

Appendix D: SMC Issue Discussion Summaries

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SMC Issue Discussion Summaries

The SMC held four meetings and several conference calls to provide executive input during the course of the Enhanced State and Tribal Role in Superfund Initiative. Below is a summary of the discussions that helped frame the approach taken on several issues by the LIT and the four workgroups—Readiness, Assistance, Agreements, and Tribal.

What Is the Planning Context of this Initiative?

Characterizing the planning context of the initiative was the primary topic of discussion during the initial SMC meeting in November 1996. The basic issue was whether the initiative should be undertaken within the context of the current CERCLA statutory and regulatory framework or whether it should anticipate statutory change that would provide for a greater role by states and tribes.

Several SMC members felt that the focus should be on the current law. They felt that because the current law was not considered to be a significant constraint to providing authority to states and tribes, the workgroups should design recommendations that could be implemented under the current law. Other SMC members, particularly state representatives, did not want to limit thinking and recommendations to the current legal framework. They felt that looking at the possibilities of a new law that would grant states and tribes a greater role in Superfund would prepare the program for future statutory scenarios. However, state representatives did not want their participation or support for this initiative to be misconstrued as a position on reauthorization.

The SMC reached consensus by deciding that the initiative should address both the present and the future statutory and regulatory framework. With concurrence from the Assistant Administrators of OSWER and OECA, the SMC instructed the LIT and workgroups to approach this effort with open minds, neither constrained by the current law/regulations or anticipating any specific future framework (delegation or authorization). In making recommendations, the LIT agreed to identify whether given recommendations could be accomplished at present, or whether a statutory or regulatory change would be required.

The Need for Flexibility

The need for flexibility was raised frequently and by nearly all SMC members. Flexibility is considered necessary because state and tribal programs and priorities change over time; each state and tribe has unique characteristics that will affect implementation, and the needs of each state and tribe are different. SMC members asked the workgroups to develop a flexible program structure that would accommodate changing state and tribal priorities and programs. SMC members also wanted to ensure that the workgroups take into account the individual nature of state budgets, legislation, organization, and site problems. However, state- and tribal-specific interests also need to be balanced with the need for broadly applicable criteria that states and tribes can be expected to meet. Ideally, a flexible framework that enables the maximum number of states and tribes to meet program criteria and produces consistent end-results should be established.

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Are There Basic Elements or Standard Principles for Response?

Consistent with the desire for flexibility, SMC members agreed that the federal interest should be focused on end-results. However, some standardized elements for Superfund responses and response programs would still be necessary. Specific elements of the program that should be considered to be included are:

- ◆ Community involvement;
- ◆ Protectiveness of remedies;
- ◆ Adequate staffing/expertise and resources;
- ◆ State approval and oversight of the response;
- ◆ Enforcement/compliance assurance authorities; and
- ◆ Liability and cost recovery provisions similar to CERCLA's, providing for enforcement "fairness," ensuring timely response actions, and verifying cleanup completion according to performance measures.

Because the development of capabilities is not dependent solely on the availability of resources, resource availability should not be used on its own as a program element for evaluating states and tribes. SMC members also agreed that when federal site-specific resources are involved, the requirements would need to be more specific. The SMC endorsed the Readiness Workgroup's plans to develop performance-based criteria for Superfund program elements.

What Is the Universe of Sites with a Federal Interest?

SMC members discussed what should be considered as the universe of sites where there should be federal involvement, and whether there are some sites where no federal involvement should occur. Under present law, the federal government must be involved in all NPL site responses and take the lead at federal removal action sites. EPA involvement is also possible for sites that are considered a high priority for NPL listing upon completion of a site inspection. However, there is no EPA involvement (beyond site assessment) in the majority of sites included in the CERCLIS inventory, and there is minimal or no EPA involvement in the broader universe of sites that are not in CERCLIS.

All SMC members agreed that low-risk sites with no unusual circumstances or community demand are not federal interest sites. However, consensus was not reached among SMC members on when federal interest would be appropriate at higher-risk sites. Many EPA members believed that sites with HRS scores that would qualify them for the NPL were a high enough risk to incur federal interest. In such cases, EPA's involvement would vary from reviewing the program to leading the response actions, depending on the state's or tribe's readiness and terms of program agreements. State members expressed concern that federal interest might result in independent EPA response and/or enforcement actions that could undermine state or tribal programs.

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How Does Federal Involvement in Response Vary?

During the January 1997 SMC meeting, members addressed how the level of federal involvement may vary depending on the type of site and the capability of the state or tribe. SMC members generally agreed that there should be an inverse relationship between the capability of a state or tribe and the level of EPA involvement. Also, the complexity of the site (from either a response or enforcement standpoint) may be an important variable.

