EC-G-2000-020

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

Received
JAN 28 2000
Enforcement & Compliance Docket
& Information Center

APR 18 1991

OSWER Directive # 9831.9

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Questions and Answers About the State Role in Remedy Selection at Non-Fund-Financed Enforcement Sites

FROM: Acting for Don R. Clay, Assistant Administrator

TO: Regional Administrator
Regions I - X

I. PURPOSE

This memorandum[1] describes circumstances under which States may select and implement a remedy at National Priorities List (NPL) sites without first obtaining EPA concurrence. Section 300.515(e) of the National Contingency Plan (NCP), State involvement in selection of remedy, specifically addresses the State role in remedy selection. The NCP provides that a State may select a remedy (and publish the proposed plan) without EPA concurrence at non-Fund-financed State-lead enforcement NPL sites. This directive defines "non-Fund-financed" in terms of State-lead enforcement NPL sites[2]. Additionally, this directive explains when a State must obtain EPA concurrence on a CERCLA remedy at an NPL site.

Certain States have requested guidance regarding the situations under which a State may select and implement a remedy without EPA concurrence. Generally, States and EPA Regions are knowledgeable about the reciprocal concurrence process for Fund-financed NPL sites, where EPA and States have corresponding roles in recommending and implementing remedies. However, there generally appears to be less awareness of situations where a State may select and implement a remedy without EPA concurrence.

1/ The policies set out in this memorandum are not final agency action, but are intended solely as guidance. They are not intended, nor can they be relied upon, to create any rights enforceable, by any party in litigation with the United States. The Agency reserves the right to change this guidance at any time without public notice.

2/ Enforcement sites are sites where responsible parties are compelled, by order or decree, to perform response actions.

This memorandum explains certain sections of the NCP that are pertinent to the State role in remedy selection. Regional staff may help resolve questions about remedy selection requirements by discussing information in this memorandum with appropriate State staff. Open and direct communication between the Regional and State offices on topics such as this greatly benefits the EPA/State relationship and ultimately the success of site cleanups.

II. BACKGROUND

Subpart F of the NCP (40 CFR 300.500 et seq.) discusses requirements for State participation and involvement in CERCLA-authorized response actions. It also includes the minimum requirements for ensuring that all States are provided an opportunity for "substantial and meaningful" involvement in the initiation, development, and selection of remedial actions, as mandated by CERCLA 121(f)(1).

As discussed in the preamble to the NCP (55 FR 8783, March 8, 1990), EPA believes that to ensure consistency among remedies implemented at sites, EPA retains final responsibility for remedy selection at sites where Fund money or EPA enforcement authority is used. However, to provide a "significant and meaningful role for State involvement in the cleanup process," EPA adopted in the NCP the reciprocal concurrence process for Fund-financed NPL sites. In this process, a State prepares a ROD and must obtain EPA concurrence and adoption of the remedy, or EPA prepares the ROD and seeks State concurrence. However, for non-Fund-financed State-lead enforcement sites, when a State proceeds under its own enforcement authority and sources of funding other than the CERCLA Trust Fund[3], a State may select a remedy (and publish a proposed plan) without EPA concurrence. Section 300.515(e)(2) of the NCP specifically addresses EPA and State involvement in the preparation of a ROD.

III. QUESTIONS AND ANSWERS ABOUT THE STATE ROLE IN REMEDY SELECTION

QUESTION 1: Under what circumstances can a State select a remedy without EPA concurrence at an NPL site?

ANSWER: States may select the remedy (and publish a proposed plan), without EPA concurrence, at NPL sites when the State has been assigned the lead role for response action at the site, the State is taking an enforcement action acting under State law, and the State is not receiving funds from the Trust Fund for response activities at the site. According to the NCP, "response as defined

---

[3]/ Trust Fund means the Hazardous Substance Superfund established by section 9507 of the Internal Revenue Code of 1986.

by 101(25) of CERCLA, means remove, removal, remedy, or remedial action, including enforcement activities related thereto." The diagram in Attachment I summarizes the circumstances under which a State may select a remedy without EPA concurrence. These sites are referred to as "non-Fund-financed State-lead enforcement sites."

QUESTION 2: When may a State proceed under its own enforcement authority at an NPL site?

