

Model Superfund State Contract Provisions (OSWER Directive 9242.3-18)
Questions and Answers
As of 4/26/16

The following questions and answers regarding the Model Superfund State Contract (SSC) Provisions originated from discussions in 2015 between EPA and state participants who worked together to develop the provisions. These discussions were invaluable and helped EPA and the states understand each other's perspectives about SSCs. These questions address some of the issues that states and EPA face as they work out agreements to implement and fund remedial actions at NPL sites.

General Questions

1. How do these new Model SSC Provisions affect existing SSCs and amendments to existing SSCs?

There is no need to revise existing SSCs to incorporate the new Model SSC Provisions. However, if regions and states are amending provision(s) within an existing SSC, regions and states are strongly encouraged to use the applicable New Model Provision(s). If regions have a question about whether to use updated provision(s), they should consult with EPA's Office of Superfund Remediation and Technology Innovation's (OSRTI) SSC team.

2. What discretion is there to alter the Model SSC Provisions?

The introduction to the Model SSC Provisions states that the model provisions are for use in standard SSCs, and allows for alteration of the provisions as necessary. When appropriate, regions and states may alter these provisions to suit their agreements, and, pursuant to 40 CFR 35.6805(s), may add other provisions deemed necessary by all parties to facilitate the response activities. However, altered text must be in compliance with statutory and regulatory requirements, and may require EPA headquarters consultation. As new SSCs are under development, regional counterparts should generally reach out to HQ staff to determine whether and how to address unique circumstances.

3. Should definitions of terms be included in the SSC?

Most of the terms used in the Model SSC Provisions are not unique to SSCs, and definitions for them can be found in statutory or regulatory references. Terms that are already defined in statute or regulations may not be redefined in an SSC, however, EPA and the state may choose to add definitions to the SSC to address unique circumstances.

4. Why do the Model SSC Provisions refer to "response actions" and "remedial actions?" Are these terms interchangeable?

No, these terms are not interchangeable. References in the Model SSC Provisions to "response actions" and "remedial actions" are used to differentiate the scope of work being conducted under the SSC and the cost share amount owed by the state. At the large majority of NPL sites, where the site was not operated by the state or political subdivision, the state's cost share for the "remedial action" (and long-term response action (LTRA) for 10 years, if necessary), is 10 percent.

At a number of sites, where the site was operated by the state or political subdivision, CERCLA requires that the state provide 50 percent (or such greater share as EPA may determine appropriate, taking into account the degree of responsibility of the state or political subdivision for the release) of the cost of removal, remedial planning, remedial action, and LTRA, if any. The term “response action,” within the context of the SSC, refers to all of the activities for which a state may owe cost share under this scenario (see Model SSC Provision 16A).

5. Why do the Model SSC Provisions not cite the specific policies that must be adhered to under the terms of the SSC?

The Model SSC Provisions includes a “Statement of Intention to Follow EPA Policy and Guidance,” as required by the Subpart O regulation (40 CFR 35.6805(f)). Many of the policies associated with the selected remedy are already referred to in the Administrative Record. EPA and the state may agree to identify additional applicable policies in the SSC. An absence of a citation in the SSC does not relieve EPA or the state from the responsibility to implement applicable policies (See Model SSC Provision 8).

6. Are EPA and the state required to use their own authorities to obtain access to the site?

Yes. EPA and the state must make best efforts to secure their own separate access, for themselves, and their agents, representatives, and their contractors, to the site. In addition, EPA will use its best efforts to negotiate for continuous and transferable access rights and, upon transfer to the state, shall assign its access rights to the state. The inability of EPA or the state to obtain access necessary to implement the remedy may require an amendment to, or termination of, the SSC (See Model SSC Provision 18).

7. What types of reports are required under the Model SSC Provisions?

Subpart O (40 CFR 35.6815(c)(1)) requires an exchange of reports between EPA and the state, but does not specify their nature. The Model SSC Provisions allow EPA and the state to determine what information is most appropriate to exchange, including the detail and frequency with which the information will be shared (See Model SSC Provision 20).

Cost Share Assurances

8. Do the Model SSC Provisions take into consideration that a state’s funding is granted by the state legislative body, and therefore a state’s environmental agency cannot ‘assure’ funding will be provided by the state legislative body?

Yes, EPA recognizes that state agencies generally do not have authority to provide assurances of funding for resources that are appropriated by state legislatures. Many SSCs currently have language that address this concern with text that protects a state agency from making any financial assurance that would violate applicable state law. To avoid any conflicting statements regarding state agency assurances, the Model SSC Provisions require the state to “assure it will seek sufficient funding to pay its cost share.” This language, along with the state’s agreement to a payment schedule in the SSC, addresses the CERCLA §104(c)(3) cost share requirement that the state

provide “assurances deemed adequate by the President” before EPA provides remedial action (see Model SSC Provision 16B).

