

Chapter 3: Agreements Recommendations

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I. Introduction

The Agreements Workgroup focused its efforts on developing an agreement that could be used as a prototype to foster greater cooperation and efficiency among EPA and the states and tribes. Once a state or tribe has identified its interest in the Superfund process, worked with EPA to assess its capability to implement the program, and determined the types of technical and financial support needed to proceed, the state or tribe is ready to work with EPA to formalize their respective roles in an MOA. The MOA is designed to ensure the most efficient use of personnel and resources to clean up the greatest number of sites.

With respect to improving the current Superfund program to promote a greater implementation role for states and tribes, the Agreements Workgroup has developed a *Model Agreement*, which represents what the Workgroup believes are the essential considerations needed within a written agreement to ensure successful relationships among signatories and to facilitate implementation of the Superfund program. These agreements cannot supersede existing agreements (e.g., consent decrees, administrative orders, Federal Facility Interagency Agreements).

Recommendations

- ◆ The Workgroup recommends that states and tribes follow the *Model Agreement* to build a long-term, results-oriented MOA with EPA.
- ◆ The most important part of an MOA between a state or tribe and EPA is to clearly define the roles and responsibilities of each party.

The Workgroup intends for the *Model Agreement* to be user-friendly and widely applicable. By identifying the categories or subjects an agreement should cover, but leaving open the exact details, the Workgroup believes the agreement will provide maximum effectiveness and durability, while still remaining responsive to the specific needs of state or tribal governments and EPA regions in defining their relationship to each other. The Workgroup envisions that EPA in many cases may negotiate individual sub-agreements to clarify time-sensitive issues (e.g., pilots and new initiatives) and/or provide site-specific guidance. This will enable the *Model Agreement* to avoid time-consuming modifications. However, in other instances the division of responsibilities may be defined more easily in the *Model Agreement* itself; it is up to the region and state or tribe to determine whether sub-agreements are appropriate.

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The Workgroup adhered to a set of guiding principles or criteria in developing the *Model Agreement*. The *Model Agreement* must:

- ◆ be easy to implement;
- ◆ be durable (long-term/multi-year);
- ◆ provide accountability;
- ◆ focus on a results-oriented approach;
- ◆ establish clearly defined roles and responsibilities;
- ◆ incorporate community participation; and
- ◆ ensure regions have an acceptable level of autonomy to implement agreements.

The Workgroup researched existing agreements under other programs through a “lessons learned” approach. By analyzing existing agreements, the Workgroup identified several common components that it considered to be essential requirements in any agreement. Presentations to the Workgroup from other program representatives provided first-hand information about the RCRA and Clean Water programs. These presentations identified problems and successes of both programs during their transition periods, as well as their current status. The more straightforward and understandable agreements that could easily and quickly be implemented by states and tribes were used as references by the Workgroup.

In addition to researching other programs and existing agreements, the Workgroup coordinated its efforts with the two workgroups developing criteria for state and tribal readiness and funding and technical assistance options. Input from these other workgroups has been incorporated into the *Model Agreement*.

By achieving the above-stated goals, the Workgroup believes that the *Model Agreement* can be used within the Superfund program both now and in the future. The *Model Agreement* is intended to work within the current Superfund program. However, given the uncertainty of what may result from reauthorization of the Superfund statute, EPA recognizes that reauthorization may dictate some changes within this model, and the Workgroup believes the model should be revisited when Superfund is reauthorized. In the meantime, any pilots using the *Model Agreement* will be implemented in accordance with applicable federal laws and regulations. EPA does not intend for regions to implement recommendations which are contrary to existing statutory or regulatory authorities during this pilot phase.

II. Model Agreement Analysis

A. Background Section

The Background Section of the *Model Agreement* sets the stage for EPA’s and the state’s or tribe’s understanding of the Agreement. The section provides basic information while stressing a partnership between EPA and states or tribes to help establish a collaborative working relationship.

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To better achieve this partnership, the agreement should identify a state's or tribe's interests and goals, what it can currently do, and what assistance is needed to fulfill those goals for additional future program responsibilities.

