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

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

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MEMORANDUM

SUBJECT: Elevating Site-Specific Superfund Five-Year Review Protectiveness Determination Issues between the Office of Superfund Remediation and Technology Innovation and Regional Superfund Program Offices.

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

TO: National Superfund Program Managers, Region 1-10

PURPOSE

A recent audit by the Office of the Inspector General (OIG) highlighted that the Superfund program could benefit by establishing a process by which Five-Year Review (FYR) protectiveness determination disagreements between the Office of Superfund Remediation and Technology Innovation (OSRTI) and the Regional Superfund Program Offices could be identified, discussed and addressed. Specifically, the OIG recommended that in instances where the OSRTI program office recommended a protectiveness determination of "not protective" or "deferred" and regional staff disagreed with OSRTI's recommendation that a formal issue elevation and resolution process be established.

BACKGROUND

The purpose of a five-year review is to evaluate the implementation and performance of a remedy in order to determine if the remedy is or will be protective of human health and the environment. Protectiveness is generally defined in the National Contingency Plan (NCP) by the risk range for carcinogens and the hazard index (HI) for non-cancer effects. Evaluation of the remedy and the determination of protectiveness should be based on and sufficiently supported by data and observations.

To continue to strengthen national consistency in protectiveness determinations during the FYR process and to resolve substantive differences in interpretation, the process described in this memorandum encourages opportunities for early and open discussions of site-specific protectiveness disagreements between OSRTI and the regions and provides a framework by which those issues can be resolved.

IMPLEMENTATION

Issue Elevation and Resolution

Typically, for non-Federal Facility FYRs reviewed by OSRTI, the Remedial Project Manager (RPM) submits the draft FYR report to the Construction and Post Construction Management Branch (CPCMB) for review. The CPCMB reviewer has up to 10 business days to review the draft report and provide written comments to the RPM.

In some instances, the CPCMB reviewer may find that the protectiveness determination in the draft FYR report is not sufficiently supported by the text of the report or appears to be inconsistent with national policy. In these cases, the CPCMB reviewer will contact the RPM via email and may suggest a protectiveness finding of "not protective" or "deferred." In the email, the RPM will be requested to provide a written response to the CPCMB reviewer within ten (10) business days as to whether they agree or disagree with the reviewer's suggested protectiveness recommendation. If the RPM agrees with the CPCMB reviewer's protectiveness recommendation, the RPM's written response will be saved as an electronic file in CPCMB's five-year review share directory.

If the RPM disagrees with the CPCMB reviewer's protectiveness recommendation, the RPM's written response should include sufficient information (e.g., additional site data/information) to more fully support the region's protectiveness determination. The RPM is encouraged to discuss with the CPCMB reviewer the type of information that would be sufficient to support the region's protectiveness determination prior to sending their response. The CPCMB reviewer will respond to the RPM's written response via email within five (5) business days. If the CPCMB reviewer agrees with the RPM's written response, the response will be saved as an electronic file in CPCMB's five-year review share directory.

If the CPCMB reviewer disagrees that the RPM's written response fully supports the region's protectiveness determination, the CPCMB reviewer will initiate a follow-on conversation with the RPM and his/her immediate supervisor in an attempt to resolve the disagreement. If the disagreement concerning the protectiveness determination is resolved at the staff level, the CPCMB reviewer will document the resolution of the issue in writing and save a copy with the HQ comments as an electronic file in CPCMB's five-year review share directory.

However, there may be occasions where disagreements on the protectiveness determination in the draft FYR cannot be resolved at the staff level. In these instances, the issue will be elevated, within two (2) business days, to the branch chief for CPCMB and the branch chief in the region in an attempt to resolve the disagreement.

In the unlikely event that there is no resolution at the branch chief level, the issue will be elevated, within five (5) business days, to the Division Director of OSRTI's Assessment and Remediation Division and the Deputy Division Director in the region for final resolution. At each level, the CPCMB reviewer will document the resolution of the issue in writing and save a copy with the HQ comments as an electronic file in CPCMB's five-year review share directory.

Conclusion

Early issue identification, and when necessary, elevation and resolution are key to this process. In discussing FYR comments, CPCMB and regional staff should clarify which protectiveness issue(s) may need to be elevated. Resolution should include, where applicable, agreement on appropriate wording to adequately support the agreed to protectiveness determination.

In addition, OSRTI recognizes that the regions produce and CPCMB typically review over 200 draft FYRs per year and quick resolution to any disagreement regarding protectiveness is important to making this process work. Therefore, one year after implementation, CPCMB will evaluate how this process is working and make changes as appropriate.

If you have any questions about this approach, please contact David Cooper at (703) 603-8763 or at cooper.davide@epa.gov.

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