ANSWER: During annual EPA/State consultations, EPA may agree to designate a State the lead at an NPL site for a non-Fund-financed enforcement action. This means that EPA and the State agree that response actions will be conducted pursuant to State law and funded by PRPs and, if necessary (for enforcement activities), by the State itself. More specifically, 300.505(d)(3) states "(i)f a State is designated as the lead agency for a non-Fund-financed action at an NPL site, the Superfund Memorandum of Agreement shall be supplemented by site-specific enforcement agreements between EPA and the State which specify schedules and EPA involvement." EPA may take back the lead from a State if the State does not comply with the EPA/State agreement.

Where EPA and a State do not agree that a site is a non-Fund-financed State-lead site, the State may still attempt to proceed with response actions under its own authority without funding from the Trust Fund. However, there is a potential for conflict with EPA response actions where no lead designation has been made, especially at NPL sites. Further, EPA is not bound by State response actions and may decide to take a CERCLA response action after the State has acted. Additionally, under CERCLA 122(e)(6), once a Federally-approved RI/FS has been initiated at a site, no PRP may undertake any remedial action at the site unless the remedial action has been authorized by EPA. Thus, State-ordered PRP remedial actions may not proceed post-Federally-approved RI/FS without EPA authorization. If EPA decided to designate a State as lead for post-RI/FS remedial actions, the lead designation may include a CERCLA 122(e)(6) authorization for PRPs to proceed with remedial action at the site as prescribed by the lead agency.

QUESTION 3: For a State enforcement-lead NPL site to be "non-Fund-financed" does it mean that EPA has <u>not</u> spent Trust Fund money at the site?

ANSWER: No. There are probably few, if any, NPL sites where EPA has not spent Trust Fund money. For example, EPA has probably funded, through the Trust Fund, PA/SIs at NPL sites. Previous EPA funding at a site, regardless of the amount, does not determine whether a site is "non-Fund-financed."

QUESTION 4: For a State enforcement-lead NPL site to be "non-Fund-financed," does it mean that there will be no future EPA funding through the Trust Fund at the site?

ANSWER: Yes. If an NPL site is "non-Fund-financed," EPA has no plans or expectations of providing funds via the Trust Fund for site-specific enforcement actions and other response actions (i.e., cooperative agreement money) to the State. The term "non-Fund-financed" as it pertains to State enforcement-lead sites and State remedy selection refers to site-specific money. Receipt of Core Program money, which is for non-site-specific activities (e.g., training), does not preclude the site from being "non-Fund-financed." All non-site-specific activities that are necessary to support a State's Superfund program are eligible for Core Program money.

QUESTION 5: How is a site designated as a State enforcement-lead NPL site by EPA?

ANSWER: EPA, during annual consultations with the States, may designate a State as enforcement-lead if the Agency deems it appropriate (and if the State agrees). However, a State may not designate itself as lead agency at an NPL site without EPA approval.

In considering whether a site should be designated as a State-lead enforcement site, EPA will take into account whether EPA has invested substantial resources at the site beyond the PA/SI and listing process (e.g., whether EPA has completed the RI/FS). Significant investment of EPA resources at a site may argue against reassigning a lead designation from EPA to a State. EPA plans to develop detailed guidance to assist Regions in determining when a State may be enforcement-lead.

QUESTION 6: May the State select the remedy without EPA concurrence at Fund-financed State-lead sites (where the Trust Fund is paying for response actions)?

ANSWER: No. Remedies selected (and proposed plans drafted) by a State at a Fund-financed site (e.g., where the Trust Fund is paying for enforcement support or other response actions) must be approved and adopted by EPA before the remedy can be implemented (or the proposed plan can be published). Similarly, EPA must obtain State assurances under 104 before EPA can proceed with a Fund-financed remedy.