B. Program Authorities Section

The Program Authorities Section can be used to clearly identify major current federal and state or tribal laws and regulations that affect the actions identified within the Agreement. This section provides a forum for states and tribes to clearly identify their unique laws and regulations. In addition to environmental laws and regulations impacting the agreement, applicable cross-cutting socio-economic requirements (e.g., Title VI of the Civil Rights Act, Drug-Free Workplace, contract procurement and debarment and suspension provisions) could also be identified within this section.

C. Roles and Responsibilities Section

One of the most important functions of this Agreement is to clearly define roles and responsibilities. Where appropriate, the Workgroup advocates a "single regulator" approach to decision-making. Where this is not possible, it is critical for EPA and the state or tribe to address the lead and support agency's roles and responsibilities, to ensure all activities are being addressed and responsibilities are divided appropriately. The negotiations between EPA and the state or tribe should address the type of sites included within the Agreement, as well as the lead for specific program activities. These early, detailed negotiations can help avoid duplicative efforts and misunderstandings while maximizing resources and capabilities.

D. Program Elements or Components Section

This *Model Agreement* is intended to facilitate an appropriate division of labor by identifying all components in the Superfund process so that EPA and the state or tribe can jointly determine which party can best address the activities under each component. *Chapter 1: Readiness Recommendations*, uses generic terms to define common Superfund activities, to accommodate the differences between state and tribal terminology and potential changes to current terminology due to reauthorization. The *Model Agreement* uses both generic and Superfund-specific types of terminology. Using both types of terminology creates long-term applicability that can serve for either the current program or any future reauthorization scenario. The familiar Superfund-specific terms will serve as a reference point to facilitate better understanding and implementation.

The Workgroup identified Data Information Management as an important cross-cutting issue that should specifically be addressed within the Agreement to ensure appropriate information exchange between the state or tribe and EPA. This information exchange is necessary in order to maintain federal and state or tribal tracking and reporting needs, and will enable appropriate accountability in response to Congressional, General Accounting Office (GAO), or other inquiries.

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Environmental initiatives like Brownfields or VCPs could be identified here, to ensure responsibilities are clear and there is appropriate division of labor. However, including programs for which other criteria have been developed would not subject such programs to any additional readiness or other requirements associated with this *Model Agreement*.

E. Protective Cleanup Section

The Workgroup viewed the Protective Cleanup section as necessary to highlight CERCLA's mandate to protect human health and the environment. This section also serves as an appropriate place to discuss EPA and state or tribal cleanup level issues.

F. Community Involvement Section

While developing the *Model Agreement*, the Workgroup discussed including public participation within each program component as well as specific community involvement during the Agreement negotiation process. The Workgroup recommends this section address community involvement in relation to the *Model Agreement*. Individual program components or site-specific sub-agreements should address the appropriate level of community involvement for each response activity, including the steps necessary to achieve the appropriate level of community involvement.

G. Program Planning and Review Section

This section is intended to emphasize a partnership approach in Program Planning and Review. This includes a shift toward recognition and measured progress based on outcome rather than process or output. These outcome-based measures could include environmental indicators. This section allows for a long-term planning and program approach. Scheduled meetings to plan and review the program at staff and management levels could also be negotiated during this time. The level of oversight will be determined by EPA and the state or tribe during this process.

H. Dispute Resolution Section

The Workgroup acknowledges that disputes may arise during the lifetime of the Agreement. This section allows for a process to be developed that resolves disputes about general program issues, as well as disputes about site-specific issues. Where current successful processes already exist, those processes should be continued. The Workgroup's main concern is that disputes are resolved at a staff level in a timely manner. If disputes are not resolved in a timely manner, they should be elevated to a higher level without retribution. Note: Superfund CA recipients must comply with dispute resolution procedures described in 40 C.F.R. §35.6770.

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I. Funding Section

To allow for durability of the Agreement, funding information may be included in either the Agreement or assistance sub-agreements. Issues and recommendations raised in the technical and funding assistance paper are applicable to the Agreement.

J. Terms of the Agreement Section

The Terms of the Agreement section is considered by the Workgroup to be an important section in any agreement. It allows for flexibility when EPA and states or tribes negotiate procedures and administrative issues. If significant change (including statutory, program or funding) occurs that affects the state's or tribe's or EPA's ability to carry out the Agreement, then it should be brought to the attention of all parties to the Agreement to decide what the implications/consequences are to the Agreement.

