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

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OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

OSWER DIRECTIVE 9355.2-02

MEMORANDUM

SUBJECT: Guidance on Lead Determinations For CERCLA Fund-Financed Responses[1]

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

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

Purpose

This Directive describes the recommended process and factors for use by Regional Offices in determining the capability of States to accept lead agency responsibility for CERCLA Fund-financed response actions.[2] Regions should include reference to this Directive in their annual or other notifications to the State of planned Fund-financed response activities.

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[1]The policies set out in this memorandum are intended solely for the guidance of Government personnel. They are not intended, nor can they be relied upon to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the guidance provided in this memorandum, or to act at variance with the guidance, based upon an analysis of specific site circumstances. The Agency also reserves the right to change this guidance at any time without public notice.

[2]This Directive applies to CERCLA Fund-financed non-enforcement National Priorities List sites, referred to hereafter as "Fund-financed sites." States' capabilities for lead, and the lead determination processes, at enforcement and Fund-financed sites may be different. Consequently, this Directive addresses only the latter.

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Background

Section 104(d)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), authorizes EPA to enter into cooperative agreements with States, Indian Tribes, and political subdivisions to undertake response pursuant to CERCLA section 104. Before entering into a cooperative agreement, however, section 104(d)(1) requires the President (EPA by delegation) to "[determine] that the State or political subdivision or Indian Tribe has the capability to carry out any or all of such actions. . . ."

The Office of Emergency and Remedial Response (OERR) has previously published guidance with respect to political subdivisions and Indian Tribes. Thus, this Directive relates only to determinations of States' capability to accept lead agency responsibility for CERCLA Fund-financed responses, and references to "State" do not encompass political subdivisions or Indian Tribes.[3]

EPA determined at the beginning of the Superfund program that the States were capable of receiving, managing, and accounting for cooperative agreement funds, and has routinely entered into cooperative agreements with States since then. The National Contingency Plan (NCP) (55 FR 8666; March 8, 1990, codified at 40 CFR Part 300 (1990)), however, establishes lead agency and support agency roles through which EPA and the States can cooperate in undertaking CERCLA responses. EPA has not previously issued guidance on determining State capability to accept and successfully carry out a lead agency role. The process and factors described below are intended to guide Regional Offices in making these determinations.

Process

Decisions on lead agency responsibility should be made by EPA on a site-specific basis in conjunction with the State. Early and continuing discussion with the State will help to ensure that lead decisions at each National Priorities List (NPL)

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[3]OERR published guidance with respect to political subdivisions (Directive 9375.5-03) on May 1, 1989 and Indian Tribes (Directive 9375.5-02A) on November 28, 1989. These were partially superseded by the publication of the Superfund Assistance Regulations (40 CFR Part 35, Subpart O; 55 FR 22994; June 5, 1990), although the guidance on procedures remains relevant. The Subpart O regulations complement the NCP lead/support agency concept and, among other things, govern eligibility to receive cooperative agreement funds from EPA.

site take into consideration the views of both EPA and of the concerned State, and that they represent the most efficient use of both State and Federal resources in carrying out CERCLA's intent. Section 300.505(d)(1) of the National Contingency Plan calls for annual planning discussions in which EPA and the States determine priorities and designate lead responsibilities for responses to be conducted during the upcoming year. Those discussions should include at least preliminary assignment of lead responsibility to either EPA or the State. This decision can and should be reviewed during each year's planning discussions, as well as whenever either party believes it to be appropriate, such as when new information calls into question the continued validity of previous assumptions or findings. Where possible, it will usually be desirable to maintain project continuity by having the lead agency retain that role throughout the Fund-financed portion of the response action, e.g., to have the agency which leads the Fund-financed RI/FS retain the lead through completion of and Fund-financed RD/RA. Lead changes are potentially disruptive and expensive, especially during an ongoing phase of response; any such changes will require close coordination between EPA and the State in order to minimize this potential.

It is important to note that the lead designation does not mean that the State may select the remedy without EPA concurrence. At all Fund-financed sites, EPA must approve the proposed plan and Record of Decision before issuance, although the State may recommend the remedy. See NCP, 40 CFR 300.515(e)(1). The cooperative agreement must reflect EPA's approval role.

The decision process is not intended to be paper-intensive, and should not require or result in voluminous documentation. Once the Region has conducted the analysis, those for subsequent sites generally will need to consider only changes in the State's circumstances in the intervening time. Agreement that the State will take the lead for a given response should be documented in a transmittal letter to the State affirming that the factors described below have been satisfactorily addressed.

As States continue to develop their programs, they are likely to seek greater involvement at NPL sites. The States are likely to vary in the kinds and amounts of experience they are able to demonstrate, with many having relatively new programs. An approach that phases in State lead responsibility over time may permit such States to demonstrate their performance in future years. This could be especially helpful to a State without a track record or to one which has encountered problems.

Factors

The Region's analysis of a State's capability should

generally include three areas of the State's program: (1) Project Management, Scheduling and Tracking; (2) Resources/Skill Mix; and (3) Past Performance. Decisions on lead should also consider appropriate site-specific problems, issues, and circumstances.