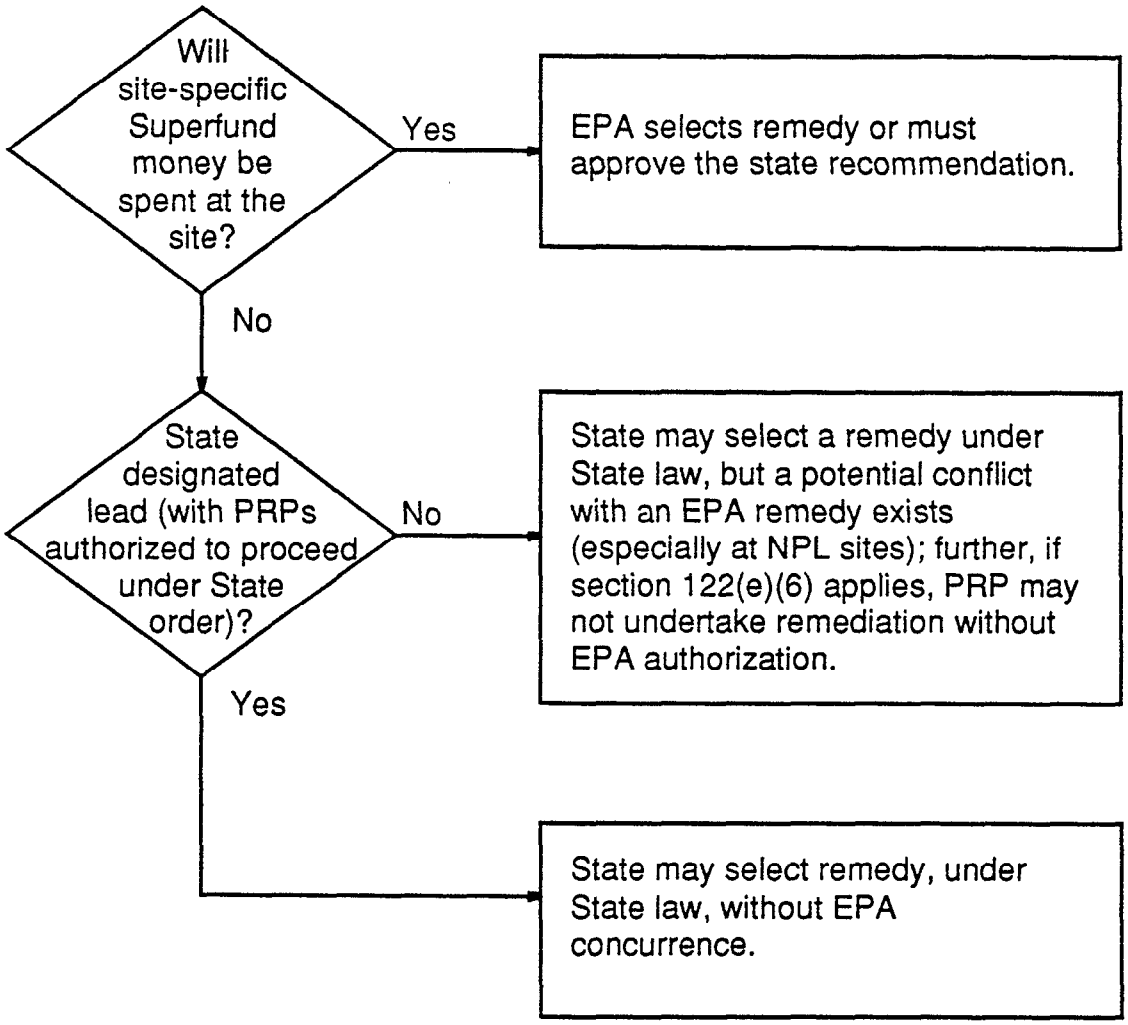
IV. CONCLUSION

There are circumstances where the State may select a remedy (and publish the proposed plan) without EPA concurrence. In some

situations, the State may be acting independently of EPA. However, when one governmental entity (EPA or State) acts independently of the other, conflicts can arise which adversely affect the quality and timing of response actions at a site. In addition, without EPA/State coordination and cooperation at a site, unnecessary conflict and duplication of effort may occur. Therefore, pursuant to § 300.505(d)(1) of the NCP, EPA and States should meet in the early stages of response actions at a site to determine site priorities and make lead and support agency designations.

If you have questions regarding this directive, please contact Lynda Priddy of the Office of Waste Programs Enforcement at FTS (202) 475-8727 or mail code OS-510.

Attachment

cc: Directors, Waste Management Division
Regions I, IV, V, VII
Directors, Hazardous Waste Management Division
Regions III, VI, VIII, IX
Director, Emergency and Remedial Response Division
Region II
Director, Hazardous Waste Division
Region X
CERCLA Enforcement Branch Chiefs, Regions I - X
CERCLA Enforcement Section Chiefs, Regions I - X
Regional Counsels, Regions I - X

State Selection of Remedy at NPL Sites