9. Are states required to cost share EPA’s intramural and indirect costs?

No. Subpart O (40 CFR 35.6805(j)(1)) explicitly excludes EPA’s indirect costs, which are those costs that cannot be directly attributable to a site, from the calculation of the remedial action cost estimate. EPA also excludes intramural costs from the calculation of the remedial action cost estimate as well. The term “intramural” is used in the 1990 Subpart O Preamble explanation of the cost share provision and is part of common parlance within EPA. Although payroll and travel costs are the most typical types of intramural costs, EPA prefers to retain the use of the broader term in the SSC provision to make clear to EPA staff the agency’s intention regarding cost shareable expenditures (see Model SSC Provision 17A).

Further, the 1990 preamble to §35.6805(j) “Cost-share conditions” provides additional clarification regarding State cost-share requirements. Historically, negotiations for state cost-share obligations sometimes included EPA’s own intramural costs as part of the total project cost to be shared by the state. However, as explained in the 1990 Subpart O preamble, it is not EPA’s intention that States share project costs to the same extent as potentially responsible parties (PRPs) (for whom the term “total project cost” means all costs incurred at the site, including EPA’s intramural costs). States are only required to cost-share those direct extramural costs incurred at the site (1990 Subpart O Preamble, 55 FR 23005).

10. What happens if either the state is unable to pay its cost share or EPA cannot fund the remedial action?

The inability of EPA and the state to come to agreement on an initial or revised payment schedule (for any reason) may be cause for EPA to suspend work and/or seek to terminate the SSC. EPA will seek to recoup any unpaid cost share from the state, including costs associated with suspension/termination. EPA considers stopping cleanup work to be an option of last resort, because of the resulting loss of efficiency, potential increased costs, and the increased duration of potential exposure to contamination. Because EPA typically will work closely with the state to avoid this situation, the model language text uses the term “may suspend...” to allow for unanticipated approaches that might enable implementation to continue. EPA’s unilateral agency action to suspend or seek to terminate work and/or recoup its costs would only take place if EPA and the state could not reach some alternative payment agreement and are unable to resolve their differences through the issue resolution process. The state is similarly not precluded from taking a unilateral position. However, such an action does not preclude further adjudication, and the SSC does not provide circumstances that would bind either party to a course of action that cannot be challenged through the judicial system.

The model language also provides text that considers the case in which EPA does not have sufficient funds to provide (or continue) a remedial action. The language explicitly provides the option to revise the payment schedule (or termination) to address state concerns that cost share payments may continue to be required even if EPA is no longer conducting construction work. EPA does not have authority to assure reimbursement to states for state expenditures incurred due to suspension or termination of work (see Model SSC Provision 16B).

11. Can EPA spend more than the cost estimate in the SSC without amending it?

No. EPA does not have statutory authority to incur expenditures without adequate state assurance of cost share. EPA believes it is in the best interest of the state and EPA to not incur expenditures that exceed the cost estimate without agreement by both parties to do so.

The model provision establishes a cost estimate ceiling and requires an SSC amendment whenever project costs exceed the cost estimate. Further, EPA has added provisions requiring periodic review of expenditures (whether for a 10% or 50% cost share agreement), which should give adequate opportunity to EPA and the state to amend the SSC in a timely manner. Additionally, the cost estimate should include a contingency amount that provides enough flexibility to allow EPA to continue incurring costs while working with the state to increase the SSC cost estimate and amend the SSC.

Cost Share Payments, Credit

12. What kind of flexibility in the payment schedule is available under the Model SSC Provisions?

The Subpart O regulation recognizes only two forms of cash payment of cost share: lump sum and incremental. Although many variations in payment schedules are possible, EPA believes payments will always fall into one of these two categories.

The bracketed instructions in the Model SSC Provisions recognize that individual states and regions may enter into unique payment schedules and does not attempt to limit these possibilities. The text accommodates payments in advance of or after EPA incurrence of costs, and explicitly allows for payments to be calendar, milestone, or expenditure based. Furthermore, the additional text (and example) also allows for EPA and the state to come to agreement on the appropriate supporting documentation for EPA billing (See Model SSC Provision 17G).