(1) Project Management, Scheduling and Tracking: States should describe and explain their process for ensuring adequate supervision of the response action. Their ability to commit to and meet schedules is especially important, as this issue has typically been the most common and prominent source of Regional Office concern with State-lead work. It is crucial that the Region and State develop a clearly understood, realistic, and mutually satisfactory project schedule, including procedures and timetables for approval of all decision documents. Discussions with the State must therefore address the State's mechanism for ensuring it can meet that schedule. Ideally, these discussions will be held prior to the establishment of SCAP targets. At a minimum, discussions should verify:

- Agreement on a realistic overall project schedule to be incorporated into the Region's SCAP commitments;
- Adequate statutory authority to carry out necessary activities; and,
- The existence of a mechanism/process for: monitoring the status of the project, including interim milestone tracking; the early identification and resolution of issues both internally and between the State and EPA; financial tracking; and, quarterly reporting.

(2) Resources and Skill Mix: Decisions on lead responsibility should be made in light of current and anticipated workload in both the State and Regional offices. There is no mandatory or standard workload/staff ratio for workload distribution among EPA or State staff. Areas reviewed with the State should include the availability of appropriate professional skills, whether State employees or contracted staff. EPA and the State should assess and agree on the kind, level, and number of staff needed for the response activity under discussion. The Region's analysis is intended to reveal whether EPA or the State is better able to accept the lead for a given response, and that the lead agency's existing workload does not already preclude successful completion of the additional response action. At a minimum, discussions should verify:

- The number, type, skill mix, and expertise of staff and/or contractor support required to manage and supervise the project (including adequate field

oversight) based upon site complexity, community interest, workload distribution,and site specific considerations;

- For actions which require procurement of contractor services:

  -- A procurement system which results in timely solicitation and award of remedial contracts;

  -- A well-defined process/procedure for monitoring and evaluating contractor performance and taking corrective action; and,

  -- A process for ensuring the reasonableness of contractor costs (e.g., government cost estimates, cost and price analyses), and for managing change orders;

- The capability for data validation and for QA/QC of sampling and analysis documents;

- Access to adequate legal support;

- The ability to compile and maintain the administrative record; and,

- The capability to carry out proper community relations/information activities.

(3) Past Performance: The quality, cost, and timeliness of the State's previous work should be useful predictors of the State's work on new activity. Discussion of the State's previous performance should also identify improvements or changes the State has made where they have had any problems. At a minimum, discussions should verify:

- The quality of the State's past work products as a demonstration of the technical ability of State staff;

- The ability to realistically plan projects and to adhere to schedules; where slippage has occurred there has been justification;

- State recommendations, decisions and approaches have been not inconsistent with the NCP;

- The ability to complete projects within planned budgets; where budgets have been exceeded there has been justification for the additional costs;

- The quality and timeliness of both the compilation and

maintenance of the administrative record;

- The quality and timeliness of quarterly and other required reporting under the regulations governing cooperative agreements;[4]

- The ability to effectively manage contracts, as evidenced by the timeliness of contract awards and quality of oversight of the contractors' work efforts;

- The effectiveness of State/EPA communications and working relationships; and,

- Where deficiencies were noted in work products or approaches, timely and effective corrective steps were taken.

(4) Site-Specific Factors: Lead assignments should consider any relevant site-specific factors which may make the response action especially delicate or complex. Examples include:

- Complexity of the response action (e.g., multi-source area-wide groundwater contamination);

- The nature of the PRP pool, e.g., whether there are State and/or political subdivision PRPs;

- Sites crossing State boundaries or otherwise affecting more than one State;

- The State's prior enforcement efforts or other involvement at the site;

- Indian tribal involvement or impacts; and

- Public sensitivity of or interest in the site.

Implementation

Experience continues to show the importance of a mutual commitment to full and continuing communication between EPA and the State regardless of which Agency has the lead. One method for ensuring this has been to identify at the outset a few key

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[4]Currently 40 CFR Part 35, Subpart O, cited above.

points during the response at which decision officials from both agencies commit to meet and carefully assess progress, data, and plans. These key points might include RI scoping, the end of the RI, the identification of alternatives, the proposed plan, and post-ROD.

It is essential that both agencies be represented at these meetings by officials able to speak authoritatively for their agencies. This will ensure that both EPA and the State can go on record early at these key points as agreeing, or as explaining their positions on any disagreements, rather than first ascertaining each other's view at decision points, such as when the ROD ESD, or ROD amendments are ready to be signed.

Conclusion

The assessment of capability serves purposes beyond guiding lead agency designation decisions for specific CERCLA responses. Such assessments also facilitate communication and should result in a mutually adopted State development plan which could include staffing, training, certifications, or experience to be accumulated over a specified period. The Superfund Memorandum of Agreement (SMOA) offers an appropriate vehicle for documenting this. Finally, the process is a natural and logical companion to your discussions with the State on Core Program Cooperative Agreement (CPCA) funding, since CPCAs are designed to promote and support the development of capable State programs.

Please direct any questions on this to Murray Newton, Chief, State and Local Coordination Branch (703) 308-8380 or FTS 678-8380.

cc: Regional Superfund Branch Chiefs