Many members felt that while there is a federal interest in the highest-risk sites, the level of EPA involvement might vary significantly. For example, EPA may take the lead responsibility for higher-risk sites in state or tribal lands where the state or tribe has a low level of readiness. EPA's involvement may be minimal for high-risk sites when the state or tribe has a high level of readiness. An objective and collaborative assessment of a state's or tribe's readiness should be the basis for determining EPA involvement. EPA involvement may include:

- ◆ Requested assistance and program-level review for the states and tribes with the highest levels of readiness.
- ◆ Technical and managerial assistance, support agency site review/oversight, or direct EPA response and enforcement for states and tribes with less developed programs.

Comments from individual SMC members that highlight the vision of how federal involvement will vary include the following:

- ◆ Rather than putting in place abstract or generalized decisions or rules, it is preferred that EPA and states and tribes negotiate partnership agreements that provide for either EPA or the state or tribe to take the lead at given sites. These decisions would be reached by considering resources, capabilities, and the most efficient division of labor.
- ◆ States understand that EPA will have greater interest/involvement in sites perceived to have a higher risk. The framework for involvement must provide for a full range of options on a state-by-state, tribe-by-tribe, site-by-site basis, in the context of a dynamic situation.
- ◆ For the next several years, even in cases of the most highly capable states and tribes, it seems prudent to proceed under a division-of-labor model to address high-risk sites. This is in contrast to scenarios where (1) EPA disengages from all site-specific involvement, or (2) EPA continues to be involved in a detailed oversight mode with state- or tribal-lead responses.
- ◆ Site risks are a factor in deciding EPA's involvement, but other factors are also relevant; among these are cultural, social and economic factors and local community impacts and interests.
- ◆ Over time, as a state or tribe gains experience and demonstrates capability, EPA oversight and involvement should decrease.

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Who Determines Federal Involvement?

The SMC discussed how federal involvement will be determined and what control states and tribes will have over the extent of federal involvement. There was general agreement that the level of EPA involvement in a site should be determined by consultation and collaboration to reach mutual agreement with the state or tribe. If a state or tribe wants assistance, EPA should offer as much help as resources will permit to conduct responses. If a state or tribe requests to conduct a site's response or enforcement action independently, then EPA should limit its involvement as much as possible, unless it is apparent that human health and/or the environment will not be protected by the state's or tribe's actions. All SMC members agreed that while EPA must be able to act independently, its involvement in a state- or tribal-lead site could not be justified by professional difference of opinion about a site's response, but required when human health and/or the environment are not being protected or an imminent threat exists. However, there was no consensus about how to determine when EPA should become involved or fairly implement federal involvement.

What Models Are There for EPA-State and EPA-Tribal Interaction?

SMC members discussed current models for state-EPA interaction. These models include site-specific and multi-site CAs, Core Program CAs, VCP MOUs, and Superfund State MOAs. In 1996, regional Superfund policy managers proposed new program agreements that divided the universe of sites and provided States the opportunity to lead new responses. The proposed agreements also provided for EPA technical assistance and state reporting. A few agreements currently exist that were the result of this proposal.

SMC members favored broad, encompassing agreements between EPA and states or tribes that cover the full range of contaminated site cleanups. The SMC endorsed the Agreements Workgroup's plan to develop a proposed model program agreement with standardized components that could be customized to individual regional, state, or tribal needs.

Some members of the SMC also recommended using a collaborative process for developing state- or tribal-specific operating plans to provide for the efficient use of joint state and EPA resources. Members also considered research on the possibility of partnership agreements without a formal "delegation/authorization" application and approval process.

What Considerations Are Specific to Tribal Programs?

During the May 1997 SMC meeting, there was a focused discussion on unique considerations for enhancing the role of tribes in the Superfund program. The SMC endorsed the Tribal Workgroup's efforts to develop customized recommendations that address the unique needs of tribes for enhancing their role in Superfund. Highlights of that discussion follow:

- ◆ It is important to simplify and clarify communication materials and administrative requirements with tribes, as the technical aspects of EPA's programs are a major hurdle for many tribes. This points to the critical need for much training and assistance to

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enhance tribal capabilities. Federal agency hands-on assistance via IPAs could be very helpful.