13. Will EPA charge interest if a state makes a payment late pursuant to the payment schedule outlined in the SSC?

Interest will accrue on payments that are past one year of the due date. Under the Cost Share provisions, there is ample opportunity for states to identify problems meeting payment schedules, and the SSC states EPA's willingness to consider payment schedule adjustments to address such problems. Further, EPA believes that the provision for periodic financial review reiterates the mutual responsibility of the state and EPA to manage the financial components of remedy implementation. EPA would expect that under a collaborative approach, the late payment provision would rarely, if ever, be invoked.

The interest provision is consistent with other EPA policies and regulations regarding debt collection. EPA believes it is appropriate and not unreasonable to preserve the continuity of this practice across its programs, but also as an incentive for states to obtain sufficient funding on a timely basis in order to meet the cost share requirements agreed upon in the contract's payment schedule (See Model SSC Provision 17G).

14. Can a state transfer excess credit to pay for state cost share from one site to another site?

CERCLA provides for states to use excess credit to reduce their cost share at other sites. One issue with this flexibility is how and when to determine “excess.” As indicated in Subpart O (35.6285(c)(3)), “The State must first apply credit at the site at which it was earned.” However, this principle is still somewhat ambiguous as a matter of practice, and in order to provide additional clarity with regard to the state/EPA relationship, to identify a safe point at which “excess” may be determined, and to protect the interests of both parties with respect to payment of cost share, the Model SSC Provisions require that excess be determined at the time of final financial reconciliation.

At the time of final financial reconciliation, all work should be complete at the site, all invoices paid, and state cash/credit/in-kind service payments balanced against the cost share owed. Only at this time is it possible to know the true amount of excess that may be applied elsewhere. Periodic review can help identify when state work (that may be used as credit) is accumulating, which may affect the schedule of future cash payments by the state, pursuant to an SSC amendment. However, this review does not satisfy a state’s assurance to pay cost share, which only can be ultimately determined during financial reconciliation (see Model SSC Provisions 17F, 27).

EPA also recognizes that in certain situations, a state, with EPA’s approval, may do creditable work that is worth substantially more than the state’s 10% cost share. In such cases, in concert with obtaining a deviation from 40 CFR 35.6285(c)(3), EPA and the state may negotiate additional SSC provisions to transfer, before final financial reconciliation, a portion of the credit that is anticipated to be excess, while reserving a sufficient margin to assure that the cost share assurance at the site will be paid.

Cost Recovery

15. How is a state’s cost share affected by EPA’s recovery from potentially responsible parties (PRPs) for EPA’s costs in the Model SSC Provisions?

The Model SSC Provisions update and revise the 1990 SSC model clauses, which did not accurately delineate the distinctions between recoveries of past costs and EPA’s use of those recovered funds to conduct future remedial action work at the site (see Model SSC Provisions 17C, 30B).

When EPA uses special account funds recovered from PRPs to conduct *future remedial action* pursuant to the SSC, the state cost share will be reduced commensurately in accordance with the amount of special account funds used for the remedial action because work funded in this manner is not subject to cost share. While the percentage of the cost share owed does not change, the amount of state cost share declines because the amount of appropriated dollars that EPA uses to conduct the Fund-financed remedial action declines.

Unless otherwise specified in a settlement (or judgment), EPA only has the authority to recover its own costs. EPA cannot settle a state’s claims against a PRP, and any settlement for past costs that EPA enters into, to which the state is not a party, only provides for recovery of EPA’s expenditures of appropriated funds. EPA and the state do not have the authority to recover costs on each other’s behalf and such authority is expressly prohibited in provision 30B of the Model Provisions. In order to be reimbursed any cost share payments it may have made to EPA, a state must be a party to a

settlement with a PRP. The Model SSC Provisions are intended to protect EPA and the state from compromising either party's current or future claims against a PRP.

EPA encourages states to join in settlements to obtain recoveries of their own past costs, including their past cost share payments to EPA, and the Model SSC Provisions include text regarding EPA and state collaboration in pursuing cost recovery (see Model SSC Provisions 30A, 30B).

Institutional Controls, Operational and Functional, Operations and Maintenance

16. How are institutional controls (ICs) addressed in the SSC?

ICs are briefly described in the Statement of Work that is attached to the SSC. ICs are further described in the draft Institutional Control Implementation and Assurance Plan (ICIAP) or draft Operation and Maintenance (O&M) Plan. The document used depends on the complexity of the ICs. These plans are described in Provision 11 of the Model SSC Provisions and are developed as part of the remedial design and remedial action. State assurance to maintain and enforce ICs is also described in Provision 11.

17. Are institutional controls (ICs) part of the operational and functional (O&F) determination?

No. ICs are non-engineered instruments, such as administrative and legal controls. Their implementation is on a separate path using a different approach than the constructed remedial action.

