also be used, as appropriate, when developing a state-lead remedial cooperative agreement.

⁸ For a complete description of the O&M planning and implementation process in Superfund, see OSWER Directive 9200.1-37FS, "Operation and Maintenance in the Superfund Program," (May 2001), which is located at Web page <http://www.epa.gov/superfund/policy/pdfs/sheet.pdf>.

O&M assurances should be incorporated in the SSC⁹, along with the other CERCLA assurances, as appropriate, under CERCLA sections 104(c)(3), 104(c)(9) and 104(j). EPA can monitor the state's compliance with its assurance to provide all future O&M, as required by CERCLA section 104(c)(3) and addressed in 40 CFR 300.510(c)(1) of the NCP.¹⁰

After the remedy is selected in the Record of Decision, detailed planning for O&M should begin. Typically, this detailed planning process starts during the Superfund remedial design phase and continues through the development of the draft O&M plan. The O&M plan defines the administrative, financial, and technical requirements for inspecting, operating, and maintaining the remedial action, including institutional controls.¹¹ The O&M plan should be continuously updated throughout the life of the project to reflect the actual remedial and O&M activities occurring on site. In addition to the O&M assurances, the SSC should also define the process and expectations for the joint state/EPA inspection¹² and the determination that the remedy is operational and functional (O&F). A well-documented O&F determination and a detailed O&M plan will help ensure the proper transition of responsibility for O&M of Fund-lead remedies from EPA to the state. We encourage the Remedial Project Managers to consult with their state counterparts throughout the development of the O&M plan and recommend that a copy of the draft O&M plan be provided to the state when the SSC is signed.¹³

Long-Term Response Action

The NCP states that:

For Fund-financed remedial actions involving treatment or other measures to restore ground-or surface-water quality to a level that assures protection of human health and the environment, the operation of such treatment or other measures for a period of up to 10 years after the remedy becomes operational and functional will be considered part of the remedial action.¹⁴

Under the NCP, the ten-year period between the O&F determination and the start of O&M generally is a long-term response action (LTRA), and federal funding is still provided as it was for the remedial action. If a remedy includes ground or surface water restoration measures, the SSC should clearly demonstrate agreement between EPA and the state that an LTRA phase, not to exceed ten years, will begin upon O&F. The SSC should define the process and expectations for transfer of the remedy from EPA to the state for O&M upon completion of the

⁹ See 40 CFR § 35.6805(i).

¹⁰ See 40 CFR § 35.6820(b).

¹¹ See Web page <http://www.epa.gov/superfund/policy/pdfs/sheet.pdf> for OSWER Directive 9200.1-37FS, "Operation and Maintenance in the Superfund Program," (May 2001). See page 7 for information concerning the O&M plan.

¹² See 40 CFR § 35.6805(q).

¹³ We recommend not incorporating the draft O&M plan by reference or as an attachment to the SSC; otherwise, you will be required to resign the SSC every time the O&M plan is updated.

¹⁴ See 40 CFR § 300.435(f)(3).

LTRA phase. The Region should review OSWER directives for practical information regarding transfer of the remedy from the LTRA phase to the O&M phase.¹⁵

*Institutional Controls*¹⁶

Institutional controls (ICs) are often integral components of remedies. We recommend including a discussion of the role of ICs at a site in the relevant sections of an SSC, including the Statement of Work (SOW), the Project Schedule, and as part of the CERCLA assurances. The discussion of ICs should also be part of the O&M plan.

We recommend that the discussion of ICs in the SOW be as specific as practicable. That discussion should include a description of ICs planned to be implemented, as well as a description of the specific instruments, objectives, responsible entities, estimated costs, and performance standards that may be involved. The discussion of ICs in the Project Schedule should include milestones for implementing the ICs. Finally, ICs should be discussed under the CERCLA assurances section of the SSC.

Conclusion

The recommendations provided in this document should be considered when drafting all future SSCs. Remember that it is good practice to begin planning for considerations such as PCC activities at the earliest practicable time, especially when drafting an SSC. If you have any questions regarding this guidance, please contact Angelo Carasea at (703) 603-8828.

Copies of this document are available on our Web site:
http://www.epa.gov/superfund/cleanup/postconstruction/ssc_guidance.pdf.

Attachments

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¹⁵ See Web page <http://www.epa.gov/superfund/cleanup/postconstruction/ltrafactsheet.pdf> for OSWER Directive 9355.0-81FS, "Transfer of Long-Term Response Actions (LTRA) to States," (July 2003). See Web page http://www.epa.gov/superfund/cleanup/postconstruction/ltra_recalc.pdf for OSWER Directive 9355.0-109, "Policy on Recalculating the Long-Term Response Action (LTRA) Ten-Year Time Period," (June 9, 2006). See Web page <http://www.epa.gov/superfund/cleanup/postconstruction/omrepairs.pdf> for OSWER Directive OSWER 9375.2-12, "Directive on Paying for Remedy Repairs or Modifications during the State-Funded Period of Operation and Maintenance (O&M)," (April 2007).

¹⁶ See Institutional Controls guidance documents at Web page <http://www.epa.gov/superfund/policy/ic/guide/index.htm>.