K. Signature of Agreement Section

The Workgroup recommends that at a minimum the EPA Division Director and the equivalent state or tribal counterpart sign the Agreement. Note, however, that NCP section 40 CFR §300.505(b) currently requires the signature of the EPA Regional Administrator and the head of the state agency.

L. Appendices (if appropriate)

Appendix A identifies additional reference documents. These documents could include the Technical and Funding Assistance Report, Readiness Criteria, lists of appropriate regulatory items, operating plans, and major guidance documents. Appendix B could include sub-agreements such as pilots, initiatives, functions, program components, training needs and strategies, and site-specific items. Appendix C could include supporting assistance or funding agreements.

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Superfund Agreement between U.S. EPA and the State of _____ or _____ Tribe

I. Background

Note: This Model Agreement is intended to address matters at a program level. If needed, separate sub-agreements could be entered into to identify the process for sub-program activities. In addition, this Model Agreement is applicable to any state or tribal program, as it can be tailored for varying purposes.

- Describe the purpose of the agreement.
- Identify how, and for what reasons, the agreement came into existence. Identify the state's or tribe's interests and goals for future additional program responsibilities, what can be done currently, and what assistance is needed to help the state or tribe fulfill those goals for future program responsibilities.
- Develop a results-oriented statement relaying that EPA and the state or tribe will achieve cleanup goals through a partnership approach. The commonality of their mission should be stressed.
- Identify the state or tribal authority or agency responsible for implementing the response program, or specify program components.
- Acknowledge federal government recognition that the identified state or tribe has the authority to ensure response or to carry out specific components/activities.
- Include language supportive of current environmental initiatives.

II. Program Authorities

This section is intended to provide a framework of federal and state laws that are applicable to the implementation of this agreement. It should include citations to federal and state environmental and socio-economic laws and regulations.

III. Roles and Responsibilities

This section is intended to specify the roles and responsibilities of each party to the agreement.

- Outline each party's responsibilities (lead and support roles) and what the state or tribe and EPA are required to do in order to carry out the agreement.
- Identify key state, tribal or EPA contacts for information relating to this agreement. These contacts should be identified by position title rather than by individual name.
- Identify the types of sites that will be included in the agreement.
- If appropriate, reference information relating to specific pilots, initiatives, and priorities that can be found in applicable sub-agreements in Appendix B of the Agreement.

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IV. Program Elements or Components

- This section provides a list of all the Superfund Program Elements or Components from which EPA and the state or tribe can negotiate the specific program components that the state or tribe will implement. Implementation should be under applicable federal laws and regulations.
- Assigning responsibility for these program components is a necessary consideration for both capacity building and effective program implementation.
- The definitions for program components identified below use Superfund-specific terms, as these are Superfund agreements; the Readiness Chapter provides generic definitions to allow for consideration of all applicable experiences and terminology.
- Site Identification, Screening, Prioritization
 - Pre-Remedial includes Deferrals, Site Assessment (Preliminary Assessments/Site Inspection, removal assessments, pre-CERCLIS screening), HRS and NPL.
 - PRP Search, Site Access, State Authorities to Compel Site Assessment, and Notification.
- Short-Term Action Activities
 - Emergency Response.
 - Removal includes Time Critical and Non-Time Critical.
 - Site Access, Orders to Compel Cleanup and Post Cleanup, Cost Recovery, and PRP Search.
- Long-Term Action Activities
 - Remedial includes RI/FS Study, Risk Assessment, Records of Decision, Remedial Design, and Remedial Action.
 - Site Access, Orders to Compel Cleanup and Post Cleanup, Cost Recovery, and PRP Search.
- Post-Cleanup Site Monitoring and Evaluation
 - Long-term Response Action, 5-Year Reviews, and Operation and Maintenance.
 - Site Access, Orders to Compel Cleanup and Post Cleanup, Cost Recovery, and PRP Search.
- Cross-Cutting
 - Natural Resource Trustee Coordination, Data/Information Management, CERCLIS 3 Interface, and Community Participation, which includes public meetings and briefings, Fact Sheets, Update Letters, Media/Site Celebrations, Public Notices and Comment Periods, and Technical Assistance Grants (TAGs).

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- In order to clarify responsibilities, other subjects could be included as states or tribes and regions want, such as Brownfields, VCPs, Environmental Justice initiatives, etc. Programs for which other criteria have been developed would not be subject to additional requirements of the agreements, such as the readiness criteria.