A construction contractor constructs the remedial action but does not implement the ICs. For the O&F determination, the NCP and EPA guidance refer to "construction is complete" and the "construction contractor makes minor adjustments." This terminology, along with the state/EPA joint pre-final inspection and state/EPA final inspection of the constructed remedial action, indicate that the O&F determination is for the constructed remedial action only (see Model SSC Provisions 23, 24). By the time the constructed remedial action is O&F, EPA, through others, may have already implemented the ICs or may implement the ICs later.

Issue Resolution, Amendments, Termination

18. What is the issue resolution process specified in the Model SSC Provisions?

The Issue Resolution process expresses the preference to resolve disputes at the lowest organizational levels and allows for increasing escalation among the management chain. The process recognizes that each respective agency head will determine its own final agency action, but that either party may pursue other available adjudication options if mutual agreement between the agencies cannot be reached (see Model SSC Provision 20).

19. Under the Model SSC Provisions, when is an SSC amendment needed? When is an amendment not needed?

SSC amendments are necessary to document changes in the status of the agreement between EPA and the state in regard to the implementation of the remedy. Amendments protect both parties by setting expectations and for documenting mutual understanding of terms. The Model SSC

Provisions generally require SSC amendments in the circumstances identified in the bulleted list below. Amendments that affect the site-specific Statement of Work (SOW) or the remedial cost estimate under the SSC must include an updated SOW reflecting these changes. All amendments to the SSC must be agreed to, in writing, by the signatories. However, SSCs amendments are not required for minor modifications to the agreement, and the Model SSC Provisions allow for EPA and the state to mutually determine whether or not certain changes should be reflected in an SSC amendment (See Model SSC Provisions 10C, 17A, 17D, 17F, 28, 37). Situations when SSC amendments are needed, include, but are not limited to:

- Project costs exceed the remedial action cost estimate thus increasing the state's cost share
- Modifications alter the Statement of Work under the SSC
- Payment schedules are altered
- Credit is used to pay cost share (after initial SSC is signed)
- Changes in the selected remedy
- Administrative closure of the SSC
- Final SSC conclusion occurs
- Alterations affect the state's CERCLA assurances

20. Under what circumstances may an SSC be terminated and who may terminate it?

In certain cases, SSC termination may be required. The Model SSC Provisions do not explicitly identify circumstances that would preclude SSC termination, but do identify conditions that may warrant termination. Such conditions include, but are not limited to:

- inability to pay cost share or implement the remedy,
- inability to agree on revised payment schedule,
- inability to obtain access to implement the remedy, or
- PRPs or other entities take over the work.

In general, the parties will agree to enter into a written termination agreement, which establishes the effective date for the termination of the SSC and final financial reconciliation, including the amount and date of any sums due either party. If the parties cannot agree to enter into a termination agreement, they may engage in the process described in the Issue Resolution provision of the SSC (see Model SSC Provisions 16, 18, 35, 36).

Closing an SSC

21. What are the steps required to close an SSC?

There are two components associated with the closure of an SSC: Administrative Closure and Final SSC Conclusion. Administrative Closure refers to most activities associated with implementation of the SSC. These include satisfactory completion of the response activities under the SSC, final financial reconciliation (which includes payments of all costs and/or refunds), transfer of property, and assumption of responsibility for all future operations and maintenance (O&M). Administrative Closure must be documented through an amendment to the SSC.

An Administrative Closure does not close or terminate the SSC nor render the state's statutory O&M assurance invalid or unenforceable. EPA will continue to monitor, as warranted, compliance of the state's assurance to provide all future O&M.

Under the Model SSC Provisions, the SSC remains in effect until O&M is no longer required at the site, a PRP has taken over the O&M, or the SSC is terminated for other reasons. At this point, Final SSC Conclusion may take place, which must also be documented by a (final) amendment to the SSC.

The distinction between Administrative Closure and Final SSC Conclusion enables both EPA and the state to come to final terms with respect to implementation and cost of construction (and Long Term Response Action), but preserves the status of the SSC as an active agreement to protect both parties with respect to O&M implementation (see Model SSC Provision 37).

22. Is there an established timeframe by which EPA must conduct final financial reconciliation?

EPA believes that states should receive the benefit of reconciliation documentation as soon as possible so that they may adequately plan to make final cost share payments (or apply credit to another site or receive reimbursement of overmatch). However, because of potentially lengthy EPA contract closeout procedures, including contract audits, a final financial reconciliation of the SSC may not be possible for several years. EPA will provide interim reconciliation documentation to the state within one year of the O&F determination or completion of the LTRA, if applicable (see Model SSC Provision 27).