UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MAR 29 1993

OERR DIRECTIVE 9375.7-01

MEMORANDUM

SUBJECT: Ensuring the Adequacy of Cost Share Provisions in Superfund State Contracts

FROM: Henry L. Longest II, Director
Office of Emergency and Remedial Response

TO: Director, Waste Management Division
Regions I, IV, V, VII
Director, Emergency and Remedial Response Division
Region II
Director, Hazardous Waste Management Division
Region III, VI, VIII, IX
Director, Hazardous Waste Division
Region X
Director, Environmental Services Division
Regions I, VI, VII, X

PURPOSE

This memorandum requests Regional Offices to re-examine existing Superfund State Contracts (SSCs) for Fund-financed remedial actions to verify that they adequately reflect incurred and projected remedial action costs. Specifically, you should evaluate the adequacy of State cost share assurances with respect to change orders or other likely additional costs. Furthermore, you should also re-evaluate your tracking systems for remedial action costs to assure that they provide timely site-specific expenditure information which allows you to amend SSCs before cost share provisions become inadequate.

BACKGROUND

Regional Offices have recently sought Headquarters assistance in at least two instances where EPA-lead remedial action costs were exceeding the amounts provided in the corresponding SSCs. Such excess expenditures may constitute breaches of the SSCs and may represent violations of existing statutes and regulations which, in turn, could prevent EPA from continuing remedial action at a site. Avoidance of these

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problems is especially important in light of the Administrator's concern that the Agency manage Federal resources well, as expressed in her recent testimony before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce (copy attached).

Section 104(c)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), prohibits EPA from "provid[ing] any [Fund-financed] remedial actions" unless the State "first enters into a contract or cooperative agreement" with the Agency in which the State makes certain, specified assurances. Section 300.510(a) of the National Contingency Plan provides that a fund-financed remedial action undertaken pursuant to CERCLA Section 104(a) cannot proceed unless a State provides its applicable, required assurances. Section 35.6800(a) of Subpart O further clarifies that an SSC "is required before EPA can obligate or transfer funds for an EPA-lead remedial action." Thus, EPA is precluded from initiating an EPA-lead, Fund-financed remedial action until a valid SSC is in place containing the necessary assurances.

This memorandum concerns the assurance that a State will share in the cost of the remedial action. The SSC contains the remedial action cost estimate, as well as the State's cost share percentage/amount (among other assurances), and governs the amount of funds the State is obligated to pay. **Once all of the funds identified in the SSC are obligated, EPA must not obligate more funds until the SSC has been amended.** Any expenditure by EPA in excess of the estimated cost would be beyond the terms of the SSC, and the State may not be contractually bound to share in paying the additional cost. Without having the adequate cost share provision in the SSC, EPA may have to interrupt an ongoing cleanup and may also be in violation of CERCLA for conducting remedial action without having a valid SSC.

In contrast, where EPA and the State have entered into a State-lead, site-specific, cooperative agreement, such potential problems do not exist. Under a cooperative agreement, the State pays for the remedial action and EPA reimburses the State for only the Federal portion of eligible costs. However, at an EPA-lead site, where the Agency and the State enter into an SSC, EPA pays for the remedial action, and the State subsequently pays EPA its share of the cost.

Whether due to change orders or other factors, the SSC's estimated project costs will sometimes prove to be too low. Regional Offices have also reported that the length of time States require to secure all required approvals for revision to an SSC varies greatly, with some States needing as long as six months. Because of the difficulty in accurately estimating project costs and the time required to negotiate a revised SSC, **Regional Offices must anticipate the need and begin the process for negotiating SSC revisions as soon as it becomes clear that the State cost share amount will be exceeded.**

IMPLEMENTATION

Regional Offices should take one immediate and one future action to ensure that cost share assurances in SSCs are, and continue to be, adequate:

Immediate. Review cost share assurances in SSCs for all ongoing remedial actions to verify that current and projected contract obligations (including contingencies) are within the amounts specified in the SSCs.

Future. Evaluate tracking systems to ensure that they have: 1) effective monitoring of actual, planned, and projected estimates of remedial action costs against the State cost share specified in each site's SSC; and 2) effective early-warning mechanisms to enable initiation of timely negotiations of any SSC revisions necessary to conduct uninterrupted cleanups. (You may wish to consult with your policy and management office to assure the effectiveness of your tracking systems.)

Your knowledge of, and experience with, your States' SSC approval processes will dictate how far ahead SSC revision negotiations should begin. To allow greater flexibility than earlier SSCs had, most SSCs now include a reasonable cost contingency provision to accommodate change orders during the construction process. The use of contingency amounts must be closely monitored, but it may help provide a buffer to allow time for any necessary negotiations for SSC revisions to take place.

Please refer any questions on this memorandum to Murray Newton, Chief of the State and Local Coordination Branch, Hazardous Site Control Division (Mail Code 5203G), or Carolyn Offutt, Chief of the State Involvement Section. Both may be reached at 703/603-8840 (voice) or 703/603-9100 (facsimile).

Attachment

cc: Regional Removal Managers
Regional Waste Management Branch Chiefs switch
Regional Counsels
Earl Salo, OGC (LE-132S)
Steven Pressman, OGC (LE-132G)
William Cooke, FMD (PM-226F)

add ARA's for management

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