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Attachment 1

Below is the list of required SSC provisions found in Subpart O, including the contents of an SSC, administrative requirements, and conclusion of an SSC. See the applicable Subpart O regulations for details, explanations and requirements.

40 CFR §35.6805 – Contents of an SSC

- a) General authorities
- b) Purpose of the SSC
- c) Negation of agency relationship between the signatories
- d) Site description
- e) Site-specific Statement of Work
- f) Statement of intention to follow EPA policy and guidance
- g) Project schedule
- h) Statement designating a primary contact for each party to the contract
- i) CERCLA assurances
 - 1. Operation and maintenance
 - 2. Twenty-year waste capacity
 - 3. Off-site storage, treatment, or disposal
 - 4. Real property acquisition
 - 5. State cost share
- j) Cost share conditions
 - 1. Estimate of response action cost that requires cost share
 - 2. Basis for arriving at this figure
 - 3. Payment schedule
- k) Reconciliation provision
- l) Amendability of the SSC
 - 1. Formal amendments requirements
 - 2. Changes to the SSC requirements
- m) List of support agency cooperative agreements
- n) Litigation
- o) Sanctions for failure to comply with SSC terms
- p) Site access
- q) Final inspection of remedy -- The SSC must include a statement that following completion of the remedial action, the state and EPA shall jointly inspect the project to determine that the remedy is functioning properly and is performing as designed. (operational and functional)
- r) Exclusion of third-party benefits
- s) Any other provision deemed necessary by all parties
- t) State review
- u) Responsible party activities
- v) Out-of-state or out-of-an-Indian-Tribal-area-of-Indian-country transfers of CERCLA waste

40 CFR §35.6815 – Administrative requirements

- a) Financial administration
 - 1. Payment
 - 2. Collection of amounts due
 - 3. Failure to comply with negotiated payment terms
- b) Personal property
 - 1. Fixed-in-place equipment
 - 2. Equipment that is an integral part of services to individuals
- c) Reports
 - 1. EPA-lead
 - 2. Political subdivision-lead
- d) Records

40 CFR §35.6820 – Conclusion of the SSC

[Includes requirements for concluding the SSC.]

Attachment 2

Revisions to Subpart O that affect SSCs

Although this memorandum focuses on PCC considerations in SSCs, EPA would like to take this opportunity to highlight some of the 2007 revisions to Subpart O that affect SSC requirements in a number of ways. Of special note:

- **Three-party SSC** – Under the revised regulation, the three-party SSC is optional rather than mandatory. (See §§ 35.6115 and 35.6800.)
- **Excess cash cost share contributions/over match** – The recipient may direct EPA to return the excess funds or use the over match at one site to meet the cost share obligations at another site. (See § 35.6285(d).)
- **Cost share under a support agency cooperative agreement** – The ten percent cost share requirement under a support agency cooperative agreement for remedial action support agency activities at EPA-lead sites was eliminated. Support agency activities are those activities conducted by the recipient to ensure its meaningful and substantial involvement. The activities described in section 121(f)(1) of CERCLA and in subpart F of the NCP, are eligible for funding under a support agency cooperative agreement. Participation in five-year reviews of the continuing protectiveness of a remedial action is also an eligible support agency activity. **Note:** The requirement under CERCLA section 104(c)(3)(C) that the state assure payment of ten percent of the cost of a Fund-finance remedial action before EPA can obligate or expend funds for a site remedial action remains **unchanged**. An SSC is required with a state for a Fund-financed remedial action within the state, when EPA or a political subdivision is the lead agency. (Section 35.6255 was deleted.)
- **Records retention** – Instead of microform, the revisions allow for an unalterable electronic format that is acceptable to EPA, produced in accordance with the Federal records requirements of 36 CFR parts 1220 through 1234, and meets EPA records management requirements. (See § 35.6705.)
- **Indian Tribes** – To reflect the reduced emphasis on jurisdiction and to make the regulation's language more precise, Subpart O was modified in several appropriate places to delete references to Tribal "jurisdiction" and refer instead to a Tribal area of Indian country. Additionally, Indian Tribes are not required to provide real property assurances. (See §§ 35.6110, 35.6120, 35.6205 and 35.6805.)
- **Operation and maintenance assurance** – The revisions clarify that operation and maintenance generally begins when EPA determines that the remedy is operational and functional or one year after the completion of physical construction, whichever is sooner. (See § 35.6805(i)(1).)
- **Final payment** – The revisions require that EPA shall invoice the state for its final payment. (See § 35.6805(j)(3).)
- **Final inspection of the remedy** – "The SSC must include a statement that following completion of the remedial action, the state and EPA shall jointly inspect the project to determine that the remedy is functioning properly and is performing as designed." (See § 35.6805(q).)

- **Conclusion of the SSC** – To help ensure long-term requirements for operation and maintenance and certain institutional controls remain in effect even after the SSC concludes, the revisions specify that EPA may monitor the signatory's compliance with assurances to provide all future operation and maintenance as required under CERCLA and the NCP. (See § 35.6820.)