V. Protective Cleanup

- This section should ensure the agreement includes a statement that the cleanups undertaken by the state or tribal programs will be protective of human health and the environment, and will comply with all applicable state and federal laws and regulations.
- This section could address EPA/state cleanup level issues.

VI. Community Involvement

This section is intended to identify mechanisms for providing community involvement during the development and implementation of this agreement.

- Mechanisms for public notification and response to public comments on the agreement should be included.
- Site-specific community involvement should be addressed within individual program components.

VII. Program Planning and Review

This section is intended to be negotiated between EPA and state or tribal representatives to facilitate a mutually acceptable level of communication between the two parties.

- Negotiate goals and outcomes in a manner that is consistent with the GPRA. This information may be included in sub-agreements.
- Establish appropriate environmental indicators (consider ASTSWMO/EPA Workgroup products) to identify the areas of progress. Actual environmental indicators could be included in sub-agreements.
- Clarify how site-specific reporting for applicable sites (should include, at a minimum, NPL sites) will be conducted, with electronic reporting compatible with EPA's national data system preferred.
- Provide for mutual access to appropriate documents.
- Determine regularly scheduled meetings between parties to facilitate long-term relationships between programs.
- Measure, on an annual basis, the past year's accomplishments and discuss the upcoming year's plans, for both the state or tribe and EPA. See 40 CFR §300.505(b) of the NCP for current annual consultation requirements. Consider mechanisms for community participation in this planning process. Specific site details can be identified in this

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- agreement or in sub-agreements.
- Respond to and address programmatic audits by state and federal agencies.
- Define types of support that will be provided to enhance the state's or tribe's capacity.
- Negotiate appropriate level of review/oversight.

VIII. Dispute Resolution

This section is intended to establish an appropriate course of action to follow if disputes arise.

- Resolution should be based upon the exchange of documented references or citations as supportive rationale for respective positions of an issue.
- Immediate supervisors for both agencies should attempt to resolve the disputes.
- A mutually agreeable timeframe should be established. Disputes that are not resolved within this timeframe should be forwarded to designated higher-level supervisors for resolution. Final authorities for resolution need to be identified.

IX. Funding

Note: This agreement has not been developed for purposes of committing or transferring monies, as it is not an assistance agreement. Additional information can be found in Chapter 2: Assistance Recommendations.

- Identify what kind of financial assistance will be available (e.g., block grants, consolidated CAs, Multi-Site CAs, etc.).
- Identify the procedure for states or tribes to access funds, e.g., funding through a CA.
- When federal monies are provided, mutually agreed upon results should be developed that are consistent with GPRA.
- Address site-specific financial audits by state and federal agencies.

X. Terms of the Agreement

This section is intended to provide administrative information relating to the life of the agreement and how the agreement may be amended if the need arises.

- Identify the duration/period of performance of the agreement, including start and end dates, and potential extension periods.
- Develop a procedure for updating the agreement or sub-agreements, or amending the agreement; for example, as new sites are added.

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- Develop and identify a procedure to ensure that significant changes affecting a state's or tribe's or EPA's ability to carry out the agreement (e.g., statute, program or funding changes) are brought to the attention of all parties to the agreement to decide what the implications/consequences are to the agreement.
- Identify the process to terminate for cause and terminate for convenience. This includes specific clauses or language that should be used for termination. Indicate that termination can occur upon request of either party after consultation with the other party.

XI. Signature of Agreement

- In accordance with applicable state and federal laws, identify appropriate signatories from EPA and the state or tribe.
- Identify appropriate sub-agreement signatories. They need not be the same as signatories for the basic agreement.

Appendix A: Reference Documents

This section may include documents and plans such as the Technical and Funding Assistance Report, Readiness Criteria, list of applicable cross-cutting socio-economic requirements (e.g., Title VI of the Civil Rights Act, Drug-Free Workplace, etc.), operating plans, and major guidance documents.

Appendix B: Additional Agreements

This section could include sub-agreements and site specific agreements that are applicable to the agreement. These sub-agreements may include pilots, initiatives, functions, program components, training needs, and site-specific items. Alternatively, if the region and state or tribe prefer, these could be included in the agreement itself.

Appendix C: Funding

This section could include assistance agreements.