- ◆ A fundamental issue is the federal government's trustee responsibility that flows from treaties. EPA must look out for the interests of tribes in Superfund decisions.
- ◆ Tribes want to be in control of site assessment decisions and provide strong input to site response decisions. Tribal cleanup standards can be more demanding than either EPA or state cleanup requirements.
- ◆ Management assistance is a critical need for developing tribal programs. Tribes face significant hurdles prior to conducting technical field work. Among these are understanding how to address administrative needs for EPA assistance and receiving the needed technical training. EPA historically provided management assistance reviews/training to states, and this helped prepare states for potential financial audits. The same could be done for developing tribal programs.
- ◆ Consider targeting a part of the national removal budget to address sites of priority to tribes that may not be of high priority to the national Superfund program.
- ◆ EPA needs to consider and understand that tribes view environmental problems differently than EPA and states do. The compartmentalization of programs is not understood by tribes; a "loosening" of the bounds of the use of Superfund resources for tribes should be considered. NRDA prohibitions are a particular concern.
- ◆ EPA should consider the possibility of retaining the federal lead for sites that impact tribal lands and resources directly. EPA may want to negotiate site-specific agreements with states and tribes for these sites.

What Issues Link Enforcement and Funding?

During the May 1997 meeting, the SMC discussed how EPA's enforcement policies would be implemented by states and tribes, and how enforcement activities were linked to decisions on the use of federal Superfund response funds.

Some SMC members expressed concern whether the enforcement first and fairness policies applied by the Federal government would be continued by states or tribes if states or tribes have authority to obligate remedial action funding. Members discussed the importance of developing lists of agreed-to orphan sites, PRP-lead sites, and the "enforcement possibility" sites. After agreeing to these lists of sites, the EPA-state or EPA-tribe dialogue about funds management would focus on sites with potential for enforcement.

Some specific comments from SMC members follow:

- ◆ The negotiation with PRPs and decision to Fund-finance a response are critically linked. Enforcement is an integral aspect of the response program, not a separate capability. EPA needs to consider and evaluate what enforcement capabilities are needed to successfully implement given aspects of the response program.
- ◆ There is an important link between cost-recovery capability and Fund-financed response actions. It is unlikely that the federal government will be entirely comfortable with states

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making cost-recovery “deals” (e.g., settle for 50 cents on the dollar). The Department of Justice (DOJ) is reluctant to allow EPA to make such decisions.

- ◆ State members said they envision that EPA would retain enforcement discretion prior to Fund-financed remedial action. This is consistent with discussions with the ASTSWMO Board of Directors at its April 1997 meeting.
- ◆ When considering access to Superfund response funding, how to address cases where a state that does not have the same liability standard as federal Superfund will need to be considered. There was a suggestion that before accessing the federal funds (remedial action), states would need to match the federal liability approach.
- ◆ EPA needs to be prepared to face criticisms of inconsistency in funds management as states take on new responsibilities in this area; there are already concerns with just 10 EPA Regions making these decisions.
- ◆ The following conceptual approach for enforcement/funds-management was discussed:
 1. Are there PRPs? How and when can they be sought? Statute of limitation considerations must be addressed.
 2. Negotiating with PRPs:
 - A. Cooperative PRP: no issues (no need for Fund-financing)
 - B. Hard Negotiations: EPA involvement/state consultation needed
 - Compromising on federal costs
 - DeMinimis/DeMicromis settlements
 - Municipal liability
 - Unilateral administrative orders (all or some parties)
 - Orphan share funding
 - Mixed funding settlements
 3. Fund-lead response actions: site-specific prioritization vs. state allocations
 4. Cost recovery: Key questions are (1) who conducts cost recovery, (2) how hard must cost recovery be pursued, and (3) who has the authority to compromise federal costs.

The SMC asked that existing workgroup members form a focus group to give greater attention to these issues. SMC members agreed with the Assistance Workgroup’s recommendation that remedial action funding would continue to be allocated based on decisions by a national priority panel, while states and tribes would have some discretion on funding allocations for pre-construction activities.

Who Are the Stakeholders?

The SMC discussed the target audience and timing of a stakeholder review of the report’s recommendations. Initially, a broad variety of groups were identified, including:

States: ASTSWMO CERCLA Subcommittee and Co-Implementation Task Force, National Association of Attorneys Generals, National Governors Association, and Environmental Commissioners.

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Federal: All regions, other federal agency Superfund contacts, DOJ, and some Congressional staff.

Tribal: National Tribal Environmental Committee, Tribal Operations Committee, National Congress of American Indians, Tribal Consortia/Tribes with Superfund programs, Inter-Tribal Consortia of Arizona, and EPA's American Indian Environmental Office.

Environmental Groups: Natural Resources Defense Council, Environmental Defense Fund.

Industry: Chemical Manufacturer's Association, International Network on Superfund Settlements.

Local/Others: National Environmental Justice Action Committee, International County and City Manager's Association.

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